Transitional justice and the prosecution model: The experience of Ethiopia

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1 INTRODUCTION

In countries emerging from periods of great political turmoil, particularly if it has been associated with gross violations of human rights, the question of how to deal with the past has been a crucial part of the transformation process (Sarkin 1996). Obviously, the nature of the transition plays a major role in determining how human rights violations of the past will be dealt with (Sarkin 1999). There are various models that a new state can use to deal with an atrocious history of human rights abuse. A common thread is the desire to pave the way for a future peaceful and democratic society. Therefore, the interests of the victims and of the community must be considered.

The type of justice that is pursued is dependent on the type of transition of which there are three broad types:[2] overthrow, reform and compromise. Being overthrown[3] is the fate of a regime that has refused to reform: opposition forces become stronger and finally topple the old order. When reform is undertaken,[4] the old government plays the critical role in the shift to democracy. In countries where change is the result of compromise,[5] the existing regime and opposing forces are equally matched and cannot make the transition to democracy without each other. Such was the case in South Africa (Sarkin 1996; 1997; 1998).

In Ethiopia, the Transitional Government of Ethiopia (TGE) chose the 'prosecution' model. These trials, it was believed, if successful, could play a part in the healing of thousands of Ethiopians whose rights were violated during the terror of the Mengistu regime or whose friends and relatives were killed (Mayfield 1995: I). Experiences with other war crimes trials, however, show that it is difficult to meet the hopes and expectations of the victims during such trials (Schwarz 1994). Victims are mostly not involved in the trials, and are often denied the cathartic experience of a

1 I would like to thank Oliver Unseld for his research assistance in the writing of this article.

2 See generally O'Donnell Philippe C & Whitehead 1986.

3 As in Argentina, East Germany, Persia (now Iran) and the Philippines.

4 As in Chile, Hungary and Spain.

5 As in El Salvador, Namibia, Nicaragua, Uruguay and Zimbabwe.

process that focuses on them as victim. In isolation trials allow for recognition of only a single version of events.[6] A truth commission, on the other hand, analyses various versions of events and can validate more than one version by accepting differing testimony and incorporating all versions into a report which becomes official history. While trials can help lead to truth, the judicial system must adhere to principles of due process and assignment of individual, not collective, responsibility. Trials often limit truth discovery. Critically, in a society in transition, the courts are often composed of judges from the old order. Their decisions may therefore, not always be responsive to the needs of the new democratic order. If new judges have been appointed, they may not be willing to hand down decisions which are too politically controversial. The standards of proof for conviction in a criminal trial are higher than those that must be attained in a civil trial. Thus, guilty verdicts are far from certain. An acquittal can have a devastating effect on victims and the society in general. It must also be remembered that the aim of a trial is to attain a guilty verdict, not to assist victims in their recovery process. There could, therefore, be major failings and disadvantages in the use of the criminal justice system in a transitional society for victims of human rights abuses.

It is in this context that Ethiopia's transition to democracy and the type of justice it has attempted to meet out to perpetrators of human rights abuse has been fascinating. It provides many lessons for other countries embarking on a transitional process. This experience is also useful for the international legal regime that is seeking solutions to the problems of prosecuting international crimes. It provides critical insights into problems that may emerge as a result of the establishment of an International Criminal Court and the jurisdictional and other problems that may emerge between the court and various countries. Extremely relevant as well have been the attempts by the present Ethiopian government to bring the former ruler to book for his involvement in the widespread crimes which occurred during his reign. While the Spanish process in England to bring General Pinochet to trial in Spain for crimes committed in Chile was eventually unsuccessful, various procedural successes during the process were obtained. Ethiopia has however not been successful in its efforts. The former ruler has been given shelter in Zimbabwe since 1991[7] and when he came to South Africa in December 1999 for medical treatment, Ethiopian efforts to secure extradition were frustrated by the South African government.[8] Thus, while many believed the Pinochet example would lead to the arrest of more individuals

6 But see Osiel (1996) on how criminal prosecutions contribute to the collective consciousness and truth-telling.

7 Various other countries are providing sanctuary to those accused of major human rights violations. Thus, Uganda's Idi Amin lives in Saudi Arabia, Haiti's Raul Cedras resides in Panama, Paraguay's Alfredo Stroessner lives in Brazil and Haiti's death squad leader Emmanuel 'Toto' Constant lives in the United States.

8 Amnesty International, fearing an unfair trial in Ethiopia, did not press for his return there but rather called on South Africa to try him or extradite him to another country which would be willing to try him.

responsible for human rights abuses when they were in other countries, the example of Haile Mariam indicates that there may be reluctance by certain countries to play a part in the politics of other countries. It may be that those who fear such proceedings being launched against them will seek assurances of safe passage from the government of the country to which they are travelling. In the Ethiopian example it seems as though high officials of the South African government had given such assurances.

2 THE HISTORICAL BACKGROUND

From 1930 until 1991, Ethiopia's history has been dominated by two individuals: Haile Selassie I who became Emperor in 1930, and Mengistu Haile Mariam who became the ruler after Selassie was overthrown in 1974.

During Haile Selassie's rule, a growing tension grew between the various classes. He attempted to introduce a fairer tax system but was frustrated in these attempts by the nobility and by landowners. He attempted to strengthen the national government and established a national judiciary. In 1955, a new constitution was drafted, but the bicameral Ethiopian parliament (Senate and Chamber of Deputies) played no role in its drafting. The constitution itself guaranteed personal freedoms and liberties, including due process of law.

In spite of these changes, there was a growing dissatisfaction with the rate of reform. On 13 December 1960, several groups initiated an overthrow, while Haile Selassie was abroad. The army and air force units remained loyal to Haile Selassie so the coup was put down. Nevertheless, this revolt led to further polarisation in Ethiopia.

Thus, the last 14 years of his reign were characterised by growing opposition. While Haile Selassie did attempt certain reforms, most attempts were frustrated by the need to provide grants to military and police officers. Unable to deal with the domestic issues, he turned his interest to foreign affairs.

2.1 The Dergue

The Ethiopian revolution began in early 1974. It was caused by a lack of reform together with rising inflation, corruption and a famine. While the urban-based new elite wanted to establish a parliamentary democracy, the revolution was initiated by the military whose conditions were poor, with underpaid personnel and insufficient food and other supplies. Many of the soldiers came from the peasantry, which was taking the brunt of the famine. Many believed that the government was not taking measures to assist the people. After the revolution a new body called the Coordinating Committee of the Armed Forces, Police, and Territorial Army was established. It was to be known as the Dergue, Amharic for 'committee' or 'council'. Major Mengistu Haile Mariam was elected chairman. Haile Selassie was initially not removed from office but controlled by the Dergue instead.

The Dergue's influence grew slowly and thus the political change that resulted has been called a 'creeping coup'. Haile Selassie was deposed and imprisoned on 12 September 1974 and died in prison in August 1975.

The Dergue was not immune from criticism and was attacked by civilian groups who demanded a 'people's government'. Some Dergue members lent support to these calls. A struggle took place in the organisation, leading to the execution of some members who supported these civilian demands. During this period many individuals, including various political prisoners, as well as. On 21 May 1991, the EPRDF entered Addis Ababa and took control. Mengistu fled the country (Mayfield 1995:1).

2.2 The Transitional Government of Ethiopia (TGE)

In July 1991, the EPRDF and other political and ethnic groups called a conference that adopted the Transitional Period Charter of Ethiopia, which served as an interim Constitution. In 1992, the TGE established the Special Prosecutor's Office to bring those responsible for human rights violations during the Dergue regime to justice. In May 1993, Eritrea became independent after a referendum. Elections for a constituent assembly took place in June 1994. The constituent assembly adopted a new constitution in December 1994. In 1995, Meles Zenawi's EPRDF party won the majority in the first elections of the country and he became prime minister. However, the electoral process was not without controversy and most political groupings refused to participate in the process. This has caused ongoing problems that have been heightened by the government's poor human rights record (US Department of State 2000).

Despite the fact that the new Constitution is based upon human rights and democracy, recent developments show that human rights are still violated. Thousands of critics and opponents of the government have been arrested, including prisoners of conscience. Even journalists were put into prison for articles critical of the government. More than 10 000 people are in detention for their political opposition to the government. Few of them had been charged or tried. There are reports of extra-judicial executions. On 6 May 1998, war broke out between Ethiopia and Eritrea as a result of a border dispute. After this, thousands of Eritreans, most of them Ethiopian citizens, were deported to Eritrea (Amnesty International 1999a). Deportees had to abandon their homes, possessions and property with no guarantee of having these returned (Amnesty International 1999b).

It is not yet clear if this development will have an impact on the trials of the former Dergue members and other perpetrators of human rights violations. Reconciliation cannot take place if Ethiopia's future is characterised by internal disturbances and human rights violations.

3 DEALING WITH THE PAST

To prosecute those guilty of human rights abuse, the Ethiopian TGE established the Office of the Special Prosecutor (SPO). The mandate given to it is to establish for public knowledge and for posterity a historical record of the abuses of the Mengistu regime and to bring those criminally responsible for human rights violations and/or corruption to justice (Report of the

Office of the Special Prosecutor 1995). In September 1992, the TGE appointed Girma Wakjira, an experienced and respected prosecutor, to head the SPO, but it took another four months before enough staff had been hired for the office to function (Mayfield 1995:III.B). At the end of 1994, there were about 30 prosecutors and 400 investigators working for the SPO.[9] Since the SPO's mandate covers a broad scope, the SPO planned to try the detainees in three categories:

- urgent interim reparation
- policy and decision makers
- the field commanders, both military and civilian
- the actual perpetrators of murder, torture and other crimes (Amnesty International 1996a:2).

To achieve these goals the SPO created four teams. Each team focused on gathering evidence for a particular abuse committed by the Mengistu government: the Red Terror, forced relocation, war crimes, and the manipulation of famine relief.

A fifth team was occupied with gathering evidence on the structure of the government, the security and military forces. The purpose was to find out how this structure was used to carry out human rights violations. Two additional groups provided support to the work of the other groups. One tried to obtain all the relevant information from the government, the other one was charged with establishing a computer database which should make easily available all the collected information (Mayfield 1995:III.B). In fact, the Mengistu regime documented most of its own offences very thoroughly. Thus, clear evidence exists for many abuses.[10]

Computerisation was an essential part of the SPO's strategy to deal with the over 300 000 pages of documents collected, and the process created the first group of computer-literate prosecutors and investigators in the country. However, the process has been far from smooth and in fact some international assistance for this work has been stopped because of concerns around what kind of information was being gathered and stored and how this was being done.

The budget of the SPO was initially a mere $200 000.[11] However, because the SPO was seen to be a critical step in the creation of a justice system in Ethiopia, the SPO received more than US$1-million from the international community.[12] The international community not only provided funds but

9 *I would like to ask him why*. 1994. Newsweek December 19: 19.

10 Mayfield (1995:III.B), referring to a statement of US attorney Stuart H. Deming, published in *The Economist* 30 July 1994: 37–38: "Not since Nuremberg has such documentary evidence been assembled suggesting the degree of complicity on the part of senior government officials. In many instances, there were verbatim transcripts made of critical meetings. There are over 200 volumes of these transcripts as well as audio tapes of many of these meetings".

11 Report of the Office of the Special Prosecutor 1994: 564 compares the budget of US$3 million in El Salvador: "This is definitely a difference worth noting".

12 Zenawie's new deal. *New African* February 1995 at 33; Report of the Office of the Special Prosecutor: 571 with reference to the donor countries – Sweden, the US, Norway, The Netherlands, Canada and Denmark.

also computer equipment, forensic experts for exhuming mass graves, legal consultants, as well as experts for establishing a public defender's office (Report of the Office of the Special Prosecutor 1995: 571, 573). Although the SPO was given financial and organisational support, foreign exchange restrictions and internal bureaucratic problems severely delayed the implementation of the prosecution process (Report of the Office of the Special Prosecutor 1995: 571).

3.1 Support of non-governmental organisations (NGOs)

NGOs play an important role in the work of a prosecutor or a truth commission. As they monitor human rights abuses, NGOs often record offences. As a result they often know the victims, as well as the perpetrators, and can provide essential information for a prosecution. However, the NGO support is very poor in Ethiopia. Given the delays and other problems, the international community is very sceptical about the ability of the SPO to comply with international standards (Report of the Office of the Special Prosecutor 1995: 572). Tensions have mounted since certain NGOs complained about the long-term detention without trial of former Dergue officials. The US Department of State (1995) even felt prompted to state that the government and human rights monitoring organisations had "failed completely to achieve a constructive dialog".

3.2 Extradition of exiles

An effective prosecution presupposes the presence of the perpetrators. However, many high-ranking officials of former regimes manage to flee to countries where they are immune from prosecution or extradition. While there often exists an obligation for states under international customary law to either prosecute or to extradite persons who allegedly committed crimes under international law,[13] the practical effects of this obligation have often proved unsatisfactory. A number of countries take the view that their national penal code is an adequate means to prosecute those criminals (Kalshoven 1987: 68–69). Moreover, even if countries do not prosecute these persons according to their national law, they often refuse to extradite the alleged criminals. This is the case in Zimbabwe, where President Mugabe still refuses to extradite Mengistu.[14] For other countries the greatest obstacle to extradition is the fact that the fugitives would face the death penalty in Ethiopia. Italy, for example, will not extradite three former officers and ministers of the Dergue who found refuge in the compound of

13 This concept is called "universal jurisdiction": the requirement that criminals have to be punished whenever and wherever possible, even by states which had no connection whatsoever with the conflict in which the atrocities were committed. This works by the principle *aut dedere, aut punire*, which places an obligation on any state holding an alleged criminal either to institute proceedings against that person itself, or to extradite the person to any other state which is prepared to institute proceedings.

14 Mengistu Haile Mariam is to leave for North Korea Addis Tribune 17 March 1998. According to this report, Mengistu has been granted asylum in North Korea and is expected to leave Zimbabwe soon.

the Italian embassy in Addis Ababa.[15] This problem is exacerbated by the fact that many prisoners in Ethiopia have been sentenced to death.[16]

3.3 Application of international or Ethiopian law

Apart from the question of its duty to prosecute the offenders, Ethiopia had to solve the problem of whether domestic or international law should be applicable to the trials (Mayfield 1995:IV.B). The Ethiopian Penal Code[17] incorporates rules of international customary law pertaining to genocide, crimes against humanity, and the grave breaches of the 1949 Geneva Conventions.[18] From the SPO's point of view, the decision to use domestic law had several advantages. First, Article 281 of the Ethiopian Penal Code is similar to the Genocide Convention. As defined in the Genocide Convention, genocide consists of acts committed "with intent to destroy . . . a national, ethnical, racial or religious group".[19] However, the Ethiopian Penal Code expands the scope of the targeted groups by incorporating political groups in that list. This distinction is particularly important since the Red Terror was directed against Mengistu's political enemies (Mayfield 1995:IV.B). Secondly, at the time of the establishment of the SPO (1992), the use of international law as a basis for the prosecution of war crimes posed a fundamental problem. The offences of the Mengistu regime took place in an internal conflict, but it was not sure whether international customary law was applicable to those conflicts. Due to the perceived limitation of international rules, the only way to try the alleged perpetrators with war crimes was to charge them under the Ethiopian Penal Code that does not require war crimes to be committed in an international conflict.

Since the decision of the International Tribunal for the former Yugoslavia in 1995 (*Tadic* case)[20], however, the distinction between war crimes committed in international or non-international armed conflicts has been blurred more and more, and nowadays, international customary law covers both international and non-international war crimes.[21]

The use of domestic law offered another advantage in the eyes of the SPO: the death penalty. While under international law it is not clear whether a death sentence is possible,[22] the Ethiopian Penal Code permits

15 Italien wegen Nichtauslieferung von Dergue-Vertretern an Äthiopien kritisiert. *Deutsche Welle Monitordienst* 14 January 1998.

16 Amnesty International 1999a: 25: "Jamal Yasin Mohamed, an Eritrean businessman, was executed in June in Addis Ababa's Central Prison after losing an appeal against his conviction for the murder of an army general in 1977".

17 Penal Code of the Empire of Ethiopia of 1957.

18 Articles 281–292 of the Ethiopian Penal Code.

19 Article 2 of the International Genocide Convention.

20 *The Prosecutor v Dusko Tadic* case IT-94-1-AR72 Appeals Chamber Decision of 2 October 1995.

21 Also the Statute for the International Tribunal for Rwanda (established by UN Security Council Resolution 955 of 8 November 1994) contributed to this development in international customary law; see in general Meron 1995: 424.

22 It is true that the Nuremberg Tribunal sentenced several former members of the Nazi regime to death, but neither the Yugoslavia Statute nor the Rome Statute allow the death sentence.

it for first-degree homicide, genocide, crimes against humanity and war crimes (Report of the Special Prosecutor 1995: 573). Since the government did not want to exclude the death penalty for "the demands for justice from victims and their relatives" (Amnesty International 1996a), the choice of domestic law was necessary.

In any case, the decision to base the charges on the Ethiopian Penal Code prevented further delays that could have been caused by a lengthy debate involved in the creation of an international tribunal, such as those for Yugoslavia and Rwanda. The trials continue to be held before Ethiopian domestic courts. In October 1995, the court turned down the request of the defendants that their trials be heard by an international tribunal.[23]

3.4 Habeas corpus proceedings

Shortly after the fall of the Mengistu regime in May 1991, the TGE arrested about 3 000 Dergue members, members of the military, various police officers, as well as other state agents suspected of direct involvement or complicity in gross violations of human rights during the Dergue period. By the time the SPO began functioning, some of these detainees had been detained without trial for almost 18 months. When presented with a *habeas corpus* petition, the SPO examined the evidence relating to that individual it had gathered until that point. If the evidence was insufficient, the SPO released the detainee on bail or unconditionally. If the SPO wanted to continue detention, it was able to use the Ethiopian Criminal Procedure Code which permitted the remand of the detainee in custody for up to 14 days while the authorities gather more evidence. To achieve this, the SPO simply had to ask a lower court for a remand order which it then presented to the Central High Court hearing the *habeas corpus* petition. This order is deemed evidence of proper detention and the court is not able to look into propriety of the order itself. In these circumstances the High Court had to dismiss the *habeas corpus* petition. This procedure could be repeated each time the SPO was confronted with such a petition (Mayfield 1995: III.C).

The applications for *habeas corpus* did ensure that the SPO began to examine the lawfulness of all detentions. As a result, 900 detainees were released by the SPO on bail. In addition, another 200 detainees were released from detention by the courts. As a result, the SPO gained a degree of credibility from the international community that saw these events as an expression of the SPO's commitment to the rule of law, and as a sign of the increasing independence of the Ethiopian judiciary.

The downside of the *habeas corpus* proceedings was that they demanded an enormous investment of time by the SPO. Further delays in the pre-trial phase thus occurred, leading to some detainees spending even longer in detention without charge.

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23 Mayfield 1995: III.D in general about the different possibilities to prosecute alleged perpetrators of international crimes with emphasis on Ethiopia's situation. See Turns 1995: 804.

The time limit for detentions was resolved to some degree in late 1993, when the cassation (appeal) division of the Supreme Court ruled that the SPO was not required to bring charges within the requisite 14 days because of the special circumstances that existed in Ethiopia and the seriousness of the crimes concerned (Amnesty International 1996a: 2). There is thus no specific time limit any more. This prevents those detained from using the *habeas corpus* application. This is highly problematic as the process of trying all the detained individuals may take over 20 years (Report of the Special Prosecutor 1995: 561).

3.5 Establishment of a Public Defender's Office (PDO)

A public defender system has never existed in Ethiopia. During the reign of Haile Selassie, an *ad hoc* arrangement existed which saw "lawyers who happened to be present in the courts were asked to take on defence of some defendants without fee" (Report of the Special Prosecutor 1995: 573).

According to the SPO, half of the detainees could not afford their own counsel (Report of the Special Prosecutor 1995: 573). By late 1993, it became clear that it was necessary to establish a defence system for former Dergue officials who could not afford private attorneys in order to meet international standards (Bach 1996). Consequently, the PDO was established in January 1994 together with the courts and the Danish section of the International Commission of Jurists (ICJDS). The PDO is organised under the Central Supreme Court (now called Federal Supreme Court) and is headed by a Chief Public Defender and a Deputy Public Defender.

The international donor community financed office equipment and running costs. Approximately 30 attorneys have been working in the PDO, among them graduates from the Law School of Addis Ababa University, diploma holders, and former judges in lower courts. They are paid by the state (Bach 1996). As of late 1997, no legislation has been enacted to establish the legal foundation for the PDO (US Department of State 1997: I.e). Thus, the exact mandate, structure and organisation of the PDO has no legal foundation (Bach 1996).

However while there is now a structure to provide legal defence, there are major problems concerning facilities to prepare such a defence. Under the Ethiopian Criminal Procedure Code, it is highly problematic that attorneys are not given access to their clients before the trials. Moreover, they are not given access to the prosecution's evidence until after the evidence is introduced at trial (Mayfield 1995: V.E). The lack of resources is a major problem and those involved in the defence work demand more pay.[24]

3.6 The progress of the trials so far

The speed with which the decision was taken to hold people accountable for human rights abuses initially won high praise for the new government

24 Lawyers defending former Ethiopian officials demand more pay 1997. *Panafrican News Agency* 3 July.

of Ethiopia. There was therefore, in the beginning, much international support for the trials, and various types of assistance given to bolster the initiative. Opposition groups in Ethiopia have however alleged that some of those being prosecuted are being targeted for political reasons (US Department of State 2000). This has undermined the legitimacy of the process.

Delays have, however, been the order of the day. While the TGE established the SPO in August 1992, it only began to function in January 1993. As alleged perpetrators had already been detained for almost 18 months without charge, the SPO immediately started examining the lawfulness of the detention and releasing those detainees who might have been in prison unjustly or who were involved in less serious crimes (Report of the Special Prosecutor 1995: 561). No SPO defendant has been released on bail but 33 defendants have been released for lack of evidence (US Department of State 2000).

The process the SPO followed after examining the lawfulness of the detentions was to begin to hear more than 2 500 witnesses, to gather more than 250 000 pages of documents and to analyse and enter these into computer databases. At the same time foreign forensic teams did exhumations. In October 1994, the SPO laid charges against the first perpetrators. At that time about 1 300 people were imprisoned (Mayfield 1995: III.D). While the SPO had set targets to charge all defendants by 1994, this was not met. It was only at the end of 1996 that charges against 1 218 of the total 1 800 detainees, were filed in Ethiopia's Federal High Court. Their cases were then allocated to the Supreme Court of the region where the crimes actually took place (Amnesty International 1997).[25]

In February 1997, it was announced that 5 198 persons had been charged with acts of genocide. A total of 2 246 were in detention (Human Rights Watch 1998) while the remaining 2 952 were charged in abstentia. However, it was only by 1998 that all alleged perpetrators had been indicted and arraigned (US Department of State 1999).

The first trial of 73 defendants began December 1994. The court proceedings opened with the court reading aloud the 269-page document of charges. Twenty four of the defendants were not present, including Mengistu, and they were tried in abstentia. The court busied itself with pretrial applications throughout 1995. While the prosecution case began in 1996, the trial only gained momentum in 1997 (Amnesty International 1996b).

In February 1997, the investigation process was completed and charges were brought against 5 198 persons. In March 1997, 128 individuals were formally indicted on genocide (US Department of State 2000). By the end of 1998, of the 5 198 persons charged, 2 246 were in detention, while the remaining 2 952 were charged in abstentia (US Department of State 1999: section 1a).

25 Amnesty International News Release AFR 25/01/97.

In March 1998 the Harari Supreme Court, and in April 1998 the Oromiya Supreme Court,[26] started hearing charges against former Dergue officials. By the end of 1998, about 550 witnesses had appeared in the trials (Amnesty International 1999a) and other cases were also in progress. Trials continued in 1999 and most were still in progress by the end of the year, although a number of individuals have been convicted (US Department of State 2000).

The courts in Ethiopia have major problems. Understaffing is one. This is partly the result of the government's decision to remove dozens of experienced judges after assuming power. It is not surprising therefore that the Ethiopian judiciary is believed to be "weak and overburdened" (Twibell 1999: 399). It is however reported by the US State Department that it shows "signs of independence" (Twibell 1999: 399). Thus, a severe shortage of trained personnel as well as financial limitations, limit the functioning of the judiciary. There are also huge resource constraints resulting in backlogs in the courts (Human Rights Watch 1998). The problem of inexperience is recognised by the government and it is addressing the problem by boosting the training of prosecutors and judges. The government does, however, recognise that the process of creating an independent and skilled justice system will take decades (US Department of State 2000).

All the trials have been characterised by years of delays. In 1999 many of the trials of the thousands of detainees were still being held up (Human Rights Watch 2000). As a result of these problems, defendants are sometimes being charged and tried collectively. Often the attorneys appointed by the courts are insufficiently skilled and lack experience. As a result of the criticisms of these and other problems, many see these trials as being unfair and not leading to an impartial and objective result (US Department of State 1999: section 1e). Because of all the problems, international support for the trials has waned over the last few years. While countries such as Canada, Denmark, France, Norway, Sweden, the Netherlands and the USA have committed some financial and technical assistance, the problems with the trials have seen this assistance dwindling. Now it seems that that there is a reluctance to support the trials because of a lack of faith in the criminal justice system to deliver fair trials and impartial results. The imposition of the death penalty has also affected support for the trials. These fears played out when Mengistu was in South Africa in December 1999 and Human Rights Watch, citing concerns about the fairness of the Ethiopian trials, declined to press for Mengistu's return to Ethiopia. The group suggested, however, that South Africa could try Mengistu before its own courts.

Of great concern and of vital importance to victims is the fact that it is quite difficult to access information about the trials as little information or coverage is found in the media. The trial delays also limit the effect of

26 Harari Supreme Court hears genocide charges against Dergue officials *Addis Tribune* 27 March 1998, and Oromyia Supreme Court hears genocide charges against Dergue officials *Addis Tribune* 24 April 1998.

holding the trials in the first place. If a goal is to provide to victims some degree of closure, to hold people accountable for their crimes, this role is limited by the time it takes to hold such trials. The longer it takes, the more difficult it is for evidence to stand up to scrutiny, individual memory fades, and the interest of people wanes. The effect of such trials cannot have the resonance as they would have had shortly after the transition to democracy. As the delays continue, so public interest shifts to more immediate and pressing issues. Over time other political issues come to the fore.

Experience also shows that, in general, trials often do not meet the hopes and expectations of victims. They are not often involved in the trial, and are often denied the cathartic experience of a process that focuses on them as victims. In isolation, trials allow for recognition of only a single version of events.

While trials may help to discover the truth, the judicial system must adhere to principles of due process and assignment of individual albeit not collective, responsibility. While crucial and necessary, these fair trial right principles can limit discovering the truth. Critically, in a society in transition, the courts are often composed of judges from the old order. Thus, their decisions may not be responsive to the needs of the new democratic order. If new judges have been appointed, they may not be willing to hand down decisions that are too politically controversial. This problem has been overcome in Ethiopia but other problems have come to the fore as a result, as mentioned above. In addition, because the standard of proof in a criminal trial is higher than that required in a civil one, guilty verdicts are far from certain. An acquittal can have a devastating effect on victims and the society in general. It must also be remembered that the aim of a trial is to attain a guilty verdict rather than to assist victims in their recovery process. There could, therefore, be major failings and disadvantages in the use of the criminal justice system in a transitional society.

In the Ethiopian context so far, very few substantive lessons can be learnt from the individual trials as the outcomes and effects are still largely unknown. What can be taken note of are the practical problems that have arisen as a result of replacing the judges, holding so many trials, having so few experienced lawyers, as well as other issues. It must be borne in mind that many of these problems are out of the control of the legal system and are severely impacted by resource shortages. These lessons are critically important for other countries in similar positions, financially and otherwise, to bear in mind before embarking on the same treacherous road.

4 CONCLUSION

As can be seen through the lens of Ethiopia, a critical question for newly democratic countries (and for the broader international community) is how to deal with past gross violations of human rights. Whether there ought to be criminal trials is a critical decision in a country in transition. Even if the model of prosecution rather than amnesty is pursued, it must

be determined whether trials are likely to deliver what is expected in terms of the needs of victims. Decisions about whether to have trials and, if so, who ought to be tried; or whether to pass or rescind amnesty laws; and whether there should be a truth commission or some similar process are difficult and complex. They must be taken in the context of historical, economic, political, social and other factors. While there is an accepted and majority view that, for certain crimes, international law puts a duty on a state to prosecute or extradite, in reality the type of justice pursued in a particular country is dependent on the nature of its transition.

The amount of available resources, and competing demands for those resources, are also very relevant in determining whether resolving the past is high on a country's list of priorities. What may be relevant and possible in other parts of the world may not be possible in Africa. In addition, the manner in which change occurs and the power relations that continue to exist in that society are important factors in these decisions.

It is in this context that Ethiopia's transition to democracy, and the type of justice it has attempted to mete out to perpetrators of human rights abuses has been fascinating. It provides many lessons for other countries embarking on a transitional process. This experience is also useful for the international legal regime currently seeking solutions to the problem of prosecuting international crimes. It provides valuable insights into problems which may emerge.

Critically, however, dealing with the past is one of the most important tasks of new democracies and as such cannot be avoided.

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