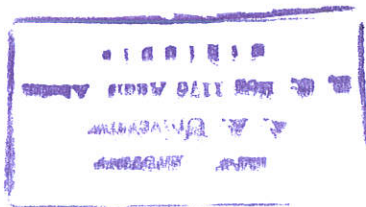


ADDIS ABABA UNIVERSITY, LAW FACULTY
POSTGRADUATE STUDIES

RESEARCH THESIS ON:

“Transitional Criminal
Justice: The Ethiopian
Experience in the Derg/WPE
Trials”

IN PARTIAL FULFILMENT FOR THE REQUIRMENT OF
LLM IN PUBLIC AND CONSTITUTIONAL LAW



Feb. 2010

By MEKONNEN YIMAM RETTA

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Important Notice

This author was not able to reveal some of the statistics of the trials before it was publicized by the Office. But the final report was made public to the House of Peoples’ Representative on February 4, 2010 after the writer defended his case in Dec. 2009. This writer wants to express that since there is no change in the essence of this paper, he founds necessary to complement the paper with the new information publicized in SPO’s final Report.

Hence, some of the statistics are included in this final print. Table 1, 5 and 6 are the inclusions that show Victims for Whom Charges were brought and Proven in the Trials in Chapter III at page 87; the Accomplishment of SPO in Conviction in Chapter V at page 174 and Sentence Distribution in Chapter V at page 175 respectively. Further more some of the important statistics are summarized in the new Section 5 of Chapter V at page 174. Hence the previous Section 5 is found in Section 6 of Chapter V at page 178.

The Writer

Acknowledgments

Above all, I owe a special debt to my advisor, Ato Tshai Wada, Assistant Professor of the University of Addis Ababa, Law Faculty, not only for his invaluable scholarly comments but also for the initiative he has made to me to write on this issue which I was being personally involved in the last Sixteen Years (1993-2009). I would like to thank all persons whose name is mentioned in the reference part of my thesis for their valuable information. Particularly my colleagues in SPO have contributed much to gather relevant data for this work. Particularly, I would like to extend my gratitude to H. E. Ato Girma Wakijira, W/O Ellenie Bekabile, Ato Guta Tuji, Ato Yosief Kiros, Ato Yesuf Ebrahim, Ato Yesuf Seid, Ato Kine Tibebe, Ato Birhane Areya, Ato Dawit Humeta, Ato Ayele Moges, Ato Habitamu Temesegen, Ato Meseret Mulat, L/t Megere Alemu, Ato Tekele W/Mikael, Ato Tewodros Berehe, Ato Zebene Hagos, and others for their valuable support.

Finally, I would like to give special tanks for all my family particularly my wife W/o Kalkidan Teffera and my daughter Saron Mekonnen for all the pains they have endured during attending my LLM classes and writing this thesis.

Last but not least I thank God for that it was on my part in my all endurances.

Addis Ababa, Feb. 2010

Mekonnen Yimam Reta

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Table 8 Some Detail Data about the Randomly Selected 47 Files

ABBREVIATIONS AND ACRONYMS

AESM	All Ethiopian Socialist Movement (in Amharic Mesion)
AETU	All Ethiopian Trade Union
ALF	Afar Liberation Front
Derg	an Amharic name given to denote Provisional Military Administration of Ethiopia
Derg/WPE	refer the Derg regime that transferred itself to Peoples Democratic Republic of Ethiopia under the leadership of Workers Party of Ethiopia and lead Ethiopia from 1974-1991
COPWPE	Commission for Organizing the Party of the Working People of Ethiopia
EDU	Ethiopian Democratic Union
ELF	Eritrean Liberation Front
EMLOU	Ethiopian Marxist-Leninist Organizations Union (-in Amharic Emaledih)
EORS	Ethiopian Oppressed Revolutionary Struggle (- in Amharic Echhat)
EPLF	Eritrean People's Liberation Front
EPRDF	Ethiopian Peoples Revolutionary Democratic Front
EPRP	Ethiopian People's Revolutionary Party
FDRE	Federal Democratic Republic of Ethiopia
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
MLRO	Marxist-Leninist Revolutionary Struggle (-in Amharic Malerid)
OLF	Oromo Liberation Front
ONLF	Ogden National Liberation Front

PDO	Public Defense Office
PMAC	Provisional Military Administration of Ethiopia
POMOA	Provisional Office for Mass Organizations Affairs
POPO	People's Organizing Provisional Office
ROCC	Revolutionary Operation Coordinating Committee
SLF	Sidama Liberation Front
SPO	Special Prosecutors Office of Ethiopia
TGE	Transitional Government of Ethiopia
TPLF	Tigrean People's Liberation Front
UDA	Urban Dwellers Association
WPE	Workers Party of Ethiopia
WSLF	Western-Somalia Liberation Front

Annex Table 8: Some Detail Data about the Randomly Selected 47 Files

No	SPO File NO	C/t File No	Name of the first Defendant	1 ¹	2 ²	3 ³	4 ⁴	5 ⁵	6 ⁶	7 ⁷	8 ⁸	9 ⁹	10 ¹⁰	11 ¹¹
1	401/85	1/87	C/L Mengistu Hailemarim	73	A.A 1st	209	1y 3d	6y	726	2500	12	2	1y 1m	4y
2	17/85	03112	Maj. Melaku Tefera	1	A.A	575	2y 2m	2y	41	1419	15		3y	2y
3	46/85	939/89	Geseges G/Meskel	79	A.A	53	2y	3y 1m 19d	153	28	10	4	1y	
4	13/85.1	937/89	L/T Abera Aga	275/68	A.A	17	2y	1y 8m	77	141	10	4	4y 13d	5y 6m
5	88/85	655/89	L/T Akalu Mekonnen		A.A	4	11m 15d	2y 5m	98	14	14	2	5m	1y 14d
6	003/85	923/89	Major Kassaye Aragaw	275	A.A	14	1y 7m	2y 4m	98	560	12	2	2 m	1y 9m
7	275/85	227/93	Ato Abebe Melaku	85	A.A	16	1y 7m	1y 11m	85		10	1	6 m	5y 7m
8	276/85	228/93	Major Semunigus Seyoum	27	A.A	1	1y 7m	1y	37		12	2	3m 24d	6y 2m
9	47/85	957/89	Commander Lema Gutema	14	A.A	5	1y	2y 4m	21	10	5	2	23d	23d
10	40/85	17/90	Basha Haileselassie Desta		Bah.	1	3y	7m	3	6	7	1	1y	4m

¹ Number of Co-offenders

² Court

³ Numbers of Counts

⁴ Time from the date of the charge filed to the day the prosecution begun producing evidences

⁵ Time to finish the prosecution evidences

⁶ Total Number of witnesses produced

⁷ Total Number of pages of documentary evidences

⁸ Maximum Numbers of witnesses the court heard in a day

⁹ Minimum Numbers of witnesses the court heard in a day

¹⁰ Time taken to give verdict (from the time the prosecution finished its evidence till the pronouncement of the verdict)

¹¹ Time taken to hear all defenses, judgments, and pass penalty all over the accused (from the verdict day to the file is closed)

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2	17/85	03112	Maj. Melaku Tefera	1	A.A	575	2y 2m	2y	41	1419	15		3y	2y
3	46/85	939/89	Geseges G/Meskel	79	A.A	53	2y	3y 1m 19d	153	28	10	4	1y	
4	13/85.1	937/89	L/T Abera Aga	275/68	A.A	17	2y	1y 8m	77	141	10	4	4y 13d	5y 6m
5	88/85	655/89	L/T Akalu Mekonnen		A.A	4	11m 15d	2y 5m	98	14	14	2	5m	1y 14d
6	003/85	923/89	Major Kassaye Aragaw	275	A.A	14	1y 7m	2y 4m	98	560	12	2	2 m	1y 9m
7	275/85	227/93	Ato Abebe Melaku	85	A.A	16	1y 7m	1y 11m	85		10	1	6 m	5y 7m
8	276/85	228/93	Major Semunigus Seyoum	27	A.A	1	1y 7m	1y	37		12	2	3m 24d	6y 2m
9	47/85	957/89	Commander Lema Gutema	14	A.A	5	1y	2y 4m	21	10	5	2	23d	23d
10	40/85	17/90	Basha Haileselassie Desta		Bah.	1	3y	7m	3	6	7	1	1y	4m

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11	41/85	14/90	Ato Asaye Birhanu et al	10	Bah.	4	3y	7m	18	0	7	1	1y	4m
12	126/85	1338/93	Ato Mekonnen Gelan	165	Arbam	35	3y 3m	2m 4d	44	44	18	5	8m	6m
13	197/85	3310/95	Mekonnen Gelan	1	Arbam	1	1y 3m	4m	5	2	3	2	11m	0
14	291/85	1404/93	Basha Mengistu W/Agegnehu	1	Arbam	1	4m	1y	11	0	8	2	8m	6m
15	303/85	1195/93	Sishaw W/Selasie	4	Arbam	1	3y 3m	4m	7	0	7	2	11m	0
16	305/85	1193/93	Demsie Teiga	20	Arbam	2	3y 13m	15d	27	0	15	5	5m	6m
17	306/85	1190/93	Samuel Nitsa	6	Arbam	1	3y 3m	5m	14	0	8	4	2m	6m
18	307/85	1194/93	Alamerew Habite	7	Arbam	1	3y 3m	4m	12	0	10	4	4m	6m
19	308/85	1196/93	Kassa Wolchie	8	Arbam	1	3y 3m	4m	10	0	7	2	3m	4m
20	309/85	1192/93	Wonbera Hoga	6	Arbam	1	3y 3m	3m	4	0	4	4	8m	0
21	58/85	26/90	Capitan Kebede Mekuriya	5	Dessie	1	2y	10	9	120	8	2	8m	11m
22	95/85	24/90	M/G Girma Niway	10	Dessie	15	1y	11m	22	19	5	10	8m	11m
23	131/85	6/92	H/giorgis Tasew	95	Dessie	61	1y 10m	2y	230	984	20	6	1y 2m	1y 8m
24	254/85	54/92	--Megersa Bikila	18	Dessie	1	11m	4m	19	11	9	9	9m	8m
25	253/85	57/92	Mehari T/Haimanot	52	Dessie	7	6m	1y 3m	255	595	20	10	1y 4m	1y 9m
26	327/85	58/93	B/Meskel Alebel	1	Dessie	2	5m	2m	6	9	6	6	2m	7m
27	359/85	42/94	Alemayehu Kassa	1	Dessie	2	6m	1m	7	65	7	7	5m	11m
28	31/85	9/89	W/gebriel G/Egz.	3	Jima	1	2y 5m 17d	6m 13d	6	0	4	2	1m 16d	
29	133/85	6/89	Derbachew Fafa	47	Jima	113	2y 11m 15d	1y 7d	49	113	10	1	1m 14d	
30	225/85	26/92	Yematawork W/yus	11	Jima	1	1m 18d	7m 14d	8	3	5	1	2m 22d	
31	25/85	3/90	C/L Ayana Mengistu	53	Mekel	52	2m 16d	3y 3m 22d	52	150	8	1	6m	

32	190/85	1/91	Tekleberhane Negash	20	Mekel	14	11m 17d	1m	38	14	7	1	24d	
33	26/85	1/90	Capitain Yesuf Tilahun	4	Mekel	2	2y 6m	2y 2m	9	26	3	2	7m 17d	
34	108/85	2/89	C/L Debebe Hurisa	106	Asela	32	3y 8m	2y 14d	75	125	-	-	4m8d	3y 7m
35	230/85	22/92	Ato Dejene Waqeyo	7	Asela	1	2y 10m	2m 25d	6	7	-	-	1m 12d	1y 7m 20d
36	180/85	14/92	---Atere Tessema	9	Asela	2	1y 24d	1m 12d	8	0	-	-	20d	1y 5d
37	242/85	23/92	C/L Getachew Wakijira	27	Asela	5	3y	10m 23d	22	8	-	-	1m 5d	8m 7d
38	241/85	24/92	L/C/L Dawit Mulat	75	Asela	11	3y	10m 15d	39	48	-	-	3m 7d	10m 28d
39	243/85	26/92	Ato Geletu Timo	14	Asela	3	2y 11m	9m 10d	19	1	-	-	1m 14d	3m 15d
40	48/85	8/89	Ato Moges Abebe	95	Asela	18	3y	1y 8m 21d	47	130	-	-	21d	1y 1m
41	178/85	11/92	Ato Araressa Robie	3	Asela	1	3m	1d	4	0	-	-	13d	7m
42	89/85	7/89	Ato Gudina Tuni	51	Asela	20	3y	1y 10m	58	64	-	-	1m 18d	10m
43	108/85.3	18/92	H/Giorgis Tasew	12	Asela	1	2y 9m	1m 24d	7	9	-	-	1m 21d	3y
44	10/85	661/94	Ato Girma Wakijira		A.A	1	6m 2d	1d	5	9	-	-	1m 14d	4m 18d
45	13/85.2	937/89	Ato Hailu Burayu		A.A	66	2y 6m 5d	1y 11m	136	76	13	5	1y 2m	2y 4m 15d
46	55/85	933/89	L.T. Abebe Arega		A.A	26	3y 21d	6m 7d	74	59	16	2	18d	14d
47	75/85	643/89	Ato Basazine Baissa		A.A	40	1y 3m 9d	3y 3m 4d	147	61	22	4	4m 16d	11m 20d

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14	291/85	1404/9 3	Basha Mengistu W/Agegnehu	1	Arbam	1	4m	1y	11	0	8	2	8m	6m
15	303/85	1195/9 3	Sishaw W/Selasie	4	Arbam	1	3y 3m	4m	7	0	7	2	11m	0
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19	308/85	1196/9 3	Kassa Wolchie	8	Arbam	1	3y 3m	4m	10	0	7	2	3m	4m
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29	133/85	6/89	Derbachew Fafa	47	Jima	113	2y 11m 15d	1y 7d	49	113	10	1	1m 14d	
30	225/85	26/92	Yematawork W/yus	11	Jima	1	1m 18d	7m 14d	8	3	5	1	2m 22d	
31	25/85	3/90	C/L Ayana Mengistu	53	Mekel	52	2m 16d	3y 3m 22d	52	150	8	1	6m	

32	190/85	1/91	Tekleberhane Negash	20	Mekel	14	11m 17d	1m	38	14	7	1	24d	
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37	242/85	23/92	C/L Getachew Wakijira	27	Asela	5	3y	10m 23d	22	8	-	-	1m 5d	8m 7d
38	241/85	24/92	L/C/L Dawit Mulat	75	Asela	11	3y	10m 15d	39	48	-	-	3m 7d	10m 28d
39	243/85	26/92	Ato Geletu Timo	14	Asela	3	2y 11m	9m 10d	19	1	-	-	1m 14d	3m 15d
40	48/85	8/89	Ato Moges Abebe	95	Asela	18	3y	1y 8m 21d	47	130	-	-	21d	1y 1m
41	178/85	11/92	Ato Araressa Robie	3	Asela	1	3m	1d	4	0	-	-	13d	7m
42	89/85	7/89	Ato Gudina Tuni	51	Asela	20	3y	1y 10m	58	64	-	-	1m 18d	10m
43	108/85.3	18/92	H/Giorgis Tasew	12	Asela	1	2y 9m	1m 24d	7	9	-	-	1m 21d	3y
44	10/85	661/94	Ato Girma Wakijira		A.A	1	6m 2d	1d	5	9	-	-	1m 14d	4m 18d
45	13/85.2	937/89	Ato Hailu Burayu		A.A	66	2y 6m 5d	1y 11m	136	76	13	5	1y 2m	2y 4m 15d
46	55/85	933/89	L.T. Abebe Arega		A.A	26	3y 21d	6m 7d	74	59	16	2	18d	14d
47	75/85	643/89	Ato Basazine Baissa		A.A	40	1y 3m 9d	3y 3m 4d	147	61	22	4	4m 16d	11m 20d

Chapter I

Introduction

1. Background of the Problem

Political transition from regime that systematically abuse human rights to regime that respect, or at least promises to respect, human rights have given rise to the idea of transitional justice.¹ Repressive regimes are characterized by systematic abuse of human rights, tradition of impunity and undemocratic governance. In order to defend their illegitimate state power, repressive regimes would violate human rights.² Abandoning their natural responsibility to prevent crimes and protect the rights of citizens, they directly and indirectly participate in the systematic violation of human rights. Perpetrators in repressive regime are, rather, immune and rewarded for the crimes they commit and have committed in the past. Consequently, repressive regimes do not only violate individual rights but also weaken or obliterate the rule of law, accountability, justice, and other crucial components or values that are demanded in a democratic society. Such massive and systematic state sponsored abuses of human rights have been threatening not only peace and stability of a nation but also the world at large. That is why United Nations Security Council considered the gross violations of human rights in the Former Yugoslavia and Rwanda as a serious danger to the world peace and existence of humanity.³

When such repressive regimes either peacefully or forcefully replaced by successor regimes that promise to respect rule of law, human rights and democracy, the latter would certainly confront with serious problems of addressing the legacies of the past. The victims would demand justice against the perpetrators of heinous crimes committed under the sponsorship of the previous repressive regime. The successor regimes could not easily ignore such demands. They have both moral and legal duty to take action against such injustices. To the contrary, the old elements would try to resist any retroactive measure addressing past injustices. Some times, the old elements may have sufficient power or support to threaten such political transitions. In such cases, successor regimes would enter into dilemma whether to address the past injustice or not; whether to prosecute and punish or forgive and forget; whether to compensate victims or not; whether to reform repressive state institutions or not; whether to disclose the truth or not, and etc. That is why countries in transitions, even though they had a legal and moral duty to prosecute and punish such gross abuses of human rights, used different alternatives to address such past injustices.

Varieties of transitional justice tools have been used all over the world to resolve these major dilemmas. Successor trials (national tribunals, international tribunals, hybrid tribunals, full prosecution or symbolic trial), truth commission, amnesty, compensation for victims, purging or lustrations, memorials and memories, etc are the major tools that have been used to address past injustices. Policy makers, academicians, supporters of the new and the old governments, victims and perpetrators and neutral citizens used to debate on such choices of transitional justices. The

¹Andrew Valls, "Racial Justice as Transitional Justice"; Polity. 36.1 (Oct 2003): 53(19); Expanded Academic ASAP Gale. Eth-Addis Ababa University, 15 Nov. 2007, at <http://find.galegroup.com/ips/start.do?prodId=IPS> Full Text: COPYRIGHT 2003 Northeastern Political Science Association

²Nilson Mandela, "Forward", entitled "Transitional Justice" Three Volumes in Neil J Kritz ed. (United States Institute for Peace 1995) as quoted by Alexander L. Boraine, "Transitional Justice: A Holistic Interpretation (FOUNDATIONS)", Journal of International Affairs, V. 60 No. 1 (2006), at par.2

³See Yusuf Aksar, Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court, (London and New York: Routledge Pub.2004) at 18-20

supporters of each mechanism of transitional justice have been justifying its own choices while discrediting other competent choices.

Transitional justice, therefore, refers to different mechanisms or tools of addressing past injustices during transition from repressive or authoritative systems of government to a state of democracy.⁴

Despite the existence of different mechanisms to heal the wounds of the past, prosecution predominates our understanding of transitional justice.⁵ The history of prosecution or successor trials goes back to ancient trials of the tyrants of the city-states of Greek.⁶ It includes the trials of secessionists in USA after the Civil War in 1776; the trial of King Louis XVI in France after the French Revolution; the trial of King Charles I in UK after the English revolution in 1215; the Post World War International and National Tribunals; the trials of Portugal's Military officers in 1974; the Greece Colonels' trial in 1974; the trials of Argentinean's Junta in 1983; the trials of some government officials and member of former communist party in the former communist countries since 1989; the International Criminal Tribunal's for Uganda and for Former Yugoslavia, the Hybrid tribunal in Sierra Loan, and etc.⁷ The establishment of the International Criminal Court and its current arrest warrant in 2009 against the present President of Sudan shows how prosecution is gradually dominating the preferences in the transitional criminal justice mechanisms. As we have discussed in detail in Section 3 of Chapter II these successor trials served as enduring symbol of transformative changes in the history of the world. They were causes of the birth and globalization of human rights, democracy, civilization and development.

Other mechanisms of transitional justice were also widely applied in different parts of the world. For example, in the 1980's amnesty and truth commission were common mechanisms of reckoning past abuses of human rights in Latin America.⁸

When the new democratic governments that prompt to respect human rights and build democracy replaced the former communist or military authoritarian regimes in 1980 and 1990's, the problem of addressing past injustices became burning contemporary issue all over the world.⁹

The Ethiopian trials emerged in the middle of this history of transitional justice. TGE's decision to prosecute all officials of previous Derg/WPE regime and their collaborators was one of the few exceptional experiences of full prosecution all over the world.

In the 1991-1992, there were no significant contemporary experiences of full prosecutions that paved the way to the Ethiopian trials. The Rwandan National and International Criminal Tribunal and the Former Yugoslavia International Criminal Tribunal are experiences that came after the Ethiopian trials. At that time, even literatures on transitional justice were rare.¹⁰ So, the Ethiopian

⁴ See the detail discussion and authority on the concept of transitional justice in Chapter II Section 2

⁵ Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press 2001), at 27

⁶ Id

⁷ See the detail history of successor trials and relevant authorities in Section 3 of Chapter II

⁸ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press 2001) at 89

⁹ Pierre Hazan, "Measuring the Impact of Punishment and Forgiveness: A Frame Work for Evaluating Transitional Justice", *International Review of the Red Cross: Humanitarian Debate: Law, Policy, Action* (Vo. 88 No. 861 March 2006) 19-20

¹⁰ Alexandra Barahona De Brito et al ed. "Bibliographic Survey" *The Politics of Memory: Transitional Justice in Democratizing Societies*, (Oxford: Oxford University Press, 2001), at 315

trials became the first huge trial in the aftermaths of Post World War II Trials. For the country like Ethiopia with poor economic resources and weakened judiciary, full prosecution was serious challenge that all observers did not have hope to its success. However, there was much attention and support that was given to this trial at the beginning.¹¹ Nevertheless, these attention and supports were denied after the international experts left the office before the charges against the Derg/WPE officials were filed to the trial courts.

Derg/WPE was authoritarian regime that ruled Ethiopia for seventeen years until it was forcefully overthrown in May 29 1991 by EPRDF force. It hijacked power from the 1974 popular revolution in Ethiopia that shocked the absolute monarchy.¹² It did not take long time to prove that it was not a better regime in respecting human and democratic rights. It promised to adopt democratic constitution, respect human right and handover state power to the democratically elected government.¹³ But, by the same law,¹⁴ it suspended democratic rights and criminalized any peaceful political struggle that was employed to revolt against the Emperor. It threatened and actually used maximum forces to crush any popular gathering and peaceful demonstration through out its regime. Derg not only failed to keep its promise but also leveled those political parties that demanded the implementation of its promise as an anti-revolution, anti-people and anti-unity that helped as a pretext to kill many thousands.

Derg had a motto “Ethiopia first without any bloodshed”, but it killed generation and due to planned state massacres and consequent civil wars the bloods of citizens flood all the streets of cities and villages as well as forests in the countryside. Derg did not take much time to twist from this motto by justifying that “the blood of reactionaries is not actually the blood of mankind.” This “justification” was aired in its governmental declaration when it announced the massacre of sixty former civilian and military officials including two former Prime Ministers and the fist Chairman of Derg in November 1974. This measure marked the beginning of the end of the rule of law in the country. The major causes of the atrocities committed during this regime were purely political. Derg targeted many political opponents. Persons suspected to be members and supporters of different political opposition groups were arbitrarily detained, tortured and summarily executed.¹⁵ In the name of “Netsa Ermija” or free killing, “Red-Terror” and other campaigns, Derg/WPE regime sponsored the killings of ten thousands of lives. And millions of citizens had also lost their lives due to wrong policies and consequently civil wars during this regime.¹⁶

The bodies of the victims were littered on the streets of Addis Ababa with Marxist slogan on their back.¹⁷ In some places, survivors and victims’ families were forced to walk over the body of the victims.¹⁸ In almost all the time, families were denied the right to mourn and others to

¹¹ See the discussion in Chapter IV

¹² See the details of the political history and the causes of the atrocities as well as the relevant sources in Chapter III

¹³ See Proclamation 1/1974 a proclamation to establish Provisional Military Administrative Council, which was the Derg itself that was established in June 1974

¹⁴ Id

¹⁵ The Charges of SPO and the hard facts proved in the trials prove these facts. See the details in Chapter III

¹⁶ See the details of the discussion and sources of information on abuses of human rights in Chapter III

¹⁷ Yakob H/Mariam, “The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court”, *Hastings Int’l & Comp. L. Rev.* Vol. 22 (1998-99), at 678 citing Heinrich Scholler and Paul Brietzke, *Ethiopian Revolution, Law and Politics* (1976)

¹⁸ See for instance testimonies in SPO V. Gesges G/Meskel et al; SPO V. L/t Guta Tuji et al and SPO V. Ato Abebe Melaku et al. These files showed that in the red-terror crimes committed in the Gurage Zone and Fitch city the

express their condolence, to bury the body of their beloved families, to hold religious and cultural funeral ceremony, and to receive pension or communal support /“Idir”/.¹⁹ The houses and properties of victims and their families were intentionally set on fire and damaged to hurt the families of the opponents.²⁰ The methods and types of tortures applied against the victims were exceptionally cruel.²¹ The crimes were committed by state structures organized following the government vertical and horizontal bureaucratic apparatus. “Laws”, government offices and materials, and public finances were used to carry out such gross violations of human rights. The systems, patterns, and organizations used to commit such crimes were sophisticated and applied in almost a uniform pattern throughout the country. In general, the atrocities committed were unprecedented in the country’s history that could not be forgotten overtime.²²

In July 1991, the TGE replaced Derg and promised to respect basic human and democratic rights while incorporating the Universal Declaration of Human Rights in its Transitional Charter. Thus, TGE faced historical responsibility of addressing such individual and structural injustices. It was difficult for the TGE to ignore as well as to address such injustices and heinous crimes committed in the previous regimes as far as it has claimed to respect human rights, rule of law and values of democracy. TGE had legal and moral responsibility to respect the right to effective remedy to the victims as well as the rights of accused to fair trial in an independent and competent judiciary. But, it succeeds weak judiciaries some of which were suspects for their compromise in the abuses of rights during the previous regime. TGE immediately detained some of the notorious suspects. After one year and three months since it took power, it reached a historic decision to prosecute and punish all crimes committed by former officials and their collaborators when it established SPO for this purpose.²³ SPO was established pursuant to Proclamation 22/1992 that came into force on August 1992. But, SPO started its undertakings in February 1993. As the victims and survivors supported this decision, it had also strong opposition from the elements of the previous regime. But, the latter actually had no political and military power to reverse or threaten against the TGE’s choice.²⁴

Similar to other experiences in transitions to democracy, different opposing views are debated on the choices of transitional criminal justice in Ethiopia.²⁵ There were views that argued for national reconciliation without even mentioning the wounds of the past. There were also views that opposed the idea of “let the bygones be bygones” and adhered for either prosecution or truth commissions. There are also arguments that adhered to prosecute some of the notorious perpetrators while giving amnesty for others on conditions of disclosing the truths.

Despite such debates, the trials continued and took long time to be concluded. In October 1994, SPO brought its first charge against 73 Derg members. In March 1997, it filled charges against 5198 suspects.²⁶ Some other charges were also filed after 1997 when particular investigations

victims’ families and survivors were waking over the bodies of victims of red-terror by singing songs appreciating red-terror and denouncing victims and their alleged political party.

¹⁹ This was a general rule applicable all over Ethiopia; See testimonies of victims families in any of SPO files

²⁰ See for instance files mentioned in foot note 22 and also SPO Vs Ato Hailu Burayu et al

²¹ See the details of the abuses of human rights in the Derg/WPE Regime and the sources of authority in Chapter III

²² See the details of the abuses of human rights in the Derg/WPE Regime and the sources of authority in Chapter III

²³ See Article 6 of Proclamation No.22/1992 a Proclamation that established Special Prosecutor Office

²⁴ See the transitional situations and factors that determine the choices of TGE and relevant authorities in Chapter IV

²⁵ See the details and relevant sources in Chapter IV

²⁶ See the details and the relevant sources of information in Chapter V

were completed. The total defendants charged are estimated to be 6,000.²⁷ However, defendants discharged for different reasons such as death of defendants in prison or out of prison; death or change of address or incapacities of witnesses that could have testified on the defendants. Due to this defendants that have got final court verdict are only 5119.²⁸ This full information is being compiled and yet finalized and publicized.²⁹ Though the trials have completed different files at different times in the past, the trials are not yet officially closed and the Office is still working. If we take the extreme case of the Derg members case, they were arrested when EPRDF Controlled Addis Ababa on May 28, 1991; and the Appeal of the Derg Officials was finally decided on May 26, 2008. When we simply count this time it is seventeen years. The Ethiopian trials is, therefore, claimed to be the largest after post WWII trials³⁰ and the longest genocide trials ever in the world. Among all recent successor trials, Ethiopia is the first country to try such huge number of defendants with its own weakened judiciary and meager resources.³¹ Ethiopia has been exercising huge criminal trials to reckon with legacies of the Derg/WPE regime's widespread, systematic and heinous human rights abuses. Ethiopia had never faced with the challenges of prosecuting such types of crimes. To investigate, prosecute and try such complex and huge crimes needs huge quantity and quality of human and financial resources. The prosecution, defense lawyers and the trial judges had no experience and special training on similar crime. Even our University had no proper curriculum on international criminal laws and transitional justice. And hence, the international crimes incorporated in the 1957 Penal Code of Ethiopia were not practically tested in our judicial system. Due to this, many challenges faced the investigation, prosecution and hearings of the trials.

The challenges to prove highly organized, systematic and planned crimes; as well as to organize indictments in which many perpetrators participated in different capacities with different groups, with many counts and in different part of the country were among the serious problems confronted the trials. In a case where many defendants charged together, the contradiction of rights and interests among defendants will also be inevitable. But, charging separately many defendants for the same crimes may also create the duplication of evidences and will force the victims to repeatedly disclose their wounds, the courts to spend many times for similar cases, to multiply the resources needed to handle the duplicated cases, etc.

Despite this unique experience in the fight against impunity, much attention was not given by the literatures to find out the real challenges and achievements of the trials. Many books have been written about the South African's Truth and Reconciliation Commission, the Argentinean's Junta Trial, the National and International Criminal Tribunals of Rwanda, the International Criminal Tribunal of the Former Yugoslavia etc. But, only few literatures are written about the Ethiopian Trials. Thus, the whole world and even majority of Ethiopians knew only few about these trials. And consequently, the international communities as well as the next generation in this country will not learn much from the weaknesses or strengths of the Derg/WPE trials in preventing and punishing future gross violations of human rights.

²⁷ Interview with chief of SPO

²⁸ SPO Final Report to FDRE House of People's Representative on Feb. 4, 2010

²⁹ Interview with chief of SPO

³⁰ See also SPO, TGE, Press Release, given on November 23, 1993, Addis Ababa

³¹ See also Firew Kebede Tiba, "The Mengistu Genocide Trial in Ethiopia", *Journal of International Criminal Justice Access* Published online on April 23, 2007, (Oxford University Press, 2007), at 2

Those few literatures written on the trials reached consensus as to the unnecessary delay of the trials by simply taking the length of times the whole trials took to finish and by taking into considerations only few defaults made by SPO.³² They did not find out the actual reasons of the delay for each file based on empirical facts and objective comparisons. Other yardsticks were not properly applied to measure if such length of time was necessary or not.

The investigation, prosecution and the trials took long time. But, the causes and lengths of delay for each file or trial differ. And the causes of delay of each step of the proceedings differ from file to file. Despite the existence of some unnecessary delays, there are some delays that could be justified by the Ethiopian laws and the international standards of the concept of "Speedy Trial".³³

Furthermore, the achievements and weakness of the Ethiopian trials were not evaluated by properly comparing with other national and international trials. In evaluating the Ethiopian trials, literatures used standards of the rich countries. So, it would be important to see if similar standard to that of stabilized democracy and well developed countries should be applied to evaluate the failures or achievements of the Ethiopian transitional trials. Ethiopia was one of the poorest countries and still is today. In addition, Ethiopia had suffered from prolonged civil war and system of repression. As a result, rule of law and the judiciaries in Ethiopia are suffering with many constraints. It is in these practical constraints that Ethiopian trials have tried to lay down foundation for the future Ethiopia.

For instance, the Ethiopian trials with a total budget that is less than the annual budget of the ICTR, had tried more than five thousand accused; while the ICTR took more than 700 million dollar before it finished its tasks of trying not more than 66 accused.³⁴ Surprisingly, literatures that tried to compare the Ethiopian trials with that of the ICTR erroneously concluded that the former is unnecessarily delayed.³⁵ But, the actual facts do not support this conclusion. The available resources, the number of detainees, the complexity of the crimes, the times taken to try similar number of case, and etc should have been taken as yardsticks to take proper comparison. We have to ask, for instance, if the Ethiopian courts were given with such resources to try 66 accused, could the Ethiopian judiciaries have taken similar time to that of the ICTR?

Much acclamation is given to the South African Truth and Reconciliation Commission due to the wider media coverage given to the Commission. But, the latest sample study shows that the Commission's tasks did not satisfy the victims and even the accused.³⁶ Similar sample study is not conducted in Ethiopia. With out such knowledge, many erroneously supported the South African model as the best means for just transition of building peace, reconciliation and democracy. Even the general study on the advantages and disadvantages of prosecution, truth commission and general amnesty were not properly evaluated before any one criticize or support the TGE's choice to prosecution.

So if we closely observe, we can draw many lessons both from the weaknesses and strengths of the Ethiopian trials. The major objective of the Ethiopian trials is to draw lessons from the past in

³² See the relevant sources and the discussion of the delay of the Derg/WPE trials in Chapter V Section 4

³³ See the relevant sources and the discussion of the delay of the Derg/WPE trials in Chapter V Section 4

³⁴ See the details and sources in Chapter V

³⁵ Id

³⁶ James L. Gibson and Helen Macdonald, "The Executive Summary", Truth-Yes, Reconciliation-May be: South Africans Judge the Truth and Reconciliation Process Research Report, Institute for Justice and Reconciliation, (Rondebosch: Institute for Justice and Reconciliation, June 2001)

order to improve the future.³⁷ In fact, it is much earlier to judge its impacts now. However, we can identify some of the lessons that can be used as a deterrent to state officials not to involve in systematic abuses of human rights. Such trials would help to establish truth, serve justice, stabilize norms, and consolidate peace and reconciliation on the genuine base and consequently to consolidate democracy.

Ethiopia is fulfilling its international duty to prosecute with its own meager resources. Concentrating only on the defects of the trials, most literatures failed to appreciate the positive impacts of the Ethiopian trials in fighting impunity. For the first time in the country's history, the trials tried and established individual criminal responsibility against both the superior and the subordinate government officials including the head of the state. This is one of few precedents in the world in fighting against impunity by national courts. As a result, the Ethiopian trials have many accomplishments that are shadowed by prolonged delay, doubts to the legitimacy of the current government and lack of proper attention from researchers. Many traditional defenses such as 'acts of the state', 'superior order', 'sovereign immunity', 'statutes of limitation', etc were rejected by the trials. The trials established many hard facts that would be common memory for this country. We can learn a lot from such precedents. Even when the present and future government officials fail to learn from the lessons drawn from these trials, such trials would be a good precedent in this country to establish criminal responsibility against future Derg type regimes.

2. Statement of the Problem

The first problem we need to address is to have clear definition and understanding of on the concept of transitional justice and transitional criminal justice.

In any transition from repressive regimes, the debate whether to punish or give amnesty is a serious challenge for the successor regime. Even if there are political and practical contexts that determine or influence the actual choice, these opposing arguments favoring one alternative transitional criminal justice from others are still unresolved hot issues. Hence, the questions: What are the arguments and counter arguments for each choice? Which alternative better serve to just transition to democratic society? Which alternative better serve justice, peace and reconciliation within the society? What are the statuses of these alternative transitional criminal choices in international law? These and other issues are important problems that should be emphasized in detail to properly evaluate the Ethiopian choice of prosecution. Thus, much emphasis is given in this research to have a better and deeper knowledge on the advantages and disadvantages of each alternative transitional criminal justice. This general discussion would give us neutral yardsticks and would help as sources of authorities to properly judge the Ethiopian choice with that of competent alternative choices: general amnesty or truth and reconciliation commission.

TGE decided not to forget and forgive the unprecedented heinous crimes committed in this country. It decided rather to investigate, prosecute and punish those involved in such crimes. Legal and moral grounds support this choice. Nevertheless, there are still arguments that criticized the choice for prosecution. These arguments have been raised in the defense motions,

³⁷ See the Preamble of Proclamation No. 22/1992

and human resources, complexities of the crimes, lack of experiences of the Ethiopian judiciary on similar cases, problem of efficiency, competence and preparedness; delaying tactics of some defendants; defects of the substantive and procedural laws; misconduct of parties to the trials; lack of support or misconduct of the government and international community and etc are among the major causes of the delay for the Ethiopian trials.

Thus, this research will try to sort out these and other major challenges faced in the investigations, prosecutions, and the trials.

Despite the challenges, the trials may have positive achievements or contributions in putting precedent to fight against impunity, to establish rule of law, accountability, respect for human rights etc. Hence, this paper will try to assess some of the achievements or lessons we can draw from these trials.

It is also necessary to raise question if the purpose of successor trials are achieved in Ethiopia. It would be important, for instance, to question if justice is served; if truths are disclosed, if norms are stabilized; if victims regained their integrity; if the trials sent clear warning against similar violations; if collective memories were established about state violence; if trials established individual responsibility rather than collective responsibility; if grounds for peace and reconciliation were established and if trials contributed in giving lessons for the need of establishing democratic orders, rule of law and accountability to avoid state-sponsored crimes and foster peace and development for the country. Even if this author has faced financial and time constraints to make samples studies to evaluate the judgment of the victims, perpetrators and the general society to the trials, but it is possible to deduce some tentative conclusion from some facts established in the trials and general theories of transitional justice.

In general, this research will try to highlight some of the challenges and achievements of the Ethiopian experiences of transitional criminal justice.

3. Objective of the Study

The study has the following objectives:

- To identify challenges of transitional criminal justices in general and their implication in Ethiopia trials.
- To find out justifications and counter-justifications of prosecution, truth commission and amnesty in general and their implication in the Ethiopian reality
- To find out justifications and counter justifications of different alternative choices of prosecution
- To ascertain the major challenges faced during the trials, the reasons behind such challenges and the impacts of these challenges in the fairness of the trials.
- To assess lessons drawn from the trials
- To highlight loopholes of our laws in the application of international crimes

4. Significance of the Study

- Instigate and contribute to further researches on the subject
- Narrow the gaps among different approaches of transitional criminal justices

- Contribute to policy makers in Ethiopia as well as other countries in similar experiences in selecting alternative transitional criminal justices
- Contribute to uncover the truths of the Derg/WPE regime and the injustices committed
- Contribute to show the need to fight against impunity
- Contribute to show the need to rule of law, accountability, democracy and respect for human rights

5. Research Methods

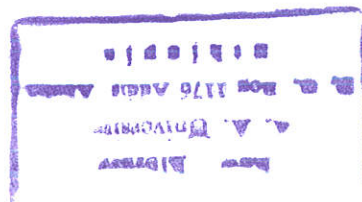
This author used Files of SPO and Courts and the necessary documents within these files such as: relevant documentary evidences; statements of the accused, victims and witnesses; indictments or counts; defense motions and preliminary objections; pleadings, motions and responses; rulings, verdicts and judgments of courts; reports of SPO etc as its primary source of data. The author in addition used the data gathered from the interviews and discussion with Special Prosecutors, Defense Counsels, Judges, Witnesses, Accused, and his personal observation as primary sources. In addition this author randomly selected 47 files to empirically study the court proceedings. Further more since this author was a special prosecutor in SPO he had the chance to review documents and reports as well as to interview and to make discussion with thousands of victims, accused, independent observer, defense counsels, special prosecutors, judges, court officials, officials of TGE, etc. In his deep experience he had observed many facts that are used as primary sources to this paper.

Different literatures, reports of independent observers, report of Human Rights Organizations, National Laws, International Laws, Media Reports, etc are used as secondary sources of information.

6. Limitations of the Study

This research needs significant amount of money and time to interview victims, perpetrators, defense lawyers, investigators, prosecutors, judges, independent observers and from the general public in a sampling method. But due to financial and time constraints the author is obliged to limit his sources, interviews and sample studies. This author was not supported financially even by the Addis Ababa University.

The subject under study is broader. As we have seen in the statement and background of the problem this research paper is expected to cover broad areas and subjects. For instance, the challenges of the trials that faced during this long time are enormous. To list down and study all the challenges need longer time and substantial finance. For instance, it was important to make sample studies how the ordinary citizens, the victims, the accused, the defense lawyers and independent observers judged the Ethiopian trials. It needs also to interview and make research on the impacts of the trials. It needs to find out the reasons behind all the challenges faced the trial. It was also important if the essences of some of the judgments were reviewed so as to clearly identify the lessons we can draw in fighting impunity from these files. But, the time and resources as well as the scope of this paper limited from such detail studies. It was difficult to cover all the challenges and achievements in the whole trials with such limited resources, time and scope.



7. Delimitation of the Study

In order to minimize the effects of the limitation to the study, the author was forced to narrow and delimit the study. For instance, among many challenges, this researcher will only focus on selected major ones. For instance the injustices in the Derg/WPE regime and the patterns of the commission of the crimes are so complicated and huge, hence the author delimited by showing the major patterns only. The paper could not elucidate the challenges in the essence of the judgments of trials. Hence, it simply concentrate on the general and few sample files. It will be beyond the scope of this research to study all problems in detail. This paper could not study all the files; hence, it randomly selected 47 files from more than 300 files of SPO. The sample study does not cover the trials held in Harare Supreme Court due to lack of data. Hence, on each section the author had explained the delimitations of the discussions.

8. Organization of the Thesis

The thesis have Five chapters: Chapter I - Introduction; Chapter II Concept, Approaches and Challenges to Transitional Criminal Justices; Chapter III Gross Violations of Human rights / Committed by Derg/WPE Regime; Chapter IV Choices of TGE: Prosecution, Truth Commission, Amnesty or Others; and Chapter V Major Challenges to the Ethiopian Trials. Finally Summary and Recommendations are included.

Each chapter will have detail sub-sections. The second Chapter will discuss the concept of transitional criminal justice in general. This chapter is basic conceptual frame works that is intended to serve as the sources of authority for the rest of our discussions. The challenges, alternatives, experiences of other countries, debates, justifications and counter-justifications of transitional criminal justices and its tools such as prosecution, truth commissions, and amnesties are discussed in detail in this section. The statuses of these alternatives in international law, the factors that will influence the choices of countries in transition; the limitations of prosecution in general and during transition in particular as well as the methods that reduce the impacts of the limitations are also discussed in this chapter.

In the third chapter, the Gross Violations of Human rights Committed by Derg/WPE Regime are briefly discussed. In this Chapter, political backgrounds or causes, system and patterns, major structures used to commit, patterns and consequences of gross violations of rights during Derg/WPE Regime are discussed.

After knowing the injustices or gross violations of human rights in Ethiopia, the next step would be to debate on what we ought to do about such injustices. These discussions are dealt in chapter IV. So in this chapter IV, the practical situations or variables that influence the choice of the TGE, other choices and their justifications and counter-justifications, and other relevant issues related to the choices of transitional criminal justice in Ethiopia is discussed.

In chapter V we will discuss the major challenges and accomplishments of the Derg/WPE trials. Finally, we will try to summarize our discussion and particularly we will try to bold out some of the lessons we can draw from these trials in the form of conclusion and recommendations.

Chapter II

Concept, Approaches and Challenges to Transitional Criminal Justices

1. Introduction

Transitional justice refers to a range of approaches or mechanisms that successor regimes undertake to reckon with the legacies of past repressive regimes.¹ Such approaches are categorized into transitional criminal justice, reparatory justice, historical justice, administrative justice, and etc.² This research paper deals with transitional criminal justice with particular reference to the Ethiopian experience in prosecuting against the former Derg/WPE authoritarian government.

In the shift towards the rule of law, accountability, democracy and human rights, successor regimes will normally face serious challenges as to what they could do with heinous crimes committed, wrongs made to the victims, inequalities and inequities in the society, which are occasioned by the practice of impunity and the absence of the rule of law in the previous repressive regimes. In such transitions, successor regimes selectively, simultaneously or chronologically undertake different measures such as prosecution, amnesty, truth telling, apologies, compensations, reinstitutions, memorials, institutional reforms, lustrations, etc. to heal past wounds or injustices.³ In contrast, few countries like Mozambique⁴ have decided not to resort to any measures lest doing so might reopen the wounds of the past. Hence, the debates on 'what to do about past injustices' signify the core dilemma intrinsic to the concept of transitional justice. Thus, transitional justice has been a source of heated academic debates and political tensions. Undoubtedly, transitional criminal justice will remain a bone of contention among politicians and lawyers. Hence, to that extent the choice of a particular approach will face legal and practical constraints in addressing state sponsored gross violations of human rights.

The Ethiopian experience is not that much different from the experiences of other countries in similar transitions. Consequently, before specifically addressing the scenario of criminal justice in Ethiopia, a discussion of the general theories of transitional justice and an assessment of relevant practices are worthwhile. Therefore, this Chapter elaborates on these points as a prelude to the Ethiopian case in the next chapters and hence is in order.

Specifically, in this Chapter, the general theoretical framework on the concepts of "transitional justice" and "transitional criminal justice" will be discussed. Besides, the concepts would be defined and a brief history of transitional justice will be presented. Furthermore, challenges, alternative mechanisms, arguments for and against each alternatives of transitional justice, factors that determine the choices of a particular transitional criminal justice as opposed to others, limitations to one alternative, prosecution, will be identified and dealt.

¹ Pierre Hazan, "Measuring the Impact of Punishment and Forgiveness: A Frame Work for Evaluating Transitional Justice", *International Review of the Red Cross: Humanitarian Debate: Law, Policy, Action* (Vo. 88 No. 861 March 2006) at 5

² Scholars use different names to such categories of justices. For example see Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Pres 2001) See also Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press 2001) Rama Mani divides justice into Legal or Rule of Law Justice, Rectificatory Justice and Distributive Justice.

³ Pierre Hazan, *supra* note 1, at 23

⁴ Rama Mani, *supra* note 2, at 109

2. Definition of the Concept of "Transitional Criminal Justice"

Transitional criminal justice is one component of transitional justice, which specifically deals with the crimes committed by previous repressive regime.⁵ Thus, the meaning of transitional criminal justice can be elaborated more by clarifying the concept of "transitional justice". Transitional justice is composed of two concepts "transition" and "justice"; the latter qualified by the former. Hence, in order to properly understand this concept, it is necessary to raise such questions as: What do we mean by "transition"? And, transition to what?

Alexandra Barahona De Birtó et al define "transition" as "--- the shift from a non-democratic regime type to a democratic one, not merely a change of government or a process of liberalization within an authoritarian regime."⁶ From this definition, we can infer that the concept "transition" refers only to the transition from authoritarian or oppressive regimes to democracy. In this form of transition, we can identify two distinct systems of government: one that systematically violates human rights, rule of law, accountability and democratic values and the other that respects or promises to take measures towards the respect of such democratic values. "The word 'transitional' --- signifies that the old order is dying and the new order has not yet been born."⁷ This definition implies that the impacts of the repressive regime are not yet fully eliminated and the new democracy is not yet born. Nevertheless, the question as to when and how can we determine whether a country has actually begun the process of democratization is necessary and relevant to say that a country is in transition to democracy or in the process of democratization.

Some schools of thought demarcate the "transition to democracy" by "objective political criteria, chiefly procedural in nature".⁸ In setting such criteria, there are differences between the "Minimalists" and "Maximalists".⁹ Their difference is by the number of procedural criteria they apply to determine whether a country is in a transition to democracy or not.¹⁰ Samuel Huntington and his followers consider transition to democracy will come about when the "most powerful collective decision makers are selected through a fair, honest, and periodic elections."¹¹ The Maximalists add other criteria, which are required to be fulfilled in liberal consolidated democracy. Such criteria include the absence of reversed domains of power by forces that are not directly or indirectly accountable to electorate, vertical and horizontal accountability or check and balance, extensive political and civic pluralism, the respect of the right of minority and underpowered majority, independent media, the respect of rule of law, etc.¹² The latter view is considered as "teleological view to democracy"; and Ruti G. Teitel argues that: "... (This approach) has been challenged for incorporating a bias toward Western-style democracies."¹³

⁵ See Foot Note 2 above

⁶ Alexandra Barahona De Birtó, Carmen González-Enriquez, and Paloma Aguilar, Ed. "Introduction", *The Politics of Memory: Transitional Justice in Democratizing Societies*, (Oxford: Oxford University Press, 2001) at 11

⁷ Alexander L. Boraine, "Transitional Justice: A Holistic Interpretation (FOUNDATIONS)", *Journal of International Affairs*, V. 60 No. 1 (2006) at 1

⁸ Ruti G. Teitel, *supra* note 2, at 5

⁹ See Larry Diamond "Is the Third Wave Over?" *Journal of democracy*, July 1996 PP 20-37 as reprinted in *Comparative Politics Annual Editions 00/0118th Edi.* (Oushkin/McCrow Hill: USA, 2000) at 226-234

¹⁰ *Id*

¹¹ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991) at 231

¹² See Larry Diamond, *supra* note 9, at 226-234

¹³ Ruti G. Teitel, *supra* note 2, at 5. Citing Guillermo O'Donnell, "Illusion and Conceptual Flaws," *Journal of Democracy* 7, No. 4 (1996) at 163-64, and Guillermo O'Donnell, "Illusion and Conceptual Flaws," *Journal of Democracy* 7, No. 2 (1996) at 34

Nevertheless, the concept “transition” in the context of “transitional justice” avoids such traditional political criteria set up to qualify the shift from illiberal to liberal democracy.¹⁴ The objective criteria and ideals that are applied to consolidated democracy should not equally be used to evaluate countries in transition.¹⁵ Actually, even those countries that are said to be “consolidated democracy” have not similar standard and level of democracy.¹⁶ Contemporary political scientists pragmatically uphold this trend.¹⁷ According to these authorities, the concept of transition to democracy is conceived in broader and inclusive practices showing the commitment of countries in transition towards aiming the acceptance of “liberal democracy and the rule of law”.¹⁸

Sheri Berman characterizes democratization process in Western Europe and USA as “twisting path to democracy”.¹⁹ He elaborated that the process of democratization may face with “turmoil, conflict, and even violence” which shows that “democracy never came easily, peacefully, or in some straightforward, stage-like progression.”²⁰ To show how difficult democratization process is, Sheri Berman wrote: “Everyone soon learned a basic lesson of transitology, however: getting rid of an authoritarian regime is one thing; creating a stable democratic one is some thing else altogether.”²¹ For example, the Nazis were democratically elected, but they committed the worst human rights violations in the history of the world. On the other hand, democratization process may need to violate some liberal rules.²² For example, in the aftermath of the French revolution the so-called “war to eradicate enemies of democracy” cost the lives of 20,000 to 40, 000 people in the interest of building democracy.²³ These experiences would warn us not to rush to conclude that a country begins democratization process by taking only some procedural criteria such as election. And equally it would warn us not to conclude that a country is not in the process of democratization or fails from democratization by taking only some weaknesses or serious limitations.

Therefore, whether a country is in the process of democratization should not be determined by purely taking one or few criteria such as election or respect of human rights as well as by evaluating some limitations or successes. For the purpose of the study of transitional justice, it is enough to show that a country at least purports to respect human and democratic rights and accepts democratic values.²⁴

Consequently, the concept to be clarified is “justice” in transition to democracy. The concept “justice” varies according to the context it is used. “Justice” has different meanings when it is used to address different types of injustices committed in the society such as criminal justice, social

¹⁴ See foot note 13

¹⁵ See Eric A. Posner and Adran Vermeule, “Transitional Justice as Ordinary Justice”, Chicago Public Law and Legal Theory, Working Paper N0.40 (The Law School of the University of Chicago, March 2003) at 6-7

¹⁶ Id

¹⁷ See Larry Diamond, *supra* note 9, at 226-234

¹⁸ Id

¹⁹ Sheri Berman, “How Democracies Emerge: Lessons From Europe,” *Journal of Democracy* V. 18 No. 1 (2007) at 30. See Eric A. Posner et al, *Ibid*, at 6-7

²⁰ Sheri Berman, *Ibid* at 37 Sheri Berman discussed the experience of bloodshed in France, UK, German, and USA in order to gradually consolidate democracy. He mentioned the various ups and downs in each countries effort in long way to transition to democracy. He mentioned some times such country faced a process to go back to authoritarianism and gross violations of human rights.

²¹ Id

²² Eric A. Posner, *supra* note 15, at 7

²³ *Ibid*, at 32

²⁴ Andrew Valls, “Racial Justice as Transitional Justice” *Polity*, 36.1 (Oct 2003): 53(19), at 1

justice, economic justice, political justice etc. It is also “often referred to as retributive, restorative or distributive, or even as economic or social transformation”.²⁵ Thus, it is difficult to find out one specific meaning for “justice” equally applicable to all contexts.

It is also difficult to define concisely what justice in transition to democracy means since its meaning similarly varies according to the context it is used to address. Transitional justice stems from the injustices committed from the repressive regimes. So, countries in transition facing different injustices apply different mechanisms such as: “transitional criminal justice” to address the crimes committed; “transitional reparatory justice” to address the damages occurred to the victims; “transitional distributive justice” to address the inequalities unfairly created in the society; “transitional historical justice” to address the lies and myths fabricated by the repressive regimes to justify its wrongs; “transitional constitutional justice” to address the claims of democratic constitution and to limit the successor governments; “transitional administrative justice” to reform institutions weakened or implicated in the repressive policy of the repressive regime; and etc.²⁶

Hence, the concept of “transitional justice” refers to different approaches countries in transition to democracy can undertake to reckon the legacies of injustices committed by repressive regimes. As we have said above, even the decision not to take any action against the past injustice is one alternative mechanism of transitional justice for which countries develop their own justification.

Transitional justice has some differences from the ordinary time justice due to the specific transitional challenges it faced, the tools necessary to tackle such transitional challenges, the justifications and debates raised behind each types of transitional tools, etc. Such distinct characters of transitional justice are elaborated throughout this chapter.

3. Brief Historical Survey of Transitional Justice and Its Mechanisms

It is beyond the scope of this research paper to discuss the detailed history of transitional justice, its mechanisms and the specific experiences each country has. However, it is important to have a “bird’s eye view” historical survey and the contributions of transitional justice in massive transformation of countries towards democracy.

The history of transitional justice is usually connected with the end of serious conflicts, civil and international wars.²⁷ It also marked the end of severe tyranny or oppressions and the beginning of hopes for a democratic society.²⁸ The history of transitional justice also corresponds to the history of the waves of democratization in the world.²⁹

The ancient successor trials against tyrants of the city-states described by Aristotle may help us to envisage how distant the history of transitional justice is.³⁰ If we deeply study the history of every

²⁵ Alexander L. Boraine, *supra* note 7, at 2.

²⁶ See for example Ruti G. Teitel, *supra* note 2

²⁷ See Rama Mani, *Supra* note 2, at 1

²⁸ See Ruti G. Teitel, *supra* note 2 at 27

²⁹ Three waves of democratization are recognized in the history of countries shift towards democracy. This corresponds with the history of transitional justices. See Samuel P Huntington, *supra* note 11

³⁰ Ruti G. Teitel, *supra* note 2, at 27; See also Alexandra B. De Berto et al, *supra* note 6 at 2. Alexander B. De Berto et al quoted John Elser, “Coming to Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy”, *Archives of Europeans de Sociologies*, 39 (1) 9-13. John Elster took the ancient Tyrants trials happened during 403 B.c.

nation that shifts from repression, war and conflicts, we can find one or more tools of transitional justice applied to reckon with the injustices committed by previous regimes. Some countries in transition may use unjust means to settle the accounts of the previous regime. For example, in 1974 the Provisional Military Government of Ethiopia, Derg, has settled the injustices of the previous regime by summarily executing almost all the civil and military leaders of the previous regime including the Emperor.³¹ There might be similar negative history of unjust transitional measures taken by successor regimes. So we can deduce the existence of unjust and just means of addressing the pains of the past. But, our concern in this paper is to focus only to just transitions from repressive regimes.

Countries in transition towards democracy and peace select different tools to reckon with their past legacies or injustices. Prosecution by national, international or hybrid courts; truth commissions; amnesties; reparations which include indemnity, compensation, restitution, satisfaction, dilatory judgment, social reparation; lustrations or purges; symbolic redress which include public apologies, memories, dedicating a day of remembering, symbolical reburial, erecting memorials or monuments, creating museums; education which includes committing events to history, rewriting text books, films, cinemas, theater, exhibitions, changing academic syllables; cultural or religious purifications, etcetera were employed in different countries to heal the past injustices.³²

Even if transitional justice models applied in different countries vary, prosecution or successor trial dominates the ideas of transitional justice.³³ Successor trials were an enduring symbol of transformative changes in the history of the world. For instance, the trials of King Charles I and King Louis XVI during the English and French revolutions were considered great symbols of transformation from monarchy to republican rule.³⁴ The modern concepts and philosophies of human rights, constitutional democracy, natural law, social contract etc. are rooted in the English, American, and French Revolutions, which took place in the 1215, 1776 and 1789 respectively. The social contract and natural rights theories, which originated the idea of human rights, as articulated by John Lock and other philosophers, have got life in the 1776 American Declaration of Independence,³⁵ and the 1789 French Declaration of the Right of Man and the Citizens.³⁶ For example, these rights and thoughts got precise manifestation in the 1776 American Declaration of Independence drafted by Thomas Jefferson which reads: -

*“We hold these truth to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure those rights, governments is instituted among men, deriving their just powers from the consent of the Governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it.”*³⁷

³¹ The Emperor and His fifty-nine civil and military officials were massacred for the alleged injustices they have committed without due process of laws. The responsible officials of the Derg were charged, convicted and sentenced penalty. See SPO v. C/I Mengistu H/Mariam et al

³² See Raman Mani, supra note 2, at 111-117

³³ Ruti G. Teitel, supra note 2, at 27

³⁴ Id

³⁵ The 1776 American Declaration of Independence is the achievement of the American Revolution. See Scott Davidson, Human Rights, (Open University, Press, Buckingham, Philadelphia, 1993), at 1

³⁶ Id

³⁷ Scott Davidson, supra note 35, at 3. This declaration was also followed the enormous trials and purges in US during 1776. See Eric A. Posner et al supra note 15 at 10

The Nuremberg and the Tokyo International Military Tribunals and many post WWII national tribunals particularly in Europe are permanent symbols for the globalization of human rights, individual criminal responsibility for state crimes, the introduction and development of many international principles and conventions that help to fight impunity against gross violations of human rights.³⁸ Gerhard Werle underlined the importance of these successor trials as: “Both international criminal law and human rights law achieved their break through as a consequence of the catastrophe of World War II”³⁹ However, the development of international law that had begun at alarming speed due to such prosecutions were delayed due to the hindrance of transition to democracy by the “cold war”. During the cold war, not only socialist authoritarians and military dictators but also friends of western democracies were involved in the violations of gross human rights on the pretext of defending their regimes from the expansion of socialism and communism.⁴⁰

Before 1980’s, the concept of “transitional justice” was little known in the literature except with the works of Post WWII International and National Tribunals.⁴¹ Earlier crimes committed by repressive regimes were largely covered by the concept of international crimes of which state action is the main element.⁴² Truth commissions, purges, policies of restitution, compensation and other informal mechanisms of transitional justices were not the “object of study by social scientists and the wider academic community until the Mid-1980.”⁴³ Scholar like Professor Cherif Bassiouni was among the leading writers on international crimes who opened fight against the impunity of officials of repressive regimes without which systematic and widespread mass violations of human rights could be committed.⁴⁴ The cry of such renowned scholars against impunity of state sponsored, systematic and widespread international crimes such as crimes against humanity, genocide and war crimes was largely given deaf ear during the cold war. This policy of silence motivated the repressive regimes to involve in gross human rights violations.

At the last phases of the collapse of cold war, the democratization process brings about a wave of transitional justice. Within 1974-75 the transitions from military authoritarianism started in Southeast Europe by Portugal, Greece and Spain.⁴⁵ The Greece junta trials marked the end of authoritarianism in the South East Europe.⁴⁶ Latter on, the massive transitions from military or communist authoritarianism towards new democracy in Latin America, Africa, South-East Europe, Former Soviet blocks bring about the ideas of transitional justice in the forefront.⁴⁷ Since the third wave of democratization special attention is given to transitional justice. The Argentina’s junta trial

³⁸ The establishment of UN, the adoption of UNDH, the Genocide and the Four Geneva Conventions, the identification by the International Law Commission and endorsement by UN General Assembly the Principles of Nuremberg and other developments in the field of human rights protection are achieved in the aftermath of the WWII. Countries like Germany, Japan, Denmark, France, Belgium and Italy had tried the leaders and collaborators of Nazis in their respective country for crimes against humanity, war crimes and crimes against the peace committed during WWII. See Eric A. Posner et al, *supra* note 15, at 10,

³⁹ Gerhard Werle, *Principles of International criminal Law* (UK: Cambridge University Press, 2005), at 40

⁴⁰ Alexandra B. De Brito et al, “Introduction”, *supra* note 6 at 22

⁴¹ Alexandra Barahona De Brito et al ed. “Bibliographic Survey” *The Politics of Memory: Transitional Justice in Democratizing Societies*, (Oxford: Oxford University Press, 2001), at 315

⁴² Id

⁴³ Alexandra et al, “Introduction”, *supra* note 6, at 315

⁴⁴ Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1992) at chapter 6 and at 529-530

⁴⁵ Eric A. Posner et al, *supra* note 15, at 10

⁴⁶ Ruti G. Teitel, *supra* note 2, at 27

⁴⁷ Alexandra B. DE Brito et al, “Introduction”, *supra* note 15, at 23-24; See also Eric A. Posner et al, *ibid*, at 1

marked the end of decades of repressive rule throughout Latin America.⁴⁸ Within the last two decades only more than two thousand books and articles are written on the subject.⁴⁹ It became a “rapidly expanding sub-field at the intersection of jurisprudence, comparative politics, and political theory.”⁵⁰ In the words of Pierre Hazan:

*Transitional justice has become the new mantra of domestic and international politics since the end of the cold war. Within two decades, the truth commissions have multiplied throughout the world, there has been unprecedented development in international criminal justice, and there have never been so many statements of public apologies and instances of reparations granted to the victims of human rights violations. Since 1989, the intensity of the process of remembrance of past atrocities has been unequalled.*⁵¹

It begins in the 1980’s by the establishment of Truth Commissions in Latin America. Consequently, the Argentina’s Junta trial, the East European lustration laws and few prosecutions, the Ethiopian prosecution, the South African’s Truth and Reconciliation Commission, the two ad-hoc International Tribunal for former Yugoslavia and Rwanda, the Special Tribunal for Sierra Leone and East Timor, etc exploded the idea. Truth Commissions in many countries are only few among the transitional justice mechanisms experienced in the contemporary world. The establishments of these national, international and hybrid tribunals are important decisions that show the international commitments in fighting injustices sponsored by repressive regimes. The International Criminal Court became a reality as a result of which arrest warrant is issued against a head of state that is still in power.⁵² This is a good beginning underlying that repressive state officials are going to be held criminally responsible not only after they are overthrown but also at the time when they are in actual power.⁵³

The dominant approaches of transitional criminal justice immediately after WWII were national and international prosecution. However, this trend was changed in the 1980’s when amnesties were the orders of the day especially in the Latin America.⁵⁴ In the 1990’s, truth commissions have preferences in many countries. But, more recently the preference is given again for prosecution.⁵⁵ Public acknowledgments have also got strong support and wide experience in contemporary times.⁵⁶ Lustrations were widely used in the former communist regimes of Eastern Europe than other countries.⁵⁷ Reparation to victims has been given together with truth commissions in South Africa and with prosecution in Post World War II Germany.⁵⁸ Hence, the end of east-west or socialist-capitalist block tensions brings fertile conditions in the expansion of transitional justice. Nowadays,

⁴⁸ Ruti G. Teitel, supra note 2, at 27

⁴⁹ Alexandra B. De Brito et al, “Bibliographic Survey”, supra note, 41 at 315 See also Andrew G. Reiter, Compilation of The Transitional Justice Bibliography (Version 2.0 – 5/9/08) visited at: areiter@wisc.edu

⁵⁰ Eric A. Posner et al, ibid, at 1

⁵¹ Pierre Hazan, supra note 1, at 19-20

⁵² The Sudanese Current President is the case at hand against whom arrest warrant is issued by ICC for the first time in history of nations.

⁵³ The ICC issued arrest warrant against the current Sudanese President General Albesher and the leader of Lord Resistance Army of Uganda for allege crimes of gross violations of human rights in Darfur and in Uganda respectively.

⁵⁴ Raman Mani, Supra Note 2, at 89

⁵⁵ Id

⁵⁶ Pierre Hazan, supra note 1, at 19-20

⁵⁷ See Eric A. Posner et al, supra note 9, at 10, Alexandra B. De Brito et al, “Introduction”, supra note 6, Ruti G. Teitel, supra note 2, Raman Mani, supra note 2; see Naumi Roht Arriaza, “The Role of International Actors in National Accountability Process,” in Alexandra Barahona De Brito et al ed, The Politics of Memory: Transitional Justice in Democratizing Societies, (Oxford: Oxford University Press, 2001), at 43

⁵⁸ Id

human rights have become a universal language. As well, the idea of fighting state injustices became a universal consensus. It gave rise for rapid expansion of both the concept and the practices of transitional justice.⁵⁹

Since it is difficult to review the experiences of each country, it is better to see concise exemplary summary of some of the tools of transitional justice chosen by countries in transitions.⁶⁰ Among countries that have adopted national prosecutions are the Ancient City of Athens, England, United States of America in 1976 (during the American Revolution), France (in 1979 during the French Revolution) and in 1944 (post WWII trials), Germany (in 1945-49 and after 1955) and (the 1989 East Germany), Japan (post WWII trials), Denmark (1945), Belgium (1944), Italy (1944), Portugal (1974), Greece (1974), Argentina (1983-4), Lithuania (1991), Bulgaria (1992), Albania (1992), South Korea (1987), Bolivia (1986-93), Burundi (1998), and others. Countries that international tribunals are established to try crimes committed by former repressive regimes are German, Japan, Yugoslavia and Rwanda. Countries that have adopted hybrid prosecutions are Sierra Leone and East Timor. Among countries that gave general amnesties are: Spain (1977), Nicaragua (1990 and 1991), El Salvador (1992 and 1993), Romania (1990), and others.

Among countries that established truth commissions are: Argentina (1984), Chile (1990), Bolivia (1982-83 Parliamentary Commission and 1990-3 by NGO), Uruguay (1985 Parliamentary Commission and 1986-9 by NGO), Paraguay (1992 by Parliamentary Commission and 1984-90 by NGO), Brazil (1979-85 by NGO), Guatemala (1994-9), El Salvador (1992-3 where UN was the key player in the process), Honduras (National Ombudsman Office in collaboration with local and USA based NGO), Haiti (1994-6), Zimbabwe (1985), Uganda (1986), the Chad (190-92), South Africa (1995-98), Zambia (1998), Nigeria (1999), Sierra Leone (1998), Philippines (1987), Sri Lanka (1995-7), and others.⁶¹

Among countries that followed lustrations are, in Greece 100,000 civil servants purged after 1974 transitions,⁶² Albania (1992), Bulgaria (1992, 1997, 1998), the Czech Republic and Slovakia (1992), Poland (1992, 1997, 1998), Romania (1998), Hungary (1994 and 1996), Germany (1992 thousands of civil servants, judges and police officers were dismissed) and etc.⁶³

4. Major Challenges of Transitional Criminal Justice

In this section, some of the major challenges of transitional criminal justices are discussed. Most of the challenges are unique to the transitional contexts. They do not usually exist in ordinary or stable criminal justice system. This part, hence, will help us to notice why transitional justice should not be evaluated by the parameters of the consolidated and stable criminal justice system. These challenges are interrelated and difficult to separate one from the other. It is difficult and beyond the scope of this paper to enumerate all the challenges that countries in transition to democracy would face. Many and diverse challenges may exist depending on the specific experiences of each country in transition. Therefore, limitations have narrowed the scope of the treatment among the list of possible challenges countries in transition may face. Nevertheless, the writer of this thesis sorts out five major challenges, which are interrelated to each other.

⁵⁹ See foot note 57

⁶⁰ Id

⁶¹ Id

⁶² Alexandra B. De Reberto, "Introduction", supra note 6, at 3

⁶³ Id

1. The first major serious challenge is the dilemma whether to prosecute and punish or forgive and forget past injustices committed by the repressive regime.⁶⁴ In ordinary criminal justice, there are no such alternative choices. The principle in ordinary criminal justice is that persons who violate the criminal laws should be prosecuted and punished. However, as we have seen in section 3 above in transitional period there are many general amnesties or truth commissions for heinous crimes committed in the repressive regimes. And, there are serious debates among policy makers, academicians and the general public particularly victims and perpetrators supporting or opposing prosecution, truth commissions or general amnesties. The debates as to whether to prosecute or give amnesty for crimes committed by repressive regimes during transition to democracy is the major and prior dilemma of transitional justice which is given more emphasis in this paper.⁶⁵

2. The other serious challenge is the existence of non-stable political situations favorable to freely determine or choose tools of transitional criminal justice.⁶⁶ During transitions, there are divisions within the society between the old and the new forces.⁶⁷ The ardent supporters and elements of the old repressive regimes will try to resist changes that will affect their acquired privileges and criminal accountabilities. They will also try to threaten the democratization process by all means possible. On the other hand, the supporters and elements of the new forces have dual duty to serve justice for victims of the repressive regimes and consolidate and defend the transitions to democracy. They have moral and legal duty to serve justice for victims, who are the main supporters and even mobilizing forces to the new regime. They have also to defend the democratization process from the threat of the old forces. In transitional period, there are instabilities and tensions. As a result, there is a fear of insecurity, political and sometimes military confrontations and tensions among the opposing forces. The transitional government may sometimes deviate from strict legal procedures in order to protect the end result of democratization.⁶⁸ Eric Posner said that: "Transitional justice is not achieved when rigid adherence to liberal norms results in political collapse and a return to authoritarianism."⁶⁹ The transitional governments may also negotiate justice to peace in order to materialize the transitions. This and other related issues will be discussed in detail in section 6 below.

3. The third problem is the capacity of successor regimes to address the complex and huge injustices committed during the reign of repressive regimes.⁷⁰ In order to address massive direct and

⁶⁴ All the scholars on transitional justice we used to refer in this paper agreed that the major dilemma in transitional justice is whether to prosecute and punish or forgive and forget past violations. See the whole discussion in section 5 of this Chapter. See for example Ruti G. Teitel, *supra* note 2, at 27; Samuel P. Huntington, *supra* note 11, at 213-215

⁶⁵ See section 5 of Chapter II on the general theoretical discussions and section 1 of Chapter IV on the Ethiopian context.

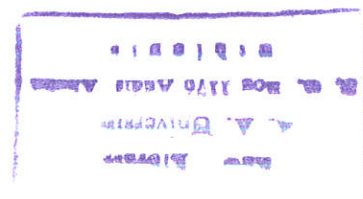
⁶⁶ See the discussion in section 6 of this chapter. There we have discussed that despite the academic and political arguments whether to prosecute or amnesty, the real policy choice depends mainly on the balance of power during and after the transition. So for the detail discussions and references see Section 6 of this Chapter and Section 1 of Chapter IV for the Ethiopian context.

⁶⁷ Erich A. Posner et al, *supra* note 15, at 4

⁶⁸ *Ibid*, at 7

⁶⁹ Erich A. Posner et al, *supra* note 15,

⁷⁰ Any transitional justice tool needs finance and institutions to address gross injustices committed in the repressive regimes. For example reparation needs huge amount of resource to compensate victims. Nevertheless the transitional economic and social situations are devastating to carry out such huge tasks. This section is intended only to show the difficult reality common to the economic and social situation of transitional period that would create practical impediments to plan and accomplish the appropriate mechanism. However since this paper is



indirect injustices committed by repressive regimes, the successor regimes need competent and efficient institutions and sufficient resources. But, the successor regimes do not usually have such institutions and resources principally because they were absent or depleted previously. The Report of UN Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies with special reference to Sierra Leone found out the challenges as:

*“Helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights, and more generally, a lack of peace and security.”*⁷¹

Rama Mani noted that the rule of law and the entire judicial systems were delegitimized in South Africa, debilitated in Ethiopia and destroyed in Rwanda during their previous repressive regimes.⁷² To the worst, the new regimes used to purge the officials and collaborators of the former repressive regime.⁷³ As a result, the institutions that are imperative to the rule of law such as the courts, police, prosecutor, securities, etc. will be more weakened or destroyed in time of transition. The weakened institutions are expected to carry out their usual day-to-day tasks. When they are given additional difficult, huge and complicated tasks of dealing with the past, one can imagine how serious the challenges of transitional justice mechanisms could be. It is more challenging and would be morally unacceptable to allow continuing such institutions and personnel implicated in the repressive regimes to play an active role in addressing such injustices. Particularly, to allow those implicated institutions and personnel would mean logically to be their own judges. The victims and the society will not have confidence on such institutions and the transitional justice mechanisms chosen. This would finally reduce the legitimacy of the successor regimes.

As we have said above, transitions to democracy usually occur in the aftermath of serious conflicts, civil wars or even international wars. The consequences of such conflicts are devastating in terms of human and material resources. The crimes committed by the repressive regimes are huge and complex. Such injustices are not only limited to individual victims. Rather they may be as heinous crimes as: loss of life, loss of limb and livelihood, trauma or psychological pain, loss of dignity, loss of property, discrimination, hate crimes, genocide, crimes against humanity, war crimes, forced disappearance, torture, forced conscription, targeted rape, abuse of power, and etc.⁷⁴ The burdens or

focused on transitional criminal justice it wants to emphasize the incompatibilities of the crimes committed and the resources and institutions of the judiciary. This part is an introductory and the detail discussion is found in section 7 of Chapter II and Chapter IV on the Ethiopian contexts.

⁷¹ Report of UN Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 3 August 2004, S/2004/616 as cited by Pierre Hazan, supra note 1 at 21

⁷² Rama Mani, supra note 2, at 6

⁷³ See Eric A. Posner et al, supra note 15, at 10. For example German, Denmark, France, Belgium, and Italy purged collaborators of the Nazis and Fascists in 1945. The disintegrated socialist block countries like Czechoslovakia, Hungary, Poland, East German, Lithuania and Ethiopia purged officials and collaborators of the repressive regime.

⁷⁴ Rama Mani underlined that since the end of the cold war, wars that are usually occurred not between states rather civil wars within the state have cost 5.5 million lives mostly civilians. According to him, in Ethiopia alone 1.5

injustices of the past also include culture of impunity; rule of tyranny; corrupted and partial judiciary; repressive police, security and military; lack of good governance; lack of political and criminal accountability; unjust inequality between citizens and groups; famine; disease; underdevelopment etc.⁷⁵ Therefore, the societies' expectation for social, economic and political reforms as well as the victims' demands for justice and reparations is enormous when seen in light of the weak financial, material and human resources of countries in transition.

The long accumulated problems of the society will explode at once and there will be a demand for solutions as immediately as possible. As opposed to such demands, the rendering of justice requires huge amount of resources as well as time. The economic situations are usually miserable. Besides, the political situations are not stable. In other words, in addressing the past, successor regimes have the duty to secure peace and stability as well as democracy and economic development. Successor regimes need to unify the divided society and create reconciliation to attain such objectives. Put it shortly, there will be a natural mismatch between the available resources and what ought to be done.

Therefore, as it is difficult to forget the painful legacies of the past, it is also difficult to address such huge injustices in the aftermaths of devastating resource constraints. Such problems and constraints will be discussed in detail when we see the limitations of prosecution in Section 7 below.

4. The other important challenge to transitional justice is raised as regards the retroactive application of laws, which is "endemic to transitional justice"⁷⁶ and how to ascribe individual responsibility for state sponsored crimes. Injustices or atrocities committed by repressive regimes are quite different from ordinary crimes. Individuals commit ordinary crimes in their individual capacity. The norms and positive laws do not support such offenders and governments try to prevent and deter crimes by punishing the criminals. This natural duty and role of the state is changed when the crime is committed by the repressive regimes. Government, laws and state officials which are naturally and logically established to prevent crimes are themselves involved in committing systematic and widespread violations of human rights. So, committing crimes becomes the norm rather than the exception in repressive regimes. Prof. Cheriff Bassiouni correctly identifies the character of crimes sponsored by repressive regimes as: "--- throughout the twentieth century most state action or policy resulting in mass human rights violations have been committed in reliance on three interactive factors: - ideology, terror and positive law. The latter being the instrument of the other two..."⁷⁷ Thus, state apparatus and institutions are the major instruments used to commit crimes by the repressive regimes.⁷⁸ Many institutions and persons will generally be involved in the commission of such crimes. The patterns of their commission are complicated and systematized. In this respect, Professor Cherif Bassiouni has identified the nature of crimes committed during the repressive regimes as:

Crimes against humanity, like other international crimes such as genocide and apartheid cannot be committed without state action or policy because of the nature and the scale of the

million lives lost as a result of red terror, forced relocation, villagization programs, famine and poverty. See Rama Mani, supra note 2, at 3

⁷⁵ See Rama Mani, supra note 2; In this book Rama Mani divided injustices into direct and indirect. The victims in the direct injustice are those individuals, which suffered from direct crimes; while the victims in the indirect injustices are the whole society. Those listed are samples of indirect injustices. The whole book deals on these concepts however it would be important to refer the first chapter for further interest.

⁷⁶ Ruti G. Teitel, supra note 2, at 33

⁷⁷ Cherif Bassiouni, supra note 44, at 88

⁷⁸ Ibid, at 247-248

crime. --- (because the commission of such specific crimes against a large number of persons (i.e. 'extermination,' 'persecution') cannot take place without pre-existing 'state action or policy' requiring the reliance on the state powers of the state in order to be carried out. --- because their commission requires the use of the state's institutions, personnel and resources in order to commit or refrain from preventing the commissions of, specific crimes described in Art. 6 (c) (of the Nuremberg charter)''⁷⁹ emphasis added.

Due to this nature the investigation, prosecution and trial against crimes committed or sponsored by repressive regimes are complicated and often raise distinct legal issues in ascribing individual criminal responsibility. The core problem is that the new legal and political norms are applied to criminalize the acts that were ordered or permitted under the implicit or explicit laws of repressive regimes.

As a result, perpetrators will raise defenses alleging that the acts for which they are charged were not crimes at the time of their commission. Naturalists argue that given the previous regime's immorality, the rule of law needs to be grounded in something beyond adherence to preexisting laws.⁸⁰ On the contrary, for the positivists, the acts or omissions that were "legal" under the explicit positive law or implicit norms of repressive regimes should continue to be legal under the successor regimes. So, they argued that holding individuals responsible for such acts or omissions is against the well-established principle of the non-retroactivity of laws.⁸¹ How far the principle of legality would be affected in the process of establishing substantive rule of law? To what extent the principle of procedural rule of law principles would be affected by the substantive rule of law necessary to shift from illiberal rule towards liberal rules? How can we reconcile the apparent dilemmas between procedural and substantial legality in transitional justices? To what extent are the roles of law in social transformation in which there is apparent contradictions in the positive law and the legality of law? How can a person be held criminally responsible for acts or omissions, which were "legal" in the previous regime? These questions and other issues raise serious debates among academicians. The positivists do not accept the role of law in social transformation. They argued the positive laws of the past should be respected to restore belief in the procedural regularity that was deemed missing in the previous regimes.⁸²

In the repressive regimes, the violations of human rights are not spontaneous, unsupported individual acts. Rather, they are state sponsored and committed under the umbrella of law and ideology. Many citizens are implicated and many of them may believe that they were doing legitimate actions. So, should such individuals who have committed crimes under the order of the state or under the implicit or explicit norms of the law or their superior order criminally responsible? Should the head of the state and state officials raise the defense of sovereign immunity or acts of the state? Should both the superior and subordinate be responsible? Should the officials that have sovereign power to enact laws be held responsible for the crimes committed due to the "laws" they enacted? And, should individual citizens be responsible for their acts committed following such "laws"? To what extent shall the superior is responsible to the acts of his subordinates?⁸³ These and other similarly related issues are not usually faced in ordinary criminal justice.

⁷⁹ Cherif Bassiouni, *supra* note 44, at 248-249

⁸⁰ For the details of such arguments see Ruti G. Teitel, *supra* note 2, chapter 1

⁸¹ See section 5.3.2 in this chapter for the full discussions between the positivists and naturalists school of thoughts

⁸² See Ruti G. Teitel, *Ibid*

⁸³ See the dilemmas of transitional criminal justice Ruti G. Teitel, *ibid*, at 27

The Nuremberg and Tokyo International Tribunals faced strong criticisms on the ground of violations of the principle of legality.⁸⁴ Nevertheless, the trials and judgments have introduced corner stone principles, which have profound implications for the development of international criminal justice. The principles, which are derived from the Nuremberg Trial, have now become part of the regime of customary international law.⁸⁵ The new regime must then decide to “either openly acknowledges retroactivity of laws or else resort to a variety of legal techniques designed to eliminate the retroactivity problem.”⁸⁶ The experiences of countries in transition vary as regards the treatment of such problems. Some countries have resolved such problems by resorting to pre-existing constitutional laws while some others have adhered to the strict interpretation of positive laws, using interpretive laws, or international laws.⁸⁷

In the East German’s trial, the prosecutor had argued that the laws of East German that allowed the shooting of persons who crossed borders were unconstitutional since East German was not a legitimate state under the constitutions of German before separation.⁸⁸ Some followed the argument that the positive laws of repressive regimes cannot explicitly allow such crimes.⁸⁹ Some countries however have enacted interpretive laws to allow the prosecution of such crimes.⁹⁰

In the contemporary world, solutions are offered to such problems under international law. Hence, we present a discussion of these remedial principles, which will serve in the search for solutions to the issue raised in section 5.1 below.

5. Another major challenge raised in relation to criminal justice is the procedural question of how do we evaluate the successes or failures of transitional criminal justice. Should challenges intrinsic to the transition itself be attributed as failures? Put it concisely, should transitional criminal justice be subject to strict evaluation by employing the ideals of consolidated and stable criminal justice? The answers to these questions seem to be in the negative. Of course, Eric A. Posner and Adrian Vermeule, have eloquently spelt out that such an approach amounts to demanding what is quite naturally unavailable and hence lacks pragmatism. Hence, they state: *In judging whether a transition has been just, it is important not to hold ideals that are unrealistic. And the literature does just that- either condemning transitions for violating these ideals or condemning any effort at transitional justice because it must fail one or more of these ideals.*⁹¹

In short, the gist of the above statement is that the problems intrinsic to all transitional periods should not be used to impute the failures of the system of transitional justice. As a matter of principle, no body would dare to argue that procedural justice should be improperly violated in transitional justice. The rights of the perpetrators as well as the victims’ should be respected. It should be held that all procedural guarantees are supposed to be made available. Nevertheless, the practical difficulty posed by the inherent limitations of transitional justice itself may hamper the full realizations of some of such rights. Evaluation of the transitional justice of a specific country, should therefore, take into consideration the specific challenges that the respective country has faced and its

⁸⁴ Gerhard Werle, supra note 39, at 10-11

⁸⁵ Ibid, at 9-10

⁸⁶ Eric A. Posner et al, supra note 15, at 23

⁸⁷ See Eric A. Posner et al, supra note 15, at 33; Ruti G. Teitel, supra note 2, at 33

⁸⁸ Id

⁸⁹ Id

⁹⁰ Id

⁹¹ Eric A. Posner et al, ibid, at 7

capacity to tackle the problems befallen on it. For example, it would be unrealistic to compare the International Criminal Tribunal for Rwanda and Former Yugoslavia with the national tribunals of Ethiopia and Rwanda and condemn the latter based on the standards used in the former.⁹² Various realities and transitional problems including the types of transitions undergone, the nature of the injustices perpetrated, the number of the perpetrators, the level of economic development of the countries and the resources allocated to the justice systems, etc. have to be taken into consideration.⁹³ Even in matters of ordinary criminal justice, the standards used in developed countries would not be comparable to the less economically developed countries. For example, the judicial resources in USA cannot be compared to that of a poor country say one in Africa in terms of prison facilities, court congestions, experience and competence of judges, prosecutors and defense lawyers. If we were going to claim that criminal justice should be served like the standards of justice in the well-developed countries, it would be difficult for poor countries to administer criminal justice for their citizens. It would be tantamount to saying that poor countries should anchor all their resources only to their justice systems. As this is not pragmatic to carry out, the assertion would boil down to saying that they should not indulge in rendering any justice till the time they attain the standards set in developed countries. In that case, justice would be tied with a standard level of wealth accumulation, which would automatically be despising of others' systems and ways of measuring justice in general terms. Yet, this assertion does not imply that we should trivialize transitional criminal justice by denying accessible basic rights and safeguards but there should always be striking a balance between interests. In line with this, Eric A. Posner et al suggest a balancing of liberal commitments and exigencies of transitional situations when they state:

*A more productive approach is to judge transitions against the standards used in consolidated liberal democracies, which must deal with their own transition problems---and (which) reflect liberal commitments---(and) which involves, among other things, maintaining valuable political structures, satisfying some illiberal popular demands, and doing substantive justice that might violate liberal norms. ---Transitional justice is not achieved when rigid adherence to liberal norms results in political collapse and a return to authoritarianism. Transitional justice allows a balancing of liberal commitments and political precautions. It is achieved when those norms are respected to the extent necessary to, and consistent with, the consolidation of liberal democratic institutions.*⁹⁴

Therefore, in evaluating the successes or failures of transitional justices, such specific circumstances should be taken into account.

5. The Arguments for and Against Prosecution, Truth Commission and Amnesty

The debate on whether it is better to forget and forgive or to prosecute and punish heinous crimes of past repressive regimes is the core dilemma of transitional justice.⁹⁵ The heated debate between adherents of these two alternatives has remained unsettled. Of course illustrative of this, "The virtually simultaneous creation of the South African Truth and Reconciliation Commission and the ICTY became emblematic of the heated debate in the mid-1990's between the advocates for a policy

⁹² See Yakob H/Mariam, "The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court", *Hastings Int'l & Comp. L. Rev.* Vol. 22 (1998-99) at 668-745

⁹³ Alexandra B. De Brito et al, *supra* note 6 at 11-23; See also Rama Mani, *supra* note 2, at 6-9

⁹⁴ Eric A. Posner et al, *supra* note 15, at 7

⁹⁵ See for example Ruti G. Teitel, *supra* note 2, at 27; Samuel P. Huntington, *supra* note 11, at 213-215

of forgiveness and those in favor of a policy of punishment, each claiming to better serve the goal of 'reconciliation'.⁹⁶

The debate among the supporters of prosecution, truth commissions and amnesties uses the same ground to justify their own choice. Hence, it will be more appropriate to evaluate the arguments and counter arguments of each choice vis a vis the common ground of justification of transitional justice such as transition, democracy, truth, justice, rule of law, accountability, peace and reconciliation. In addition, the proponents of prosecution present strong justifications based upon international law and conventional purposes of punishment.

Some of these grounds may not be used as justifications for one or the other choices. But, as far as one mechanism uses as justification, it would be important to evaluate that ground with all other mechanisms. For example, the conventional purpose of punishment usually serves only to justify prosecution. But, it would be important to evaluate if truth commissions and amnesty would supplant the benefits we can get from such purpose of punishment. It is also important to assess the status of amnesty in international laws. Therefore, the arguments for or against prosecution, truth commissions and general amnesty is assessed and evaluated based on three perspectives: the international law, conventional purpose of punishment and just transition to democracy.

5.1 International Duty to Prosecute and Punish Gross Violations of Human Rights Committed by Repressive Regimes

As we have discussed above there are three major alternatives in addressing the crimes committed during and by repressive regimes: prosecution, truth commission or general amnesty. But, are all these alternatives legally possible choices? What is the obligation of the state in international law towards violations of human rights? While addressing the dilemma of a choice, Laura M. Olson has ruled out the legal possibility of other choices but prosecution as:

*A discussion on penal repression and amnesty must begin with an understanding of existing obligation under international law, because the obligation under international law to prosecute and punish certain criminal conduct reduces or eliminates the states' legal options, including the passing of amnesty laws for those crimes are thus proscribed.*⁹⁷

We have stated above that crimes committed by repressive regimes could be either international crimes due to their magnitude and nature or simply ordinary crimes. International crimes and ordinary crimes differ mainly in their magnitude, nature and the direct or indirect involvement of the state.⁹⁸ The core element that distinguishes international crimes from ordinary crimes is the existence of "state action" in the former.⁹⁹ In the latter, the state forbids the commission of the crime by enacting criminal laws and investigating, prosecuting and punishing the perpetrators. In the latter, the crimes are state sponsored, systematic and massive in their nature.¹⁰⁰ International crimes by their nature cannot be committed without the involvement of state power or organized forces that

⁹⁶ Pierre Hazan, supra note 1, at 20

⁹⁷ Laura M. Olson, "Provoking the Dragon on the Patio Matters of Transitional Justice: Penal Repression Vs. Amnesties", International Red Cross Review, Vol. 88 No.862 at 283

⁹⁸ See Cherif Bassiouni, supra note 44, at 248-249 See also See Revised and updated report on the question of the prevention and punishment of the crime of Genocide prepared by Mr. B Whitaker, Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN, E/CN.4/sub.2/1985 2 July 1981, par.22 and n.6.; see also Ruti G. Teitel, supra note 2, at 28

⁹⁹ Id

¹⁰⁰ Id

have the *de facto* control over a given territory.¹⁰¹ In case of international crimes, the roles of the state and its institutions are changed from preventing, deterring and punishing crimes into promoting, supporting and immunizing perpetrators. If a state or *de facto* force is not part of that crime, the specific crimes could be controlled, prevented and the responsible persons get prosecuted before the crimes become widespread against a large number of victims. Ruti G. Teitel properly explains the nature of crimes committed by the repressive regimes as:

Repressive rules are often defined by criminal behavior such as torture, arbitrary detention, disappearances, extra judicial executions all substantially state sponsored; even when past evil is perpetrated by private actors, the state is often, nevertheless, still implicated, whether in the policies of persecution, by acts of omission in failing to protect its citizens, or, finally, in the cover-up of criminal acts and impunity."¹⁰²

Since international crimes are sponsored or committed by repressive states, such state would logically loosen the sovereign rights either to legitimize such actions by positive laws or give amnesty for the perpetrators.¹⁰³ International laws took international crimes out of its politicized national context.¹⁰⁴

The duty to prosecute gross violations of human rights stems from international human rights law and humanitarian laws. Human rights are recognized in different international instruments such as the Universal Declaration of Human Rights¹⁰⁵, the 1966 International Covenant for Civil and Political Rights/ICCPR/, the 1966 International Covenant for Economic and Social Rights/ICESCR/, the African Charter on Human and People's Rights (ACHPR), and other international and regional conventions. Ethiopia has ratified or acceded to the majority of international human rights instruments including the two 1966 UN Human Right Covenants and the African Charter of Human and Peoples' Rights.¹⁰⁶

All those international instruments have established duties or obligations on the state parties to respect, protect, promote and fulfill these rights."¹⁰⁷ By "respect" it means that the state has obligation to "refrain from interfering from the enjoyment of all fundamental rights."¹⁰⁸ The reference to this right as negative obligation captures the theme of this obligation in that what is required of the state is to refrain from disturbing the enjoyment of this right. By "protect" it means that the state is expected to protect the right holders against other subjects by legislation and provision of effective remedies.¹⁰⁹ The state should guarantee that human rights are not violated by "an effective interplay of laws and regulations so that" right bearers "will be able to freely realize

¹⁰¹ See foot note 98 and Yusuf Aksar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court*, (London and New York: Routledge Pub.2004) at 25. He wrote: "The ICRC and ICRT) also noted that a policy need not be the policy of state on the ground that crimes against humanity, in accordance with the development of customary international law can be committed by forces which have deface control over territory."

¹⁰² Ruti G. Teitel, *supra* note 2, at 28

¹⁰³ Yusuf Aksar, *ibid*, at 34

¹⁰⁴ *Ibid*, at 33

¹⁰⁵ Universal Declaration of Human Rights, Endorsed by the General Assembly of UN on December 10, 1948

¹⁰⁶ Ibrahim Indris, "The Structure of Human Rights Regime of the FDRE Constitution: Fundamental Rights and Freedoms", (Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution prepared by Law Faculty, AA University Unpublished), at 54

¹⁰⁷ African Commission on Human and Peoples' Rights, the Decision on the Violation of African Charter on Human and Peoples' rights by F.R Nigeria, 155/96 27th May 2002, p.8

¹⁰⁸ *Id*

¹⁰⁹ *Id*

their rights and freedoms.”¹¹⁰ The state, for example, has a duty to adopt laws such as criminal laws that will prevent violations of human rights and punish perpetrators. Certain human rights such as the right to life, the right to physical integrity, the rights to freedom of thought, etc. are non-derogable even during a state of emergency or war.¹¹¹

These human rights laws not only give a general duty to protect and respect but also recognize the right to effective remedy when violated, which encompasses the right to justice, truth, judicial protection and guarantees and the right to reparations for damages.¹¹² Article 8 of the UNDHR provides: “Every one has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.” Art 2 (3) of the ICCPR recognizes effective remedy for the violation of human rights notwithstanding that the violation has been committed by persons acting in an official capacity. This provision further provides that remedy should be given by “competent judicial, administrative or legislative authorities, or by any other competent authority provided by the legal system of the state, and to develop the possibilities of judicial remedy.” Article 13 of the European Convention on Human Rights has also similar phrases on the right to effective remedy.

This duty to give effective remedy is interpreted not to include amnesty but to include the right to know the truth and the right to see justice served against the perpetrators. The UN Human Rights Committee,¹¹³ the Inter-American Court,¹¹⁴ and the European Court of Human Rights have affirmed this interpretation.¹¹⁵ This duty of the state gives birth to criminal responsibility of its officials for failure to control their subordinates not to commit crime and to take necessary and effective measures when the superior had knowledge of the commission of crimes by his subordinates.¹¹⁶

The violations of duties to protect, respect, promote and fulfill human and democratic rights by the state do not only raise international condemnation but also create individual criminal responsibility against the officials of the state. International humanitarian laws recognize that certain serious violations of human rights are international crimes against which state parties undertook to prevent and punish.¹¹⁷ The primary sources of international crimes are international conventions such as: the

¹¹⁰ See foot note 107

¹¹¹ See ICCPR Article 4. The limitations laid down in this article are: not to derogate human rights that are made not-derogable in this treaty; to conform with other international obligations such as international humanitarian laws; and that derogation has to be in the strict conformity with Art 4 of the ICCPR.

¹¹² See Ronald C. Slye, “The legitimacy of Amnesty under International Law and General Principles of Anglo American Law: Is a Legitimate Amnesty Possible?” *Virginia Journal of International Law* (Fall 2002) 191-192

¹¹³ See Racquel Aldana-Pindel, “In vindication of Justiciable Victims’ Right to Truth and Justice for State Sponsored Crimes”, *Vanderbilt Journal Transitional Law* 35 (November 2002) 1416

¹¹⁴ Velasquez Rodriguez, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C. No. 4 (as referred by Gerhard Werle, supra note 40, at 62); the Inter-American Court has decided “...that a state has a legal duty to prevent human rights violations, seriously investigate evidence of such violations, identify those responsible, impose suitable penalties and ensure suitable restitution to the victims.”

¹¹⁵ Gerhard Werle, supra note 39, at 62

¹¹⁶ See the decision of the Tokyo International Military Tribunal against General Tomoyuki and other cases mentioned in Ruti G. Teitel, supra note 2, at 33-34 She elaborated that the Nuremberg trial principle rejected traditional defenses of “sovereign immunity for head of state,” “superior order” or “act of state”, and “reinforce responsibility of superior for the wrong doing.” She wrote that “In the Tokyo trials, General Tomoyuki Yamashita was held criminally responsible for atrocities committed by his troops, convicted and executed all without any showing of personal involvement or even knowledge of the acts committed by his subordinates.” However this principle was later narrowed that the knowledge and participation or “failure to take measures to avert particular harm is prescribed.”

¹¹⁷ See For example Article 1 of the Genocide Convention

Nuremberg Charter¹¹⁸ and the Principles of Nuremberg,¹¹⁹ the 1948 Genocide Convention, the 1949 Four Geneva Conventions and the 1977 two Additional Protocols, the 1982 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, the Convention against Apartheid, the Statute of ICCR, the Statute of ICTY, the Statue of the International Criminal Court, etc. These and other sources of international humanitarian laws recognize international crimes such as: crimes against humanity, war crimes, genocide, torture, disappearance etc. Such international crimes have reached to the level of *jus cogens* as a result of which all states have the duty to prevent, prosecute and punish or extradite. Henceforth, it has become an obligation *erga omnes* in nature.¹²⁰ Professor Cherif Bassiouni wrote that: “‘crimes against humanity’ is a category of international crimes and as such a general duty exists to prosecute or extradite. This duty in the opinion of this writer and other scholars has become a *civitas maxima* and a rule of customary international criminal law.”¹²¹ These conventions clearly recognize systematic and mass violations of human rights by repressive regimes against their own citizens as crimes against humanity. The violations of gross human rights are punishable against any person including the head of state or any official of state irrespective of whether such acts are not punishable in the domestic laws of the country where the crimes are perpetrated.¹²² International laws have lifted statute of limitation for such crimes. Among the international laws that lift statute of limitations are Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of New York, 26 November 1968¹²³ and the European Convention on the Non-Applicability of Statutory Limitations. They have also given universal jurisdiction on international crimes. Cherif Bassiouni has also underlined:

*“The law of the Nuremberg charter, the post Charter legal developments, the 1949 Geneva Conventions, the Apartheid Convention and the Torture convention, as other international instruments, recent national legislation and judicial decisions, and the writings of the most distinguished publicists all and up to the conclusion that “crimes against humanity” is subject to universal jurisdiction.”*¹²⁴

The principle of universal jurisdiction gives power to other countries or international tribunals to prosecute perpetrators of international crimes. Thus, even if a perpetrator of gross violations of human rights benefits amnesty in certain states, it would not give impunity from criminal accountability in all other states. In order to minimize the political impediments of prosecution in national courts, Permanent International Court is established to supplement national prosecution in case the national prosecution fails to properly investigate, prosecute and punish international

¹¹⁸ See Nuremberg Charter of the International Military Tribunal Annexed to The London Agreement For the Prosecution and Punishment of Major War Criminals of The European Axis, London, 8 August 1945.

¹¹⁹ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and its Judgment of the Tribunal, formulated by the International Law Commission on 29 July 1950 as per the mandate given by UN General Assembly Resolution on Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, 11 December 1946, (UN Doc. A/64/Add.:1946)

¹²⁰ See Yosuf Askar, 101, at 240; See also Cherif Bassiouni, supra note 44, at 500, see Rome statute of the ICC preamble par. 4

¹²¹ See Cherif Bassiouni, *ibid*, at 500

¹²² See for example Art 6 (c), 7 and 8 of the Nuremberg charter; Principle I, II, III, IV and VI of the Nuremberg Principles; Article Art. II (1) and (c) II (c) of the ACC Law No. 10; Art 5 (c) of the Tokyo Charter; Art 33 of the Rome statute of ICC; Art IV of the Genocide convention; Art 7 of ICTY Statute; and Art 6 of ICTY Statute

¹²³ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, New York, 26 November 1968

¹²⁴ Cherif Bassiouni, *ibid*, at 526

crimes.¹²⁵ International criminal law denies some of the conventional criminal defenses such as immunity of the head of state, sovereign action, superior order, due-obedience, etc.¹²⁶ The international criminal law also holds the superior responsible for the actions of his subordinate if he fails to prevent or take disciplinary or criminal action for the crimes of his subordinate for which he has knowledge.¹²⁷

The gross violations of human rights by repressive regimes was conceived of as a serious threat for international peace by UN Security Council as a result of which the Council referred UN Charter Article VII as justification¹²⁸ to establish International Ad hoc Criminal Tribunal in the Former Yugoslavia and Rwanda, which has introduced decisive precedents for the establishment of the permanent ICC.¹²⁹

Therefore, all such international laws and principles impliedly or explicitly established the duties over states to investigate, prosecute and punish violations of human rights despite such acts are allowed by the domestic sovereign laws. All these international laws and principles prove that the international law is against any form of impunity for gross violations of human rights.

Amnesty is one form of impunity since it prevents criminal accountability for violations of human rights. It violates the rights of victims to effective remedies by competent and independent judiciary recognized in international laws. The decisions of international tribunals did explicitly render illegitimate amnesty to violations of human rights. "The Inter-American Human Rights Court has ruled against the amnesties and pardon in Argentina, Chile, and Uruguay as contravening international legal obligations."¹³⁰

5.2 Conventional Purposes of Punishment

Unlike ordinary times, the arguments for punishment in transitional justice are mainly based on reasons different from conventional arguments for punishment.¹³¹ However, there is no reason that the conventional purposes of punishment would be irrelevant in transitional criminal justice. Rather, it would be strengthened by the special role of state officials to protect and respect the peace and security of the society by preventing citizens from committing crimes against the rights of fellow citizens.

The conventional goal of punishment can be inferred from the question and answers: Why should offenders be punished? Because they deserve it; to stop them committing further crimes; to reassure the victims that society cares about what has happened to him or her; to discourage other people from doing the same thing; to protect society from dangerous or dishonest people; to allow offenders

¹²⁵ See the Rome Statutes of the ICC, See Also Andreas O'Shea, *Amnesty for Crimes in International Law and Practice*, (Netherlands: Kluwer Law and Taxation Publishers, 2002) at 121. Andreas O'Shea in page 98-101 describes one of the major challenges of prosecution is as lack of cooperation and interest by domestic politics.

¹²⁶ See the international laws referred in foot 122 above. See also the Ruti G. Teitel, *supra* note 2, at 33-34. She listed down the conventional defense the Nuremberg International Tribunal rejects.

¹²⁷ *Ibid*

¹²⁸ See Yusuf Aksar, *supra* note 101, at 18-20

¹²⁹ *Id*

¹³⁰ See Alexandra Barahona De Brito et al, "Introduction", *supra* note 6, at 24-29

¹³¹ Ruti G. Teitel, *supra* note 2, at 28

to make amends for the harm they have caused; to make people realize that laws must be obeyed.¹³² Punishment, therefore, has denouncing, deterring, incapacitating and rehabilitating purposes. All of such purposes of punishment have the goal to prevent and deter crimes. Crimes are social evils, which are dangerous to the security and safety of the citizens and the peace, security, welfare and development of the society. The utilitarian, consequentialist or reductivist gives more emphasis to preventing future crimes while retributivists give more emphasis for punishing already committed crimes.¹³³ Nevertheless, both schools of thoughts agree that crimes are social evils that should be prevented or deterred and when committed perpetrators should be prosecuted and punished.¹³⁴ Their differences lie only on the emphasis they give for different goals of punishment.¹³⁵

Thus, punishments in transition to democracy also serve the purpose of disapproval of the wrongs committed; satisfying the retributive feeling of victims and society through penalty rendered by the courts of law in which the rights of the accused are respected; making strong warning to the society and the future perpetrators that crimes will not pay; and preventing and incapacitating the perpetrators from committing similar offenses or violations of human rights in the future.

The major relevant question here is: could amnesty or truth commission supplant such conventional purposes of punishment? While addressing this question, Yasmin Sooka argued about truth commission by saying that:

*“Purposes of transitional justice if properly managed are: helping to build democracy, acknowledgment, dealing with the denial of the past, responding to the needs of the victims, reparation, reconciliation, building a common narrative of the country’s past and thus ensuring a common set of promises from which to build for the future. In truth commission you can accomplish the above by finding out the truth, but the perpetrators are left unpunished which could rehabilitate, incapacitate, and deter them.”*¹³⁶

If the truth commissions do not replace the conventional purpose of punishment, it is obvious that the general amnesty would not. Thus, the conventional purpose of prosecution could not be fully achieved either by truth commission or by general amnesty since the major element, punishment of perpetrators, is not applicable in both. In fact, in the truth commission, the perpetrators may face public stigma that could serve as some sort of criminal sanction.¹³⁷

The moral arguments are in favor of punishment against the perpetrators of repressive regimes. As we have mentioned above crimes committed by repressive regimes are “crimes”, which are more dangerous than “ordinary crimes”. There is no moral or legal ground to justify amnesty for officials who committed serious crimes while poor citizens are punished for lesser crimes. State officials who, undermining their responsibility to protect citizens from crimes, have committed serious and heinous crimes should logically have more criminal responsibility than ordinary citizens. That is

¹³² Barbra Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (Philadelphia: Open University 1996) at 3

¹³³ *Ibid* at 3-7

¹³⁴ *Id*

¹³⁵ *Id*

¹³⁶ Yasmin Sooka, “Dealing with the Past and Transitional Justice: Building Peace Through Accountability,” *International Review of Red Cross*, Vol. 8 No. 862 (318-319), at 311-325

¹³⁷ Perpetrators suffer public stigma only if the truth commission named the perpetrators. But not all truth commissions did do this. There are further arguments in section 5.3.3 of this Chapter (II).

why official positions in many cases are aggravating circumstances.¹³⁸ Millions of people have lost their lives due to crimes committed by repressive regimes during WWII, in the cold war and even at the end of the cold war.¹³⁹ Those crimes shock the conscience of mankind. Even the worst tragedies shown in Rwanda and Yugoslavia warn the whole nations that there is no more serious threat to the world peace and security than crimes sponsored by repressive regimes.¹⁴⁰

5.3 Which for Just Transition to Democracy: Prosecution, Amnesty or Truth Commission?

Despite the international laws and decisions of International and Regional Human Rights Courts and International Tribunals against amnesty for gross violations of human rights, many countries practically gave amnesty for such heinous crimes committed in their respective countries.¹⁴¹ The UN has also played vague role towards this issue. On the one hand, it has an essential role in establishing Truth Commissions such as for El Salvador, Haiti, and Sierra Leone while on the other hand it established international ad hoc and special criminal tribunals for Former Yugoslavia, Rwanda, Sierra Leone, and East Timor. And, surprisingly many renowned academicians and politicians argued for general or conditional amnesty as an appropriate means of transitional justice. Hence, it is important to assess the arguments and counter arguments of these alternatives of transitional criminal justice.

Transitional justice is justified by reason of peace, truth, justice, reconciliation, rule of law, accountability, reparation of victims, respect for human rights and democracy.¹⁴² In the following section, therefore, it is important to discuss and try to evaluate the arguments and counter arguments for forgetting or addressing the past injustices and on the alternative tools of transitional criminal justices.

5.3.1 Back-Ward or Forward-Looking?

Ranges of views exist as to the need and direction of transitional justice. Some argue that transitional justice must not deal with the past i.e. no special transitional measures, no prosecution, no compensation to victims, and no cultural or symbolic measures to the past injustices.¹⁴³ The supporters of this view propose to totally forget and forgive the past and concentrate only on the future.¹⁴⁴ They considered transitional justice as reopening the wounds of the past as a result of which conflicts will escalate within the society.¹⁴⁵ This according to them disturbs the peace and democracy of the country in transition. They argue that retroactive measures unnecessarily divert our focus and resources from the emergent need of building peace, democracy and societal development. As a result, they warn, the construction of the future will be hampered to the extent we give attention to the past. They also argue that democracy requires the participation of all parties with opposing views. They believed this would be better achieved by forward-looking approaches. Those who

¹³⁸ See Article 81 of the 1957 of the Penal Code

¹³⁹ See the number of persons who lost their lives in section 5.3.2 in this chapter.

¹⁴⁰ See Yusuf Aksar, *supra* note 101, at 18-20

¹⁴¹ See some of the countries that applied truth commissions and amnesty to address past injustices in Section 3 in this Chapter. See also the arguments for and against amnesty in the following sections. The supporters of amnesty or truth commission do not use legal authority that could support their justifications.

¹⁴² See for example Andreas O'Shea, *supra* note 125, at 23 and Yasmin Sooka, *supra* note 136, at 311-325; See also Pierre Hazan, *supra* note 1, at 19-23

¹⁴³ Eric A. Posner et al, *supra* note 15, at 5 and Andrew Valls, *supra* note 24, at 2-3

¹⁴⁴ Andrew Valls, *ibid*, at 2-3

¹⁴⁵ Rama Mani, *supra* note 2, at 93

advocate this view argue to simply give deaf ear to the past, as it has never happened or to give general amnesty by simply forgiving the past without even discussing about the injustices.

The advocates of transitional justice, on the other hand, question: can we really forget the past? We cannot easily forget the past by simply deceiving ourselves as if nothing had happened. This is particularly difficult for those who suffered much from the heinous crimes. It is difficult to simply forget for those who lost their beloved families, those who suffered physical and mental damage, those who have been tortured, those whose bodies were cut, those who lost their jobs and property etc. The advocates held that transitional justice is necessary and should be both backward looking and forward-looking.¹⁴⁶ It must be backward looking in that it confronts and addresses the past, and forward looking in that it attempts to thereby lay the foundations for a more just successor regime.¹⁴⁷ The proponents of transitional justice contend that the major reason to address the past is mainly for the sake of the future.¹⁴⁸ We denounce the past, punish the perpetrators and compensate the victims, to heal the wounds, to prevent the future recurrence of similar violations, to level the playing field of democracy, to make a clear demarcation between the repressive and democratic regimes, to establish rule of law and accountability, to establish reconciliation, peace and security to the society.¹⁴⁹

5.3.2 Transition to Democracy with Clear Separation or Concession with the Past?

We have said the idea of transitional justice deals with political transition from regime that systematically abuse human rights to regime that respect, or at least promises to respect, human rights.¹⁵⁰ Today, democracy is the best form of modern political governance. As Sheri Berman wrote: “unlike during much of the twentieth century, when radicals on both the right and the left were skeptical of democracy’s value, today the most important political discussions concern not whether it is desirable but rather how to promote and nurture it”.¹⁵¹ Therefore, the major dilemma in transitional justice is how to realize the transition from illiberal to liberal rules.¹⁵² Transition to democracy requires the establishment and strengthening of the values and norms of democracy. Among such values, the rule of law and accountability are the corner stones.

The concept of the rule of law has opposing meanings when the positivists and naturalists use it. The positivists considered rule of law as a strict adherence to the law as it is. They do not bother whether that law respects human rights, democracy, morality or substantive justices. They are concerned only with the predictability and consistency of laws. According to their understanding, it can be consistent with “various political system besides democracy, such as theocracy or monarchy as long as established laws and regular procedures to govern are followed.”¹⁵³ Thus, according to positivists rule of law could “co-exist with gross human rights violations and discriminatory laws like Apartheid.”¹⁵⁴ Hence, for them the repressive regimes’ injustices are “legal” as far as they are done according to the “laws” of the time. This understanding of rule of law defends all the rights, privileges, even wrongs that are gained in the repressive laws. They as a result argue for the full

¹⁴⁶ Eric A. Posner et al, supra note 15, at 5 and Andrew Valls, supra note 24, at 2-3

¹⁴⁷ Id

¹⁴⁸ See the arguments in section 5.3.2 below

¹⁴⁹ See for example the arguments of Andrew Vallys, *ibid*, at 1-18

¹⁵⁰ Id

¹⁵¹ Sheri Berman, supra note 19, at 28

¹⁵² Ruti G. Teitel, supra note 2, at 28

¹⁵³ Rama Mani, supra note 2, at 27

¹⁵⁴ Rama Mani, supra note 2, at 27

○ continuations of the prior repressive laws¹⁵⁵ so as “to restore belief in the procedural regularity that was deemed missing in the prior repressive regime.”¹⁵⁶

However, for naturalists and international law, the rule of law does not support the laws of past repressive regimes that were used to violate human rights.¹⁵⁷ Lord Coolidge commented: “Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence.”¹⁵⁸ For example, it is difficult to hear let alone to accept a “law” that permits the killings of human beings by color, race or political or religious beliefs indiscriminately without due process of law respected. It is also difficult to accept law as “law” that snatches the right to life or liberty without due processes of law.

○ However, the rule of law does not only base on such moral reasoning. It does also give serious attention to the respect of the principle of legality or procedural justice. Cherif M. Bassiouni explained the importance of procedural justice in his words:

*To disregard legality and the due process of the law in both its substantive and procedural meanings and applications reduces us to arguing that better reasons or higher motives justify or excuse that which others have also done, but for different reasons or motives. Competing values should not be the only distinction as between those who sit in judgment and those who stand accused. History has all too well and all too frequently recorded that ends do not justify the means, Machiavelli’s advice to the Prince notwithstanding.*¹⁵⁹

○ Therefore, the rule of law incorporates both substantial and procedural justices such as: equality before the law, respect for fundamental rights and freedoms, fair and public hearings by independent and competent courts, due process of laws, legal and political accountability of states officials, etc. Human rights can be threatened if such basic principles are violated. Such principles are recognized in all the laws of civilized nations and international laws¹⁶⁰ that cannot be legitimately erased by sovereign power.¹⁶¹ Laws and practices that violate such fundamental principles are not actually “laws”. The international laws and decisions of international tribunals do not consider such “laws” as binding laws that can defend persons from criminal responsibilities.¹⁶² The “Organization for Security and Cooperation in Europe for example defines rule of law as:

*The rule of law does not merely mean formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a frame work for its fullest expression’.*¹⁶³

¹⁵⁵ Ruti G. Teitel, supra note 2, at 13-14

¹⁵⁶ Id

¹⁵⁷ Id

¹⁵⁸ The Queen V Dudley and Stephens 19 Q.B.D. 273 (1984) at 287

¹⁵⁹ Cherif M. Bassiouni, supra note 44, at 535-536

¹⁶⁰ See the discussion in section 5.1 above

¹⁶¹ Rama Mani, supra note 2, at 29

¹⁶² See the discussion on the international laws and principles in section 5.3.1 of this chapter. See for example, Nuremberg Charter Art.6 (c)

¹⁶³ OSCE (Organization for Security and Cooperation in Europe) as cited by Rama Mani, supra note 2, at 28

Therefore, the rule of law, human rights and democracy are inseparable. The rule of law requires that there should be accountability against violations of human rights either by individuals or state officials. As Samuel P. Huntington quoted the Uruguayan Judge criticizing the democratic government's amnesty proposal: "Democracy is not just freedom of opinion, the right to hold elections, and so forth. It is the rule of law. Without equal application of the law democracy is dead. ---"¹⁶⁴ If such laws including criminal laws enacted by representatives of the people are violated, the perpetrators should be prosecuted and punished. "If the military and the police establishments can prevent prosecution through political influence or the threat of a coup, democracy does not really exist in the country, and the struggle to establish democracy must go on."¹⁶⁵ "There must be effective and independent judiciaries to ensure accountability, and military and police forces must be subordinated to civilian authority and committed to democratic governance."¹⁶⁶

However, there are opposing views on the means to better facilitate transition to democracy. The supporters of amnesty allege that transition to democracy is better achieved by negotiation not by expanding the division of the past. They claim that to facilitate transition to a better society co-operation of key figures or role players may be necessary, which can be realized when group of actors are forgiven for the crimes they have committed.¹⁶⁷ They enforced their arguments alleging that in many cases the opposition and the government forces as well as many people commit violations of human rights during the repressive regimes and groups in the society shared guilt for such crimes.¹⁶⁸ So, in such practical contexts democracy will gain stronger base through reconciliation and general amnesty than punishing individuals.¹⁶⁹ They contend: "(E)ven if a legal and moral argument could be made for prosecution, that would fall before the moral imperative of creating a stable democracy. The consolidation of democracy should take precedence over the punishment of individuals."¹⁷⁰ They base their argument on the fact that in countries where repressive regime retains essential power to disrupt transition, the commitment to prosecute will either prevent, or delay peaceful transition and extend the repression¹⁷¹ or provoke rebellion or other confrontation that will weaken the transitional government and perhaps results in political collapse and a return to authoritarianism.¹⁷²

The new force may need to negotiate against prosecution with the old force to guarantee peaceful transitions. As a result, the old force may retain some guarantees that would impede some democratic reforms. However, the supporter of prosecution really doubt if such kind of transition is a real democracy.¹⁷³ They argued that clear demarcation has to be established between the repressive regime and the new transitional government to establish democracy, accountability, the rule of law and respect for human rights.¹⁷⁴ They underline that unless the traditions of impunity and injustices

¹⁶⁴ Samuel P. Huntington, *supra* note 11, at 213

¹⁶⁵ *Id*

¹⁶⁶ Alexandra B. De Brito et al, "Introduction", *supra* note 6, at 31

¹⁶⁷ Samuel P. Huntington, *ibid*, at 214

¹⁶⁸ *Id*

¹⁶⁹ *Id*

¹⁷⁰ *Id*

¹⁷¹ Kristin Henrard, "The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law", *Michigan State University Journal of International Law* (1999) Vol. 8, at 633-635

¹⁷² Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", *The Yale Law Journal*, Vol. 100, No. 8, (June 1991) (2537-2615) at 2546

¹⁷³ Samuel P. Huntington, *Supra* note 11, at 216

¹⁷⁴ For Example See Ruti G. Teitel, *supra* note 2, at 27- 30 and 66-67, Diane F. Orentlicher, *supra* note 172, Cherif Bassiouni, *supra* note 44

of the past are denounced in uncontested manner by means of prosecution, there is no guarantee that similar atrocities will not be committed again.¹⁷⁵

Hence, due to failure to hold accountable the officials of a repressive regime during transition periods, some undemocratic practices and violations of human rights may continue even in the new regimes.¹⁷⁶ Paloma Aguilar argues “while amnesty and institutionalized ‘forgetting’ may have been appropriate to ensure a peaceful transition, they also placed some obstacles in the way of reform over the medium term and thus slowed down a process of democratic deepening.”¹⁷⁷

Amnesty contradicts with the principle of the rule of law, accountability and justice, which are the basic element of democracy. Amnesty will rather promote impunity by endorsing past injustices. Amnesty will give moral support for the injustices of the past to be repeated again in the successor regimes. Truth Commissions on the contrary do not endorse past injustices. They established that human rights violations and heinous crimes are morally unsupported. But, they give message that future violations of human rights may be unpunished. It will also create wrong perceptions both for the citizens and the officials that social and political status as well as power will relieve from criminal responsibility. It would also fail to incapacitate or reform perpetrators. It would not hinder perpetrators even for shorter time from taking public offices. Thus, the perpetrators may use this opportunity to threaten the reform towards accountability and the rule of law. Hence, truth commissions and amnesty would play lesser roles than prosecution for the establishment of the rule of law, accountability, and democracy as well as for the protection of human rights on solid basis.

Ruti G. Tietel noted that prosecution will help in drawing a line between the old and the new by denouncing past state violence, disavowal of past wrongs, correcting of wrongs in the broader society and thereby liberating the successor regime from the state’s past evils.¹⁷⁸ Advocates of prosecutions hold that prosecution may help to deter the forces of the old regime from attempting to retake power from the new transitional government through violence by riding off the armed and security forces of some of their worst elements.¹⁷⁹ Jamal Benomar warned that any concession with the military rulers of the former regime to give impunity opens the door to more systematic build up of military control or a potential veto over the new government’s policies.¹⁸⁰ He continued his argument alleging that failure to prosecute could seriously undermine the legitimacy of the new regime.¹⁸¹ He concluded: “punishing perpetrators of past abuses can thus serve not only as a systematic break with the ugly legacy of authoritarian rule, but also as an affirmation of adherence to new democratic rule.”¹⁸²

¹⁷⁵ See foot note 174

¹⁷⁶ Paloma Aguilar, “Justice, Politics and Memory in Spanish Transition” in Alexandra B. Brito et al ed. “The Politics of Memory: Transitional Justice in Democratizing Societies, (Oxford: Oxford University Press, 2001), at 92-119 strongly argued about the dangerous of such transition taking the examples of Spain’s experience of ‘dirty war’ sponsored by the element of the previous regime, Basque Terrorism in the late 1970’s and 1980’s.

¹⁷⁷ Id

¹⁷⁸ Ruti G. Teitel, *supra* note 2, at 27- 30 and 66-67; See also Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (West Port, Conn.: Green Wood Press, 1961) at 301

¹⁷⁹ See Jamal Benomar, *Justice After Transitions*” *Journal of Democracy* Vol. 4 No. 1 at 4

¹⁸⁰ Jamal Benomar *Ibid*, at 4

¹⁸¹ Id

¹⁸² Id

Transitions escorted by amnesty and negotiation usually face tension and difficulties even after transitions.¹⁸³ Transitions that have properly tried the perpetrators and served fair justice do not face political tensions. They only faced difficulties or challenges only until the prosecution is concluded.

Punishment is illustrative of accountability and the rule of law.¹⁸⁴ The rule of law needs strengthening of judicial institutions. Trials are also important to reform and strengthen the weak judiciaries. Supporters argued that prosecution stimulates the courts into action; contributes to improve the image and legitimacy of judiciary; put basic reforms on the agenda; and contribute to deepen the values of democracy.¹⁸⁵ Hence, courts and other institutions will be evaluated through trials if they are weak and corrupted to carry out the demands of fair, independent and effective justice, which can be forgotten due to the replacement of the tasks of the courts by temporary Truth Commission.¹⁸⁶ The principle of accountability implies the existence of political and criminal liability for state officials. "Unless major crimes are investigated and punished, there can be no real growth of trust, no 'implanting' of democratic norms in the society at large; and therefore no genuine 'consolidation' of democracy."¹⁸⁷

Failure to prosecute will encourage the culture of impunity and the recurrence of similar and some times more complex violations.¹⁸⁸ For example, Professor Cherif M. Bassiouni emphasized the danger of failure to hold accountable against violators of human rights as:

*To underscore the indifference and at times, politically motivated disregard, in opposing significant human rights depredations, we must recall the words Hitler is reported to have said in a speech in Munich in 1936 in reference to his policies against the Jews: 'who after all is today speaking about the destruction of the Armenians?' Perhaps, if the world community had remembered or had showed more concern for these victims, the Gypsies, the mentally ill, and so many others, the horrors that befell the Jews would not have occurred. And perhaps, if the world community had learned the lesson of WWII, the many atrocities that have since occurred may have also been avoided; if not in whole, at least in part.*¹⁸⁹

To mention only some of such tragic events that have shocked the conscience of mankind and which occurred due to the failure to hold accountable those responsible for some political or other constraints are: the ottoman massacre of 1 million Armenians in 1915–1916; the 100,000 to 250,000 Jews massacres in 1919 by Whites, Cossacks and Ukraine nationalities; the Nazi holocausts in Europe that slaughtered some 6 millions Jews, 5 million Protestants, 3 million Catholics and half a million Gypsies during World War II; the Stalin purges of more than one million persons in the 1950's; the killings of more than one million Nigerians in the 1960 Civil War; the Killings of one

¹⁸³ For example Argentina started the transitions from the military junta by establishing truth commission, but latter selective prosecution was held against 9 junta members that faced serious problems. Recently the human rights activities are winning in the court that allow prosecution.

¹⁸⁴ Ruti G. Teitel, supra note 2, at 27

¹⁸⁵ Alexandra B. Brito et al, "Introduction", supra note 6, at 31

¹⁸⁶ Richard A. Wilson, "The Seizure Will Not Go Away: The Truth and Reconciliation Commission, Human Rights and Nation-Building in South Africa," African Studies, vol. 55 No 2 at 14 as cited by Alexandra B. Brito et al, Ibid, at 32

¹⁸⁷ Samuel P. Huntington, supra note 11, at 214

¹⁸⁸ Gerhard Werle, supra note 39, at 30. Gerhard Werle wrote: "There is much to be said for the belief that the practice of impunity for human rights violations (a "culture of impunity") is an important reason for their persistent recurrence."

¹⁸⁹ Cherif M. Bassiouni, supra note 44, at 540

million Bangladesh in the 1970's war of secession between east and west Pakistan; the Killings of two million Cambodians (4% of the population) by Khmer Rouge in 1980's; the deliberately induced famine of Ukraine; the practices of Apartheid in southern Africa, etc.¹⁹⁰ All these are only few examples of the failure of the world community to take serious measures against the leaders of the repressive regimes due to many political factors such as peace, diplomacy, etc. Rama Mani noted that since the end of the cold war alone due to the conflicts that arose from the repressive policy within national states more than five and half million people lost their lives all over the world.¹⁹¹

Even the latest experience in the Balkan states shows that the failure to punish perpetrators of human rights invited for other gross violations of human rights. Yusuf Aksar gave an example of impunity encouraging the commission of the crime, by citing the Report on the Situation of Human Rights, in the Territory of the Former Yugoslavia as: "The lack of an effective international response to counter the policy of ethnic cleansing perpetrated by Serb forces from the beginning of the war created the precedent of impunity which has allowed them to contribute and which has encouraged Croat forces to adopt the same policy."¹⁹²

Diane F. Orentlicher argued: "when criminal law is not enforced its authority is compromised and it loses its power to deter future crimes."¹⁹³ Herbert L. Packer notes that: "---respect for law generally is likely to suffer if it is widely known that certain types of conduct, although nominally criminal, can be practiced with relative impunity."¹⁹⁴ Former UN High Commission for Human Rights, Ayala Lasso urged that: "We must rid this planet the obscenity that a person stands better chance of being tried and judged for killing one humane being than for killing 100, 000."¹⁹⁵

Trials are also important for norm stabilization. Trials are "didactic monuments"¹⁹⁶, which have the major purpose to remind the society of fundamental norms that nobody is above the law and that every body is accountable for the criminal wrongs he has made.¹⁹⁷ According to Pierre Hazan the sole merit of trials is sending this message. He said: "In a way, the verdict is merely of secondary importance: given the horror of the crimes committed, no punishment can match the tragedy."¹⁹⁸

Nevertheless, when the transition to democracy is impossible without the full cooperation of the perpetrators the choice will be between two evils.¹⁹⁹ Particularly, when the repressive regime has retained the force to threaten the process of transition to democracy, political settlement to amnesty in return for handing over of the reign of power is not a choice but absolute necessity.²⁰⁰

¹⁹⁰ Cherif M. Bassiouni, supra note 44., at 539

¹⁹¹ Rama Mani, supra note 2, at 3

¹⁹² Yusuf Aksar, supra note 101, at 29 citing The Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, UN Doc. E/CN.4/1994/4(19May 10993) par.43

¹⁹³ Diane F. Orentlicher, supra note 172, at 2542

¹⁹⁴ Herbert L. Packer, *The Limits of the Criminal Sanction*, (Sanford: Sanford University Press, 1968) at 287 (quoted by Andreas O'Shea, supra note 125, at 84)

¹⁹⁵ Mohamed C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*, (Berline: Springer Pub. 2005) at 3 citing Annual Report of the ICTR to the SC and UNGA, UN doc. A/51/2925/1996/665/16 Aug. 1996, Para. 5

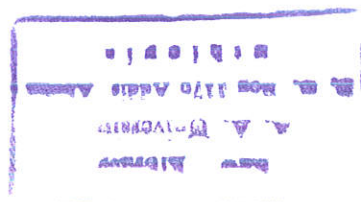
¹⁹⁶ Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, (New Brunswick: Transactions Publishers, 1999) at 4 (quoted by Pierre Hazan, Supra note 1, at 32)

¹⁹⁷ Ruti G. Teitel, supra note 2, at 29

¹⁹⁸ Pierre Hazan, supra note 1, at 32

¹⁹⁹ Andreas O'Shea, supra note 125, at 23

²⁰⁰ See the detail discussion how the balance of power determine the choice of transitional criminal justice tools at Section 6 below in this Chapter



Therefore, unless the balance of power²⁰¹ makes it absolutely impossible for the prosecution of past injustices it is the best mechanism to make transitions from illiberal to liberal orders.

5.3.3 Truth and Justice or Truth Only?

One of the dilemmas in transitional justice is whether to establish the truth of the past and acknowledge the wrongs done to the victims or to “let bygones be bygones”. The victims in repressive regimes suffered not only physically but also psychologically. Their reputation is tarnished due to the blame as the “enemy of the country”, “terrorist”, “anti-people”, etc.²⁰² The media of the repressive regimes used to stereotype the lies and myths to justify crimes and to humiliate the victims. Many part of the society may genuinely believe such propaganda used by the repressive regime and stigmatize the victims. The victims may suffer a lot to which the majority of the people might not know. As a result, victims of repressive regimes would suffer psychological trauma, humiliation, segregation, loss of dignity, loss of jobs, friends, families, etc.

In order to heal such pains truth telling is imperative. Telling the truth has many advantages in constructing new societies towards democracy such as reestablishing reputation and dignity to victims; creating common understanding and common memory about past injustices in the society; creating awareness as to the danger of repressive policies and necessity of preventing recurrence of similar state sponsored atrocities; and underscoring the importance of democratic values as a guarantee for human rights. For instance, Aryeh Neier supporter of truth commission has argued that:

*By knowing what happened, a nation is able to debate honestly why and how dreadful crimes came to be committed. To identify those responsible, and to show what they did, is to mark them with a public stigma that is a punishment itself, and to identify the victims, and recall how they were tortured and killed, is a way of acknowledging their worth and dignity.*²⁰³

Susan Forward, an eminent psychologist has also written:

*“The wounds that we acknowledge openly and minister to through therapy or support groups can become a deep source of wisdom: sensitivity and information about ourselves and others. It is the wounds that we try to deny and keep secret that will continue to drive us to repeat behavior patterns that keep us in depression, anxiety and bad relationships.”*²⁰⁴

In a transitional period, there are also political and related historical conflicts.²⁰⁵ The repressive regime has its own political justifications and ideology that have mobilized the support of the majority of the population. For example, socialist countries like Ethiopia had a Marxists-Leninist ideology, which had a strong support both by the opposition groups and the government. The ideology had benefited many people through nationalization and redistribution of private property. Such ideology and wrong benefits had then motivated the majority of the people to support the repressive policy of the former communist regime at least for a while. Hence, disclosing the truth and reestablishing rights would disown the greatest tools perpetrators used to orchestrate widespread

²⁰¹ See the discussion how the balance of power determines the choices of transitional justice in Section 6 of this Chapter

²⁰² Yasmin Sooka, supra note 136, at 318-319

²⁰³ Aryeh Neier as quoted by Samuel P. Huntington, supra note 11, at 230

²⁰⁴ Susan Forward, “From Wounds to Healing,” *Journal of Psychology and Judaism* Vol. 18 (1994) at 13 as cited by Andreas O’Shea, supra note 125, at 32

²⁰⁵ Ruti G. Teitel, supra note 2, at 72

violations of human rights. The leaders of the repressive regime will be detached from their collaborators and popular support. "While military or political collapse may well succeed in bringing down repressive leadership, unless the repressive regime is not only defeated but also publicly discredited, its political ideology may well endure."²⁰⁶

Therefore, truth telling has many advantages in transition to democracy. But, the question here is as to which transitional criminal justice mechanism best serve this objective: Trial, truth commissions or blanket amnesty? And, should the project of transitional justice end by disclosing the truth or should justice be served? In answering these questions, blanket amnesty would be out of choice since it does not require the truth to be uncovered. Truth Commissions are modified to minimize this weakness of blanket amnesty. So the debates would be between prosecution and truth commissions.

Supporters of truth commission argue that it helps best to achieve truth in relatively short period and with little cost. The major arguments to justify truth commissions are mainly based upon the shortcomings of prosecution. They argue that prosecution is less favorable due to its financial costs and time consuming effects, the complexities of the adversary nature of the litigations, the scarcity of evidences in the aftermath of conflicts, the highest standard of proof, the non-existence of incentives for perpetrators to cooperate in exposing the truth, the complexities of cases, etc. Priscilla Hayner argued that truth commissions provide more comprehensive accounts of past facts, patterns, causes and provide unthreatening platform for victims to be heard.²⁰⁷ Andreas O'Shea has also written:

*"(Criminal proceedings) can be costly and ineffective. The evidence may be old and destroyed the witnesses reluctant, the judges may be partial. In South Africa, the trial of the former defence minister, General Magnus Malan, in 1996 involved state-funded defence costs alone approaching \$2 million, lasted for four months and ended in acquittal. The Prosecution of Eugene de kock---cost nearly \$1 million and required 18 months of testimony before (he) finally admitted to 121 charges. The South African amnesty process has had marginal success in helping to discover truths that otherwise have never been unearthed."*²⁰⁸

For instance, it may be difficult to expose the full truth of secret crimes without the cooperation of the perpetrators. In case of prosecution, perpetrators will face penalty as a result of which they may retreat from disclosing the truth.

Besides, in case of prosecutions, there will not be any interest to find out truths if for instance the perpetrators have passed away prior to the institution of criminal proceedings. In that case, some gross violations of rights would remain unraveled and unreported and this in turn might not please victims.

Therefore, the argument that truth commissions are more appropriate to uncover the whole truth is sound. Nevertheless, supporters of prosecution criticize alleging that the truths established by truth commissions are disputed than truths established by trials. For example, the Truth Commission in El Salvador, which was widely, regarded as successful, faced contests both from the government and

²⁰⁶ Ruti G. Teitel, supra note 2, at 73

²⁰⁷ Priscilla Hayner, "In the pursuit of Justice and Reconciliation: Contribution of Truth Telling," Presented at Conference of Comparative Peace Process in Latin America, Woodrow Wilson, International Center for Scholars, Washington, Dc, March 1997 at 8

²⁰⁸ Andreas O'Shea, supra note 125, at 32-33

the military.²⁰⁹ Each party was found to have worked in organized manner to mislead its roles in the conflict and violation as well as to make an impression of its versions of the truth in the report.²¹⁰ Thus, “victims and survivors never had the moral satisfaction of an official acknowledgment and apology.”²¹¹ Such problems are reduced in the trials by the strict criminal litigations procedures. In criminal cases, prosecution is required to prove his allegation beyond any reasonable doubt. If the party is dissatisfied by the decisions of the trial it can appeal to the appellate court. Therefore, the trial-established truths are truths “beyond any reasonable doubts”.²¹²

The final question that seriously distinguishes between prosecution and truth commissions is: Could truth telling without justice heal the wounds inflicted in the victims and the society? This question is essential because there is a doubt as to whether truth telling is by itself the end objective of transitional justice. Transitional justice does not end by uncovering the truth. Truth telling may open more wounds when secret crimes are uncovered. The families of disappeared victims may, for example, not know who and how their family members were abused, tortured or murdered. If witnesses expose or perpetrators confess how cruelly ones beloved was mistreated or killed: would that fuel their grievance? Argentineans for example first established truth commission which report that more than fifteen hundred disappeared persons were thrown from the air to the ocean.²¹³ These results of the commission fueled the victim’s strong demand for justice, which forced the government to prosecute only few and which is still an unclosed agenda in Argentineans.²¹⁴ Even in South Africa, the national representative survey conducted to know how the ordinary South Africans feel about the TRC shows that they evaluated it overwhelmingly unfair and unjust.²¹⁵ That is why Truth and Reconciliation of South Africa is said to be not the “morally ideal but the politically possible.”²¹⁶ Rather, it was not justice rendered but a solution gained by the political compromise between the elite of the former apartheid regime who still had the power in their hand and the African National Congress. The South African TRC, “the most ambitious and far reaching truth commission instituted, as well as the most high-profile, publicized, and extensively researched process of its kind, with its dispositions a substantial budget, adequate staff, and elaborated methodology” has faced “many setbacks, and its benefits have been mixed.”²¹⁷ It faced problem of lack of repentance by the leaders of apartheid, which has frustrated the black population. In this process full disclosure without a word of apology and sense of sorrow could benefit full amnesty for the perpetrators of heinous crimes. As a result, some amnesties to “known murderers provoked public outrage.”²¹⁸

²⁰⁹ Raman Mani, *supra* note 2, at 103

²¹⁰ *Id*

²¹¹ *Id*

²¹² Ruti G. Teitel, *supra* note 2 at 73

²¹³ Roy L. Brooks, “Introduction”, *When Sorry is not Enough*, Roy L. Books edn. (New York/London:New York University Press 1999) at 4

²¹⁴ Jemal Benomar, *supra* note 179, at 11

²¹⁵ See James L. Gibson and Helen Macdonald, “The Executive Summary”, *Truth-Yes, Reconciliation-May be: South Africans Judge the Truth and Reconciliation Process Research Report*, Institute for Justice and Reconciliation, (Rondebosch: Institute for Justice and Reconciliation, June 2001)

²¹⁶ Lyn Graybill, “South African’s Truth and Reconciliation Commission: Ethical and Theological Perspectives”, *Ethics and International Affairs*, Vol. 12 1998 (43-62) at 62

²¹⁷ Rama Mani, *supra* not 2, at 107; See also the details of the problems the South African TRC faced to attain truth and reconciliation in Raman Mani, *Ibid* at 103-109

²¹⁸ Victoria Britain, “Outrage Over Amnesty for Apartheid Killer,” *Guardian*, 13 June 2000.

These and other facts certainly prove that mere truth telling cannot amount to rendering of justice.²¹⁹ Rather, it instigates the demand for a better brand of justice. Reopening wounds without appropriate healing process will simply create more pains and additional wounds. Mohamood Mandani in support of this ideal argued:

*"It is not also possible that the more truth comes to light-and the less justice is to be done-the more truth may breed outrage among the majority and fear in the minority? ---While the argument to opt for truth-telling as opposed to criminal justice was underscored as a political necessity, the more truth is told the more it may fuel the very demand it is supposed to have displaced, that for justice."*²²⁰

If prosecution is held properly, it will satisfy the demands of justice for both the victims and the perpetrators. The victims would likely feel a sense of justice when they express their grievances to the properly instituted courts and when justice is properly served. Rama Mani cited the results of scientific study to know the choices of the victims:

*Psychologists and scholars of procedural justice who have studied victims of the Holocaust, state repression and torture note that victims derive more satisfaction from the way the procedure is conducted and its symbolic value than from its actual outcome. Victims want above all a fair procedure where they can be heard by an impartial arbitrator, as this allows them to express their loss and goes further towards restoring their sense of dignity and giving value to their suffering. For these reasons, studies of procedural justice suggest that victims prefer formalized proceedings such as court trials and tribunals to out-of-court settlement, as the latter denies them the opportunity to voice their grievances."*²²¹

It might be important also to cite how Alexander L. Boraine expresses the quest for justice:

*It is quite understandable that supporters and advocates of these developments rejoice at the possibility of achieving justice for grave human rights abuses. To victims whose hands and arms were amputated in Sierra Leone, to HIV-positive rape victims in Rwanda, to families burnt out in their homes in East Timor and Bosnia, the day of reckoning²²² for perpetrators brings enormous comfort. Therefore, while the search for justice is often imperfect, it is clearly well worth the pursuit."*²²³ Emphasis added.

Prosecution if properly held will also satisfy the demands of justice for the accused. Prosecution will help to shift responsibility from collective to individual. Trial will make clear who among the officials or persons that served the repressive regime are responsible for the crimes committed. Even those suspects that accept the findings of the truth commission will not feel vindicated since he does not serve any penalty or sanction for the wrongs he has made. Perpetrator who served punishment does not fear retaliation from the victim; rather he feels confidence as vindicated from his wrongs or "evils". Prosecution therefore served both the truth and justice in the satisfaction of the victims, the perpetrators and the whole society. This will be a good ground to establish reconciliation, peace and democracy.²²⁴

²¹⁹ Raman Mani, supra note 2, at 109

²²⁰ Mahmood Mandani, "Reconciliation Without Justice", South African Review of Books, 46, (November-December 1996) at 12

²²¹ Rama Mani, supra note 2, at 90

²²² Typical in the day of reckoning is not just that people confess crimes. It is rather unraveling of the truth by reliable evidences and the consequential receiving of due punishments by perpetrators.

²²³ Alexander L Boraine, supra note 7, at 2

²²⁴ See other arguments such as "peace and reconciliation" in section 5.3.4

Roman Mani suggests that even if Truth Commissions contribute for the search for justice “their benefits should not be overestimated, and caution is required before advocating commissions indiscriminately in all post-conflict countries”.²²⁵ However, it should not be forgotten that prosecution should not be held improperly for exacting vengeance based on personal, political, tribal, or any other similar grievances, as it will back fire on the purposes of transitional justice.²²⁶ This criticism calls for the fair successor trial, due process of law and independent and competent tribunals that will satisfy the demands of transitional criminal justice by all sides. Hence, transitional successor trial, if properly held, is the best mechanism to uncover truths and to do justice against the gross violations of human rights by the repressive regimes.

5.3.4 Peace and Reconciliation through Truth and Justice or with “Do not provoke the Dragon on the Patio”?²²⁷

The importance of peace and security for any society particularly in building democracy is not debatable. The main purpose of criminal law is to safeguard the peace and security of societies by preventing crimes.²²⁸ One form of attaining peace and security is through reconciliation. Reconciliation is believed to put an end to hostility between enemies.²²⁹ Andreas O’Shea underlined: “It is difficult to conceptualize a meaningful peace without reconciliation. As long as former enemies continue to be hostile to each other, the root causes of war continue to foreshadow the peace settlement and peace itself is fragile, assailable and ultimately ephemeral. Reconciliation is therefore a catalyst for lasting peace.”²³⁰ But, there is also an argument that alleges the necessary prerequisite for peace and security is not reconciliation rather it is the democratic means of resolving hostility. Jonathan Allen for example argues:

*Reconciliation as unity can mean a lot of things. Unity may be elusive and even undesirable if it is conceived of in a non-democratic way. By contrast, consensus around the need for democracy, for a system of rules, laws, procedures, and values that calls for peaceful coexistence among all kinds of groups, whether friendly or not, is a lower threshold and a mere practicable possibility.*²³¹

Accordingly, reconciliation between the victim and the victimizer could come gradually if fair criminal justice is served for the victims and the perpetrators.

The principal justification of amnesty is restoring peace through reconciliation and forgiveness in a society that was seriously divided. On the other hand, the supporters of prosecution also claim that where heinous violations of human rights are committed and serious injustices inherited, sustainable peace and genuine reconciliation can be achieved only through truth and justice. The Rwandan Trial, for example was set up “primarily, (a) to bring perpetrators of crimes to justice, (b) to put a stop to

²²⁵ Raman Mani, supra note 2, at 109

²²⁶ Sheri Berman, supra note 19 at 633-635 and Diane Orentlicher, supra note 172, at 2545

²²⁷ “Do not provoke the Dragon on the Patio” is a concept taken from Larn M. Olson, supra note 97, at 277. .

²²⁸ See for example Article 1 of the 1957 and 2004 of the Criminal Codes of Ethiopia

²²⁹ Andreas O’Shea, supra note 125, at 29

²³⁰ Ibid, at 25

²³¹ Jonathan Allen, “Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission,” University of Toronto Law Journal, 49 (4) 315-353

impunity, (c) to re-establish the rule of law, (d) to promote national reconciliation, and (e) to restore peace and security.”²³²

Hence, the supporters of each mechanism use these two concepts (peace and reconciliation) in different contexts without precise and clear definition to justify their arguments. So what do we mean by peace? Is it permanent cessation of conflicts or temporary cease-fire? Is it absence of formal conflict or causes of conflicts? Even the real meaning of “reconciliation” is not yet agreed.²³³ Who are going to be reconciled: victims with the victimizers or the government with rebels or among the parties to the war? What is the goal of reconciliation: individual, national or political reconciliation? How can reconciliation be reached? Should perpetrators request apology for the victims to forgive? Should truth and justice be served? These and other relevant questions should be put in mind to evaluate the support for criminal prosecution, truth commissions and blanket amnesty.

In the context of transitional criminal justice, many people associate reconciliation “with pardoning and forgetting (that is do not ‘provoke the dragon on the patio’) while others hold the opposite view.”²³⁴ Such opposing views or approaches as to how reconciliation may be achieved can be summarized into: 1) by totally forgetting and forgiving the past even without discussing the wrongs in the past, (General Amnesty); 2) by uncovering the truth, acknowledging the injuries to the victims and or by compensating the victims, (Qualified Amnesty or Truth Commissions); 3) by uncovering the truth, holding the perpetrators criminally accountable, and punishing the offender in a fair trial and or compensating the victims, (Prosecution)

Hence, amnesty does not distinguish who is the violator and whose claim is true. It does not also facilitate for the perpetrator to repent and the victim to forgive. Amnesty is simply forgiveness given from the political power that controlled the government. Those, who oppose amnesty, hold that reconciliation needs wrong maker or perpetrator to repent and the victim to forgive.²³⁵ Laura M. Olson argues: “The victims are the only ones who can forgive. Neither a government that has oppressed a people nor the individuals who committed the violations can proclaim forgiveness, they can only ask for it. The victims must decide to forgive and then reconciliation has the chance to develop.”²³⁶

In ordinary usage reconciliation means “restore friendly relations between” persons in hostility or “settle a quarrel”.²³⁷ Therefore, who is going to reconcile differs according to the type of hostility or disputes. Andreas O’Shea wrote:

“In the context of incomplete rebellion or the end to a war between states, the government reconciles with the rebels or the other government through amnesty---. (But in the context of change of government) where the purpose of amnesty is not to reconcile the government with the people, but the people among themselves---one should therefore expect that forgiveness would come from the victims of wrongs, if they can genuinely to reconcile with their former oppressors. It is artificial to speak of forgiveness in this context. While the government may forgive, the victims may not, and therefore there may not be true reconciliation between the

²³² Mohamed C. Othman, supra note 195, at 54

²³³ Laura M. Olson, supra note 97, at 277

²³⁴ Id

²³⁵ See for example Andreas O’Shea, supra note 125, at 211

²³⁶ Laura M. Olson, supra note 97, at 277

²³⁷ See the Concise Oxford Dictionary, (10th Ed.)

*victims and the perpetrators or former oppressors. ---Since the government was not the direct victim of the wrong, while it may punish or refrain from punishing on behalf of the victim, it is not in a position to forgive that wrong on behalf of the victim. Only the victim can do that.*²³⁸

This shows that in the context of crimes committed in the past repressive regime, the persons to be reconciled in a new democracy are primarily the victims and the individual perpetrators who were the officials of the former regime. But, can victims forgive unless their victimizer repent and request for forgiveness? Can perpetrators be ready to request apology unless truth is established? Can the victim be satisfied to forgive without truth and justice? These questions do not have easy answers. The preconditions that victims may need to forgive depend on each individual victim's culture, religion, personal beliefs, nature and degree of pains or damage the victim suffered etc. However we can generalize that persons expected to forgive do need some kinds of rewards (moral, material or legal) so that they could forgive the worst things happened to them.²³⁹

Reconciliation imposed from above without uncovering the truth; with out repentance from the perpetrators; and without forgiveness from the victims do not necessarily bring about genuine reconciliation and assurance of the non-existence of the feeling of retribution or hostile tension within the society. Amnesty given from above may free the perpetrators from sanctions and punishment for the crimes they have committed. As a result, there is no question amnesty satisfy the perpetrators. But, it does not address the wounds of the victims. The perpetrators may still fill that their wrongs to the victims is justified by the overriding need to suppressing terrorism, defeat Marxist-Leninist guerrillas, defend the unity of the country, and restore law and order and other propaganda aired by the repressive regime.²⁴⁰ The victims on the contrary argued denouncing the allegation of their perpetrators.

Hence, general amnesty and reconciliation with out uncovering the truth do not necessarily create an end to hostilities and tensions. Truth commissions are believed to alleviate this weakness of general amnesty by uncovering the truth and as a result by influencing or forcing the perpetrators to confess their crimes²⁴¹ or to request apologies from victims in order to benefit from the amnesty clause.²⁴² The supporters of truth telling argue that peace and national reconciliation will be achieved through "popular catharsis" by telling the truths of what had happened to the victims.²⁴³ From this process, not only the victims regain their dignity and heal their wounds but also such truths will be the common history of the nation in which all parties, both the victims and perpetrators agree as common history of the past. This, according to Pierre Hazan, will help enemies to coexist without violence and to ride off mutually exclusive and antagonistic memories and identities.²⁴⁴ Since the points of disagreement have ended in an open and fair manner, there would not be concealed wounds on both sides that will prevent to coexist in peaceful manner.

²³⁸ Andreas O'Shea, Supra note 125 at 29.

²³⁹ Andreas O'Shea, Ibid, at 214

²⁴⁰ Yasmin Sooka, supra note 136, at 318-19

²⁴¹ The South African Truth and Reconciliation Commission is a good example. See Rama Mani, supra note 2, at 107

²⁴² Id

²⁴³ See Pierre Hazan, Supra note 1, at 26

²⁴⁴ Id

However, even this qualified amnesty does not accomplish the basic requirements of reconciliation. In most truth commissions, perpetrators are not required to show repentance and request apologies to benefit amnesty from punishment.²⁴⁵ The victims are not usually given the chance to forgive their perpetrators or the chance to express their consent to the policy of forgiveness. The practice shows that amnesty or forgiveness is simply given by political decision without such preconditions for reconciliation. Forgiveness and reconciliation could not come by certain formula that is not accepted by victims. This kind of reconciliation is not genuine and does not guarantee lasting peace. And, it might create fertile conditions for the eruptions of conflicts since the demand of justice and the right of the victims is trade off for gaining temporary peace or cease-fire.

Advocates of prosecution disagree with amnesty alleging that amnesty does not bring real reconciliation and peace. "As expressed by Guatemalan Nobel Peace Laureate Rigoberta Menchu: 'Peace without justice is only a symbolic peace.'"²⁴⁶ Conflict may temporarily be ceased when one party to the conflict became militarily weak. Even in the repressive and authoritarian regime, violence serves to silence any grievances and formal conflict and hostility. But, the victims bury their sense of grievance in their deep heart and act as friend of their victimizer till they get the chance to avenge. This kind of peace is considered as negative or nominal peace not positive or real peace.²⁴⁷

Therefore, the question is: is this type of peace and reconciliation that we want to continue to exist in the new democracy? Such kind of reconciliation and peace is achieved simply as far as we do not provoke the dragon on the patio. But, when the victims feel stronger or the dragon become weak, the hostility and conflict will certainly revive again. Such kind of silence or "reconciliation" or "peace" is a "time bomb". We can simply see the history of Chile. In Chile many attempts have been tried to get peace and reconciliation through amnesties. After a long time on 17 October 1998 General Augusto Pinochet Ugarte was arrested in the United Kingdom while in a London Hospital. This opportunity only broke out the hidden tension to be publicized. The claim of justice against him in UK courts disturbs not only Chile's politics once again but also that of the United Kingdom, the Spanish and the world politics.²⁴⁸ We have seen in previous Section that despite widespread domestic and international media coverage of South Africa's Truth and Reconciliation Commission, the sample studies shows that the truth telling did not bring genuine reconciliation in South Africa.²⁴⁹

Rama Mani also supported this argument on a different rationale alleging that since conflict and injustice are interconnected, in order to cease conflict justice has to be made.²⁵⁰ Rama Mani said: "injustice is not just a consequence of conflict, but is also often a symptom and cause of conflict."²⁵¹ As a result, unless injustice is addressed conflict will not cease and or even if conflict has ceased temporarily, the un-addressed injustice will cause the eruption of conflict.

²⁴⁵ See Rama Mani, *supra* note 2, at 2; Rama Mani wrote: "some wonder whether (the South African TRC) process has not opened more wounds that it has healed."

²⁴⁶ Phil Gunson, "Guatemala's 'Peace without Justice'", *Guardian*, 28 December 1996 cited by Rama Mani, *id.*

²⁴⁷ See Rama Mani, *ibid.*, at 11-22

²⁴⁸ Rosanne Van Alebeek, "The Pinochet Case: International Human Rights Law on Trial", *The British Year Book of International Law 2000 75 Years of Issue* (Oxford: Clarendon Press, 2001) at 29-70

²⁴⁹ See James L. Gibson et al, *supra* note 215

²⁵⁰ Rama Mani, *supra* note 2, at 4-5

²⁵¹ Rama Mani, *supra* note 2, at 5

In connection with this, there is an argument that holds criminal prosecution can prevent and delay a cease-fire or a peaceful solution to a conflict.²⁵² For instance, the charges brought in Uganda against the leader of the Lord Resistance Army by ICC are “said to have provoked attacks against possible witnesses and to have led to renewed fighting.”²⁵³ In time of actual conflict, like it has been practically tested in contemporary Uganda, the Sudan, Central African Republic and Congo, the promise to prosecute one side of the conflict becomes an impediment to reach a cease-fire.²⁵⁴ There are some arguments, which claim the promise to prosecute may deter the parties in conflict to refrain from extending their violations.²⁵⁵ In such instances, amnesty may better serve to reach a cease-fire and to achieve a temporary peace as a solution to a conflict.

Nevertheless, such reconciliation and peace are simply the results of a balance of power, which favors the perpetrators. In other words, such resolutions are not based on genuine truth and justice. In such cases, parties to the conflict may reconcile and stop firing at each other. But, the individual victims and perpetrators have not reached reconciliation. Hence, this would be a fertile ground for the resumption of conflicts.

There is also argument that alleges “wars ended by compromise and forgiveness may be said to foster peace more effectively than those followed by recounting scores and revenge.”²⁵⁶ If the conditions made by the victor are going to hurt the dignity of the vanquished, like the conditions laid by the Treaty of Versailles after the defeat of Germany in WWI, the peace will not last and other round of war, like the WWII, will likely erupt.²⁵⁷

However, this criticism begins from wrongly perceived premises, which conceive prosecution as a means of “recounting scores and revenge.”²⁵⁸ Though prosecution or punishment has some elements of retribution, it has also a purpose of doing justice to perpetrators. The rights of the accused for fair and impartial trial and all due process of laws are respected in criminal justice. Even those perpetrators that are found guilty and sentenced will benefit from the rehabilitative purpose of punishment. By serving their punishment, the perpetrators will also get relief from moral guilt or fear of reprisal.²⁵⁹ Punishment has the purpose to socialize the violators of human rights.²⁶⁰

Therefore “--- (in the context of change of government) where the purpose of amnesty is not to reconcile the government with the people, but the people among themselves---”²⁶¹, prosecution is the best mechanism to reach genuine reconciliation among the victims and perpetrators, which will be the bases for sustainable and lasting peace in a transition to democracy.

²⁵² Toni Pfanner’s “Interview with Philippe Kirsch”, President of ICC, International Review of the Red Cross Vol.8 8 No. 861 March 2006

²⁵³ Ibid at 16

²⁵⁴ Id

²⁵⁵ See the discussion on the issue at Yesuf Askar, supra note 101, at 29

²⁵⁶ Andreas O’Shea, supra note 125, at 25

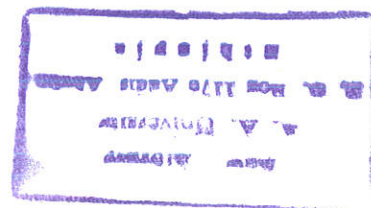
²⁵⁷ Andreas O’Shea, supra note 125, at 25 Ruti G. Teitel, on the contrary, claimed that one of the causes of the WWII is the failure of the earlier national justice to hold accountable those responsible for the eruption of the WWI as per the Treaty of Versailles. She underlined that the failure of the earlier Post WWII national justice “was deemed to prevent a transition to lasting democracies. See for the detailed argument Ruti G. Teitel, supra note 2, at 31

²⁵⁸ Andreas O’Shea, supra note 125, at 25

²⁵⁹ Kristin Henrard, supra note 171, at 8

²⁶⁰ Pierre Hazan, Supra note 1, at 25-26

²⁶¹ See Andreas O’Shea, Supra note 125, at 29



6. Factors that Influence the Choice of Transitional Criminal Justice in Practice

We have seen above the arguments for and against each alternative approaches to transitional criminal justice: prosecution, truth commission or amnesty and reached to the conclusion that prosecution is the most legally and morally supported alternative. Nevertheless, such academic debates are less important in the selection of a given transitional justice mechanism. Hence, countries in transition are influenced more by other variables. Samuel P. Huntington identified the decisive factors as:

*It (the choice of alternative transitional justice) was shaped almost exclusively by politics, by the nature of democratization process, and by the distribution of political power during and after the transition. In the end, the working of politics in the third wave countries undermined the efforts to prosecute and punish authoritarian criminals.*²⁶²

Alexandra Barahona De Brito et al. also identified various factors that shape the choice of transitional justice mechanisms. They categorized these factors into national and international. Under the national factors, they listed different ways through which transition comes into reality and balance of power between the old and new forces; the attitudes and beliefs of new leaders and political parties; social pressure; judicial and democratic institutions; democratic tradition; civil or human rights organizations; experience of civil societies; involvement of new forces in the past atrocities; individual fears inherited from the dictatorial regimes; duration of atrocities; nature of the repression; and others.²⁶³

Yasmin Sooka has also identified nature of violence and political transition, the extent of the dominance and power of offenders in the new regime, public support and the international pressures are among the key factors to decide what approaches to follow.²⁶⁴ In the following section, we will briefly discuss how those factors influence the choice of transitional criminal justice.

6.1 Balance of Power between the Repressive and Successor Regimes

The balance of power between the old and the new force is the decisive factor that actually determines the countries choice among prosecution, truth commission or amnesty. The core dilemma as whether to punish or forgive were largely determined on how the transition has come into reality (by military defeat, by dialogue or by the will of the repressive elites)²⁶⁵ and on whether perpetrators retain the actual power to influence, create fear, bring about further conflict and destabilize the transition to democracy.²⁶⁶

The balance of power between the old regime and the new regime may be equal or proportional in which case the negotiation between the two may be crucial to realize the transition. In transitions that came by negotiations, the old regime will try to gain protection from retributive measures such as prosecution. It will also try to exploit some advantages from the negotiations like general amnesty if possible or truth commissions with some reparations for the victims instead of prosecution. The repressive regime may also negotiate for lesser accountability or symbolic justice rather than full prosecution. The South African Truth Commission is a good example, which tries to satisfy the

²⁶² Samuel P. Huntington, supra note 11, at 215

²⁶³ Alexandra Barahona De Brito et al supra note 6, at 11-20

²⁶⁴ Yasmin Sooka, supra note 136, at 311-325

²⁶⁵ Id

²⁶⁶ Id

needs of both the ANC and the previous government in the middle path of prosecution and blanket amnesty.²⁶⁷ Even if there is no clear negotiation, the successor regime would take into consideration the threat it will face and would retreat from full prosecution. For instance, in Argentina since the military force was intact, the prosecution was negotiated to be symbolic only against nine junta leaders among the whole military implicated in the violations.²⁶⁸

If the balance of power is in favor of either of the two forces, the one who has the power in his favor would dictate the type of transition and the transitional justice measures. If the repressive regime's power or influence is weaker than the successor, the transition process will be determined by the will of the latter.²⁶⁹ In this case, the successor regime usually replaces the former regime and will be at liberty to choose how to address the past injustices taking into account other factors. Samuel P. Huntington has summarized this as: "normally such regimes did not anticipate their end and hence did not attempt to protect their members by enacting amnesties."²⁷⁰ Portugal (1974), Greece (1975), Argentina (1983), Colombia, Venezuela, Philippines, Romania, Ethiopia and Rwanda are examples showing that the transition came at the weakness and defeat of the repressive regimes.²⁷¹ In such countries, the transitional governments selected prosecution and lustration or purges of the former officials. Officials of authoritarian governments that collapsed or overthrown were targets for punishment.²⁷² There were also transitions to democracy when repressive regimes were overthrown by foreign states or international military alliances like the post World War II transitions in Europe and Far East²⁷³, as well as Grenada Communist regime which was removed by US military forces.²⁷⁴ In such countries also, prosecution and punishment, purges and compensation (only in some countries)²⁷⁵ are applied.

To the contrary, if the balance of power is in favor of the repressive regime, it will retain the power to dictate the way the transition has to take place and to safeguard its interest during the successor regime.²⁷⁶ Under such a scenario, the leaders of the repressive regimes may at times threaten the new government with tones that would amount as though they were still in power. For example, General Pinochet declared in October 1989: 'The day they touch any of my men will be the end of the state law.'²⁷⁷ In this respect, from the beginning, transitions may not be envisaged with out the full cooperation of the elite of the repressive regimes or in the middle the transition process is threatened due to the revival of the elements of the repressive forces.

²⁶⁷ Rama Mani, *supra* note 2,

²⁶⁸ See foot note 278 and 279 below

²⁶⁹ Eric A Posner et al conceived such types of transition as either "opposition lead" or "foreign lead" transition. See Eric A. Posner et al *supra* note at 15. Samuel P. Huntington on the other hand such types of transition as "replacement". See Samuel P. Huntington *supra* note 11, at 216

²⁷⁰ Samuel P. Huntington, *supra* note 11, at 217-18

²⁷¹ See the discussion in section 3 of this chapter (II)

²⁷² Samuel P. Huntington, *supra* note 11, at 217-18

²⁷³ Eric A. Posner et al *supra* note 11, at 10-12. He mentioned in this categories Germany, Japan, Denmark, France, Belgium, Italy in which the officials of the previous regime faced national or international prosecution.

²⁷⁴ Samuel P. Huntington *supra* note 11, at 216

²⁷⁵ Eric A. Posner et al, *supra* note 15, at 10-12 He mentioned among such countries that gave compensation for victims are Germany and Japan.

²⁷⁶ Eric A Posner et al conceived such types of transition as "elite lead" transition. See Eric A. Posner et al *supra* note 15 at 9. Samuel P. Huntington on the other hand such types of transition as "transformation". See Samuel P. Huntington *supra* note 12, at 215

²⁷⁷ Samuel P. Huntington, *supra* note 11, at 216

The elite will cooperate for the transition of power to the new government only when their interest in the successor regime is safeguarded. To ensure this, the elite of the repressive regime will retain the military, police and security forces of the previous regimes as well adopt some legal or constitutional mechanisms to protect their interest and their immunity from prosecution and retroactive measures.²⁷⁸ Elites of former regimes try either to avoid civil and criminal responsibilities or place themselves in situations where they are likely to be responsible for fewer and less heinous crimes.²⁷⁹ A study based on empirical evidence from 30 transitions since the mid-1970's notes that a government's policy choice on former human rights abuses tends towards trials as outgoing regimes become weaker and away from trials as they become stronger, indicating the resistance of leaders to prosecution.²⁸⁰

However, Daniel F. Orentlicher and Cherif M. Bassiouni²⁸¹ argue that punishment should prevail by taking and confronting reasonable risks associated with pursuit of justice and prosecution.²⁸² Daniel F. Orentlicher argues that governments are "not excused from their duty to prosecute human rights violations merely to placate restive military forces; the excuses are available only to avert a threat to the life of a nation".²⁸³ Kader Asmale and C.S. Nino, the supporter's of amnesties argue that drawing the line between the necessary and unnecessary or reasonable and unreasonable political risks must be "asserted and responded to in the heated context of actual politics and life-or-death political contestation."²⁸⁴ Cherif Bassiouni argues that impunity has all too frequently been the result of real politic. At times, it is rationalized as a necessary evil, which is indispensable to achieving peace. While this is true in most cases, it is a cynical manipulation by governments of people's expectations that both peace and justice can be attained.²⁸⁵ The intervention of international forces will reduce the impact of real politic as it has been in Former Yugoslavia by establishing ICTY despite the existence of real threat of force by perpetrators.

6.2 Other Factors that may Influence the Choices of Transitional Criminal Justice Tools

As we have said earlier, other factors are secondary to the balance of power. Among such factors, the nature of the atrocities has an important impact on the choice of transitional criminal justice mechanisms. Whether violations are committed on one side or both, whether violations are grave or lesser, whether the violations are ordinary and international, whether the violations are committed in

²⁷⁸ See Jemal Benomar, *supra* note 179, at 3-4 He mentioned many countries experience in Latin America. For example he illustrated how General Augusto Pinochet, drafted the constitution of the new government in which he retained the command of the Armed Forces and cannot be removed. He managed to resist any reform and the former member of the secret police who committed violations of human rights under the General Pinochet remains occupying senior positions with the Army.

²⁷⁹ *Id.*; Jemal Benomar mentioned many countries experience in Latin America. For example in Argentina the army rebelled three times during the 1980's against the prosecution policy of President Alfonsín, as a result of which the government introduced the Punto Final (full stop) and *obediencia debida* (due obedience) laws which paralyzed the prosecution.

²⁸⁰ Raman Mani, *supra* note 2, at 92 citing Elin Skaar, "Truth Commissions, Trials or Nothing? Policy Options in Democratic Transitions", *Third World Quarterly*, Vol. 20 (1999), 1109-28

²⁸¹ Cherif Bassiouni, "Introduction", *Law and Contemporary Problems* Vol. 59 No. 5 (1996)

²⁸² Daniel F. Orentlicher, *supra* note 172, at 2537, 2548-49

²⁸³ Daniel F. Orentlicher, *Ibid.*, at 2549-2550

²⁸⁴ Kadir Asmal, "Truth, Reconciliation and Justice: The South African Experience in Perspective", *The Modern Law Review*, Vol. 63, No. 1. (January 2000) (1-24) at 7 See also C. N. Nino, "Response: The Duty to Prosecute Past Abuses of Human Rights Put in Context: The Case of Argentina" in Kritz (ed), *Transitional Justice* (United States Institute of Peace Research, 1995) at 432-435

²⁸⁵ See Cherif Bassiouni, *supra* note 281

secret or in public are important variables to determine which transitional mechanism is more appropriate.²⁸⁶ In countries where both the opposition and the repressive regimes are implicated in the violations of human rights, the politicians do not want to initiate either inquiry to uncover the truth or to prosecute perpetrators.²⁸⁷ When we consider also the gravity of the crimes, it would be difficult to forgive and forget when the violations of human rights are grave. The claims of the victims and civil societies as well as the international pressure would be strong in grave violations than lesser violations. In such a case, it will be difficult for the new regime to choose general amnesty. In some countries like Argentina, South Africa and Chile the demand for prosecution became strong after the truth is uncovered and the crimes is established to be grave than the society expected.²⁸⁸

When the crimes are committed in secret, finding the truth or investigating the crimes will be complicated and difficult unless the former officials cooperate. Rama Mani argued: "If victims were openly executed, the need for uncovering the 'truth' may not be important as in cases where repressive actions were clandestine."²⁸⁹ In such cases, countries like Argentina, El Salvador, and Uruguay that suffered highly secretive crimes such as disappearance, their priority choice was truth commissions so as to uncover the whereabouts of the victims.²⁹⁰ In countries like Rwanda and Ethiopia where most of the major crimes are committed publicly, there was no much need to establish truth commissions and it would be difficult to convince the victims to forgive the perpetrators whom they knew without prosecution.²⁹¹ The duration of the time when the crimes are committed is also important. In cases when the crimes are committed very long before, when the society is almost on the verge of forgetting the atrocities and when most of the victims and perpetrators have passed away and when evidences withered away it may be unnecessary to reopen bad memories.²⁹² And, it may also create serious difficulty to successfully prosecute. But in situations where the memory of the victims and the society is still fresh it is difficult for the politicians to justify their decision to the victims to forget the fresh pains and forgive perpetrators.²⁹³ Fresh evidences would support prosecution in such case.

Public support or pressure is also important in choosing an approach from among prosecution, truth commissions and general amnesty.²⁹⁴ Yasmin Sooka argued: "unless the broader public, political parties, the political elite and civil society supports the mechanism of transitional justice it would not enjoy cooperation or achieve success."²⁹⁵ Individual fear inherited from repressive regimes, democratic tradition, civil or human rights organization, experiences of civil societies, cultures and religion are among the factors that mold the public support either to forgive or prosecute or to go in

²⁸⁶ See in general Yasmin Sooka, *supra* note 136

²⁸⁷ See Rama Mani, *supra* note 2, at 90-93 in which the experience of Mozambique, Rwanda, South Africa and other countries mentioned. In these countries both the repressive regime and the successors were involved in the crimes committed in the previous regime. This fact is said to influence the choice and measures of transitional measures.

²⁸⁸ See section 5.3.4 of chapter II foot note 278 and 279 above. For instance the Leaders of South African TRC are seeking for prosecution; the Argentina decision to prosecute came after the truth commission report; and the General Pinochet case was come again to the agenda. See also Eric A. Posner, *supra* note 16 at 6

²⁸⁹ See the discussion in section 5.3.3 and particularly see Priscilla Hayner, *supra* note 207, at 8

²⁹⁰ See Eric A. Posner et al, *supra* note 15, at 6

²⁹¹ We have seen our discussion in section 5.3.2 even in countries where crimes committed in secret, the demand for justice is increasing where the truth is uncovered.

²⁹² See Rama Mani, *supra* note 2, at 18. Rama Mani further argued due to the lengths of time evidences could be destroyed and memory lost as a result of which it would be hard to prove the prosecution

²⁹³ See the discussions in section 5.3.2

²⁹⁴ See for instance Yasmin Sooka, *supra* note 136, at 311-315

²⁹⁵ *Id*

the middle way between the two.²⁹⁶ Society is the collection of individuals and interactions of individuals. Individuals in repressive regimes developed fear to claim justice and rights. They witnessed how individuals killed, tortured, imprisoned, loss their property and jobs for the mere fact that they claim their rights. As a result they inherited fear. Unless such fear is cured, confidence developed and feel guaranteed that similar atrocities would not be recurred; victims and societies may fear to cooperate in the investigation and prosecution.²⁹⁷ As a result public support for punishment of perpetrators would be bargained. The existence of democratic tradition, civil and human rights organization, experience and culture of the civil society to stand for their rights are decisive factors to influence the policy of the transitional governments.²⁹⁸ They became weaker when the repressive regime suppresses their existence and functioning.²⁹⁹ If there was such strong tradition before the repressive regime they could easily re-strengthen immediately after the collapse of repressive regime.³⁰⁰ The existence and strength of such traditions will force the new regime to select prosecution.³⁰¹ If they strongly weakened or non-existed the public pressure for prosecution will be weakened equally. Culture and religion of a given society may also influence the new regime to decide either prosecution or amnesty.³⁰²

International pressures or supports plays also important role in influencing the choice among prosecution, truth commission and general amnesty. The international human rights development, the pressure of international NGOs and UN Human Rights Organizations Agencies, the attachment of aids to human right criteria by western countries; the ratification of international humanitarian conventions by many states; the expansion of international human rights courts in favor of prosecution or against impunity; the establishment of ad hoc and special international tribunals as well as ICC are considered by Alexandra Barahona De Brito et al as an important influencing factors on the national choices of transitional measures.³⁰³ Human rights became the concern of not an individual state but the whole nations. So the United Nations as well as the regional organizations such as European Union, African Union etc gave especial emphasis for the respect of human rights. They do not only pressure individual state to respect human rights and prosecute violators but they became also active participant in directly involving in enforcing human rights and prosecuting violators of human rights.³⁰⁴ The establishment of the ICTY, ICTR, the Sierra Leone and East Timor Special Tribunal are only few examples.³⁰⁵ In the contemporary world the international pressure is not simple diplomatic, political and economic pressure but it became direct action. This is witnessed from the UN SC decision to refer the Darfur case to the ICC and the latter's decision to prosecute the current Sudanese Head of State.³⁰⁶

²⁹⁶ Alexandra Barahona De Brito et al supra note 6, at 11-20 and Yasmin Sooka, supra note 136, at 311-315

²⁹⁷ Rama Mani, supra note 2, at 18 Rama Mani wrote "--- Stalinist Terror has left a deep mark on victims, who fear that speaking out even today is unsafe."

²⁹⁸ Rama Mani, Ibid at 16-17

²⁹⁹ Id

³⁰⁰ Id

³⁰¹ Id

³⁰² Andreas O'Shea, supra note 125, at 26-27

³⁰³ Alexandra B. De Brito et al supra note 6, at 20-25

³⁰⁴ For the example the role of UN SC and the regional organizations in the establishment of international ad hoc tribunals like ICTR, ICTY, and Special Court for Sierra Leon and East Timor is a good example discussed in detail above.

³⁰⁵ Id

³⁰⁶ Andreas O'Shea, ibid, at 26-27

○ The attitudes of political leaders and political parties in the new regime play also some roles in determining the choices.³⁰⁷ The attitudes of political leaders and political parties may be determined by many factors,³⁰⁸ but it is important factor to influence the choice of transitional criminal justice. As we can learn from the history of the Argentineans transition the change of individual leaders has influenced the prosecution processes.³⁰⁹

○ The strength or weakness of judicial institutions is also important factor in choosing among different alternative of prosecution such as full prosecution or symbolic prosecution and prosecution or amnesty (conditional or general).³¹⁰ The strength or weakness of judicial institutions: the courts, the prosecution, the police, the defense lawyers, and the prisons are important to determine appropriate transitional criminal mechanisms. If the decision is for prosecution these institutions are the one that are responsible to provide fair and speedy trial. But usually in the aftermaths of repressive regimes such institutions are usually weak and incapable to properly handle the complex and huge responsibility of trying complex and huge crimes committed in the previous regimes.³¹¹ Such institutions are also subject to reform and purges as a result of which their capacities would be reduced.³¹² So wise political leaders usually give due attention for the capacities and efficiency of their judiciaries before they choose prosecution which otherwise would counter attack the necessities of transitional justice.

These are the major factors that would positively or negatively influence the choices of transitional criminal justice.

7. Limitations and challenges to Prosecution and Alternatives to Reduce Its Impacts

○ As already seen above prosecution is the first best alternative to address the heinous crimes committed in the previous repressive regimes.³¹³ We have seen and evaluated that the other alternatives, truth commission and amnesty are not supported by the international laws and moral arguments.³¹⁴ Prosecution is more favorable to facilitate transition to democracy by making distinct line between the old tradition of impunity and tyranny and the new system of rule of law and accountability.³¹⁵ It is the best mechanism to get uncontested truth and justice.³¹⁶ It provides justice for both the accused and the victims.³¹⁷ As a result prosecution even if it will reopen the wounds of the society, it will finally heal permanently. Therefore prosecution is the best means to achieve genuine reconciliation and permanent peace.³¹⁸ And therefore more recently the preference of human rights organizations, victims groups, certain UN agencies, and several bilateral donors is for prosecution.³¹⁹

³⁰⁷ Rama Mani, *supra* note 2, at 14

³⁰⁸ Rama Mani noted such factors that can influence leadership as: “personal loyalty, the nature of political and religious beliefs, the nature of personal experiences and relationships with the old forces.” Rama Mani *Ibid*

³⁰⁹ See Jemal Benomar, *supra* note 179, at 11-12

³¹⁰ Rama Mani, *Ibid*, at 15

³¹¹ See the discussion in Section 4 of Chapter II above

³¹² *Id*

³¹³ See the whole discussions and the conclusion reached in section 5 of Chapter II above

³¹⁴ See section 5.1 and 5.2 of Chapter II above

³¹⁵ See section 5.3.2 of Chapter II above

³¹⁶ See section 5.3.3 of Chapter II above

³¹⁷ *Id*

³¹⁸ See section 5.3.4

³¹⁹ See Rama Mani, *Ibid*, at 89

But all these advantages exist only if the persecution is carried in visibly fair way. The trials should be conducted with reasonable speed by independent and competent tribunals where the rights of the accused are respected. If the prosecution failed to be fair and unnecessarily delayed, then “the very same tribunals can back fire, risking the wrong message of political justice and threatening a fledgling liberal state.”³²⁰

There are difficulties or limitations to get fair and speedy trial in the transitional period. Those limitations can be either internal to the nature of criminal proceedings or to the special contexts of transitional period. Challenges or limitations internal to all transitional justices are discussed in section 4 above in this chapter. Hence it would not be necessary to repeat all the discussions here. But it is important to mention some of them here. In transitional period, the judicial institutions are weak and have dual responsibility of dealing with the past and the ordinary crimes. The crimes committed in the repressive regimes are widespread and systematic in which huge numbers of persons and institutions are involved. Such crimes were not subject to investigation in the previous regimes. Hence, the crimes committed with out prohibition for the whole period of the repressive regime will be investigated, prosecuted and tried not gradually but at once when the repressive regime is replaced. To the contrary, countries in transition usually face resource, political and legal constraints to address such huge and complicated tasks.

In addition criminal proceedings by their nature are characterized by strict adversary procedures that are designed to protect the rights and interests of the accused, the victim and the society.³²¹ There are many important legal procedures that can create delay on the criminal proceedings in the interest of justice. These legal procedures are well recognized in international and constitutional laws. The details of such procedural rights are founded in Amnesty International Fair Trial Manual.³²² There are always tensions on the right to speedy trial and the respect of the right to fair trial. When such proceedings are coupled with the transitional contexts, the fairness and speediness of successor trials will come into serious questions.

Literatures on transitional justice categorized constraints of transitional prosecution in to political, legal and practical.³²³ In this section, we will concentrate on how such challenges together with limitations internal to all criminal proceedings affect the fairness and speed of the successor trials. We will also try to evaluate the alternatives proposed such as full prosecution or symbolic prosecution; international or national tribunals or “Confession-for-Leniency”: the Rwandan Model.³²⁴

³²⁰ Ruti G. Teitel, *supra* note 2, at 29–30

³²¹ See American Bar Association Speedy Trial Manual, “General Principles: Standard 12-1.1 Purposes of the Standards on Speedy Trial and Timely Resolution of Criminal Cases”, as referred online, [file:///C:/Documents and Settings/User/My documents/ speedy r\trial limit.htm](file:///C:/Documents%20and%20Settings/User/My%20documents/speedy%20trial%20limit.htm) at 1

³²² See Amnesty International Fair Trial Manual; accessed on line at <http://www.amnesty.org/ailib/intcam/fairtrial.org/indexftm.htm>

³²³ See for example Rama Mani, *supra* note 2, at 90-91

³²⁴ See Naumi Roht-Arriaza, *supra* note 57, at 43

7.1 Constraints of Prosecution in the Domestic Courts and the Alternative of International Tribunal

Prosecution, both in ordinary time and in transitional period, is largely determined by political factors. Prosecution needs forces, which depends on political cooperation to carryout investigation arrest, trial and execute sentence. Therefore, unless the state or the political power is not cooperative in the persecution and punishment, successor trials will face serious challenges. It is also the state or political power that will appoint judges and prosecutors; that will organize and control the police, security and the military; that will finance or reform these institutions; that has the necessary documents to prove the charges in its hands etc. The state may expressly adopt amnesty or pardon law or impliedly create situations that do not favor prosecution.³²⁵ If state for various reasons lacks political interest, prosecution will not be achieved. Even to the contrary, if state wants to retaliate, it can create conditions that can delay the criminal prosecution or that can violate fair and impartial justice. For example, the state may intentionally appoint partial judges and prosecutions or may intentionally reduce resources necessary for persecution. The state may also actually lack necessary resources for many reasons. In transition from repressive to democracy, successor regimes have usually faced serious legal, political and practical or resources constraints to prosecute complicated and huge crimes that have been committed for long time.³²⁶ Particularly, countries at lower level of development would face more serious challenges.³²⁷ In order to avoid such limitations of prosecution by national courts, many scholars suggest international tribunal.³²⁸ Since it is believed that domestic politics and laws influence less the international prosecutions, international prosecution may reduces the criticism of “political” or “victorious justice” attached to domestic transitional prosecution.

But, international prosecution is also determined by the international politics or political decision by international community of states.³²⁹ Unless the international powers supported, international prosecution will also face similar challenges like that of the national courts.³³⁰ It is important to recall here that the Nuremberg and Tokyo International Tribunals were also seriously criticized as “victorious justice”.³³¹ Further more international tribunals do not have their own executive to enforce prosecution. International prosecution is dependent upon the cooperation of states. Philippe Kirsch, President of ICC said: “There is no police force, no army, none of the tools normally available to a national court. This shortcoming must be remedied by other national and international mechanisms.”³³² This is also the major weakness of the ICTR and ICTY. International prosecution is mostly remote to the victims.³³³ It cannot also prosecute all persons implicated in huge international crimes committed by the participation of state institutions and personnel.³³⁴ The capacities of international tribunals do not reach to the level of prosecuting huge numbers of

³²⁵ Andreas O’Shea, supra note 125, at 98– 01

³²⁶ See the details of political, legal and practical challenges successor regimes used to face during transition in Section 4 and 6 above in this Chapter (II)

³²⁷ Developing countries are less developed in every social, political and economic aspect. So, the legal, practical and political necessities to carry out huge project of successor trials would less fulfilled in less developed countries.

³²⁸ See for example Anders O’ Shea, supra note 125, at 98-101

³²⁹ Toni Pfanner’s Interview with Philippe Kirsch, President of the ICC, supra note 252, at 10

³³⁰ Id

³³¹ Gerhard Werle, supra note 39, at 10-11

³³² Id

³³³ Rama Mani, supra note 2, at 100; Alexandra B. De Brito et al, supra note 6 at 25

³³⁴ Id

perpetrators. The ICTR for example tried only 66 perpetrators,³³⁵ and the Nuremberg Tribunal only 24.³³⁶

Prosecution by international tribunal may reduce the impact of lack of substantive and procedural international principles to fight impunity in the national laws.³³⁷ Many national laws failed to fully incorporate the international laws in their countries. That may create challenge to the national courts to ascribe criminal responsibility or punishment in the absence of enforcing national laws. In fact, the international customary laws obliged to prosecute and punish international crimes notwithstanding to the non-existence of national laws or even if the national laws legalized such international crimes.³³⁸

The other problem that makes one to prefer international prosecution is that the international tribunals since they are supported by the international community may have more financial and human resources than the poorest country. In Rwanda national courts one hundred thirty thousands of perpetrators are awaiting trials in devastating conditions.³³⁹ When the Rwandans national court's resources are compared with its international counter part, the ICTR, there is huge difference in every respect.³⁴⁰ There are unfair differences in the handling and the sentences of the mastermind perpetrators tried in ICTR and the lower rank perpetrators tried in the Rwandan national courts.³⁴¹ These situations have created dissatisfaction for both the victims and perpetrators in Rwanda.³⁴² Hence, these differences send unnecessary messages on the rule of law.

Therefore, the natural place to persecution is domestic courts if the domestic politics, resources and laws create favorable conditions for fair and effective prosecution.³⁴³ Philippe Kirsch also underlined that: "It is up to the states to exercise jurisdiction over crimes-all crimes, including the most serious ones such as genocide, crimes against humanity and war crimes."³⁴⁴ Though international tribunals seem advantageous in certain aspects, they are on an infant stage that could not carry huge and complicated tasks of prosecutions of crimes committed by the repressive regimes.

7.2 Practical Constraints of Full Prosecutions and Alternatives to Reduce these Constraints

As we have discussed above, transitional prosecutions have limitations that are attached to the strict adherence of lengthy adversary procedures and the special transitional contexts. We have seen in Section 4 above that transitional justices are full of challenges. Such challenges are rooted in the special contexts of transitional period. We have discussed the limitations of prosecution in devastating economic situations and weak judiciaries in the transitional period.

In transitional period the times and resources needed in ordinary period would be multiplied by the numbers of persons suspected and charged. The more the number of perpetrators the more is needed

³³⁵ See Table 7 in Section 6 of Chapter V at 178

³³⁶ Gerhard Werle, *ibid*, 11

³³⁷ Andreas O'Shea, *supra* note 125, at 97

³³⁸ See the discussion and sources of international law in section 5.1 of this Chapter II

³³⁹ Yakob H/Mariam, *supra* note 92, at 736

³⁴⁰ Yakob H/Mariam, *Ibid*, at 722

³⁴¹ *Id*

³⁴² *Id*

³⁴³ See Andreas O'Shea, *supra* note 125, at 96

³⁴⁴ Toni Pfanner's Interview with Philippe Kirsch, President of the ICC, *supra* note 252, at 9-10

to invest more financial resources and to appoint sufficient competent and independent personnel in the judiciary as well as to spend more times to achieve fair and speedy trial.

The ICC current president, Philippe Kirsch said, “with more resources we will be able to do more, with fewer resources we will be able to do less.”³⁴⁵ Alexander L. Boraine also wrote: “whenever there are human rights violations on a huge scale, such as in the former Yugoslavia or Rwanda or Sierra Leone, it is impossible to persecute every one.”³⁴⁶ Therefore, the opponents of prosecution seriously criticize for prolonged time it will take and huge resources it require.³⁴⁷ Andreas O’Shea gave illustrating example of how time taking and costly prosecution is. He said:

*“In change of government records become destroyed and the truths may be buried in the secret cavities of the hearts and minds of perpetrators and victims alike. The direct alternative to amnesty is the institution of criminal proceedings. These can be costly and ineffective. The evidence may be old and destroyed the witnesses reluctant, the judges may be partial. In South Africa, the trial of the former defense minister, General Magnus Malan, in 1996 involved state-funded defense costs alone approaching \$2 million, lasted for four months and ended in acquittal. The Prosecution of Eugene de kock---cost nearly \$1 million and required 18 months of testimony before (he) finally admitted to 121 charges. The South African amnesty process has had marginal success in helping to discover truths that otherwise have never been unearthed.”*³⁴⁸

Yasmin Sooka also writes: “Prosecution may take one or more decades and require multiple interventions”³⁴⁹ Rama Mani also expressed his concern as: “These short comings combined with political, legal, and material difficulties in low income post conflict countries raise serious doubts about the ability of trials to provide satisfactory justice.”³⁵⁰

However, the major question here is: are such weaknesses or shortcomings of prosecution suggesting us to drop prosecution from our choice or to find solutions? Similar limitations or weakness exist in ordinary criminal justice. So do societies choose forgiveness for all crimes fearing the time, cost and challenges of prosecution? The answer is certainly no. In ordinary criminal prosecution trials also take long time and huge costs to serve justice. But, that is the necessary risk the whole civilized nation agreed to take in order to ensure peace and stability, respect for the right to effective justice, and prevent future violations of human rights.

Those criticisms do not necessarily suggest discarding the option of prosecution rather reducing the impacts of its limitation by injecting necessary resources to reduce the time prosecution needs.

In addition to this, there is alternative to full prosecution: that is selective prosecution. In transition period selective prosecution help to prosecute only few perpetrators or few case so as to serve symbolic justice. This suggestion raises debates on the advantages or disadvantages as well as on the appropriateness of full and symbolic prosecution.

³⁴⁵ Toni Pfanner’s Interview with Philippe Kirsch, President of the ICC, supra note 252, at 13

³⁴⁶ Alexander L. Borain, supra note 7, at 2

³⁴⁷ see Andreas O’Shea, supra note 125, at 32–33, Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 100; Rama Mani, Supra note 2 at 100

³⁴⁸ Andreas O’Shea, supra note 125, at 32-33

³⁴⁹ Yasmin Sooka, supra note 136, at 223

³⁵⁰ Rama Mani, supra note 2, at 293

Ruti G. Teitel acknowledged that who to bring to trial and for what crimes is one of the dilemmas of successor regimes.³⁵¹ She underlined that “the priority is given to those most responsible for the worst crimes starting with those at the highest level of responsibility for the most egregious crimes.”³⁵² Nevertheless she acknowledged that this priority is not a universal ideal.³⁵³ The international law and the Nuremberg precedents did not explicitly provide rules if selective prosecution is legitimate.³⁵⁴

The rationales for selective trials is purely dependent up on the practical constraints such as the difficulty to try large number of accused generally implicated in modern state persecution, scarcity of judicial resources in transitional societies, and a high political and other costs of successor trials.³⁵⁵ Mehari Radi, also had suggested the Ethiopian government to prosecute on a selective bases taking into consideration the complexity of the crimes, the large number of perpetrators, the dalliance of the trial and the scarcity of the human and material resources of the judiciary in Ethiopia.³⁵⁶

Ruti G. Teitel mentioned the opposing views as: “An exemplary prosecutions policy runs the risk of undermining the very democratic purposes of the trials, advancing instead a rank message of political justice. Selective prosecutions policy can threaten the rule of law.”³⁵⁷

In practice, countries in the world follow both symbolic and full trial. For instance, Argentina held selective trial only against nine junta leaders while the Rwandan and the Ethiopia government selected full trial.³⁵⁸ The Nuremberg International Trial tried only the highest officials of Nazi, but Allied Control Council Law No 10 mandated the Occupying Allied Forces (France, USA, UK and USSR) to try the lower ranks.³⁵⁹ The ICTR tried the higher rank of former Rwandan governments while the lower ranks were tried in the Rwandan national courts.

The other alternative used to reduce the impact of the delay of prosecution in trying huge numbers of perpetrators is “Confession-for-Leniency”: the Rwandan Model.³⁶⁰ According to this model Naumi Roht-Arriaza wrote: “To manage the enormous numbers of suspects the Rwandan government replaces amnesty with reduced penalties for those defendants who confess and apologize publicly.”³⁶¹ This model serves justice against all perpetrators together with facilitating incentives for the perpetrators to uncovering the truths in return for reduced sentences. The whole truths will be more uncovered in this alternative than the full and symbolic prosecution. It will also help to reduce resources and time to concentrate only on few notorious perpetrators. This model will minimize the criticism of both symbolic and full prosecution. This alternative is similar to plea-bargaining

³⁵¹ Ruti G. Teitel, *supra* note 2, at 36

³⁵² *Id*

³⁵³ *Id*

³⁵⁴ *Ibid* p. 40-41

³⁵⁵ See Ruti G. Teitel, *ibid*, at 40 – 41, and Mehari Redai, “Revisiting the Ethiopian ‘Genocide’ Trial: Problems” *Ethiopian Law Review*, V.1 No. 1 August 2002 at 16-18

³⁵⁶ See Mehari Radi, *Ibid*, at 23-24

³⁵⁷ Ruti G. Teitel, *supra* note 2, at 40-41

³⁵⁸ See Table 7 in Chapter V at 178

³⁵⁹ Allied Control Council Law No 10

³⁶⁰ See Naumi Roht-Arriaza, *supra* note 57, at 43

³⁶¹ *Id*

procedure that is applied in the common law countries criminal justice system. But, there are some opponents that oppose this choice.³⁶²

The other way out for resource constraints is the support of international community for less developed country that has faced the challenges of prosecuting gross violations of human rights with limited or devastated resources. The international community's effort to universalize human rights can be more successful if it helps the efforts of prosecution of gross violations of human rights by domestic courts. Otherwise, the international community should also share the blame for the failure to prosecute or the delay of successor trials due to resource constraints in less developed countries like Rwanda and Ethiopia.

³⁶² See the discussion in Chapter IV

CHAPTER III

Gross Violations of Human Rights Committed by Derg/WPE Regime

1. Introduction

In Chapter II, we have said that transitional criminal justice deals about how to reckon crimes committed by repressive regimes during the transitions to democracy. The nature, type and magnitude of injustices had a role to influence the choice of transitional criminal justice.¹ The nature and extent of the injustices committed would also affect the fairness and speed of the successor trials.²

Therefore, our whole discussions and debates need to base on what types of violations of human rights are we going to deal with. Hence, this chapter would briefly review the background and contexts of the crimes, the structures and natures of the crimes and the consequences of these crimes committed in the Derg/WPE regime. However, the atrocities committed for seventeen years using government and mass organizations through out the whole territory of Ethiopia could not be summarized with this limited scope. Hence, our discussion is only to “bring to surface in gigantic leaps, the sequence of events and highlights developments that will ultimately be linked to the examination of prosecution strategies, policies, and core legal issues surrounding accountability”³ and the transitional criminal justice in Ethiopia.

2. Brief Historical Backgrounds for Gross Violations of Rights during Derg/WPE Regime

“All atrocious crimes have political character. Invariably they are the result of state action, in action, omission, or policy.”⁴ Similarly, the heinous crimes committed in Ethiopia have political causes.⁵ The major targets of the crimes were political groups that opposed Derg.⁶ SPO did not find out that Derg planned or executed specific race or religion. Actually, in its final stage it ordered many Tigreans to be killed in different part of the country. But, it was mainly for its suspicion for their collaboration with TPLF.⁷ Therefore, it is necessary and relevant to review

¹ See Section 2 of Chapter II; See also the discussion in Section 2.2 of Chapter IV

² See the discussion in Section 7 of Chapter II

³ I borrowed the expression of Mohamed C. Othman; See Mohamed C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*, (Berlin/Heidelberg/New York: Springer, 2005), at 7 found the words of Mohamed C. Othman who was confronted in similar problems when he studied the accountability process in Rwanda and East Timor.

⁴ Id

⁵ See all the Charges brought against the Derg Officials; See for the detail causes of the crime from books written about the Derg/WPE regime; for instance See generally Babile Tola, *To Kill a Generation: The Red Terror in Ethiopia*, (Washington DC: Free Ethiopia Press, 1989); Dawit W/Giorgis, *the Red Tear*; Zenebe Bekele, “Nebere” (1996); Yakob H/Mariam, “The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court”, *Hastings Int’l & Comp. L. Rev.* Vol. 22 (1998-99); Dadimos Haile, *Accountability for the Crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia*, (Leuven Law Series Leuven University Press 2000); Andargachew Tiruneh, *The Ethiopian Revolution, 1974-1978: Transformation from the Aristocratic to a Totalitarian Dictatorship*, (New York: Cambridge University Press, 1993); Heinrich Scholler and Panal Brietzke, *Ethiopia, Revolution, Law and Politics*, (Munich: Welform Verlag, 1976); Firew Kebede Tiba, “The Mengistu Genocide Trial in Ethiopia”, *Journal of International Criminal Justice*, Oxford University Press, 2007); and others

⁶ See all the charges of the SPO; See for example *SPO v C/L Mengistu H/Mariam et al*

⁷ See for instance the result of SPO investigation in *SPO V. Ato Getahun Zenebe et al* in Nazeret and surrounding cities; *SPO V. Ato Mezegebe Worke et al* for Wolliso and surrounding cities;

briefly some of the historical backgrounds and contexts in which these atrocious crimes were committed in Ethiopia.

The political crisis in Ethiopia that existed before the coming into power of Derg reached to the climax in 1974.⁸ But, Derg succeed such crisis and wrongly thought that such hectic problems could only be solved by strong military measures rather than democratic means.⁹

Ethiopia was in a continuous political crisis starting from the second half of the 19th century.¹⁰ During the Zemene Mesafent, the crises were related to the highly decentralized character of the state. The fierce struggle among the power contenders or nobilities and the non-existence of strong central government were the causes of serious political conflicts in Ethiopia.¹¹ The power contenders were claiming or fighting for power not on the bases of support they had from the people rather on the basis of army they had. This time was the darkest history of Ethiopia. In the 18th and 19th century Ethiopian elites were fighting each other to control the status of absolute monarchy, king of kings, while Europe was in industrial revolution.

The fierce struggle to change this decentralized hectic situations initiated by Emperor Tewodros was not also without problem. After the end of Zemene Mesafint, the centralization proposal was launched in the name of modernization and unification. The “reunification” process continued by Emperor Yohannes, and Emperor Menilik expanded the campaign, which was able to “annex” or “reunify”¹² autonomous territories in the south and southwest of the present day Ethiopia.¹³ However, there were important areas of Ethiopia, including Welega, Benishangul (Asosa), Jimma and the Afar lands where their autonomy survived until Haile Sellassie’s regime.¹⁴

Emperor Haileselassie was the one that finished the “centralization” project. He avoided the autonomous status of these regions as well as Tigray, Wollo, Gonder, and Gojam, which had their own kings.¹⁵ Thus, Emperor Haile Selassie brought about the complete legal framework of

⁸ See for instance Proclamation 1/1974 refers the serious social, political and economic crisis that Derg inherited and promised to solve it.

⁹ This is clearly expressed in the preamble of Proclamation No. 1/1974 through which Derg assumed power from Emperor Haile sellassie. It reads as: “Believing that the ill effects of the past aristocratic rule have thrown the country into an abyss of economic, social and political problems; that it has become necessary to establish strong provisional administration dedicated to serve the public good and capable of developing Ethiopia and coping with the various security problems prevailing at this transitional period;”

¹⁰ See for example generally Bahiru zewdie, A history of modern Ethiopia, 1855-1991, Athens, Ohio: Ohio University Press Second ed.; Teshale Tibebu, the Making of Modern Ethiopia 1896-1974 (Laurenceville, NJ: The red sea press inc., 1995); Harold Marcus, a history of Ethiopia (Berkeley: University of California Press, 1994); Assefa Fisseha, Federalism and the accommodation of diversity in Ethiopia, a comparative study, revised Ed. Wolf legal publishers (WLP) 2006

¹¹ See for instance Bahiru Zewede, supra note 10, at 25-42

¹² The proponents exhibit some differences based on whether Menelik’s move to the south is expansion or reunification. Authors like Teshale Tibebu consider it as expansion while authors like Bahiru Zewde consider it as unification. Much of the controversies seem to center on ones views in favor or against what Menelik had done. The differently suggested solutions to the age-old state crisis therefore are based on these views. See Bahiru Zewde, supra note 10, at 16, Teshale Tibebu, supra note 10

¹³ See Bahiru Zewde, supra note 10, at 16

¹⁴ C. Clapham, constitutions and governance in Ethiopian history, a paper presented to the symposium on the making of the new Ethiopian constitution, 17-21 may 1993 Addis Ababa Ethiopia the inter Africa group, at 31

¹⁵ See the different the 1931 Constitution that deny the status of “King” to these regions and dislocate the regional lords from their locality in the name of “parliamentarian”.

centralization.¹⁶ This aim was achieved by tactically breaking the powers of regional lords and traditional kings.¹⁷ The establishment of parliament served the purpose of breaking the possibility to power rivalry as a design to monitor the land lords, the parliamentarians. The 1955 Constitution was a revised version of the 1931 Constitution with no new political philosophy introduced into the realm. There were some socio-political demands that necessitated the revision of the constitution. Nevertheless, as regards the powers and prerogatives of the Emperor, the document remained quite a replica or even extensive revision of the previous constitution.¹⁸ As a result, power was concentrated to the Emperor. The Emperor's selfish contention for power dissatisfied the traditional contenders of power and their followers in the previous autonomous regions.

Political crisis had also emerged opposing thus "reunification" as colony of the north, particularly Amahara. There are extreme groups that opposed and support the "reunification" and the latter regards secession as the sole remedial measure to the problem. The latter political view is known as the *colonial thesis*.¹⁹ This view is upheld by some ethno-nationalist political actors such as the OLF and ONLF. These groups claim that the northern rule over the south and south west of the country shall be undone and hence the colonial empire needs to undergo decolonization whereby independent states must be formed. Hence, there are political forces that fought and still fighting for cessation in Ethiopia. At another extreme, there are the nationalists who adhere to the notion of "one nation one country" implying rejection of change in the *status quo*.²⁰ According to this view, the country is united both ecologically and culturally. Therefore, the building of greater Ethiopia on a nation state model but curbing the prevailing injustices within the set up is what they suggest as a solution to the crisis. In the middle of these two extremes there is the national oppression thesis. This view tried to address the problem of state failure from an ideological²¹ perspective. This group holds that there were in fact oppression and discrimination of people. But, the corresponding remedy is to tailor an economic solution that fits the problem. Those who characterize the conflict from the point of view of economic and political suppression or discrimination alone are referred to as instrumentalists.²² These problems were not openly discussed and find out solution due to the non-existence of democratic rights.

¹⁶ See the 1931 Constitution

¹⁷ The 1931 constitution did not recognize the nobilities and local kings' influential power within their region, which traditionally served as a check to the central power. Rather, the nobility and the local chief were forced to come to the center to be the member of the chambers, which have no power other than to deliberate on the draft laws. In their position Haile Selassie replaced officials selected by Him. So the nobilities and locality tactically pulled to the center so as to detach them from their support. See for example the 1931 Constitution Chapter II Art. 7 chapter 4 Art 30 and the followings

¹⁸ See the 1931 and 1955 Constitutions

¹⁹ See Asafa Jalata, ed., *Oromo Nationalism and the Ethiopian Discourse* (Lawrenceville, NJ: Red Sea Press, 1998), at 56. According to the colonial thesis, Ethiopia is a colonial empire which needs to undergo decolonization whereby independent states must be formed.

²⁰ Solomon Gashaw, "Nationalism and Ethnic Conflict in Ethiopia," *The Rising Tide of Cultural Pluralism*, ed. Crawford Young (Madison: University of Wisconsin Press, 1993), p. 142

²¹ Bahiru Zewde, *supra* note 10. 225. The Ideological groups such as the Ethiopian Students' Movement (ESM) finally hold that the problem is not ethnic based rather economic oriented. Accordingly, avoidance of class exploitation would do away with the problem.

²² See John Markakis, *Resource Conflict in the horn of Africa* (London: SAGE publications, 1998): p.103-104, also Assefa Fiseha, *Federalism and the accommodation of diversity in Ethiopia, a comparative study*, revised Ed. Wolf legal publishers (WLP) 2006, at 55

The re-union of Eritrea with Ethiopia coupled with the failure of the Emperor to accommodate the autonomy of the Eritrea's federation did also create strong oppositions and armed struggle within Eritrea.²³ The Eritrean question and its solution is also one of the dividing issues within the political forces in Ethiopia. In addition to these political crises, the economic system left majority of the population landless and oppressed. Such oppression and political crisis reached to climax in the late 1960's.

The Ethiopian students that were influenced by the communist ideology sought Marxist-Leninist solutions to such complicated crisis of Ethiopia.²⁴ Those students' movements raised many demands, which included "land to the tiller", "self-determination to oppressed nation and nationalities" and political power for the oppressed broad mass.²⁵ These questions or demands reflected the existing political, economic and social problems born during feudal and aristocratic Ethiopia and even implied the socialist trend of the movements.

Gradually, the majority of Ethiopians joined the struggle against the age-old absolute monarchy.²⁶ The absolute monarchy reached to the position that could not cop-up with the popular uprisings in February 1974.²⁷ At this time, the different units of the Armed Forces, the Police and Territorial Army of the Emperor retreated from defending the monarchy and established a "council" in June 1974 and called it "Derg".²⁸ The members of "Derg" were first delegated from their respective units only to demand pay rise and improve their living conditions.²⁹ But, some conscious members of the committee used this opportunity to hijack power from both the Emperor and the popular revolution. So, they ought to deceive the popular uprisings, the Emperor and His elements and even the military as well as their colleagues within the Derg. They heralded "Ethiopia Tikedem Yalamenem Deme" which literally means "Ethiopia first without any bloodshed" as their political philosophy. This motto was appealing to majority of the population since it touched the timely grievances and demands of the popular uprisings. This philosophy helped Derg to tactically congregate supports at the beginning. In line with this, Derg had also taken measures that can satisfy all sides, the Emperor and the revolutionaries. They arrested higher military and civil officials of Emperor Haile Selasse alleging that they are responsible for the misdeeds to the people against the real motive of the Emperor.³⁰ The Emperor and his supporters did not see this as a major threat to the monarchy.³¹ Rather, they were watching suspiciously. But, Derg did not take much time to turn its face to the Emperor himself and its institutions. On September 12, 1974 Derg declared that the Emperor was deposed as of since the 12th day of September 1974. Derg took power provisionally, "until the

²³ See James. C.N Paul and C. Clapham, *Ethiopian Constitutional Development, a Source Book*, Volume 1, Haile Sellassie University, Addis Ababa, 1967 at 367

²⁴ Bahru Zewede, *supra* note 10, at 822-239

²⁵ Id

²⁶ The introduction of sector review, the rise of fuel, the exposure of hidden famine in Wollo and Tigray worsened the situations and gave rise for strikes by the taxi drivers, Trade Unions, Teachers, army mutinies etc. See for the detail of the Revolution Bahiru Zewede, *supra* note 10, at 225, Dadimos Haile, *supra* note 5, at 11-12, Andargachew Tiruneh, *supra* note 5, at 64-66)

²⁷ Tefera Haile-Selassie, *The Ethiopian Revolution 1974-1991* (London and New York: Kegan Paul International, 1997) at 86-99

²⁸ See generally Zenebe Feleke, *supra* note 5; See also in general Tefera Haile-Selassie, *ibid*

²⁹ See Andargachew Tiruneh, *supra* note 5, at 64

³⁰ Article 9 of Proclamation 1/1974 provides for the establishment of Military Court to try those officials for "administrative and judicial misfeasance and unlawful enrichment".

³¹ This can be inferred from Proclamation No 1/1974 that it promised the Monarchy to continue as a symbol of unity in Ethiopia.



emperor's successor assumed constitutional monarchy and permanent government elected".³² Alleging that the 1955 Constitution gave absolute power and did not respect human rights in practice, it suspended the 1955 Constitution.³³ Alleging that the parliaments were not democratically elected, it dissolved the Senate and Chamber of Deputies until democratically elected representative assumed power.³⁴ As a result, Derg took the power of the parliaments, the head of state and head of government. This showed that it never learned a lesson from the failure of the Emperor that concentration of power and undemocratic government was the main causes of the crisis.

Derg never respected its promise to give power to the elected government. Rather, it closed all peaceful means of political struggle the revolutionaries were using to dispose the Emperor. Hence, Derg used the same Proclamation to criminalize democratic rights of citizens.³⁵ Article 8 provides that: "It is hereby prohibited, for the duration of this proclamation to conspire against the motto, "Ethiopia Tikdem", to engage in any strike, hold unauthorized demonstration or assembly or engage in any act that may disturb public peace and security." (Emphasis added). And Article 9 further provides: "A Military court shall be established to try those who contravene Article 8 of this proclamation (and) those who may be charged with administrative and judicial misfeasance and unlawful enrichment." (Emphasis added) This proclamation surprisingly provides that judgment handed down by the military court shall not be subject to appeal.³⁶

That was not a change expected from long struggle of the Ethiopian people for democracy, equality and fraternity. The economic trade off to these basic rights and demands for justice did not bring peace to Ethiopia. These measures of Derg aborted the revolution and bitten the actual revolutionaries on their back. Once again, the hope for democracy and end of conflict, hostilities and injustices came to an end by systematic denial of democratic rights of the people. Those that bitterly struggled against the Emperor and his armed forces were conceived as criminals and their peaceful means of struggle were leveled as criminal acts. Peaceful means of struggle: strikes, public speech, demonstrations, even meetings were the main "crimes" for which thousands of people received death penalties, cruel tortures, illegal detention etc without due process of law through out the regime.³⁷

On the contrary, the armed forces that were repressing the peaceful struggle during the revolution took the political power and became "legitimate" and "revolutionary".³⁸ The revolutionaries were called "anti-revolutionary" while the "anti-revolutionaries" took the name

³² See Article 3 and 4 of Proclamation 1/1974; and the practice showed this was a tactic to deceive the Emperor and those who supported the monarchy; because Derg never taken this as a serious commitment rather it had been detaining all the families of the Emperor.

³³ See the Preamble and Article 5 of Proclamation 1/1974

³⁴ See the Preamble and Article 4 of Proclamation 1/1974

³⁵ This prohibition never lifted until Derg overthrown. Since there was no legal mechanism created to request permission for peaceful demonstration or strikes, Derg practically closed all peaceful means of exercising democratic rights of citizens recognized in international laws. See for instance UDHR, the ICCPR, ICSEER etc

³⁶ Article 9 of Proclamation 1/1974; This not only contravened the internationally recognized natural justice or due process of laws but also denied the long established traditions of appealing against judgments in Ethiopia till the Zulfane Chilot (The Kings Bench).

³⁷ The Special Penal Code of 1974 made also these democratic rights as "crimes" that would entail non-appeal able harsh penalties including capital punishment. See the 1974 Special Penal Code Articles 1, 2, 7-11.

³⁸ Yakob H/Mariam expressed these situations as "Riding on the tails of the popular uprisings, the Derg seized power, overthrew and jailed the long reigning Emperor Haileselassie." See Yakob H/Mariam, supra note 5, at 675

of the “revolutionaries”. Derg used the name and good will of the revolution to take majority of the people on its side in its plan to eradicate against its power contenders. Andargachew Tiruneh noted that the killings of 59 Higher Civil and Military Officials of the former regime was an expression of the Derg’s desire to appear as a revolutionary force in the face of the leftist movements.³⁹ But, Derg also used it as means of threatening others showing explicitly that Derg would never be abided by its words or rule of law if any one opposed its rule.⁴⁰

Despite the strong violent measures, the students and teachers continued their demands against Derg. Derg employed different tactics to eradicate the revolutionaries. Derg designed lawful coverage to materialize its criminal plan. But, when it felt that such mechanisms were time taking it simply violated the norms it had adopted. For example, despite the harsh new penal code and military court without due process of law, Derg without empowering provision used to pass death sentence reviewing the light sentence pronounced by the Special Military Court.⁴¹ Derg even used to pronounce judgment in the name of the Special Court.⁴² Traditionally, ordinary citizens believed that the head of state, the king or Emperor is merciful that would reduce harsh penalty of the lower officials. But, in the regime of Derg, the Head of the State could without any appeal and litigation increase punishment of the lower courts.⁴³

These measures marked the transition of Ethiopia from absolute monarchy to military dictatorship in which more arbitrariness, terror, horror and the end of any respect for human and democratic rights were the main characteristics of the system. The revolution thus did not bring an end for the existing injustices or crisis. Rather, they became more severe and the resistance equally grew to the level of well-organized fierce military confrontations and civil wars that finally overthrew Derg.⁴⁴

Derg used different tactics to consolidate support and to get ride of oppositions. It sent students and teachers of high schools, colleges, universities and other higher educations to Development Through Cooperation, Enlightenment and Work Campaign to rural areas with the pretext “to enable the people to properly grasp the philosophy of ‘Ethiopia Tikdem’ and to lay foundations and open vistas for its implementation.”⁴⁵ Consequently, Derg proclaimed “Hibertsebawinet” which means socialism as the state ideology in Tehsas 1967 (Nov. 1974).⁴⁶ Consistent with this, Derg nationalized rural and urban lands, urban extra-houses, factories, and other private property.⁴⁷ The urban and rural lands were nationalized and redistributed to the people; urban

³⁹ Andargachew Tiruneh, *supra* note 5, at 78-79

⁴⁰ Derg had promised to put to trial those former officials. And Inquiry Commission was organized and investigated the alleged crimes they have committed. But, the report of the commission showed that they would be charged for lesser offenses than Derg expected. That is why Derg violated its own laws within two months. See evidences produced in the SPO V C/L Mengistu H/Mariam et al on the killings of the 59 former Higher Officials of Emperor Haile Selassie.

⁴¹ See the testimonies of the Judges and Prosecutors of Special Military Court in SPO V. C/L Mengistu Hailemama

⁴² Id

⁴³ Id

⁴⁴ Dadimos Haile, *supra* note 5, at 11

⁴⁵ See Proclamation No 11/1974; A Proclamation to Provide for Development Through Cooperation, Enlightenment and Work Campaign, *Negarit Gazeta*, 34th Year No. 10. Effective on 25th November 1974

⁴⁶ This philosophy was expressed in the preambles of many proclamations issued after that day. Particularly those proclamations that nationalized private property and redistributed some property to the “broad mass” proved that the country was already following the socialist line.

⁴⁷ See Government Ownership and Control of the Means of Production Proclamation No. 26/1975, *Negarit Gazta* 34th Year No. 22 to be effective on the 7th day of February 1975; Public Ownership of Rural Lands Proclamation

extra-houses nationalized and rented to the lessee at lower rent; industries and small scale means of production nationalized and the rights of the workers broadened; Urban Dwellers Association, Peasant Associations, Women's Associations, Youth Organizations, Trade Union's, Revolutionary Squads in the town and Militias in the rural areas were established and taught and armed to protect the interests they had acquired from the "enemies of the revolutions". Those persons to be elected in these mass organizations were qualified to be beneficiaries of such revolutionary measures.⁴⁸ Almost these socialist measures were taken while the students and teachers were in the countryside for the Campaign. Derg extended the campaign until June 1976 on proclamation issued on 24th August 1975.⁴⁹ Aware of the Derg's tactic, many students absconded from the Campaign and started to strengthen opposition parties all over the country.

At that time, the major organized opposition political forces were also leftists who advocated for such actions. Nevertheless, such measures did not calm down all oppositions. Only some opposition parties agreed to accept the call from Derg to work together.⁵⁰ Such parties were AESM (All Ethiopians Socialist Movement- in Amharic Mesion), MLRO (Marxist-Leninist Revolutionary Struggle- in Amharic Malerid), EORS (Ethiopian Oppressed Revolutionary Struggle- in Amharic Echat), Workers' League (in Amharic Wozlige) and Revolutionary Flame (in Amharic Abiyotawit Seded).⁵¹ The latter is said to be affiliated to C/L Mengistu Hailemariam. These five political parties united as Ethiopian Marxist-Leninist Organizations Union (EMLOU- in Amharic Emaledih). Derg established government offices that will coordinate these political parties. This office was called POPO (People's Organizing Provisional Office).⁵² This Office was organized through out the country from the center to each lower administrative unit.⁵³ It had a responsibility to train and employee cadres from the five pro-Derg Marxist-Leninist parties to facilitate and ensure the proper implementation of the Ethiopian National Democratic Programs, to organize the people, to enlighten the philosophy of socialism and to organize the people according to this line, to lead and operate the political school established to train cadres, to arm the officials and leaders of the revolutionary mass organizations, etc.⁵⁴ As a result this office organized and trained the supporters of Derg with the ideology of Marxism-Leninism and the Stalin's philosophy of red-terror to eliminate oppositions. The cadres of this office were the main mastermind of the atrocities committed during the Nitsa Erimija and Red-Terror.⁵⁵ This tactical unity⁵⁶ of Derg and other political parties helped to strengthen their force against their common enemies, particularly EPRP that had majority

No. 31/1975, Negarit Gazeta 34th Year No. 26 to be effective as of the 4th day of March 1975; Government Ownership of Urban Lands and Extra-House Proclamation No 47/1975. Negarit Gazita 34th Year No. 41 to be effective as of 7th day of August 1975;

⁴⁸ See the Proclamations issued in the 1974-75

⁴⁹ See Development through Co-operation, Enlightenment Campaign Extension Proclamation No. 48/1975, Negarit Gazeta 34th Year No. 42 to be effective on 24th day of August 1975

⁵⁰ Andargachew Tiruneh, *supra* note 5, at 78-79

⁵¹ Id

⁵² See People's Organizing Provisional Office establishment Proclamation No 91/1976, Negarit Gazeta 35th Year, No. 33 to be effective as of the 25th day of April 1976 (Mizia 14, 1968)

⁵³ See Article 7 of Proclamation No 91/97

⁵⁴ See Article 8 of Proclamation No 91/97

⁵⁵ To the personal knowledge of this author there is no count in which cadres were not implicated

⁵⁶ See Article 8 /6/ of Proclamation No. 91/97 It reads: "To indicate the tactics by which the present bureaucracy may be changed through the struggle of the broad masses, so that, at this transitional period, efficiency of the work may be assured and revolutionary actions may not be obstructed." This might indicated the tactical unity of these political forces with the Derg

support. They opened propaganda against EPRP and other political parties who refused to join this front.⁵⁷

On the other side, three major political groups were not satisfied by such revolutionary actions taken by Derg. The first groups included parties organized on the nationality question such as TPLF (Tigrean People Liberation Front), EPLF (Eritrean People Liberation Front), OLF (Oromo Liberation Front), ELF (Eritrean Liberation Front), WSLF (Western-Somalia Liberation Front), ONLF (Ogden National Liberation Front), SLF (Sidama Liberation Front), ALF (Afar Liberation Front), and etc. These groups claimed that Derg did not properly address the nationality questions.⁵⁸ The second groups that opposed Derg were those political forces that did not support socialist ideology. These groups opposed such socialist ideology and nationalization of private property. The leftists considered these groups as reactionary and elements of the former regime. Among such political forces the well-organized one was EDU (Ethiopian Democracy Union). The third groups that were in opposition with the Derg were those that demanded Derg to give power to popularly elected government. Among such groups, the major organized group was EPRP. It had the support from the majority of the students and teachers who were the major forces of the revolution. Having this support into considerations, EPRP strongly advocated and struggled for immediate election of popular government.⁵⁹ For this demand Derg and its collaborators called EPRP as “anarchist”. EPRP’S demand did not satisfy both the Derg and oppositions political parties, which were organized under the umbrella of POPO.⁶⁰

Therefore, the political struggle intensified between EPRP and other oppositions mentioned above on one side and Derg and its supporters, Mesion, Wozleg, Echat, Abyotawit Seded, and Maleried on the other side. Derg, taking those five opposition parties on its side, continued its plan to destroy EPRP and other opposition nationalist parties and elements of the old regime. They blamed them as anti-revolutionary, anti-unity, anti-people, and collaborators with CIA, with the cessationist, and with the Somalia invasion etc.⁶¹ They alleged that EPRP had started the white terror and the civil unrest by firing and executing against Derg and its supporters.⁶² Nevertheless, the investigation carried out by SPO and the facts proved in the trials show that the plan was there even before these political forces were united to destroy EPRP and before the alleged killing of EPRP begun.⁶³

⁵⁷ See Andargachew Tiruneh, *supra* note 5, at 78-79. He noted that EPRP and AESM had differences on various issues that begin from the students’ movements, but their contradictions mainly intensified when the latter agreed to work together with Derg.

⁵⁸ We have seen that these groups have different views to the problem and solution of Ethiopia.

⁵⁹ This was made clear in the 1977 May Day Demonstration organized by EPRP

⁶⁰ But this demand was in accordance with the promise of the government promulgated under Proclamation No.1 of 1974, which we have discussed in detail above.

⁶¹ All the documents produced by the SPO show that Derg used these justifications to destroy EPRP. See for instances the Shoa Regional ROCC to exterminate members of EPRP through out Shoa. Evidence No. 1 in SPO V. Major Kassaye Aragaw et al

⁶² This has been used as the major propaganda during the Derg regime. There was a common motto saying “we will kill one thousand anti-revolutionaries as a revenge for one revolutionary.”

⁶³ See the discussion in Section 3.1.1 of this Chapter (III). As we have discussed in that section Derg had already took its stand to destroy opponents and had killed many members of alleged members of EPRP and other targeted political groups. See the counts of SPO V. C/L Mengistu H/Mariam et al. Further more Dadimos Haile cited what Andargachew Tiruneh searched out as: “Conscious of the increasingly aggressive stance of Mengistu’s Coalition against EPRP Since the latter’s rejection of the call for the formation of the joint front, the central committee of EPRP had, by September 1976 (Meskerem 1969) decided to conduct urban armed struggle against the coalition and had authorized its polit-bureau to map out a strategy.” See Andargachew Tiruneh, *supra* note 5, at 185

The tactic of “beat one after the other” of Derg did not take much time to turn against the tactically allied political forces. The killings even extended against the one-time friends of EMLOU (in Amharic Emaledih). In August 1977, Derg started the attack against the leaders of Mesion the influential party in Emaledih, which were organized under POPO (Peoples Organizing Provisional Office, which later was called as Provisional Office for Mass Organizations Affairs (POMOA). By amending the previous proclamation of POPO, Derg tightened its control against POPO.⁶⁴ In the previous proclamation, there was supreme committee that would serve as a bridge between Derg and this office.⁶⁵ But latter, this committee was cancelled and the Central Committee of Derg had been given power to control the Office directly. Previously, POPO had the power to assign the head of its Regional Office, but this time it could not do without the permission of Derg. The Central Committee of Derg had been empowered to supervise and check the POPO. The leaders of Mesion, the strongest allies of Derg in the Netsa Ermija, flee in the same month of the adoption of this proclamation. Consequently, Derg detained the leaders before they went far and latter executed them.⁶⁶ Derg, hence, continued its violations even against those friendly parties when they finished their assignment.⁶⁷ POMOA replaced by Commission for Organizing the Party of the Working People of Ethiopia /COPWPE/, the Chairman of which by law was the Chairman of Derg, C/L Mengistu Hailemariam.⁶⁸ POMOA dissolved and most of the cadres of POMOA were assigned in different government owned organizations.⁶⁹ Consequently, Workers Party of Ethiopia established in 1984. C/L Mengistu Hailemariam and other Derg Members took the leading role in WPE. The Ethiopian state and society were obliged by the law to follow only the leadership of WPE.⁷⁰ WPE had been given the authority as the sole and only political party that would lead every aspect of the social, economic, and political affairs of the nation so as to “ensure the achievement of the final objective of building socialism and subsequently communism.”⁷¹ Derg, finally, transformed itself as permanent government adopting the 1987 Constitution of PDRE and conducting selection not “election” among members of WPE. Once again, Derg members became the leaders of the Peoples Democratic Republic of Ethiopia /PDRE/.⁷²

⁶⁴ See Provisional Office for Mass Organizational Affairs Organization and Operation Improvement Proclamation No. 119/1977, Negarit Gazeta 36th Year- No 22 to be effective on the 14th day of July 1977 (Hamle 7 1969). This time was, as we will see in section 3.1.2 of this chapter, the time Derg had on the verge of establishing National Revolutionary Command to carry out Red Terror. It was also a time when the Somalia Invasion Received decisive counter attack on the part of the Derg. So Derg found no reason to work with this front and to share power.

⁶⁵ See Proclamation 91/1176

⁶⁶ See Count No 93 of SPO V. C/L Mengistu H/Mariam et al. Derg illegally and secretly detained the leaders of Mesion, (Ato Haile Fida, D/r Nigst Adane and others) and finally hanged by the special forces of Derg in Ras Asrate Kassa Compound.

⁶⁷ However, most of the four political party members infiltrated to the Derg and continued their task as cadres until Commission for Organizing the Party of the Working People of Ethiopia Establishment Proclamation No. 174/1979 issued. See Negarit Gazeta 39th Year No.5

⁶⁸ Id; See Article 10 of this Proclamation No. 174/1979

⁶⁹ Personal observation of the Writer; some also assumed power in the COPWPE, see Zenebe Feleke, “Nebert Part Two”

⁷⁰ Recognition of the Leading Role of the Workers’ Party of Ethiopia Proclamation No. 267/1984, Negarit Gazeta 43rd Year No. 17 to be effective on the 10th day of September 1984.

⁷¹ See the Preamble of Proclamation No 267/1984

⁷² See Ethiopian People’s Democratic Republic Constitution Proclamation No. 1/1987, Negarit Gazeta 47th Year NO. 1 to be effective on the 12th day of September 11, 1987

3. System and Patterns of Gross Violations of Human Rights during Derg/WPE Regime

3.1 Names and Chronological Orders of the "Killing Campaigns"

For seventeen years, from 1974 to 1991 gross violations of human rights have been committed against opposition political groups by the Derg/WPE regime.⁷³ It is difficult to exhaustively list down all the criminal injustices committed against huge number of victims all over the country for prolonged time. From the patterns of the crimes the killing Campaigns during Derg/WPE regime can be categorized in to three broad phases: Netsa Ermija (1974 - October 1977), the Red-Terror (October 1977 - August 1978) and Secret killings (August 1978-May 1991).⁷⁴

3.1.1 "Netsa Ermija" /Free Killing/: (1974- October 1977)

Derg started the extra judicial massacres on November 1974 two months after it took power.⁷⁵ Members of Derg assembled in the Menilik's Palace, office of the Derg at Arat Killo to pass political decisions against the Higher Civil and Military Officials of the former regime.

The members of the Derg were the prosecutors and the judges who were armed even in the assembly Hall. The accused were absent since they were detained under the Hall where the Assembly was taking place. In short hours, all the fifty-nine High Civil and Military Officials of the former government charges were concluded with the verdict of death penalty without single due process of law respected. It was in the same evening that the members of Derg rushed to see their decisions executed. They divided themselves into groups to execute the executions and to prepare messages to publicize the bad news of these extra-judicial killings to the general public. All the fifty-nine victims were massacred before they went out of the Assembly and bad news was broadcasted to Ethiopians and the whole world. This was the first shocking tragedy during the seventeen years continuous horror and terror.⁷⁶

This was the precedent that was applied through out the regime. From then onwards, the case of "anti-revolutionaries" was not the concern of the judiciary and rule of law. The rule of law was replaced by the rule of horror and terror. Derg organized itself and its subordinate in a way that could give fast extra-judicial decisions against the precious lives of human being.⁷⁷

Derg consolidated its military forces in Arat Killo. Special Forces that were stationed around Arat Killo were busy traveling to different parts of the country to massacre remnants of the previous regimes and other opponent political groups.⁷⁸ To mention only some operations, the killing Squad lead by Major Ali Mussa went to the South part of the country.⁷⁹ His squad hunted

⁷³ See the counts in the charges against SPO V. C/L Mengistu Hailemariam et al

⁷⁴ This categorization is based on the author's intensive readings of the documents of Derg/WPE regime in his investigation and prosecution as well as from his discussion with other staffs of SPO

⁷⁵ In fact Derg had started illegal detention of the former regimes even before it formally took state power. It continued this illegal detention until this date. Enquiry Commission was also established to investigate the injustices committed by the officials of the former regime who were later extra-judicially massacred.

⁷⁶ SPO V. C/L Mengistu H/Mariam et al ; See for instance the testimony of Ato Teshome G/Mariam

⁷⁷ See section 3.2.1 of this Chapter (III)

⁷⁸ See the documents showing their report on the success of their Operation in the Files of SPO V. C/L Mengistu H/Mariam et al; SPO v. Ato Hailu Burayu et al; and SPO V. C/L Ashiber Amare et al, and others

⁷⁹ See for instances the Killings in Shashemene and the evidences produced to the trials to prove the case, SPO V. C/L Ashebir Amare et al and SPO V. Major Ali Musa et al

anti-revolutionaries starting from the nearest village in the south up to the southern border of the country, Kenya.⁸⁰ The other killing squad lead by Major Getachew Shibeshi went to the South Western Ethiopia from Sebeta to the Sudan Border.⁸¹ There was no place in their way in which they did not detain, torture, terrorize, and massacred.⁸² Up to September 1976, Derg was in relative peace with the leftist political parties.⁸³ Alleged killings by EPRP against Derg Officials begun only after September 1976.⁸⁴ But, there were killings against members of the EPRP before this period.⁸⁵ Derg came into unprecedented attack against peaceful demonstrators organized by EPRP in Addis Ababa on May Day, 1977.⁸⁶ That was the worst bloodshed in Addis Ababa streets after the Fascist Italy massacre. Thousands of youngsters were detained and massacred in different parts of the city.⁸⁷ Many atrocities were committed during this period that cannot be exhaustively listed here.⁸⁸

The killings during this period were named as Netsa Erimija, which means free killing. During this period, different search operations were carried out in Addis Ababa as a result of which many suspected members of EPRP were killed.⁸⁹ Derg Investigation Squad was also busy investigating suspected members of EPRP and reporting through their channels to the Derg to get approval of their investigation report. Derg was passing decisions for execution and prolonged arrest during this time.⁹⁰ During this time, the participation of the lower strata was not well organized. In order to organize these spontaneous measures, some efforts were attempted. Among such attempts, the establishment of Revolution and Development Committees Consolidation Proclamation No. 115/1977 that was promulgated on April 21, 1977 was one.⁹¹ Such spontaneous and decentralized killings were not successful to eliminate opponents with the required magnitude and speed. Hence, Derg realizing these facts designed other plan and started its preparation immediately. Thus in August 1977, Derg enacted Proclamation No. 129/77⁹² that established Revolutionary Campaign Coordinating Committees through out the country.⁹³

3.1.2 Red-Terror (From Oct. 1977-August 1978)

At the end of October 1977, the ROCCs (Revolutionary Operation Coordinating Committees) were established all over the country and finalized their preparations.⁹⁴ On Hidar 6, 1970

⁸⁰ See for instances the Killings in Shashemene and the evidences produced to the trials to prove the case, SPO V. C/L Ashebir Amare et al and SPO V. Major Ali Musa et al

⁸¹ The whole report of this Squad was used as evidence in Count No. 1 in the Killings of Guangul Chichiayebelu and other 25 victims in Wolliso Town and surrounding towns. See SPO V. Ato Hailu Burayu et al

⁸² Id

⁸³ See Section 2 of this Chapter (III)

⁸⁴ See Andargachew Tiruneh, supra note 5, at 185

⁸⁵ See for instances the killings proven in the trials of SPO V. Ato Hailu Burayu et al Count No. 1 in which members of EPRP were killed in June 1975 in Wolliso town.

⁸⁶ See for instance Count No. 154 of SPO V. C/L Mengistu H/Mariam et al

⁸⁷ See the testimonies given on this massacres in count No. 154 of SPO V. C/L Mengistu H/Mariam et al

⁸⁸ See those atrocities investigated and prosecuted in the SPO files in different courts

⁸⁹ See Documentary Evidences in SPO V. C/L Mengistu H/Mariam et al to prove these Operation Commands

⁹⁰ See for instances Count No. 7, 8, 9, 13, 14, 15, 18, 19, 20, 21, 22, 36, 37, 43, and No 154 of SPO V. C/L Mengistu H/Mariam et al

⁹¹ Revolution and Development Committees Consolidation Proclamation No. 115/1977, Negarit Gazeta 36th Year No. 18 to be effective on April 21, 1977

⁹² National Revolutionary Operation Command Proclamation No. 129/1977, Negarit Gazeta 36th Year No. 30 to be effective on 27th August 1977 (Nehasie 21, 1969)

⁹³ See about the structures of these Committees and their members in Section 3.2 of this Chapter (III)

⁹⁴ As we have seen in Section 3.2 of this chapter (III) each ROCC formed following the proclamation, each government institutions and mass organizations sent their representatives, the representatives deliberated as to

(October 1977) Derg officially proclaimed Red Terror. In his speech in the revolutionary square, Mengistu H/Mariam announced the beginning of red-terror as one of government day-to-day business.⁹⁵ He also threw bottles filled with red color to symbolize the beginning of Red Terror in February 1977.⁹⁶ Red terror was not formally closed, but practically the manner and magnitude of killings were changed after August 1978.

Red terror was the worst campaign.⁹⁷ Since it was committed in public, the whole world and many Ethiopians associated abuses of human rights during Derg only to Red-Terror. But, Red-Terror is one of the killing campaigns. It was not the beginning and the end of the heinous crimes committed during the Derg regime. It was only carried for almost a year. It was intensively carried in the months of December 1977 and from January to May 1978.⁹⁸ Already more than enough was killed before the end of Red terror; and the survival detainees were highly tortured. After August 1978, it was gradually replaced by other secret killings.

3.1.3 Secret or Centralized Killings, War Crimes, and Other Violations after Red-Terror

When the condemnation by the international community strengthened and the necessity of using huge institutions became not necessary, Derg went back to its secret killing structures that were also participating and coordinating the Red Terror. For instance, in Addis Ababa, a committee was established to investigate the survivor detainees in the Kebele and Higher detention and torture centers.⁹⁹ The committee had members from chairmen of Higher UDA and the Central Investigation Organization. The committee gathered information from the Kebebel and Highers. Finally, the committee produced its recommendation to the Mayor of Addis Ababa. The Mayor, Dr Alemu Abebe sent it with his recommendation to the Ministry of Interior, then to Derg. As a result of this, many detainees were killed and many others sentenced up to twenty years imprisonment.¹⁰⁰ But, since this was carried in secret most of the people were not aware if the killings were continuing in Addis Ababa after the red-terror. Only inmates and families knew this fact. When the victim took out from prison in the evening, the inmates would try to find out if he joined his family. If the victim did not join his family they used to guess that he was killed that evening. That was secret code commonly known by the killers, the family and the close friends, and the inmates.¹⁰¹

Derg never ceased its violations until May 1991. The repressive structures of Derg at the center continued the abuses in a very systematic and secretive ways. The Derg members assigned through out the country were at freedom to massively detain, torture and killed oppositions. For instance, in May and June 1979, the Member of Derg L/t Petros Gebere, the then Administrator

how they should continue with their tasks, set-up sub committees etc. See for instances the Shoa Region Selalie Awraja ROCC, which met for the first time in September 26, 1977(SPO V. Ato Abebe Melaku et al)

⁹⁵ This government order is also issued on the Printed Medias and government circulars.

⁹⁶ This was transmitted live on Ethiopian Television.

⁹⁷ See how brutal was the crime in section 4 below.

⁹⁸ The investigation and charges of lower Derg-Officials in Addis Ababa showed this fact. See for instances the SPO V. Ato Zenebe Ayele et al; SPO V. Major Desta Awlachew et al; SPO V. Chief Tesfaye et G/Selasie al; SPO v. Ato Ato Endale Amenu; SPO V. L/t Abera Aga et al; and others

⁹⁹ This committee had members from Higher Chairmen and the Central Investigation Organization. See the charges and evidences showing this fact against one of the members of such Committee, Major Desta Awlachew the Chairman of Higher 22 in Addis Ababa and Secretary of this Committee. SPO V. Major Desta Awlachew et al

¹⁰⁰ Id

¹⁰¹ This was the pattern of killings that was established by SPO's evidences in almost all SPO files

of Kembatana Hadiya, Shoa Region tortured many hundreds of detainees and killed 36 members of EPRP in two rounds.¹⁰² In Shoa Chebona Gurage Awraja four men were killed by the decisions of ROCC in 1979 and 1980.¹⁰³ If we see the charges of SPO v. K/L Mengistu H/Mariam et al many counts were proved in the trial that were committed after the Red-Terror. The Central Investigation Organization that was established by the merger of the Derg Investigation Department and the Special Police Investigation opened different branches through out the country and continued its abuses against oppositions. This Organization together with the Special Forces committed more sophisticated and complicated killings against the oppositions till the end of Derg/WPE regime.¹⁰⁴

War crimes were also committed during the armed confrontation within the northern regions: Eritrea, Tigray, Wollo, Gonder and Shoa. In these areas, there were serious military confrontations with the EPRDF and EPLF. Though SPO tried to disclose the war crimes committed in these regions using its War Crimes Investigation Department, only few cases were successful to prove the individual responsibilities. One of such cases is the Howzen Massacre in which more than 2500 civilians are bombarded in market place.¹⁰⁵ There were reports that more than 250 prisoners of war were buried alive in Gonder, but the prosecution is not yet successful to prove the case and to identify individuals responsible for such crimes.¹⁰⁶ There are also many cases in which civilians were tortured, executed and illegally detained with out due process for their alleged collaborations with the rebel forces.¹⁰⁷

Many people lost their lives due to forced relocation programs, but the investigation made by the Forced Relocation and War Crimes Team of SPO was found difficult to prove the criminal intent of the Derg/Officials in the court of law.¹⁰⁸

3.1.4 Repressive Norms or “Laws” used to Cover-up the Abuses

The followings were some of the proclamations, directives, orders, and decisions passed by the Derg that explicitly or impliedly permitted the abuses of human rights in violations of the principles of international laws discussed in Chapter II Section 5.1.

1. Derg criminalized democratic rights such as strikes, political associations, the right to expressions etc.¹⁰⁹ It also adopted a retroactive criminal law to punish former officials of Emperor HaileSelassie.¹¹⁰
2. The directives of Derg issued on Hidar 3, 1967 (Oct 1974) established The Derg Investigation Department.¹¹¹

¹⁰² See SPO V. L/T Petros Gebere et al

¹⁰³ See SPO V. C/L Debella Dinsa et al

¹⁰⁴ See for example the evidences and counts in the SPO V. C/L Mengistu H/Mariam et al and SPO V. C/L Debella Dinsa et al

¹⁰⁵ See SPO V. Captain Legesse Asfaw et al

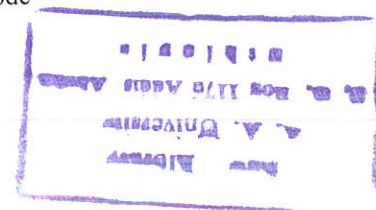
¹⁰⁶ The writer had an interview with an eyewitness in Gonder City.

¹⁰⁷ For instance in Mehalmeda Town more than hundred civilians arrested after the EPRDF forces retreated from the city with the allegations those detainees received or bought government property from EPRDF forces and they were elected for Peace and Stability Committee established by EPRDF forces. Finally huge amount of private properties of the detainees were confiscated and ten of the prisoners were executed. See SPO V. Major Semunigus Seyoum et al

¹⁰⁸ Discussion with the member of this Team in SPO

¹⁰⁹ See Proclamaition No.1/1974 Article 8 and the 1974 Special Penal Code

¹¹⁰ See Proclamaition No. 1/1974 Article 8 and the 1974 Special Penal Code



3. On Hidar 14, 1967 (Oct 1974) the General Assembly of Derg in Radio and TV announced that: "we have had said 'Ethiopia first without bloodshed'... Nevertheless execution taken to day and all similar executions that will be taken in the future against those who apposed the right and freedom of the broad mass and those cruel officials who made injustice should not be considered as measure taken against the innocents and we would not considered their 'blood 'as the blood of innocent human being."
4. On Hamlie 24/1968 (July 1976) the General Assembly of Derg passed a decision that orders EPRP, TLF, TPLF, ELF and EDU are the enemies and should be executed and denounced using government mass medias.
5. On Meskerem 22/1969 (September 12, 1976) the General Assembly of Derg passed a decision that order to further persecution and killings against members of the opposition political parties.
6. On Tikimt 17/69 (Oct 1976) the General Assembly of Derg passed a decision that order to further the execution of members of EPRP.
7. On Hidar 9/1969 (Oct 1976) the General Assembly of Derg passed orders giving power to itself to pass death sentence against members of targeted political groups. This decision had nothing but formalized all patterns Derg had practically been following since October 1974.
8. On Tahsas _1969, The General Secretary of Derg, Capitan Alemayehu Haile who was executed about a month latter due to his power race with C/L Mengistu H/mariam had issued a circular to members of Derg ordering them to execute or eliminate anti-revolutionaries who resided in the country-side.
9. On Megabit 9, 1969 (March 1978) the first Chairman of Derg, C/l Mengistu H/Maraim had issued "Operation Assessa Menter 1" order, which had 2243 armed strong forces, to hunt and execute any suspects of members of targeted opposition political groups. The term "Netsa Erimija" seems to stem from this Operation. Other two consecutive "Operation Assessa Menter" 2 and 3 succeeded this.
10. On Nehasie 21/1969 (August 27, 1978) the Derg General Assembly adopted Proclamation No 129/77 to establish the National Revolutionary Operation Command through out the country with the clear objective to destroy anti-revolutionaries.
11. On Meskerem 27/1970 (Oct 1978). The General Secretary of Derg had dispersed circulars ordering that the lower strata should not release any person detained in suspension of opposition membership before the General Secretary of Derg approved it.
12. On Tikemet 19/1970 (Oct 1978) "Assessa Netsa Ermija" (Free Search and Killing) Command No 1 was issued ordering the execution of members of targeted political groups using the government security and Army forces and the Revolutionary squads.
13. On Hidar 6/1970 (Oct. 1978) Derg gave an explicit order for all the organized revolutionaries to take executions in the name of Red-Terror. This order was transmitted in the mass Medias and through circulars or directives following the formal government structures and the National Revolutionary Operation Command down to the lowest administrative unit.
14. On Tir 13/1970 (Nov. 1978) Derg had issued an order for all institutions involved in the red-terror ordering them to submit twenty-four hour reports using the stretched structures as to their accomplishments and problems faced in their execution of the Red-Terror.¹¹²

¹¹¹ All the documents mentioned from 2-14 were produced as evidence in See SPO V. C/L Mengistu Hailemariam et al,

¹¹² See the SPO V. C/L Mengistu Hailemariam et al, Documentary Evidence. Those reports were taken from the Kebele, to Higher or Woreda, from Woreda or Higher to Awraja or City level UDA or the Ministry of Urban

3.2 Major Structures Used for the Gross Violations on Human Rights

3.2.1 Derg's Structures to Facilitate the Abuses: a Model to the Whole Structures

The crucial structure that planned, coordinated, begun and massively executed the gross violations of human rights was Derg itself. Derg organized itself in a manner that can facilitate the abuses. It acted as a lawmaker, a judge and executioner of death sentences it passed.¹¹³ Derg established a kangaroo court from itself when it wants to deceive the people.¹¹⁴ Derg used the Menilik palace not only as the office and residence of the head of state to receive foreign credentials, but also to illegally detain, torture, and hang up thousands. Derg design to carry out all the violations itself but when it could not cop up with the huge number of victims it planned to exterminate; it organized killing institutions in the lower strata with the model it had.

If we carefully compare the structures Derg used in the center and the structures to the lowest administrative unit, similar patterns and structures had been followed to commit the crimes. In this limited scope the writer could not be able to show all the structures Derg used to implement its violent policy. But, it is important and necessary to show some of the structures that were used as a model to the lowest officials' structures.

Derg commonly was said to have 120 members, but actually it had 109 members.¹¹⁵ Latter it had executed its own sixteen members due to the power race. Therefore, the remaining members were only 93.¹¹⁶ In order to facilitate its function as investigator, prosecutor, decision maker and executer, all its internal organizations had been established with this main objective in mind.

Derg had 93 General Assembly Members, 32 Central Committee Members elected from the General Assembly, 16 Standing Committee Members elected by the General Assembly from the Central Committee, and Sub-Standing Committees.¹¹⁷ The Chairman of Derg was the Chairman of the General Assembly and the Standing Committee. The sub-standing committees included: the Defense and Intelligence Affairs, Public Safety Affairs, the Prison Administration, the Information and Press and the Administrative Sub-Standing Committee.¹¹⁸

Development, From Awraja to Regional Administration, From Regional Administration to the Ministry of Interior, From Ministry of Interior and Urban Development to the Derg. All the files of SPO used these reports as evidence to show the participation of the higher officials. See for example SPO V. Hailu Burayu and et al

¹¹³ See Proclamation No. 2/ 1974 Article 6 and the General Assembly of Derg's decision on Hidar 9/1969 (Oct 1976), mentioned in section 3.1.4

¹¹⁴ The Special Military Court Special First Bench was a non-existence "court" in the name of which Derg had been passing death sentence. See evidences produced in SPO V. C/L Mengistu Hailemariam et al

¹¹⁵ See Documentary Evidences produced in SPO V. C/L Mengistu H/Mariam et al

¹¹⁶ See Documentary Evidences produced in SPO V. C/L Mengistu H/Mariam et al

¹¹⁷ See Proclamation No. 2 of 1974, A Proclamation to Declare the PMAC as Head of State and Head of Government and to Define the powers of the chairman of the PMAC and that of the Council of Ministers, Negarit Gazeta. 34th year – No 2 Effective date 15th day of September 1974; Proclamation No 27/1975, Provisional Military Government Establishment and Definition of powers of the PMAC and Its Chairman Proclamations Amendment effective dated 17th March 1975; Redefinition of Powers and Responsibilities of the PMAC and the Council of Ministers Proclamation 110/1976, Negarit Gazeta 36th year No. 13. Effective on 11 Feb 1977 (Yekatit 4, 1969)

¹¹⁸ See Documentary Evidence Produced in SPO V. C/L Mengistu H/Mariam et al; and See also Proclamation No. 129/1977 Article 5

Under the Defense and Intelligences Standing Sub-Committee, the Operation and Intelligence Department and the Guard Department were established. The Operation and Intelligence Department had the duty to take any operation within the country so as to detain or execute targeted political groups pursuant to the order given from the standing committee approved by the Office of the Chairman of Derg or the General Assembly. This Department had the duty to carry out any military strike against the suspects any where in the country.¹¹⁹

Under the Public Security Sub-Standing Committee the followings were organized:¹²⁰

1/ The Second Revolutionary Command which had the duty to gather information, hold investigation, and report its recommendation against the member of the targeted political groups within the different branch of the Army.

2/. The Derg Investigation Squad or Department, which had responsibility to gather information, hold investigation, and report its recommendations against the members of the targeted political groups within the civil society particularly in Addis Ababa and the surrounding Areas.

3. The Information Distribution and Analysis Committee¹²¹ had the Special Police Investigation Department and the National Intelligence Department. This Committee had the duty to gather information, to hold investigation and report its recommendation against the members of targeted opposition political parties through out the country using the intelligence, police and administrative channels. After July 1978, the Police Investigation Department and the Derg investigation department merged to the Central Investigation Department.¹²²

These entire three sub-Committees held investigation not in a normal way of what we commonly understand the term "investigation". Practically "investigation" means serious tortures against suspects to get confession of their membership and status in the opposition political party.¹²³ Their recommendation was simply to report that the "detainee is dangerous members of the targeted political party".¹²⁴ Both the decision makers and the person that recommended knew the penalty for persons leveled as "dangerous members of targeted political group". But there was not clear definition to this phrase that entails death penalty. As a result of which ordinary members who read the pamphlet of EPRP were also killed due to this leveling. The decision was usually execution or some times prolonged sentence.¹²⁵ The recommendations were addressed to the Derg Public Security Standing Sub-committee.¹²⁶ This Sub-Standing committee would add its recommendation and sent it to the G/Secretary of Derg.¹²⁷ The General Secretary of Derg in consultation with the Chairman and or to the General Assembly of Derg used to approve decisions including execution and prolonged sentences.¹²⁸ The Derg Operation and Intelligence

¹¹⁹ See Documentary Evidences Produced in SPO V. C/L Mengistu H/Mariam et al

¹²⁰ Id

¹²¹ Id. This committee was headed by C/L Tesfaye W/sellase, under Ministry of Interior; See the document evidences produced in SPO V. C/L Debela Dinsa et al

¹²² Id; IDAC was headed from the beginning until the end by C/L Tefaye W/Selasie, in different status or positions. He was the head of the Intelligence, and Ministry of Interior.

¹²³ See Documentary Evidences Produced in SPO V. C/L Mengistu H/Mariam et al

¹²⁴ Id

¹²⁵ Id.

¹²⁶ Id

¹²⁷ Id

¹²⁸ Id

Standing Sub-Committee usually executed the decisions.¹²⁹ Some times the Investigating Committee used to execute such decisions itself.¹³⁰

Derg was also directly involving in leading, organizing and facilitating the Red-Terror by being the member and chairman of the National Revolutionary Operations Commands: at the National Operation Council, Sector Commands, Regional ROCC, Awraja ROCC, Woreda ROCC, and Addis Ababa ROCC.¹³¹ At the national level for instance Chairman of Derg, Vice Chairman of Derg, General Secretary, Sub-committee of Military and Political Affairs, Sub-Committee of Defense Affairs, Sub-Committee of Public Safety Affairs were among the members of the National Operation Council.¹³² At the regional level, Representative of Derg members of every region were the chairmen of the ROCC established in their respective regions.¹³³

Latter, Derg had established branches of Central Investigation Organization in different part of the country. For instance, Central Investigation Organization was established in Awassa, Dessie, Mekele, and Asmara. Derg also used the worst and cruel detention and torture center known as “Bermuda”.¹³⁴ Derg trained Special Forces that stationed at Ras Asrate Kassa Compound to secretly hung thousands of opponents. These are only few of the permanent structures used by Derg. Derg also used to send temporary squads lead by its own members to exterminate opponents in different part of the country during different times.¹³⁵

3.2.2 Other Structures from the Center to the Lowest Administrative Units

Gross violations of human rights were systematically organized following both horizontal and vertical state structures. Vertically, there were Derg and all the state, mass organizations and party organizations at the center and their branches down to the Regions, Awraja, Woredas and Kebeles levels.

We have seen the structures of Derg at the center. At the center, there were also horizontal government institutions, which had been given responsibility to directly or indirectly involve in the violations. For example, one of the major repressive institutions was the National Revolutionary Operations Command that had the National Operation Council and the Sector Commands at the center. These two decisive bodies had power to coordinate, organize and give military support when the lowest ROCC requested support for the execution of the crimes. The government and mass organizations represented in these central and decisive bodies were (including the representatives of Derg discussed above):¹³⁶

1. From Government Offices (Senior Minister; Minister of National Defense; Minister of Interior; Minister of Foreign Affairs; Minister of Information and National Guidance; Regional Chief Administrators; Commander of the Armed Force within

¹²⁹ See Documentary Evidences Produced in SPO V. C/L Mengistu H/Mariam et al

¹³⁰ Id

¹³¹ See Proclamation 129/1977 Articles 3, 5, 7, 10, 15, 16, 19 and 20. This organ was established to lead, coordinate, decide and execute the red-terror on the national level to the lowest administrative units.

¹³² See Proclamation 129/1977 Articles 3

¹³³ See Proclamation 129/1977 Articles 3, 5, 7, 10, 15, 16

¹³⁴ See Documentary Evidences Produced in SPO V. C/L Mengistu H/Mariam et al

¹³⁵ See for example the squads lead by Major Getachew Shibeshie and Major Ali Musa as well as the different “Assessa” operations discussed in Section 3.1.1 above

¹³⁶ See Proclamation No 129/19 77Article 5 and 7

the sector; Commander of the Militia of each Region; Commissioner of the Police of each region; Cadre of the Military Political Affairs; Head of POMOA of each region; etc)

2. From Mass Organizations (POMOA, AETU, Ethiopian Patriot's Association, Women's Association, Youth Associations and Peasant Association, Militias or Revolutionary Squads)

Next to the center, ROCC were established at Regional, Awraja, Woreda, Addis Ababa Central UDA, and Addis Ababa Higher levels. The governmental institutions represented in these repressive institutions were: Representative of Derg at every administrative units as a Chair Person; Chief Administrators of each administrative units; Head or Representative of POMOA at all administrative unit, as Vice Chairman; Head or representative of the Police at each administrative units as member; Senior Commander or representative of the Armed forces stationed in the administrative units; a Representative of Ministry of Transport and Communications; Ministry of Agriculture and Settlement; Ministry of Health; Ministry of Interior; Ministry of Labor and Social Affairs; Ministry of Urban Development and Housing; and other representatives from other appropriate government offices located in the administrative units.¹³⁷

The Revolutionary Mass Organizations represented in these repressive institutions established in each administrative unit were: AETU (All Ethiopian Trade Union); Patriot's Association; Women's Association; Youth Associations; Peasant Association; Militias; and UDA (Urban Dwellers Associations).¹³⁸

The minimum numbers of members of the ROCC in each administrative level were: at the National Operation Council 25 members; at the five Sector Commands level from 23 to 32 members; at each Regional ROCC more than 25 members; at each Awraja ROCC more than 16 members; at each Woreda ROCC more than 16 members; at Addis Ababa city ROCC 12 members; at Addis Ababa Higher or Kefetegna ROCC 9 members.¹³⁹ One can multiple these numbers with the existing administrative units on each level and can visualize the numbers of persons suspected in the commission of the violations of human rights in Ethiopia.¹⁴⁰

The members of this committee at the national level include almost all the then highest national leaders such as head of state, C/L Mengistu Hailemariam. Even from the regional to district level, the members of these committees were the senior leaders or officials of government and mass organization on each respective administrative unit.¹⁴¹ These members were politically influential officials in their respective administration units. As a result, they have the power to mobilize the rest of the officials and leaders of government and mass organizations.

Furthermore, these committees established additional sub-committees that had responsibility to gather information about the opposition political members, to hunt and detain suspects, to torture and interview inmates, to guard prisoners, to recommend decisions to the main committee, to

¹³⁷ See Proclamation No 129/1977 Articles 3, 5, 7, 10, 116, 19, and 20

¹³⁸ Id

¹³⁹ Id

¹⁴⁰ In fact in its investigation SPO proved some of the ROCC were not involved in serious crimes. Further more in certain administrative units there was no violations for various reasons. The author had personally proved this as investigator and prosecutor as well as from his interviews Special Prosecutors

¹⁴¹ Id

execute the decisions of the main committee. For instance, the Addis Ababa Higher 16 ROCC had established six Sub-ROCC committees: Intelligence or Information, Operation, Investigation, Registration, Propaganda and Recommendation Committees.¹⁴² In practice, all leaders of UDA in the towns and Peasant Associations in rural areas; revolutionary squads and militias and other armed revolutionaries; leaders of the mass organizations and revolutionary men were fully participant on each administrative unit to execute the general plan to eliminate opponents.¹⁴³ For instance, in Addis Ababa all the 289 kebeles and 28 Kefetegnas had detention and torture centers.¹⁴⁴ The kebeles together with the Kefetegnas in Addis Ababa were involved in killings, tortures and illegal detentions during the red-terror.¹⁴⁵ Ministry of Public Works and Housing or Ministry of Urban Development had been given responsibility to organize and lead Urban Dwellers Associations.¹⁴⁶ UDA were established at all kebeles, Higher and City levels in all towns and cities.¹⁴⁷ There were 23 cities that had Central UDA, 90 cities where Higher UDA established, and 90 cities where one kebele exists.¹⁴⁸ UDA had also Revolutionary Squads under their Public Safety Committee. The numbers of members of Each Kebele UDA Polity Committee were not less than 15; each Higher UDA Council not less than 26; and each Congress of the Central UDA not to be less than 30.¹⁴⁹ The criterion for election was subscription to the Ethiopian National Democratic Revolution Program.¹⁵⁰

The Ministry of Urban Development had a department responsible to organize and arm revolutionaries in the kebeles and Kefetegnas.¹⁵¹ It also organized the Revolutionary Squads in the UDAs.¹⁵² It had transmitted all government orders of red-terror and Netsa Erimija. It monitored the executions of these illegal orders.¹⁵³ This department had heads from the high officials of Meson and the other political groups that supported or instigated red terror and Netsa Erimija.¹⁵⁴ The representatives of the Ministry played a decisive role in arming, organizing, leading, ordering and executing the red-terrors together with UDA in all the cities. The Ministry and UDA had also representatives in the ROCC, at Awraja, Woreda and in the Addis Ababa city level and Kefetegnas'.¹⁵⁵

In practice, in rural areas Red-terror was committed with the active participation of Peasant Associations and the Ministry of Agriculture.¹⁵⁶ Ministry Of Agriculture and Settlement or Ministry of Land Reform and Administration had been given the responsibility to lead and

¹⁴² See SPO V. Chief Tesfaye G/Giorgis, the 25th Documentary Evidence

¹⁴³ See for instance in Higher 16 Addis Ababa all the kebele officials were involving in the abuses lead by the Higher 16 ROCC.

¹⁴⁴ For instance see documents produced in SPO V. C/L Debella Dinssa et al

¹⁴⁵ See for instance SPO V. Ato Ergete Medebew et al

¹⁴⁶ See Proclamation No. 47/1975; and Urban Dwellers' Association Consolidation and Municipalities Proclamation No. 104/1976, Negarit Gazeta 36th Year No. 5, Effective date 20 Nov. 1976 (Hidar 16 1969)

¹⁴⁷ See Proclamation No. 47/1975 Articles 22-26

¹⁴⁸ Regulations to Provide for the Payment of Provincial Urban Land Rent and Urban House Tax Legal Notice No. 64/1979, Negarit Gazeta 38th Year No. 9 to be effective on 9th August 1973

¹⁴⁹ See Article 8, 10 and 16 of Proclamation 104/1976

¹⁵⁰ See proclamation 104/1976

¹⁵¹ See for instance Documentary Evidence in SPO V. C/L Debella Dinssa et al

¹⁵² Id

¹⁵³ Id

¹⁵⁴ For instance Ato Abera Yemaneab was head of this department. See Documentary Evidences in SPO V. C/L Debela Dinsa et al

¹⁵⁵ See Proclamation No. 129/1977, Articles 15, 16, 19, and 20.

¹⁵⁶ See for instance in SPO v. Ato Endale Amenu et al; SPO V. Major Demeke Hailemariam et al; SPO V. Major Kassaye Aragaw, and etc

organize Peasant Associations that were established through out the rural areas under Proclamation 31/1975.¹⁵⁷ The peasant Associations had similar number of leadership like that of UDA. Each Kebele, Woreda and Awraja Peasant Associations had also armed Militias like that of the UDAs.¹⁵⁸ The Peasant Associations and the representative of the Ministry were represented in the National Revolutionary Operations National Council, Sector Commands, and ROCC in Reginal, Awraja, and Woreda level.¹⁵⁹

Peoples Organizing Provisional Office (POPO) or Provisional Office for Mass Organizations Affairs (POMOA) was the main responsible body to organize and lead revolutionaries in the execution of Netsa Erimija and Red-terror.¹⁶⁰ They opened branches in every horizontal and vertical apparatus of the government structure and assigned cadres.¹⁶¹ This Office was also represented in the national Revolutionary operations command at National Operation Council, Sector Commands, and ROCC at Regional, Awraja, Woreda, Addis Ababa UDA, and Addis Ababa Higher UDA level.¹⁶²

In fact, the proclamation explicitly gave power to ROCC only to detain for three or six months without due process if the committee suspected some one to be anti-revolutionary. If it found evidence to prove its suspicion, it had to transfer the case to the court.¹⁶³ But, in practice they used to interpret some words of the proclamation as they are empowered to take any measure including extra-judicial killings. Almost all red-terror crimes were committed under the sponsorship of these committees.¹⁶⁴

ROCC was working in the office of the administrator of each administrative unit.¹⁶⁵ The budget for this purpose was allocated through the Administrations.¹⁶⁶ The Polices were usually the investigators of ROCC and hence most of the time the police stations were used as detention and torture centers.¹⁶⁷ The Prison Administrations were participated in detaining the victims and some times executing the decisions.¹⁶⁸ The security forces and Special Forces headed by C/L Tesfaye W/Selassie were the major institutions for these purposes.¹⁶⁹

Ministry of Defense was also one of the government institutions that were hugely involved in the violations.¹⁷⁰ Ministry of Defense as an institute was also represented for instance in the National

¹⁵⁷ See Public Ownership of Rural Lands Proclamation No.31/1975, Article 12-18

¹⁵⁸ See for instance SPO v. Ato Endale Amenu et al; SPO V. Major Demeke Hailemariam et al; SPO V. Major Kassaye Aragaw, and etc

¹⁵⁹ See Proclamation No. 129/1977 Articles 5, 7, 10, 15 and 16

¹⁶⁰ In almost all cases in the lower official trials the cadres of this office were the main perpetrators implicate by the investigations of SPO; Personal experience and observation from his investigation and from discussions from Special Prosecutors. So it is hard to find file where cadres were not charged and convicted in SPO's cases.

¹⁶¹ See Proclamation No. 91/1976 and Proclamation 119/77

¹⁶² See Proclamation No. 129/1977 Articles 5, 7, 10, 15, 16, 19, and 20

¹⁶³ See Proclamation No 129/1977

¹⁶⁴ It is difficult to find files that ROCC was not implicated in the crimes committed during the red-terror and immediately after the red-terror until 1980.

¹⁶⁵ Interviews with the witnesses and observation of the author, the documents the ROCC were using etc.

¹⁶⁶ Id

¹⁶⁷ Id

¹⁶⁸ See for instance the Omer Mohamed killing, See SPO V. Major Kassaye Aragaw et al

¹⁶⁹ See documents produced to prove this fact in SPO V C/L Debela Dinsa et al

¹⁷⁰ See for example Different "Assessa" operations launched by Derg; see the documents produced to prove this fact in SPO V. C/L Mengistu H/Mariam.

Revolutionary Command, Sector commands, and ROCC at the Regional, Awraja, Woreda, Addis Ababa and Addis Ababa Higher level.¹⁷¹

These and other structures were involved in the commission of the crimes. That is why the commissions of the crimes were said systematic, massive and complicated.

3.3 Patterns of the Commission of Gross Violations of Human Rights in Ethiopia

The crimes were committed following government bureaucratic structures or chains of commands and procedures. The day-to-day government bureaucratic procedures and the commissions of these crimes were almost the same.¹⁷² They used the government institutions assigned to government tasks.¹⁷³ For instance the drivers and the cars, the offices and materials, the finance and personnel were the same for committing this crime and carrying out the day-to-day activity of the government.¹⁷⁴

As normal bureaucratic functions, Derg was issuing many circulars, directives, orders, instructions, clarifications, and etc to facilitate the heinous crimes.¹⁷⁵ Trainings on how to torture and investigate were regularly given even by foreign experts.¹⁷⁶ Even the questions for interrogations were uniform all over the country. Every lower stratum had an obligation to transmit information he had got from the investigation. The central government used to update to all the structures about the current information on the targeted groups and their movements and tactics.

Normal government procedures like reporting, commanding, supervisions, budgeting, controlling, promoting, awarding, approving, etc were also applied in the commission of these crimes.¹⁷⁷ The chains of command of superior and subordinate were strictly followed within the government structures from the central government to the lowest Kebeles.¹⁷⁸ In a single incident or isolated crime, many institutions and individuals were implicated or involved. For instance, one group involved in arresting the victim, others in investigating, others in deciding, others in approving, and others in execution of the crimes.¹⁷⁹ There were many cases in which the Woreda, Awraja, Regional and National ROCC approved the decisions before it went to execution.¹⁸⁰

¹⁷¹ See Proclamation 129/77 Articles 3, 5, 7, 10, 15, 16, 19 and 20. This organ was established to lead, coordinate, decide and execute the red-terror on the national level to the lowest administrative units

¹⁷² All the SPO Cases cited in this paper proved this fact

¹⁷³ Id

¹⁷⁴ Id

¹⁷⁵ We have seen some of these norms or laws above in section 3.1 of this chapter

¹⁷⁶ See Documentary Evidences Produced in SPO V. C/L Mengistu H/Mariam et al

¹⁷⁷ All the SPO Cases cited in this paper proved this fact

¹⁷⁸ Id

¹⁷⁹ Id

¹⁸⁰ See for instance the Omer Mohammed Killing Case against which the Alaba Woreda, Haikochina Butajira Awraja, the Shoa Region ROCC and Derg directly involved and different charges brought against them. Similarly, the case of victims Ato Zeleke Shikur and Zeleke Haile passed the same channel of decision-making procedures. See SPO V. L/t Abera Aga et al

After the execution, the killers were required to set off the bullets they used following the regular bureaucratic procedures.¹⁸¹ These procedures once again required the approval following the chains of command from bottom to the Central government, Derg. This procedure, for example, was also fulfilled in many killings like Omer Mohammed's killing.¹⁸² Finally the bullets were set off as they were used for public services. When arms finished the killers used to request their superior extra arms for similar purposes. And the superior used to send extra bullets and arms for further killings without any complaint on the previous crimes committed and reported to them.

Some times, the superior requested their subordinates to clarify if some of their actions were in accordance with the general plan. Or the highest officials used to request the middle ones to clarify if the crimes committed by the lowest officials were following the general plan against the targeted political groups and the procedures designed or not. For instance, in the SPO V Ato Endale Amenu et al case, the Regional Administrator ordered for clarification if the killings of 13(thirteen) peasants by Peasant Association was following the government guidelines and if the victims were members of opposition political parties. The Awraja Administrator defended the case arguing that according to their political consciousness they were eliminating counter-revolutionary and hence they were in accordance with the guideline.¹⁸³

As we have seen above, there were rules that obliged the killers to report to their superiors following their chain of command till to the top, the Derg.¹⁸⁴ The Mass Medias also used to report the killings and justify the government abuses.¹⁸⁵ The media reports were mostly orchestrated as if the victims were killed in military operations.¹⁸⁶ The Mass Medias used to justify the abuses frequently. The perpetrators were immune and their participation in the crimes was seriously considered for promotion and reward.

All the patterns: detentions, investigations, decisions, approvals, executions and reporting needed huge number of human resources, detention centers, finance, means of transportations, per-diem etc. All this was covered by public funds. That was why Professor Cherif Bassiouni concluded that such massive, widespread and systematic crimes could not be committed without the direct or indirect participation of state institutions, personnel, and resources.¹⁸⁷

4. Consequences of the Horrible Gross Violations of Human Rights in Ethiopia

4.1 Loss of Lives

We can mention some massacres in Ethiopian history, but they were not committed systematically and massively in a cold-blood like the Derg/WPE.¹⁸⁸ Fascist Grazani killed many

¹⁸¹ See for instance the Omer Mohammed Killing and the evidence to prove the cases in SPO V. Major Kassaye Aragaw et al

¹⁸² See for instance SPO V. Major Kassaye Aragaw (Omer's Killing charge was brought at least in five charges: C/L Mengistu et al; C/L Debella et al; Major Kassaye et al; Ato Asheber Amare et al and at the Woreda level)

¹⁸³ This letter is produced as evidence in SPO V. Endale Amenu et al, and SPO V. Ato Hailu Burayu et al

¹⁸⁴ See section 3.1.4 of this Chapter

¹⁸⁵ See many similar reports to the press in SPO V. Gesges G/Meskel et al

¹⁸⁶ For instance all killings in SPO V Gesegess G/Meskel et al were against the detainees, but they reported to the Mass Medias as they have killed in military operation, or "Assessa".

¹⁸⁷ Cherif Bassiouni, Crimes against Humanity in International Criminal Law, (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1992) at 248-249

¹⁸⁸ See the first testimony, Ato Teshome G/Marima, in SPO V. C/L Mengistu Hailemariam. Ato Teshome G/Mariam, well illustrated how unprecedented were the heinous crimes committed during Derg /WPE.

citizens in hot-blood only for few days, but Derg continued its massacre against its own citizens for seventeen years. In the 21st century, Derg had massacred thousands of youngsters, women, and children, the old, religious men, etc usually after seriously tortured them.¹⁸⁹ All the victims against whom SPO charged were harmless since they were detained under their killers' control. The detention centers, even if no body sees, were said to be harsher than hell. Who can articulate the harsh realities than those who experienced them?

The members of the Derg, even used their recreation center, Ras Asrate Kassa compound for the torture and killings of well known personality such as Reverend Gudina Tumssa, the President of the Ethiopian Lutheran church, His Holiness Abune Tewflos, the Head of Ethiopian Orthodox Church, Ato Haile Fida and Dr Nigest Adane the leaders of Meson, Ato Brahane Mesekel Ereda one of the leader of EPRP etc.¹⁹⁰ Mengistu H/Mariam had built his offices over the grave of Emperor Haileselassie.¹⁹¹

Most of the killings were publicly committed. The bodies of the victims were thrown to the streets. The families were not allowed to bury the victims' body or to express their condolence. In some places, the families or the inmates were forced to walk over the body of the victims and to sing a song denouncing the victims and promoting the Red-Terror.¹⁹² There are victims who have lost more than three of their family members'.¹⁹³ Many thousands perished and hundred of thousands tortured, many hundred thousands illegally detained for prolonged time in devastating conditions. There were tragic horrors that were hard to believe that such crimes were committed by fellow human beings. Many pregnant women, old aged, religious leaders, physically disabled person, teenagers, etc were tortured to death, gun down, thrown to death in rivers and heals, hanged, burned etc. Many high level professionals and patriots of the country were killed. Many families of the victims lost their property, jobs, family, profession etc.¹⁹⁴ During the Red-Terror, other crimes were also committed such as arson, robbery, destruction of private property, abuse of power, rape, etc.¹⁹⁵

Different from the other campaigns, the Red-Terror was committed using huge structures of state and revolutionary mass organizations as well as extra-ordinary institutions that were formed at each level of administrative units. The structures had huge number of personnel to gather information, to hunt, to interview and torture suspects, to prepare recommendations, decide, execute killings, to guard prisoners, etc. that finally helped Derg to "kill a generation", as Babile Tola used the term. Families were obliged to pay money for the bullets Derg used to gun down their children in 1977 when they were peacefully demonstrating claiming for elected government.

¹⁸⁹ SPO had never brought charges for killings in crossing-fires. See all the files cited; Personal experience and Interviews with Special Prosecutors.

¹⁹⁰ See SPO v. C/L Mengistu H/Mariam et al, Particularly Opening Statement of SPO

¹⁹¹ See SPO v. C/L Mengistu H/Mariam et al, Particularly Opening Statement of SPO

¹⁹² For instance in Gurage Zone this was a common practice. Students were forced walk over the body of the victims. The members of the family of the victims were forced to start this. See the testimony of Solomon and others in SPO V Ato Gesgegn G/Meskel et al. See also similar practice in Fitch Town when more than sixty three victims were massacred in April 1978. See SPO V. Ato Abebe Melaku et al

¹⁹³ See for instance Ato Kebede Admasie who lost three of his children, SPO V. Major Desta Awlachew

¹⁹⁴ All the files of SPO have proved these tragic horrors and these truths were disclosed during the trials; See Books on the nature of the atrocities mentioned in foot note 5 and Heinrich Scholler and Paul Rietzke, Ethiopia: Revolution, Law and Politics (1976); James C.N Paul, Human Rights and the Structure of Security Forces in Constitutional Order: The Case of Ethiopia, 3 WM.& Marty Bill RTS, J. 1 (1994)

¹⁹⁵ See for instances the Charges of SPO V. Capitan Guta Tuji et al; SPO V. Ato Endale Amenu et al; SPO v. Major Semunigus Seyoum et al; etc

Those families who could not pay were denied the bodies, and Derg buried in the mass graves around the bushes of the city. Derg assigned person in the Menilik hospital who would check the dead from the alive and authorized him to finish the alive.¹⁹⁶ Hospitals became not a place where persons injured were to be supported but to be killed.

Whatever causes the perpetrators had, the manners in which they were committed those crimes disqualified their justifications. Such inhuman and barbarian actions were shame for the country, which claimed to have long civilization.

Derg had grossly violated human rights throughout its tenor. It is difficult to exhaustively enumerate those gross violations of human rights committed in the seventeen year. Even the SPO could not exhaustively record the violations committed. Different human rights organizations gave their estimation on the numbers of people that lost their lives during the Derg regime. The Human Rights Watch estimated only in 1977 thirty to fifty thousand people were executed without ever having charges brought against them.¹⁹⁷ The Anti Red Terror committee that collected information from the families of the victims estimated this number to be 150, 000 to 200, 000.¹⁹⁸ According to Rama Mani in Ethiopia alone 1.5 million lives lost as a result of red terror, forced relocation, villagization programs, famine and poverty.¹⁹⁹

SPO focused only on cases that have evidences to prove the perpetrators' participation beyond any reasonable doubts. As a result, if the killers of the victims were unknown or if there is no sufficient evidence to prove the crime, the prosecution was not interested to spend its scarce resource and time to find out all the persons killed during the Derg regime.²⁰⁰ For example, documents showed that many civilians, many soldiers, and war prisoners extra-judicially executed in the war fronts.²⁰¹ But the army is dissolved or dismissed as a result of which the prosecution could not prove its case. Even there were many cases in which the killings of victims were reported, but the data did not show the specific individual official responsible for such killings. Many persons lost their lives due to the forced relocation, and villagization programs. But, the prosecution found difficult to find evidences proving the criminal intent of officials beyond any reasonable doubts.²⁰² Due to this, the victims for whom criminal charges were brought were only insignificant portion of the total victims who lost their lives. Despite such limitations, the number of victims killed for whom the SPO brought criminal charges against the identified perpetrators are 12, 315.²⁰³

¹⁹⁶ See in SPO V Ato Zenebe Ayele et al. He is sentenced to life imprisonment.

¹⁹⁷ Yakob H/Mariam, *supra* note 11, at 678 citing Amnesty International, Human Rights Violations in Ethiopia (Dec. 1977)

¹⁹⁸ Yakob H/Mariam, "The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court", *Hastings Int'l & Comp. L. Rev.* Vol. 22 (1998-99) , at 678 citing Interview given by the Officials of Red Terror Victims Coordinating Committee, On Radio Addis Ababa, (Voice of Ethiopia Broadcast, June 28, 1993)

¹⁹⁹ See, Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press 2001), at 3

²⁰⁰ Interviews with the prosecutors

²⁰¹ *Id*

²⁰² *Id*

²⁰³ SPO report to the FDRE House of Peoples' Representative dated Feb.4,2010. See Table 1 at the end of this Chapter (III)

4.2 Traumas, Losses of Dignity, and Other Sufferings

Most of the survivors claimed they liked to be killed sooner than live in the Derg's detention center. Thus, many prisoners falsely confess to their "investigators" so as to be killed sooner than to be cruelly tortured. For example, in Addis Ababa Woreda 13 kebele 03, Beyene Haile had falsely confessed that he was a member of EPRP, and killed supporters of Derg. As a result, he was killed with other thirteen victims.²⁰⁴ The survivors testified that he falsely confessed only to avoid torture in favor of murder.²⁰⁵ In Higher 13 Kebele 06, a girl whose name is Fetelework Assefa threw her self in to deep latrine and lost her life in order to relieve herself from the cruel torture.²⁰⁶

In Selalie Awraja, torture victim, Sisay kebede has no word to express the cruelty he has received, and he is always crying whenever he is asked to tell the wrongs made to him.²⁰⁷ In Debre Birhan, Ato Getachew Sahele, torture victim, told this author that he wants to see his torturer day and night in the same place so as to see that one day they may recognize him as a human being. Fearing that they might be arrested and taken out of his sight, he resisted testifying against his torturers.²⁰⁸

In Shoa province, Sister Degnesh Antewan, who was around 13 years old in 1978 and whose father and elder brother killed, her sister tortured, her brother fled, and their home destroyed, testified to the trial how difficult it was to be a survivor at that time.²⁰⁹ Only her mother and she were left at home, which was later destructed by the killers. She told that the perpetrators used to come to their home, to the school or waited her on her way to check if she had felt about the killing and suffering of her family. They used to warn her not to portray any unhappy face. As a result, she testified to the court that she wished if she were a bird so as to fly on air not to meet the killers or to flee to the unknown place. That day all persons attending the testimony including the judges were crying with her. The court was interrupted for the moment until every body calmed down.

Many horrors, which touched even the perpetrators, were uncovered in the trials. It is difficult and would be out off time and space to discuss here all the horrors committed during that period. It is more difficult to find out the exact figures of victims of torture in the Derg repressive regime. First, the definition of torture does include not only those who suffered physical pain but also those who suffered mental or physiological torture.²¹⁰ Even the ordinary citizen who was forced to walk over the dead body of their closer relatives or any human being was victim of torture. All persons who saw the horror of the day are victims of torture. It was common at that time to see every morning the body of human being thrown in the street, the blood sacked by dogs, the skull broken and the brain spread over the road and the revolutionary guards terrorizing the passers-by. Therefore, it is difficult not only to put the exact number of persons tortured but also to identify the types of traumas citizens suffered in that period. But, to create some clue to

²⁰⁴ See for instance the testimonies of Afework Tefera in the 13th count, in SPO V. Ato Zenebe Ayele

²⁰⁵ Id

²⁰⁶ See testimonies on the 27th count in SPO V. Ato Zenebe Ayele et al

²⁰⁷ See SPO V. Ato Abebe Melaku et al

²⁰⁸ See SPO V. Ato Abebe Melaku et al

²⁰⁹ See the Testimony of Sister Degnesh Antewan, in SPO V. Geseges G/Mesekel et al

²¹⁰ See Article 281 (a) of the 1957 Penal Code and see also for observation the types and methods of torture as Retrieved from "<http://en.wikipedia.org/wiki/Category:Torture>" and Retrieved from http://en.wikipedia.org/wiki/List_of_torture_methods_and_devices

envisage the figures of victims of tortures in the detentions center, it is important to highlight the numbers of detention and torture centers in Ethiopia during the red-terror. For instance, in Addis Ababa only there were detention and torture centers in all the 289 Kebeles, 25 Kefetegnas, 5 police stations, Office of the Derg, Central Investigation Organization, Bermuda, Different Units of the Army, etc. These detention centers were by themselves places designed for maximum trauma for prisoners even without physical torture. The detention centers were not capable of accommodating large number of prisoners. They were not also built for such purposes. In most of these detention centers, prisoners had no place to sleep. Some of them had to stand or sit down while others sleep. There was no enough water and food. Almost all the prisoners were wounded and medical treatment was not allowed. So, there was bad smell and infections of wounds. The prisoners were humiliated. The first thing detainees were forced to do was to walk on their barefoot in front of the public. The prisoners were forced even to walk over the body of their colleagues and to sing song denouncing their political party and their colleagues. They were also forced to beat each other. Hence, one can safely conclude that all the detainees were victims of torture at that time. To create some clues as to the number of persons detained and as a result suffered mental or physical torture two samples are selected, one from Addis Ababa and the other from Deber Birhane.²¹¹ In 1978 there were 241 persons detained in Debre Birhane among them 221 were male and 20 were female.²¹² They were arrested in the Debre Birhan Awraja Police Station, and POPO (POPOA) office.²¹³ In 1978 the numbers of persons illegally detained in Addis Ababa kefetegna 16 were 384 persons among them male were 300 and the females were 84.²¹⁴ One can multiply this number of victims in a given detention center to the where detention centers that existed in each administrative units. One can imagine how difficult for such huge numbers of prisoners to get necessary accommodation even if the perpetrators humanly wished to provide. So the condition of the prisons was by itself intended to torture them.

The SPO could not prosecute all the torture cases committed throughout the regime. The number of victims of torture and serious bodily injury for whom SPO brought criminal charges against the identified perpetrators are 4181.²¹⁵

4.3. Destructions of Rule of Law, Accountability and Democracy

The Derg regime did not only commit illegal detention, torture, forced disappearance, extra-judicial extermination, expropriation or destruction of private property of persons suspected to be members of the opposition parties,²¹⁶ and etc. Derg also destroyed long established tradition, moral values and rule of law in the country. The prohibition to bury or express condolence to their beloved family and friend, to walk over the deceased body, to force families of the deceased to sing a song and to get social services such as Idir and pension,²¹⁷ etc were against the tradition of the society that has been long established in Ethiopia. The fragile rule of law and human right

²¹¹ See SPO V. Ato Abebe Melaku et al

²¹² Id

²¹³ Id

²¹⁴ See SPO V. Chief Tesfaye G/Giorgis et al

²¹⁵ SPO report to the FDRE House of Peoples' Representative dated Feb.4, 2010 (Tir 27, 2002). See Table 1 at the end of this Chapter (III)

²¹⁶ See for instance cases in SPO V. Ato Hailu Burayu et al; and SPO V. Capitian Guta Tuji

²¹⁷ Idir is a community base social service. When a family or relative of a member of Idir died, the Idir will pay money to express their affectionate and to remunerate some costs. All Idirs were ordered by Derg not to pay to the families of anti-revolutionaries. Interviews with thousands of victim families during investigation

that used to exist even in the absolute monarchy were denied and weakened during the seventeen years of military dictatorship.

The way of committing crimes created fear on the society. The society felt insecure and lost confidence in state institutions. There are still many people who do not want to see the road to kebeles, which were the major scene of killings, tortures and illegal detentions. The majority of the people that witnessed the horrible massacres became phobia to politics. They developed fear to stand for their own and for others rights. Many people do not want to cooperate for persons in uniform.²¹⁸ People became indifferent for their rights and the business of the government. Those youngsters who fought with stone to their freedoms against fully armed dictators would now advise others not to “touch politics and electricity.”²¹⁹

The fear for Derg still exists even after it was over thrown. Many witnesses showed fear to confront their torturers in the courtrooms. A witness in Federal High Court who was testifying against the accused of Higher 22 was asked to identify them in person. He gently saluted many perpetrators but failed to name them. The author, who was the bench prosecutor, asked the witness if he knew those persons. He hesitated. The writer continued his question, if he did not know why did he salute them? Finally, he testified that he knew all of them in the detention center while they were torturers against victims including him. He then confessed to this writer in private that he hesitated because he still feared them. This is only one example among many similar incidents. Even there were victims who failed to cooperate with SPO in fear of the elements of the Derg.

Derg did complicate the political crisis it inherited. If the situations were favorable and democratic and human rights were properly respected, the situation that existed in time of the Emperor could have been improved rather than worsened. But, Derg was even unable to retain what it had succeeded from the Emperor. Those political forces that were banned or persecuted for their peaceful political struggle went to the forest to fight repression and oppression. Since there was no peaceful means of resolving political conflicts, the only possible way was military confrontations. The civil war in Ethiopia was intensified due to the repressive rules of Derg. The liberation movements, which were fragile at the beginning of the revolution, were strengthened by the killings, tortures, lack of democracy and injustices of the Derg regime. The liberation movements won majority support mainly due to the violent policy of Derg rather than their political causes.²²⁰

All this shows that Derg did not improve democratic and human rights. The day Derg usurped power; it banned any forms of peaceful political struggle, which practically served to over throw the Emperor.²²¹ This prohibition never lifted till Derg was overthrown. Derg did not only proclaim prohibition, it also used its strong force in an unprecedented way to crush any peaceful political oppositions.²²²

²¹⁸ SPO had witnessed these experiences. People do hesitate to give information when police in uniform request for information; Personal Observation in the investigation and prosecution.

²¹⁹ Personal observation

²²⁰ Personal opinion; Most of the liberation fronts and EPRDF itself got much support at the later stage when the repression of the Derg worsened.

²²¹ See the details of these prohibition in Section 2 of this Chapter (III)

²²² See the whole discussion in Section 3 and 4 above of this Chapter (III)

In the time of the Emperor and before that if an individual requested a person or an official to stop in the name of the Emperor or the law, he would not hesitate to respect that request. But, this tradition had been violated. Every Kebele chairman or Revolutionary Squad or “revolutionaries” were given the full authority to kill a person if they simply suspected him to be member of the opposition. Even there is a rumor that C/L Debela Dinsa had said: “We established thousands of kings by avoiding one king.” This is, because, some of them even tried to transgress their delegations of power. Hence, the rule of law was highly obliterated in this regime.

Courts were paralyzed since they do not have power to review the cases of the persons arrested on suspicion of being “anti-revolution”. Any authority could order the court to close the files and transferred the case to him. There are many victims executed in this way in different parts of the country. (Sidamo, Gonder).²²³ Many judges and prosecutors were involved in the extra judicial killings.²²⁴

It is not exaggeration to say that the police and security institutions were almost fully involved in the violations of human rights. Police stations were the major places where tortures against political enemies were carried on.²²⁵ Police members undertook illegal detentions, illegal executions and inhuman tortures. The police investigated both the ordinary and political crimes. They sent the ordinary crimes for ordinary prosecution while they sent political “crimes” for political decisions.²²⁶ Police investigators were promoted or selected not for their professional tasks but based on their political partisanship.²²⁷ The security forces were also the main instruments of suppression.²²⁸ Derg in the latter stage forced most of the judges, prosecutors, and polices to be members of WPE. In General, the rules of law and the judicial institutions were weakened during the Derg regime. Therefore, in May 1991 the Transitional Government of Ethiopia that replaced the Derg/WPE regime after fierce military confrontation for nearly seventeen years was faced with reckoning such legacies. In the next chapter we will see the available choices of the TGE to deal with these problems.

Table 1 Victims for Whom Charges were Brought and Proven in the Trials

	No. of Victims for whom SPO Filed Charges	No. of Victims Proven in Court
Killing	12, 315	9,546
Torture	2,681	1,687
Serious bodily Injury	1,500	1,500
Total	16,496	12,733

²²³ In SPO V. L/t Petros Gebere some 20 victims were being tried by the Sidamo High Court, in which Ato Wolde Amanueal Dubale was a presiding judge; but upon the order of the Derg member their case was withdrawn and all the victims were executed. Similarly in Gonder in SPO V. Major Melaku Tefera case the Gonder High Court in which Kegnasmach Zewdu Asfaw was a presiding case, many victims case was withdrawn from the court and executed by the ROCC

²²⁴ To mention only some cases in SPO V. Geseges G/Meskel et al a judge of the Woreda; in SPO V. Ato Tadesse Taye et al a judge of the Awraja Court; in SPO V. Major Desta Awlachew et al prosecutors and Supreme Court judge were convicted for genocide crimes. There are many lawyers involved in this crime.

²²⁵ Personal observation from the investigation and trials and interviews with other Special Prosecutors

²²⁶ Id

²²⁷ Id

²²⁸ See for instance evidences to prove the crimes committed by the security forces in SPO V. C/L Mengistu H/Mariam et al and SPO V. C/L Debela Dinessa et al.

Chapter IV

Choices of TGE: Prosecution, Truth Commission, Amnesty or Others

1. Introduction

In chapter II, we have discussed the concept of transitional criminal justice, its challenges and the experience of other countries; the debates for and against different tools of transitional criminal justice; the variables that practically influence the choices of transitional criminal justice and the limitations and possible alternative means of reducing the impact of prosecution. In Chapter III, we have seen the major injustices that were committed by the Derg/WPE regime that raised the idea of transitional criminal justice when the TGE had promised to transfer the country to democracy in 1991. In this chapter we will try to address as to what ought to have been done to the heinous crimes committed in the Derg/WPE regime.

Since 1991, TGE and its successor government are claiming that Ethiopia has been in transition towards democracy. Like any country in similar political transition, Ethiopia has faced serious challenges on the issue on what to do about the past injustices. As we have seen in Chapter III above Ethiopia has experienced serious political crisis that are not yet completely solved. Ethiopians have long history of statehood but we are not yet embraced the traditions of peaceful political transitions. We Ethiopians are not yet lucky enough to see transfer of state power via a ballot box. The tradition, beliefs or cultures of violence and guns are not yet fully ruled out of the mind of the oppositions, the powers in government and from the majority of our society.¹

There are debates and doubts if Ethiopia is in transition to democracy or simply shifting from one authoritarian regime to another. This question may raise serious debates if the transition from Derg/WPE to TGE is transition to democracy and consequently if such successor trials are one of the measures of transitional justice in the strict sense of the concept of transitional justice discussed in Chapter II Section 2 above. This might need to have an overview of the whole political dialogues that is still going on among the contending parties, human rights activists, and the government.

Nevertheless, as we have discussed in Chapter II Section 2, the concept of transitional justice do not need to entertain and evaluate whether a country is fulfilling the objective criteria of democracy. It has been pointed out that political scientists even do not agree on what the objective criteria should be. Besides, transition to democracy could not be determined by some successes or failures. We have said that democratization is a process that may take long time and can face many ups and downs and even failures before it consolidates. Therefore, as we have discussed the concept in detail in Section 2 of Chapter II, it is not relevant to discuss all the success and failures of democratization process in Ethiopia for the purpose of the issue at hand.

The TGE promised to respect human and democratic rights when it took power after prolonged military confrontation with Derg/WPE regime.² Ethiopian political transition has faced, as Sheri

¹ This has been mainly witnessed in the 2001 election where the first competitive democratic election has been finally resulted in bloodshed. As a result, many people lost their lives. These days were the shocking days for the country that entered serious commitment not to repeat similar violation when it decided to put into trial those who had participated in the killings of the May-day peaceful demonstration against the Derg government.

² See the Transitional Charter, which endorsed the Universal Declaration of Human Rights as component part of the charter, the supreme law of the transitional period, which were substituted by the 1995 FDRE Constitution.

Berman noted from similar experience of other countries many “turmoil, conflict, and even violence”³; nevertheless we have not yet lost hope that present day government would completely ignore its promises to build democracy in Ethiopia. At the beginning, for instance, Jemal Benomar stated: “A Transitional Charter was adopted in August 1991 as a constitutional framework intended to introduce multiparty democracy, ensure respect for the rule of the law, and guarantee fundamental human rights and independence of the judiciary. The National Charter explicitly recognized the Universal Declaration of Human Rights’ as the ‘supreme law of the land.’”⁴ All the promises enshrined in the Charter, as Jemal Benomar expressed, imply that TGE has committed itself to shift the country from military authoritarianism to democracy.⁵ The 1995 Constitution has also recognized fundamental democratic and human rights.⁶ Many other democratization processes can be mentioned, some practical limitations remain, however. Though many may allege this government has gone out of the right track of liberal democracy, but the government still is claiming that it is still consolidating democratization processes. Similar dialogues on similar other countries that are categorized as in the process of third wave democratization processes showed that we should not yet lose hope.⁷

Thus, this paper need not to evaluate if some objective political criteria to democratization in Ethiopia are fulfilled or not. For the purpose of addressing the concept of transitional criminal justice, it is satisfactory if the TGE or its successor continued purporting to protect human rights and democratic values and actually starts some democratization processes. One of such measures is the decision of the TGE to prosecute the perpetrators of gross violations of human rights. In any way, as we will see in detail in the following section and the summary of this paper, successor trials against state sponsored crimes would contribute in the democratization process of this country.

Having this in mind, we will briefly discuss in this chapter the background and context of political transition from Derg/WPE to TGE that influenced positively or negatively the choice of the TGE. In addition to this, we would try to evaluate other factors that influenced the choice of TGE. We will also discuss and evaluate other alternative choices and debates against the TGE’s choice of full prosecution.

2. The Practical Situations or Variables that Influenced the Choice of the TGE

In Chapter II section 7 above we have seen that despite the academic and legal arguments of whether to forgive and forget past injustices, the practical national and international political contexts play influential roles on the choices of transitional criminal justice mechanisms. The balance of power between the old and the new political forces is the decisive factor that actually determines the countries choice among prosecution, truth commission and amnesty.⁸ Other

³ Sheri Berman, “How Democracies Emerge: Lessons From Europe,” *Journal of Democracy* V. 18 No. 1 (2007) at 30.

⁴ See Jamal Benomar, “Justice After Transitions” *Journal of Democracy* Vol. 4 No. 1 at 12

⁵ Though TGE had been charged for the violations of human rights by the oppositions and human rights activists in different times, nevertheless such limitations or weakness could not reverse this statement. See the discussion in Chapter II section 2. Ethiopia is also leveled as one of the country in transition to Larry Diamond, “Is the Third Wave Over?” *Journal of democracy*, July 1996 PP 20-37 as reprinted in *Comparative Politics Annual Editions* 00/0118th Edi. (Oushkin/McCrow Hill: USA, 2000,

⁶ See Article 8-47 of the 1995 FDRE Constitution

⁸ See all the discussion in Section 7.1 of Chapter II; Among the authorities that support this statements are Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of

factors that may influence the choice of a successor regime are: the nature of violence; duration of atrocities; public support; democratic tradition; civil or human rights organizations; experience of civil societies; individual fears inherited from the dictatorial regimes; judicial and democratic institutions; the attitudes and beliefs of new leaders and political parties; involvement of new forces in the past atrocities; and others.⁹ Therefore, we will see some of the major factors that helped or influenced the TGE to choose prosecution rather than amnesty or truth commission.

2.1 The Transitional Situations and the Balance of Powers

In May 1991, Derg was forcibly overthrown by the joint EPRDF and EPLF military operations. EPLF controlled Eritrea while the forces lead by EPRDF controlled the rest of the country. One of the first actions of the TGE was to dismantle completely the past repressive regime's army, security forces, police and Workers Party of Ethiopia and to arrest thousands of officers and high officials from these institutions.¹⁰

The TGE forces captured some of the security, intelligence, and party files that helped the TGE to purge persons implicated in these repressive institutions of the previous regime. The TGE established Peace and Stability Committee from among communities in each lower administrative unit. The TGE forces together with Peace and Stability Committee initiated the investigation on human rights abuses by using the information gathered from captured documents and from the victims families established in the name of "Anti-Red Terror Committee". The investigation and mining of these documents and arresting of suspects of the crimes committed in the name of Red-Terror continued to each lower administrative unit in a very alarming speed. The disclosure programs and the excavation of mass graves by human labor and machines were reported daily by the government Mass Media. For the families who were silenced for seventeen years even not to loudly cry for their beloved relatives that time was considered as fond of hope. This process helped the TGE that came from the rural fighting to strengthen its supporters in the cities and places that it was not operating.¹¹ To the contrary, some of the supports of the Derg/WPE regime that used to exist at the initial stage of the revolution was eroded due to the injustices it had committed, the wrong policies it adopted, the famine and poverty that worsened due to the wrong policies, the hit-one-another policy, the concentration of power from the military junta to a single person, C/L Mengistu H/Mariam and from many revolutionaries to selected colleagues of C/L Mengistu H/Mariam.¹²

Oklahoma Press, 1991), at 215; Alexandra Barahona De Brito, Carmen González-Enriquez, and Paloma Aguilar, Ed. "Introduction", *The Politics of Memory: Transitional Justice in Democratizing Societies*, (Oxford: Oxford University Press, 2001), at 11-20; Yasmin Sooka, "Dealing With the Past and Transitional Justice: Building Peace Through Accountability", *International Review of Red Cross*, Vol. 8 No. 862 (318-319), at 311-325; Eric A. Posner and Adran Vermeule, "Transitional Justice as Ordinary Justice", *Chicago Public Law and Legal Theory*, Working Paper N0.40 (The Law School of the University of Chicago, March 2003) at 16

⁹ Alexandra Barahona De Brito et al, *supra* note 8, at 11-20; see also Yasmin Sooka, *supra* note, (318-319), at 311-325

¹⁰ *Id*

¹¹ In his formal discussion with many victims of the Red-Terror this writer observed that they joined EPRDF due to this disclosure programs and the TGE's decision to prosecute the abusers.

¹² See for example what Dadimos Haile considered favorable conditions for the TGE to select Prosecution, See Dadimos Haile, "Accountability for crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia", *Leuven Law Series* 2000, (Leuven University Press, Belgium 2000) at 32-33

In the middle, there were political forces that opposed both the Derg/WPE regime and TGE. Among the groups include political forces that were organized in the name of 'Amarach Hailoch Mikerbet'. Those forces were indifferent to the prosecution of Derg/WPE due to their political differences with the EPRDF.¹³ They particularly opposed the TGE policy towards Eritrea and the "ethnic federation" set up in the country. However, they did not explicitly oppose the prosecution of Derg/WPE officials for the crimes they had committed against its members. They were actually indifferent and some among them argued that EPRDF lead government is not morally the proper one to prosecute the Derg/WPE officials.¹⁴

Therefore, there was no serious organized political opposition against the decision to prosecute. Rather the individual members of these oppositions were in practice on the side of the trial.¹⁵ Despite some allegation of TPLF's involvement in the persecution of EPRP, EPRDF has strong position on the prosecution of Derg/WPE's crimes against EPRP and other targeted political groups. Therefore the internal political situations were and are still in favor of prosecution.

2.2 The International Situations

The international political situations from 1991-1992 were highly in favor of prosecution against gross violations of human rights.¹⁶ As we have mentioned in section 3 of Chapter II above, this period was the time during which the socialist block was disintegrating. Therefore, it was golden opportunity for their western counterparts to see socialist authoritarianism buried deep and liberal democracy flourish with clear demarcation. Prosecution is the first choice to attain this objective. So, the TGE's choice of prosecution has got substantial support from the international community. To mention only some example, on November 30, 1991, the African Watch wrote a letter to the then President Meles Zenawi which partly reads as:¹⁷

" --- In our view, the most important means of securing accountability is for the government to undertake a careful and systematic effort to disclose and acknowledge the abuses of the past including--- to the extent possible---the identities of the victims of practices of gross abuses and of those with the highest level of responsibility for committing such abuses. In addition to espousing disclosure of the truth about past abuses, we urge that those who committed such abuses --again, particularly those with

¹³ See for example Yakob H/Mariam, "The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court", *Hastings Int'l & Comp. L. Rev.* Vol. 22 (1998-99), at 678 at footnote 52. Dr Yakob mentioned that when EPRDF called national conference on July 22, 1991 to establish Transitional Government composed of representatives from several political parties and political ethnic organizations, EPRDF intentionally excluded EPRP, AESM (Mesion) and others.

¹⁴ Id; See also Dadimos Haile, *supra* note 12. The writer observed from the informal discussions and sources that the major reasons for their opposition were based on two points. The first one is EPRDF prosecuted Derg/WPE for its political violence against EPRP while EPRDF it self excluded EPRP from political participation in the TGE and FDRE. The other ground is that EPRP alleged that EPRDF itself involved in the persecution of EPRP particularly during the conflicts between these two parties in Assimba, Tigray.

¹⁵ Professor Asrat Woldyes, who was detained in the present government, was fully cooperative to give his testimonies against the Derg officials who were also his prison colleagues at that time. He was one of the people that opposed the EPRDF's policy towards Eritrea during the Transitional Conference to Establish TGE in July 22, 1991.

¹⁶ See the discussion and authorities in Section 3 of Chapter II

¹⁷ African Watch's letter dated November 30, 1991 to the then TGE President, Ato Meles Zenawi. This letter was copied and faxed from Professor James Paul to Dr. Todd Howland the then legal adviser of SPO on September 3, 1993. The letter had detailed advises for the TGE as to what laws and legal principles should be applied in the investigation and prosecution of Derg Officials. (The copy of this letter is in the hands of this author.)



the highest level of responsibility for the most severe abuses—should be brought to justice. African Watch welcomes your commitment to bring those suspected of human rights abuses during the previous regime to trial, before an independent court, with due process of law, and in the presence of international observers. We believe that such trials are important, for several reasons: ---”

International legal experts were sent from Carter Human Right Center to help the SPO. Among them were Dr. Todd Howland¹⁸ and Professor Rodolfo Mttarollo¹⁹ and other legal and technical experts such as Matthew Pritchard, Libi, Landelson and others. Many countries extended their support for the prosecution of Derg officials materially, morally and by sending delegates and experts to share their experience on the subject. Among the countries are Sweden, USA/Carter Center, Netherlands, Canada France, and Denmark.²⁰ Internationally acclaimed scholars on international criminal law also forwarded their expertise, opinions and shared their experiences to SPO staffs. For instance, Professor Cherif Bassiouni and Professor James C. N. Paul advised SPO on what laws should the Derg officials be prosecuted. On the letter dated September 3, 1993 the latter scholar said that,

“The gist of my recommendation is that I think the SPO’s Office should consider very seriously charging many of these suspects with crimes under International Law. The reasons for this include considerations of practicality and efficiency as well as establishing precedents and policies which may be of the utmost importance in respect to the transition and the establishment of a rule of law in Ethiopia that makes clear its determination to criminalize all future Dergue-type regimes.”²¹

M. Pierre Truch, the then Attorney General of France and the Head Prosecutor for the French Government in the War Crimes Trial of Klaus Barbie, and the representative of French Government on the UN’s International Criminal Court made an official visit to the SPO to extend his support for the prosecution and share his experience. On March 3 and 4, 1994 Mr Truch and his colleagues from France gave lectures to SPO on international laws, French laws, the cases of Klaus Barbie, the great trials of Post WWII in France, etc.²² Similarly, the then Attorney General of USA made official visit to SPO to express his government’s support and share his experience.²³ These could be enough to show how strong the supports from the international community for the prosecution were.²⁴ As we have mentioned in Section 3 of Chapter II, the international trends in the beginning of 1990’s were also from general amnesty towards truth commissions and prosecution.

¹⁸ Todd Howland was one of the experts group sent from the Carter Center for Human Rights, after SPO he had been working in the ICTR and now he is working as Representative High Commissioner Human Rights in Democratic Republic of Congo

¹⁹ He was an expert in International Law. He was also the then advisor to the Argentina Junta Trial.

²⁰ See SPO, Report on February 1994

²¹ Professor James C. N. Paul, the letter written to Todd Howland the TGE SPO, dated September 3, 1993 (The writer have the copy of this letter)

²² The writer participated in these lectures and had made private discussions with these expertises. They were in support of the Prosecution of the Derg officials. See the internal Memo on this subject dated on 28/ 2/94 from Todd Howland to the SPO Staff. The writer had the copies.

²³ Though the writer forgets his name for the time being, he had private discussion with this authority on the process in his Office.

²⁴ There were many visits and supports to the Prosecutions, but the scope of this paper would not allow the writer to mention all of them here.

2.2 Other Factors that Helped or Influenced the TGE to Choose Prosecution

We have said that the nature and duration of the atrocities is one of the variables that may influence the choice of transitional criminal justice tools. For example, the crimes committed may be ordinary crimes or state sponsored, systematic and massive. In the latter type of crimes, the choice of the successor regime would not be free, as many victims are involved, the pressures from national and international community would not be easy. Furthermore, the international laws put serious obligations to prosecute such crimes.²⁵ State sponsored crimes by their nature and magnitude would cause serious individual and structural injustices and the failure to correct such injustices would hamper not only the individual victims but also the national and consequently the international peace, security and development. Such type of crimes would also create serious challenges in investigating, prosecuting and trying.²⁶ If the atrocities are committed in secret, truth commission might be appropriate tools to disclose the truths.²⁷ However, if the atrocious crimes are committed in public amnesty and truth commission may not be appropriate choices.²⁸

The crimes committed during the Derg/WPE regime were not of the sort that any successor government could easily convince the victims and their survivors to forget and forgive. As we have tried to highlight the major atrocities in chapter III, they were unprecedented in the country's history. These crimes were state sponsored and involved state personnel and institutions. They were committed under the umbrella of positive norms and state ideology. Therefore they were of international crimes that the TGE were not free to forgive and forget, as they never happened.²⁹

Most of the crimes were committed in public.³⁰ The victims and survivors knew the actual wrong doers. The perpetrators and the victims usually lived as neighbors. Thus, unless similar violent measures were taken to silence the victims at that time, it could not have been easy to give amnesty for the notorious criminals of the red-terror.³¹ The number of victims was so enormous that if the government turns them a deaf ear on their demands and concentrates on other problems of the transitions, it could have faced a political risk. The major support for the transitional government in the cities came from the victims, the victims' families and survivors of the Derg/WPE regime.³² If TGE chose not to prosecute but give amnesty to the perpetrators, it would have lost this support. The disclosure programs also helped TGE to eliminate elements of Derg from public institutions. The disclosure programs furthermore fueled the anger of the victims. Unlike other socialist countries like USSR³³, the crimes were committed within only less than two decades. Therefore, the grievances were fresh for the victims. In such conditions,

²⁵ See the discussion in Section 4, 5.1 and 6.2 of chapter II

²⁶ See the general discussion in Section 4, 5.1 and 7 of Chapter II

²⁷ See the discussion on Section 5.3.3 of Chapter II

²⁸ See the discussions in Section 5.3.1-5.3.4 and 7.2 of Chapter II

²⁹ See the discussion on Chapter II Section 5.1 and Chapter III

³⁰ See Chapter III for the details of the nature and magnitude of the crimes committed in the Derg/WPE Regime

³¹ The writer observed that the pressure of the anti-red terror committee was strong during the investigation, and prosecution. Every time the prosecution decided to give bail, the committee was strongly demanding the office the justification for such decisions.

³² The writer had observed from his intensive contacts from the victims and victims families.

³³ In some socialist countries the successor government had faced the prosecution of crimes committed before 50 and 60 years. See Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press 2001) at 37

as we have seen in the literatures discussed in Section 6.2 above, it would have been difficult for the TGE to decide to forget and forgive as never had happened.

Public support and democratic tradition are also other factors that determine the choices of mechanisms of transitional criminal justice.³⁴ Since Ethiopians witnessed the cruelty of the crimes committed during Derg/WPE regime and the public disclosure programs further consolidated such public knowledge, there was no clearly manifested opposition from the largest population against prosecution of the Derg/WPE regime. Rather, the public was cooperative in the investigation and prosecution of those officials.³⁵ For instance, except the family of suspected detainees in the transitional period,³⁶ there was no single incident where the people went to demonstration opposing the detention or prosecution processes.³⁷ Even the family of the perpetrators and the perpetrators themselves were cooperative to the trial process.³⁸ In fact there were many victims and eyewitnesses who feared the Derg/WPE repressive institutions and even the dispersed officials.³⁹ Though there were no other civil societies before and during the fall of Derg/WPE, the Anti-Red Terror Committee that was established in 1991⁴⁰ played a significant role in creating fertile conditions to organize the victims and their supporters to seek to justice.⁴¹ The role of this committee and the families of the victim organized under the umbrella of this civil organization was extraordinarily important to the prosecution processes.⁴² They were the ones who helped SPO to detain suspects, to search for witnesses, to find out documentary evidences, to summon witnesses, etc.⁴³

The attitudes and beliefs of the new leaders and political parties as well as their involvement in the past injustices would also play important roles in the choices of transitional criminal justices.⁴⁴ Literatures underlined such a factor has played important roles both in the negative or positive. For example, in Argentina, South Africa, Mozambique and other countries, this factor

³⁴ See the detail discussion in Section 6 Chapter II

³⁵ The experience of the writer and the interviews and discussions with SPO staff; with these sources the author is certain to witness that the cooperation of the largest public including the suspects themselves was enormous. Had such cooperation were not existed, the process would have taken much time than it has actually took. The people were cooperative in informing the fugitives, producing evidences, giving testimonies etc. There are many occasions, in which the family of the suspects informed the address of the fugitive for this author. This shows that there was public support for the process particularly in the countryside. Hence this author would have been questioning if the cities are less cooperative due to the mixture of cultures and beliefs.

³⁶ Jemal Benomar, *supra* note 4, at 12

³⁷ *Id*

³⁸ Personal observation of this author in his deep involvement in the prosecution process

³⁹ For example in the SPO V. L/t Desta Awlachew one torture victim feared to give the names of the victims in the hearing of the trial. He was asked to show them physically. He went to the suspects and simply saluted them. When he was asked as to where he knew those accused, he told to the court that they are the one who tortured him. And he confessed that he knew their name. Latter this writer asked why he did that and he told him that because he was afraid of them. One victim in SPO V. Chief Tesefaye G/Giorgis came to the office of the writer to tell him that he feared them to testify in front of them. Having seen his fear the writer has agreed with his proposal, not to take him to the court. Many victims still fear men in uniform. And they became suspicious of every thing.

⁴⁰ Interview with the members of Anti-Red Terror Committee

⁴¹ Personal Observation and discussion with the Special Prosecutors

⁴² The writer had witnessed that in many cases he has investigated and prosecuted and he has got similar observation from the interview of other prosecutors.

⁴³ Personal experience of the author and discussions with Special Prosecutors

⁴⁴ See as to the general discussion and literatures supporting this view in Section 6 of Chapter II

played important role in selecting and maintaining tools of transitional criminal mechanism.⁴⁵ The Ethiopian government chose prosecution. Does that show the forces or leaders of the TGE were not involved in the past atrocities? This is a question that raised serious doubts and that needs detailed research. Nevertheless, the leaders of the TGE usually showed their strong commitment for prosecution in their public speech⁴⁶ and practical actions.⁴⁷ One of those actions is their decision and consistency on the prosecution of the former regime.⁴⁸ However, there is criticism going around alleging that TPLF itself was involved in the execution of members of EPRP in 1976 in Assimba, Tigray. This criticism went further that it is due to this fact that the EPRDF-led government did not give power to prosecute crimes committed by other forces than officials and collaborators of Derg/WPE.⁴⁹

Proclamation No. 22/1992 authorized SPO to investigate only crimes committed by Derg/WPE officials and their collaborators, not against all parties involved in the commission of crimes. This provision of the Proclamation was criticized as partial alleging, for example, that member of EPRPE who were involved in killing the elements of the Derg and members of EPRDF who were also involved in the killings of members of EPRP or Derg were not subject to investigation and prosecution by SPO. Hence, they argued that it is victorious justice that holds criminally responsible only those who lost the war.

Nevertheless, it is important to note that unlike the Derg officials and their collaborators, members of EPRP, EPRDF and other oppositions were not and are not given the privilege of impunity. If there were cases and evidences, the ordinary prosecution both in the previous regime or the present government had un-waived power to prosecute. There might be practical constraints for the prosecutors. That is always the nature of prosecution. So, when such practical constraints removed the law would be at place. In any way, such criticisms could not validly serve to discredit the TGE's decision to prosecute against those who committed gross crimes with impunity. Even such failure to hold accountable certain groups could not legitimately justify amnesty for others who involved in gross violations of human rights.

The capacity of judicial institutions is also one of the factors that determine the choices of transitional mechanisms.⁵⁰ Prosecution requires competent and independent judicial institutions to provide fair trial. Like any other country in transitions, judicial and democratic institutions in Ethiopia were weakened or delegitimized during the transition. But such limitations were not properly deliberated by the TGE when it decided to prosecute against all suspects for all crimes

⁴⁵ See chapter III Section 3 and 6

⁴⁶ The defendants in SPO V. C/L Mengistu H/Mariam et al repeatedly rose in their motions that Leaders of EPDRF in their public speech leveled them criminal and should be punished. They collaborated their arguments with many public speech of the then President, Prime Minister and other officials. See SPO V. C/L Mengistu H/Mariam the defendants' preliminary objections.

⁴⁷ As a member of the prosecution office I witnessed that the leaders of EPRDF were always in support of the trial process.

⁴⁸ The leaders of TGE, who are still in power, never hesitated in their stands of prosecution against the previous officials. This was reflected in many instances. For example in the 2001 election campaign there was a dialogue among political parties on this issue, I observed that EPRDF had strong position on prosecution.

⁴⁹ I have heard this argument in some private discussions. See also the argument by Firew Kebede Tiba, "The Mengistu Genocide Trial in Ethiopia", *Journal of International Criminal Justice Access* Published online on April 23, 2007, (Oxford University Press, 2007), at 13

⁵⁰ See the discussion in Chapter II Section 7

committed for seventeen years. This is the main point of criticism to the Ethiopian choice of full prosecution that will be discussed in Section 4 of this Chapter and Chapter V in detail.

3. Debates on the Choice of TGE: Prosecution, Truth Commission or Amnesty

In chapter II above, we have seen that during transition to democracy there are strong debates among policy makers, academicians and the general public on what to do about the past heinous crimes. In that discussion, we have seen the debates from three angles: 1) from international law, 2) from conventional purposes of punishment, and 3) from just transition.⁵¹

We have seen that both human rights and humanitarian laws place strong duty over state to prosecute and punish gross violations of human rights.⁵² As we have said, Ethiopia is a party to most of such international laws.⁵³ We have seen also that there are no moral arguments that justify amnesty for crimes against humanity. Since Ethiopia was not in a state of serious national threat not to prosecute; the TGE had no legitimate excuse not to prosecute the gross human rights violations committed by the previous regime. Ethiopia has an international responsibility and obligation to investigate, prosecute and punish those found guilty of gross violations of human rights.⁵⁴

Taking this international duty into considerations and the advantages of the total destruction of the police, security and military forces of the Derg regime, the Transitional Government of Ethiopia decided to prosecute and punish all persons implicated in the crimes committed during the repressive Derg regime. Proclamation No.22/92 endorsed this decision of TGE. Jemal Benomar views this decision as: “Ethiopia is the first emerging democracy in Africa to make a firm commitment to prosecute those accused of human rights crimes under the old dictatorship.”⁵⁵

The Preamble of the Proclamation has underlined that “... heinous and horrendous criminal acts which occupy a special chapter in the history of Ethiopia has been perpetrated against the people of Ethiopia by officials, members, and auxiliaries of the security and armed forces of the Derg-WPE regime.” And this proclamation as well as other laws provides duty on the SPO to investigate and prosecute and the courts to hear the trial and pass judgment impartially based upon international and national laws.⁵⁶

Now, the trials are being completed. But, there are still arguments that criticize the decision of the TGE to persecute. The criticism can be categorized in to two: those that oppose prosecution and propose amnesty or truth commission and on the other side those that oppose full prosecution and propose alternative for full prosecution. The first group raised their arguments or debates in the defense motions, public and private discussions.⁵⁷ Their arguments stem from the experiences of other countries that chose amnesty or truth and reconciliation commission to deal

⁵¹ See Section 5 of Chapter II

⁵² Section 5.1 of Chapter II

⁵³ Id

⁵⁴ See all the discussions and the source of such obligations in section 5.1 of Chapter II.

⁵⁵ Jemal Benomar, *supra* note 4 at 12

⁵⁶ See Proclamation 22/1992 and Proclamation 23/21992 that established Central High Courts in the transitional period.

⁵⁷ See the whole discussion in Section 1 of Chapter IV

with their past injustices. These alternatives have their own supporters, which argued criticizing other choices and justifying their own choice as appropriate to just transition to democracy. The Ethiopian experience could not be different from such reality. Hence, it is important to assess the arguments and counter arguments of these alternatives of transitional criminal justice in Ethiopia. Their arguments and counter arguments are based on what they considered the objectives of transitional justice should be. Transitional justice is justified in view of peace, truth, justice, reconciliation, rule of law, accountability, reparation of victims, respect for human rights and democracy.⁵⁸

The other criticism stems from the weaknesses or limitations of the capacity and competency of the judicial institutions to carry out the full prosecution of complex and huge crimes committed by Derg/WPE regime. This criticism has a well-established and framed argument by academicians in Ethiopia. Literatures are available on this second criticism.⁵⁹

Hence, in the following sections the debates of whether TGE should have decided to prosecute and punish or forget and forgive or whether the TGE should have decided full prosecution with its weak judicial institutions or should it find other alternative prosecutions to limit the impact of the limitations eternal to prosecution and to the Ethiopian practical contexts will be discussed.

3.1 Is Prosecuting Derg/WPE Backward Looking only?

Similar to the general discussion we have made,⁶⁰ there are views, which oppose prosecution in Ethiopia as backward and retributive.⁶¹ They argue that all those that came into power in Ethiopia were focusing on denouncing the past rather than concentrating on the future. They argued that Derg was discrediting the Emperor while it was committing the worst human rights violations. They continued their argument, similarly, EPRDF discredited in the disclosure programs and prosecuted the Derg officials to disown the past while it involved in the same violation of human rights. The supporters of this view proposed to totally forget and forgive the past and concentrate only on the future.⁶² They argued the TGE should not reopen the wounds of the past and escalate conflicts within the society. This, according to them, retards the peace and democracy of Ethiopia. The advocates of this idea argued that TGE raised this issue to unnecessarily divert the peoples' opposition against the EPRDF's ethnic policy and its own violations of human and democratic rights. They also argued that Ethiopia should forget the past evils and be unified to build democracy and better society with the participation of all parts of the society. Those who had this view advocated forgetting the past, as it has never happened without even discussing about the injustices committed.

⁵⁸ See for example Andreas O'Shea, *Amnesty for Crimes in International Law and Practice*, (Netherlands: Kluwer Law and Taxation Publishers, 2002), at 23 and Yasmin Sooka, *supra* note 8, at 311-325

⁵⁹ See for instance in general Mehari Redai, "Revisiting the Ethiopian 'Genocide' Trial: Problems" *Ethiopian Law Review*, V.1 No. 1 August 2002; Dadimos Haile, *supra* note 12; Firew Kebede Tiba, *supra* note 49, in general; Yakob H/Mariam, *supra* note 13 all of them supported selective prosecution. Ato Mehari Redai and Dr Yakob suggest that selected prosecution to be complemented by disclosure of the truth; for the full discussion of this see Section 4.2 of this Chapter IV. Dadimos Haile also suggested selective trial without explaining how to select. See section 4 below of this chapter.

⁶⁰ See the discussions in Section 5.3.1 of chapter II

⁶¹ This writer did not find a literature on such arguments. But from the personal contacts of the writer, he observed that many people oppose the prosecution in Ethiopia on these grounds. Many persons privately expressed such views to the writer while he was in the SPO.

⁶² Andrew Valls, "Racial Justice as Transitional Justice", *Polity*, V. 36 No.1 (Oct 2003): 53(19), at 2-3

But, can those who suffered from the heinous crimes really forget their sufferings in the past? Can those who lost their beloved family members forget their grievance without justice served? Could the wounds of those who lost every thing in the past be healed without the truth uncovered and the perpetrators held accountable? As we have discussed in section 5.3.1 of chapter II, it would be difficult to answer those questions in the affirmative. Those who did not suffer had no moral right to argue in the names of the victims. We cannot easily bring peace and better future for those who were living together with their tortures or killers of their closer relatives unless some justice has been done.

Therefore, in order to build better society the wounds of the past should be healed. We have to secure that the same perpetrators or others who are currently in power would not commit similar violations.⁶³ It is necessary to level the playing field of democracy to make a clear demarcation between the repressive and democratic regimes, to establish rule of law and accountability, to establish reconciliation, peace and security to the society.⁶⁴ TGE prosecuted Derg officials mainly to give due notice for those in power that crimes would not pay, that similar violations would not occur in the future. There might be violations incidentally committed everywhere and every time. Criminal law is always passive that it would not appear in the scene of the crime to physically prevent the perpetrators. The perpetrators commit crimes using the advantage of their temporary balance of power over the victim. The same is true for religious rules. For instance, to kill a person is prohibited by the rules of every religion. Nevertheless, religion cannot totally or physically prevent this crime. One of the purpose of criminal law or punishment is to give due notice for others not to commit crime and to warn that if they commit they will be punished. For those who are duly advised they would not commit. For those who could not be advised the punishment or suffering will come one day in the future. So, the argument that EPRDF is also committing crimes do not logically serve as proper justification not to prosecute and punish crimes committed in the Derg/WPE regime.

The major purpose of transitional criminal justice is not primarily to prevent incidental crimes committed by the government officials.⁶⁵ Ordinary crimes exist both in the democratic and repressive regimes. The main characteristics of repressive regimes are that the crimes are systematic, widespread and state sponsored.⁶⁶ It was also true to the crimes committed in the Derg/WPE regime.⁶⁷ Such crimes were committed with the privilege of impunity from the Derg/WPE regime that naturally had a duty to prevent and punish perpetrators. Those officials that committed serious heinous crimes were not subject to criminal or political responsibility. Rather those crimes were the main criteria for promotion and appraisals.⁶⁸ The crimes committed during the Derg/WPE regimes were supported by the law, ideology and public

⁶³ See the arguments in Section 3.3.2 below. See also the arguments of Professor James C. N. Paul *supra* note 21.

⁶⁴ See for example the arguments of Andrew Vallys, *supra* note 62, at 1-18

⁶⁵ See the discussion in Section 4 of Chapter II for the detail discussions on the type of crimes committed in the repressive regimes and Chapter III to the Ethiopian realities.

⁶⁶ *Id*

⁶⁷ See the discussions on the nature and magnitudes of the crimes committed in the Derg/WPE regime in chapter III

⁶⁸ Derg had established Medal Commission to reward. Those that were selected for reward were those who were actively participate in the Red-Terror and other campaigns to oppress oppositions. Even to be a WPE party member; this contribution was the major criteria. See the WPE party forms used as evidence in *SPO v. Ato Zenebe Ayele et al*

institutions.⁶⁹ For most of the majority of the people, such crimes were considered as legitimate state actions.

So, by punishing both state officials that created the laws and ideology to commit serious crimes and the subordinate that committed crimes following such “laws” and “ideology”, we are mainly focusing on the future that similar atrocities will not be committed by state officials and the ordinary citizens. The state officials should be aware that they should take due care not to give illegal orders or to enact illegal “laws” that permit violations of human rights recognized by the international laws. The ordinary citizens should also draw lesson that such illegal “laws” would not immunize from criminal responsibility. So, punishing the Derg/WPE officials has the purpose not mainly to correct the past wrongs and punish perpetrators, rather it is to lay down unmistakable line for better future, respect of rule of laws, human rights and democracy in Ethiopia.

3.2 Clear Separation or Concession with the Repressive System of Derg/WPE Regime?

We have mentioned literatures in section 5.3.2 of Chapter II that supported the idea that democracy is the best form of modern government. Therefore the major dilemma in transitional justice is how to realize the transition from illiberal to liberal rules.⁷⁰ Thus the main justification for the advocates of amnesty and truth commission was that the practical political reality in certain country is difficult to realize transition to democracy unless clear concession of amnesty is given for the elites of the repressive regime. We have said that in such cases preference should be given to peaceful transitions than punishment.

But, the Ethiopian reality was different.⁷¹ There was no force that seriously threatened the TGE and its transition to the new system of government.⁷² So, the TGE could attain both peaceful transitions to democracy and prosecution without any potential threat from the elements of the past. Therefore, the argument for amnesty on this ground is not sound to the Ethiopian reality at that time. And hence, since there was no political necessity to negotiate with the officials of Derg/WPE to realize peaceful transition, the argument for truth commission or general amnesty could not be supported on this ground. In such situations, the TGE could not have been justified on the necessities of realizing peaceful transition to democracy. So, if TGE were to choose amnesty or truth commission for the heinous crimes committed by the Derg/WPE regime it could be criticized by the supporters of prosecution as unlawful and arbitrary decision against the international law and the rights of the victims.

Punishing past injustices has a purpose to establish democracy, accountability, the rule of law and respect for human rights⁷³ by drawing a line between the old and the new by denouncing past state violence, disavowal of past wrongs, correcting of wrongs in the broader society and there by liberating the successor regime from state’s past evil.⁷⁴ Prosecution helped to avoid the

⁶⁹ See the discussions in chapter III

⁷⁰ Ruti G. Teitel, *supra* note 33, at 28

⁷¹ See Chapter III

⁷² See the discussion in Section 2 of this Chapter

⁷³ For Example See Ruti G. Teitel, *supra* note 33, at 27- 30 and 66-67; Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *The Yale Law Journal*, Vol. 100, No. 8, (June 1991) (2537-2615); and Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1992)

⁷⁴ Ruti G. Teitel, *supra* note 33, at 27- 30 and 66-67

possible threat of the forces of the Derg regime from attempting to retake power through violence by riding off the armed and security force in the new transitional government.⁷⁵ If the TGE had chosen amnesty or truth commission, it would not have also claimed other advantages of prosecution enumerated in Section 5.3.2 of Chapter II.

In Section 5.3.2 of chapter II we have discussed that amnesty is against the principles of rule of law and accountability. Hence, when we support amnesty or truth commission we mean that we are supporting some of the traditions of impunity to continue in the new regimes. We have seen that the heinous crimes in Ethiopia were supported by the norms of the government and were considered as legal. The prosecution helped to change this view and to establish that such system of government was illegitimate and should be held accountable.

We have discussed that positivist support amnesty since they believe that the acts committed in the repressive regimes are supported either by the explicit or implicit norms or laws of the repressive regime. The positivists argued that the acts committed under the repressive laws should not be prosecuted or punished.⁷⁶ Surprisingly the Ethiopian courts and the defenses⁷⁷ were trained by Professor Andargachew Tiruneh who has adhered to the positivists' arguments.⁷⁸ He argued that the acts to which the Derg/WPE officials were prosecuted and punished were legal under the norms of the previous government of Ethiopia. Professor Andargachew concluded in his remark to judges that:

“---these laws (Proclamation 1 and 2/ 1974 and 108 and 110/1975 that suspended and replaced the 1955 Revised Constitution) had the character of basic law which gave validity to the permissive and coercive normative order of the time. --- The one thing is, Derg was not, “criminal” for the simple reason that it has not been proved guilty of any crime in a court of law. What is more, I doubt whether it will ever be. I am not privy to what the SPO has installed. However, if it is going to prosecute under the 1957 Penal Code of Ethiopia, it is individuals, not organizations, which appear liable to criminal prosecution.”⁷⁹

⁷⁵ See Jamal Benomar, *supra* note 4, at 4 See the other advantage of prosecution in establishing democracy in clear line in Section 5.3.1 -5.3.4 of Chapter II

⁷⁶ See Section 5.3.2 of Chapter II

⁷⁷ Ato Abate Degene, the then Head of the Public Defense Office, on his interview with the writer on Yekatit 27, 2001

⁷⁸ What is surprising is that the courts, which are expected to have a balanced knowledge on different views, were not given this chance. At that time they should have been given the chance to know opposing views, the naturalists and the international law that invalidate sovereign laws that permit the violations of international human rights and humanitarian laws. And when we see the reasons the court applied in rejecting the preliminary motions of the accused, the judges seem to have been influenced by this view. They applied mostly strict interpretations of the positive laws of the Derg/WPE regime.

⁷⁹ Andargachew Tiruneh, “The Lectures to the Ethiopian Courts on the 1974-1991 Atrocities and the Law,” as cited by Rodolfo Mattarollo, Legal consultant to SPO, Special Prosecutors Office, Internal Memorandum, on Some Preliminary Remarks about ‘the Lectures to the Ethiopian Courts on the 1974-1991 Atrocities and the Law’, 29 August 1994 unpublished. (This author had the copy of this memorandum) The international legal advisor for the SPO, Professor Rodolfo Mattaralo, had responded for this lecture given by Professor Andargachew. But, to the knowledge of this writer such opposing argument was not given to judges until the prosecution was able to actually litigate based on international laws to which Ethiopia has a duty not to violate even using her national laws.

As we have discussed in detail in Section 5.3.2 such views of the positivist is rejected by the international principles to which Ethiopia has obligation to be abided.⁸⁰ Hence, for the naturalists and the international laws the rule of law and human rights are inseparable. They support and put obligation to prosecution against the repressive regime to denounce their traditions of violating human rights or giving impunity for violators of human rights under the umbrella of “positive law”.

We have seen above that Derg had been using all government apparatus and mass organizations to commit such huge and complex crimes.⁸¹ Derg issued many government orders, circulars, official speeches, proclamations, and oral orders to commit the crimes.⁸² The killers and torturers were praised and promoted while those who were not cooperative to repression were not favored.⁸³ The innocent citizens were illegally detained, tortured and killed for the mere facts that they peacefully opposed the military junta and claimed that the democratic rights be respected.

Those undemocratic practices and traditions ought to have been denounced clearly. We need transition from repressive to democratic form of governance in Ethiopia not simple change of dictators. To establish permanent peace and development in Ethiopia, such transition requires the establishment and strengthening of the values and norms of democracy. Among such values, the rule of law and accountability are the corner stones.

If the TGE negotiated against prosecution in the pretexts of peaceful transitions; the old force that had been abusing human rights in Ethiopia could have got the chance to continue working in the public institutions with similar practices. The old forces may retain some guarantees that would impede some democratic reforms. As a result, it would promote some undemocratic practices and violations of human rights to continue even in the new regime.⁸⁴ But, today even if there are violations, no body would consider them as legal like the previous regime.

Trials are important to norm stabilization. When compared with the norm stabilization, the verdict is merely of secondary importance.⁸⁵ The victim and the victim families are more interested to see their violators be held criminally responsible than the degree of penalty imposed against them.⁸⁶ Trials serve to establish a principle that no body is above the law, that every body is equal before the law.⁸⁷ The rule of law incorporates both substantial and procedural justices such as equality before the law, respect for fundamental rights and freedoms, fair and public hearings by independent and competent courts, due process of laws, legal and political

⁸⁰ See the full discussion as to the sources of this arguments in section 5.1 and 5.3.2 of Chapter II

⁸¹ See Chapter III Section 3.2

⁸² See Chapter III Section 3.1.4

⁸³ See Chapter III Section 3.3

⁸⁴ Paloma Aguilar, “Justice, Politics and Memory in Spanish Transition” in Alexandra B. Brito et al ed. “The Politics of Memory: Transitional Justice in Democratizing Societies, (Oxford: Oxford University Press, 2001), at 92-119

⁸⁵ Pierre Hazan, “Measuring the Impact of Punishment and Forgiveness: A Frame Work for Evaluating Transitional Justice”, International Review of the Red Cross: Humanitarian Debate: Law, Policy, Action (Vo. 88 No. 861 March 2006), at 32

⁸⁶ The author’s discussion with many accused; And An interview with one of the victim and who was one of the leaders of Anti-Red Terror Committee, in Shoa, Chebona Gurage Zone

⁸⁷ Ruti G. Teitel, supra note 33, at 29

accountability of state officials and etc.⁸⁸ So, the Derg trials would help to stabilize such norms. Even Derg officials became the witnesses as to the importance of human rights, the rule of law, and independent and competent judiciary. This was proved from their consistent arguments in the trial.⁸⁹ This would be also a good lesson against those who are and who would be in power in the future in this country.⁹⁰

Rule of law needs strengthening of judicial institutions. Prosecution stimulates the courts into action; contributes to the improvement of the image and legitimacy of judiciary; puts basic reforms on the agenda; and helps to deepen the value of democracy.⁹¹ The prosecution of Derg/WPE regime was the first serious challenges both in its kinds and magnitudes to the Ethiopian judiciaries in the history of the country. So, this challenge would help to draw lessons and to take necessary measures to reform the judiciaries, to increase its capacities and to improve or reform the personnel in the judiciary. On the other hand, this lesson could not have been drawn if TGE had chosen amnesty and truth commissions.⁹² If the TGE were choosing amnesty or truth commission all these limitations and weaknesses of the judiciaries would not have been exposed.

As Samuel P. Huntington mentioned it, there cannot “be real growth of trust, no ‘implanting’ of democratic norms in the society at large; and therefore, no genuine ‘consolidation’ of democracy.”⁹³ The principle of accountability implies political and criminal liability for state officials. If the violators of gross and heinous crimes committed in Ethiopia left unaccountable and perpetrators were allowed to go free the survivors and victims would also lose confidence on the new government. Therefore, prosecution in Ethiopia could show serious commitment to the respect of rule of law and would serve to draw a clear line that even officials should not trespass in the future. If TGE chose amnesty and truth commission, these theoretically well-established principles and valid arguments of scholars would not have been clearly established in the courts of law. In Ethiopia the trials gave lessons that temporary power would not relive from criminal responsibility. What relives more is, it is when the government officials respect rule of law and human rights. Derg might not guess that the civil violence and students’ movements would one day get military strength to defeat its strong army.

Amnesty or truth commission is nothing but failure to prosecute and punish those who grossly violated human rights. Failure to prosecute will encourage the culture of impunity and the recurrence of similar and some times more complex violations.⁹⁴ Amnesty will give moral support for repetition of similar injustices.⁹⁵ It would also fail to incapacitate or reform perpetrators. It would not hinder perpetrators even for shorter time from taking public offices. Thus, the perpetrators might have used this opportunity to threaten the reform towards accountability and the rule of law.

⁸⁸ See the detail discussion and literatures that support this statement in section 5.3.2 of Chapter III

⁸⁹ See for example SPO V. C/L Mengistu H/Mariam, the Preliminary Objections of the Defendants

⁹⁰ See the achievements the Derg/WPE trial with this respect in the Summary of this paper

⁹¹ See the discussion and the sources of authorities in Section 5.3.2 of Chapter II

⁹² Paloma Aguilar, *supra* note 84, at 92-119

⁹³ Samuel P. Huntington, *supra* note 8, at 214

⁹⁴ Gerhard Werle, *Principles of International Criminal Law* (UK: Cambridge University Press, 2005, at 30.

⁹⁵ See the abuses of human rights due to failure to hold accountable against those responsible for abuses of human rights in Section 5.3.2 of Chapter II

Therefore, the TGE's choice of prosecution is by far the proper decision than amnesty or truth commission to establish clear precedents on rule of law, accountability, and democracy as well as protection of human rights in Ethiopia.

3.3 Truth and Justice or Truth Only?

One of the dilemmas in transitional justice is whether to establish the truth of the past and acknowledge the wrongs done to the victims or "let bygones be the bygones".⁹⁶ We have seen that Derg had caused many direct and indirect injustices. Many thousands of citizens lose their lives, property, job and family in their struggle for the respect of democratic and human rights in Ethiopia. For instances, the main difference between EPRP and Derg was not the political line they alleged to follow. It was EPRP's claim for provisional popularly elected government rather than military junta (Derg). This was legitimate question that even Derg had promised in September 12, 1974 when it assumed political power provisionally. Derg had also promised to adopt constitution that would respect human rights when it suspended the 1955 Constitution. Therefore, by no means the question of EPRP was illegal or illegitimate. Nevertheless, in order to justify their wrongs Derg and its collaborating parties falsely blamed EPRP. Using the government mass medias, Derg and its collaborating parties stereotyped their propaganda to deceive the people that members of EPRP were "anti-revolution," "enemy of the country", "anarchist", "anti-people", "supporter of secessionist," "anti-unity", "against the nationalization programs", and etc.⁹⁷ The media during that time continuously stereotyped many lies and myths to humiliate also other victims on similar grounds.

The victims had no chance to tell the truth about the falseness of the propaganda of Derg and the correctness of their political agenda. Rather those illegally detained and tortured members of EPRP were forced to falsely blame EPRP and its political agenda. They had to lie against their party and their colleagues to save themselves. And some members were also forced to torture and kill their colleagues in order to save their lives.⁹⁸ They had been forced to denounce their beliefs in front of public gatherings and through Mass Media.⁹⁹ The victims had also suffered a lot to the extent that majority of the people might not know the details. The same is true for other targeted opposition political groups. Many people were persuaded to doubt if the fighters of EPRDF were really human beings until they saw them in May 1991.¹⁰⁰ This was due to the orchestrated propaganda made by the Derg/WPE regime. This is the characteristic of repressive regimes that do not allow opposing ideas to be publicly discussed. As a result victims of

⁹⁶ See the detail debates on these opposing views in Section 5.3.3 of Chapter II

⁹⁷ Yasmin Sooka, *supra* note 8, at 318-319

⁹⁸ There were many incidents of this kind. For instance in SPO V. Ato Zenbe Ayele et al case a victim was forced to torture his colleagues. Capitain Teshome Lorenzo who was a member of EPRP was forced to kill his uncle, Kedir Hegeyane who was also considered as anti-revolutionary. See SPO V. Gesegesse G/Mesekel et al

⁹⁹ This is one form of torture during Derg/WPE regime. Many members of EPRP had been tortured since they refused to denounce. They preferred to be physically tortured rather than denounce their political beliefs. For example in SPO V L/t Petros Gebrie a victim called Mister, who was the residence of Yirgalem city in Sidama have been suffered serious torture and finally killed. She was telling loudly to her killers that EPRP is right even when they were shooting her to death. See an Eye witness testimony in the SPO v. L/t Peros Gebre et al

¹⁰⁰ The writer observed many people in the streets of Addis Ababa who went out of their house in mass to clear their doubts. If it were for democratic rules, the people could have the chance to know the physical personality and political agendas of all contenders for powers. As a result in democratic societies the people would be informed in advance the political agenda of each contender, and the personality of the would be leaders, which would serve to support what they wanted and to refuse what they do not want.

Derg/WPE like any victims of repressive regimes had suffered psychological trauma, humiliation, segregation, loss of dignity, jobs, friends, families etc.

In order to heal such pains truth telling is imperative.¹⁰¹ Telling the truth has many advantages discussed in section 5.3.3 of chapter II. Persons who do not know the real sufferings and grievances of victims may not understand the advantage of truth telling in healing such wounds. As a result most of us were surprised and raised a question as to why the TGE would reopen the mass graves and reburied the bodies of the victims after long time.¹⁰² But it has a purpose to heal the wounds of the victims forever.¹⁰³ This is supported by different social and psychological¹⁰⁴ researchers.¹⁰⁵ For instance Susan Forward wrote:

*"The wounds that we acknowledge openly and minister to through therapy or support groups can become a deep source of wisdom: sensitivity and information about ourselves and others. It is the wounds that we try to deny and keep secret that will continue to derive us to repeat behavior patterns that keep us in depression, anxiety and bad relationships."*¹⁰⁶

In Ethiopia, Butagira town, the writer was participated in the reburial ceremony for the first time. First, he was not convinced that such ceremony was important for the victims' families. He had the view that this project would unnecessarily reopen the grief of families. At the reburial ceremony of ten victims many friends, relatives and members of Ider (the community social committee), religious leaders, elders of the community, governmental officials and the presses were invited. The families were crying like fresh reburial ceremony. In the next days, families of the victims came to the writer to thank him and his office. The writer asked them why they needed to thank for such ceremony. They told him that they had buried their grievances in their deep heart as a result of which they had been suffering for more than twenty years. But today they said: "We are relieved. We buried our children like any human being. We cry openly in front of our families, friends, the community, and even the families of the perpetrators. So we thank you and God. This was the day we had been looking for." The writer was able to understand how he had wrongly conceived such process.¹⁰⁷ The families of victims or the victims would be healed when they spoke out their suffering and when the community acknowledged their sufferings and causes of sufferings.¹⁰⁸

Truth telling had many other advantages discussed in Section 5.3.3 of Chapter II such as creating common memory or history of the past.¹⁰⁹ For instance, in Ethiopia both the perpetrators and the victims who were fighting each other developed common knowledge from the hardest evidences produced in the trials. Today the hardest reality would help for both side to acknowledge that committing crimes using the advantage of temporary power had caused not only for the suffering

¹⁰¹ See the whole discussion and literatures in section 5.3.3 of Chapter II

¹⁰² This was the feeling of the majority of the neutral citizens in the disclosure programs in the first years of the transitions. The writer observed this feeling from many persons whom he personally was in touch with during that period. This was also the belief of this writer.

¹⁰³ We have seen that the African Watch recommended this to the TGE. See, Africa Watch letter, supra note 17.

¹⁰⁴ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press 2001), at 90

¹⁰⁵ See Section 5.3.3 of Chapter II for the detail literatures on the issue

¹⁰⁶ Susan Forward, "From Wounds to Healing," *Journal of Psychology and Judaism* Vol. 18 (1994) at 13 as cited by Andreas O'Shea, supra note 30, at 32

¹⁰⁷ The writer believes that this is the common feeling of many citizens whom he discussed with and who did not have the chance to discuss with the actual victims.

¹⁰⁸ See relevant authorities supporting these findings in Section 5.3.3 of Chapter II

¹⁰⁹ Ruti G. Teitel, supra note 33, at 73

and killing of the victims but also for the detention, prosecution and punishment of perpetrators. No body gained profit from such system of government.

Truth telling may be achieved through truth and reconciliation commission or trial or both. We have seen the advantages and disadvantages of the two alternatives in finding the whole truths from the experiences of other countries.¹¹⁰ Hence, we have reached the conclusion that truth commissions may be better choice to get more comprehensive truths than prosecution.¹¹¹ We have said that truth commissions have got this advantage due to mainly the cooperation of the perpetrators for the incentive of amnesty if they disclosed the truth. We have also said that prosecution does not have this incentive. Nevertheless, telling the truth would fuel the demand for justice.¹¹² We have seen the experience of Truth Commissions in South Africa, Argentina, Chile and other countries do not satisfy victims and the perpetrators. In these countries there is serious demand for justice. For example, Yasmin Sooka, who was official of Truth Commission in South Africa and El Salvador, strongly argued against truth commissions. She strongly argued in favor of truth and justice.¹¹³ We have also mentioned that survey study as to how the South Africans judges their TRC showed that it did not satisfy both the victims and perpetrators. These experiences proved that only truth telling could not satisfy the demand of justice for both perpetrators and victims. Truth can complement justice but cannot replace it. Rather the practice shows that truth telling fueled the conflicts and demands of justice in these countries.¹¹⁴

Therefore, despite some of its limitations, the TGE's choice of prosecutions is better justified than truth commissions and amnesty to heal the wounds of the victims and to serve justice for both the perpetrators and victims. Truths established by prosecutions are truth beyond doubt. Unlike the Argentineans case, most of the crimes in Ethiopia were committed publicly and with the support of massive government document that disclosing the truth through the cooperation of the accused were not as such mandatory. Furthermore, the disclosure programs held at the beginning of the transition complemented some of the limitation of prosecution to disclose the whole truth in Ethiopia.¹¹⁵

3.4 Peace and Reconciliation with or without Truth and Justice?

We have seen that peace and security is imperative for a country to build democracy, respect for human rights, and to improve the living standard of citizens. But, there are debates as to how peace and security could be better achieved.¹¹⁶ When broadly categorized there are at least two views: those that believe and argue reconciliation should be given priority and those that argue the priority should be given to the democratic way of solving hostilities among individuals or groups.¹¹⁷ In Ethiopia, some of the opposition parties repeatedly call for national reconciliation in Ethiopia. EPRDF rejected such calls alleging reconciliation should not come first as far as differences can only be solved in democratic ways. These political arguments had something to

¹¹⁰ See the discussion in Section 5.3.3 of Chapter II

¹¹¹ See the discussion in Section 5.3.3 of Chapter II

¹¹² Mahmood Mandani, "Reconciliation Without Justice", *South African Review of Books*, 46, (November-December 1996) at 12

¹¹³ See in general Yasmin Sooka, *supra* note 8

¹¹⁴ See the detailed experiences of truth commissions and the literatures that support this argument in Section 5.3.3 and 5.3.4 of Chapter II

¹¹⁵ See the discussion in Chapter III

¹¹⁶ See the whole detail discussions on this point in Section 5.3.4 of Chapter II

¹¹⁷ See the arguments in Section 5.3.4 of Chapter II

do with the issue at hand, because the supporter of the first idea vaguely used it to argue amnesty for Derg/WPE officials.

The supporters of amnesty held that in a seriously divided current Ethiopia restoring peace and security as well as building democracy could be materialized only if the divisions or conflicts are resolved through reconciliation. The supporters of amnesty and truth commissions do not give priority to justice, which could also be sources of conflicts and divisions.¹¹⁸

But, in assessing these arguments one should seriously consider the questions relevant to find out the purpose of reconciliation and the parties to be reconciled as well as the preconditions necessary for reconciliations.¹¹⁹

We have seen in principle supporters of blanket amnesty would like reconciliation without even discussing the past injustices; the supporters of truth commissions on the other hand would like reconciliation by disclosing the truths about the past injustices but without necessarily admitting wrongs and apologizing from the perpetrators side.¹²⁰

In Ethiopia, for instance, the accused did call for reconciliation in their motions, but they never admitted the wrongs they had made to the victims.¹²¹ Most of them still justified their wrongs even after the court of law established their guilt. The opposition parties called for reconciliations repeatedly but they made not clear as to who should be reconciled. Even there are no clearly established and well-framed arguments if the perpetrators of heinous crime should not be held criminally responsible or not. They did not make clear if the reconciliation should be made among the victims and the victimizers or the political parties only. The question of justice may not be necessary for political parties to agree to stop conflicts with each other. But, what about the victims and victimizers who are living in the same community? Those who argued for truth and reconciliation were not heard to openly argue that Derg should first admit that it had committed serious injustices and should first request the victims' for apology before the victims forgive. Different communities in Ethiopia have traditional and religious means of reaching reconciliations between victims and victimizers. Reconciliation among the victims and victimizers should have begun from such traditional or religious reconciliation. The non-existence of support for this argument shows that the call for reconciliation is not truly motivated from real remorse for what has been made against the victims. The writers knew many cases in which the victims and victimizers reconciled in traditional ways and where the victims tried to save the perpetrators from prosecution or to reduce the penalty based on their reconciliations.¹²²

In ordinary usage reconciliation means "restore friendly relations between" persons in hostility or "settle a quarrel".¹²³ Thus reconciliation needs wrong maker or perpetrator to repent and the

¹¹⁸ See Rama Mani, *supra* note 110, at 5-6

¹¹⁹ See important questions raised in Section 5.3.4 of Chapter II

¹²⁰ See the detail discussion and experience of countries on this issue at Section 5.3.4 of Chapter II

¹²¹ See Preliminary objections of accused in *SPO v. C/L Memsgitu H/Mariam et al*

¹²² For example, in the killing of Imam Helile Sheho in Gurage Zone, the victim families and perpetrators were reconciled in their tradition. In SPO's effort to arrest the perpetrator the victim's families were linking information for the perpetrator. Finally he was arrested and put to trial. The perpetrator alleges that he reconciled with the families of the victims, and the court reduced the penalty taking this fact into considerations. Latter this author was informed it was the family of the victim that was helping to be fugitive from SPO. See *SPO V. Gesegess G/Meskel et al*

¹²³ See the Concise Oxford Dictionary, (10th ed.)

victim to forgive.¹²⁴ Reconciliation imposed from above without uncovering the truth; repentance from the perpetrators; and forgiveness from the victims does not necessarily bring about genuine reconciliation and assurance of the non-existence of feeling of retribution as well as hostile tension within the society. We have said that in transitional period where the repressive regime is overthrown reconciliation is necessary not between political forces of the old and the new but between the victim and victimizers.¹²⁵

The hostility between the two political forces, EPRDF and Derg/WPE was ended at least formally in 1991. Even EPRP as a party reconciled and is working with political parties implicated in the Red-Terror. EPRDF took the state power and was expected to administer justice. If the victims of the former regime demanded justice could TGE legally denied such rights, which are recognized by international laws with the pretext that EPRDF had reconciled with Derg/WPE or EPRP had reconciled with Mesion or others? As a government, TGE is expected to fairly address the grievances of victims and the rights of the accused. TGE does not have legal mandate to give amnesty for serious international crimes. And even if TGE decided to ignore its international duty, it could not forgive in the names of the victims. The same is true to other parties whose members were victimized. It can be argued that TGE should work for reconciliation between the victims and victimizers. But, it cannot legitimately give forgiveness for the wrongs made to individual victims without their consent. The victims would not be healed from their pains unless the wrongs made to the victims were acknowledged and justice was served. 'Peace without justice is only a symbolic peace.'¹²⁶ Conflict may temporarily be ceased when one party to the conflict become militarily weak. But, victims would bury their sense of grievance in their deep heart and act as friend of their victimizer till they get the chance to avenge. This kind of peace is considered as negative or nominal peace not positive or real peace.¹²⁷

Prosecution, if carried fairly, could satisfy both the victims and the perpetrators. The rights of the accused for fair trial would be protected in an independent and competent court. The accused have many fair and speedy trial guarantees. Furthermore, once the perpetrators passed through the criminal proceedings and either acquitted or served their punishment they could not be further embarrassed for similar acts. It would also reduce the fear of retribution. For example, in Ethiopia there is one retribution case after the trial. The victim family who killed for revenge was immediately arrested and put to trial. There is no other report of retribution after the trial.

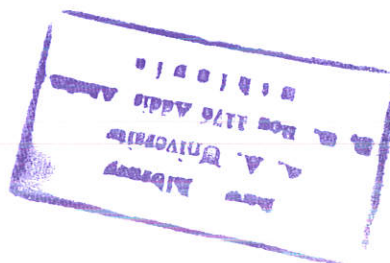
Therefore the TGE's choice of prosecution is more appropriate than other alternatives to gradually achieve genuine reconciliations between victims and victimizers and consequently to avoid causes of conflicts.

¹²⁴ See for example Andreas O'Shea, *supra* note 58, at 211

¹²⁵ Laura M. Olson, "Provoking the Dragon on the Patio Matters of Transitional Justice: Penal Repression Vs. Amnesties", *International Red Cross Review*, Vo. 88 No.862, at 277; see also Andreas O'Shea, *Supra* note 30, at 29

¹²⁶ See Rama Mani, *supra* note 110, at 2 citing Phil Gunson, "Guatemala's 'Peace without Justice'", *Guardian*, 28 December 1996.

¹²⁷ See Rama Mani, *Ibid*, at 11-22



4. Alternatives to the TGE's Choice within Prosecution

4.1 Full or Selective Prosecution?

This question raises the argument whether to choose full or selective prosecution. We have seen the advantages and disadvantages and justifications and counter justifications of the two alternative prosecutions in Section 7 of Chapter II. Both choices support prosecution, their difference lies on whether we should prosecute all persons implicated in all crimes of the repressive regime or only some persons or some crimes.

This choice seems relevant for Ethiopia in which full prosecution was difficult due to serious limitations of resources to investigate and prosecute huge and complex crimes committed for seventeen years without interruptions.¹²⁸ As we have discussed above, prosecution by its nature is time taking and costly. When these limitations are coupled with the huge and complex crimes, prosecutions required considerable human and material resources to serve fair trial within reasonable speed.

The Ethiopian trials took prolonged time as it is discussed in Chapter V. When we closely observe the experiences of other national and international prosecutions, they also took long time and huge costs. For example with 700 million dollars budget and with the support of internationally competent and well-staffed prosecution, defense and court the ICTR took long time from 1994 up to now to try 66 perpetrators only.¹²⁹ The former Rwandan chief of staff was sentenced only on February 2009. This shows how prosecution is difficult, challenging, time taking and costly. When more resources and experienced personnel are assigned more and more can be done to complete the prosecution with reasonable speed and in a fair way. And, on the contrary, when the resources are limited and the cases are complicated and huge, it is natural that it would take prolonged time and the quality of justice served will be reduced.¹³⁰

In such complicated crimes, the TGE ought to have seriously deliberated on how the prosecution should be carried out on reasonable speed and in a fair way considering the capacities, efficiency and competency of the judicial institutions at the transitional period.¹³¹ So even if there was political commitment for fair and speedy trial in Ethiopia, the practical difficulties for a poor country like Ethiopia in the aftermaths of more than 30 years of civil wars were not simple.

In fact the choice of symbolic justice was not also without moral, legal and practical difficulties in the Ethiopian contexts. Symbolic justice can be served by prosecuting few perpetrators or by prosecuting perpetrators only for selected crimes leaving other crimes. Symbolic justice in transitional period is justified only when it is practically difficult to prosecute all persons involved in a state sponsored crimes. We have seen above that morally and legally partial persecution is unjustified.¹³² How can, for example, one decides to persecute one while to give amnesty for other for the same criminal participation? The rule of law, for example, requires that

¹²⁸ See the discussions on the limitations of the judiciaries and the rule of law in Section 2 of Chapter V

¹²⁹ See the detail discussions and sources of authorities in Section 4 of Chapter V

¹³⁰ Toni Pfanner's "Interview with Philippe Kirsch", President of ICC, International Review of the Red Cross Vol.88 No. 861 March 2006

¹³¹ But, this author was unable to find out any such deliberations before wholesale prosecution was chosen.

¹³² See Section 7 of Chapter II

all persons that committed crime should be equally held responsible or treated.¹³³ Symbolic justice denies the equality of persons before law, which is the fundamental principle of rule of law.¹³⁴

The Nuremberg Tribunal gave a precedent that the superior, the subordinate, the head of state and the soldier all have individual responsibility in the international crimes.¹³⁵ The concept of justice also requires that it should be served to all the victims, not only for the few. The government has a duty both under international law and the very necessity of state to provide service of justice and effective remedy for each victim of crime.¹³⁶ The idea of "truth" also recognizes that every victim and the whole society should know the whole truth as far as possible. And the idea of "reconciliation and peace" also requires restoring friendly relationship among all those who see each other as enemy. Hence, only the few cannot reconcile in the name of the whole victims and perpetrators. Therefore, there is doubt if symbolic justice could help to attain such objectives. Symbolic justice practically means to give amnesty for a large or some number of perpetrators only by prosecuting and punishing few perpetrators. So, counter arguments for amnesty discussed in section 5 of Chapter II can also apply to those who are going to benefit from the policy of symbolic justice.

In the contexts like Ethiopia, where the crimes were largely committed in public by subordinate officials who are neighbors to the victims, prosecuting only the higher echelon and giving amnesty for those actual offenders cannot produce peace and reconciliation. Can the victims' families who knew the killer of his beloved ones be satisfied if other perpetrators whom the victim did not know in person be prosecuted? It is unlikely to expect the answer in the affirmative. In SPO case, many families were not interested to give their testimony against the higher officials claiming that those persons did not do any wrong to them.¹³⁷ They were only eager to confront against those lower officials who took their beloved families from home, tortured, directly ordered the killing or personally shot the victim. This implies that the victims would not be satisfied if only the higher officials were prosecuted and the lower officials who directly commit the crime in public were given amnesty.

The other possible suggestion is to prosecute only few counts or crimes rather than many counts or crimes. This choice has still both legal and practical difficulties. Every individual victim has the right for effective remedy. How can it be legally possible to refuse the strong demand of every individual victim to get effective remedy for the wrongs committed against him? If, for example, a perpetrator is punished only for one victim while he has participated in the commission of one thousand killings, can the families of the one thousand victims feel justice served? Can we create peace and reconciliations? Are we not denying the rights of the majority of the victims? Can we say that most of the crimes committed in the previous regime as a result would be concealed? As a result can justice, truth, reconciliation, peace and other purposes of transitional criminal justice be served? I think the answer is in the negative.

¹³³ All the international laws we have discussed in Chapter II Section 5.1 do not distinguish responsibility among persons or perpetrators. Rather all violators of international law including the officials of state as well as superior and subordinate have criminal responsibility if they commit crimes and that states have a duty to prosecute and punish them. The same is true to domestic criminal laws. See for example Art.4 of the 1957 Penal Code of Ethiopia.

¹³⁴ A.V. Dicey, *An Introduction to the Study of the Constitution*, (1885: Basingstoke: Macmillan, 1959) at 202-3

¹³⁵ See the discussion in Chapter I Section 5.1

¹³⁶ See Roma Mani, *supra* note 110, at 6 and the international laws discussed in Chapter II Section 5.1 and 5.3.3.

¹³⁷ Personal observation of the author in his experience as a prosecutor and investigator of the case

Therefore, if the constraints of the full prosecution particularly material and human resources are properly addressed, full prosecution would better serve the purposes of transitional justices discussed in chapter II. Symbolic justice, in this regard, could not be comparable choice with full prosecution.

4.2 Full Prosecution or Selective Prosecution and Truth Commission

Taking into account the constraints in the judiciary to handle the full prosecution, selective prosecution and truth commission was proposed for Ethiopia trials. It stated that:

“Finally, to determine who should be subjected to full scale trial and who should benefit from amnesty by disclosing facts, the bulk of evidence at the disposal of the SPO should be objectively and neutrally assessed. An accused, irrespective of the level of the official position he occupied during the commission of the crime, against whom the SPO has notorious and rigorous human rights violations record shall be subjected to full-scale trial. Whereas, accused who fall out of this objective standard, irrespective of their official position then, shall benefit from the amnesty provided that they fully disclose relevant facts with in their knowledge and acknowledge responsibility publicly.”¹³⁸

Four advantageous were mentioned for this proposal:¹³⁹ 1) It would reduce work load and create opportunity to efficiently and effectively handed few cases “without scarifying the promised international standards”; 2) Deterrence can be achieved from both the prosecution and disclosing the truth; 3) Victims families and survivor would satisfy their demand for justice from disclosure of the truth and would help them to claim reparation and compensation; and 4) SPO would be in a better position to achieve its duty to maintain the full historical records of the past. Nevertheless, it is doubtful if this proposal would lead towards the promised international standard of fair trial and to accomplish the purposes mentioned above for the following reasons.

The standards employed are not objective enough to identify those persons to be prosecuted from those to be given amnesty. How can a prosecutor who assessed the bulk of evidences decide that certain defendants are notorious and rigorous while others are not? Is it based on the number of victims? Or is it based on the manner of execution of the crimes? It did not give the clues how can a prosecutor decide objectively and neutrally that certain perpetrators are notorious while others are not. This suggestion was practically difficult. It was not also supported by the experiences of other countries. While the experiences of other countries would prefer prosecuting the higher officials, the rational is that rather than those who executed the orders, those who give and design the atrocities are more responsible to state sponsored crimes. This approach did not mention the rational why this common experience of other countries in selecting prosecution is not preferred to the Ethiopian case.¹⁴⁰ If this proposal was adopted SPO would have reached unfair decisions. As we have seen in practice, the lower officials who executed the killings were considered the notorious and rigorous criminals while the people considered those who gave orders in secret humane.¹⁴¹

¹³⁸ Mehari Redai, supra note 59, 24

¹³⁹ Mehari Redai, supra note 59, at 25

¹⁴⁰ The African Watch Letter to the then President of TGE, supra note 17. This letter proposed that at least the highest officials should be prosecuted.

¹⁴¹ For instance in the case of SPO V. C/L Debela Dinsa et al one accused produce many character witnesses to prove that he was taken as who fought against Red-Terror and who helped many victims to get out of prison. But

Secondly this proposal would not have reduced the time and cost the trials has incurred. First this proposal was given after five years had elapsed. By this time, the investigations were virtually concluded and the charges were being filed. Second this proposal requires setting criteria and assessing accordingly all bulk of evidences to determine who should benefit amnesty and who should be prosecuted. Third this proposal requires the preparation of public hearing and huge institutions like South African Truth and Reconciliation Commission that could head the public disclosure program everywhere in the country. If SPO was to exercise this function, its resources and time would have been diverted towards this project that could have delayed the prosecution more.

Fourthly the reasons used to justify such selection are not well grounded. In the legal arguments to support this suggestion it claimed that the gross violations of human rights committed in Ethiopia are not committed in relation to the international warfare or the civil wars that can be covered by Additional Protocols to Geneva Convention and therefore the 1949 Geneva Convention could not obliged Ethiopia to prosecute¹⁴². It further argued that the Genocide Convention does not protect political groups and hence Article 281 of the 1957 Penal Code is not an international crime. It consequently argued that Art 28(1) of the FDRE constitution comes into force after the crimes at issue are committed; and this provision should be interpreted in accordance with the international law that prohibits only general amnesty and not truth commissions. Hence it concluded that giving amnesty for selected perpetrators is not either against the international law or the FDRE Constitution.

It should not link the obligation to prosecute gross violations of human rights in Ethiopia to international crimes defined only by the 1949 Geneva Convention, the 1977 Additional Protocols to the Geneva Convention and the 1948 Genocide Convention. There are international crimes that have sources other than these Conventions. One of such crimes that are not specifically defined by these three conventions is "crime against humanity." These two conventions deal about genocide and war crimes, which are distinct from crimes against humanity. As we have mentioned in section 5.1 of chapter II, gross violations of human rights are crimes against humanity to which Ethiopia has an obligation to prosecute and punish. Therefore, even if the abuses of human rights by the Derg/WPE regime are not covered by the definition of the 1949 Geneva Convention and the 1948 Genocide Convention, they are crimes against humanity covered by Art 281 of the 1957 Penal Code and Art 6 (c) of the Nuremberg Charter and other sources of international laws which Ethiopia had an obligation. Crimes against humanity have got the statuses of *jus cogens*.¹⁴³ Therefore, Article 281 of the Penal Code of Ethiopia is an international crime, even if it is doubtful if it corresponds to the Genocide Convention. And therefore Article 28 (1) of the constitution did not create new laws but only recognizes the already enforceable international law and principles.¹⁴⁴

the documents produced against him showed that he was one of his colleagues in the system. Hence SPO would have faced lack of credibility if it were to decide that he should be prosecuted while the people was expecting otherwise.

¹⁴² See Mehari Redai, *ibid* 59, at 18-23

¹⁴³ See the discussions and the sources of the crimes against humanity in Section 5.1, chapter II. Further more see the acclaimed international criminal law authority; See in general Cherif Bassiouni, *supra* note 73

¹⁴⁴ See for the full discussion and authorities on this issue Section 5.1 of Chapter II

In its moral arguments the suggestion alleged that since exposing truths could also help to attain the goals of punishment such as deterrence, satisfaction of victims, acknowledging the sufferings of victims, public humiliation and moral condemnation of perpetrators, convey the message of the rule of law, and disclosing the truth more than prosecution, it would be morally acceptable to give amnesty for some of the perpetrators. We have shown the detail debates on these points in Section 5.2 and 5.3 of Chapter II and Section 3 and 4.1 of this Chapter (IV). Hence it might be a repetition to raise the arguments and counter arguments here. But it is important to add some points if the victims would be satisfied on such choice. In the suggestion it was argued that: "Obviously, victim's families and survivors may not be sympathetic to such an arrangement (plea-bargain), because they do not want any person responsible for human right crimes to escape serious punishments."¹⁴⁵ There is no reason that this argument would not be applicable for amnesty on condition of disclosing the truth if it is applicable to reduced penalty for disclosing the truth.

Finally the proposal was justified saying "- - the county's meager resources that could have been allocated for the pressing economic and social needs of its long suffering people have been consumed by this trial. Consequently, the trial has been conducted at the expenses of vital economic and social needs of the Ethiopian public."¹⁴⁶

As we have seen in the general discussion injustices are the consequences of conflicts, and in turn conflicts cause injustices.¹⁴⁷ This vicious circle problem is the causes of the loss of millions of people in Ethiopia.¹⁴⁸ It is also the cause of civil war and consequently famine and poverty. Thus, we cannot easily reduce the significant of justice from economic and social development. Rather justice is the precondition to economic, social and political development and stability of this country. Furthermore, it is wrong to associate justice only to the economic development. Justice has been given by poor country as developed countries have given it. And, consequently the fairness of the trial should not only be judged by criteria associated with huge resources and high qualification of professionals. This opinion was also supported by Dr Yakob H/Mariam, who asserted that:

*It would be untenable to maintain that a court in poor country, which does not have the same level of resources as an international court, cannot try its citizens who may have committed heinous crimes. There is no plausible reason to maintain, however, that those presently accused in Ethiopia are entitled to a better or more judicial resource than those Ethiopians who may be charged with the murder or any other egregious crimes.*¹⁴⁹

Hence the key question is that: should poor countries need not to address heinous injustice? Should the state not expend much for justice, which is the corner stone of peace and security?

Therefore, additional resources from the national government and international community ought to have been assigned rather than trading off justice for other economic and social needs. And in the absence of such capacity, poor counties should not be blamed if they serve justice in time of transition like that of their ordinary justice.

¹⁴⁵ Mehari Redai, supra note 59, at 13

¹⁴⁶ Ibid, at 26

¹⁴⁷ Mehari Redai, supra note 59, at 1-5

¹⁴⁸ Id and see also Chapter III

¹⁴⁹ See Yakob H/Mariam, supra note 13, at 744

4.3 Ethiopian or International Tribunals?

Some of the defenses raised this issue in their preliminary objection.¹⁵⁰ They argued that courts that were trying them are established by the TGE that fought with them; the judges are expected to be faithful to the charter; and the laws enacted by TGE and the high officials of TGE prejudged them as criminals. Hence, they alleged that the national trials could not be impartial. In addition to the problem of impartiality, they contended that the crimes they have been charged are international crimes that should be tried by international tribunal. Thus, they requested the courts to refer the case to international tribunal.

SPO replied that the objection of the accused to be canceled for the reasons that: 1) the opinion expressed by the officials of TGE and some proclamations is directed towards the Derg regime, the system as a whole, but did not level individuals as criminal. The presumption of innocent is a right of individual not the system of governments. 2) Both the international law and the 1957 Penal Code did entitle the Ethiopian government the jurisdiction and obligation to prosecute and punish international crimes.¹⁵¹

The court cancelled the objections alleging that the court is impartial and Ethiopia had sovereign immunity to try crimes committed within its jurisdiction.¹⁵²

As to the advantage and disadvantage of international tribunals vis-a-vis national tribunals we have seen the arguments in Section 7.1 of Chapter II. Hence it would be repetition to review here again. Furthermore, at that time when Ethiopia decided to prosecute there was no permanent international tribunal to replace national courts. Even the ICC that is established much later has the purpose to complement national courts where the national courts failed to prosecute abuses of human rights.¹⁵³

The decision of the TGE to prosecute the case with its own judiciaries had many advantages as illustrated by Dr. Yakob H/Mariam.¹⁵⁴ He mentioned many advantages of Ethiopian national courts that ICTR did not have to the victims, to the reconciliation process, the experiences of the courts etc.¹⁵⁵ Even legally, there is no international law that prohibits national courts trying crimes within their territory.

4.4 Full Prosecution or Confessions-for-Leniency Model / or Pre-Bargaining/?

This might be one of the tools to reduce the burden of the judiciary and to get more truth on the general structural violence committed during Derg/WPE regime. It could have been helped to speed up the trials.

¹⁵⁰ See the preliminary objections raised in SPO Vs C/L Mengistu H/mariam et al; See also Girmachew Alemue Aneme, Anatomy of Special prosecutor V. Colonel Mengistu Hailemariam et al 1994–2008 unpublished A.A university

¹⁵¹ See the SPO reply in SPO V. C/L Mengistu H/Mariam et al

¹⁵² For the detail reason of the courts see the ruling against the preliminary objection in SPO V. C/L Mengistu H/Mariam

¹⁵³ See the Preamble of the ICC Statute

¹⁵⁴ See Yakob H/Mariam, supra note 13, at 735-744

¹⁵⁵ Id

As we have seen in Chapter II Section 7 Rwandan National Court is using this method to confront the serious constraints of judicial personnel to try 130, 000 detainees of suspected Genocide Crime.¹⁵⁶ In comparison with the Rwandan National Judiciaries, the Ethiopian ones are better. Rwandan loose many judicial personnel due to the genocide crime in the country, this was not the case in Ethiopia. The Rwandan had 130, 000 detainees while Ethiopia had not more than 6, 000 accused to be tried.

Despite this differences Ethiopia had faced resource constraints to speed up the trial. And as a result some mechanism was needed to solve this challenge and to try the suspects fairly and in a reasonable time.¹⁵⁷

Plea-bargaining is one of the methods employed in common law countries to reduce volume of prosecution without precluding justice. It would also help to reduce the limitations of prosecution by giving incentive of lesser penalty to defendants in return for their disclosure of the truth. Plea-bargaining does not need other procedures and institutions like truth commissions. SPO has contemplated to employ this alternative to its cases. As a result, a committee of SPO and foreign experts working in the office had deliberated on the use of this procedure.¹⁵⁸ As the laws in Ethiopia did not permit such bargain, this committee prepared a draft law. But, for the different reasons the draft did not become a law, and hence the plan failed to be tested.

In fact, even if the law was adopted there could have been implementation problems since there was no expertise and experience on the prosecution, the defense and the judiciary to settle criminal cases by way of plea-bargaining.¹⁵⁹ Other problem was that since this practice was to be applied for the first time, there could be dissatisfactions on the parts of the victims.¹⁶⁰ An accused that was detained for eight years without trial might not have agreed to bargain in good faith.¹⁶¹

Furthermore, the government might not accept this law that was not applicable to other ordinary criminal cases. That would also created unequal treatment of accused prosecuted with SPO cases and other cases, which would be the criminal law principle embodied in Art 4 of the Criminal Code.

¹⁵⁶See Naumi Roht-Arriaza, "The Role of International Actors in National Accountability Process," in Alexandra Barahona De Brito et al ed. *The Politics of Memory: Transitional Justice in Democratizing Societies*, (Oxford: Oxford University Press, 2001), at 43

¹⁵⁷ See the causes of the delay in the Ethiopian trial in Section 4 of Chapter V and the capacity of the judiciaries in Section 2 of Chapter 5

¹⁵⁸ This author was the chairman of this committee

¹⁵⁹ See also Mehari Redai, *supra* note 59, at 13

¹⁶⁰ Id

¹⁶¹ Id

Chapter V

Major Challenges and Accomplishments of the Ethiopian Trials

1. Introduction: - Challenges in General

In the previous chapters, we have seen that countries in transition to democracy would face serious challenges as to what to do with gross violations of human rights committed in the preceding repressive regimes. We have noted in Chapter IV above that the TGE had chosen prosecution to reckon heinous crimes committed during Derg/WPE regime. In Chapter IV we have also discuss the debates or criticisms against the TGE's decision to prosecute. Against these backgrounds, it was concluded that there are no valid moral, legal, and political arguments that invalidate the decisions of TGE to prosecute perpetrators of gross violations of human rights.

We have said that prosecution is both morally and legally a preferable choice than amnesty and truth commissions. Prosecution also better serves to lay the foundations of accountability, justice, truth, rule of law, democracy, reconciliation and peace in the aftermaths of repression, traditions of impunity and lack of justice. In order to end the vicious circle of injustices and conflicts, the successor regime has to make a clear demarcation between abuses and respects of human rights.

However, prosecution has also serious challenges.¹ As the right to justice is a basic right recognized and respected in international laws; equally the right to fair and speedy trial is a well recognized right to suspects.² Therefore, countries in transition to democracy have the moral and legal obligations to serve justices by balancing the two opposing rights. These opposing rights could only be respected if criminal trials are carried in fair and speedy manner before independent and competent tribunals.³

There are serious challenges to serve fair and speedy trial before independent and competent tribunals during transitional periods. These challenges can be:⁴ challenges inherent to transitional problems; the nature of prosecution; and nature of state-sponsored crimes.

In Chapter II Section 4, it was articulated that among serious challenges common to countries in transition from repressive regimes to democracy are the existence of unstable political situations due to division within the society between the old and the new forces,⁵ which may sometimes force transitional governments to deviate from strict legal procedures in order to protect the end result of democratization;⁶ the non-existence of strong judiciary and sufficient resources;⁷ and

¹ See Chapter II Section 7

² See for instance Article 8-11 of UDHR

³ See for instance Article 14 of ICCPR, which says "--- every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

⁴ See Chapter II Section 4 and 7 that discussed those problems are common to all countries in transition to democracy

⁵ Eric A. Posner and Adran Vermeule, "Transitional Justice as Ordinary Justice", Chicago Public Laws and Legal Theory, Working Paper N0.40 (The Law School of the University of Chicago, March 2003), at 4

⁶ Ibid, at 7

⁷ See for instance Report of UN Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 3 August 2004, S/2004/616 as cited by Pierre Hazan, "Measuring the Impact of Punishment and Forgiveness: A Frame Work for Evaluating Transitional Justice", International Review of the Red Cross: Humanitarian Debate: Law, Policy, Action (Vo. 88 No. 861 March 2006) at 21; Rama Mani, Beyond

the unique nature of crimes committed by the repressive regimes and the consequent challenges of “retroactivity” and ascribing individual criminal responsibility to state sponsored crimes.⁸

We have said that crimes committed by the Derg/WPE regime are commonly state-sponsored that involved many persons in the commission of the crime; are supported by the laws or norms of the repressive regime, and as a result are committed for prolonged time with impunity.⁹ Derg not only passed death penalties and executed them with its machineries stationed in the palace, but also used its power to enact laws to legalize the heinous crimes prohibited by international laws.¹⁰ These crimes could not be investigated, prosecuted and prevented until the Derg/WPE regime was replaced by TGE.

The victims were enormous and the natures of the crimes were heinous. There were serious instability and division in the country, immediately and during the overthrow of Derg. Since the crimes had political causes, the effort to serve justice has been given political interpretations. The supporter of the old regimes did not consider the decision of TGE to prosecute as a legal reply required by international law. These interpretations created many negative pictures on the ordinary people and even in the process of the trials.

The crimes are of the nature difficult either to forget or prosecute.¹¹ They are also enormous to the capacity of the Ethiopian judiciary. The judicial institutions and the rule of law were highly weakened during the previous regime and due to the reform to purge old elements and replace by the new forces. The TGE also replaced the unitary system of government with federal form of structure, which requires huge resources and trained manpower. TGE was shifting trained manpower to the newly established regional states. Furthermore, many thousands of suspects were detained during the transition period before investigation was started. Taking into considerations some of the practical constraints the TGE did not limit the prosecution to reduce the burden of the judiciaries.

Criminal justice by its nature is complex. It protects contradictory rights and interests of the victims, the defendants and the general society.¹² It also contains contradictory principles. For instance, the concept of speedy trial does not mean the speed disposition of criminal charges in the detriment of the rights of defendants, victims and the society.¹³ Hence, criminal justices developed prolonged adversary procedures that would protect the interest of justice and defendants. Due to this adversary nature, prosecution is generally blamed for the prolonged time it takes and huge costs it requires even to handle single ordinary case.¹⁴ These inherent problems of prosecution would be exacerbated due to the unique contexts of transitional situations we have seen above. Further more, the poor economic situations and level of development of Ethiopia would add fuel to the limitations of prosecution against huge abuses of human rights in Ethiopia.

Retribution: Seeking Justice in the Shadows of War (Cambridge: Polity Press 2001), at 6; and Eric A. Posner et al, *supra* note 5, at 10

⁸ See for instance Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press 2001), at 33

⁹ See Chapter II section 4.5.1 and 5.1.4 and Chapter III as to the nature of crimes in the Derg/WPE regime

¹⁰ See Chapter III

¹¹ See Chapter III

¹² See Section 3.3 of this Chapter (V)

¹³ *Id*

¹⁴ See the detail discussion in Section 7 of Chapter II

It is due to these inherent problems of prosecution in transitional period that literatures criticize the TGE for its failure to choose selective prosecution with other complimentary alternatives such as truth commission.¹⁵

Therefore, considering only these general premises we could safely conclude that the trials in Ethiopia were full of challenges and constraints. Challenges to Derg/WPE trials are also common to any successor trials during transitions to democracy.¹⁶ As it will be clear in the following sections, there are also challenges unique to the Ethiopian transitions. The challenges of transitional successor trials for poor countries like Ethiopia are enormous. Nevertheless, prosecution is still preferable to accomplish the purposes of just transition to democracy.¹⁷ It is time taking and costly, but it is still needed for all the reasons we have discussed in chapter II and IV.

Any effort to identify all these challenges and to find out their sources and their implications would require extended time, huge resources and wider scope. Since this paper has limitations of all of them, the author tried to pinpoint only some of the major challenges faced in the Derg/WPE trials in the following sections. This paper would not try to evaluate the essences of judgments of the trial and the detail management problems and individual personnel limitations for lack of time and space. Hence the paper is limited only to the few major challenges.

2. Challenges Related to Resources, Organizations and Preparations of SPO and Courts

2.1 Establishment of SPO with Dual Power

The TGE enacted Proclamation No.22/1992 to establish Special Prosecutors Office. SPO was empowered to investigate, prosecute and establish historical records about gross human rights violations committed during Derg-WPE regime.¹⁸ The main purpose of prosecution was identified by proclamation 22/92 as:¹⁹

*Whereas it is in the interest of a 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 those offences in order to prevent the recurrence of such a system of government.*²⁰

SPO has both prosecuting and investigating powers. The defenses have been raising motions opposing the fusion of responsibilities of the police and prosecution in SPO.²¹ They voiced their suspicion on the independence of SPO.

One of the reasons why TGE established SPO different from other ordinary prosecution was to properly handle, specialize, focus and concentrate only on this special task.²² The other reason

¹⁵ See Chapter III

¹⁶ See Chapter II Section 4 and 7

¹⁷ See the discussion in Section 5 of Chapter II

¹⁸ See the Preamble and Article 6 of the Proclamation

¹⁹ See the Preamble of Proclamation 22/1992

²⁰ Id

²¹ See for instance the Preliminary Motions in SPO V C/L Mengistu Hailemariam et al

²² Discussion with Ato Grima Wakijra, Chief of SPO

was the need to establish an independent investigating and prosecuting body due to the involvement of the former police institution and some members of the prosecution and the judiciaries with gross violations of human rights in the previous regime.²³ Article 5 (3) and (4) of Proclamation 22/1992 prohibit members of WPE and those who have participated in the offenses in any way to be prosecutor. If such officials are suspected of the abuses committed it would be illegitimate to appoint suspects to judge themselves.

As we have seen in detail, the police and security forces were highly implicated in the violations of human rights during the previous regime.²⁴ Consequently these institutions were dissolved and replaced by less experienced members.²⁵ There were also some officials in the prosecution and the judiciary who were implicated in the abuses²⁶ or who were members or collaborators of the political party of the previous regime.²⁷ Thus, TGE logically preferred to give responsibility to new institution that had no role in abuses of human rights and which can work independently and fairly.²⁸ As it has been proved in practice, SPO was independent from the day-to-day influence of the TGE.²⁹ The fact that more qualified professionals carried the investigations helped to better respect pre-trial fair trial guarantees to the accused.³⁰ If non-trained new forces carried the investigation, the common complaints of accused on police on ordinary cases would have been a ground of serious criticism to the trials. Nevertheless, in the Derg/WPE trials there was no serious complain on the human treatment and respecting the rights of the accused in the investigations and prosecution, except the delay.³¹ Hence, the TGE choice to give the dual responsibilities of investigation and prosecution had created many advantages both in handling the complex cases and in humanly treating the accused. But it equally created burden on few staffs of SPO to carry out dual responsibility of investigation and prosecution of huge and complicated crimes. This in turn affected the speed of the trial.

2.1.1 SPO Manpower Recourses and Efficiency³²

The Office had prosecutors, police, support staffs, temporary project workers, and international experts. At the beginning, SPO had shortage of trained manpower. But, after a while SPO was able to get relatively significant numbers of prosecutors, investigators and supporting staffs. And later on this number has declined to a greater extent before SPO completed its investigation and

²³ See Article 5 (3) and (4) of Proclamation No. 22/94

²⁴ See Chapter III

²⁵ See Mehari Redai, "Revisiting the Ethiopian 'Genocide' Trial: Problems" Ethiopian Law Review, V.1 No. 1 August 2002 at 16

²⁶ Many persons who were judges and prosecutors in the previous regime were prosecuted and convicted in the SPO cases. For instances see SPO V. Geseges G/Meskel et al; See also SPO V. Major Desta Awelachew et al;

²⁷ There were many judges, prosecutors and officials of the judiciaries who joined WPE. We have mentioned only some of the files where judicial personnel were charged and convicted.

²⁸ Discussion with Ato Grima Wakijra, Chief of SPO; see also the Preamble of Proclamation NO. 22/92

²⁹ Discussion with the Special Prosecutors underscored that they did not face influence or interruption in their professional tasks both from their bosses and from the government officials. This author would like also to share the same view. Rather this writer would like to score that SPO had detained, prosecuted, and convicted many higher officials of EPRDF. For instance in SPO V. Hailu Burayu High official of Opposition Party and Head of Federal Investigation Agency of EPRDF were prosecuted and convicted. See also the 6th paragraph of the Amharic version of the Preamble of Proclamation 22/92

³⁰ Personal observation of the author and discussions with accused at different times

³¹ The author's experience and discussion with the judges and prosecutors

³² The Sources of All the information in this section are SPO recordings, this writer's personal observation and experience as well as discussions with the staffs of SPO

prosecution. So the number of staffs of SPO was fluctuating and the turnover was high. But some staffs were serving through out the tenure of the Office that enables them to master their cases.

Totally 37 graduates most of whom had some experiences in the prosecution and courts; 16 diploma graduates many of them had more than 15 years experience in persecution; more than 8 Lieutenant rank and more than 5 lower rank police members; more than six foreign legal experts served the office in different times.³³ There were, however, continuous resignations of prosecutors and supporting staffs for various reasons. Particularly from 37 graduates that joined the office only 22 of them served for longer time in the crucial need of the Office.³⁴ The remaining 17 had left the office at difficult time for various reasons. Among the diploma graduates seven experienced staffs left the office before charges were brought to courts. Therefore, SPO had accomplished most of its tasks with 30 prosecutors (22 graduates and 8 diplomas).³⁵

SPO has a Chief, two Deputies, Assistant Chiefs, and prosecutors.³⁶ At the beginning, SPO had Higher Official Team, Red Terror Team, War Crime and Forced Relocation Team, and Regional Investigation Team.³⁷ But, after a while, this structure was changed and every prosecutor has been given responsibility based on geographical location and structure of the previous government.³⁸ Hence, except at the Higher Officials and some War Crimes Teams, the other Teams have investigated and charges have been prepared and filed more or less following the previous administrative structures: Kebele, Woreda, Awraja, and Region.

SPO had tried to inject additional manpower to the office. But, many professionals were not interested to join this “risky and difficult business” for many reasons. On the one hand, the victims and their families were strongly pushing the works of the Office. On the other hand, the accused, their families and supporters had been trying to ridicule the tasks of SPO with many political justifications. There was also fear of insecurity due to the dispersed security and military forces of the former regimes. There were also international pressures to speed up the investigation and prosecution or other wise demand to release the detainees.

Despite the difficulties of the works of SPO, the remunerations were insignificant. The salary was very low when compared with the private market.³⁹ No special privilege was given for persons working in the office. Even when we compare training opportunity, SPO staff's have not benefited except trainings on their tasks. The Office had no remuneration and privileges that could win the will of many experienced professionals. Hence, the Office's effort to recruit additional manpower ended without result. As we will see in detail in other parts of this chapter, the number, training and experiences of staffs of SPO was very limited to cover up and carry out the burden of investigating and prosecuting the complicated crimes committed for seventeen years throughout the country.

³³ Human Resource Files of SPO

³⁴ Human Resource Files of SPO

³⁵ Id

³⁶ See Proclamation No. 22/1992

³⁷ Internal Structure Manual of SPO and personal observation of the author

³⁸ Id

³⁹ In fact the salary at the beginning was the highest within the judiciary. And it has been made to be equal to other judiciaries after a while. But, latter the scale of the Anti Corruption Commission was by far exceeding the SPO's scale.

On the positive side, the Office carried out intensive trainings to its staff and has got some financial and technical supports from the international communities at the beginning. They helped to develop SPO's computerization programs and legal trainings to its staffs.⁴⁰ Even if the computerization programs ceased before the whole documents and data filled in useful manner, nevertheless the trained staffs in the computer programs supported the massive preparations of prosecution. Professional coming from outside Ethiopia strengthened the computer department. This department played crucial role in preparing, rewriting and organizing charges. This department was busy writing and rewriting thousands of pages of charges due to the difficulty of grouping and regrouping of defendants and counts. The numbers of copies of documents and charges that needed to be copied to the courts and each suspect can be estimated to be million of pages.⁴¹ This huge task was accomplished with the support of this department.

The contribution of 200 trained data and document collection employees were also crucially important.⁴² This group was employed under the fund extended by the international community. This group had been working from October 1993 up to April 1994. With gradual reduction of its members, this group had helped the office in gathering documents and helping prosecutors in analyzing relevant documents. But, this support was not continued through out the trials. If the international community continued its support, SPO's tasks could have been accomplished much earlier than it took.

All other support staffs were not bureaucratically oriented. Every member of support staff was balancing the shortage of prosecutors by participating in investigation, hunting fugitives, collecting information, searching and summoning witnesses, etc.⁴³ In SPO, division of labor was not an excuse not to participate in every field where the shortage occurred.

Persons organized under the Association of "Anti-Red Terror Committee" were also supporting the Office in gathering and providing information and evidences, in organizing and summoning victims' families; in summoning witnesses and in searching fugitives, and etc.

The cooperation of the society in general with the Office, particularly in giving information on the cases and hunting fugitives were crucial. Had it not been for the cooperation of the society in general and the whole staffs in particular, SPO could have taken longer times than it actually took to finish its huge and difficult tasks.

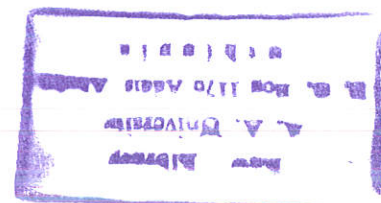
Even the co-operation of suspects to the whole processes cannot be simplified in words. All the prosecution process was concluded in peaceful manner. Except at the beginning, the suspects were friendly with the staffs. There was no bad incident in the SPO's investigation and executing arrest warrants against thousands of suspects. Suspects were conscious of the shortage of resources in the judiciary. So, they were following the prolonged trials in a great discipline, calm and decent way. If it were not for the calm responses of the defendants, the prolonged processes

⁴⁰ This author was the coordinator of these programs and he has personal knowledge. The trainings, financial and technical supports are mentioned in Chapter III.

⁴¹ Personal estimation of the author from his observation

⁴² Personal observation, since this author was the coordinator of these employees.

⁴³ Personal knowledge and observation of the author



of the trials would have not ended in such peaceful manner.⁴⁴ Now, those who finished their terms of imprisonment are friendly to SPO staffs.⁴⁵

2.1.2 Material and Financial Resources to SPO⁴⁶

The resources assigned for this process were not compatible to the tasks needed for the investigation and prosecution. Transport mechanisms were crucial for SPO. The investigators needed to travel frequently to the scene of the crimes until works of investigations and prosecution were completed. The scenes of the crimes were all territories of Ethiopia from the center to the remotest borders of the country. The investigators had serious demands to vehicles to investigate crimes committed in every region; to search the fugitive suspects; to go to the courts for remand and custody and etc. SPO had no branch office in the regions during the investigation times. So, SPO should have to travel from the center to different parts of the country to accomplish all works of investigations and prosecutions. If more transport mechanisms were available, it would have served to complete the investigation much earlier than it took.

But, SPO in the critical periods had only two old model Pajeros and two Land Cursors assigned for investigations.⁴⁷ As a result, there were many occasions the investigators were to wait for their turn to carry their urgent tasks. One can imagine how far the processes of the trials were affected by lack of vehicles. Later on, some cars were bought and others were borrowed from other government institutions.

SPO had an annual budget of 2 million Birr in 1996.⁴⁸ It had got international support of about 500 USD and technical and material support in kind only at the beginning.⁴⁹ By comparison the ICTR had 17.7 Million USD annual budgets for the prosecution only for very few accused.⁵⁰ The ICTR had consumed 700 millions of dollars to try only 66 accused up to 2004 only and its tasks is not yet completed.⁵¹ The total cost SPO took to complete the whole investigation and the trial could not be on average more than 34 million Ethiopian Birr, which is approximately 14 million USD in current exchange rate.⁵² That means the total cost spent by SPO to accomplish the Ethiopian trials is less than the annual budget of the ICTR.⁵³

⁴⁴ Discussion with the Special Prosecutors and the author's personal observation and experience

⁴⁵ Id

⁴⁶ The Sources of All the information in this section are SPO recordings, personal observation and experience as well as discussions with the staffs of SPO

⁴⁷ There were other vehicles, which were not strong to go to the field except to serve within Addis Ababa. Prosecutors were carrying crucial documents while they used public transport in their field work and within Addis..

⁴⁸ See the 1996 Budget; this was the time where SPO had major works of investigation and preparing charges.

⁴⁹ Discussion with the finance department of SPO; See also Todd Howland, "Learning To Make Proactive Human Rights Interventions Effective: The Carter Center And Ethiopia's Office Of The Special Prosecutor," *Wisconsin International Law Journal*, (Spring, 2000) at 7

⁵⁰ See Table 7 below at 178

⁵¹ Pierre Hazan, *Supra* note 7 at 61

⁵² This is a rough estimation based on the 1996 budget, but for long time since 2002 when SPO mostly completed its tasks its budget was reduced nearly by half.

⁵³ See the comparison table of the two trials at Table 7 below at 178

2.1.3 SPO's Brief Work Progressions and Challenges⁵⁴

Though Proclamation 22/94 that established SPO came into force on August 21/1992, SPO was not able to select and appoint Special Prosecutors until the beginning of Feb. 1993. In Feb. 1993, SPO started its undertakings with only few staffs (13 prosecutors). SPO's work's progression can be divided in to "madness time", "deliberation or preparation time" and the "well organized times".⁵⁵ Since the time each stage has passed is illustrated in Section 4 of this chapter, this Section is intended only to show the general work progress and challenges of the Office.

The time from February 1993 to June 1993 was the difficult time for the office. Before SPO organized itself and planned its tasks, analyzed documents, interviewed witnesses, knew who the detainees were and where they were detained, and before the staffs knew each other; the suspended proceeding of habeas corpus was permitted starting from the beginning of Feb. 1993. At the opening period, SPO confronted the worst challenging tasks. The outsiders did not properly appreciate this time. For the SPO this time was "the madness time".

The few staff had to act and litigate against thousands of pleadings of habeas corpus through out the country. At that time SPO did not yet gather and study the evidences of more than 2000 detainees arrested before its establishment. So, one can imagine how madly the Office was reacting against the thousands of habeas corpus pleadings. In parallel the few staffs had to open thousands of remand files and arrest warrant to legalize or regularize the detentions carried out by EPRDF forces before the establishment of SPO. This time was really a tough test for the office and the wisdom of our courts. Nevertheless without knowing the real problem inside, professional colleagues and ordinary citizens had developed wrong perception to the Office.

During this time, there were also other serious but simply laborious tasks to SPO. Thousands of families of victims and survivors coordinated by Anti-Red Terror Committees were over flooding the office daily to file their complaints. At that time, the Office had no detail information as to what it had to investigate. It had not well deliberated plan as to how to go on and what to investigate and what types of evidences or testimonies it wanted to collect. Hence, SPO had to write down only what the families dictated to their interviewers. The SPO could not raise professional questions that would help to construct its cases. Until it had got substantial information and documents, SPO could not figure out the full picture of the crimes it was going to investigate. This time, SPO was simply busy writing down complaints of thousands of victims and victim families. During this time it was the flow of the works than SPO's plan that has directed the day-to-day activities of the Office. Hence, this should not be considered as proper time of investigation; rather it was a confusion time to the office that frustrated some members of the staff to resign. Surprisingly, there were pressures from different side to come out with charges even at this time.

It is only when this "madness time" had passed that SPO started to act in an organized, planned, and professional manner. This time had begun from June 1993. This was a time whereby the prosecutors had got enough time to plan their works, to investigate the systematic state sponsored atrocities committed during the 17 years, to search and call important witnesses, to mine all governmental archives or files through out the country, to interview those that had direct

⁵⁴ The Sources of all the information in this section are SPO recordings, personal observation and experience as well as discussions with the staffs of SPO

⁵⁵ The author's personal observation

knowledge to the atrocities, to hunt fugitives, to train its staffs on international laws and experiences of international criminal prosecution, to research on appropriate laws for prosecution, to deliberate on prosecution strategies, etc. This was the time the international community extended its financial and technical assistances. Supported by such assistances SPO employed more than 200 document gathering personnel, trained them and sent to different part of the country to mine relevant documents from implicated mass organizations and government offices. SPO also launched the computer programs. SPO was able to collect millions of pages of documentary evidences to its huge libraries.⁵⁶ SPO gave intensive trainings on international laws by permanently employed international law experts and guest lecturers.⁵⁷

Having done this organized and professional investigation on the one hand and intensive trainings on the other hand, SPO got clear pictures on what crimes it was going to prosecute and what evidences it needed to prove the reported crimes. Hence, from June 1994 onwards it was able to work well-organized and deliberated investigation and prosecution. So, SPO re-started to consolidate its cases by finding out the loopholes. During this time SPO professionally evaluated evidences to prepare draft charges on each file, to identify perpetrators charged in many files, to find out solution to minimize the appearances of perpetrators in different files and in different benches in Addis Ababa or in regional courts, to identify cases that are charged in different files and find out solution to minimize the appearances of witness in so many files to give same testimony, and detaining fugitives. In this period, the Office had turned its focus from Addis Ababa towards other regions. In this period, hunting fugitives was difficult and time taking task for SPO. SPO could not simply bring charges without arresting suspects charged.

In the mean times, the Office faced serious pressures from opposing sides. The international community, the human rights activists and the families and supporters of the Derg officials were lobbying against SPO to rush to charges that were at hand. The victims' families and their associations, on the other hand, were pushing hard for investigating and prosecuting every violation against every suspect and every victim.

For instance, there were lobbies from different groups to bring separate charge against each individual perpetrator or case before the whole pictures of the atrocities were clarified and clear prosecution strategies and policies were developed. If that view was chosen, one can imagine thousands of files saturating the courts and the same witnesses and evidences being produced thousands of times. This could have created the present delay to be multiplied.⁵⁸ The courts could have studied and decided the same cases repeatedly that would consume the weak judiciary much of its limited times and resources.

This complicated situations and pressures of the lobbying forces created tensions inside the Office that resulted in cracking the unity of the staffs. The debates on what laws the accused should be persecuted also fueled the cracks. There were groups who advocated that accused be prosecuted using the Special Penal Code. This group was dissatisfied by the Office's stand not to use harsher repressive laws. Many staffs left the office at this crucial time due to these factors

⁵⁶ This author was the coordinator of this project

⁵⁷ See the details in Chapter III

⁵⁸ This author came across his former colleagues who were advocating for bringing separate charges. They told him that they realized their mistake after they closely observed the trials' development.

and other misunderstandings.⁵⁹ This internal tension was also one of the reasons that made the Office's effort to recruit additional staff fruitless. If the remuneration and privileges were increased at this time, the new forces may have developed interest to join the Office by setting off the challenges with the benefit they could have gained. So, these internal situations aggravated the resource constraints of SPO that caused the delay of the investigation and prosecution.

After the charges were filed to the courts, the prosecutors were in a relatively calm situation until the courts begun hearing the prosecution evidences. But, the prosecutors exploited this time to consolidate their cases more and more. They were able to further their searches for additional witnesses and documentary evidences. The most difficult task to the Office after a court rejected to accept non-verified documents was to find out additional documents for verifications purposes.⁶⁰ For instance, if 20 suspects signed in a document on the decision to execute some victim, all the 20 suspects' signatures had to be verified by forensic experts in the Federal Police. For each accused, SPO should have to produce three authenticated documents signed by the accused during the same period. One can imagine how difficult it was to produce sample signatures of thousands of suspects to verify thousands of documents produced as evidences. That was why in few files SPO was forced to take one or two additional adjournments to produce documentary evidences after it completed producing witnesses.⁶¹ The other detail challenges SPO had faced during the trial would be discussed in Section 4 of this Chapter when we review the reasons of delay.

2.2. The Courts and Filing of Charges

The first charge was brought to the "Central High Courts" in the transitional period on October 1994 against 73 Derg Officials.⁶² All other charges against the lower officials were brought after the Federal Democratic Republic of Ethiopia has been established, from December 1996 to March 1997.⁶³ Therefore, the charges were filed and tried in the Federal High Court at Addis Ababa, the Amhara Supreme Court at Bahirdar and Dessie, the Tigriain Supreme Court at Mekele, the Harari Supreme Court at Harar, the Oromia Supreme Court at Assela and Jima, and the Southern Nation, Nationalities and People's Regional State Supreme Court at Awassa and ArbaMinch.⁶⁴ Except the Addis Ababa Federal High Court and Oromia, the other Courts had assigned only one bench. The Oromia Supreme Court assigned two Benches for SPO cases. The Addis Ababa Federal High Court at the beginning assigned four Benches. At the beginning, except the Tigrian Supreme Court all other benches had also other ordinary civil and criminal cases to adjudicate. Later, the Addis Ababa Federal High Court reduced the number of benches from five to three and the two benches (the Second and Sixth Criminal Divisions) were entrusted to try only SPO cases while the 1st bench that was handling the SPO V. C/L Mengistu Hailemariam and other SPO cases had other ordinary criminal cases.⁶⁵

⁵⁹ At this time two Deputies, three assistant chief, eight persecutors, and some of the international experts left the office; author's personal observation.

⁶⁰ See SPO V. Ato Abebe Arega et al

⁶¹ See for instance SPO V. L/t Abera Aga et al (Table 2 below at 159-160)

⁶² See the SPO V. C/L Mengistu H/Mariam et al

⁶³ Records and Charges of SPO and Discussions with the Staffs of SPO

⁶⁴ Discussions and interviews with the Special Prosecutors who were bench prosecutors

⁶⁵ Records and Charges of SPO, interview with the Special Prosecutors and Personal experience and Observation

On March 1997, SPO filed most of the charges against 5198 accused, of which 2940 at the Federal High Court of Addis Ababa and 2258 at the Regional Supreme Courts.⁶⁶ The distribution of charges at that time was 202 accused at Tigray Region, 508 accused at Amahara Region, 855 accused at Oromia region, 421 defendants at Southern NNP Region and 302 at the Harare Regional Supreme Court.⁶⁷ The SPO had also filed some charges after this period. Most of the files are cases that were investigated on the later date. In fact, there were few cases that took long time due to their nature. For instance, the Hawzien massacres in which L/T Legesse Asfaw et al took long time due to the technical complications of the case.⁶⁸ Similarly, the investigation and prosecution of the Derg Investigation Squad and the Central Investigation Agency members took longer time to complete the investigation and prosecution.⁶⁹

Before the Addis Ababa Federal High Court's reform, judges that were trying SPO cases were 15 in Addis Ababa, 3 in Tigray, 3 in Amahara, 6 in Oromia, 3 in Harari, and 3 in Southern N.N.P Region. Totally 33 judges were involved in the hearing of the SPO case. But after Addis Ababa Federal Court reduced the benches, the numbers of judges that were trying the case were only 27. Due to the turnovers and continuous reshuffling of judges it would be difficult to find out judges that worked continuously through out the trials.

2.2.1 Experiences, Qualifications, Preparations and Trainings of Courts

Though some of the judges had no relatively long experiences, almost all of the judges were of the highest qualified professionals the country had at that time.⁷⁰ In fact Ethiopian judiciary had lost the highly experienced judges during the transitional reforms.⁷¹ But, SPO cases were of the types that had no precedence in Ethiopia both in their complexities, volumes, the issues they raised, etc. As a result, one cannot say that even the purged senior judges and prosecutors had the experience to handle such unprecedented cases.⁷² This is the first in its kind even in Africa.⁷³ Furthermore, international criminal law and transitional justice were not taught in our Law Faculty, at Addis Ababa University. Even there was no similar experience after the Post WWII trial except the Argentina junta trials.⁷⁴ After post WWII, the experience of prosecution was insignificant in other countries. The dominant experience at that time was the truth commission and the very limited prosecutions in the former communist blocks.⁷⁵ Therefore, even those professionals who had the experience on the criminal proceedings lacked the exposure in international crimes, their investigations, principles, and laws. The experiences of the post WWII trials in Europe were remote past to access and apply to Ethiopian trials.

⁶⁶ SPO Press Release dated on February 12, 1997

⁶⁷ Id

⁶⁸ See SPO V. L/T Legesse Asfaw et al

⁶⁹ See SPO Vs L/T Teshome Bayu et al

⁷⁰ See Yakob H/Mariam, "The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court", *Hastings Int'l & Comp. L. Rev.* Vol. 22 (1998-99), at 740

⁷¹ See Redi Mehari, *supra* note, 25, at 16-18

⁷² Even our seniors in the law schools never had such exposure. It is recently that Dr. Yakob Hailemariam had worked in the Rwandan International Criminal Tribunal.

⁷³ See also Firew Kebede Tiba, "The Mengistu Genocide Trial in Ethiopia", *Journal of International Criminal Justice* Access Published online on April 23, 2007, Oxford University Press, 2007, at 2

⁷⁴ See Chapter II Section 3

⁷⁵ See the history of transitional criminal Justice in Chapter II Section 3

Thus, proper trainings in international criminal laws and principles and sharing of experiences on handling international crimes' investigation, prosecutions, trials, etc was mandatory to promptly and fairly try these state-sponsored crimes. Therefore, whether judges, defense lawyers or prosecutors had longer experience or not could not make much difference in trying these cases unless trainings were given.

Naturally, the courts and other institutions were expected to envisage the types of cases and their volumes in advance. And, consequently, necessary trainings should have been given to the judges and personnel that were going to handle those cases in timely, competent and efficient manner. Further more the court administrations were expected to finish necessary preparations to handle such huge and complicated cases. When the achievements of the courts are evaluated on these regards, it was not satisfactory. Unlike the Defense Office and the SPO, the Court administration did not prepare in advance judges by providing proper training on the principles and techniques on how to handle such complicated and unprecedented cases.⁷⁶ The courts had got trainings only later. But, even such trainings were one sided that were given by Professor Andargachew, who has positivist stand on the crimes committed by the previous regime.⁷⁷ Even the court administration ought to have in advance assigned judges that would handle such cases. If that had been done, the judges would have been at least making their own moral or psychological preparations and individual researches on the subject. On the contrary, the practice was no judge was named to handle the cases until SPO brought charges to court.⁷⁸

One may justify that this might have happened to show the courts' independency in advancing impartiality. They may think that selecting certain judges and giving training only for them could harbor some suspicion on the judiciary. But, the failure to do so for any justified or unjustified reason played negative roles in delaying the cases at the beginning.⁷⁹

2.3 Defense Counsels

The right to competent defense counsel at the expense of government is a well-established principle in international law. The 1st Criminal Bench of the Federal Court assigned the best lawyers the country had.⁸⁰ At least two accused had got one attorney to defend their cases.⁸¹

Unlike the Derg Members' trial, the lower officials were not given the chance to get the best lawyers in sufficient numbers. But, for the first time, in the country's history independent institution for defense counsels was established in order to provide counsel service to Derg/WEP trials.⁸² The Office of Defense Counsels had up to 20 members.⁸³ It got trainings from international experts on the field.⁸⁴ Some of the members and heads of the Office had been sent to Norway for further trainings on the issues that would be raised in the trials.⁸⁵ In fact similar to other judicial institutions, there were shortages of well-trained counsel and there were manpower

⁷⁶ Discussion with the judges of the Addis Ababa Federal High Court

⁷⁷ See chapter IV

⁷⁸ Personal observation

⁷⁹ See Section 4 of this Chapter (V)

⁸⁰ See also Yakob Hailemariam, *supra* note 70, at 740

⁸¹ See SPO V. C/L Mengistu H/mariam et al

⁸² Mehari Redai, *supra* note 25, at 5

⁸³ Interview with Ato Abate Dejene, the former Head of the Public Defense Office

⁸⁴ Id

⁸⁵ Id

turn over due to lower payments.⁸⁶ There were serious technical problems in some of defense counsels in framing questions to the witnesses during the trials.⁸⁷ But, the written litigations produced by the Defense Counsels were well framed and followed the same pattern.⁸⁸ And they were not different from those who had the best private defense lawyers.⁸⁹ Furthermore, even those accused who decided to litigate personally were producing almost uniform litigation in their merits.⁹⁰ From the formats they had been using and their essence, one can easily conclude if there was a well-deliberated preparation on the part of the accused to defend the crimes committed in similar pattern.⁹¹ Within the accused, there were highly experienced judges, prosecutors and private lawyers, university lecturers, etc who had plenty of time to investigate on the subject while SPO was busy in investigation and preparations of the charges. Hence, the balance with regard to qualification, preparation and experience was towards the accused than to the courts and SPO.⁹²

Therefore, it is not proved objectively if some of the lack of technical skills on the part of the defense created a serious impact on the part of the accused. Furthermore, the Ethiopian Criminal Procedure Code gave the courts a crucial role to protect the interest of accused.⁹³ They have unlimited power to examine the witnesses for whatever question they needed to raise.⁹⁴ Before any conclusion, hence, empirical and comparative studies should have been taken if the lack of appropriate experience in the defense counsel had created injustices. Some authors have taken as serious concern on the fairness of the trials taking only some of the weakness of some of the members of the Defense Counsel.⁹⁵ If such empirical study is taken and compared with those who had the best lawyers, the writer doubts if there exist significant differences on the fairness of the trials against those who had government employed defense. Without such empirical and comparative studies, literatures' exaggerated concern on the respect of the fair and accurate trial in Ethiopia is debatable.⁹⁶ The time and scope of the writer has prevented him from making such detail empirical studies and reach authoritative conclusion. But, from his personal observation in the trial he could witness that he did not see much differences on the impacts of justice between who had the best lawyers and those who had counsel from Defense Office.

⁸⁶ Interview with Ato Abate Dejene, the former Head of the Public Defense Office

⁸⁷ See for instance Debebe H/Gebriel, *Prosecution of Genocide at International and National Courts: A Comparative Analysis of Approaches by ICTY/ICTR and Ethiopia/Rwanda*, submitted in Partial Fulfillment of the Requirement of the Degree LLM, Faculty of Law, Makerere University, Kampala, 2003, at 25-27

⁸⁸ See for instance the preliminary objections produced by individual accused, the Defense Counsel Office and the private lawyers in SPO V. C/L Mengistu Hailemariam et al in comparison with that of , for instance, in SPO V. Ato Hailu Burayu et al or SPO Vs Ato Geseges G/Mesekel et al

⁸⁹ Id

⁹⁰ Id

⁹¹ The writer observed that even the handwritings of many of pleadings of the accused were similar. The writer in his discussion with an accused has been informed that the accused and his colleagues had been deliberating on the merit of their objection and defense with their lawyer inmates in prison.

⁹² Personal Observation and experience

⁹³ Dolores A. Donovan, "Leveling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Un-represented by Counsel, *Ethiopian Law Review*, V. 1 No.1 August 2002 at 27-62

⁹⁴ Id, The practice in the Derg/WPE trials was also the same. The courts have been filling up the gaps of the weakness of the Defense Counsel

⁹⁵ See Debebe H/Geberel, *supra* note 80, at 25-27; See also Firew Kebede Tiba, *supra* note 73, at 12

⁹⁶ Id

During the trials, the accused were not equally armed with the prosecution. For instance, the courts were not paying allowances for defense witnesses.⁹⁷ The courts were not also paying for prosecution witnesses. But, the prosecution had its own budget to pay for the witnesses.⁹⁸ The interview with the official of the Defense Counsel Office revealed that the accused were paying personally or getting cooperation from their witnesses to cover costs.⁹⁹

3. Challenges Related to Joinder of Defendants and Counts

The complexity of the crimes obliged SPO to join charges and defendants. As we have seen in Chapter III above, the crimes are state-sponsored as a result of which many people were involved in different capacity at different levels of the government even for the commission of a single crime. Thus, many persons were implicated for the commission of a crime. Art 116 of the Criminal Procedure Code of Ethiopia provides that a charge may contain several different counts relating to the same accused and each offense so charged shall be described separately. Article 117 Sub-Articles (1) and (3) also provide:

- 1) *All persons accused of having participated in whatever capacity in the offence or offences even at different times shall be charged and tried together.*
- 3) *Where several persons have committed different offenses connected with the same criminal activity they may where necessary be charged and tried together.*

Due to the nature of the case, the complications in deciding persons to be charged together were difficult to explain in words. This complexity of grouping defendants and their counts was a major challenge in framing charges, starting trial and hearing witnesses.¹⁰⁰ In order to see the merit and demerit of the SPO prosecution policy in the grouping of the accused and counts, it is better to see in advance the other alternatives and their advantages and disadvantages in the following sections. This policy of SPO in grouping the accused have faced strong objection by the accused¹⁰¹ and critics by literatures conceived as the main cause of delay.¹⁰² Hence this author discussed the merits and demerits of different alternatives of framing charges against many accused that participated in different crimes with different groups and different regions.

3.1 Joinder Based on Counts

According to Art 117 (3) of the Criminal Procedure Code all co-offenders in a crime shall be charged together. So if SPO follows this rule, many charges could be brought as many as the number of crimes or counts that had been committed. Thus, one of the bases to group co-offenders was to charge as many files as the numbers of individual counts or crimes. That means files could have over flooded our courts. Let us look at the disadvantages of this way of framing charges:

1. Defendants could have been charged as many times as they have been involved in crimes with different co-offenders.
2. Defendants that committed crimes in different regions could have been charged in different regional courts.

⁹⁷ Interview with Ato Abate Dejene, and personal observation author

⁹⁸ Personal observation of the author

⁹⁹ Interview with Ato Abate Dejene

¹⁰⁰ See Section 3 of this Chapter (V)

¹⁰¹ See for instance the preliminary objections raised in SPO V. Ato Gesges G/Meskel et al

¹⁰² See for instance Ato Debebe H/Gabriel, supra note 80, at 32

3. As a result, it would have needed that much number of defense counsels; persecutors and benches.
4. Defendants would have traveled from one regional court to the other, which could have been serious causes of prolonged delay for others and for themselves.
5. All officials from top to bottom could be prosecuted for each single count in different courts all over the country, with all their co-offenders. This could have made the process unmanageable.
6. The courts would have been obliged to give separate sentence or gathered all the judgments against an accused to summarize sentence.
7. As a result the cases would have taken much exaggerated times than they took.
8. It would have exaggerated resources and time needed to try all files.
9. Since the country did not have that much resources and time, the prosecution would have been failed.

If not for such limitations, this approach could have the following advantages:

1. The witnesses could have given their testimony only once.
2. The courts could have better understood how a given count or act had been systematically committed.
3. The victims' families would have a better chance to know about the whole truth and all persons involved in the crime.
4. Defendants involved only in a single count or few counts could have been served justice early. Their cases should not have been delayed until other counts of their co-offender's case completed¹⁰³

3.2 Joinder based on Accused

According to Article 116, a criminal charge may contain several different counts against an accused. Hence, one of the alternatives to the SPO was to frame charges against each accused. For instance, C/L Mengistu Hailemariam could have been charged for all the crimes committed in Ethiopia. So if 10 thousands people were killed in Ethiopian, SPO could have prosecuted him for all these counts. Similarly, all officials could legally be charged for all the atrocious crimes they have committed. For instance, with few differences all the Derg officials and other officials from the top to bottom can be charged independently in thousands of files. That means we could have more than five thousand charges as the member of suspects we had. Disadvantages of this alternative to SPO cases:

1. The same count could have been charged as much as the numbers of suspects involved in that crime.
2. The witnesses could have given their testimonies as much time as the numbers of suspects involved in the crimes.
3. The victims would have suffered much by repeatedly revealing their wounds and challenged by cross-examinations.
4. More than five thousand suspects would have more than five thousands files in courts
5. The number of prosecutors, judges and defenses should have been increased proportionally.
6. As a result, the cases would have taken many times than they took.
7. It would have exaggerated resources and time needed to the whole trials.

¹⁰³ Nevertheless, the load that would have been created on the courts could have certainly delayed even those that could be charged in a few crimes or in an independent charge.

8. Since the country did not have that much resources and time, the prosecution would have failed.

If not for such limitations, this approach could have the following advantages:

1. Suspects with lesser participation should not have been delayed till the cases of their co-offenders who were charged with more crimes were completed.
2. The courts could better realize the criminal participation of each individual perpetrator and reach fair and proportional sentence.

Thus, SPO was seriously challenged to balance the advantages and disadvantages of the above alternative ways of joinder of cases before it reached the final decision of grouping of the accused and counts.

3.3 SPO Choice: Joinder of the Accused and Counts with Some Practical Considerations

This approach is the one envisaged in Article 117(1) of the Criminal Code. It has combined both joinder of accused who participated in a crime and joinder of counts against accused joined in one charge. But it had to reconcile with some practical difficulties that would deviate from this principle. Theoretically, these analyses seem easy. But, practically, it required knowing first the numbers of the defendants, for how many crimes they were implicated, with whom they committed crimes, where they committed the crimes, how better the proceedings could be ended early without seriously affecting interests, etc.

Individual prosecutors who completed their investigation and prepared draft charges were not aware of the fact that other persons were also implicated for similar crime or that suspects they have charged were also implicated in other crimes by other investigations.¹⁰⁴ Some times there were doubts if similar names shown in different charges are the same person or different persons. So, prosecutors ought to have studied the backgrounds of each named suspects, his CV, the places and positions he had been serving during the Derg regime, and etc.¹⁰⁵ One may ask why the eye witnesses or victims and survivors should not have identified these persons. The problem is that most of the witnesses knew only the accused that executed the order of their bosses. They did not know how these crimes were systematically organized, who ordered and who participated in each repressive institution.¹⁰⁶ So the names of the higher officials and the middle level officials could be identified only after searching of huge documentary sources and searching out the background history of each accused. This took time and resources. This task was one of the reasons of delay for SPO's investigation and prosecution.

After pain staking works, prosecutors recognized that some accused charged on one file were also charged in other files.¹⁰⁷ Even checking with such procedures did not bring perfection to SPO. That was why SPO was blamed for it had prosecuted some persons in namesake.¹⁰⁸ For instance, in Addis Ababa Kefitegaa 16, a person called Tesfaye Kebede was implicated by the

¹⁰⁴ Discussion with the Special Prosecutors and observation and experience of the author

¹⁰⁵ Id

¹⁰⁶ Discussion with the Special Prosecutors and observation and experience of the author

¹⁰⁷ Id

¹⁰⁸ Author's discussion with observers of the trial in different times; Many people whom the writer knew in person used to ask him why SPO charged people for namesake. This is the common public concern without knowing the reason behind.

documents of the Higher ROCC.¹⁰⁹ The person Tesfaye Kebede was detained on crimes committed in other place. The prosecutor who was in charge of kefetegna 16 interviewed Tesfaye Kebede. But, he concealed the fact that he was also suspected in other place. He knew that if he was charged, he would later be acquitted by the defense he could easily produce. He then kept silent until the prosecutor was concluding. He, unfortunately, exposed that he was arrested and charged in namesake. The media transmitted this allegation. Latter, the Office found out the truth and charged him on other proper file. The real Tesfaye Kebede was also arrested and charged after a while. Any similar incidents could occur due to the complexity of the crimes. The complexities of the crimes, hence, were the causes of many challenges in the Derg/WPE trials.

The defendants seriously complained the way the SPO joined the charges. They claimed that the prosecution did do this to unnecessarily delay their cases, or to revenge them. They claimed that persons charged together had not even known each other let alone committing crimes together.¹¹⁰ They had complained to the court that the way SPO joined the case is to hurt them in bad faith by delaying the case.

From their sides, the defendants had the truth. Due to the nature of the crimes, most of the accused charged together did not know each other. For instance, one of the members of ROCC who passed decision could not necessarily know the executor of his decision. They may choose to be charged individually. That may help them to defend their cases better. Nevertheless, they did not realize other factors that may delay their cases more. SPO chose Article 117 (1) as a better alternative of grouping defendants taking many factors. SPO tried to evaluate and balance the interests of the defendants to fair trial and timely disposition of cases and the capacities of the judicial institutions. It had also taken into considerations the advantages and disadvantages of alternative groupings or joinder of the charges. Hence, SPO's charges have the following advantages:¹¹¹

1. To save time and cost to hear, analyze and weigh the same evidence or testimony several times
2. To accord the same verdict and treatment to accused of same crime
3. To easily determine the role of each accused in the crime and to give proportional punishment.
4. To avoid discrepancy in the testimony of witnesses both for the defense and the prosecution.
5. To avoid harassment of witnesses in giving the same testimony or disclosing the same sufferings time and again
6. To maximize the chance of the accused to defend his case by reducing the time and cost to defend similar cases charged in different files

The Disadvantages of such joinder of accused and counts are:

1. Conflict of interest.

For instances, the superior and subordinate involved in committing a crime may want to defend themselves by producing evidences that negate the interests or defenses of others. The

¹⁰⁹ See SPO V. Chief Tesefaye G/Giorgis et al and SPO V. Tesfaye Kebede

¹¹⁰ See for instances the preliminary objections in SPO V. L/T Abera Aga et al,

¹¹¹ Some of these justifications were mentioned in the reply of SPO to preliminary objection of the accused. See for instance in SPO V. Ato Geseges G/Meskel et al

subordinate may need to defend alleging that he committed the crime due to the order given by his superior who is charged together. So the subordinate need to prove that his superior has ordered him to commit such a crime. On the contrary, the superior may defend alleging that he did not give the order.

Many dramas of similar nature have been witnessed in SPO cases. For example, many subordinates alleged duress to commit the crime by their superior who was also charged and denied his participation in the crime. For example, in the Colonel Tesfaye Woldselasie et al case his subordinates were defending alleging that they committed the crime up on the order of C/L Tesfaye W/Selasie. Surprisingly, Colonel Tesfaye was acquitted on the same count, but SPO had appealed against his acquittal. Similarly, many accused in SPO V. Geseges G/Gemeskl et al case tried to defend their case alleging that they committed the crime upon the order of Geseges G/Gemeskel. The same is true for almost all the SPO Cases.¹¹²

But, these conflicts of interests were raised during the defense. Those persons charged together were joined only until SPO completed its evidences and the court gave verdict. After that the courts did in practice separated the defense of each accused.¹¹³ This would help to avoid their fear to defend their cases on their individual reasons. As a result the subordinates were able to defend their case raising superior order and the superiors raising their own defense.¹¹⁴ One may argue that the defense of the subordinates raising superior order might have created bias on the judges. Since judges are the same to try persons charged in different files, this is unavoidable even if the case is charged in different files. Even in the consolidated democracy, any country could not afford individual judge for individual defendants.

Furthermore, the courts were empowered to order separation if the interest of an accused was seriously prejudiced by such joinder of the case.¹¹⁵ The courts were also ordering the separation in some cases where the interest of some accused were substantially prejudiced until the cases of their co-offenders case was finalized.¹¹⁶ SPO had also separated certain cases after it tested its choice in practice.¹¹⁷

2. Delay of the Investigation and Trials¹¹⁸

SPO took several times to group and regroup the accused while preparing the charges. The courts were also obliged to violate the right to speedy trial of one accused in order to respect the interests and rights of other accused. During the pre-trial proceedings, in the hearing of the trial, in the judgment and during the appeal joinder of many accused and counts contributed for the delay of the trials. Since this would be discussed in Section 4 below, it is not necessary to repeat here how joinder of many defendants and counts delay the Derg/WPE trials.

¹¹² Discussion with the Special Prosecutors

¹¹³ See for instance Table 2 and 3 below at 155, 157

¹¹⁴ See for instance SPO V. Ato Geseges G/Meskel et al

¹¹⁵ Article 117(2) of the Ethiopian Criminal Procedure Code

¹¹⁶ See for instance SPO V. L/t Abera Aga et al and SPO V. C/L Debellla Dinssa et al

¹¹⁷ See for instance SPO V. Geseges G/Meskel et al

¹¹⁸ See Section 4 of this Chapter (V) for the detail discussion

4. Challenges Related to the Prolonged Delay of the Trials: Justified or Unjustified

4.1 Some of the Impacts of the Delay and the Wrong Approaches to the Problem

The major serious criticism to the Derg/DPE trial is the delay of the whole trial process. The accused have objected the trials on this ground. Almost all literatures written on the Derg/WPE trials reached consensus as to the delay of the trials.¹¹⁹ It is difficult even for this writer to argue otherwise. It is not merely to be on the safest side of the debates. But, the elapse of times from May 1991 up to Feb. 1993 before SPO was established; the prolonged investigations and prosecution period that took from Feb. 1993 up to December 1996 before the accused were charged; the elapse of up to three years before the full trial begun; and the long times the trials took before all the files were concluded are hard facts that cannot be denied and some of them are difficult to justify.

Due to this delay, the accused had been detained for an extended time before they were tried. There were many detainees who passed away in the prison before the trial begun, during the trial and before their final indictment.¹²⁰ Equally, many victims, victims' families, survivors and eye witnesses died, changed address, left the country or became permanently sick before they could give their testimonies and before justice was served against the perpetrators.¹²¹ Documentary evidences had been destroyed.¹²² As a result of which, many suspects have got the chance to be acquitted. This has created opportunity for some of the perpetrators to cry as if they have been victim of prolonged detention without committing crimes. For instance, in SPO V. C/L Abera Aga et al File, more than 25 accused were acquitted due to the death of the secretary of ROCC who could verify the documents proving the decisions of the ROCC to kill four people.¹²³

Due to this delay, as there were actual perpetrators who were wrongly acquitted, there were also innocents who were detained for a prolonged time until the courts weighed the prosecution evidences or until they defend themselves. Some times witnesses lost their memory as a result of which they testified against the innocent while forgetting the actual perpetrators.¹²⁴ As the

¹¹⁹ See for instance Mehari Redai, *supra* note 25, at 1. He said that lengthy time the trial took up to the time he wrote his article in 2002, could not be justified; See also Dadimos Haile, "Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: The Case of Ethiopia", Leuven Law Series 2000, (Leuven University Press, Belgium 2000) at 3; Yakob H/Mariam, *supra* note 70, at 732; Frew Kebede Tiba, *supra* note 73, at 2-13

¹²⁰ For instance in SPO V. Major Desta Awelachew et al, among 84 defendants 6 were passed away during the trial

¹²¹ For instance in SPO V. Major Desta Awelachew et al among 612 witnesses, only 150 testified, while the rest were not able to give their testimonies for various reasons (such as death, change of address, physical or mental incapacitates). As we have mentioned above, in this case only few documents are found from the whole documents that were crucial for the prosecution. For instance, only insignificants documents of Woreda 22 ROCC were found, the rest were either destroyed or taken by suspects during the transitions.

¹²² Due to the delay many important documentary evidences destroyed before SPO had acquired them. Discussion with Special Prosecutors and author's personal experience as prosecutor and co-coordinator of Document Collection and Data Analysis Project

¹²³ But, since the Secretary of the ROCC verified the document in the trial court, the Supreme Court found guilty against officials who signed in ROCC document by reversing the finding of the Arsi Oromia Criminal Bench; Interview with Ato Ayele Moges, Assistant Chief of SPO.

¹²⁴ In SPO V. Ato Hailu Burayu et al an eyewitness who by mistake mentioned the name of a suspect as he participated in the decision of the killing of persons in Chebona Gurage Awraja, Ameya Woreda finally corrected his words he had given to SPO during his testimony to the trial. That individual had been arrested until the court gave the verdict.

prosecutors had lost many evidences to prove their cases, defendants equally lost many evidences that could help them to defend or to minimize their penalty.¹²⁵

Not only the victims and perpetrators or suspects but many judges and prosecutors also passed away before the cases they handle were completed.¹²⁶ They were transferred to other positions or left the country and new staffs replaced and took long time to study the cases to finish the project.¹²⁷ This in turn was one of the causes of delay particularly in the courts. Due to the continuous reshuffling of the courts and resignation of the judges, the files were delaying until new judges studied the huge files.¹²⁸

Hence delay would cause many damages not only to the accused but also to the victims and the society.¹²⁹ Speed trials may be unwanted by perpetrators for two reasons. First, if the trial unfairly denied some of the fair trial guarantee with the pretext of speedy dispositions of cases, the innocents would be wrongly convicted at the end. Secondly, for those who are certain that they would be convicted for serious crimes speedy trial may be unwanted. So, they may design tactics to prolong the trial hoping that witnesses might die, evidences destroy, governments change, etc. For instance, Major Melaku Teferra raised motion to the trial court alleging that since it gave one month adjournment for single count, he should be given proportional time for 600 counts he had been charged (that is more than 600 months).¹³⁰

Delay is one of the challenges of addressing past human rights abuses committed by the repressive regime.¹³¹ Similarly, the trials in Ethiopia were delayed due to the inherent problem of addressing huge abuses of human rights committed under the sponsorship of the Derg/WPE regime in transitional situations.¹³² As a result of such many miscarriages of justice are imperative. So, the delays have multi-dimensional consequences that should be studied in detail in an objective manner.

Nevertheless, the high tone of the criticism had blinded us not to find out the real and the main causes for the delays and the actual victims of such delays. Further more, many of us overlooked the crucial point that in “speedy trial” what we tried to avoid is not the delay, but the unnecessary delay.

Most of the literatures written on the Ethiopian trials never tried to assess if such delays were justified or not; reasonable or not; caused by conduct of the prosecutors or not; if the defendants and the courts contribute to the delay or not; and if the government or international community contributes for the delay or not or if the victim of delay was only the accused or not etc. Many

¹²⁵ In almost all the files, accused usually raised this excuse to the courts. They had been saying that their witnesses passed away; the documents destructed etc.

¹²⁶ This author personally knew that four special prosecutors and three judges had passed away during the trial.

¹²⁷ Personal observation; the author knew that many staffs left the Office or the courts before they accomplished this process.

¹²⁸ See the detail discussion in Section 4.3.2 of this Chapter (V)

¹²⁹ About the general impact of delay of Criminal Cases, see in general Marc I. Steinberg, “Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974”, *The Journal of Criminal Law and Criminology*, V. 66 No. 3 1975

¹³⁰ See SPO V. Major Melaku Tefera Court Proceedings; this author personally heard the request of the accused

¹³¹ See Section 1 of Chapter V

¹³² See the detail challenges and the consequent delay of successor trials during transition from authoritarian regimes to democracy in Section 4 and 7 of Chapter II and Section I of this Chapter (V)

criticisms concentrate only on damages inflicted to the perpetrators. They applied facts of certain files to the whole trials.¹³³ For instance, many literatures assume that all the accused were arrested immediately after the downfall of Derg, May 1991.¹³⁴ Some literatures took only reason of one or two adjournments due to prosecution among many adjournments for many reasons.¹³⁵ All this shows that proper attention was not given to study the real and major causes of the delay and its consequences.

This paper tried to sort out sample study of 47 randomly selected files from cases tried in different courts except Harare State Supreme Court. Hence, this author wants to open a new way of properly challenging and evaluating the real causes of the delay of Derg/WPE trials.

4.2 Concept of Speedy Trial and Yardsticks to Measure Unnecessary Delay

We have to begin the discussion by having clear understanding on the concept of speedy trial, the purpose, and the yardsticks to measure or differentiate necessary delay from unnecessary delay. American Bar Association indirectly defined the concept of speedy trial as:¹³⁶

The (speedy trial) standards are not intended to emphasize speedy disposition of cases to the detriment of the interests of the parties and the public, including victims and witnesses, in the fair, accurate and timely resolution of cases. (Emphasis added)

Accordingly ABA Speedy Trial Manual, the purposes of Speedy Trial and Timely Resolution of Criminal Cases are:

- (1) to effectuate the right of the accused to a speedy trial;
- (2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and
- (3) to ensure the effective utilization of resources.¹³⁷

In these definitions, the important elements that need to be fulfilled in the speedy trial are not only the timely resolution of cases but also the fair and accurate settlement of criminal cases. Fair and accurate settlement of criminal cases is the main purpose of criminal justice in the interests of the victims, witnesses, the accused, and the public. It has also the purpose to effective utilization of material and human resources of a nation.

Penalizing the innocents or acquitting the real perpetrators could not serve the purpose of speedy trial. And such trial could not fulfill the concept of speedy trial. Derg for instance concluded the cases of fifty-nine higher officials of the former regime within a day while its cases took more than seventeen years to be completed in courts of laws.¹³⁸ If such decision was taken by the courts of law, can we appreciate such decisions for its speed? If the end result of speed trial is injustice, could we justify that injustice in the name of speedy trial?

¹³³ See in general Wondoson Sintayehu, The Right to Speedy Trial Vs The Government's Duty to Ensure Trials of Human Rights Violation, (Addis Ababa University, Submitted for Partial Fulfillment of LLB, unpublished, 1996)

¹³⁴ See literatures wrote on the Derg/WPE trials for instance: Mehari Redai, supra note 25; Yakob H/Mariam supra note 70; Firew Kebede Tiba, supra note 73; Dadimos Haile supra note 119; and Wondoson Sintayehu supra note 133

¹³⁵ See for example, Wondoson Sintayehu, Ibid

¹³⁶ American Bar Association: Criminal Section Standards speedy trial, as visited on 10 June 2007 online, file://C:\Documents and Settings\User\My documents\ speedy r\trial limit.htm p.1

¹³⁷ See foot note 136

¹³⁸ EPRDF Controlled Addis Ababa on May 28, 1991; and the Appeal of the Derg Officials was finally decided on May 26, 2008. When we simply count this time it is seventeen years.

The only fast justice is the justice of the dictators. But, that do not mean ordinary justice should be delayed. But, it is to say that speedy justice should go hand in hand with the fair and accurate resolutions of criminal cases.¹³⁹ The respect of the rights of fair trial and the accuracy of the judgments would be the limit to the speediness of justice. If the trial is speedy to the extent that it would not respect the rights of the accused to cross-examine, to defend, to counsel, to prepare the defense or prosecution evidences and litigations, to appeal and etc, that criminal proceedings would not be justified by the speed it has been completed.

Hence, the delay to meet such due processes is necessary delay. The speedy trial should balance the interests of those three groups: the defendant, the victims, and the society.¹⁴⁰ The delay of trial does hurt not only the interests of defendants but also the interests of the victims, the society and the government.¹⁴¹

Nevertheless, the concepts of “speedy trial” and “delay” are far from being precise. The concept of speedy trial is provided in Article 14 (2) of the ICCPR, which recognized the right of the suspects to trial without undue delay. Undue delay is interpreted to be a criminal case to be settled within reasonable time.¹⁴² Reasonable time itself is a vague phrase far from precise to solve the problem. This may at first sight seem a paradox. This showed that whether a case is unnecessarily delayed or not could only be determined case by case. In some cases, the lapse of years for an accused was not considered as unnecessary delay.¹⁴³

There are two approaches to determine whether a criminal case is delayed or not. First, there is what we call a balancing test.¹⁴⁴ This test has developed some factors or yardsticks that would help to evaluate whether a given case is unnecessarily delayed or not.¹⁴⁵ The second one is that laws or standards adopted time limits for each step of criminal proceedings that should be met by the stakeholders to the criminal proceedings.¹⁴⁶ And yet both perspectives base their reason on attaining fair and accurate trial to the defendants, the victims and the societies. Furthermore, the two approaches require the evaluation of each particular case and judging of the reasons behind the delay. It is true that the length of time is not the sole criterion for measuring unnecessary delay in the trial. The length of time may be considered necessary delay if the reason of delay is in the interests of accurate and fair trial.

The balancing test provides factors, which are necessary for the determination of delay:¹⁴⁷ the relative seriousness and complexity of the case; whether the defendant is arrested or not; whether the opportunities for the prosecutor and defense counsel to prepare for fair trial is ensured or not; the length of the delay; the reason for the delay; the severity of prejudice suffered by the

¹³⁹ American Bar Association: Criminal Section Standards speedy trial, Supra note 136

¹⁴⁰ Id

¹⁴¹ See the discussion in Section 1 of this Chapter(V)

¹⁴² SeeYakob Hailemariam, supra note 70at 732-733 citing Manfred Novak, UN Covenant on Civil and Political Rights, ICCPR, Commentary (1993) at 257

¹⁴³ Barker V. Wingo, USA Supreme Court, 407 U.S 514, 925. Ct 2182,33,L.E.D. 101(1972)

¹⁴⁴ Yale Kamisar, WayneLafav, and Jerold H. Israel, Modern Criminal Procedure, 7th ed. West Publishing Co. 1990, at 1031

¹⁴⁵ Id

¹⁴⁶ The ABA Standards of Time Speedy Trial is one example. As we will see in detail the Ethiopian Criminal Procedure Code also provides time limit.

¹⁴⁷ Yale Kamisar et al, Ibid

defendant; and the defendant's timely assertion of the right to speedy trial.¹⁴⁸ The USA Supreme Court in *Barker V. Wingo*, 407 U.S 514, 925, Ct 2182, 33, L.E.D. 101(1972) rule out as:

A balancing test necessarily compels courts to approach speedy-trial cases on ad hoc basis. We can do little more than identify some of the factors, which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express in different ways, we identified four factors: Length of delay, the reason for the delay, the defendant's assertion of his rights, and prejudice to the defendant" - - - It further stated that "They are related factors and must be considered together with such other circumstances as many be relevant."¹⁴⁹

For instance, the case may need adjournments for one year in the interest of the accused to prepare his defense or his decisive witness to come from outside a country or to be discharged from hospital. If the court refuses adjournments for such case there would not be fair justice. It would hurt the interests of the accused. The same might be true for the prosecution. In such case, we can say that there is delay but such delay is necessary delay. That is why we have said that the final conclusion whether the case is unnecessary delayed or not need to evaluate each specific reason of delay or adjournment.

Some of the yardsticks are not taken for granted. For instance, previously the defendant's timely assertion of the right to speedy trial was taken as a factor in determining speedy trial. That is to say, if the defendant fails to assert his right to speedy trial or acquiesces in the face of protracted pretrial delays, he may not raise it as defense. Moreover, defendants who delay prosecutions by inundating the trial court with frivolous pretrial motions will be considered as having forfeited their rights.¹⁵⁰ But, recently, there is a tendency that a presumption of prejudice established by the lengthy nature of the delay may alone constitute showing of prejudice to the defendant.¹⁵¹ In this connection, we are reverting back to the problem. Moreover, if there is prosecutorial negligence such as misplacing of a defendants file, we can say that this is inappropriate reason for delay.

The reasons that justified delay could not be exhaustive. It depends upon the specific contexts. For instance, Dr Yakob H/Mariam wrote: "The European Human Rights Court accepted that the danger of flight from the jurisdiction of the court, suppression of evidence by the accused and prevention of another crime by the accused or those seeking retribution are legitimate grounds for continued detention."¹⁵²

In the *US V. Ewell* the Supreme Court of USA commented that: "The right of speedy trial is necessarily relative. It is inconsistent with delays and depends upon circumstances. --- Whether delay is completing a prosecution amounts to unconstitutional deprivation of rights, depends upon all the circumstances surrounding the case.--- The delay must not be purposeful or

¹⁴⁸ Yale Kamisar et al, *supra* note, 144, at 1031

¹⁴⁹ *Barker V. Wingo*, *supra* note 144

¹⁵⁰ *Baker Vs Wingo*, *supra* note 144

¹⁵¹ *Dogget Vs United States*, Supreme Court of USA, 505 U.S. 1992, as quoted by Stephen A. Saltzburg, 134, at 1108

¹⁵² Yakob H/Mariam, *supra* note 70, at 733 citing *Wemhoff Case*, European Court of Human Rights, Judgment of June 27, 1968

oppressive.”¹⁵³ Hence, this statement of the court provokes us to question the reason and the purpose of each delay rather than simply counting the days, months and years a given criminal case took. In a simple case delay for days may be unnecessary if the courts could reach a decision without prejudicing the rights of accused, victim, the general public and the demands of criminal justice. On the contrary even years may be required to reach accurate and fair decision on a simple case. For example, a case of homicide against a single victim may not logically take equal time than a case of a victim in a state sponsored crime in which many individuals and state institutions may participate in different status and role to execute that victim.

These national and international tribunal’s decision and literatures warn us not to conclude the existence of unnecessary delay without looking the detail circumstances surrounding the case. It is not proper to single out only certain specific fact or facts of the case and reach erroneous conclusion. There are no absolute rules and theories developed to easily say that certain case is unnecessarily delayed without taking all the circumstances of the case.

To summarize the above discussion, some of the yardsticks to measure if certain case is delayed unnecessarily or not we have to see all the circumstances surrounding the case such as: 1) if the delay is occurred to respect the interests of the victims, the society and the government; 3) if the delay is due to attaining fair and accurate trial; 4) the relative seriousness and complexity of the case; 5) whether the defendant is arrested or not; 6) whether the opportunities for the prosecutor and defense counsel to prepare for fair trial is ensured or not; 7) the length of the delay; 8) the reason for the delay; 9) the severity of prejudice suffered by the defendant; 10) the defendant’s timely assertion of the right to speedy trial; 11) if the delay is caused by frivolous pretrial motions or delaying tactics of the defense; 12) if the delay is due to prosecutorial negligence; 13) if the delay occurred to prevent the danger of flight from the jurisdiction of the court, suppression of evidence by the accused and prevention of another crime by accused or those seeking retribution, purposeful or oppressive; etc

Unlike the balancing test, which we have just discussed above, the American Congress came up with the speedy trial Act of 1974, which establishes specific time limits between various stages of federal criminal proceedings.¹⁵⁴ However, we could see that even in this act, there is a tendency of exemptions and exclusions of certain types of delays. For instance absence of defendants, unavailability of an essential witness or the conducts of a co-defendant are justified reasons for delays.¹⁵⁵ If the defendant becomes a fugitive from justice, he cannot claim the right to speedy trial. Therefore, all these tend to show that the tendency in determining how speedily a case be disposed of is a matter far from precise determination. Those limited time standards are themselves subject to different conditions and exclusions.

But, as reminder as it relates to this part, the crucial question in the determination of the legitimacy of delay is whether that delay might reasonably be avoided or not, or whether it was unnecessary or not. In the determination of whether it was necessary again we take in to account the length of the delay, the reason for the delay, and the potential for prejudice.

¹⁵³ USA V.Ewell as quoted) at by Livingston Hall (ed.), Modern Criminal Procedure: Cases, Comments and Question (3rd ed. Minn: West Publisher Co.; 1969)905

¹⁵⁴ Speedy trial: Information Answers. Com U.S Supreme Court as read online
<http://www.answers.com/speedy+trial&+7> on 06/28/2007

¹⁵⁵ Id

4.3 Speedy Trial Standards in the Ethiopian Laws and their Application to the Trials

As we have mentioned above, the right to speedy trial is important but difficult to apply in practice balancing different interests involved in criminal justice. We have seen above that “speedy trial” is the resolution of criminal cases with undue delay. Therefore, it was necessary to put some standard time limits in every stage of the criminal proceedings. Ethiopian Constitution and other laws consistent to the general theory and experiences of other countries gave some general standard time limits for each step in the criminal proceedings: investigation, prosecution, trial and appeal. They also gave some remedies to be taken at the spot to correct the violations.

However, it would be difficult to put absolute time limit by laws that can be applicable to all unique reasons and facts that differ from time to time, from place to place, and from reason to reason, and case to case. As a result all such limitations given by the laws have many exclusions and exceptions that could make up such differences from case to case. The courts have been given the responsibility to control such limitations by weighing the specific reasons and unique features and to give remedy considering the practical problem at the spot.

The 1995 Constitution, the 1961 Criminal Procedure Code, the 1960 Civil Procedure Code and Proclamation No. 22/92 are the main sources of laws in Ethiopia that regulate and give remedy to the speedy trial standards in Derg/WPE trials. And, therefore, our evaluation should depend on such laws of Ethiopia and the general principle of speedy trial we have discussed above.

Hence, in the following section we would try first to briefly review some of the standard time limits and the remedies given by the laws in Ethiopia. Consequently, we would see the violations of such standards, the reason for the violations and the remedies given immediately by the courts so as to have our view if such violations and remedies are justifiable or not.

4.3.1 The Time Limits during Investigation and Prosecution

4.3.1.1 Commencement of Investigation: Laws and its Applications

In ordinary criminal cases, a complaint or accusation is made to the police or the investigation officer. The police may also be aware of the commission of the crime by itself. The police record the accusation, complaint or the commission of the crime. Hence, the speedy trial limit would start to apply from the commission of the crime.¹⁵⁶ In Ethiopian laws, the legal concern of speedy trial arises from the time of arrest and the issuance of summons.¹⁵⁷ In other words, the Ethiopian Criminal Procedure Code prohibited only investigation and prosecution of offences after statutes of limitation elapsed. Until that, it seems that there is no time limit set to investigate and prosecute the accused. Proclamation 22/1992 exempted SPO cases from statutes of limitations.¹⁵⁸ Among the crimes committed during the Derg/WPE regime, the majority are international crimes that could not be limited by statute of limitations.¹⁵⁹ The second reason is that the investigation and prosecution of such cases are practically prevented by the accused as a result of which until such impediments are avoided Article 229-30 of the 1957 Penal Code of

¹⁵⁶ See Article 11 to 18, 22 and 23 of the Criminal Procedure Code of Ethiopia

¹⁵⁷ Art 29 of Criminal Procedure Code of Ethiopia

¹⁵⁸ See Article 6 of Proclamation No. 22/1992

¹⁵⁹ See the sources of such international laws in Section 5.1 of Chapter II

Ethiopia would suspend the statute of limitation from running.¹⁶⁰ Hence, Proclamation No.22/1992 was not against the principle of non-retroactivity of laws since it only recognized the existing laws.

Logically, the concern of speedy trial ought to have started from the actual commission of the crimes. Even if the accused is not actually detained, the delay in investigation has an impact on the whole process of the trials and the interest of the accused, the victims and the society. The investigator needs to start its tasks immediately not to lose necessary evidences to prove the case. That would also help the accused to collect evidences before they are ruined. The society and the victims also want such crimes to be investigated and perpetrators to be prosecuted and punished. The failure of commencement of the case at early time helped the accused to raise the right of speedy trial. The Constitution of FDRE provides that the accused have the right to be tried with out unnecessary delay.¹⁶¹ This by implication would prohibit any unnecessary delay that would prejudice the basic rights of the accused to defend his case. For instance, if the prosecution without good cause fails to bring charge and as a result of which the accused's right to defense is grossly violated the courts should entertain and remedy the violation of this right.¹⁶²

However, in the Derg/WPE trials, the cause of delay from the day of the commission of each criminal act up to May 1991 was the Derg/WPE regime itself. Investigation and prosecution was only possible when Derg was militarily defeated in May 1991. Hence, what would be for the lapse of time before May 1991 and the consequent damage on prosecution and defense evidences? When Derg was in power no body could apply to the law enforcement bodies for investigation and prosecution against such violations. Rather, these institutions were themselves the instruments of the violations.¹⁶³

We have seen above in Section 4.2 that if the criminal proceedings are interrupted by the conduct of the perpetrators, the defense could not logically benefit from the right to speedy trial. Gross abuses of human rights were committed during Derg/WPE regime by immunizing and promoting the perpetrators for seventeen years. The case, hence, delayed without investigation until Derg was militarily overthrown. As we have said above in Section 4.1, the delay in the prosecution caused many prejudices both for the prosecution and the accused. Due to such delay for about seventeen years, thousands of witnesses has passed away or left the country or lost their memory or changed address or were incapable to give their testimonies; documents were damaged or misplaced; suspects changed address or flee the country; etc.¹⁶⁴ In turn the impact of such delays contributed for further delaying the investigation, prosecution and trials. Because, it was difficult to search out evidences, fugitives, and testimonies due to the elapse of long time after the crimes were committed. Such delays did not only hurt the interests of the accused it also affected the rights of the victims, the society and the interest and purpose of criminal justice. If each violation was prosecuted on time, not only the investigation and prosecution of SPO would have been disposed in short time but also the gross violations of human rights would have been timely deterred.

¹⁶⁰ See for the details debates and ruling of the court for instance in SPO V. C/L Mengstu H/Mariam et al

¹⁶¹ See Article 19(4) of the 1955 FDRE Constitution

¹⁶² See Article 19(4) of the 1955 FDRE Constitution

¹⁶³ See discussion in Chapter III

¹⁶⁴ Interviews with Special Prosecutors or personal observation from the investigations of the cases of SPO

Therefore, Derg/WPE Officials had contributed for the delay and consequent impacts of the delay of the trial and should share responsibility.

Concerning the delay from May 1991 up to February 1993 the delay was caused by the following transitional,¹⁶⁵ practical and legal situations. From July 1991 up to August 1992, there were many things for the TGE that came from the Guerilla fighting to do in the aftermaths of intensive civil war and devastating socio-political and economic situations.¹⁶⁶ The huge security, military, police and party institutions were dissolved and their members were dispersed throughout the country. As a result, the formal government institutions were paralyzed until the transitional government properly replaced. The TGE was busy reorganizing state institutions in the new federal form of structure. The country's economy had been in deteriorating circumstances. Millions of citizens and former army were in need of support. The country was also in need of stabilizing peace and security. The TGE had also a duty to prosecute and punish gross violation of human rights committed in the previous regime.¹⁶⁷ This required the existence of independent and impartial judiciary. In the aftermaths of the transition from the repressive regime, it was difficult to establish or reform institutions as well as to scrutinize professionals who did not compromise with the previous regime.¹⁶⁸ Pertaining to the previous repressive policy, the police institution that had responsibility to initiate investigation was involved itself in the commission of the crimes.¹⁶⁹ Hence, police institution could not logically investigate its own cases; and furthermore due to this involvement it was dissolved.¹⁷⁰ Thus, the practical realities did not allow the commencement of investigation until new investigating institution was established. Some literatures criticized the delay of the trials alleging that the existing regular prosecutor should have initiated the investigation and prosecution.¹⁷¹ But, there was no legal ground for the ordinary Prosecution Office to initiate investigation in the Ethiopian Criminal Procedure Code. Furthermore, we have said that the previous prosecution office was also suspect for its compromise with the previous regime.¹⁷²

In that case we have to raise question: should TGE have released the suspects until new investigation and prosecution body was established? The Derg/WPE officials who surrendered after a civil war that can be covered by the 1977 Additional Protocols to Geneva Convention were prisoners of war until things changed to the normal situations. Furthermore, the interest of the victims and the public as well as securing peace and deterring of further crimes could not justify the release of such suspects of heinous crimes until investigation institution was established. We have seen that the EPRDF military force and the Peace and Stability Committee were beginning an informal investigation to handle the strong demands of the victims and survivors.¹⁷³ This action served to create calm conditions and to deter the commissions of further crimes due to the victims' strong wish to avenge their accumulated grievances.¹⁷⁴ There were serious divisions within the society between the supporter of the previous government and the

¹⁶⁵ See the detail discussion and sources of authority during the transition time in Section 1 and 2 of Chapter IV

¹⁶⁶ See the detail discussions on these transitional situations in Section 1 and 2 of Chapter IV and Section 1 and 2 of Chapter V

¹⁶⁷ See Section 3 of Chapter IV and Section 5.1 of Chapter V

¹⁶⁸ See Section 2 of Chapter V

¹⁶⁹ See Section 3.2.2 of Chapter III

¹⁷⁰ See Section 1 and 2 of Chapter IV

¹⁷¹ Wondoson Sintayehu, *supra* note 133

¹⁷² See Section 2 of Chapter V

¹⁷³ See Section 1 and 2 of Chapter IV

¹⁷⁴ As to the victims sense of revenge and strong demand for justice see Mehari Redai, *supra* note 25, at 16-17

new government. The victims and survivors of the previous regime used this transitional situation as an opportunity to seek justice or to take the laws in their own hands.¹⁷⁵ Unless the TGE made some temporary measures, there could have been political instability and lack of peace at that time.

There was an argument that alleges political stability and want of peace does not sufficiently justify the delay for the establishment of SPO.¹⁷⁶ But, we have seen in Chapter II section 4 and 5.3 that such justifications are used to even select either prosecution or amnesty despite the clear legal obligation to prosecute. Furthermore, these reasons are taken as a legal ground to continue detention by the decision of the European Court of Human Rights.¹⁷⁷ The TGE's measure to detain those suspects of notorious human rights violations until judicial institutions established are justified since it prevented further crimes that could have been dangerous to the country's peace due to sense of retribution from the victims. Furthermore, the TGE has an obligation to stop fleeing of suspected notorious perpetrators of gross violations of human rights. Many notorious criminals had left the country before EPRDF begun detaining the suspects.¹⁷⁸ We have seen also that many documents were destroyed during the transitions due to the invisible hands of the suspects. We have seen also that the old elements tried to politicize the investigation and the prosecution process. The disclosure programs had been given wrong pictures by the elements of the previous regime. It was considered as a political revenge by the victorious forces against the vanquished forces.¹⁷⁹ All the forces of the repressive regime that had been trained in killings and kidnappings were also dispersed.¹⁸⁰ To the contrary, the TGE forces supported the victims of the previous regime. The EPRDF forces themselves were victims of the previous regime. Hence, unless peace and order was established by detaining notorious perpetrators, any incident would have brought civil wars that would have destabilized the country and caused the commission of other crimes.

Hence, these political and practical situations could justify the detention of suspects of notorious human rights violations until the new government legally established independent investigation and prosecution body. Therefore, even if one cannot safely say that all the one year and three months were necessary delay, but no body could deny that certain times were necessary to be elapsed to accomplish such crucial transitional situations. These situations were not brought by voluntary conduct of the TGE or SPO. Such reasons are inherent to all transitional trials and hence are justifiable reason for some delays.

The next question would be: And why SPO that was legally established on August 1992 waited until June 1993 before it began its proper investigation? As to the reason of the delay of the prosecution to start its tasks we have discussed in detail in Section 2.1 above. We have seen that due to the transitional situations and the politicization of the process it was difficult for the Office to get professionals until Feb. 1993. And from Feb. 1993 to June 1993 the Office was busy regularizing the previous detentions and litigating against the petition of the habeas corpus.

¹⁷⁵ See Mehari Redai, *Ibid* in general; see also the discussion in Chapter IV

¹⁷⁶ See Wondoson Sintayehu, *supra* note 133

¹⁷⁷ See Wemhoff Case, European Court of Human Rights, Judgment of June 27, 1968 as cited by Yakob H/Mariam, *supra* note 70, at 733

¹⁷⁸ Personal interviews with thousands of witnesses

¹⁷⁹ See Section 1 and 2 of Chapter IV

¹⁸⁰ *Id*

Hence, there was no bad motive and negligence on the part of the SPO and TGE that could show the existence of unnecessary delay during these periods.

4.3.1.2 “48 Hours Rule” and It’s Application

In the ordinary cases, the moment the police detained a suspect; it has to bring the accused within 48 hours to the nearest court. Art 29 of the Criminal Procedure Code and Article 19(3) of the constitution provide that the investigating officer has a legal duty to bring the arrested person before the court within forty-eight hours of his arrest. The Constitution¹⁸¹ and the 1960 Civil Code¹⁸² of Ethiopia provide that the accused that is not taken to the court within this time has the right to habeas corpus.

This standard of speedy trial had also exception or excuses. Among those explicitly recognized excuses are: delay due to journey from the place of arrest to the nearest court that might take long time in the countryside,¹⁸³ and when the interest of justice so requires.¹⁸⁴ The laws did not limit the maximum time excluded for the journey. Since the time needed for the journey depends on the local circumstances and communications, the law cannot provide specific time limit applicable for such exclusion. Thus, delaying more than 48 hours is justified to the extent that the delay is due to the journey from the place of arrest to the nearest court. The constitutional phrase “the interest of justice” is broader that in effect would not allow the remand courts to order the release of persons arrested more than 48 hours. Article 29(2) and 59 of the Criminal Procedure Code would not also allow the remand courts to order the release of accused brought before them. The investigator would only request remand from courts when it believed that it had evidence that implicate the suspects in committing crimes. Other wise, the investigator who did not respect the forty-eight hour rule without excusable reason could not logically took the suspect to the court while he could have released him on bail.¹⁸⁵ These provisions of the constitution and the Criminal Procedure Code in effect impliedly allow other justifiable reasons of delay such as if the accused is seriously sick, the defendant refuses to go to the court, or etc.

The courts are also obliged to give excuse to the delay if it is in the interest of justice so requires.¹⁸⁶ Hence, they should not release the accused; rather they should give remand for further investigation.¹⁸⁷

These rules are applicable to all cases to be investigated by SPO.¹⁸⁸ SPO had responsibility to investigate not only detainees arrested by the Office but also those more than 2000 detainees arrested before its establishment without following the legal procedures. Hence, SPO had to request remand for those detainees to regularize the previous detention. To perform this responsibility, immediately when SPO opened its office in Feb. 1993, SPO had requested the Central High Court remand to investigate detainees arrested before its establishment.¹⁸⁹

¹⁸¹ See Article 19(4) of the 1995 FDRE Constitution

¹⁸² See the habeas corpus provisions of Articles 177 to 179 of the 1960 Civil Procedure Code

¹⁸³ Art 29 of the Criminal Procedure Code of Ethiopia

¹⁸⁴ Article 19(4) of the FDRE Constitution

¹⁸⁵ Article 28 of the Criminal Procedure Code of Ethiopia

¹⁸⁶ See Article 19(4) and Article 59 of the Criminal Procedure Code of Ethiopia

¹⁸⁷ Id: See also Art. 29(2) of the Criminal Procedure Code of Ethiopia

¹⁸⁸ See Article 6 of Proclamation No. 22/1994

¹⁸⁹ Discussion with Chief of SPO

However, the courts rejected the efforts of SPO to regularize the previous detention¹⁹⁰ while they ordered the release of some suspects based on the pleadings of detainees for habeas corpus.¹⁹¹ That time, the courts were not considerate to the “interest of justice” as it is framed in the FDRE Constitution and the transitional political and practical situations that forced the delay of the formal investigation processes that we have discussed in 4.3.1.1 above. As a result, SPO was forced to use technical jargons to come out of the mess created without the office’s responsibility.

In some notorious cases, SPO did release the defendants on one door and arrested them immediately after they left the prison with fresh arrest warrant.¹⁹² The readers are invited to see the hectic situations of this time in Section 2.1.3 of this Chapter (V). At that time it was difficult for the Office to find out even a single document or witness for all detainees so as to convince or show to the courts that the detainee was suspected of crimes and to get permission for investigation. Some of the suspects might be famous and notorious, but SPO had yet to find out evidence to prove that general knowledge. There was no time for SPO to find out such evidence and even if it found evidence there was no time and resource to file remand pleadings for each accused of all more than 2000 detainees by finding out as to where such suspects were arrested. Most of the detainees were arrested in Holeta town, 45 Kilo Meters far from Addis Ababa. The detainees’ families were able to easily file their habeas corpus pleadings without going to the prisons. But, SPO was obliged to transport the suspects from Holeta to Addis both for the court that heard the habeas corpus and the remand pleadings. This requires time, huge resources, and sufficient prosecutors. The Office had no time, resources and sufficient prosecutors to properly manage these hectic and difficult situations. Hence, there were many defects in the performance of the Office. If the Courts allowed a week or two weeks time accepting the request of remand for hundreds of suspects in a single file, the office could have been able to cop-up such difficult situations. Some times the Special Prosecutor that requested the remand court and that responded to the habeas corpus pleading were not able to get time to interchange information. As a result, there were many contradictory orders of different courts against the same suspect. For example, the remand court had permitted time for investigation against Ato Bersisa Bedada while the court that heard the habeas corpus pleading ordered the release of this suspect.¹⁹³ There were many messes that seem childish play at that time. It is difficult to exhaustively list such messes here.

This was one of the difficult situations that blurred the picture of the Office. Yes, this childish play was shame to the Derg/WPE trials at that time. And it consumed about three months of the golden investigation time to the Office. For the courts that used to adjourn more than six-months without purpose to fix and summon for the first appearance, it would be out of the merit of the law to reject at least a week time investigation period for SPO. It showed the paradox of the speedy trial concept in Ethiopia where the courts control each minute and days of the police and

¹⁹⁰ Discussion with Chief of SPO

¹⁹¹ See for instance, In Nega Ayele V. SPO the Central High Court Criminal File No 28/85; in this case the court ordered the release of the suspect on the ground that the suspect is arrested without arrest warrant issued from the proper court, despite the fact that the suspect was remanded by other courts; the same decision is given in Asfaw Wosen V. SPO by the Central High Court on File No. 272/85

¹⁹² For instance in Endale Tessema V. SPO the Central High Court, on Criminal File No. 272/85, ordered the release of the suspect who was the one of the Standing Committee of Derg and the Polit-Burro of WPE. SPO arrested him with fresh warrant after he was released.

¹⁹³ See SPO V. Bersisa Bedada et al; this author was the prosecutor for the remand court while other prosecutor was responding on the pleading of the habeas corpus. The courts were in difficult situations to execute their conflicting orders.

prosecutor but they are left without effective control if they strictly follow their own part of responsibility.¹⁹⁴ Due to this, the victims and the TGE Officials developed suspicion against the courts credibility at that time.¹⁹⁵

After this major incident, SPO tried to apply the time limits given by the Criminal Procedure Code. The remand courts were also checking the Office's investigation task. The SPO, like any other investigation officer might violate the 48 hours limits in few cases. But, courts were strictly controlling and made timely corrections when such violations had occurred.¹⁹⁶

4.3.1.3 "Fourteen Days Rule" for Investigation and Its Application

Once the suspects appear to the remand courts, Art 59¹⁹⁷ of the Criminal Procedure Code designs a procedure to hold the investigation in a timely manner under the control of the remand court. This law is the major means of balancing the right to speedy trial of the accused and the interests of justice. The law recognizes that sufficient time is necessary to investigate crimes. Investigation is the first step to set apart the innocents from suspects. It is the necessary prerequisite for justice. Usually crimes are not committed in public. Suspects would try to threaten testimonies and destroy evidences. If investigation failed to gather appropriate evidences, the actual criminal may be acquitted while innocents may be harassed. Hence, sufficient time is necessary to investigate crimes. But, the time sufficient for one crime could not be sufficient to other crimes.

On the other hand, if the investigation is unnecessarily prolonged, the rights of the accused will be prejudiced and the evidences to prove or disprove the commission of the crime will be at risk of disappearance or destruction.

Article 59 of the Criminal Procedure Code does not limit the maximum or the minimum time for investigation. It only limits at what interval the court needs to evaluate the achievement of the investigation. There are cases that can be investigated within less than 14 days and there are also cases that cannot be investigated for years. Courts have huge responsibility to balance the two interests. At the end of the fourteen days, the court has to examine whether the investigation is developing or not; whether the investigation is completed or not and whether the investigator employed the maximum effort or not. After evaluating these, the court may allow extra time or decide not to give permission for further investigation.

¹⁹⁴ See Table 2-4 and the discussions in Section 4.3.2 of this Chapter

¹⁹⁵ This author has personal view that this measure of the courts at that time did not show their impartiality. Rather it showed that judges were unnecessarily influenced by the then sympathetic situations created by the accused family in the courtrooms. They had forgotten the huge numbers and interest of victims behind the courtroom that were strongly demanding and fought to see justice served. From that time onwards, the TGE had been suspicious of the judiciary. I think that does not help the judiciary to develop strong and independent.

¹⁹⁶ All the SPO cases passed through the strict control of remand and custody procedures, See for instance the files mentioned in Table 8

¹⁹⁷ It reads as: "Art.59 Detention (1) The court before which the arrested person is brought (Art. 29) shall decide whether such person shall be kept in custody or be released on bail. (2) Where the police investigation is not completed the investigating police officer may apply for a remand for a sufficient time to enable the investigation to be completed. (3) A remand may be granted in writing. No remand shall be granted for more than fourteen days on each occasion."

SPO has an obligation to follow this law.¹⁹⁸ What were the practices of SPO with regards to this? The discussion and interviews with prosecutors and the review of SPO remand files showed that SPO was following this procedure. But, this writer observed that since the courts were not allowing sufficient time taking into account the complexity of the crimes, SPO exploited the necessary time only after the remand file was closed. When SPO claimed that it had completed its investigation, the court used to give an order to keep the accused in custody until SPO brought charge against him.

But, actually the investigation was only partly completed at that time. As we have seen in chapter III, the crimes that were investigated by SPO were complicated and state sponsored. First, an accused may not necessarily be implicated only in one or few charges. Secondly, even if his part of investigation is completed, SPO needed the complete picture of the commission of the crimes before it decided who with what group should be charged. For instance, the investigation of one accused may be completed but usually many other co-offenders directly or indirectly involved in the commission of that crime. To get the full pictures of that crime, which was committed following the state structures, the role of other co-offenders should be clear through further investigation. However, it was difficult to convince the remand courts every time to get further investigation time on these and similar reasons. The courts would simply want to evaluate whether SPO had got evidences that implicated the suspect or not. If they were convinced of these facts they would not allow further time to investigate the whole pictures of the commission of the crime. They were judging on the parameters of the ordinary crimes.

But, it was obvious that the same court would order that the defendant be held in custody without time limit till the case finally instituted against him. This was other childish play SPO had experienced with remand courts during the investigation and prosecution. It is obvious fact that SPO's investigation and prosecution tasks in fact took nearly four years before SPO filed all its charges. The courts' strictness in not giving much time for investigation under Article 59 did not brought the necessary speed of the process. The courts rather could have played important role in shortening the whole investigation and prosecution time SPO took if they were able to give sufficient time interval so as to control and check the developments of the investigation and prosecution rather than pushing the prosecutor to lie to the court as the whole investigation is completed by bringing only some documents or evidences that implicate the accused and to close the files with the pretext that the investigation is concluded. They ought to have confronted the hardest reality that the investigation was complex and need much time than few fifteen days like ordinary crimes. This was implied in Article 59, but the courts were not able to wisely use their controlling power. By doing so, they could have more controlling role to reduce the time SPO took after each remand file was closed. The remand files that were closed in the first fifteen days investigation time took nearly four years before the investigation of SPO was completed and the charges were filed. This would be further elaborated in the next Section when we discuss the fifteen days prosecution time. There was no mechanism for the courts to control the time limit after the remand file was closed for indefinite time until SPO brought its charges. If such loopholes were not created, SPO and TGE would have been obliged to increase their maximum effort to strengthen the Office by all necessary means and finished its investigation and prosecution much earlier than it took nearly four years.

¹⁹⁸ Article 6 of Proclamation No. 22/1992

4.3.1.4 “Fifteen Days Rule” for Prosecution and Its Suspension

In the ordinary cases prosecutor that received investigation report from police shall reach a decision to prosecute the accused or to refuse prosecution or to order further investigation or preliminary inquiry within the fifteen days time limit given by law.¹⁹⁹

The Criminal Procedure Code does not explicitly allow exception from this time limit. Nor does the law provide effective remedies if this time lapses. There is no clear remedy the court could give by law. By reasoning, the court may terminate the remand after investigation. In terminating the remand, the court may release the accused on bail by applying Art 59(1). Even if the court releases the accused, nothing will prohibit the prosecutor from instituting charges in the court having jurisdiction.

However, even this rule has loophole to exclude the time limit. If the prosecution is not satisfied or unable to reach decision it can order further investigation.²⁰⁰ This would give the prosecutor ample time than the fifteen days limit.

This time limit was suspended to SPO.²⁰¹ If this time limit was not suspended, SPO could have faced serious challenges on prosecuting the cases. The complexity of the cases required painstaking works in organizing and regrouping of the accused and counts. Had it not been for the works accomplished at this time all the trial process would have been taking multiplied times than it had already taken.²⁰² In practice, the cases could have been failed or taken too much cost, time and human resources. So, SPO had to settle and plan prosecution strategy that took into consideration the capacity of the judicial institutions, the interests of the defendants and the witnesses.²⁰³ And further we have seen in the above section that SPO was able to complete its investigation after the remand files were closed and before the cases were prosecuted. Proclamation 22/1992 extended this time for indefinite time

Proclamation 22/1992 has given the following privileges that differ from the then existing laws. Those limitations suspended by the proclamation are:-²⁰⁴

1. Fifteen days for instituting charges (Art 109)
2. To institute investigation and charges (statutes of limitations)
3. Submission of evidences at the first hearing of the trial (Art 124)
4. Habeas corpus for persons arrested prior to the coming into force of the proclamation only from 8th August 1992 for six months

Complicated cases committed by the whole system of government for two decades could not have been governed by the same standard of time as ordinary cases. As to the privilege of habeas corpus it had run before the office used over it.²⁰⁵

¹⁹⁹ See Article 38 and 109 of the Criminal Procedure Code of Ethiopia

²⁰⁰ See Article 38 (c) of the Criminal Procedure Code of Ethiopia

²⁰¹ See Article 7(2) (3) of Proclamation 22/92, which reads as: “ 7. Applicability of Existing Laws.--- (2)---the provisions concerning limitation of criminal action and the time limit concerning the sub-mission of charges, evidence and pleading to charges shall not be applicable to proceedings of the Special Prosecutors as indicated in Article 6 hereof.”

²⁰² See our discussion in Section 3 of this Chapter (V)

²⁰³ See the challenges of grouping and regrouping of accused in Section 3 of this Chapter (V).

²⁰⁴ Article 7 (2) and (3) of Proclamation No. 22/92

²⁰⁵ See the discussion in Section 4.3.1.2 of this Chapter (V)

There were two cases against this provision of the proclamation ascertaining that it is against international laws and the Charter of the TGE.

C/L Debela Dinssa Vs SPO in Cassation case No. 8/85 was one of the two cases. SPO had a file at Addis Ababa Higher court for remand against C/L Debela Dinsa²⁰⁶. The prosecutor had requested to the remand court that since he had found evidences implicating him to the crime he was suspected; the remand court should give order that the defendant be held in custody till the case finally be instituted against him. The motion was based on Art 59(1) and Proclamation No 22/84 Art 7(4).

The court over ruled the SPO motion and ordered SPO to bring the charge after 15 days. The order was given on Mizia 7, 1985 G.C (March 1993). The Office appealed against this decision claiming that the order is against Art 7(2) of the Proclamation. The appeal was filed in the Central Supreme Court on file No. 71/85. The defense counsel raised the issue that the proclamation that suspends the 15 days time limit is against the Charter and the international laws. The Supreme Court decided in favor of the defense. The Office appealed to Court of Cassation alleging that the subordinate courts made mistake of law in their decision.

The Court of Cassation heard the arguments of the prosecutor and the defense on the issues. Finally on Tahsas 12, 1986 G.C (Dec. 1993) the court of Cassation gave the final judgment on the issue. This judgment over ruled the subordinate court on the following reasons. The court of cassation held that the subordinate courts decision did not properly value the purpose of Art 7(2) of Proclamation 22/92. The purpose of the provision, the court interpreted, is to give sufficient time to SPO by suspending the time limit concerning the submission of charges. The court held that this suspension is not against the TGE Charter or the international laws. The court reasoned out that the standards of speedy trial has to balance the right of the accused and the criminal justice principle which includes that criminals have to be properly prosecuted, tried and punished for the crimes they have committed; that the speedy trial principle has to take into considerations the society's capacity to investigate and achieve criminal justice purpose; and that the court took judicial notice that to investigate and prosecute the crimes committed by the previous government is complex and time taking. The Cassation Court ruled that speedy trial standards should be applied considering the nature of the crimes and cases. The court held that international law also has no definite and specific time limit for all types of cases; rather reasonable time is the standard of international laws. This reasonable time standards are determined taking into account the countries capacity in the administration of justice and all necessary conditions discussed above. Investigating state sponsored crimes, to identify the crimes committed and the persons responsible for each crime are very complex and needs more time than the time specified in the Criminal Procedure Code of Ethiopia. Even if the court has believed this period should not be delayed unnecessarily, the provision that extends the 15 days time limit incorporated in Art 109(1) of the Criminal Procedure Code is not against the basic principles of the right to speedy trial. Hence, the Court of Cassation dismissed the order of the subordinate courts and gave an order that the accused shall be in custody without time limit until the prosecution institutes the charges with reasonable time.

²⁰⁶ C/L Debela Dinessa was one of the Derg Members. He was also the chief administrative of Shoa province, one of the 14 Administrative Regions. He was also the chairman of RCCC of Addis Ababa in which thousands of people tortured, arrested and Killed. He is sentenced for death. See SPO V. C/L Debelea Dinssa et al and SPO V. C/L Mengistu H/Mariam et al

The other similar case was SPO V. B/G Geremew Bekele, Cassation Case No. 9/85. The Central High court of Addis Ababa in case No 212/85 on Mizia 4, 1985 G.C (March 1993) refused the accused's motion that the prosecutor should bring his charge within 15 days. The accused appealed against this decision to the Central Supreme Court on Case No 68/85. The Supreme Court dismissed the judgment of the Higher Court on Sene 30, 1985 G.C (June, 1993). The Supreme Court has given the reason that despite the suspension of the time limit in Proclamation 22/92 Art 7(2) the SPO has to institute charges against the accused within 15 days. The SPO appealed to the Court of Cassation on the ground that the Supreme Court has made a mistake of law in its interpretation of Proc.22/84 Art.7 (2) and Art 109(1) Criminal Procedure Code of Ethiopia.

On Tahsas 12, 1986 (Dec. 1993) the Court of Cassation dismissed the Supreme Court's decision on similar reason to that of the case we have seen earlier.

We have seen how complex the crimes committed during the Derg/WPE regime were.²⁰⁷ The crimes committed were diverse types, systematic and massive. They were committed through out the country and the seventeen years of the regime. Almost most of the state and mass organizations that existed during the Derg/WPE regime were implicated in the crimes. The crimes were committed following the state structures both horizontally and vertically as well as the normal bureaucratic procedures. The numbers of persons subject to investigation were as wide as the numbers and complexities of the structures used to commit the crime. One can imagine the numbers of suspects for the crimes committed during the Derg/WPE regime.²⁰⁸ Officials suspected in one geographical area could also be involved in other areas, because of their transfer from one administrative unit to various administrative units.

The law that established SPO did not limit the crimes or the perpetrators to be investigated and prosecuted. Any person who is a victim of any type of crimes by the officials of the previous regime has the right to demand justice. SPO has no authority to refuse such claim for investigation as far as the case has evidence. Furthermore, Unlike the Argentinean Junta trial,²⁰⁹ well-organized and professional enquiry was not made on the abuses committed before SPO was established. Due to the elapse of long time since the crimes were committed, witnesses and suspects were not easily found for variety of reasons and documents were misplaced or destructed. The existences of many documents that should be verified, the shortage of technical experts to verify documents, etc were also practical constraints that necessarily delayed the investigation and prosecution.

Many suspects had been detained long before SPO was established. Close scrutiny by the remanding courts was a serious challenge to investigate complicated crimes after thousands of suspects were arrested. Hence, rather than investigating the crimes, SPO was forced to attain prolonged court proceedings to regularize the detention of 2000 detainees. Long times were also taken to prepare charges, to research the relevant laws and to determine groups to be jointly charged. For example, up to 275 accused were joined in single file.²¹⁰ One defendant was

²⁰⁷ See Chapter III

²⁰⁸ See Chapter III

²⁰⁹ Discussion with Professor Rodolfo Mattarolo; who was legal consultant of SPO and who had deep knowledge not only as a citizen of Argentina, but his own involvement in the trial process

²¹⁰ See SPO Vs L/T Abera Aga

charged for more than 600 counts.²¹¹ The resources of the Office were incompatible with the volume and complexity of the crimes.²¹² We have seen the number of prosecutor, supporting police investigator, and temporary document collection teams.

Hence, the decisions of the Cassation Court supporting the extension of the fifteen days limit is consistent to the concept of the speedy trial we have discussed in Section 4.2 above. But, the cassation court was not able to limit the maximum time that SPO should have charged its cases. It made open and as a result SPO consumed the times from June 1993 up to March 1997 to charge almost all its cases. Hence, one may raise question if that time is consistent to the decision to the Court, which in fact assume the charges to be brought within reasonable time.

In comparison to the resources and the complexity of the crimes, the Office's performance could be appreciated. But, that was not enough to ensure the right of accused to speedy trial. Resources ought to have been increased and maximum remuneration and privileges ought to have been given to attract many professionals.

There is an argument that held that Ethiopia had not sufficient legal professionals at that time.²¹³ Legal professionals trained through out the country at that time were no more than 3000.²¹⁴ The government could not have financial capacity to employ professionals from outside. Hence, even if the government attracted many professionals to SPO, there was a fear that the courts and the defenses and even the private firms would have faced scarcity. That could have in turn created conditions that would have delayed the trials at latter stage.

Hence, this reasoning would lead us to the conclusion that the causes of the delay were not attributed to the bad faith and misconduct of the parties and even the government. It was mainly caused by the financial and trained manpower constraints of the country to investigate and prosecute the complex and huge state sponsored crimes. Thus, one can say that such delays are justified.

Nevertheless, despite such problems related to the transitional situations and the constraints of resources due to the low level of development of the country, TGE's budget of 2 million Birr was not sufficient. If the TGE had doubled the budget and increased the benefit at least by twofold, the SPO, the Judiciary and the Defense could at least have maintained the manpower they had and injected some more professionals. This could have speed up the process and reduce the time taken at least by half. And on the other side, if international community had supported at least equal to the one-year budget of the ICTR, the investigation and prosecution could have been speed up. If international community provided sufficient support, the country could have employed professionals from outside the country. By doing so, the whole processes could have been shortened. This would, hence, lead us to the conclusion that some of the times consumed to investigate and prosecute could have reasonably reduced if resources were increased. Therefore, only to the extent of time that we could have reasonably reduced, we can say that there was unnecessary delay.

²¹¹ See SPO Vs Major Melaku Tetfera

²¹² See discussion in Section 2 of Chapter V

²¹³ See the detail arguments related to this point by Ato Mehari Redai, *supra* note 25, at 17-18

²¹⁴ See Mehari Redai, *ibid* at 17-18 citing Rita A. Fry and Gregory W.O Really, "Developing the Right to Counsel in Ethiopia," 80 *Judicature* 112 (1996) at 112

4.3.2 The Trial Time Limits: The Law and Its Application

We have seen in the previous section the delays during the pre-trial, the investigation and the prosecution. During these periods, SPO was the major actor of the delay under the supervision of the remand courts. But, after SPO filed the charges, it could not only cause the delay. Hence, in the following section, we will try to see the laws that limited the times within the trials, assess some of the reasons of the delay and responsible parties for such delay after the charges are filed to the trial courts.

The courts are empowered to control investigator and prosecutor to follow the time limits given by law; but after the trial begun courts failure to keep up within the time limits is not properly controlled by the laws in Ethiopia. The courts have discretionary power to fix time limits following the laws. Court's misconduct in keeping such time limits is not subject to appeal.²¹⁵ Article 184 (a) of the Criminal Procedure Code reads that "No interlocutory appeal shall lie from a decision of the court: (a) granting or refusing an adjournment under Article 94." The courts are trying criminal case during the adjournment time. If the hearing is not concluded in a first adjournment, the courts will give other adjournments. Such adjournments hence will determine the speed of the hearing. The courts need time to fulfill some of the fair trial guarantees.

The close reading of the Criminal Procedure Code presupposes full trial to begin and end on the first appearance fixed by the courts.²¹⁶ Except for petty offences, this ambition of the lawmakers to finish the trial within a day has never been practiced in Ethiopia. In complex and grave crimes where fair trial guarantees of the accused are mandatory, the ambition of concluding a trial within a day could not be materialized in any way.

Hence, the court is empowered to adjourn the case for different reasons specified in the law.²¹⁷ Adjournments took time and hence affect the speedy trial. But "the interest of justice" or fair trial guarantees obliged adjourning the case until such time the purpose for which adjournment is given accomplished. In criminal justice "fairness and accuracy are essential components."²¹⁸ We have seen above that the concept of speedy trial could not be justified if innocent persons are convicted and punished and real perpetrators are acquitted. Hence, according to the American Bar Association Speedy Trial Standard, the idea of speedy trial did not serve as an excuse not to give defendant and the prosecutor "adequate opportunity to investigate their cases, consult with witnesses, review documents, make appropriate motions, and conduct other aspects of case preparation,"²¹⁹ These and other activities which are necessary to reach fair and accurate trial should be accomplished through the adjournments. Thus the times taken to accomplish such tasks are necessary delay.

The Criminal Procedure Code recognizes type of adjournments by giving general criteria and also giving lists of adjournments.²²⁰ Art 94 has placed the following limitation in giving adjournment:-²²¹

²¹⁵ See Article 184 of the Criminal Procedure Code of Ethiopia

²¹⁶ See 124(1), 124(2), 127(1), 128-130 of the Criminal Procedure Code of Ethiopia

²¹⁷ See Article 94 of the Criminal Procedure Code of Ethiopia

²¹⁸ American Bar Association, *supra* note 123, at 1

²¹⁹ American Bar Association, *Ibid* at.2

²²⁰ See Article 94(1) and Article 94(2) of the Criminal Procedure Code of Ethiopia

²²¹ Art. 94(1) of Criminal Procedure Code Ethiopia

- The adjournment should be given only when the interests of justice so requires
- The law lists the types or reasons for which the adjournment should be given
- The law limits the time of adjournment

Since the wording of Art 94(2) seems the types of adjournment listed down are exhaustive, it is not clear why the general criterion is given in Article 94(1). As a result, opposing interpretations exist on the application of these two articles.²²² The first approach held that the types of adjournment listed are exhaustive. And thus, it argued that the courts should not give adjournments for other reasons. This interpretation, hence, reconcile the two sub-articles, alleging that the courts should judge if such exhaustively listed types of adjournments are requested for the purpose of justice or not.

The other approach held that the close reading of the two sub-articles presupposes that the lists are not exhaustive. Rather the lists in Art 94(2) are obligatory that should not be weighed by the courts. For instance, if the defendant or the prosecutor fails to appear for good cause, the court needs not to weigh whether that reason is necessary for the interest of justice or not. The lawmakers believe and accept the reasons mentioned in sub-article 2 as necessary for the interest of justice. Hence, the court cannot legally reject adjournment for those reasons. This view continued to argue that there are other important reasons of adjournment, which are not listed in Article 94 (2) but which are mandatory for the fair trial and interest of justice. For instance, adjournment is mandatory where the interpreter or judge or any staff in the court is unable to attend the trial.

The courts in Ethiopia practically followed the latter interpretation as a result of which many reasons that are not listed in Article 92(2) from “a” to “i” are used for giving adjournments.²²³ In fact this interpretation is a proper one but it unnecessarily expanded the discretion of the courts; and hence the courts do not usually refer these Articles when they give adjournment.

As to the time limit of these adjournments, the Criminal Procedure Code provides: one week; definite period, and indefinite period.²²⁴ The one week adjournment is to be given on the type of adjournments referred in Article 94(2) (a), (f), (g) and (h).²²⁵ The law does not limit this “definite period”. Rather this will be given for sufficient time to enable the purpose for which adjournment is given.²²⁶ The sufficient time is limited by the discretion of the courts. These types of adjournments are listed in Article 94(2) (b), (d) and (f).²²⁷ The indefinite time adjournment is given without time limit until such purpose would be accomplished. Until such purpose is accomplished, the criminal proceedings will be suspended. The types of adjournments that should be given for indefinite period are listed in Article 94(2) (c), (i), (j) and (k).²²⁸ The law also recognized additional similar time, if such adjournments fail to be carried out for the reasons not attributable to the fault of the prosecution or the defense.²²⁹ Hence, those adjournments that are

²²² Getachew Afrassa, *Speedy Trial in Ethiopia*, Thesis Paper for Partial fulfillment of LLB, Faculty of Law, AAU, unpublished, 1973, at 42

²²³ See Table 4 and 5 below at 157, 159

²²⁴ See Article 94(3) and 95 of the Criminal Procedure Code of Ethiopia

²²⁵ Id

²²⁶ See Article 94 (1) of the Criminal Procedure Code of Ethiopia

²²⁷ See Article 95 (1) together with Article 94(3) and 95(3) of the Criminal Procedure Code of Ethiopia

²²⁸ See Article 95(3) of the Criminal Procedure Code of Ethiopia

²²⁹ See Article 95(2) of the Criminal Procedure Code of Ethiopia

not mentioned in Article 94(2) should be given for the time following the above patterns and reasoning of the lawmakers in determining the time limit.

As we have seen above, the length of time is one of measurement of delay. The total sum of all times taken in all adjournments from the commencement of investigation up to the completion of the proceedings shows the length of time the trial took. In addition to the length of time the trials took the reason of delay should be assessed so as to determine if there exists unnecessary delay or not.²³⁰ The reason or cause of delay may differ from file to file, from one stage of the proceeding to other stages and from one adjournment to others. Therefore, to reach a correct conclusion, it requires assessing reasons of delay in detail. Therefore, with this limited scope of the study it is difficult to reach ultimate conclusion as to whether the whole Derg/WPE trials, which have been conducted by many courts or benches, in many files, with varieties of reasons of adjournments, etc, are unnecessarily delayed or not.

But, we may find out the general causes of delay and reach some tentative conclusions by assessing some sample studies.²³¹ Hence, this author collected data from some randomly selected files. These files or data are:

1. 47 randomly selected Files of SPO from cases tried by Federal and Regional Courts except Harar²³²
2. Two randomly selected sample files to demonstrate detail proceedings and reasons and duration of each adjournments:
 - a. SPO V. L/T Abera Aga et al
 - b. SPO V. Ato Geseges G/Meskel et al
3. Comparative Tables of ICTR and Derg/WPE Trials: Resources and Tasks
4. Some necessary information of the 47 randomly selected files

Based on such empirical studies, we would try to assess the times taken and the reasons of delay during different stage of the proceedings: (1) The time before “full trial” begins; (2) The time for full trial (hearing prosecution evidences); (3) The time for verdict; and (4) The time for defense. In each steps, the major or sole actor of the proceedings differ, though other actors could also play influencing role in the accomplishment of the major actor. In the first period, the major actors are the courts and the defense; in the second period the prosecution and the court are the main actors to produce and hear evidences; in the third period the sole actor is the court; and in the last step the sole actors are the courts and the defense. This would give a good insight how, by whom and why the delay is occurred. Furthermore, each step had clear implications how important the delay is. For instance, the first period had only very few significance in protecting the fairness of the trial. That is why the law gives the shortest period, one week, for the type of adjournments that should be given during this period.²³³ Hence, if much time is taken in this period, we can say in general that the time spent during this period is not much important to reach accurate and fair trial. And hence it would be difficult to justify such delay.

In the second step, crucial tasks of the criminal proceedings would be carried on. During this time the prosecution evidences would be heard. This time is important for all parties in the criminal proceedings. If the defense is able to confront the prosecution witnesses he would be

²³⁰ See our discussion in Section 4.2 in this Chapter (V)

²³¹ But, logically this general conclusion may not be applicable for some exceptional reasons of delay.

²³² The author could not easily assess the data's from Harare Supreme Court

²³³ See Article 94(3) of the Criminal Procedure Code of Ethiopia

acquitted before he defends his case. It is on evidences heard during this time that the court would reach verdict. Hence the courts, the prosecution, the defense, and the victims need this time for accurate and fair trial. That is why the law gives wider time for adjournments during this time.²³⁴ The third period is the courts time to pass verdict, which is largely dependant by the tasks accomplished in the second step. The law does not specify adjournment for such step explicitly. But, the courts need time to weigh the evidences and write their reasoning and verdict. Logically, this time should be less than hearing evidences.

The last time is the defense time. During this time the presumption of innocence is rebutted by the court's decision. The defense would try to regain this presumption by his defense. Some times the defense may want to delay the time for its defenses if he knew that his defense would not help much. At this time, the courts would not pressure the defense to speed up since it would count against him. Hence, this time runs against the interest of the defense by the defense himself. If the defense extends this time on its delaying tactic or failure, he could not benefit from the right to speedy trial.

The study did not cover the time consumed during the appeal. This is mainly due to time and scope limit of this paper.

Hence, in the following section we shall try to find out the main reason of delay based on these two randomly selected detailed analyses of the court proceedings on two cases and the other 47 randomly selected files from Addis Ababa, Tigray, Amhara, Oromiya, and Southern Nations, Nationalities and Peoples Regional Supreme Court.

Before we analyze the empirical studies, it is necessary to see first the collected data in the following three tables. (Table 2 - Table 4). Table 2 summarizes the times spent (1) times taken before full trial- (from filing charges up to beginning of prosecution witnesses); (2) times taken during the full trial- to hear the prosecution evidences; (3) times taken to give verdict by the courts; and (4) times taken to complete the defense, judgment and sentencing. Table 3 and 4 will help to elucidate the types of adjournments, the times allowed for each adjournment and institution that took the adjournments within two randomly selected sample files: SPO V. L/t Abera Aga et al (Table 3) and SPO V. Ato Geseges Gemeskel et al (Table 4). Table 8 summarizes other relevant data of these 47 randomly selected files for further considerations. For instance it might be necessary to see the SPO and Court File Numbers; the Name of the files, the Name of the Court that Tried the File; Total Number of Witnesses Heard; Total Numbers of Pages of Documentary Evidences Produced; Maximum and Minimum Number of Witnesses heard in a day; the Number of Co-Offenders Charged Together; and the Number of Counts in Each File. They will indicate important data for further consideration of why one file delayed more than others. Table 8 is attached in the last part of the paper.

²³⁴ The adjournments given during this time are unlimited. Rather as we have seen above it says for sufficient definite time that can be extended for other similar definite time to be determined by the court.

Table No. 2 Table Comparing Times Taken During Four Stages (Periods) of the Trials of 47 Randomly Selected Files

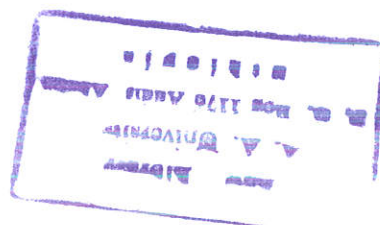
No	SPO File NO	C/t File No	Name of the first Defendant	Co - off	1 ²³⁵	2 ²³⁶	3 ²³⁷	4 ²³⁸
1	001/85	1/87	C/L Mengistu Hailemarim	73	1y 3d	6y	1y 1m	4y
2	17/85	03112	Maj. Melaku Tefera	1	2y 2m	2y	3y	2y
3	46/85	939/89	Geseges G/Meskel	79	2y	3y 1m 19d	1y	2y 10m
4	13/85. 1	937/89	L/T Abera Aga	27 5	2y	1y 8m	4y 13d	5y 6m
5	88/85	655/89	L/T Akalu Mekonnen		11m 15d	2y 5m	5m	1y 14d
6	003/85	923/89	Major Kassaye Aragaw	27 5	1y 7m	2y 4m	2 m	1y 9m
7	275/85	227/93	Ato Abebe Melaku	85	1y 7m	1y 11m	6 m	5y 7m
8	276/85	228/93	Major Semunigus Seyoum	27	1y 7m	1y	3m 24d	6y 2m
9	47/85	957/89	Commander Lema Gutema	14	1y	2y 4 m	23d	23d
10	40/85	17/90	Basha Haileselassie Desta		3y	7m	1y	4m
11	41/85	14/90	Ato Asaye Birhanu et al	10	3y	7m	1y	4m
12	126/85	1338/93	Ato Mekonnen Gelan	16 5	3y 3m	2m 4d	8m	6m
13	197/85	3310/95	Mekonnen Gelan	1	1y 3m	4m	11m	
14	291/85	1404/93	Mengistu W/Agegnehu	1	4m	1y	8m	6m
15	303/85	1195/93	Sishaw W/Selasie	4	3y 3m	4m	11m	
16	305/85	1193/93	Demsie Teiga	20	3y 13m	15d	5m	6m
17	306/85	1190/93	Samuel Nitsa	6	3y 3m	5m	2m	6m
18	307/85	1194/93	Alamerew Habite	7	3y 3m	4m	4m	6m
19	308/85	1196/93	Kassa Wolchie	8	3y 3m	4m	3m	4m
20	309/85	1192/93	Wonbera Hoga	6	3y 3m	3m	8m	
21	58/85	26/90	Capitan Kebede Mekuriya	5	2y	10	8m	11m
22	95/85	24/90	M/G Girma Niway	10	1y	11m	8m	11m
23	131/85	6/92	H/giorgis Tasew	95	1y 10m	2y	1y 2m	1y 8m
24	254/85	54/92	Megersa Bikila	18	11m	4m	9m	8m
25	253/85	57/92	Mehari T/Haimanot	52	6m	1y 3m	1y 4m	1y 9m
26	327/85	58/93	B/Meskel Alebel	1	5m	2m	2m	7m
27	359/85	42/94	Alemayehu Kassa	1	6m	1m	5m	11m
28	31/85	9/89	W/gebriel G/Egz.	3	2y 5m 17d	6m 13d	1m 16d	No data
29	133/85	6/89	Derbachew Yifa	47	2y11m15	1y 7d	1m14d	No data

²³⁵ Time Before full trial that is from the day the charges filed up to the beginning of hearing prosecution witnesses

²³⁶ Full trial- that is time taken to complete the prosecution evidences (from the first day of beginning of hearing prosecution witnesses or evidences up to the day that SPO complete its evidence)

²³⁷ Time taken to give verdict by the courts (from the day SPO end its evidence till the court pronounce its verdict)

²³⁸ Time taken to complete the defense, judgment and sentencing (from the day of the verdict until the file is closed)



					d			
30	225/85	26/92	Yematawork W/yes	11	1m 18d	7m 14d	2m 22d	No data
31	25/85	3/90	C/L Ayana Mengistu	53	2m 16d	3y 3m 22d	6m	No data
32	190/85	1/91	Tekleberhane Negash	20	11m 17d	1m	24d	No data
33	26/85	1/90	Capitain Yosef Tilahun	4	2y 6m	2y 2m	7m 17d	No data
34	108/85	2/89	C/L Debebe Hurise	10 6	3y 8m	2y 14d	4m8d	3y 7m
35	230/85	22/92	Ato Dejene Waqeyo	7	2y 10m	2m 25d	1m 12d	1y7m20d
36	180/85	14/92	---Atere Tessema	9	1y 24d	1m 12d	20d	1y 5d
37	242/85	23/92	C/L Getachew Wakijira	27	3y	10m 23d	1m 5d	8m 7d
38	241/85	24/92	L/C/L Dawit Mulat	75	3y	10m 15d	3m 7d	10m 28d
39	243/85	26/92	Ato Geletu Timo	14	2y 11m	9m 10d	1m 14d	3m 15d
40	48/85	8/89	Ato Moges Abebe	95	3y	1y 8m 21d	21d	1y 1m
41	178/85	11/92	Ato Araressa Robie	3	3m	1d	13d	7m
42	89/85	7/89	Ato Gudina Tuni	51	3y	1y 10m	1m18d	10m
43	108/85 .3	18/92	H/Giorgis Tasew	12	2y 9m	1m 24d	1m 21d	3y
44	10/85	661/94	Ato Girma Wakijira		6m 2d	1d	1m 14d	4m 18d
45	13/85. 2	937/89	Ato Hailu Burayu		2y 6m 5d	1y 11m	1y 2m	2y4m15d
46	55/85	933/89	L.T. Abebe Arega		3y 21d	6m 7d	18d	14d
47	75/85	643/89	Ato Basazine Baissa		1y 3m 9d	3y 3m 4d	4m 16d	11m 20d

Source: The sources of these data are the files of the Courts and SPO mentioned in the table. The Special Prosecutors helped this author to sort out these data from the report of the court proceedings within the mentioned files.

Table No 3. SPO V. L/T Abera Aga et al Trial Court Proceedings

No.	Reasons of Adjournments	Time	Institution responsible
1	From the filing of the charges until the beginning of hearing witnesses	3 years	
1.1	To fix the first Appearance	9 months 1 time	Court
1.2	Adjournments related to the right to counsel		
1.2.1	To get advise with family as to how they would employee defense lawyer	3 times	Accused
1.2.2	To verify if the accused is financially capable to employee private counsel at his own cost	10 times	Accused and Prison Adm.
1.2.3	To ensure if the order given to Public Defense Office is executed or counsel is assigned for accused	6 times	PDO and accused
1.3	Adjournments related to the right to appear		
1.3.1	To ensure the execution of summons and bench arrest warrant against the accused	4 times	Police
1.3.2	To publicize summons on Medias	1 time	Fugitive accused
1.4	To read Charges	3 times	Court + Accused
1.5	To rule on the motion on bail	3 times	Court + accused
1.6	To ensure the assignments of translators	1 time	Court
1.7	Adjournments related to raise preliminary objections	13 times	Accused
1.8	To receive the prosecutors reply on the preliminary objection	1 time	SPO
1.9	To give verdict	1 time	Court
1.10	The Failures of the Judge to appear	2 times	Court
1.11	The failure of court clerk to send order to SPO	1 time	Court
1.12	To Separate Charges upon the order of the court	1 time	SPO
1.13	To read the separated charges and record guilty or not guilty response of the accuse	1 time	Court and Accused
Sum.	Total Adjournments in 3 years	26	
Avera.	Average time for each adjournment	1.4mths	
2	To Hear Prosecution Witnesses and Receive Documentary Evidences	1 year + 8 months	SPO + Court + Accused
2.1	Number of Adjournments where Prosecutors failed to bring witnesses or document	1 time	SPO
2.2	Number of Adjournment where Some of the Prosecution Witnesses Fail to Give their Testimony due to Lack of Court Time	6 times	Court
2.3	Number of Adjournment where Some of the Prosecution Witnesses Fail to Give their Testimony due to non-appearance of accused	None	Accused
2.4	Number of Adjournment where all of the Prosecution Witnesses Fail to Give their Testimony due to non-appearance of accused	None	Accused

Summ.	Total Adjournments in 1 year and 8 months	12	
Av.	Average time for each adjournment	1.6 months	
3	Time to give verdict (From the completion of Prosecution evidence until the Court passed verdict)	4 mths 13days	Court
4	Time to Hear Defense Evidences, to Pronounce Judgment and Sentence in 58 adjournments	5 Years and 6 months	
4.1	Failure to constitute a quorum of Judges	4 times	Court
4.2	Failure to Pass Judgments or Sentence	8 times	Court
4.3	Failure of Police Not to Execute Bench Warrant against accused	5 times	Police
4.4	Adjournments to Defend	41times	Accused
4.5	Failure of the Accused to Produce Defense	2 times	Accused
Sum.	Total Adjournments	58	
Av.	Average time for each Adjournment	1.13 month	

Source: Trial Court Report of SPO V. L/T Abera Aga et al From the SPO File No. 13/85.1 and Addis Ababa Federal High Court File No. 937/89. This file at the beginning had 275 accused together. But considering the accused preliminary objection and their request for separation the court in its ruling against the preliminary objection decided the case to be separated into different files. Taking into consideration the courts order this file was divided into five files. The first file continued in this file with reduced numbers of accused (68) until its completion.

Table. No. 4 SPO V. L/T Ato Gesegess G/Meskel et al Trial Court Proceedings²³⁹

No.	Reasons of Adjournments	Time	Institution responsible
1	From the filing of the charges until the beginning of hearing witnesses	2 years	
1.1	To fix the first appearance	8 m.+6 d.	Court
1.2	Adjournments related to the right to counsel		
1.2.1	To verify if the accused is financially incapable to employee counsel at his own cost	2 times	Accused and Prison
1.2.2	To ensure if the order given to Public Defense Office is executed or counsel is assigned for accused	2 times	PDO and accused
1.3	Adjournments related to the right to appear		
1.3.1	To ensure the execution of summons and bench arrest warrant against the accused	3 times	Police
1.3.2	To publicize summons on Medias	1 time	SPO and Accused
1.4	To read Charges	1 time	Court + Accused
1.5	To rule on the motion of bail rights	1 time	Court + accused
1.6	Adjournments related to raise preliminary objections	3 times	Accused
1.7	To receive the prosecutors reply on the preliminary objection	1 time	SPO
1.8	To give verdict	1 time	Court
1.9	The Failures of the Judge to appear	None	Court
1.10	The failure of court clerk	None	Court
Summary	Total Adjournments in 2 years	10	
Average	Average time given for each adjournment	2.4	
2	To Hear Prosecution Evidences	3y 1 m 19 d	SPO + Court + Accused
2.1	Number of Adjournment Prosecutors failed to bring witnesses or document	None	SPO
2.2	Number of Adjournment where all of the Prosecution Witnesses Fail to Give their Testimony due to Failure to constitute a quorum of Judges	1 time	Court
2.3	Number of Adjournment where Some of the Prosecution Witnesses Failed to Give their Testimony due to Lack of Court Time	11 times	Court
2.4	To Separate Charges upon the order of the court	1 time	Court
2.5	Number of Adjournment where Some of the Prosecution Witnesses Fail to Give their Testimony due to non-appearance of accused	3 times	Accused

²³⁹ In SPO V Ato Gesges G/Meskel et al where ---accused were charged, the time taken to complete the trial and the time and reason of each adjournment are shown in the following table.

2.6	Number of Adjournment where all of the Prosecution Witnesses Fail to Give their Testimony due to non-appearance of accused	1 time	Accused
Summary	Total Adjournments in 3 years 1 months and 19 days	27	
Average	Average time for each adjournment	1.4 mth.	
3	From the completion of Prosecution evidence until the Court pass verdict	1 year + 5 months	Court
4	To Hear Defense Evidences, to Pronounce Judgment	2yr 10mth	
4.1	Failure to constitute a quorum or other misconduct	11	Court
4.2	Failure to Pass Judgments or Sentence	7	Court
4.3	Failure of Police Not to Execute Bench Warrant against accused or witness	3	Police
4.4	Adjournment the Accused took to Defend	15	Accused
4.5	Failure of the Accused to Produce Defense Evidence	3	Accused
4.6	Failure of SPO	0	
Summary	Total Adjournments in 2years and 10 months	41	
Average	Average time each adjournment took	1.12	

Source: Trial Court Report of SPO V. L/T Geseges G/Meskel et al from the SPO File No. 46/85 and Addis Ababa Federal High Court File No. 939/89. This file at the beginning had 143 accused together. But considering the time that would consume in hearing the prosecution witnesses due to the workload of the court SPO initiated the idea of separating the cases into three files. The trial court and the accused agreed. After some prosecution witnesses heard the case is separated. The first file continued with reduced numbers of accused (79) until its completion.

4.3.2.1 The Time before “Full Trial” Begin

This time is a period that includes from the day the file is instituted to the trial court up to the beginning of hearing prosecution witnesses, or the “full trial”. After the prosecutor prepares the charges against the accused, the charges will be filled to the registrar of the court. Art 123 of the criminal procedure code provides:

“When the charge has been filed under Art.109, the court shall forthwith fix the date of trial and cause the accused and the public prosecutor to be summoned to appear on the date and at the time fixed by the court. It shall take such steps as are necessary to secure the attendance of the accused if in custody.” Emphasis added

This provision does not give the maximum time limit within which the court should commence the first appearance. Therefore, this loophole enabled the court to fix the time as it wishes. Thus, the courts unnecessarily extended their power to fix the day of hearing. The paradox lies here. The courts, which used to push the investigation and prosecution to end their tasks within days, have been adjourning the first hearing for months.²⁴⁰ So, in Ethiopia, it seems that the concept of “speedy trial” is not strictly applicable in the trial and there is no effective controlling mechanism.

²⁴⁰ See the cases randomly selected in Table2-4 at 157-162; For instance in Table 3 we can see that courts took more than 9 months before the first appearance.

This part of the proceedings is largely influenced by the conduct of the court, the defense counsels, the accused and the police. SPO is expected only to reply to some of the motions or preliminary objection or to give court's summons to the accused.

When we see the law, the followings are the tasks that should be accomplished before the court begin the full trial, or hearing evidences of SPO. Article 124(1) provides that "as soon as the date of the trial has been fixed, the public prosecutor and the accused shall give the registrar a list of their witnesses and experts, if any, whose presence is necessary." So, the register will summon the witnesses to attend at the hearing fixed by the court. Art 124(2) provides also that "the public prosecutor and the accused shall be responsible for ensuring that all exhibits to be produced at the trial shall be in court on the day fixed for the trial." If the parties and the evidences appeared in the first day, the law presupposes the hearing of criminal case to be concluded or at least begun in that day. In fact, this demands the appearance of accused and his defense counsel,²⁴¹ the prosecutor and the witnesses; consequently the court would verify the accused,²⁴² read the charges,²⁴³ hear the preliminary objections and the reply,²⁴⁴ settle the motions, record plea of the accused, before it goes to the full trial or hearing prosecution evidences.

These are the preliminary procedures that would help to protect the rights of the accused to appear, to be represented by counsel, to challenge the jurisdiction of the trial court or to produce legitimate grounds that the charges should not be heard at all, etc.²⁴⁵ Even though these procedures are important; they can be performed without taking much time. That is why the law provides only one week in every adjournment if such proceedings are not accomplished for good cause.

If we see from the Table 2-5, the times the courts took for these preliminary procedures are clear violations of the laws. We have seen above that the lawmakers allow only a weak for such adjournments. As we can see in the two sample files, the courts gave adjournment on average 2 months in SPO V. Ato Abera Aga et al and 2. 4 months for SPO V. Ato Geseges G/Mesekel et al case.²⁴⁶ Moreover, Table 1 shows that not only cases that had many accused and counts but also cases that had one accused or few accused and one or few counts took long times to accomplish these preliminary procedures. Even cases that had only one accused that appeared in the first hearing took from 3 months to 2 years and 2 months.²⁴⁷ Even cases that had less than 10 defendants took 3 years and 3 months.²⁴⁸ In Addis Ababa Federal High Court, in SPO V. Geseges G/Meskel et al the court took 8 months and 6 days from the receipt of the charges until the court issued summons to parties to appear to the first day in the trial court.²⁴⁹ In SPO V. Ato Abera Aga et al the court took 9 months from the day the charges filed to the first appearance.²⁵⁰

²⁴¹ Art 127(1) of the Criminal Procedure Code of Ethiopia

²⁴² Art 128 of the Criminal Procedure Code of Ethiopia

²⁴³ Art 129 of the Criminal Procedure Code of Ethiopia

²⁴⁴ Art 130 of the Criminal Procedure Code of Ethiopia

²⁴⁵ See Amnesty International Fair Trial Manual and the Criminal Procedure code of Ethiopia

²⁴⁶ See Table 2 and 3 above at 157-162

²⁴⁷ See for instance SPO V. Ato Gudina Tuni and SPO V. Maj. Melaku Tefera

²⁴⁸ See Table 4 above at 161-162

²⁴⁹ See Table 3 above at 159-160

²⁵⁰ See Table 2 above at 157-158

As we can see clearly from the random sample study of the 47 files, in almost all the files the courts took longer period than the law permitted. Surprisingly, the time consumed during this period in most of the case is much longer than the times taken to hear the prosecution evidences and to give verdict. These times are even closer and some times greater than the time the prosecution took to investigate and prosecute. Hence, in general, we can safely say that courts should not have taken much greater time to carry out such preliminary tasks than the full trial and some times greater than the time consumed to investigate the case. The courts had no-serious tasks during this time, which would force them to give repeated adjournments for months and years. If these times had been shortened in a month time, the trials could have been completed much earlier than they actually took.

But, we have to go deep in detail and ask some questions like: Is there any justifiable reason for such delay? What was the reason for such delay? The followings are some of the reasons of the delay during this time. The Oromia Regional State Supreme Court took more than a year until the court structures were established in Arsi and Jima towns.²⁵¹ There is no reason officially given for the delay the courts took to fix the first appearance and to issue summons in Addis Ababa and other courts. This author tried to find out the reasons from some officials of the court, but he cannot get any justification.²⁵² Hence, the delay in issuing summons implied only that courts were not prepared in advance to try such huge and complicated tasks that had been investigated by SPO under the supervisions of the courts. Even judges or benches were not assigned in Addis Ababa Federal High court in advance. If such preparation was at least made in advance, judges may have had the chance to be psychologically and individually prepared in advance and might have shortened the times taken.²⁵³

The other reasons for the delay after first appearance are many which include or related to accused's failure to appear or the appearances of accused in different times; the prolonged procedures to assign defense counsel, to decide hearing in the absence of accused who failed to appear; frivolous pretrial motions and preliminary objections, and etc.²⁵⁴ Some of these procedures are important for fair trials and may take longer time when many accused are charged together. But, could not the courts shorten these procedures? Why they took longer time for cases, which had one accused or few accused that appeared in the first day? Why the courts took longer time to execute bench arrest warrant by police while the investigation officer, SPO, had ensured to the court that it could not get them on their addresses? These and other questions are important to assess if such delays are necessary or not.

One of the reasons of the delay during this time was the court's failure to strictly follow the time limit given for such kinds of adjournments. The court may be legally right to give adjournments for the reasons mentioned above. But, by no means we can justify the longer times given against the strict limitation of the law. How can we justify, for example, more than two months adjournment for verifying the financial incapacity of an accused by the Prison Administration? First of all, should the court need to follow this procedure? Second, if it should, why not the

²⁵¹ Interview with Ato Ayele Moges, assistant Chief of SPO and bench Prosecutor in Oromia Supreme Court Arsi Criminal Bench

²⁵² This author tried to find out reasons of delay during this time by interviewing the Registrar, the then Vice – President of the Federal High Court and some of the judges. But, no one could give the reason for such delay.

²⁵³ See Section 2.2.1 of Chapter V

²⁵⁴ See the reasons from sample studies in Table 3 and 4 above at 159-162

court do itself within the trial like it used to do after a while? Hence, the courts should have strictly valued the importance of each adjournment and shortened the time of the adjournment as required by law.

The other important reason for the delay was that the courts have been giving longer adjournments to execute bench arrest warrant by the police. SPO had already in vain tried to detain the fugitives during its investigation. We have seen that this is one of the difficult times that delayed the investigation and prosecution of SPO. The court first ordered SPO to give the courts summon to the accused in their address. SPO explained to the courts that it could not get the accused since they were fugitive. In these situations, courts should not have given repeated orders, which consumed prolonged time of the trials, to the Federal and Regional Police for the detention of fugitives that were already tried by SPO for long time before the charges were filed.

In the ordinary criminal case, the courts used to order police to give summons to the accused. This is because Police is the one that investigated the case. In SPO case, SPO had acted both as police and prosecutor. In ordinary case, when the police respond that it cannot get the accused on their address, courts used to order the summons to be publicized in medias before it decide to try the case in the accused's absence. The same procedure should have been followed after SPO explained to the court that it could not get the accused by their address. The courts should have taken the SPO's assertion for granted. The charges stated those fugitive were charged in their absence.²⁵⁵ This implied that SPO tried to hunt the accused but it could not get them on their addresses. This was what had happened in practice. SPO might have requested the courts to order bench warrant, but the courts should have ruled out alleging these reasons. In practice, the police's role in executing the bench arrests warrant was insignificant except taking long time. Even the successes of those few bench arrests warrant were possible with the full cooperation of SPO. Though this procedure might be done with good faith to ensure the rights of the accused to appear and defend their case, but it unnecessarily took longer times.²⁵⁶

Longer time was also taken even for a file where one accused is charged and appeared.²⁵⁷ In a case where individual accused is charged much time was taken to hear the preliminary objection.²⁵⁸ But, the courts should not have given years for the accused to produce his preliminary objection.²⁵⁹ The courts were not also quick enough to rule out the preliminary objection. We may say that judges might have been researching on the preliminary objections, which had raised unprecedented litigations citing national and international laws and principles. But, the court's rulings were not of those kinds that took much research.²⁶⁰ Most of the rulings were rejection simply on the ground that the objections were not brought following Article 130 of the Criminal Procedure Code.²⁶¹ The courts should not take longer time to reject preliminary objection on such simple procedural grounds. If the courts adopted this stand at the beginning, many accused should have been limited from bringing frivolous objections and motions that consumed much time.

²⁵⁵ See every charges of SPO; it mentioned the non-detained accused as "charged in absentia".

²⁵⁶ See the sample studies in Table 3 and 4 above at 159-162

²⁵⁷ See Table 8 below annexed

²⁵⁸ See for instance SPO V. Major MelaKu Tefera and interview with the bench prosecutor

²⁵⁹ See for example SPO V. major Melaku Tefera.

²⁶⁰ See the ruling of the courts on each file; see for instance SPO V. Ato Geseges G/Mesekel

²⁶¹ See many of the rulings in the referred files; even the ruling on SPO V. C/L Mengistu H/Mariam et al rejected most of the issues with this procedural point.

Therefore, long times consumed during this preliminary stage of the criminal proceedings in almost all the files were difficult to justify. If such time were reduced, the whole trials should have been concluded much earlier than it had took, even with the existing constraints of resource.

4.3.2.2. Full Trial: Hearing the Prosecution Witnesses and Evidences

The major reason for the adjournment during this time is related to production and hearing of witnesses. As we have seen above, the Criminal Procedure Code recognizes adjournment to produce prosecution witnesses for a definite period fixed by courts.²⁶² The law gives discretionary power to courts to determine “sufficient time” for such purpose.²⁶³ We have said that this time is crucial for the whole fair and accurate resolution of criminal cases.²⁶⁴ That is why the law gave more time than the time given to the previous stages discussed in Section 4.3.2.3. And we have said the longer time taken in this step is more justifiable than the smaller time at the first stage discussed in 4.3.2.3 above.²⁶⁵

The trial courts had been giving adjournments for sufficient times upon their discretion taking into account facts such as the number and distances of addresses of the witnesses; the types and magnitude of their testimony; the schedules of the courts, defenses and prosecutors; the number of accused charged jointly, the capacities of the trial to hear witness in a day, the volume of documentary evidences, and other reasons related to producing of witnesses and evidences.²⁶⁶ Since the cases of SPO are complicated and huge, the number of witnesses or and volume of evidences were huge that could not be heard in a day or in a short time. Hence, the trial courts were giving many adjournments with sufficient time to complete hearing prosecution evidences.²⁶⁷

When the courts lacked time to hear witnesses produced by SPO, the witnesses went back so many times without giving their testimonies.²⁶⁸ That was costly and time taking to re-summon witnesses. And furthermore, witnesses were not interested to repeatedly appear before the court without giving their testimonies.²⁶⁹

There were differences in the essence of testimonies and the time they took.²⁷⁰ For instance, when the witnesses were victims’ families they mostly testified on the mere fact of the killing of the victim. When they were important eyewitnesses that could certainly testify against most of the accused, examinations of such witness took much time. In the former types of witnesses, the defenses normally used to waive cross-examining the witnesses, but in the latter types both party used to intensify their examination to prove or disprove facts testified by such witnesses. Table 8

²⁶² See the discussion in Section 4.3.2 above in this chapter

²⁶³ Id

²⁶⁴ Id

²⁶⁵ See the discussion or reason in Section 4. 3.2.1 in this chapter (V)

²⁶⁶ Discussions with the judges and the Special Prosecutors as well the personal experience and observation of this author

²⁶⁷ See for instance Table 3 and 4 above at 159-162

²⁶⁸ See Table 1 and 2 above that shows many times witnesses went back without giving their testimonies due courts’ lack of time to hear them.

²⁶⁹ Personal observation and interview with Special Prosecutors

²⁷⁰ Id

gives some clues on the maximum and minimum numbers of witnesses heard in an adjournment.²⁷¹ We can see that the same pattern exists in hearing witnesses in files where both large and few numbers of accused were jointly charged.²⁷² This may imply that the nature and type of testimonies a witness gave had crucial role in taking time than the number of accused charged together. Even in files where one accused was charged, the courts heard almost similar minimum and maximum number of witnesses in an adjournment. Normally, hearing a witness in criminal proceedings would take longer time due to strict adversary litigations that include intensive motions in the mean times, the need to respond and rule those motions, the examination-in-chief, cross-examination, re-examination and the courts examination to a witness, etc. This was exaggerated in many cases when the testimonies needed to be translated in different languages. Hence' the reason why only few witnesses were heard in a day was partly due to the nature of the adversary litigation procedures, the existence of many accused charged together, the joinder of many counts in a file, the congestion of the courts schedule by other files, the nature and magnitude of the testimonies given by the witnesses, the need to translate or interpret some of the testimonies, etc.²⁷³

Such delays were associated with the complex nature of the cases, adversary nature of the criminal proceedings and resource constraints of the courts. Such proceedings were important for the accused, the victims and the society. The accused had got the chance to confront the prosecutor's witnesses. By doing that, many accused were able to show their innocence. SPO was able to show the participation of the accused in the heinous crimes committed during the Derg/WPE regime through its evidences brought during this stage. The truths and the alleged truths by SPO were disclosed during this stage. All the efforts of SPO to investigate the abuses of the past regime could only be proved in this stage. Thus the times taken to strictly challenge and counter challenge evidences are necessary delay for accurate and fair resolution of cases. Hence, in principle cases that delayed on such reasons are justifiable.²⁷⁴

Surprisingly, in most files this stage took lesser time than the previous stage. This clearly implied that SPO had efficiently played its role of timely producing its huge evidences. Huge number of witnesses and volume of evidences could be heard with short time than the courts took to give verdict and even to complete simple preliminary proceedings. Logically producing witnesses and documents from different geographical locations is time taking and difficult task. We knew in ordinary cases, courts used to repeatedly adjourn ordinary single case due to the non-appearance of evidence, but this was not a major problem seen in these empirical studies and interviews with the judges and bench prosecutors.

Though the general performance during this stage is better than that of other stages, we still need to analyze some of the reasons of the delays during this period. From the empirical studies and the discussion with the prosecutors, among the major reasons for the delay in hearing prosecution witnesses was the length of time between adjournments. For instance, in SPO V. C/L Mengistu Hailemariam the courts adjourned every week to hear prosecution witnesses. But, in SPO V. L/T Abera Aga et al between each adjournment an average of 1.6 months were taken; while in SPO V. ATo Geseges G/Meskel et al 1.4 months were taken. If the cases of the two files

²⁷¹ See Table No. 4 above at 161 and Table 8 annexed

²⁷² Id

²⁷³ Interviews and discussions with the bench Special Prosecutors, personal observation and empirical studies shown in Table 2 and 3 above at page 157-160

²⁷⁴ See the discussion in Section 4.2 of this Chapter (V)

were seen every week, like that of C/L Mengistu Hailemariam et al case the SPO witnesses could have been completed in 12 weeks and 27 weeks rather than 320 weeks and 150 weeks respectively. One can imagine how painful was for the accused to hear only few witnesses after they had waited for more than one month. Furthermore, we can easily deduce that if all the cases of SPO were heard every week, the whole trials could have been completed within very short time. But, this required many resources both in the SPO, the Courts and the Defenses.

From the empirical studies we have seen, some of the SPO's witnesses had been returned back due to the court's lack of time to hear all the witnesses summoned and appeared. From Table 3 and 4, we can imply that after certain trials SPO tried to produce witnesses that the court could hear in a day. The remedy to reduce such delay was to shorten the time between adjournments and to increase other benches.

But, the courts were not able to give this remedy. The major reasons for this were the workload and tight schedules of courts by other files as well as the non-existence of sufficient numbers of judges to open other Benches.²⁷⁵ This could have been solved if additional benches were established by increasing the numbers of judges. But, this was not the problem exceptional only to the Derg/WPE trials. It was also common problem to other ordinary criminal and civil Benches. This shows that the country's judiciaries were highly week and are still week.

The failure of accused to appear for various reasons was one of the causes for delay in hearing the prosecutor witnesses.²⁷⁶ When even an accused from among many accused fail to appear, the hearings were suspended until the accused appeared. This was one of the problems related to the complexity of the crimes. Each accused has basic right to appear in the hearing of his case and confront the prosecution witnesses that testified against him. In his absence, he could not exercise such important rights. The delay due to his default may not be counted against him as it jeopardized only his right to speedy trial. The problem is when he failed to appear; the rights of other accused were prejudiced. The courts used to change the adjournments in such cases.²⁷⁷ They some times tried to hear those witnesses that could not testify against the accused who failed to appear. In Geseges G/Gemeskel et al, for example, two accused repeatedly failed to appear and finally the court decided to continue the others' case and to hear witnesses against the absentees at later time. This had created discomfort to the witnesses that appeared twice in the same bench and consumed extra cost and time of the SPO and the Courts.

But, when we see the empirical studies, such problem was not the major reason for delaying the trials. For instance, in the SPO V. Geseges G/Meskel among 27 adjournments the hearings of witnesses were hampered only three times due to the failure of accused.²⁷⁸ While in SPO V. L/T Abera Aga hearing of witnesses were not hampered due to the failure of the accused to appear.²⁷⁹ However, such conclusion might not be applicable to all other cases. But, this author witnessed that from his personal experience in more than 1200 accused he prosecuted; he did not experience such problem as a major cause of delay.

²⁷⁵ Discussion with the Judges of the Federal High Court of Addis Ababa and personal observation of the author

²⁷⁶ See for instance Table 2 and 3 above at 157-160

²⁷⁷ Id

²⁷⁸ See Table 3 above at 159-160

²⁷⁹ See Table 1 above at 157-158

Failure of the prosecutor to produce his evidences may be one of the causes of the delay. But, the empirical studies prove that the default of SPO was almost insignificant.²⁸⁰ This was also witnessed in the discussions the author had made with judges and his personal observation during the different seminars he participated to share experiences within the judiciary.²⁸¹ Unlike the ordinary prosecutors, SPO investigated and prosecuted the case itself. Thus, every prosecutor knew his witnesses and their addresses and had individual contact with the witnesses. In addition, most of the witnesses were co-operative to the prosecution processes. Hence, SPO did not face problem in producing as many witnesses as courts required it.²⁸² Therefore, both from these sample studies and discussion with the judges and prosecutors, SPO did not create major obstacles in delaying the trials by failure to produce its evidences on time. There might be exceptional misconducts that the prosecution failed to do so; but generally when compared from the total accomplishments, its failures were insignificant.²⁸³

Despite these findings, there are literatures that wrongly associated the major cause of delay during this period to the misconduct of SPO. One group blamed SPO for its failure to produce sufficient evidences /witnesses on each adjournment²⁸⁴ while other groups blamed SPO for producing several “irrelevant” witnesses or evidences.²⁸⁵ Extremely conflicting finding on the same fact by these two groups of authors may show that such researches did give less attention on empirical and objective assessment of the facts on the ground. One writer, for example, mentioned the failure of SPO for an adjournment to bring documentary evidence as evidence to support his conclusion that SPO’s failure in one or two adjournments among many similar adjournments in producing its evidence was the major causes of the delay of the Derg/WPE trials.²⁸⁶

To the contrary another author alleges that:

“In the Ethiopia genocide trial the prosecution usually lists and presents several witnesses and exhibits in a single count. At times it seems that as long as the witnesses willing to appear before the court, there is no prior selection by the prosecution as to their relevance and probative value. To prove the death of one person, the prosecution may call all of his parents, relatives, friends or any one who is interested as long as he can mention the name of the victim. This situation led the trial to become long and hamper the right of the accused to expedition trials,”²⁸⁷ Emphasis added.

The author did not mention the sources of his information as a result of which it is difficult to argue based on tangible facts even if his statement seems doubtful.

But, issues such that if the courts in Ethiopia had no power to control such gross misconduct of prosecutors and if such misconduct was the main cause of delay in the Ethiopian trials should be

²⁸⁰ See Table 2 and 3 (In Table 2.SPO failed only one adjournment to produce documentary evidences).

²⁸¹ The author heard such comments in many instances including in his personal discussion with Judges and Prosecutors, as well as in experience sharing seminars etc

²⁸² Personal Experience and Observation while he was a bench prosecutor in the cases of more than one thousand accused.

²⁸³ See Table 2 and 3 above at 157-160

²⁸⁴ See in general Wondoson Sintayehu, supra note 133 and See also Geleta Assefa, Evaluating the Red Terror Trial in Light of Some Basic Constitutional Rights of the Accused, (Addis Ababa University, Submitted for Partial Fulfillment of LLB, unpublished, 2004)

²⁸⁵ Debebe H/Geberiel, supra note 87, at 33

²⁸⁶ See Geleta Assefa, ibid

²⁸⁷ Debebe H/Geberiel, supra note 87, at 33

seriously addressed. In practice, SPO and defenses used to show the issues and relevance of testimonies before the court permit the hearing of a witness.²⁸⁸ During this time, both parties may raise motion as to the relevance and probative value of witnesses. The party that called the witnesses had a duty to convince the court on the motion raised. And finally, the courts used to rule out either accepting or rejecting the motion.²⁸⁹ In fact, the courts might be in a difficult position to rule out if the parties try to convince that a witness has important distinct points to prove that are not mentioned by other witnesses on the same issue. For instance, one witness may forget one or two of the perpetrators that are involved in the commission of the crime. Hence, the other witnesses may help the prosecution to fill that gap. There are many similar occasions in which seemingly similar testimony had in fact simple but crucial differences. This is important in cases where many accused had participated in the commission of a crime.

The other problem peculiar to these trials was that some witnesses lost some memories in reminding all accused involved in the crime due to the length of time and participation of many suspects in a crime.²⁹⁰ For instance, in SPO V. Ato Endale Amenu et al in a decision to kill 5 victims more than 100 elected officials of Peasant Associations were participated. Every witness may give his testimony on the same issue but the perpetrators mentioned by each witness vary. Each one may mention new names that others forget. In such similar cases, SPO was obliged to produce many witnesses that should testify the killing of the same person, but against different accused. Some or all of the witnesses repeatedly mentioned some of the accused. But, only one or two of the witnesses could mention few accused.²⁹¹ Even the victims families would not equally remember all accused involved. Hence, many victim's families or relatives may be called to fill such gaps. The author that criticized the production of many witnesses on similar issue may not see this problem SPO had faced. If SPO chose only few witnesses, for example, in SPO Vs Ato Endale Amenu et al case, many accused ought to be acquitted. SPO had face this challenge in SPO Vs Major Ali Musa case in which the bench prosecutor only produce few witnesses to prove massive killings in a single incident in Shashemene town.²⁹² Those few witnesses testified that incident but as a human being they could not remember all the accused participated in such massive killings partly due to memory lose or fear and confusion due to the number of persons attending and the adversary procedures in the trial. Hence, many accused were acquitted due to such error in predicting and evaluating similar situations.

Therefore, the non-existence of evidence laws in Ethiopia did not preclude courts from ruling out irrelevant and inadmissible prosecution or defense witnesses unless there was convincing reason why the party was obliged to produce many witnesses and exhibits to prove the same issue.

Furthermore, the empirical study on SPO V. Ato Geseges G/Meskel et al and L/T Abera Aga showed that the major cause of delay was not the existence of many witnesses. This can be also inferred from the 47 sample files. We have said above that if the courts had sufficient time and

²⁸⁸ Personal experience and observation and interview with other Special Prosecutors

²⁸⁹ See for instance the proceedings of all the files mentioned in Table No. 5 annexed. This procedure was applied in all these files.

²⁹⁰ The discussion with Special prosecutors and personal observation of this author

²⁹¹ This was the main problem typical to SPO cases where many accused participated in committing a crime. For instance in Jima 32 killers were involved in shooting 34 victims, further more there were masterminds of the crime in the scene. See SPO V. B/General Tedlea Desta et al File No. 222/85, the Victims were Ato Gezahagn Wondemu and other 34 persons

²⁹² See SPO V. Major Ali Musa et al

resources, the prosecution witnesses ought to have been completed much earlier than they actually took. As we have mentioned above, the courts were able to hear up to 20 witnesses a day when the witnesses are called to testify on limited or the same issue repeatedly.²⁹³

Moreover, if the delay happened due to the hearing of crucial and relevant witnesses or evidences, such delays are necessary that should not be considered as they jeopardized the essence of speedy trial.

The same author also mentioned that the joinder of cases was the major cause of the delay.²⁹⁴ He cited Annexes II and III of the 5th Annual Report of ICTR to UN General Assembly Security Council to support his argument which reads as: "As to joinder of accused is problematic and causes delays in the ICTR trial, have been appreciated by the tribunal itself in its 2000 annual report to the UN Security Council."²⁹⁵ He further noted that "this situation begs the question that whether ICTR will accomplish the remaining cases within the time limit set for it, which almost 76% of the total detainees."²⁹⁶

If the joinder of cases in ICTR, which were only four groups which consists of 6, 3, 4, and 3 co-offenders only,²⁹⁷ was considered as serious causes of delay, the Ethiopian trials should not be criticized even if they were totally failed.²⁹⁸

We have seen in Section 3 above that joinder of many accused and many counts was one of the major factors to delay in the Derg/WPE trials. But, taking the shortage of resources in the judiciary, the Ethiopian trials would have been more delayed if the charges were dispersed into many files.²⁹⁹ Even if the cases were filed in separated charges, such additional files could have overloaded the courts. Their schedules would have been distributed accordingly. And finally, the cases may have been delayed more.³⁰⁰ This can be implied from the empirical data we have in Table 8. Furthermore, when we compare the patterns of the times taken to hear witnesses among files with different number of accused charged together; the courts took long time to hear prosecution evidences not only in files that had several counts, accused and evidences, but also in cases that had one accused and few counts.³⁰¹

In fact this could not disprove that joinder of many accused was one of the major causes of the delay. But, what we have to consider is that since this problem was eternal to the nature of the crimes committed in the Derg/WPE regime, it would have been the major cause of further delay if SPO had followed other alternative of joinder of accused and counts.³⁰²

The major reason of delay in this stage that could have been reasonably avoided was the length of the adjournments given by the courts that could have been reduced by injecting some

²⁹³ See Table 8 below annexed

²⁹⁴ Debebe H/Gebriel, *supra* note 87 at 32

²⁹⁵ Debebe H/Geberiel, *Ibid* at 30 citing Annexes II and III of the 5th Annual Report of ICTR to UN General Assembly Security Council, 55th session, 2 October 2000, A /55/435-5/2000/927

²⁹⁶ *Ibid*, at 30

²⁹⁷ *Ibid* at 33

²⁹⁸ See the comparison of their resources, the numbers of accused they tried and the time they took in Table 8 at 178

²⁹⁹ See my arguments in Section 2.3 of this Chapter (V)

³⁰⁰ See for the detail discussion on this point on the joinder of accused in section 3 in this chapter (V).

³⁰¹ See Table 8 annexed

³⁰² See discussion on this alternative of joinder of accused and counts in Section 3 of this Chapter (V)

resources to the Courts, SPO and Defenses.³⁰³ If the courts were able to hear the cases within short adjournments, the cases might be heard much earlier than they took. But, the courts were overloaded with files. It was due to the congestions of their schedule that they were giving long adjournments.³⁰⁴ If the resources of the courts were at least doubled the time of the hearing of evidences would have been reduced. One may allege that even if the courts speed up the prosecutors and defenses would have lagged the process behind due to their limited resources. But, the courts pressure could have created the conditions necessary for the reform of these institutions. Hence if additional resources were assigned to the concerned parties, the times taken in this stage would have been shortened.

The delay that occurred for lack of adequate manpower and resources is partly justified by the poor development standard and the transitional situations of Ethiopia. But, the Ethiopian government could have injected some additional resources without affecting other sectors of the government. We have said in Chapter IV that addressing injustice is important to the country's peace and security that should have been given proper attention and even priority. The international community should also share responsibility in its failure to extend substantial support to increase the capacities of the judiciaries that were trying the Derg/WPE trials.

4.3.2.3 Time to Give Verdict

This is the time taken by the court to give verdict. The Criminal Procedure Code expected the verdict to be given within the first trial.³⁰⁵ But, as it was unrealistic for all other ordinary cases it could not also be applicable to the Derg/WPE Official trials.

As we can see in Table 2 and 8 many times have been consumed for the courts to pass verdict. In some cases, this time was greater than or closer to the time taken to hear evidences. For instance in SPO V. L/t Abera Aga et al, the court took only 1 years and 8 months to hear the whole SPO evidences on this case, while it took 4 years and 13 days to give verdict. In SPO V. Major Melaku Tefera the court took 3 years to hear evidences, while it took 2 years to give verdict. In SPO V. Major Kassaye Aragaw et al the court took 2 years to give verdict while it took 2 years and 4 months to hear the evidences. In SPO V. Ato Assaye Birhanu et al the court took one year to give verdict while the court took 7 months to hear SPO evidences. In SPO V. Sisaw W/Selasie et al the court took 11 months to give verdict while it took 4 months to hear prosecution evidences. There are many files that the court took more time to give verdict than to hear evidences.³⁰⁶ The minimum time the court took to give verdict was 13 days in SPO V. Ato Araressa Robie et al 3 co-offenders in one count.³⁰⁷

When we compare the time to hear prosecution evidences with that of giving verdict, at least for two reasons the latter one ought to be completed by far in a very short time. First, the courts were studying the evidences during the hearing. Thus, they are expected to have done some works during this time to their final judgments. During the long times taken in the hearing of the prosecution evidences, the courts were working on the cases. And hence when SPO finished its

³⁰³ See Table 2 and 3 above at 157-160

³⁰⁴ Discussion with Judges of the Addis Ababa Federal High Court and personal observation of the author

³⁰⁵ See our discussion in Section 4-3-2 of this Chapter v

³⁰⁶ See Table 2 above at 157-158 and Table 8 annexed for further considerations

³⁰⁷ See the volume of the case from the numbers of the accused, the counts, witnesses, documents and the time taken to pass verdict from Table 4 at 161-162 above and Table 5 annexed

evidences, the courts could have simply summarized what they have been working or hearing on the trials. On the contrary, the courts took more times than they consumed during the hearing of evidences. It is difficult to accept such performance of courts as reasonable and justifiable causes of delay.

Second, in time of hearing of evidences, as we have seen above, there are many factors that could consume the time of the trial.³⁰⁸ All these difficult and time taking tasks did not exist in preparing and giving verdict. The judges could analyze the files and evidences at their hand at any time and place. All judges are not necessary to analyze the testimonies or the evidences. Assistant judges or clerks could do this laborious works leaving the legal conclusion to the judges. This work was already partly done during the trial when the judges heard live the testimonies of witnesses. The appearance or non-appearances of parties or witnesses could not affect preparing verdict. These and other favorable situations helped the courts to save the time of the trial at this stage. The prosecution and defenses had a duty to find out concealed facts and evidences including hunting fugitives; while the courts had relative facilities to analyze facts and laws produced in their tables

But, the trial courts committed surprising inefficiencies in giving verdict on reasonable time. Nevertheless, many criticisms failed to see the bolded inefficiencies of the courts, while they were able to see minor deficiencies of SPO and the Defenses.

Many reason can be mentioned for such delay such as workloads of the judges, insufficient number of judges, complexity of the cases, frequent reshuffling of judges, constraints of human and material resources that could facilitate their tasks and etc.³⁰⁹ But, to be frank such causes should not justify the whole delay of the courts to give verdict that even exceeds times to hear huge evidences.

The courts, unlike SPO, were not able to permanently hold judges who could have studied the laws and facts so as to promptly try the cases. Every time judges that studied the laws and cases were being changed to other benches.³¹⁰ The huge and difficult responsibilities of judges were not given proper recognition by the administration. This had created some of the judges to lose interest to give maximum effort and knowledge to the case. The courts failed to assign sufficient number of assistant judges or some trained clerks that would minimize laborious tasks of analyzing facts. Even the filing system of the courts were poor in which case there were times that judges were unable to render judgment due to the misplacement of evidences. There were many problems of inefficiency that contribute for the delay of the verdict. SPO had frequently complained against these and other problems to the court officials, but proper reply was not given.³¹¹ The judges were always complaining this problem of the administration of the courts. This problem or inefficiency of the courts was also some of the causes of delay in other stages of the trials.

³⁰⁸ See the reasons or factors that were the causes of adjournment or delay in hearing prosecution evidences in Section 4-3-3- of this Chapter (Chapter V)

³⁰⁹ Discussions with the Judges trying the SPO cases in Addis Ababa Federal High Court, the Special Prosecutors who were working in the benches and the author' personal experience

³¹⁰ This author personally knew many times and again reshufflings of judges in the case he was bench prosecutor before the cases were completed. Only few cases studied and decided by the same judges.

³¹¹ This author personally visited the Presidents of the Federal High and Supreme Courts to complain this problem on behalf of SPO. This author had frequent personal discussion on this problems with the Judges in Addis and in the Regions

As we have seen in Tables 3 and 4 many adjournments elapsed due to the failure of the courts to work their own parts. The courts changed many adjournments due to the non-existence of judges or their failure to prepare verdict, ruling, judgments or sentences. The root cause of this problem was the non-existence of sufficient number of judges and resources. Since there was no sufficient number of judges, judges were overloaded. And due to this the court administration was not at ease to strictly follow up misconducts of some judges. The remunerations to the judges were insignificant, as result there was a regular resignation of judges. Hence, the problems are complicated that are associated with resource constraints and some time inefficiency to properly utilize the resources at hand. As we have discussed in Section 4.3.2.1 and 4.3.2.2 above, some of such constraints could have been reasonably avoided if sufficient support in resources was given to the judiciaries from Government of Ethiopia and the International Community.

4.3.2.4 Time for Defense and Pronouncement of Judgments

After the court passed its verdict those acquitted would be released while others would be required to produce their defenses if they wanted to rebut the prosecution evidence. In the trials, most of the lower official did not want to defend their cases. Most of them used to allege many problems that reduced their defense capabilities such as the death or disappearance of their defense witnesses, lack of financial capacity, non-existence of family that could coordinate their defense, etc.³¹²

Nevertheless, the closer observation of the facts revealed that some of those allegations were not true to all the accused. Some of the accused did not want to defend for additional reason such as: the leniency of the courts in sentencing (See Table 6 below) and the prolonged detention that would be deducted from their sentences.³¹³ When the courts in the mean time passed harsher sentence, others immediately changed their decision in favor of defending their cases. The accused were simply following the trend of the courts that was changed each time when judges reshuffled or until the new judges accustomed with the nature of the cases. In general accused that did not defend their cases were by far greater than those who defended their cases.³¹⁴

We can categorize two types of accused who wanted to defend their case: (1) those who genuinely believed that they can defend their case and (2) those who wanted simply to delay penalty expecting some miracles that could relieve them from accountability or to try their chance by bringing alibi defense witnesses. The first type of accused will insist the courts to speed up while the second group used different delaying tactics. Hence, the courts gave priority for those who insisted and produced their defenses in time. After the court finished the defense of the first group, it latter pressed the second type to produce their defense. Until the court initiated, the second groups were reluctant to insist the courts to defend their cases.³¹⁵

³¹² Personal observation of the author and his personal experience in more than 30 files (1200 accused) he had prosecuted as well as his interview with judges and prosecutors.

³¹³ Id.; In addition he personally discussed with the majority of the accused. Even once upon a time when the judges in the 6th Criminal Bench of Addis Ababa Federal High Court replaced by others, the accused openly complain to the new judges that the former were nice for them. Taking this statement as evidence this author and the other prosecutors who were working in Addis Ababa Federal courts openly complained to the authority of the courts if they consider the problem seriously. As a result there were many appeals.

³¹⁴ See for instance SPO V. Ato Geseges G/Meskel et al; SPO V. Ato Zenebe Ayele et al etc

³¹⁵ Personal experience and observation of the author

There are other groups of accused that defended in the trial courts. These are accused acquitted and released at the trial courts, but were ordered to defend by the Federal Supreme Court after it reviewed the trial courts' verdict. These groups were out of prison when they were litigating at the Federal Supreme Court with out bail. They knew the decision of the Supreme Court and they became fugitive when the trial court tried to summon or issued bench arrest warrant. Hence, until the courts decide to hear in their absence long times have been elapsed to fulfill the procedures under Art 160–163 of the Criminal Procedure Code. As we have seen in Section 4.3.2.3, the courts for similar reason took many times for many reasons to pass judgments and sentences against accused that completed their individual defense.³¹⁶

Due to all such complications, the time, from the verdict until the case finally closed took longest time. Most of the people who criticize the delays made err by adding these delay that had many reasons including mostly the fault of the accused. The empirical study shows that this time took the longest in the trial proceedings.³¹⁷

As we can see in Table 3, and 4, SPO V L/t Abera Aga et al and SPO V Ato Geseges G/Meskel et al, there was no single default committed by SPO at this time.³¹⁸

Most of the defaults were associated with the courts or the defenses.³¹⁹ However, the defaults of the courts were much lower than the accused.³²⁰ The defaults of the accused are related to either for their delaying tactics or genuine reason of failure to get the address of their defense witnesses or documents.³²¹ The reasons of delay attributable to courts during this time are not different with the reasons we have discussed in the other proceedings.³²² So, it would be a repetition to assess the justification of delay on the part of the courts here.

This time SPO completed its part of producing its evidences and the court passed verdict that partly refuted the presumption of innocence of the accused. The delay of the case after that was not that much damaging to the rights and interests of the accused if the cause of the delay was the accused himself. The damage of the society would be reduced since the fear of destruction of evidence is avoided. In fact the victims would like to see the final pronouncement of the courts in time. Those accused who feel that they can defend their case might be jeopardized if this process is unnecessarily delayed. Hence, the fact that this time took longest time from other proceedings shows divergences of interest and delaying tactics of some of the accused.

As to the prolonged time taken due to the delaying tactics of the accused during this time we have said in section 4.2 that such delay could not be considered as unreasonable delay.

³¹⁶ See Table 3 and 4 above at 159-162

³¹⁷ See Table 4 above at 161-162 and Table 5 annexed

³¹⁸ See Table 2-4 above at 157-160

³¹⁹ Id

³²⁰ Id

³²¹ Id

³²² See the discussions from Section 4.3.2.1-4.3.2.4 in this Chapter (V)

5. Accomplishments of Ethiopian Trials in Conviction

Despite the difficult challenges discussed above, the Ethiopian trials were able to pass verdict on 5119 defendants after hearing 8047 SPO witnesses and 15214 documentary evidences.³²³ The trials also heard similar volume of defenses of thousands of accused. The trials established that the Derg/WPE regime has committed state sponsored crimes such as genocide or crimes against humanity and war crimes. In addition the trials established that many state officials have committed other ordinary crimes such as aggravated homicide, rape, abuse of power, arson, etc. The trials have dismissed many traditional defenses such as superior order, sovereign immunity, act of the state, etc that are also denied in international laws. Both the superior and subordinates were held responsible for the state sponsored crimes. The head of the state, senior government and military officials, field commanders, legislators and judicial personnel, officials and ordinary citizens who participated in these systematic and massive violations of human rights are held accountable.

As we have seen in detail the trials were carried after the elapse of more than twenty years. Due to this documents were ruined or misplaced, witnesses passed away or changed their addresses or lost their memories, suspects passed away or changed their addresses or their physical appearance changed etc. Even the trials were carried after years since the investigation begun. For example according to SPO report to FDRE House of People's Representative, among the 16107 witnesses, only nearly half that is 8047 witnesses were able to testify in court.³²⁴ The report mentioned some of the reasons for this as change of address; leaving to other country, illness, death, losing interest to repeatedly disclose their sufferings, etc. We have seen in Section 4 of this chapter, many important documents were destroyed, misplaced or taken away during the transitional instabilities. In these practical circumstances 69.99% conviction rate is a great success for the prosecution.³²⁵

Table No. 5 Table Showing the Accomplishment of Ethiopian Trials in Conviction

Defendants ³²⁶			Defendants Convicted and Sentenced			Conv. Rate	Defendants Acquitted		
Total	In their Presence	In their absence	Total	in their presence	in their absence		Total	in their presence	in their absence
5119	2931	2188	3583	2275	1308	69.99%	1536	656	880

Source: SPO final Report to Ethiopian Federal Democratic Republic House of People's Representatives on Tir 27, 2002(Feb. 4, 2010)

As we can see in Table 6 below, 68.96% of the accused were sentenced less than 14 years. The charges brought against those accused had serious penalty. For example most accused were

³²³ SPO final Report to Ethiopian Federal Democratic Republic House of People's Representatives on Feb.4, 2010;

³²⁴ Id

³²⁵ See Table 5

³²⁶ This does not include those defendants that has been charged but latter discharged before verdict for many reasons such as death of the defendants or witnesses that can testified on the accused. This writer estimated the numbers of accused whose charges were discontinued to be nearly 1,000. The statistics of the accused whose charge were discontinued was not finalized. This estimate is also supported by the Chief of SPO as this author has interviewed him.

charged under Article 281 of the Penal Code of Ethiopia. The penalty under this provision ranges from 5 up to life imprisonment and in more serious cases with death. The other charges were also punishable with serious penalty. However, those accused who were punished for death sentence for such horrible crimes were only 1.4% while those punished for life imprisonment are only 5.08%. In general Table 6 shows that the penalties for most of the accused were compassionate.

Table No. 6 Table Showing Sentence Distribution

Sentences	Death	Life Imprisonment	20-25 Rigorous Imprisonment	15-19 Rigorous Imprisonment	Under 14 Years Rigorous Imprisonment
NO. of Defendants	51	182	313	566	2471
Percentage (Out the 3583 Defendants Convicted)	1.42%	5.08%	8.74%	15.80%	68.96%

Source: SPO Final Report to Ethiopian Federal Democratic Republic House of People's Representatives on Tir 27, 2002(Feb. 4, 2010)

As we have discussed in the conclusion part, the most import accomplishment for the trials is not the conviction rate or the harshness of the penalty, rather it is the implications of the trial in this country's future.³²⁷

The trials' sentences prove that the primary purpose was not to avenge the previous government officials. The trials naturally would help to attain the conventional purpose of punishment and the benefits of transitional prosecution discussed in Section 5 of Chapter II and Section 3 of Chapter IV. It helped to carry out Ethiopia's international duty to investigate and prosecute systematic and gross violations of human rights forbidden in many human rights and humanitarian laws mentioned in Section 5 of Chapter II. It would help to establish precedent in Ethiopia as well as in other countries in holding accountable against government officials who would violate human rights in the future. It served justice for more than 12733 victims and millions of their families and friends.³²⁸ Justice was made in favor of 1536 suspected to be acquitted from their criminal charges. Justice was also served against those officials who actively participated or lead the terrible crimes committed with impunity. This would help to stabilize norms of democracy, rule of law, good governance, accountability, peace and stability etc. The question how the trials would help in stabilizing such norms in this country is discussed in detail in Chapter IV and the conclusion part.

The trials also served to disclose the truth and establish the dignity of the victims. It exposed how systematic and massive as well as horrible the crimes committed by the Derg/WPE regime were. SPO collected millions of government documents; interviewed thousands of witnesses and suspects as well as it wrote thousands of charges and pleadings. The defenses in turn produced thousands of documents and witnesses to verify the truth. The courts interpreted the evidences

³²⁷ See the details in Chapter IV Section 3 and the Conclusion and Recommendation Part of this Paper

³²⁸ See SPO's Final Report to HPR of FDRE, Feb. 4, 2010

and reached conclusions about the truths of the past. All the 364 files³²⁹ of SPO and the files of the courts would be the sources of the truth from which many historians would write in detail about the history of the past. SPO on its part was able to rebury the bodies of 4855 victims who were killed and buried in inhuman ways.³³⁰ Memorials were established for thousands of victims in every parts of the country.

6. Evaluating the Ethiopian Trials in Comparison with ICTR?

Those who compare the two tribunals seriously criticized the Delay of the Ethiopian trials.³³¹ But, facts they exposed contradict their conclusion.³³² Further more in evaluating the success or failure of a transitional trial, the same yardstick applied for consolidated and stable criminal justice should not be applied for war-torn societies like Ethiopia who “suffered with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights, and more generally, a lack of peace and security.”³³³ We have said in Chapter II Section 4 that: “For example, it would be unrealistic to compare the International Criminal Tribunal for Rwanda and Former Yugoslavia with the national tribunals of Ethiopia and Rwanda and condemn the latter based on the standards used in the former.”³³⁴ Various realities and transitional problems including the types of transitions undergone, the nature of the injustices perpetrated, the number of the perpetrators, the level of economic development of the countries and the resources allocated to the justice systems, etc. have to be taken into consideration.³³⁵

Despite the legal and practical constraints that contributed to the delay of the Ethiopian trials, this author had his own view that the Ethiopian trials had performed better when it is compared with the resources and the tasks of the ICTR. Let us see the tasks accomplished and the resources used in the two trials in the following table. (Table 7)

The comparison in resources shows big difference in favor of the ICTR. The whole budget of the Ethiopian trials consumed is less than the amount of the yearly budget of ICTR. Dr Yakob H/Mariam judged the comparison of the two trials as:

Trying to compare the resources at the disposal of the ICTR and the Ethiopian courts of carrying out their respective tasks may be like trying to compare the weight of an elephant with that of a mouse, the scale tipping heavily in favor of ICTR.

³²⁹ Id

³³⁰ Id

³³¹ See Debebe H/Gebereil, supra note 87 at 25–28; Yakob H/Mariam, supra note 70 at 722 – 730

³³² See the facts both writers find out about ICTR and Ethiopian trials as it is listed down in Table 7

³³³ Report of UN Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 3 August 2004, S/2004/616 as cited by Pierre Hazan, supra note 7 at 21: See the full discussion in Section 4 of Chapter II

³³⁴ See Yakob H/Mariam, supra note 70, at 668-745

³³⁵ Alexandra Barahona De Brito, Carmen González-Enriquez, and Paloma Aguilar, Ed. “Introduction”, The Politics of Memory: Transitional Justice in Democratizing Societies, (Oxford: Oxford University Press, 2001) at 11-23; See also Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War (Cambridge: Polity Press 2001), at 6-9

To the contrary, the comparison in volume of cases shows big difference in favor of Ethiopian trials. Personnel in ICTR are highly qualified and are the best paid in international standards. Ethiopia tried these volumes of cases with its very few and less experienced as well as poorly paid personnel with meager resources. However, the comparison in time taken to accomplish their tasks does not show big differences. Without taking in to considerations majority of cases decided 1998–1999, which would be 7 and 8 years since the detention of some of the accused in May 1991, almost all the cases in Ethiopia were completed in 2001 and 2002.

As the ICC president says if we had more resources we could have worked more.³³⁶ If Ethiopia had the budget equal to that of ICTR, we could have employed many Ethiopian professionals that were working in the private business, universities, and were living and working outside the country. Even we could have employed foreign professionals. We could have many material resources that could support in speeding up the trials. Crimes were committed not for months like Rwanda but for seventeen years without interruptions. Crimes committed in Ethiopia were carried by the flows of millions of governmental documents from top to bottom and bottom to top. All such documents had to be searched out and verified. Though Ethiopia was struggling to carry out its international duty to investigate and punish gross violations of human rights the support of international community to Ethiopia is insignificant when it is compared the resources allocated for the ICTR and ICTY. Hence, Ethiopia has better performed when the times taken by the two tribunals compared with their resources and volume of cases. This comparison did not, how ever, cover the essence of the works of the two tribunals, which is not the subject matter of this paper.

³³⁶ Toni Pfanner's "Interview with Philippe Kirsch", President of ICC, International Review of the Red Cross Vol.8 8 No. 861 March 2006 at 13

**Table No. 7 Table Comparing Ethiopia Trials on Derg/WPE and ICTR
/International Criminal Tribunal for Rwanda**

No	Item	Ethiopia	ICTR
1	Documentary Evidence	15214 pages of SPO ³³⁷	Not mentioned
2	Witnesses	8047	Not mentioned
3	Number of Suspects in 2003	5119 ³³⁸	66
4	Maximum Time Taken in 2003	12 years (but majority of the cases were decided in 8-10 years) ³³⁹	9 years
5	Defense Counsel	1. 31 Known Lawyers for the Derg Officials 2. 7 (according to Ato Debebe PDO Representing more than 150 cases) 20 (An interview with the former Head of PDO) 3. Others Privately Employed in Each File	87 Acclaimed International Defense Representing Two for One Accused
6	Salary or Remunerations of defense	1,750 USD for the defense counsel representing Derg officials With minimum salary for PDO (1400 Birr)	1. 400,000.00 – 5000,000.00 US dollar
7	Remuneration for costs of preparing defense	Ethiopia did not cover such costs	All costs for preparing defense, research, and producing evidence reimbursed
8	Prosecution budget	1. In 1996 2 million Birr of (318,000 dollar) annual budget 2.500,000 USD fund by international community only once	1. 17.7 million USD annual budget 2. Supplemented by grants of money, material equipment, and experts regularly
9	Prosecution manpower	1. 32 Prosecutors at its inception not more than 23 for most of the time 2. 200 documentary investigators temporarily employed 3. 13 Police investigator	For each case 3 senior trial attorneys assisted by 1 assistant trial attorney, 1 legal advisor, 10 investigators, interpreters and case managers and they were supported by senior experts of ICTY at the Hague
10	Privileges' and benefits of prosecutor	1. Almost equal to other prosecution, but lower than prosecutors of Anti- Corruption Commission	Due to the types and kinds of privileges and benefits member states of UN security open fight to get their citizen in ICTR ³⁴⁰
11	Budget of courts that are hearing is case	1. The trial courts assigned for this purpose have no special budget 2. For some time free lunch was prepared for the judges	41.2 million USD annual Budget
12	Number of judges	1. In Ethiopia at the beginning 33 2. But most of the time 27 judges 3. Judges also tried ordinary files 4. No assistant judge for majority of the time	4 Judges Assistant highly qualified judges.

Sources: See Debebe H/Gebereil, supra note 87 at 25–28; Yakob H/Mariam, supra note 70 at 722 – 730; See Section 2 of chapter V, and See Final Report of SPO to FDRE House of People's Representatives, Feb. 4, 2010.

³³⁷ This does not include documents used to verify the main documents as well as documents produced by defendants

³³⁸ As it is mentioned above this number does not include those accused discharged before the verdict for many reasons.

³³⁹ That does not mean that all accused were detained for 9-10 years before. There are many accused arrested even after the cases are filed and in the mean time of the trial.

³⁴⁰ See Yakob H/Mariam, supra note 70 at 724

Conclusions and Recommendations

The heinous atrocities committed in the Derg/WPE regime are open-wound in our national soul that cannot be ignored; nor healed through mere forgetfulness. To close our eyes and pretend, as it never happened would be to maintain at the core of our society a source of pain, division, hatred and violence. Only the disclosure of the truth and the search for justice can create the moral climate in which reconciliation and peace flourish. And we have to build strong barrier that deter the recurrence of similar atrocities in the future by denouncing the tradition of impunity in the clearest manner.

Thousands of youngsters were massacred but due to their legitimate demand for democracy. Derg chose violent means of solving all types of oppositions. The rule of law was replaced by rule of horror. The crimes committed were massive, systematic, and state sponsored. They were committed under the umbrella of state law, ideology and terror. Victims had neither the right to fair trial if they have committed crimes as alleged by Derg nor the right to demand justice for heinous crimes committed against them. Rather, perpetrators were promoted and rewarded for such crimes they have committed. Those injustices forced many to take arms to struggle for their rights. This has destabilized the country's peace, security and development. Finally, after intensive civil war that consumed huge material and human resources of the country, Derg was militarily defeated in May 28, 1991.

The carved grievances of the victims and survivors exploded in 1991 that created serious challenges to the successor regime. TGE chose to investigate and prosecute such gross violations of human rights committed for seventeen years. The trials were one of the largest and longest ever trials for genocide charges.¹ The trials took lengthy time as a result of which many criticized for its unnecessary delay without taking into considerations the detail reasons of delay. In this thesis, we have seen that the weakness of the judiciary, the constraints of resources, the complexities of the crimes, the transitional situations, the nature of prosecution, etc are among the reasons that partly justified this delay. Those factors are interrelated each other and one factor aggravated others. For instance, the transitional situations in Ethiopia, which are also common problems for the delay of all successor trials, were aggravated by the poor level of development of Ethiopia, weak judiciary, inherent nature of prosecution, and complicated nature of the crimes. We have seen in Chapter II Section 4 that in evaluating transitional justice mechanism, one need not only compare situations and principles applicable in stable and consolidated democracy. The practical transitional situations and the actual concrete reality of a given country in transition should also be seriously considered. We have seen that such transitional situations used to divert from such stable and consolidated principles of democracy. For instance, amnesty is not the rule in a stable and normal situation. Similarly, many transitional situations forced countries to deviate from normal principle of accountability and rule of law, for example to hold accountable only few accused while leaving other perpetrators in selective successor trials. Hence, similarly many practical and transitional factors in Ethiopia should be seriously considered to evaluate if the delays of the trials are necessary or unnecessary. For instance, in Ethiopia we have seen that due to the elapse of seventeen years, documents were ruined or misplaced, witnesses passed away or changed addresses or lost their memories, suspects passed away or changed their addresses or their physical appearance changed. Unlike

¹ Frew Kebede Tiba, "The Mengistu Genocide Trial in Ethiopia", *Journal of International Criminal Justice Access* Published online on April 23, 2007, Oxford University Press, 2007, at 2

the normal time, all these facts are the major reasons that delayed the Ethiopian trials. Due to the policy of impunity in the previous regime, each crime was not investigated and tried the moment it was committed. These situations not only created fertile conditions for the commissions of other huge crimes but also were the main reason for the delay and consequent impacts of the delay against the accused, the victim, the society and those few personnel of the judiciary. Due to the state sponsored nature of the crimes, many accused were involved even in the commission of single criminal act. This situation forced to delay the investigation, prosecution and trials. In fact there were considerable delays that should have been reasonably avoided. But, lack of experience of the judiciary also contributed for such misconducts.

Despite the weaknesses and the challenges of the trials that are expressed mainly by the prolonged times it consumed, the Ethiopian trials have positive achievements. In certain respects they were performed better than ICTR when for instance we compared the resources, volume of works and the time consumed in the two trials.²

The Derg/WPE trials are among one of the few full prosecutions in the world that put strong precedent in fighting against impunity.³ They established individual criminal responsibility for state sponsored crimes against both the superiors and subordinates. The courts proscribed the defense of sovereign immunity, legitimate action, superior order and other traditional defenses that are also denied in international laws.⁴

Unlike many successor trials, the Ethiopians did not face major substantive and procedural retroactive problems. Fortunately, systematic and gross violations of human rights against political groups had been explicitly criminalized as genocide and crimes against humanity in Article 281 of the 1957 Ethiopian Penal Code.⁵ The major difficult the trial faced was the inconsistency of Art 281(c) with that of the international instruments that defined forced disappearance and with that of the facts proved in the trials.⁶ With regard to procedural retroactivity problem, also period of limitations were suspended by the previously existing law⁷

² See Table 7 that compare the ICTR and the Derg/WPE Trials

³ See the history of transitional prosecution in Section 3 of Chapter II

⁴ See Section 5.1 of Chapter II

⁵ The defenses raised motions that Art 281 is contradictory to the 1948 Genocide Convention in protecting political groups and hence they held that it is not international crime. And consequently they argued that Derg legitimately repealed by the law and norms it enacted. SPO replied alleging that the defenses motion is groundless. It alleged that Art 281 which combines Genocide and Crime against Humanity is not inconsistent to international law if it protects persecutions or systematic and massive abuses of rights against persons for their alleged participation in certain political groups. See the whole motions and SPO response in, for instance, SPO V. C/L Mengistu H/Mariam et al and SPO V. Ato Geseges G/Meskel et al

⁶ In relation to this, the courts in many files did not accept the SPO charge for disappearance instituted under Article 281 (c) alleging that the definition in this provision did not correspond to the facts proved by SPO. See for instance SPO V. Major Desta Awelachew et al. The court has not made wrong in holding that Art 281 (c) did not correspond both to the definition of international crime "forced disappearance" and the facts in Ethiopian that showed many people disappeared after they have been detained. If the prosecution failed to prove that the disappeared persons were finally executed, the courts held the accused responsible only for much lighter crime; illegal detention. But such acts are serious crimes, which entail serious penalty like that of the act of killing. The problem was caused due to 1) the failure of the provision to properly define "disappearance", and 2) that SPO's failure to visualize this problem and to prosecute such crimes citing international law rather than provision of the criminal code that did not properly defined "forced disappearance".

⁷ See Article 229 of the 1957 Penal Code of Ethiopia

until the legal and practical impediments by the Derg/WPE regime to investigate and prosecute against those accused were lifted in 1991.⁸

Derg used positive “laws” or norms to legalize gross violations of human rights. And hence, the accused argued that their actions were legitimate. And even they further contended that Article 281 of the 1957 Ethiopian Penal Code was impliedly deleted. But, the trials underscored that these laws did not explicitly permit and could not legitimately authorize the commission of gross violations of human rights prohibited under international human rights and humanitarian laws.⁹

These “laws” served only for SPO as evidence to prove the commission of the crimes. Such laws did not serve the lawmakers, the state officials, head of states, and the ordinary citizens as a defense. Therefore, the trials denounced the tradition of impunity. They denounced irresponsible governance and system of repression. They will serve to give strong warning to the Ethiopian state officials that they cannot and should not violate human rights by enacting “positive laws”. They also used to warn citizens not to follow putative laws that violate internationally recognized human rights or internationally prohibited crimes: crimes against humanity, war crimes, genocide, etc. This would be a good lesson for future Ethiopia. It would motivate the society to stand for democracy and rule of law. It would also warn against future repressive government. This strong precedent underscored the importance of respecting human and democratic rights recognized in international law.

The trials served justice. It is not the magnitude of the penalty that has paramount importance, but the victims were able to see Derg officials held accountable in the courts of law. Victims and survivors got effective remedy when they saw that justice was made against officials who tortured them and arbitrarily killed thousands of people in public. The trials proved that every body is equal before the law. The defense of immunity and superior order were rejected. As a result, not only the head of state and lawmakers in Ethiopia were held accountable for the crimes committed through the laws or norms they adopted, but also the subordinates and ordinary citizens that committed crimes following these orders were held accountable.

The trials were not retributions to express hate against the accused that worked for Derg/WPE regime; rather they served to norm stabilization. The human treatment during the whole trial and their handling in the prisons as well as proportionate punishment passed by the courts made clear that the prior purpose of the prosecution was not retribution. “These trials should not be looked at as revenge; rather the ultimate desideratum should be to engrave the rule of law into the social fabric of the Ethiopian people.”¹⁰ The trials denounced the violations of human rights, and tradition of impunity and retribution against officials of previous regime by the successor regime. This is the first in Ethiopian history that laid foundation that the successor regimes should avoid

⁸ SPO replied to the motion of period of limitation asserting that such objections are groundless based on: 1) statutes of limitations are not applicable against those international crimes for which accused are charged, 2) statute of limitation of most of the crimes against which the accused are charged did not yet expired in Ethiopian laws, and 3) due to the accused’s conduct, the statutes of limitations were suspended until the practical impediments to investigate and prosecute against those accuse were lifted in 1991.⁸ The court accepted the SPO’s argument and rejected the defense’s objection in all files. See for instance SPO V. C/L Mengistu H/Mariam et al

⁹ See foot note 5 above; See the definition of Crimes against humanity in international instruments as mentioned and elaborated by Cherif Bassiouni. Read in General Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1992)

¹⁰ Yakob H/Mariam, “The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court”, *Hastings Int’l & Comp. L. Rev.* Vol. 22 (1998-99), at 743

retribution against previous officials. It gives precedent that officials that leave their power peacefully or by force should only be held accountable in an independent court where fair trial guarantees and due process of laws are respected. This is a good initiative for future Ethiopian leaders to peacefully transfer power without fearing revenge in the absence of due processes of laws and fair trial.

In the normal course of things, the delay of the case in which the prosecution had strong documentary evidences even to prove a single killing act could not be retribution by delaying tactics. Whether an accused is convicted for killing of thousands or few persons, there is no much difference in determining sentence. Even the accused could have received harsh penalty, if SPO had charged accused for a single homicide crime than the killings of many victims in Article 281. In Article 522, the courts have the discretion only to pass death penalty or life sentence if the prosecution proved all the elements of the law in the case. But, in Article 281 the courts had wider discretion to pass sentence from five to life imprisonment and in certain exceptional circumstance to death. Even the Office refused to charge with more rigorous criminal law, Special Penal Code, which Derg had been using against its opponents. Hence, the trials could have ended earlier with serious and harsh penalty by prosecuting only for selected few serious crimes that were supported with strong evidence.

But, the practice was so different. SPO tried to disclose the magnitude of the state sponsored crimes. The accused equally took more than sufficient time to defend their cases. From Table 2 and 4 and 8 we have seen that Derg Officials took about 4 years to defend their cases and the prosecution also took 6 years to prove many serious criminal counts. As a result, the trials took longer time. We have to remember that all this time is taken within the serious international and national political pressures to speed up the cases.

Therefore, Derg/WPE trials proved that former officials were not retaliated for the heinous crimes they have committed rather they were held accountable in an independent court with fair trial guarantees with all available resources that were equally assigned to the whole criminal justice system. And their sentence was either light or proportionate (See Table 6). Despite the dissatisfactions of the victims and prosecutors in the sentences,¹¹ this author has his own opinion that, fairness of the proceedings and lighter sentences in most of the cases helped to compensate the delays of the trials. Most of the perpetrators now joined their families after they have served their sentences. And so far there is no serious report of conflict among victims and perpetrators as well as judicial personnel involved in the trials processes (See the SPO final Report to House of Peoples' Representative on Feb. 4, 2010).

The trials drew important lessons for future politicians if they are wise enough to attentively observe truths and experiences established in the trials. The trials gave lessons that violent way of solving political differences was precarious for the victims, the perpetrators and the country in

¹¹ Victims and Special Prosecutors that held discussion with the author during his long experience in the SPO were not satisfied with the sentences of the courts. Some facts proved the correctness of this feeling. For instance, in SPO V. Ato Seyum G/Medihnn et al, one accused had a record of life imprisonment for the killing of two-peasants in the false pretext of red-terror during the previous regime; and in this case he was convicted for the killings of 13 persons, arson etc. SPO requested the court to increase the penalty taking into considerations the previous penalty as one of aggravating circumstances. But, the court sentenced him only for seventeen years rigorous imprisonment. And he had not finished the previous penalty. Many samples can be mentioned how the sentences were too light if we compare with similar ordinary crimes. (See Table 6 at 175)

general. Hence, both sides should learn from these trials that the only pledge for both players in the political field is respecting genuine playing rules of democracy. Derg could have ruled this country forever if intensifying the magnitude of killings and repressions of opponents could have silenced oppositions or ensure permanent state power. In support of this, Dr Yakob H/Mariam argued that:

Through these trials, the Ethiopian courts have hopefully sent the message that the massacre of people because of their political views will not be tolerated. The Ethiopian justice system is historically swift and brutal when dealing with government protests, while the issue of official misconduct is glossed over. These trials, despite their shortcomings, are a happy departure from the wholesale massacre of government officials and their underlings the moment their rule is overthrown.¹²

The violations of the rule of law, human rights and democracy did not only abuse and hurt victims but also perpetrators and their families as well as the whole society. Huge public resources and times were spent not only to those huge prosecutions but also in committing those crimes. Many brains of victims or perpetrators expired in prisons or passed away with the victims. When state officials used state institutions to commit crimes, the damages or social evils would be widespread and dangerous to the state and the society as a whole. Society would lose confidence on government. As a result victims and the society in general would begin to disobey governments. Finally peace and security of the country would be disturbed. Hence, these trials are important in drawing experiences and establishing norms of liberal democracy such as good and democratic governance, respect of human and democratic rights, rule of law, accountability of state officials, and the need to build strong judiciary that would guarantee fair trial for suspects and prosecute and punish those who abused the rights of others.

The trials also exposed the weaknesses of the Ethiopian judiciaries and indicate the need for reform. As we have seen in Chapter V, the major challenge in the trials was the weakness of the judiciary. Had the judiciaries been strengthened with additional resources, trainings, and privileges, they would have concluded the cases in a far better speed and quality. Such problems of the Ethiopian judiciaries are not still given proper attention by the concerned bodies. Even if there were improvements, but our judicial system is not yet developing parallel to the demand of justice in this country. Proving this truth and the dissatisfaction of the government, we have witnessed that the jurisdictions of the courts were gradually given to other bodies. This is not a good symbol for a country that is in the direction of liberal democracy.

Dr Yakob H/Mariam said that: "They (the trials) will help to create a cadre of lawyers and judges trained in the prosecution and trials of persons responsible for violation of international humanitarian and human rights laws, thus strengthening the domestic judicial system."¹³ So, the trials of Derg/WPE contributed in exposing the weakness and attaining some experiences that will contribute for strengthening the systems. Therefore, those judicial institutions that did not properly pass such tests should be reformed urgently.

¹² Yakob Hailemariam, *supra* note 9, at 742-743

¹³ Yakob H/Mariam, *supra* note 9, at 744

The trials also helped to uncover the truth, serve justice and consequently establish foundation for gradual reconciliation and peace in the country.¹⁴ The victims that were humiliated and discredited by the myths of the previous regime had got the chance to uncover the truth in the public hearing that were partly transmitted through the mass media. This would help, as we have said, to heal the wounds of the victims. And it will be a good foundation for reconciliation. Dr Yakob H/Mariam wrote that:

*"It is common knowledge that the first prerequisite for reconciliation is that the victims should have an intimate knowledge of the trials and be involved in all stages through the media or attending the trials as spectators or witness. Nothing is more cathartic than for the victim to see the accused made subservient to the law."*¹⁵

Thus, in this regard, the Ethiopian trials were by far better than the international tribunals such as ICTR, which was held far from the victims, in other nations.¹⁶

Yet, the process did not end by unrevealing truth in the manner the truth commissions did. The trials also entertained the defenses of the accused. The courts weighed conflicting allegations and evidences before it reached judgment of guilty. The truths were established based not only on the testimonies of rivals but also by independent witnesses that have worked with the accused and documentary evidences written by the accused at that time. To day, many documents and testimonies of the prosecution and the defenses are attached in each file uncovering the truths. Some of the accused might not tell even to their families or closer relatives about the truth established in the tribunals. But, the criminal proceedings and the hard facts that were proven based on the test of "beyond any reasonable doubt" are strong truths that could create collective memories about our past legacies. In addition to these, the comprehensive trial reports are being prepared and compiled.¹⁷ And researchers and historians may produce valuable studies from such hard facts established by trials. Even those accused that served their sentences may contribute in revealing other facts that were uncovered by the trials.

The massive graves in different part of the countries were located and opened so that bodies that were thrown without proper dignity were reburied in cultural and religious ceremonies with the participation of the community. Many memorials were also built in different part of the countries. These had a remarkable therapeutic effect to heal the wounds of the victims and to facilitate the grounds of genuine reconciliation and peace among the victims and perpetrators. And it would also have deterrent effect "on the general population and present and future leaders of Ethiopia than ICTR trials on the Rwandan People."¹⁸ The trials proved that not all the officials of the Derg/WPE regimes are criminals or perpetrators. Hence, the trials shifted collective responsibility from all persons that served Derg/WPE regime to few individuals prosecuted and convicted during the trial. Such truths established in the trials will be our common history that no body would legitimately deny or discredited it.

¹⁴ The truths disclosed by the trials are only pieces of the iceberg. The prosecution by its nature focuses only to facts of crimes that are necessary to prove guilt of the accused. For instance the prosecution has no interest and need not to invest its meager resources to find out the crimes committed by dead perpetrators. See chapter III

¹⁵ Yakob H/Mariam, supra note 9, at 735

¹⁶ Id

¹⁷ This author was not able to reveal some of the statistics of the trials before it will be publicized by the Office. Hence this author would advise to see the final report that would be publicized after short while. That report would complement this research. {But the final report was made public after the writer defend his case and hence some of the statistics were included when this paper is printed}

¹⁸ Yakob H/Mariam, supra note 9, at 744

This author has the view with all the reasons discussed in chapter II and Chapter IV, that full prosecution, despite its weaknesses, created better chance for reconciliation among all the victims and their victimizers. Unlike selective trial, the Ethiopian trials tried to serve justice for those who requested for it by investing substantial resources to the trials. They saw their tormentors charged, convicted and sentenced. They have been given the chance to confront their victimizers in the courts of law. Thus, they gave up the reasons that could push them to seek revenge. To the contrary, as far as the capacities of the country allowed and the evidences proved, all perpetrators involved in the commission of heinous crimes are charged and tried that they should not be afraid of revenge or they should feel relieved from guilt. The suspects have been also given to confront the prosecution evidences. Some suspects acquitted after the evidences weighed and the courts branded innocents from actual perpetrators. Thus, genuine ground for reconciliation and peace is laid down.

Now the difficult time has passed, there is a better hope for peace and reconciliation in Ethiopia than South Africa, where there are symptoms that some day when the balance of power is changed the quest for justice would revive. We have seen that countries, which addressed past injustice by amnesty due to negotiation among political forces rather than genuine reconciliation that came without real repentance of the perpetrators and forgiveness of actual victims, did not settle the issues in the lasting way. On the contrary, Ethiopia has settled the injustices in lasting way by prosecuting and punishing those perpetrators involved in the commission of the crimes.

The inclusion of the non-applicability of status of limitation and the principle against impunity for similar crimes in Article 28 of the 1995 FDRE Constitution is the reflection of this trial which expands the good beginning of the 1957 Penal Code of Ethiopia.

Before I conclude, I would like to suggest that the 2004 Criminal Code that was expected to expand the incorporation of the international criminal laws and principles, but that failed even to hold those acquired in the previous Code, should be revised to properly define crimes against humanity, genocide, forced disappearance, torture and other international principles. Furthermore detailed research has to be made to reveal the lessons we can draw from these huge trials. And finally, I would like to remind the government to give proper and positive support for all agencies of the criminal justice system to come out of their weakness. This assistance should begin from genuine belief that strong and independent judiciary is not a danger to government rather it is vital guarantee for democratic system, individual rights and peace for the country.

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22. Captain Legesse Asfaw et al SPO File No.M/C001; Fed. H. Court. File No.03116
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25. Dejene Waqeyo SPO File No. 230/85; Fed. Oromia Sup. Court. File No. 22/92
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37. Hailu Burayu et al; SPO File No. 13/85.2; Fed. H. Court. File No. 937/89
38. Kassa Wolchie SPO File No. 308/85; SNNP Sup. Court. File No.1196/93
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60. Seyoum G/Medihen SPO File No. 296/85; Fed. H. Court. File No 767/93
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ii.

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2. Ayele V. SPO the Central High Court Criminal File No 28/85
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22. Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, UN Doc. E/CN.4/1994/4(19 May 1993)
23. Rome Statute of the International Criminal Court [U.N. Doc. A/ CONF.183/917 July 1998
24. Statute of International Criminal Tribunal for former Yugoslavia
25. Statute of International Criminal Tribunal for Rwanda
26. United Nations General Assembly Resolution on Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, 11 December 1946
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28. Universal Declaration of Human Rights, Endorsed by the General Assembly of UN on December 10, 1948

F. Names of Interviewees

(The author had informal discussion with thousands of Accused, Victims and Independent witnesses and Observers in different times. Only very few of them are mentioned hereunder)

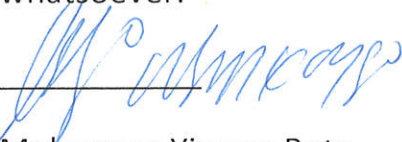
Special Prosecutors whose names are mentioned here had filled questionnaires prepared by this author and these documents are handed to this author.)

1. Ato Girma Wakijira, with the status of Minister, Chief of SPO
2. Ato Ayele Moges, Assistant Chief of SPO
3. Ato Yosief Kiros, Special Prosecutor
4. Ato Habitamu Temesegen, Special Prosecutor
5. Ato Meseret Mulat, Special Prosecutor
6. Ato Zebene Hagos, Special Prosecutor
7. L/T Megre Alemu, Special Prosecutor
8. Ato Tewodreos Berhe, Special Prosecutor
9. Ato Guta Shege, Special Prosecutor
10. Ato Asfaw G/Alief, Special Prosecutor now Judge
11. Ato Redi Belay, High Court Judge
12. Ato Solomon Reda, High Court Judge
13. Ato Hagos Woldu, Supreme Court Judge, Vice President of the Federal High Court
14. Ato Teshome Registrar of the Federal
15. Ato Seid Mohammed, High Court Judge
16. Ato Mekonnen Ambo, High Court Judge
17. Ato Anteneh Demisse, Elected Member of the Anti-Red Terror Committee and Victim, Shoa Gurage Zone
18. Ato Adnew Shewarega, Chairman of the Anti-Red Terror Committee and Victim, Shoa Gurage Zone
19. Ato Mesfen Asrat, Elected Member of the Anti-Red Terror Committee and Victim, Addis Ababa
20. Ato Teshome Zeleke, Elected Member of the Anti-Red Terror Committee and Victim, Addis Ababa
21. Ato Eshetu Seid, Accused from Amhara Region
22. Ato Demere G/Yohanes, Accused from Amhara Region
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DECLARATION

This thesis is my own original work. When the research avails of works by other persons, they are duly acknowledged. Hence, I declare that the statement just avowed is true and if it be found wrong in any way, I take complete responsibility whatsoever.



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