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ETHIOPIA

RECKONING UNDER THE LAW

I. INTRODUCTION

In May, 1991, the government of former President Mengistu Haile Mariam was overthrown by the military forces of the Ethiopian People's Revolutionary Democratic Front (EPRDF) and the Eritrean People's Liberation Front (EPLF), ending seventeen years of the repressive rule of the Dergue regime. The Mengistu government was responsible for human rights violations on an enormous scale. Tens of thousands of Ethiopians were tortured, murdered or "disappeared" after arrest during the period from 1974 to 1991.

Human Rights Watch/Africa (HRW/Africa) documented these violations in its book-length report *Evil Days: 30 Years of War and Famine in Ethiopia* (*Evil Days*) in 1991[1]. In March and April, 1994, HRW/Africa sent a mission to Ethiopia to investigate the process established by the Transitional Government of Ethiopia (TGE) to bring former officials of the Mengistu regime to justice for these human rights violations.

HRW/Africa believes that this process of accountability is essential to the building of democratic institutions in Ethiopia. At present these institutions are extremely fragile and require support from the international community to flourish. The TGE has an obligation under international law to both the victims of human rights violations and to all of Ethiopian society to bring those who have committed human rights crimes to justice and to ensure that the truth about these crimes be told and documented for the present and the future. To fulfill these duties, the TGE must complete the accountability process by exposing the full extent of the human rights violations of the prior regime and by identifying and prosecuting those responsible for these terrible crimes. We hope that this report will make a contribution to the successful conclusion of this essential process.

Ethiopia faces a daunting array of challenges. There continues to be a high level of ethnic and political tension and suspicion throughout the country. The absence of any history of democratic traditions impedes the development of methods of consensus building and reconciliation of competing interests so important in a democratic society. The prosecution of the alleged human rights violators of the Mengistu regime provides an important opportunity to bring all segments of Ethiopian society together around issues of accountability and justice about which there is a great deal of consensus in Ethiopia.

Ethiopia lacks the resources to provide adequately for the pressing economic and social needs of its long-suffering people. It has few resources to apply to the development of democratic institutions, including a new legal system. The demands of the accountability process in bringing the human rights violators of the Mengistu regime to trial are very difficult for a poor society in the midst of democratic transition and rebuilding. In light of these obstacles, the TGE has made important strides in many areas and must be commended for these efforts.

The creation of a Special Prosecutor's Office (SPO) in August, 1992, was a significant step toward ensuring accountability for the crimes committed under the Mengistu regime. As this report is published, however, it is not yet clear whether the early promise of the SPO process will be realized.

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[1]See also, Human Rights Watch, *Human Rights Crisis as Central Power Crumbles: Killings, Detentions, Forcible Conscription and Obstruction of Relief*, April 30, 1991; *Mengistu's Empty Democracy: One Year After Reform is Announced, No Improvements in Civil and Political Rights*, March 5, 1991; *200 Days in the Death of Asmara: Starvation as a Weapon and Violations of the Humanitarian Laws of War*, September 20, 1990; *Violent Suppression of Student Protest*, August 30, 1990; *"Mengistu Has Decided to Burn Us Like Wood": Bombing of Civilians and Civilian Targets by the Air Force*, July 24, 1990; *Conscription: Abuses of Human Rights during Recruitment to the Armed Forces*, July 1, 1990.

In the past two years the SPO has received more than $1 million in aid from the international donor community for the proposed human rights prosecutions. This assistance has included the provision of computers and other equipment and financial assistance to hire prosecutors, investigators and other needed personnel, and international advisors. Though this aid has been essential, the amount of aid is very small given the enormous task of bringing more than 1,000, and perhaps as many as 3,000 former Mengistu officials to trial.

The SPO has assembled tens of thousands of documents and thousands of witness statements documenting the human rights violations committed by the Mengistu regime. The SPO has consulted with international experts, including a United Nations team that visited Ethiopia in July 1994, about the international law issues relating to the charges against the former Mengistu officials. While the SPO's efforts have continued a new court system is being developed, including the creation of a new Public Defenders Office. These efforts are far from completion.

As of this writing, more than 1,300 persons associated with the Mengistu regime remain in detention awaiting charge and trial. Many of them have now been in prison for more than three years. The SPO has promised on several occasions that charges against the detained defendants would be filed promptly, but the first charges against 73 defendants were not filed until October 25, 1994, as this report was going to press. The filing of these charges, including charges against the top officials of the Mengistu regime and Mengistu himself, is a significant event and hopefully the other detainees will either be charged or released without delay.

There is little doubt that the detention of more than 1,300 people, many for more than three years, without charge or trial, is a violation of international human rights standards, including Ethiopia's obligations under the International Covenant on Civil and Political Rights. There are further concerns about the ability of the SPO to prosecute and the courts to try the detainees in a manner fully consistent with international standards.

The process of accountability and justice is at a crossroads in Ethiopia. The expectations of the Ethiopian people and the international community have yet to be fulfilled, and the delay in bringing any formal charges or starting trials has raised concerns about the ability of the SPO to carry this vital project to a successful conclusion.

There is still time to address these concerns. The filing of charges against 73 defendants on October 25, 1994, is an important step in the right direction. It is now essential for charges against the remaining detainees to be filed immediately, and for trials to begin in a timely manner, consistent with the fair trial rights of the defendants. Thus it is still possible for the SPO to fulfill the purpose for which it was founded—to make the violators of human rights accountable for their crimes through process of law. Trials conducted in accordance with international standards would contribute enormously to the strengthening of democratic institutions and the rule of law in Ethiopia.

However, the trials will not complete the process of accountability. The larger truth telling process transcends the upcoming trials. The information gathered by the SPO must be compiled and made accessible to Ethiopian society as a whole.

The rehabilitation and compensation of victims is also a key element of the accountability process. Ethiopia's lack of resources makes rehabilitation and compensation of victims a difficult goal to fulfill; however, some program to meet these needs, supported by the international community, is an important part of the accountability process.

The upcoming human rights prosecutions still have the potential to serve as a model for other nations emerging from long patterns of human rights violations and dictatorship and struggling to build democratic institutions based on the rule of law. The entire international community has an important stake in the outcome of this process.

II. HISTORICAL BACKGROUND

A. The Human Rights Violations of the Mengistu Regime

Until 1974 Ethiopia was an autocratic monarchy, ruled by Haile Selassie as Emperor since 1930. Although the imperial government promulgated a constitution and legal codes in the 1950s, neither the legislature nor the judiciary

were ever really independent, and in the countryside an essentially feudal system persisted. Some of the problems of the Mengistu regime had their origin in the imperial period, including neglect and concealment of rural famine, human rights abuses in the course of various counterinsurgency campaigns, and the war in Eritrea.

The historical status of Eritrea is a disputed issue. Eritrea was an Italian colony from the 1880s until World War II. In 1952 Eritrea was "federated" with Ethiopia, but the Emperor, in effect, annexed it. Eritrean opposition to this absorption led to the outbreak of war in 1961, with the formation of the Eritrean Liberation Front (ELF). The ELF was joined by a second, rival front, the Eritrean People's Liberation Front (EPLF) in 1972. From its inception, the Eritrean war was marked by human rights abuses perpetrated by both fronts and by successive Ethiopian governments, until the EPLF emerged victorious as part of the coalition of forces that brought down the Mengistu regime in May, 1991.

The Rise of the Dergue

The revolts in Eritrea and other regions, and a severe famine in Wollo province which the government tried to conceal, helped to weaken the imperial regime.[2] In 1974 a series of mutinies in the army and strikes and demonstrations among civilians led to the overthrow of Haile Selassie and (in 1975) the abolition of the monarchy. The group which came to power was a coordinating committee of the armed forces and the police known as the Provisional Military Administrative Committee, the "Dergue" or "Derg" (an Amharic word for committee).

The Dergue, a committee of some 120 military officers, was at first led by General Aman Andom (killed in 1974), and later by General Teferi Banti (killed in 1977). In 1977 Major, later Colonel, Mengistu Haile Mariam became head of state after eliminating his rivals within the Dergue.

In November 1974, at Kerchele Prison in Addis Ababa, the Dergue summarily executed fifty-eight former imperial government officials. General Aman was killed the proceeding night at his residence, while resisting the soldiers who came to arrest him. The Dergue met to decide the fate of these former officials, and each official's case was discussed. The SPO has the minutes of this meeting in the evidence it has collected, detailing what various Dergue members said in the discussion, and their unanimous decision to execute the former officials.[3] This was only the beginning of a series of summary executions by Dergue high officials, many at the direct command of Mengistu himself.

The Red Terror[4]

Opposition to Haile Selassie included a wide range of Marxist intellectuals and groups, with two organizations particularly prominent in Addis Ababa, the Ethiopian People's Revolutionary Party (EPRP) and the All-Ethiopia Socialist Movement (Amharic acronym "MEISON"). MEISON was prepared to cooperate with the Dergue, but EPRP was not, and was ready to engage in urban guerrilla warfare against the Dergue to bring about a civilian government.

The Dergue adopted an ostensibly Marxist program—nationalizing land for example, and organizing the rural population into Peasants Associations and the city dwellers into similar local organizations, called *kebeles*. However, the Dergue was determined to destroy all organizations that could serve as a political opposition to its rule. Thus,

[2] *Recent History*, p. 353. *Evil Days*, chapter 3.

[3] The Office of the Special Prosecutor, the Transitional Government of Ethiopia, *Dossier: The Special Prosecution Process*, p. 3 (*Special Prosecution Process*).

[4] See chapter 6 of *Evil Days*.

members of—or anyone suspected of supporting—the EPRP and MEISON came under harsh repression.

In 1976 the EPRP began to assassinate Dergue and MEISON officials, a campaign which Mengistu called the "White Terror." The Dergue began executing suspected EPRP members in 1976, but the "Red Terror," as this campaign came to be known, was not officially declared by Mengistu until after the Dergue Chairman, General Teferi Banti, was killed in early 1977, and Mengistu publicly took supreme power.

During the Red Terror thousands, perhaps tens of thousands, of suspected opponents were arrested, tortured, and summarily executed, many by local *kebele* officials. Hundreds of people, often teenagers, were arrested and detained in *kebele* headquarters or military facilities. A large percentage were tortured. Many of these prisoners were detained under truly unspeakable conditions, packed by the hundreds into airless, lightless cellars, where they could hear the screams of those being tortured while they awaited torture themselves. Many of those executed were simply left by the roadside with Red Terror slogans attached to their bodies to terrify potential opponents. Others were simply "disappeared." Relatives of those killed were forbidden to mourn, or compelled to pay for the killers' bullets before family members' corpses would be released.[5]

The Red Terror came in several waves, lasting into the middle of 1978. The first wave largely destroyed the urban EPRP; in the last wave the Dergue attacked its former ally, MEISON, and the killing and torture spread to the countryside.

Altogether at least 10,000 people were killed in the Red Terror in Addis Ababa alone, with many others tortured and imprisoned under inhuman conditions. Detainees were not charged or tried, and often *kebele* officers had the power of life or death on a whim. Many of the victims were high school students. Among the detainees awaiting charges from the SPO are many former *kebele* leaders who were arrested for their actions during the Red Terror campaign.

Although the Red Terror period stands out for its unparalleled degree of barbarity, the Mengistu regime continued to arbitrarily detain, torture, execute or cause the disappearance of thousands of its perceived enemies until it was overthrown in 1991. During the HRW/Africa mission in March-April 1994, an Argentine forensic team working in consultation with the SPO was excavating a mass grave at a teachers college outside Addis Ababa used by the former Minister of Interior during the Mengistu regime. The grave contained dozens of fully clothed bodies with nooses still around their necks. The forensic team believed that these victims were killed toward the end of the Mengistu regime.

The Dergue was surprisingly systematic in conducting the Red Terror. The decision as to which detainees lived or died was often carefully recorded in documents transmitted to high military officers. In fact, the SPO has hundreds of orders, directives, and reports of summary executions from the Red Terror period.[6] During the mission, HRW/Africa representatives spoke with dozens of victims of the Red Terror, and their relatives. The magnitude of human rights violations during the Red Terror was such that practically everyone in Addis Ababa was affected, directly or indirectly. The extent to which this experience, and its unresolved aftermath, has traumatized the society can hardly be overstated.

War Crimes and Crimes Against Humanity

During the Dergue period, warfare continued and expanded throughout Ethiopia. The Dergue regime continued and intensified the war in Eritrea and also fought a conventional war against Somalia, in 1977-78, when Somalia invaded and claimed the Ogaden region. The Dergue also fought, in virtually every part of the country, against ethnic-based insurgencies—especially by Tigrayans in the north, and Oromos and Somalis in the south and east.

All of these wars were marked by widespread human rights and humanitarian law abuses against civilians.

[5] Members of the HRW/Africa delegation interviewed numerous victims of the Red Terror and visited several detention sites used in this period.

[6] *Special Prosecution Process*, p. 3.

These abuses included not only isolated massacres perpetrated by individual military units, but a systematic and general policy of terror and destruction aimed at the civilian population. The government's counter-insurgency measures included mass killings of villagers by the army, the bombing of villages and market towns, killing of livestock, poisoning of wells, and forcible relocation of much of the rural population. Air raids on farmers' markets and livestock were particularly common in Eritrea and Tigray. A prominent example was the day-long bombardment, in June 1988, of the market town of Hawzen in Tigray by airplanes and helicopters, which killed some 2,500 civilians. The Argentine forensic team working with the SPO has investigated this particular site and documented the extent of the destruction.[7]

Forced Relocation and Misuse of Food Aid

The government's military, counterinsurgency, and social control policies turned the drought of the early 1980s into devastating famine.[8] Droughts were not a new phenomenon in Ethiopia, and their effects were traditionally mitigated through migration and trade. Farmers temporarily left areas of shortage as migrant laborers, while small traders brought food from areas of surplus.

What was different during the Dergue period, was that war and government counterinsurgency campaigns exacerbated the damage caused by drought, while the government directly hampered the traditional means of coping with drought, by restricting migration and trade. Farmers' grain stores were confiscated and diverted to towns and the military. The government also directly manipulated famine relief as an element in counterinsurgency, channelling food aid to the military and to secured areas, and blocking relief to areas it did not control.

[7] HRW/Africa interview with the Argentine forensic team, Addis Ababa, March 26, 1994.

[8] See *Evil Days,* chapters 1 and 9.

Famine was also used as an excuse for implementing a government campaign of forced resettlement, actually designed to remove popular support for the insurgents. It is estimated that some 600,000 people were forcibly relocated. Of these, perhaps 100,000 died, either from the brutality of the relocation itself (crushed or suffocated in transit), or because of starvation and disease in the resettlement camps.[9]

B. The Failure of the Dergue Policy of Terror and the Downfall of the Mengistu Regime[10]

The Dergue use of terror against its own population was successful in destroying any effective opposition in the capital. In the countryside, particularly in Eritrea and Tigray, the regime was merely able to prolong its hold on power—despite famine, all-out warfare, Soviet military aid, and the help of up to 16,000 Cuban troops. Although the liberation movements opposing the Dergue had numerous setbacks on the battlefield, they were finally victorious, partly because the atrocities committed by the Mengistu regime evoked such hatred in its opponents, in the civilian population, and ultimately among its own ranks.

The Oromo Liberation Front (OLF) was formed, in 1972, to advocate self determination for Oromos. In what ultimately proved to be the most serious threat to the Dergue, the Tigrayan People's Liberation Front (TPLF) was established in 1975, with the help of the EPLF, and called for Tigrayan self-determination.[11]

Famine, drought and international criticism all contributed to the Dergue's problems. The military situation deteriorated, with defeats in 1988 in Eritrea followed by a loss to the TPLF of all of the Tigray region in 1989.[12] Mengistu's regime was also crumbling from within. In the final years of the regime, as the liberation movements gained military ascendancy in Tigray and Eritrea, the Dergue relied increasingly on forcible conscription and the brutalization of its own troops. The army became demoralized, and international pressure to reach peace with the Eritreans was strong. This led to an attempted coup in 1989, and finally to the complete collapse of the Dergue's forces, and the overthrow of the Mengistu regime in 1991.

In 1989 the TPLF, along with the Ethiopian People's Democratic Movement (a largely Amhara organization) and other allied groups formed a united front called the Ethiopian People's Revolutionary Democratic Front (EPRDF), to seek the removal of Mengistu and the Dergue rather than ethnic self-determination. By late 1989 EPRDF forces were within 160 kilometers of Addis Ababa, while its EPLF allies controlled most of Eritrea. Meanwhile, Ethiopia's economy was floundering and its Soviet block support had collapsed because of developments in eastern Europe.[13]

On May 21, 1991, the EPRDF entered Addis Ababa and in a surprisingly non-violent takeover, took control of

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[9] *Special Prosecution Process*, p. 3. *Evil Days*, chapter 12.

[10] *Recent History*, pp. 354-356.

[11] Ibid.

[12] Ibid.

[13] Ibid.

the country. That morning Mengistu Haile Mariam fled the country to Zimbabwe, where he remains today.[14]

C. The Transitional Government of Ethiopia

[14] Office of the Supreme Council of the EPRDF, *Statement by the Supreme Council of the EPRDF*, May 21, 1991. Ethiopia requested Mengistu's extradition from Zimbabwe on February 16, 1994. SPO press release, October 27, 1994.

On July 1, 1991, the EPRDF convened a conference of most of the Ethiopian factions, to discuss the formation of a transitional government.[15] To facilitate the meeting, it was decided that the issue of Eritrean independence would be set aside until a later date. Also, the OLF pledged to drop their demand for independence in the interest of forming a multi-ethnic Ethiopia organized as a federation.

The Transitional Period Charter of Ethiopia was promulgated on July 22, 1991. The preamble to the Charter delineates the "proclamation of a democratic order [a]s a categorical imperative."[16] It provides, in detail, for rights that Ethiopian people have not enjoyed at any previous time in their history.[17] Respect for these new rights requires a sometimes difficult break with tradition in areas such as press freedom, non-violent political opposition, and independence of the judiciary.

Another very significant aspect of the Charter is its affirmation of "the right of nations, nationalities and peoples to self-determination..."[18] In addition, the Charter created a Council of Representatives and a Council of

[15] Jane Perlez, "Ethiopians to Discuss a New Regime," *New York Times*, July 1, 1991. The U.S. had recommended that a transitional government be formed as soon as possible with the following goals: assumption of legal and political responsibility for Ethiopia, use of existing civil administrative structures to form a society broadly representative of diverse political groupings, free elections within 12 months, establishment of a Constituent Assembly to create a new constitution, and the guarantee of due process of law to persons accused of offenses (including the possibility of amnesty). Statement by Herman Cohen, Assistant Secretary of State for African Affairs, United States Information Service, Press Release, (May 28, 1991)(available in the African Section, Library of Congress).

[16] Preamble, Transitional Period Charter of Ethiopia, *Negarit Gazeta*, July 22, 1991.

[17] Part One, Article One of the Charter bases respect of human rights on the Universal Declaration of Human Rights of the United Nations; adopted and proclaimed by the General Assembly by resolution 217 A (III) of December 10, 1948. The Charter guarantees each individual "the freedom of conscience, expression, association and peaceable assembly, the right to engage in unrestricted political activity and to organize political parties, provided the exercise of such right does not infringe upon the rights of others." Part One, Article One, Transitional Period Charter of Ethiopia, *Negarit Gazeta*, July 22, 1991.

[18] Part One Article Two, Transitional Period Charter of Ethiopia, *Negarit Gazeta*, July 22, 1991. The secession of Eritrea was allowed under this clause.

Ministers, to be comprised of representatives of national liberation movements, political organizations and prominent individuals. The Council of Representatives was given the difficult task of creating governmental structures and beginning the implementation of projects which would determine the success of the transition to peace and democracy.[19] In Part Four of the Charter, the transitional program is outlined in two sections. The first section addresses the political transition, specifying procedures for the adoption of a new constitution and calling for national elections within two years. The second section delineates priorities and procedures for providing relief and rehabilitation to "areas ravaged by war and drought."

[19] According to the Charter, the Council of Representatives would be responsible for: establishing procedural rules, forming an Executive Committee, adoption of a national budget, administration of justice, establishing the Constitutional Commission, ratification of international agreements, defense policy, press laws, and labor laws. Part Three, Article eight, a - k, Transitional Period Charter of Ethiopia, *Negarit Gazeta*, July 22, 1991.

After the Charter was adopted, the TGE issued several proclamations establishing regional administration, with extensive political and economic powers. Most regional councils were elected by June, 1992.[20] The regions were established in order to provide representation and a degree of autonomy to Ethiopia's major ethnic groups, especially those groups under-represented in the past. Critics of the TGE's policy of ethnic regionalization claim that it has increased ethnic division and ethnic-based violence, and are suspicious of the government's motives. An analysis of these issues is beyond the scope of this report.

A Constitutional Commission was also formed under the Transitional Charter, with the task of creating a draft constitution. The draft constitution was submitted to the Council of Representatives early in 1994, presented to the people for discussion, and presented to the Constituent Assembly, recently elected in June, 1994,[21] for debate and approval.

The goals of the Constitutional Commission include avoiding a repetition of past repression by means of the protection of human rights through procedural and substantive guarantees.[22] The human rights chapter of the draft constitution provides for rights relating to the administration of justice and remedial measures which could be interpreted expansively.[23] Under the draft constitution, criminal courts will have jurisdiction to prosecute war crimes and crimes against humanity. While courts will have the ability to enforce individual rights, it is not yet known whether individuals will be able to bring civil actions against human rights violators.[24] Human rights treaties ratified by Ethiopia will apparently become part of national law.[25]

III. THE SPECIAL PROSECUTOR'S OFFICE AND ACCOUNTABILITY IN ETHIOPIA

A. The Duty to Prosecute[26]

The modern period of international protection of human rights began, in the aftermath of World War II, with

[20] Proclamation No. 7/1992 cited by Regional Affairs Sector of the Prime Minister's Office of the TGE, *The System of Regional Administration in Ethiopia*, January, 1994, at 9.

[21] These elections were boycotted by many opposition groups, claiming unfairness. The consideration of these claims is beyond the scope of this report.

[22] Interview with Kifle Wedajo, Chairman of the Constitutional Commission, Addis Ababa, March 23, 1994.

[23] As of March, 1994, it had not been decided which branch of government will have the authority to interpret the constitution. Because of a history of lack of judicial independence, there seems to be a presumption against allowing the judiciary open-ended authority to determine the constitutionality of laws. Alternative means of interpretation are being considered, including an independent constitutional committee, composed of representatives from different ethnic groups. Interview with Kifle Wedajo, March 23, 1994.

[24] Interview with Constitutional Commissioner Kifle Wedajo, March 23, 1994.

[25] Ethiopia has ratified the ICCPR, but has not yet ratified the Optional Protocol to the ICCPR. HRW/Africa representatives were told that a committee is currently working on the first report that Ethiopia must submit to the Human Rights Committee as required under Article 40 of the ICCPR. Ethiopia has also ratified the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment.

[26] See esp. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 2537 (June, 1991). See also Diane F. Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation," Chapter 16 in Louis Henkin and John Lawrence Hargrove (eds.), *Human Rights: An Agenda for the Next Century*, Studies in Transnational Legal Policy, No. 26 (American Society of International Law, Washington, D.C., 1994).

the prosecutions for war crimes and crimes against humanity at the Nuremberg and Tokyo trials. The principle of accountability for human rights violations depends on the willingness of governments, singly and collectively, to prosecute human rights violators.

The more comprehensive human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) do not explicitly require states parties to prosecute violators of the rights protected in the treaties. However, authoritative interpretations by the bodies established to interpret the conventions, such as the U.N. Human Rights Committee, have found a duty to prosecute certain violations. For example, the U.N. Human Rights Committee has repeatedly spoken on the duty to investigate and prosecute torture, disappearance, and extrajudicial execution.

The duty to prosecute for certain crimes is also established explicitly in the Convention on the Prevention and Punishment of the Crime of Genocide[27] ("Genocide Convention") and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment[28] ("Torture Convention"). The four Geneva Conventions also require states to prosecute certain offenses, such as grave breaches. [29] Although the TGE is a transitional government, it is still obligated to fulfill Ethiopia's state duties under international law,[30] which include prosecuting former human rights violators.

Ethiopian law has long recognized a duty to prosecute crimes against humanity by, for example, the incorporation of "Offenses Against the Law of Nations" in Article 281 and following of the Penal Code of 1957. The TGE has recognized its duties under these international human rights standards in the wording of the Transitional Charter, in the plans to incorporate protection of human rights in the new constitution, and in the proclamation establishing the Special Prosecutor's Office. In his press release announcing the charges filed against the first 73 defendants, the SPO recognized that "it is the duty of the Transitional Government of Ethiopia to bring to justice those persons with respect to whom there are serious reasons for considering that they are responsible for serious violations both of international law and domestic law."

B. The Special Prosecutor's Office

When the EPRDF entered Addis Ababa in May, 1991, it immediately detained a large number of Dergue officials. Originally, approximately 2,000 former officials were arrested, and many more mid-level officials were arrested subsequently. Different sources identify varying numbers of current detainees, but at least 1,300 detainees are still in custody as of October, 1994.

Many of those arrested after the EPRDF takeover were brought in by former victims or their families who encountered them on the street. While the HRW/Africa Watch delegation was told that some cases of revenge killings occurred after the Dergue regime was overthrown, the existence of the Special Prosecutor's Office appears to have channeled such impulses into a legal procedure for accountability. One of the concerns about the slow pace of the SPO process is that desires for revenge may return if the SPO is unable to bring to trial those accused of human rights crimes

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[27] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec. 1948, Art. VI, G.A. Res. 260 A (III), 78 U.N.T.S. 227 (entered into force 12 Jan. 1951).

[28] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature by G.A. Res. 39/46 of 10 Dec. 1984, entered into force, 26 June 1987.

[29] Geneva Convention I (for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field), 12 August 1949, Article 49 (duty to search for and prosecute or extradite). Geneva Convention II, Article 50, 12 August 1949 (recognition as a crime). Geneva Convention III (Relative to the Treatment of Prisoners of War), 12 August 1949, Article 129 (duty to search for and prosecute or extradite), Article 130 (recognition as a crime). Geneva Convention IV (Relative to the Protection of Civilian Persons in Time of War), 12 August 1949, Article 146 (duty to search for and prosecute or extradite), Article 147 (recognition as a crime).

[30] See Velasquez Rodriguez Case, Inter-American Court of Human Rights (ser. C) No. 4, para. 184 (1988) (judgment).

under the Mengistu regime in a reasonable time.[31]

[31] The HRW/Africa delegation was told by several people it interviewed from different parts of Addis Ababa that some human rights violators continue to be free in the city. HRW/Africa was unable to verify the extent to which this is true.

Proclamation 22/1992 created the Special Prosecutor's Office (SPO), which was mandated to investigate and prosecute "any person having committed or responsible for the commission of an offense by abusing his position in the party, the government or mass organizations under the Dergue-WPE regime."[32] Thus, the SPO mandate has two objectives: (1) to establish a historical record of the human rights violations of the Mengistu regime, and (2) to bring those criminally responsible to justice.

After Girma Wakjira was named as Special Prosecutor in September 1992,[33] the SPO began the process of gathering evidence and interviewing witnesses. The initial stages of the SPO process were also occupied with the need to raise money from the international community to support the process.

It was not until late 1993 that most of these resources were in evidence in Addis Ababa, when the SPO was able to expand its operation due to outside funding from USAID and the Swedish International Development Authority.[34] Aid has been received from Sweden, the United States, Norway, Denmark, the Netherlands, Canada and France.

The Organization of the SPO

The SPO is organized into four teams, whose areas of focus provide a rough classification of the crimes with which former officials will be charged: (1) the Red Terror, (2) war crimes, (3) high officials of the Dergue, and (4) forced relocation and misuse of food aid. As of May 1994, the SPO had forty-five Ethiopian prosecutors and eight foreign advisors.[35] In all there are more than 400 SPO employees, including investigators and support staff.

For most of the crimes some type of documentary evidence exists, in the form of *kebele* documentation, minutes of official meetings, politburo documents, or military orders.[36] In addition, there is a substantial amount of eyewitness testimony. In fact, local groups often alerted the SPO to low-level political leaders who operated in their neighborhoods, and asked that these alleged criminals be arrested. The HRW/Africa delegation was told that approximately 70% of the entire detainee population are mid-level *kebele* officials.

There are also a number of former military officials in detention. There appear to be two main types of cases involving former military officers. First, there are cases involving summary executions conducted by military disciplinary committees, for which reports of execution decisions often exist. Second, there are cases involving the bombing of civilian areas and the burning of crops in violation of humanitarian law. In these cases, the pilot as well as the military officers who gave the orders may be prosecuted.

Considering the SPO's limited resources and the need to recruit and train staff, significant progress has been made in gathering evidence, training prosecutors, and establishing the SPO apparatus. However, many of the prosecutors in the SPO have very little experience as attorneys and they must prepare cases that would be challenging even for more experienced attorneys. Similarly, the new Ethiopian judiciary faces a difficult challenge in judging the upcoming trials.[37]

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[32] A Proclamation to Provide for the Establishment of the Special Prosecutor's Office, Proclamation No. 22/1992.

[33] Girma Wakjira had been a prosecutor during the Mengistu regime, serving in the High Court (1979-85), the Supreme Court (1986-89), and the Court of Cassation (1989-91). *Curriculum Vitae of Girma Wakjira Kalla*, attached to *Special Prosecution Process*.

[34] International Human Rights Law Group, *Ethiopia in Transition: A Report on the Judiciary and the Legal Profession*, January 1994, (*Ethiopia in Transition*), at 31.

[35] HRW/Africa interviews with Dawit Yohannes (secretary of the Constitutional Commission, legal advisor of the President, and member of the Council of Representatives of the TGE), Roger Briottet (French lawyer advisor to the fourth team), and Peter Bach (Danish advisor to the Public Defender's Office), Addis Ababa, March-April, 1994.

[36] Interview with Todd Howland, Consultant to the Special Prosecutor's Office, Addis Ababa, March 28, 1994.

[37] Many experienced judges fled the country during the Mengistu regime, while many of those who remained have been barred from serving as judges because of their affiliations with the prior regime. Some of these former judges may

While the SPO has made considerable progress toward its objectives, it is clear that insufficient resources and the overwhelming size of the task have created problems. The SPO has gathered tens of thousands of documents. In March, 1994, HRW/Africa was told that these documents would be entered into the SPO's growing computer database by May 1994; however, it does not appear that this project has been completed. In addition, according to the SPO, at least 2,500 witnesses have come forward with testimony. These interviews are also being indexed for computerization. HRW/Africa has been unable to ascertain the current status of the computerization process. It is not clear at this time either how much material has been entered into the database or how accessible the database is to use by the prosecutors or others, including attorneys for the defendants.

become defense counsel for those accused of human rights crimes by the SPO. However, it is not clear whether the detainees have the resources to hire these experienced lawyers. HRW/Africa was told by the Public Defenders Office that some funds may be available to hire experienced attorneys in at least some cases.

International consultants have played a significant role in assisting with the compilation and indexing of evidence, and advising on issues of international law and trial strategy. However, the participation of foreigners, especially Americans—whether as representatives of NGOs or as consultants to the government—appears to be a sensitive matter in Ethiopia at this time.[38] It would be unfortunate if the process of accountability was undermined by unfounded allegations or speculations about the motivations of international observers. The comments and criticisms in this report, for example, are intended to be constructive and supportive of the important process underway in Ethiopia, while suggesting improvements and steps which must be taken to adhere to international human rights standards.

The SPO in the Context of an Emerging Legal System

Ethiopia has never had an independent judiciary. The enormous challenges facing the newly emerging Ethiopian legal system in general also affect the SPO and the accountability process. Under Emperor Haile Selassie the judiciary was never really independent of the imperial court, but there were tentative steps toward reform starting in the 1940s, and continuing with the enactment of the Penal Code (1957), the Civil Code (1960), the Criminal Procedure Code (1961), and the Civil Procedure Code (1965). Under the Dergue the courts were subservient to the Mengistu regime. In much of the country the courts ceased functioning altogether.[39] This history, combined with the current lack of resources, poses immense obstacles to establishing an effective, independent judiciary.

In January, 1993, Proclamation No. 40/1993 of the TGE established a new court system, including both a Central Court system, governed by an independent Judicial Administration Commission (JAC),[40] and a Regional Court system, governed by regional JACs.[41] The central court system has three levels: the Central Supreme Court, the Central High Court, and the Central First Instance Court. The Regional Court system, also consisting of three levels, is administered by regional governments and is separate from the Central Courts. Decisions of the highest regional courts are usually final, but in rare instances cases may be appealed to the Central Supreme Court.[42]

The majority of the proceedings to be filed by the SPO are expected to be heard by the Central High Court. All of the first charges filed on October 25, 1994, were filed in the Central High Court. In view of the fact that the number

[38] *Ethiopia in Transition*, a report on the Ethiopian court system produced in January, 1994, by the International Human Rights Law Group (based in Washington, D.C.) generated controversy in the Ethiopian judiciary and the TGE generally. Government officials told the HRW/Africa delegation that from their perspective the report showed a lack of understanding of the challenges confronting the judiciary. Notwithstanding this controversy, many of these same officials acknowledged many useful observations and recommendations in the Law Group report.

[39] *Ethiopia in Transition*, pp. 5-7.

[40] Proclamation No. 23/1992, Article 4(2) states that "judges shall be completely independent in the discharge of their judicial functions."

[41] Proclamation No. 7/1992.

[42] Interview with Kemal Bedri, President of the Central Supreme Court, Addis Ababa, March 28, 1994.

of human rights cases to be brought by the SPO may be overwhelming, and because many human rights violations during the Mengistu regime occurred outside of Addis Ababa, some SPO trials may be moved to Regional High Courts.

If trials occur outside Addis Ababa, particular fair trial and logistical problems may arise. For example, regional courts will often operate in languages other than Amharic, the language of the central government and the central court system. Thus, there is the potential for cases to be appealed from a regional court, using another language, to the Central Supreme Court, where only Amharic is used. While the solution to this problem has not been settled yet, the President of the Supreme Court envisions a translation service either in the Supreme Court or in the Regional Court. Such practical difficulties may place even more burdens on a fragile legal system.[43]

The Central Court system operates under a severe shortage of resources. Cases have not been recorded or published, and there is no ready body of precedent available to the courts or lawyers. There is a recognition of the importance of creating an independent, efficient court system and a great deal of progress appears to have been made in fulfilling these goals. It remains to be seen, however, whether the court system is capable of handling the number of prosecutions involved in the SPO process in a manner consistent with international fair trial standards.

The challenges of creating a new legal system are enormous even without the added pressures generated by the need to try hundreds of former Mengistu officials for human rights crimes.

C. The SPO Detainees

Legality and Length of Confinement

When the EPRDF took control of the Ethiopian government, many Dergue officials suspected of committing human rights violations were arrested and jailed. Currently more than 1,300 detainees are awaiting charges. [44] Victims and their relatives have complained about the release of some detainees, while others continue to pressure the SPO to detain alleged human rights violators still at large. The SPO is continuing to arrest people as new evidence is discovered.[45] As recently as October 1994 the Special Prosecutor announced his intention to arrest and charge additional suspects. He indicated that as many as 3,000 people may ultimately be charged within the next six months.

The initial detention of 2,000 Dergue prisoners occurred before the creation of the Special Prosecutor's Office. By the time the SPO was created, staffed, and operational, in the beginning of 1993, some of the prisoners had already been detained for up to 18 months. After the establishment of the SPO, many of the detained officials filed *habeas corpus* petitions. The Central High Court was granted the power to consider *habeas corpus* petitions by Proclamation No. 40/1993, Art. 6(15) (January 11, 1993). From February to July, 1993, the Central High Court heard over 1300 petitions in Addis Ababa alone, and ordered 130 detainees released on bail and at least 54 unconditionally.[46]

In a typical *habeas corpus* proceeding in which the SPO participated, once the writ was filed the SPO examined the evidence against the detainee. If the SPO determined that there was not enough evidence, it released the detainee on its own authority, either on bail or unconditionally. The SPO released 900 of the original 2000 detainees on bail. If, however, the SPO determined that a detainee should not be released, it would apply to a lower court for a remand for sufficient time to complete its investigations. Under Criminal Procedure Code, Article 59, the lower court

[43] Ibid.

[44] In his October 1994 press briefing Special Prosecutor Girma Wakjira stated that 12 to 15 detainees had died of natural causes. The names of these detainees and the circumstances of their deaths is not known at this time.

[45] Interview with Special Prosecutor Girma Wakjira, Addis Ababa, March 24, 1994. The Anti-Red Terror Committee, a private organization of victims of the Red Terror has been very critical of the SPO for releasing some detainees and failing to arrest many others. Interview with Committee official, Addis Ababa, March 1994. Thus, there are continuing demands in Ethiopia for the SPO to broaden the scope of its prosecutions.

[46] *Ethiopia in Transition*, p. 29.

could grant a remand for up to 14 days. The SPO would obtain such an order for remand and present it to the Central High Court hearing the *habeas* petition as proof that the detainee was legally detained. By the time the 14 days expired, the *habeas* petition would have been dismissed. If a detainee filed another *habeas* petition, the SPO could simply seek another remand. On the other hand, once an investigation was formally completed, the SPO could legally continue a detention.

In 1993 the Supreme Court ruled that the SPO did not have to bring charges against Dergue officials within 14 days of detention, as required in normal cases.[47] However, the court indicated that at some point indefinite detention without charges would be impermissible, and therefore *habeas* petitions would again be allowed. As a practical matter, it does not appear that the SPO detainees have any legal remedies in Ethiopian courts for release from detention because of their long period of detention without charge or trial at this time.

As a party to the International Covenant on Civil and Political Rights (ICCPR), Ethiopia has a duty to observe international standards prohibiting prolonged arbitrary detention. Article 9 of the ICCPR states that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." [48] Since the detainees—many of them detained since May 1991—have not been informed of the charges against them, there is little doubt that their continued detention without charge or trial violates Ethiopia's obligations under the ICCPR and other international human rights standards prohibiting prolonged arbitrary detention.

The United Nations Working Group on Arbitrary Detention issued decisions finding that the continued detention of several of the Dergue officials constituted arbitrary detention, in contravention of the Universal Declaration of Human Rights (articles 9 and 10), the International Covenant on Civil and Political Rights (articles 9 and 14) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (articles 2, 4, 9, 10, 11, 12, 32, 37, and 38). [49] The Working Group declared the detentions to be arbitrary and requested that the Ethiopian government take steps to conform the situation with the Universal Declaration and the ICCPR. Thus, Ethiopia has been on notice for more than a year that its detention of the SPO suspects without charge or trial is a violation of international human rights standards.

Considering that the initial detention of the Dergue officials occurred in the midst of a difficult transitional period, and that the SPO has faced legitimate difficulties and daunting obstacles, some delay in bringing charges against the detainees and commencing their trials is understandable. Nevertheless, in the light of Ethiopia's commitment to observe international standards, the SPO cannot delay any longer bringing charges against the SPO detainees. The Ethiopian courts reopened in September, 1994, after recessing for the rainy season. As of mid-October no charges had been filed against any SPO detainee. On October 25, 1994, charges against 73 high level officials, including "policy and decision makers, senior government officials and senior military commanders," were filed in Central High Court in Addis Ababa.

There is no acceptable reason why the remaining SPO detainees should not be charged immediately. The SPO has indicated that the second group of defendants is composed of "field commanders," both civilian and military, who commanded the forces, groups and individuals who committed human rights violations. The third group of defendants consists of individuals who actually carried out the atrocities. If the SPO is unable to charge detainees immediately, those detainees who have not been charged should be released.

Conditions of Confinement

Dergue officials are being detained primarily in two prisons, Kerchele in Addis Ababa and Kaliti just outside

[47] Interview with Supreme Court President Kemal Bedri, Addis Ababa, March 28, 1994.

[48] In *Monguta Mbenge v. Zaire*, the U.N. Human Rights Committee found that detention was arbitrary and in violation of article 9 of the ICCPR where an individual was detained for more than a year without being formally charged for the purpose of obtaining information. 78 I.L.R. 18, 26 (1988) (UNHRC).

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

Addis Ababa. In general, facilities in Ethiopian prisons appear to fall short of international standards. Under the Dergue, overcrowding of prisons was common, with Kerchele Prison holding between 8,000 and 10,000 prisoners. The current government has reduced the number of prisoners—currently about 4,000 in Kerchele—and is trying to improve the prison conditions. [50] The HRW/Africa delegation observed some evidence of this progress during its visit.

[50] Interviews with Kinfe Gebremedhin, Vice-Minister of Interior and Chief of Security, and with the Warden of Kerchele Prison, Addis Ababa, March 24, 1994.

When HRW/Africa representatives visited Kerchele prison in March, 1994, the SPO detainees' main complaint was the length of time without charges, not the conditions of confinement, which are much better for SPO detainees than for the general prison population.[51] Confinement conditions for SPO detainees more nearly comply with the Standard Minimum Rules for the Treatment of Prisoners than do conditions for the general prison population.[52]

Some 400 Dergue officials are imprisoned at Kerchele, separated from the general prison population. These SPO detainees are housed in a building containing small cells for four to six detainees to sleep in. There are two toilet blocks of eight units each in the SPO detainee facility. The SPO detainees have personal possessions in their cells, including mattresses and reading material. Cells did not appear to be grossly overcrowded or unhealthy and the detainees seem to get enough food and exercise. There is an exercise space in the compound, where detainees are free to walk around, play chess, checkers or cards, read, write and converse with each other. Family visits are permitted on weekends. There are also rooms provided in which SPO detainees will be able to meet with their attorneys. Prison authorities have clearly provided better conditions for SPO detainees than other inmates at Kirchele prison. The conditions are still quite difficult for pre-trial detainees in prison for years without charge or trial. However, it is difficult to fault the government on this point in light of the demands on its resources in all areas of Ethiopian life.

D. The Nature of the Evidence

The amount of evidence collected in preparation for the prosecution of the former Dergue officials is immense. With the assistance of foreign experts, the SPO has been creating a computer database system to store and use all the evidence collected.[53] This computerization process had four phases.

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[51] HRW/Africa representatives who visited Kerchele Prison in March, 1994, found that overcrowding and poor conditions in the main prison are still problems, particularly in the unit housing most of the male common prisoners. This population is housed in large, corrugated metal buildings, with no separate cells, only space on a dirt floor. Only a few inmates have mattresses. There are no toilets or showers, and only a bare dirt compound outside for exercise.

[52] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955, approved by Economic and Social Council, res. 663 C (XXIV) 31 July 1957 and 2076 (LXII) 13 May 1977.

[53] Of course, computerization of the evidence is not an essential requirement for adequate prosecutions or for fair trials. Difficulties in implementing computerization should not be a reason for indefinite delay in initiating the trials.

The first phase was the gathering of government documents. There were approximately 400 sources of documentary evidence in Addis Ababa, from which the SPO collected over 250,000 pages of government documents. SPO investigators were trained on how to collect the documents systematically, establishing a clear "chain of custody" to ensure that documents had not been tampered with.[54] Handwriting experts from the Ministry of Interior and the Police laboratory authenticated the handwriting in the documents.[55] The SPO also has videotapes, audiotapes, and slides of the planning of crimes which may be introduced into evidence.[56] The forensic team from Argentina mentioned above may also offer physical evidence from the sites excavated, or may testify at the trials if necessary. The collection phase was largely completed at the time the HRW/Africa delegation visited Addis Ababa in March 1994.

[54] Approximately 70% of the documents were collected systematically in this way. There may be "chain of custody" problems relevant to the use of some documents collected by the Anti-Red Terror Committee before the creation of the SPO.

[55] *Special Prosecution Process*, p. 18.

[56] An example of the sort of evidence collected is provided by the case against the Dergue members for executing fifty-eight former officials of the Haile Selassie government. The SPO has minutes of the meeting where 105 Dergue members discussed and voted on whether the activities of the officials merited execution. There is also a record of the group assigned to carry out the execution orders. Finally, there is a report by the executing group back to the Dergue stating that the execution had been carried out. Such documents can show that Dergue officials either directly ordered or had knowledge of violations. Interview with SPO Consultant Todd Howland, Addis Ababa, March 28, 1994.

The second phase was the analysis of the evidence obtained. This included government documents, detainee interviews, and testimony of victims and witnesses. Approximately 5,000 witness interviews were taken by prosecutors. It is unclear whether these statements will be used.[57] The HRW/Africa delegation was told by several SPO representatives that the analysis of the evidence gathered was well underway by March 1994.

In phase three, the documents and analyses were to be entered into the database. Important documents were to be scanned and entered onto compact disks. Finally, in phase four, it is intended that reports be generated from the database of information to aid the prosecutors' cases. The progress of phases three and four of this process is unclear.

The computerization project is expected to be particularly important in helping the prosecutors find systematic abuses by higher officials to support charges of creating and implementing a system of repression. It could also help identify the especially notorious abusers and violators.[58] However, after the termination of the foreign experts hired to implement the computerization process, its present and future status is unclear. It is not currently known to HRW/Africa whether the computerization was, or will be, completed, or whether the SPO has or will have staff members able to fully utilize the database.

E. Apprehension of Former Dergue Officials Now Abroad

The SPO believes that some 300 government and military officials fled Ethiopia when the Mengistu regime collapsed. [59] Other Dergue officials guilty of human rights violations may have left the country earlier, having fallen out of favor with the regime. The SPO has investigated the whereabouts of at least sixty fugitive officials. The largest number of fugitives are believed to be in the United States and Kenya, with others in Europe and Djibouti. [60] Three

[57] One proposal, circulated for comment while the HRW/Africa mission was in Ethiopia in March-April, 1994, recommended that the Criminal Procedure Code be changed to require that any witness must appear in person unless unavailable to testify. Draft Proclamation Modifying the Criminal Procedure Code, Art. 144. According to the most recent information available to HRW/Africa, it appears that this proposal will not to be adopted.

[58] *Special Prosecution Process*, p. 19.

[59] *Special Prosecution Process*, pp. 10 ff.

[60] According to estimates furnished to HRW/Africa, there may be at least 36 Dergue fugitives in the United States, 17 in Kenya, 17 in various European countries, and 6 in Djibouti.

former officials remain in the Italian Embassy in Addis Ababa, where a fourth fugitive committed suicide.[61] Of course the most notorious fugitive, Mengistu himself, is in Zimbabwe. Mengistu is named in the first indictment filed on October 25, 1994, and the SPO has indicated that it will try him in absentia if Zimbabwe fails to extradite Mengistu pursuant to Ethiopia's February 1994 request. [62]

Ethiopia does not have extradition treaties in force with the countries where the fugitives are believed to be. For example, there is no extradition treaty between the United States and Ethiopia. The TGE is interested in negotiating an extradition treaty with the United States. However, the HRW/Africa delegation was informed by U.S. government sources that the Justice Department does not view an extradition treaty with Ethiopia to be a high priority, and there has been no movement toward the negotiation of such a treaty.[63]

[61] *Special Prosecution Process*, p. 11.

[62] Of the first 73 charged on October 25, 1994, only 45 are now in custody. The remaining 28 defendants are in hiding or in exile.

[63] This issue arose in the context of Kelbessa Negewo, one of the most notorious and ruthless *kebele* leaders during the Red Terror. In August 1993 three young Ethiopian women won a $1.5 million judgment against Negewo in a federal court in Atlanta, Georgia, under the Alien Tort Claims Act, 28 U.S.C. § 1350, for torturing them. *Hirut Abebe-Jiri, et al., v. Kelbessa Negewo*, No. 90-2010 (N.D. GA, August 20, 1993) (appeal pending). Immediately after the judgment the Special Prosecutor, Girma Wakjira, requested that Negewo be sent back to Ethiopia to stand trial. To date, the United States has made no attempt to deport Negewo and he remains in the United States.

The SPO argues that, even in the absence of bilateral extradition treaties, defendants charged with war crimes and crimes against humanity should be extradited based on the principles of international comity, specific international conventions, and customary international law.[64] The SPO cites in particular the obligation to extradite contained in Article 8 of the Convention Against Torture, and provisions of U.N. General Assembly Resolution 3074 (XXVIII) of December 3, 1973. With respect to Mengistu himself, the SPO also asserts that several treaties, ratified by Ethiopia and Zimbabwe, require Zimbabwe to extradite Mengistu to stand trial for war crimes and crimes against humanity.[65]

Other possible approaches to pursuing the fugitives, if extradition is not available, include deportation proceedings. For example, given the cooperation of the United States government, the U.S. Immigration and Naturalization Service might be able to initiate deportation proceedings against fugitive Dergue officials, on the grounds that concealing their complicity in human rights violations constitutes a material misstatement of fact on their immigration applications.[66]

Many of the suspected human rights violators living outside Ethiopia are alleged to be among the most culpable human rights violators in the Mengistu regime, including Mengistu himself. Thus, the SPO's efforts to bring these suspects to justice are extremely important. It would be incomplete justice if relatively low level officials now in custody in Ethiopia received substantial punishments, while even more culpable officials continue to live in security abroad.

HRW/Africa believes that the international community, especially the United States, should cooperate more fully and without delay with the SPO's efforts to obtain custody over these suspects. The SPO and the Ethiopia government, on the other hand, should provide such assurances regarding the death penalty or fair trial rights as may be necessary to facilitate such cooperation.

IV. THE CHARGES

A. Introduction

One of the apparent reasons for the delay in charging defendants appears to be debate within the SPO about what charges should be brought. A major issue is whether to charge the detainees with international crimes or, to rely solely on charges in effect in the 1957 Ethiopian Penal Code.

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[64] *Special Prosecution Process*, pp. 11-14.

[65] *Special Prosecution Process*, p.13, cites the following treaties. 1949 Geneva Convention I, art. 49; 1949 Geneva Convention II, art. 50; 1949 Geneva Convention III, art. 129; 1949 Geneva Convention IV, art. 146. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Articles VI and VII (duty to extradite), Article VII (duty not to apply political offense exception for the purpose of extradition). Furthermore, Zimbabwe (but not yet Ethiopia) has ratified Protocol I Additional to the 1949 Geneva Conventions, 12 December 1977, Article 88 (duty to cooperate with other states in the matter of extradition).

[66] Almost all immigration applications in the United States have questions regarding the applicant's involvement in serious criminal conduct that could form the basis of a deportation proceeding.

According to the SPO press release announcing the filing of the first charges, against 73 high level Mengistu officials, charges have been filed both under Article 281 of the Ethiopian Penal Code, which includes crimes against humanity and genocide, and directly under the United Nations Genocide Convention. In addition, the SPO has stated that it has also filed "alternative charges of aggravated homicide and homicide in the first degree," as permitted in the Ethiopian Criminal Procedure Code, against the first 73 defendants. The SPO has also indicated that it will file subsequent charges for war crimes and related offenses for atrocities committed in connection with armed conflict, as provided in the Ethiopian Penal Code.

Human Rights Watch/Africa believes that it is essential that the 1,300 SPO detainees be charged immediately or released, and that such debates about whether to charge defendants directly under international law should not delay this. There are ample grounds for charging the detainees under the 1957 Ethiopian Penal Code, which itself specifically incorporates many international human rights and humanitarian law crimes.[67] The initial charges suggest that the SPO has decided to rely primarily on the provisions of the Ethiopian Penal Code that incorporate international law prohibitions against genocide, crimes against humanity and war crimes, as well as other traditional criminal offenses specified in the 1957 Penal Code. This decision seems sensible especially in light of the delays in bringing charges against the detainees.

Human Rights Watch/Africa does support, in general, the idea of bringing some charges directly under international law. As the Nuremberg Principles recognize "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." [68] The use of international law as a direct source of criminal charges would represent an advance in strengthening truly international standards of accountability. Concerns have been expressed about possible violations of the principle of legality, or of the retroactive application of criminal law, if such international law charges are filed. A full analysis of these issues is beyond the scope of this report. However, HRW/AFrica believes that ample authority exists for individual criminal responsibility for at least some international crimes without violating the principle of legality.

In this section, we briefly outline the possible charges against the SPO detainees available under Ethiopian law. This section is not intended as a comprehensive analysis of Ethiopian or international law. Many of the issues discussed in this section will be the subject of extensive legal briefing and debate in the course of the upcoming trials.

B. Ethiopian Penal Code - Common Crimes

The Ethiopian Penal Code defines and punishes both crimes against the individual and crimes against the laws of nations.[69]

There is little question that most, if not all, SPO detainees can be charged for common crimes under the Ethiopian Penal Code. First, the officials who organized, ordered or were in charge of the policies that led to the human rights violations discussed above may be charged under the Ethiopian Penal Code with abuse of power (article 414), use of improper methods (article 417) or conspiracy (article 472).

Under the abuse of power offense, any official who misuses their position or power to procure an unlawful advantage or to do injury to another, may be punished. Similarly, under the use of improper methods offense, public servants may be punished for conduct incompatible with their position, namely, treating detained persons improperly, brutally, or in a manner incompatible with human dignity. These charges may be applicable against many Dergue officials who ordered or initiated policies that were beyond the scope of their positions. The use of the improper

[67] HRW/Africa in conjunction with the Center for Justice and International Law, has submitted an amicus (friend of the court) brief to the Ethiopian Supreme Court outlining its legal views in more detail.

[68] Report of the International Law Commission; U.N. G.A.O.R. V, SUPP. (A/1316) 11-14 (1950), Principle II.

[69] Penal Code of the Empire of Ethiopia, Book III and Book IV (1957)("Penal Code").

methods offense may apply especially to *kebele* leaders whose detention and abuse of thousands of people comprise a large percentage of the crimes committed.

Specific instances of abuse may be prosecuted under the offenses of contamination of water (article 506) or creation of distress or famine (article 509). Under these articles, Dergue officials who contaminated wells, misused food aid, or exacerbated the famine by forced relocations may be charged.

The Penal Code covers many forms of homicide committed by the Dergue's officials and agents.[70] For example, Article 521 provides that a homicide is committed when a person causes the death of another, no matter what the means used. Thus, it appears government officials involved in forced relocation policies and the misuse of food aid may be charged with homicide if it can be shown that deaths were caused by specific actions intended to deny food to particular groups of internal refugees or to relocate people. Consistent with basic due process safeguards, such charges would have to be based on a close, direct connection between the intentional acts of officials and the deaths in question.

The Penal Code also bans wilful injury, assaults, intimidation, coercion, and illegal restraints.[71] Officials who illegally detained, tortured and assaulted many Ethiopians during the Red Terror could be charged under these provisions.

Government officials who forced many Ethiopians into the resettlement and village-ization programs, preventing their return to their own homes and jobs, may be prosecutable under the Ethiopian Penal Code, Articles 569 and 570. These articles prohibit restrictions on the rights of freedom of movement and to work.

Thus, there appear to be ample grounds to bring criminal charges against the SPO detainees for the human rights violations committed by the Mengistu regime under the Ethiopian Penal Code, without any recourse to international crimes. Some of these provisions appear broadly worded and susceptible to abuse if used improperly. It is too early in the process to know whether prosecutors will attempt to stretch these provisions beyond a reasonable application in these circumstances.

In the first charges filed on October 25, 1994, the SPO took the option of bringing common criminal charges under the Penal Code by filing "alternative charges" of homicide against the first defendants. Of course, basing charges solely on common crimes covered by the Ethiopian Penal Code alone, even charges of abuse of power, do not seem commensurate with the magnitude and quality of the crimes committed by the Mengistu regime. There are provisions in the Ethiopian Penal Code, however, that incorporate international human rights and humanitarian law standards that do embrace the full scope of the crimes of the Mengistu regime.

C. Ethiopian Penal Code - Crimes Against the Laws of Nations

Under the Penal Code, the SPO detainees may be charged with genocide, crimes against humanity, war crimes against the civilian population, war crimes against wounded, sick or shipwrecked persons, war crimes against prisoners and interned prisoners, pillage, piracy and looting and maltreatment of, or dereliction of duty towards, wounded, sick or prisoners.[72]

1. Crimes Against Humanity

Article 281 of the Penal Code appears to be a general grant of authority to the Ethiopian courts to enforce the customary international law prohibiting crimes against humanity. Article 281 punishes as "Genocide; Crimes against humanity":

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

[70] Penal Code, art. 521, 522, 523 and 526.

[71] Penal Code, arts. 537-539, 544, 552, 554 and 557.

[72] Penal Code, arts. 281 - 285 and 291.

organizes, orders or engages in, be it in time of war or in time of peace: (a) killings, bodily harm or serious injury to the physical or mental health of members of the group in any way whatsoever; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance.

International law defines crimes against humanity as "elementary dictates of humanity" to be recognized under all circumstances.[73] The recognition that individuals may be charged with crimes against humanity under international law was affirmed in the judgment at Nuremberg: "that international law imposes duties and liabilities upon individuals as well as upon states has long been recognized."[74]

These principles were recognized at Nuremberg in Article 6 of the International Military Tribunal Charter. [75] The Nuremberg Charter and Judgment found that crimes against humanity include:

> [m]urder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecution on political, racial or religious grounds, when such acts are done or such persecutions are carried out in execution of or in connection with any crime against peace or any war crime.[76]

In the Nuremberg Charter, crimes against humanity had to be connected to a "crime against peace or [a] war crime." However, the Allied Control Council Law No. 10, establishing the basis for trials of Germans for crimes against other German citizens, defined crimes against humanity, omitting the requirement of a nexus to war:

> Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhuman acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

Since the Nuremberg trials, the requirement of a nexus to war has been abandoned in many instances. The International Law Commission found that crimes against humanity could be committed before a war,[77] and more recently, the U.N. War Crimes Commission found that crimes against humanity existed "irrespective of war."[78] Acts which constitute "crimes against humanity" are also prohibited under article 3 of the four Geneva Conventions of 1949, which Ethiopia ratified in 1949. "In the case of armed conflict not of an international character," article 3 prohibits with respect to those protected by the Conventions:

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[73] *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), U.N. Doc. S/1994/674, paragraph 73.

[74] M. Cherif Bassiouni, *A Treatise on International Criminal Law*, 113 (1973) citing Agreement and the Charter at the Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, 1950, at 446 - 447.

[75] The Charter provides the following definition: "(c) crimes against humanity: namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 278, article 6. Adhered to by Ethiopia in 1945.

[76] Principles of the Nuremberg Charter and Judgment, 2 Yearbook International Law Commission, 374 at princ. VI(c), *adopted by* U.N., [55th plen., mtg. 12/11/46], *adopted by* G.A. Res. 177 (II)(a), 5 U.N. GAOR Supp. (No. 12) at 11-14, U.N. Doc. A/1316 (1950).

[77] 2 Yearbook of International Law Commission 377, para. 120 (1950), UN Doc. A/CN.4/SER.A/1950/Add'l.

[78] Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274, Ann. I, para. 45 (1993).

"violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." [79]

These international standards for establishing crimes against humanity easily apply to the crimes of the Mengistu regime, considering the wealth of documentation available regarding extrajudicial executions and torture committed by the Dergue. Moreover, these human rights crimes were not isolated acts of torture or murder but were systematic acts to punish ethnic and political groups.

Dergue officials may also be charged with "crimes against humanity" for attacks on civilian marketplaces and other similar attacks on civilians. These attacks may be considered to violate Article 4 of the 1977 Geneva Protocol II, which prohibits "violence to the life, health and physical or mental well-being of [protected] persons; [or]...acts of terrorism." These acts may also be considered "inhuman acts committed against a civilian population," a crime against humanity as defined in the Control Council Law No. 10. It is also possible that some acts committed as part of the Mengistu regime's forced resettlement program may also be prosecuted as a crime against humanity if it can be shown, as it has been alleged, that the way the civilians were transported, and the conditions under which they had to live in the resettlement areas were designed to cause the death and misery of thousands of resettled persons.

[79] Geneva Conventions, Aug. 12, 1949, 75 U.N.T.S. 31. Article 4 of the 1977 Additional (Protocol II) to the Geneva Conventions of 1949 Relating to the Protection of Victims of Non-International Armed Conflicts added to this list of forbidden acts, violence to the mental well-being of persons, torture, corporal punishment, rape, any form of indecent assault, and threats to commit any of these acts. Protocol II protects civilians and others from acts that constitute crimes against humanity.

Sexual assaults on prisoners, especially if found to be systematic, might also be charged as crimes against humanity. Although incidents of rape and sexual assault have been alluded to, they have not been discussed as possible charges to be brought against the Dergue officials.[80] It is possible that the inability to develop such claims stems more from the reluctance of victims to come forward with evidence of sexual abuse. Unless the SPO can overcome these obstacles, and develop evidence of systematic sexual abuse, it will be impossible to prosecute such offenses. Even if no charges are filed in this area it is essential that the historical record include discussion of these issues.

2. Genocide

Genocide is also covered under Article 281 of the 1957 Penal Code.[81] Article 281 defines genocide as intentional actions meant "to destroy, in whole or in part, a national, ethnic, racial, religious or political group," whether in time of war or peace, in the form of (1) killings, bodily harm or serious injury, (2) measures to prevent the propagation or continued survival of a group, or (3) compulsory movement or dispersion of people, or placing them in living conditions meant to result in their death or disappearance. Anyone who organizes, orders, or engages in such acts is guilty of genocide, and punishable with imprisonment from five years to life, or in exceptional cases, with death.

Unlike other Penal Code offenses against the laws of nations, the crime of genocide is defined without reference to principles of public international law. This is a notable omission because the Penal Code defines the offense of genocide more broadly than it is defined in international law. Under Article 281, the crime of genocide may be perpetrated against political groups, as well as ethnic, racial, national or religious groups.

The inclusion of political groups makes the Penal Code definition of genocide and scope of possible victims wider than the definition of genocide in the Genocide Convention.[82] Under Article I of the Genocide Convention, genocidal acts must be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Acts targeting strictly politically defined groups are excluded.

The SPO has in the first charges relied upon both Article 281 of the Penal Code and international law directly in bringing charges of genocide against the 73 high officials of the Mengistu regime.

3. War Crimes

[80] Girma Wakjira told the HRW/Africa delegation that there were acts of sexual abuse against women during the Mengistu regime but indicated the reluctance of witnesses or victims to discuss such abuse. Interview with Girma Wakjira, March 24, 1994. At this point it is not clear that the SPO intends to try to overcome these obstacles.

[81] Penal Code, art. 281.

[82] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, [Hereinafter, Genocide Convention."] Ratified by Ethiopia in 1949.

Under the Ethiopian Penal Code, war crimes are defined using reference to customary international law and international humanitarian conventions.[83] The Penal Code defines war crimes against the civilian population, war crimes against wounded, sick or shipwrecked persons and war crimes against prisoners and interned prisoners and pillage, piracy and looting.[84]

Article 281 describes the circumstances in which war crimes may arise, "in time of war, armed conflict or occupation." The Penal Code does not distinguish between internal and international armed conflicts. Thus, under the Ethiopian Penal Code it appears that conduct that would amount to war crimes in the context of international armed conflict may be prosecuted in Ethiopia in the context of internal armed conflicts. Here too, reliance on the Ethiopian Penal Code may make prosecutions more feasible. If the SPO sought to charge detainees with war crimes directly under international law, it would be required to demonstrate that the acts alleged, with some exceptions, occurred in the context of international armed conflict. This may be difficult to prove for most of the acts to be charged in these prosecutions.

Under Penal Code Article 282, War Crimes Against the Civilian Population, the actions for which the Dergue officials could be prosecuted include: killings, torture or inhuman treatment, including biological experiments, or any other acts involving dire suffering or bodily harm, or injury to mental or physical health; compulsory movement or dispersion of the population, its systematic deportation, transfer or detention in concentration camps or forced labour camps; measures of intimidation or terror; or the confiscation of estates, the destruction or appropriation of property. milar actions are proscribed for the wounded, sick, or shipwrecked persons under Penal Code Article 283 and for prisoners and interned persons under Article 284.

The Ethiopian Penal Code also punishes two other international crimes: use of illegal means of combat and

[83] The applicability of international standards on war crimes under international law would depend on whether a conflict is termed an internal armed conflict or an international conflict. When an armed conflict is internal, the international standards for war crimes do not apply. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, paragraph* 52 and 54. Many of the abuses perpetrated in Ethiopia may well be considered to have occurred during an internal armed conflict, making the concept of war crimes inapplicable. The use of the 1957 Penal Code appears to avoid this problem and the complicated problems of proof such charges might entail.

[84] Penal Code, arts. 282 - 285.

maltreatment of, or dereliction of duty towards, wounded, sick or prisoners.[85] In defining these crimes, the Penal Code refers to principles of customary international law and humanitarian conventions. These international crimes are comparable to war crimes in international law.

The offense of "use of illegal means of combat" refers specifically to "means of combat" that violate conventions to which Ethiopia is a party.[86] Conventions to which Ethiopia is a party include: the Geneva Conventions,[87] the Torture Convention[88], the Genocide Convention[89] and the Hague Convention.[90] Thus, under this offense, international conventions must be used in determining the illegal means of combat.

The offense "maltreatment of, or dereliction of duty towards, wounded, sick or prisoners" is directly defined under international law (Article 291 begins "Whosoever in violation of the rules of public international law...."). Thus, under this article as well, international law standards must be used in order to define the offense.

D. The Use of International Law and Standards

[85] Penal Code, arts. 288, 291 and 292.

[86] Penal Code, art. 288.

[87] Ratified in 1969.

[88] Ratified by Ethiopia on March 14, 1994.

[89] Ratified by Ethiopia in 1949.

[90] Ratified by Ethiopia in 1935.

The use of international standards in the upcoming trials is appropriate and important for many reasons. The use of international standards would contribute to the development of the rule of law in Ethiopia and to the independence of the judiciary. If international standards are applied fairly and independently by the courts, under observation from the international community,[91] it would be more difficult to claim that the trials are simply victor's justice. The use of international standards in prosecuting the Dergue officials would also help to ensure the fairness and acceptance of the legitimacy of the prosecutions, both in Ethiopia and the international community.

Moreover, the TGE has embraced international standards by ratifying important international human rights treaties. The use of international standards in this crucial accountability process would demonstrate to groups within Ethiopia and to the international community, Ethiopia's full acceptance of and intent to implement these new treaty obligations.

The use of international law for the interpretation of crimes in the Ethiopian Penal Code against the detainees would also be a significant development and contribution to the enforcement of international human rights standards and humanitarian law in the international community.

E. Penalties

The penalties imposed on any defendants convicted will, of course, depend in the first instance on how they are charged. Defendants will apparently be charged under the laws in force at the time of the crimes. These include the Ethiopian Penal Code of 1957 (which incorporates, in articles 281-295, offenses against the law of nations), and perhaps the "Special Penal Code" of Mengistu.

In general, the likely charges allow for penalties ranging from short periods of imprisonment to life imprisonment. Many of the likely charges could lead to the imposition of the death penalty. The Ethiopian Penal Code (Articles 281, 282, and 522) allows the imposition of the death penalty for either first degree homicide or for grave crimes against humanity or war crimes.

Possible penalties are listed by the SPO as follows:[92]

Ethiopian Penal Code:
1st degree homicide: life imprisonment or death.
2nd degree homicide: 5-25 years imprisonment.
Negligent homicide: not to exceed 5 years.
Grave wilful injury: 1-10 years.
Common wilful injury: not less than 6 months.
Exposure of life of another: 3 months to 3 years.
Failure to lend aid: not to exceed 6 months.
Unlawful arrest or detention: not to exceed 5 years.
Abuse of power: not to exceed 5 years.

Genocide, crimes against humanity: 5 years to life, death.
War crimes against civilians: 5 years to life, death.
War crimes against wounded or prisoners: 5 years to life, death.
Use of illegal means of combat: 3 months to life, or death.

[91] The HRW/Africa delegation was informed by Special Prosecutor Girma Wakjira, and other government officials, that international observers would be welcome at the upcoming trials.

[92] *Special Prosecution Process*, pp. 16-17.

Mengistu's "Special Penal Code":
Abuse of authority: 3-15 years.
Failure to supervise: not to exceed 3 years.
Unlawful arrest or detention: not to exceed 5 years.
Jeopardizing defense/famine relief: 10 years to life.

Ethiopian law allows for consecutive sentencing, and many of the defendants will be charged with multiple offenses, so sentences could be extended by multiple convictions.

The Death Penalty

The death penalty is applicable to many of the charges likely to be brought against the SPO defendants. Proclamation 22/1992, creating the Special Prosecutor's Office, requires that detainees be tried under the 1957 Ethiopian Penal Code, which allows for capital punishment. Furthermore, the death penalty is provided in Ethiopian law for ordinary criminal offenses such as murder. All of the first 73 defendants charged on October 25, 1994, face charges punishable by the death penalty under Ethiopian law.

Most government officials the HRW/Africa delegation met during its visit argued that there was overwhelming support for capital punishment, especially in the context of these prosecutions.[93] The Special Prosecutor has stated that it would take a national referendum to drop capital punishment.

Opposition to applying the death penalty in the SPO cases—or the attempt to greatly limit the number of cases in which it is applied—comes mainly from the international community; and from Ethiopians concerned about international standards.

One strand of opinion within the TGE appears to regard the whole SPO process as a waste of resources and to hold that the execution of most of the SPO detainees would save resources necessary to rebuild the country. Another view expressed to the HRW/Africa delegation is that it is offensive to immunize the worst human rights violators in Ethiopia's history from the death penalty while this penalty is still applicable to other cases of homicide. It is also argued that legal execution is necessary to convince the population, particularly victims and survivors, to forego private vengeance and accept the rule of law.

Notwithstanding these arguments, HRW/Africa urges the TGE to renounce the use of the death penalty in the SPO proceedings. The U.N. Security Council, in setting up the International Tribunal to hear war crimes cases arising in the former Yugoslavia, did not permit the imposition of the death penalty for crimes at least as severe as the crimes the SPO is prosecuting. Thus, the international community is forging standardsstandards of accountability for war crimes and crimes against humanity that do not permit capital punishment. The SPO has referred to these important international developments in its press release announcing the first charges it filed in October 1994. A decision by Ethiopia to adhere to the death penalty in these trials would be at odds with these international decisions.

Even with the most advanced procedural safeguards the imposition of the death penalty cannot be squared with the human rights principles inspiring the SPO process. There could be no stronger statement of Ethiopia's adherence to the rule of law and its embrace of international human rights standards than a decision to forego the death penalty in these prosecutions.

[93] Within the Constitutional Commission there is the feeling that public confidence in the SPO process would be severely shaken if the government were to limit the use of the death penalty. Interview with Kifle Wedajo, March 1994. Not all government officials the HRW/Africa delegation met with shared these views. At least one *kebele* official was of the view that abolishing the death penalty would be a positive human rights statement for the new Ethiopia.

F. International Law and Defenses

Command Responsibility

The Ethiopian Penal Code indicates that an individual who gives orders to commit a crime against humanity is equally guilty of the offense as the person who carries out the order. Penal Code Article 69 states:

> In the case of an offense under this Code committed on the express order of a person of higher rank whether administrative or military to a subordinate, the person who gave the order is responsible for the act performed by his subordinate and is liable to punishment so far as the subordinate's act did not exceed the order given.

This offense is limited to instances where the commander knew or had reason to know that the subordinate was about to commit such acts.[94]

Under the Geneva Conventions of 1949, authorities who order the commission of a crime against humanity are equally guilty as the person who actually commits the crime.[95] This principle applies to both military commanders of regular or irregular armed forces, and civilian authorities.[96] In certain circumstances, governmental leaders and public officials have been held responsible under this doctrine.[97]

In addition, superiors are individually responsible for the crimes committed by their subordinates if the following requirements are met: the superior had actual knowledge of the crimes; the dereliction on the part of the superior constituted wilful and wanton disregard of the possible consequences; or given the circumstances, the superior must have known of the offenses committed.[98]

Ethiopia therefore has an obligation under both national and international law to hold superior officers responsible for violations of human rights committed under their command. Indeed, the leaders of the Mengistu regime may be more culpable than many lower level officials in detention.

Superior Orders Defense

Under both the Ethiopian Penal Code and international law, a subordinate may not avoid responsibility for the

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[94] Penal Code, art. 58 (3).

[95] 1949 Geneva Convention I, art. 49; Geneva Convention II, art. 150; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[96] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, para. 55.

[97] Ibid., at para. 57.

[98] Ibid., at para. 58.

commission of an offense because he or she acted pursuant to the order of a superior.

Article 70 of the Penal Code provides for liability of the subordinate where the subordinate was "aware of the illegal nature of the order or knew that the order was given without authority or knew the criminal nature of the act ordered, such as in homicide, arson or any other grave offenseoffense against persons or property, essential public interests or international law." However, the penalty may be mitigated by the court upon consideration of the compelling nature of the "sense of duty dictated by discipline or obedience."

The Ethiopian Penal Code restricts the court's ability to impose punishment where, in consideration of the circumstances of the act and requirements of military discipline, the subordinate had no choice other than to act as he did.[99]

[99] Penal Code, art. 70 (2).

International legal instruments generally reject the superior orders defense. The U.N. Resolution on Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal substantiates the assertion that superior orders do not constitute a defense.[100] In addition, superior orders may not be invoked as a defense by law enforcement officials,[101] torturers,[102] implementors of summary or arbitrary execution,[103] or those carrying out disappearance orders.[104]

The Nuremberg Judgment declared that superior orders "has never been recognized as a defensedefense to acts of brutality, though [under the London Charter] ... the order may be urged in mitigation of punishment."[105] "Superior orders, even to a soldier, cannot be considered in mitigation where crimes have been committed consciously, ruthlessly and without military excuse or justification."[106] Mitigation is allowed, not because of the existence of an order, but when there was no moral choice.[107] This standard was adopted in the Report of the International Law Commission in Principle IV: "The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him."

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[100] G.A. Res. 95, U.N. GAOR pt. II, U.N. Doc. A/64/Add.1 (1946).

[101] The Code of Conduct for Law Enforcement Officials, art. 5, G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46 at 186, U.N. Doc. A/34/783 (1979).

[102] Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/39/46 (opened for signature 1984).

[103] The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, G.A. Res. 44/162, U.N. GAOR, 44th Sess., gnat. plen. mtg., Supp. No. 49 at 463, U.N. Doc. A/44/898 (1989).

[104] The U.N. Declaration on Enforced Disappearances, art. 6 (1), G.A. Res. 47/133, U.N. GAOR, 47th Sess., U.N. Doc. A/47/133 (1993).

[105] Nuremberg Judgment, p. 42.

[106] Ibid. at 92.

[107] Ibid.

A clear definition of when a moral choice exists in international law has not been established. In the Nuremberg Judgment, the Tribunal explained that "individuals have international duties which transcend the national obligations of obedience imposed by the individual State."[108] Mitigation has also been allowed when the unlawfulness of the act is not apparent to the rational soldier. Thus, if the order requires an act that is "obviously, palpably or manifestly unlawful to a reasonable soldier," then the reasonable soldier can recognize the illegality of the order and choose not to follow it.[109]

It is expected that many defendants may rely on this defense after charges have been filed. These international standards should be considered by the Ethiopian courts especially in connection with charges based upon the provisions of the Ethiopian Penal Code that incorporate international standards.

V. ALTERNATIVES TO CHARGES

[108] Ibid.

[109] L. C. Green, *The Contemporary Law of Conflict*, p. 294 (1993).

Massive amounts of evidence, an overwhelming number of defendants to be tried, and insufficient resources in the SPO, the Public Defenders Office and the court system may require the SPO to focus its efforts on the most egregious violators. These practical realities raise difficult issues relative to plea bargaining and amnesty for at least some SPO detainees or others accused of human rights crimes.[110]

A. Plea Bargaining

Ethiopia has no tradition of allowing plea bargaining. It is not clear whether plea bargaining is consistent with the existing code of criminal procedure.[111] The general expectation is that the SPO detainees should be tried in the courts. In addition, many detainees may be unwilling to plead guilty.[112] However, the use of some form of plea bargaining may help the SPO to try those cases it does prosecute more effectively, by lessening the demands placed on the office and its abilities.

If every detainee is tried, the number and length of the trials may be too much for the SPO to handle, considering the limitations of resources, without failing to adhere to international standards. It may not be feasible for the SPO or the Ethiopian legal system to try more than 1,300 defendants, much less the 3,000 defendants indicated by the Special Prosecutor in his October 1994 press briefing, without sacrificing fair trials. Given the sheer number and length of cases against mid-level *kebele* officials, (approximately 70% of the detainee population), plea bargaining may be the most effective way to handle a significant number of cases.

The SPO operates in a political environment in which the Ethiopian people understandably do not want any person responsible for human rights crimes to escape serious punishment. Nevertheless, in order to punish the worst criminals effectively while guaranteeing stability during the transitional period, it may be decided to use a form of plea bargaining that imposes serious penalties against some detainees without a full trial.

HRW/Africa would not oppose the use of plea bargains in appropriate cases, provided that the plea bargaining is serious and conducted in good faith, and that it does not allow major culprits to go free while lesser offenders are punished. Plea bargaining should not trivialize or overlook the interests of victims or their families. Ideally, plea bargaining should be used to determine appropriate sentences rather than decide liability for human rights violations.

Any plea bargaining used by the SPO should be conditioned on full disclosure of information and acceptance of responsibility. Any defendants who are allowed to plead guilty should be required to disclose all of the circumstances of their crimes. Full disclosure may be helpful to the SPO in gaining direct evidence to help convict higher, more culpable officials. The SPO should insist that anyone who is allowed to plea bargain must continue to

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[110] The HRW/Africa mission was told by a number of people that many people responsible for human rights abuses, including torture and summary execution, are at large in Addis Ababa and elsewhere in Ethiopia. Given the scale of human rights violations during the Mengistu regime, this is likely to be the case. However, HRW/Africa was not able to investigate the extent to which those responsible for human rights crimes are still at large in Ethiopia.

[111] At the time of the Human Rights Watch/Africa mission a draft of a Proclamation that would have revised the Code of Criminal Procedure was circulating for comment. As of October 1994 the draft Proclamation had not been approved and it is not clear whether the draft will ever be considered by the TGE.

[112] Interview with Public Defenders, Addis Ababa, March 30, 1994.

cooperate with the other SPO prosecutions.

Just as important, such disclosures may help the family members of disappeared persons discover the circumstances of the deaths of their loved ones, and enable the SPO to complete the most comprehensive historical record possible for disclosure to the Ethiopian people.

If these criteria are met, the use of plea bargaining in the context of the upcoming prosecutions may be an effective means of ensuring that all human rights violators are brought to justice while recognizing the strain that this process puts on Ethiopia's resources.

B. Amnesty

HRW/Africa is extremely reluctant to endorse any amnesty for human rights violators, and would never support amnesty if it is to be applied before the truth has been investigated. Under some circumstances, amnesty at the end of the process of accountability may be acceptable, when it genuinely contributes to national reconciliation. For example, South Africa has allowed a limited amnesty for those who fully confess their crimes.

As is indicated by numerous situations in other states, dealing with past human rights violations is a perplexing ethical and political problem.

Political leaders cannot afford to be moved only by their convictions, oblivious to real-life constraints, lest in the end the very ethical principles they wish to uphold suffer because of a political or military backlash.[113] The reasons for establishing and publicizing the truth about human rights violations, then prosecuting the perpetrators, are to vindicate the victims and their families, and to deter a repetition of past abuses. Often, establishing the truth about events that transpired has a cathartic effect for the families of the victims. It is common that what matters most to victims and their families is not vengeance, but "that the truth be revealed, that the memory of their loved ones not be denigrated or forgotten, and that such things never happen again."[114]

Differing levels of immunity have been given, for example, in Brazil, Uruguay, Guatemala, and the Philippines; in Poland, Hungary, and Czechoslovakia; and, more recently, in Chile, Nicaragua and El Salvador. In Ethiopia, it has been suggested that immunity be given to some of the defendants. However, the Anti-Red Terror Committee and others have expressed the feeling that every person responsible for human rights crimes during the Mengistu regime must be tried in order to truly vindicate the victims. Understandably, many Ethiopians want to see their abusers punished and brought to justice. Many also blame the delay in the start of trials on the debate over amnesty proposals, combined with lack of donor money.

International law generally discourages amnesty for perpetrators of human rights and humanitarian law violations, as inconsistent with a duty to prosecute such violations. The United Nations Human Rights Committee, the Inter-American Commission and the Inter-American Court of Human Rights have stated that amnesty in respect to torture is generally incompatible with the duty of states to investigate such acts, guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.[115] Further, the International Commission of Jurists concluded that people have a right to have the truth made public, have perpetrators tried and punished, and allow victims and their families to be compensated for their suffering. Immunity has also been strongly opposed by the United Nations Working Group on Enforced or Involuntary Disappearance. The Working Group argues that immunity

[113] José Zalaquett, "The Matthew O. Tobriner Memorial Lecture: Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," 43 *Hastings Law Journal*, p. 1425 (August 1992).

[114] Ibid.

[115] Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur. U.N. ECOSOC Doc. E/CN.4/Sub.2/1993/8 (2 July 1993).

could induce victims to resort to self-help and take the law into their own hands, exacerbating the spiral of violence.[116]

In addition, there is a nexus between immunity and the failure to provide reparation to victims. Immunity often has the undesirable effect of barring victims from seeking and receiving redress and reparation. Moreover, in Ethiopia the possibility that victims and their families may be compensated could actually contribute to the future stability of the society.

There appears to be no reason for the TGE to consider amnesty proposals at this time. Indeed, the situation in Ethiopia lacks some of the factors that may have led to the enactment of amnesty laws in other countries. The most important factor is that the Mengistu regime and its army were completely defeated and do not appear to pose a military threat to the new government. It does not appear that the trials of the human rights violators of the former regime are opposed by any significant sector of Ethiopian society. No person interviewed by the HRW/Africa delegates stated such opposition. It appears, in fact, that the upcoming trials could make a significant contribution to the building of Ethiopian democracy and national reconciliation.

It is possible that procedures like plea bargaining or a system of civil remedies may offer solutions to the practical problems caused by the large number of cases awaiting trial. It may not be possible to try all of the human rights violators of the Mengistu regime, but a premature amnesty would not contribute to the stability of emerging democratic institutions in Ethiopia.

VI. RIGHTS OF VICTIMS

The Ethiopian government also has a responsibility to ensure that victims' rights to rehabilitation and compensation are realized in the accountability process. This responsibility includes the consideration of the psychological needs of the victims arising from both the human rights abuses they have suffered and the effects the prosecutions will have on the victims. HRW/Africa realizes that Ethiopia lacks the resources to provide substantial financial compensation to human rights victims. However, these issues should receive careful attention, within the limits of government resources, in the accountability process.

A. The Right To Compensation In International Law

[116] Ibid.

The right of compensation is well established in international law. Article 8 of the Universal Declaration of Human Rights relates to the right of every individual to an "effective remedy" by competent national tribunals for acts violating human rights which are granted by the Constitution or by law.[117] International treaties and other international standards also provide for a right to compensation. The African Charter on Human and Peoples' Rights, Article 21(2), delineates the "right to an adequate compensation." Both the Article 9(5) of the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms refer to an "enforceable right to compensation." The Convention Against Torture contains an "enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[118] Guidelines related to restitution, compensation and assistance for victims of crime are clearly stated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[119] In the Velásquez Rodríguez case the Inter-American Court of Human Rights found a victim's right to reparation includes "full restitution, which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."[120]

A state has an obligation to ensure victims of human rights violations are redressed. As the Inter-American Court of Human Rights explained in the Velásquez Rodríguez case:

> "The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, identify those responsible, to impose the appropriate punishment, and to ensure the victim adequate compensation".[121]

[117] UN ECOSOC Doc. E/CN.4/Sub.2 (1993) at 13.

[118] *See, e.g.* Article 14(1), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 19, Declaration on the Protection of All Persons from Enforced Disappearance.

[119] G.A. Res. 40/34 (1985).

[120] Judgment, Inter-American Court of Human Rights, Series C, No. 7 (1989) para. 26.

[121] Judgment, Inter-American Court of Human Rights, Series C, No. 4 (1988), paragraph 174.

States are also obligated to victims for compensation or reparations from injuries inflicted by government or public officials, whether or not still in office.[122] In addition, the Declaration provides that "[w]hen compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation."[123]

International humanitarian law norms also support victim compensation. International treaties specify that a contracting party that violates the treaty is liable to pay compensation.[124] Further, the Geneva Convention prohibits any contracting party from absolving itself of liability with respect to grave breaches involving "wilful killing, torture or inhuman treatment."[125]

Thus, states have a responsibility to pay compensation or make reparations to victims who have suffered human rights abuses. However, these principles must be viewed in light of the financial constraints often left to successor governments. These constraints are clearly present in Ethiopia. The HRW/Africa delegation found that most officials in Ethiopia agreed that compensation to the victims would be appropriate. However, they emphasized that the lack of resources for basic necessities in the country made compensation considerations inconceivable at this time.

B. The Right to Compensation Under Ethiopian Law

[122] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Art. 11 states:
"Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims."

[123] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 12.

[124] *See, e.g.* article 3, The Hague Convention Regarding the Laws and Customs of Land Welfare, Protocol I, article 91, Protocol Additional to the Geneva Conventions of August 12, 1949.

[125] *Ibid.*

The Ethiopian legal system provides two ways for victims of offenses to make a claim for restitution. The claim for restitution can be raised in a criminal prosecution, or a separate civil claim may be filed against the offender.

Under Article 100, a person may make a civil claim for compensation to be ordered for damage caused by an offenseoffense, "to the injured person or to those having rights from him, particularly in cases of death, injuries to the body or health, defamation, damage to property or destruction of goods."[126] This right to sue and obtain restitution is governed by civil law provisions. However, for the purpose of establishing a claim, the injured party may also become a party to the criminal proceedings.[127]

The Ethiopian Criminal Procedure Code provides that a person who has been injured by a criminal offense may make an application in writing for compensation.[128] Where the application is allowed,[129] the victim is allowed to take part in the proceedings with the same rights as an ordinary party.[130] The court is required to allow the victim or the victim's representative to address the court on the question of the amount to be awarded.[131]

[126] Penal Code, art. 100 (1).

[127] Ibid., at (3). This procedure is governed by the Criminal Procedure Code.

[128] Criminal Procedure Code, Art. 154 (1).

[129] The application may be dismissed by the court for reasons specified in Article 155 of the Criminal Procedure Code.

[130] Ibid., at Art. 156.

[131] Ibid.

In circumstances where it appears unlikely that the offender will be able to pay on his own, "the court may order that the proceeds or part of the proceeds of the sale of the articles distrained, or the sum guaranteed as surety, or a part of the fine or of the yield of the conversion into work, or confiscated family property be paid to the injured party."[132]

Restitution is a valuable remedy for victims because it forces the human rights abusers to pay for some of their abuses directly to the victims. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides:

> Offenders or third parties should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.[133]

The SPO should ensure that victims are informed of their rights in applying for compensation in both criminal and civil proceedings. Efforts should be made to help the victims obtain redress with these or any other procedures available through the legal system.

Unfortunately, the difficulty is that these compensation rights under Ethiopian law may be hollow promises if the SPO detainees lack the resources to satisfy court-ordered compensation. If it is possible to develop a compensation scheme, within the limitations of Ethiopia's resources, it would be an important step in the accountability process.

C. Other Measures For Victims

There are many non-monetary forms of redress for the victims of the human rights crimes of the Mengistu regime. As discussed below, the trials themselves are a form of redress. The experiences in other countries that have emerged from dictatorships may offer useful precedents for Ethiopia.

In Chile, after the military dictatorship ended in 1990, national law provided for reparations and a National Commission provided information to the families of victims, including three categories of reparations: first, symbolic reparation to vindicate the victims; second, legal and administrative measures to solve several problems relating to the acknowledgement of death (family status, inheritance, legal representation for minors); third, compensation including social benefits, health care, education.[134]

The Ethiopian government may be able to formulate symbolic reparations to vindicate the victims of the Mengistu regime. In addition, a historical record that fully and truthfully discloses what happened in Ethiopia can serve this purpose. The government can take steps to help the family members of disappeared persons in the administrative and legal problems relating to acknowledgment of death. The government appears to lack the resources to conduct comprehensive investigations into all mass crimes to determine the fate of all disappeared persons. However, the government should attempt to discover the fate of as many of the disappeared as possible within its resources and the international community should support such efforts.

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[132] Penal Code, art. 101 (1)

[133] U.N.G.A. Res. 40/34 (Nov. 29, 1985), Article 8.

[134] See Cecilia Medina Quiroga, "The Experience of Chile," in Seminar on the Right to Restoration, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, SIM Special No. 12, at 101.

The government should also seek the assistance of the international donor community in establishing compensation and rehabilitation programs for victims. The compensation may come in the form of much needed counseling for the victims and their family members, resources for rebuilding homes, infrastructure, and community facilities that were destroyed by the Dergue officials, or payment for harm or loss suffered. While compensation from the TGE may not be possible at this time, the international donor community may be able to provide resources for this endeavor.

At a minimum, there should be a government program specifically directed at the issues of compensation and rehabilitation of victims that harnesses the available, and potentially available, resources, domestically and internationally in the service of the needs of human rights victims.

D. The Fact of Criminal Prosecutions as a Form of Reparations

The prosecution of human rights violators is a crucial form of reparation for the victims. The Inter-American Court in Velásquez Rodríguez found that a judgment on the merits of a human rights claim itself served as a "type of reparation and moral satisfaction of significance and importance for the families of the victims."[135]

The state prosecution of human rights violators can serve as a remedy for the victims in several ways. First, a failure by the state to prosecute human rights violations may act as a license for others to repeat such crimes and as a sign of indifference to the government's responsibility to protect its citizens, including those who have already been victimized.[136] Thus, a state's duty to prosecute can be seen, not only as a duty to society, but also as a remedy owed by the state to individual victims.[137]

In addition, a state prosecution can serve as formal recognition of the abuses suffered by victims. The rehabilitation of victims is promoted by this public acknowledgment of responsibility for human rights violations that is a byproduct of prosecuting violators.[138]

In this regard, it is essential for the SPO to involve victims in the trial process. The community of victims should be given information about the process. It will also be essential for victims and the Ethiopian public to have access to the trials themselves, directly and through the media. There are many ways in which such public accessibility may be accomplished but it is an important element in the ultimate success of the accountability process for the human rights victims of the Mengistu regime.

E. The Psychological Trauma of the Trials

As noted above, the investigation and prosecution process can have a significant effect on the victims of human rights violations. Publicizing human rights abuses can have a cathartic and healing effect for victims and families. Thus, public access to the trials is of great importance.

An important issue that must be considered by SPO, though, is the psychological implications of the trial process for victims and family members. This problem is especially sensitive given the cultural tradition in Ethiopia of

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[135] Judgment, Inter-American Court of Human Rights, Series C, No. 7 (1989) at para. 36.

[136] Diane F. Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation," in *Studies in Transnational Legal Policy - No. 26: Human Rights: An Agenda for the Next Century* (1994) p. 427 [hereinafter Addressing Gross Human Rights Abuses].

[137] Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, at 26, para. 56 [hereinafter Van Boven Report].

[138] Gross Human Rights Abuses, p. 427.

not discussing pain or seeking psychological help.[139] The HRW/Africa delegation met with many victims, and family members of the disappeared and killed, during its visit. There is an enormous amount of unresolved pain in the community of human rights victims in Ethiopia.

[139] Interview with Girma Wakjira, March 1994.

Due to the hesitancy of victims to discuss their experiences, the SPO has encountered additional difficulties in collecting evidence. While the SPO has encountered hesitancy by victims to testify regarding their traumatic experiences, it has not yet addressed the issue of providing counseling for victims. Part of the problem is, of course, a lack of resources.[140] Another problem is the apparent absence of such counseling in Ethiopian society. Traditionally, religious leaders have been the providers of emotional counseling for Ethiopians.

International financial and expert support may be crucial in the area of victim psychological support. Given the fact that a high percentage of the Ethiopian population lost family members during the Mengistu regime or were victims themselves, the trials will stimulate an emotional response for many who have tried to forget their suffering. Counseling and rehabilitation services are crucial in the process of holding human rights violators accountable and providing compensation and healing for victims.

To date, for understandable reasons, very little attention appears to have been given to this issue. There may be a variety of solutions that fit Ethiopian cultural traditions but the SPO and the international community should give this issue some serious attention.

VII. DEFENDANTS' RIGHTS

A. Introduction

This section focuses on the right to counsel and defense access to information. Many other issues relating to the fair trial rights of defendants are likely to arise in the course of the upcoming trial. One general concern is that it does not appear that the procedures governing criminal trials in Ethiopia had been changed to ensure their conformity with the fair trial rights contained in the International Covenant on Civil and Political Rights. These international standards, agreed to by Ethiopia, must be scrupulously observed in the upcoming trials. With trials likely to begin in early 1995 these issues require urgent attention.

B. Right to Counsel

The Ethiopian Criminal Procedure Code, as it is now, does not provide for a right to defense counsel, nor does it afford adequate protection to the defendant's right of access to counsel. The proposal of changes to the criminal procedure code recommends adding a provision in Article 127 to give the accused the right to counsel from the Public Defender's Office of Ethiopia if the defendant is indigent and cannot afford an attorney.[141]

The Public Defender's Office (PDO) was established in January 1994, under the supervision of the Ethiopian Supreme Court. Ethiopia has never before had a public defender system. During the Haile Selassie regime, defendants who could not afford an attorney sometimes received ad hoc appointed attorneys who served without compensation.[142]

Public Defender's Office

The PDO started with five Ethiopian lawyers in early 1994.[143] Of the original five PDO attorneys, only one,

[140] The entire annual budget for the SPO is $400,000. Interview with Girma Wakjira.

[141] Proclamation Modifying the Ethiopian Criminal Procedure Code, Article 127, para. 3. As of October 1994 this proclamation had not been adopted.

[142] *Special Prosecution Process*, p.17.

[143] According to information received by HRW/Africa, this number was increased to fifteen attorneys in May, 1994.

the Public Defender, is an experienced trial attorney, while the other four are recent graduates of the Addis Ababa Law School without previous experience in representing criminal defendants. They had just begun to handle cases in the middle of March, 1994, to gain experience. The PDO is expecting to give its public defenders training sessions in international law, as well as courses on how to use computers. It was expected that the PDO would most likely defend the lower-level Red Terror defendants, such as *kebele* leaders. It is not known whether the PDO will be involved in the trial of the 73 defendants charged on October 25, 1994.

During the visit of the HRW/Africa delegation the Public Defender operation appeared to suffer from a lack of resources.[144] We were told that the office had even fewer resources, relatively speaking, than the SPO. The office has received more attorneys and resources since March 1994 but it is not clear whether the office has adequate resources to play a meaningful rule in providing a defense to those charged in the SPO process. This problem is exacerbated by the short time the office has been in existence and the enormity of the charges to be filed against the SPO detainees.

The Availability of Private Attorneys

Many of the SPO detainees, especially the high level former Dergue officials, are believed to have the ability to pay for private attorneys to defend them. There are about 2,000 attorneys in Ethiopia, virtually all located in Addis Ababa.[145] On the other hand, the Bar Association has only about 200 members, and does not seem to be an organization capable of coordinating the defense of so many defendants. Private attorneys, many of whom were formerly judges or prosecutors, often have more experience than either PDO or SPO attorneys.[146]

The attorneys the HRW/Africa delegation spoke with in March 1994 indicated that they believed that private attorneys would not be afraid to handle these cases and that there would be enough attorneys to defend these cases.[147] However, it is impossible to know at this time whether there will be a major problem in securing adequate defense counsel for those who will be charged by the SPO. If many of the defendants cannot hire private counsel there is a potential serious problem unless funds are made available to pay private defense counsel.

The absence of adequate defense counsel for all of the defendants threatens the legitimacy of the entire process and is an issue requiring urgent attention and the resources of the international community if necessary. This is an option the government and the international donor community should address promptly to ensure that the defendants receive a fair trial.

C. Defense Access to SPO Evidence

An important issue for the accused is the defense's right to access to the computerized data and other evidence assembled by the SPO. According to the Special Prosecutor, after the computerization process is complete and the investigations by the SPO are finished, the defense will have access to the evidence.[148] Several efforts to obtain more information from the SPO about this issue by HRW/Africa have met with no response.

It is possible that the defense may have access to the evidence only after it is introduced into the court by the prosecution. This is how the Ethiopian Criminal Procedure Code currently reads. The proposal for amending the Criminal Procedure Code circulating in March 1994 would have provided that after the charges are read, the prosecution shall provide the defense with the charge sheet and copies of all documents that may be put into the

[144] Interview with PDO Attorneys, March 30, 1994.

[145] Interview with PDO Consultant Peter Bach, Addis Ababa, March 25, 1994.

[146] Interview with Supreme Court President, 26 March 1994. It should be noted that all judges and prosecutors who were members of the Mengistu regime's Workers People's party have been dismissed and disqualified from holding public office.

[147] HRW/Africa interviews with private defense attorneys, Addis Ababa, March 1994.

[148] Interview with Girma Wakjira, 24 March 1994.

evidence during the trial.[149] This will be considered a continuing obligation, thus, if the prosecution obtains more evidence after the first exchange it shall give copies of that evidence over as well. The proposal also requires the reverse: fourteen days after the charge the defense must give the prosecution any documents it may put into evidence at the trial.[150]

These proposals represent advances over existing procedure that would help ensure that the SPO detainees receive fair trials. However, the defendants would be at a significant disadvantage if they were not given reasonable access to the information the SPO has gathered under reasonable procedures. HRW/Africa recognizes that the creation of such procedures is not without difficulty, but, in particular, there may be exculpatory evidence relevant to some defendants in the SPO's database, and such materials should be made available to defendants.

In general, the TGE should evaluate the existing Code of Criminal Procedure to ensure that all international fair trial standards are fully respected. The draft Proclamation amending the Code of Criminal Procedure was a step in this direction. This report is not the place to comment on this draft, especially in light of its uncertain status, but if the upcoming trials are conducted under the 1965 Code of Criminal Procedure without modifications it will be essential for the courts to take appropriate steps to guarantee the fair trial rights of all defendants.

VIII. THE IMPORTANCE OF THE HISTORICAL RECORD

The prosecution of particular human rights violators is only part of the mandate of the SPO. The SPO also has a mission under its proclamation to create a historical record of the human rights abuses under the Dergue regime. As the press release announcing the SPO's first charges made clear, the SPO has a responsibility "to educate the people and make [them] aware of those offenses in order to prevent the recurrence of such a system of government." While there is an urgent need to move forward with the SPO prosecutions, it is also essential that the SPO fulfill this second part of its mission.

To support the principle of accountability for past human rights abuses it is first necessary to establish, as accurately as possible, what happened. When a country has been torn apart by civil war and a reign of terror, genuine reconciliation must be accompanied by a truth-telling process which will help heal the wounds of the victims and family members of those who have been killed or disappeared and instills a commitment to the rule of law.

The exposure of the truth and the establishment of a historical record has contributed to the healing process in many countries including El Salvador, Chile and Argentina. The duty to expose and prosecute war crimes was first established in the Nuremberg trials, and has been observed repeatedly. In addition, much-deserved importance is attributed to reports of the Holocaust and the crimes against humanity committed by the Nazis. While other elements are crucial to transition to peace, exposure of persons implicated in violations, recognition of the pain suffered by so large a portion of society, and recognition of governmental responsibility for human rights crimes gives successor governments the evidence needed to attempt to hold alleged violators accountable for their crimes.

[149] Draft Proclamation Modifying the Criminal Procedure Code, Art. 127, para. 5.

[150] *Ibid*., at Art 127, para. 6.

Human rights investigating and reporting conducted by the U.N. in El Salvador parallels closely the type of investigation the SPO is doing to prepare for the Dergue trials. In a move never before taken by the U.N., it created the Truth Commission in 1991 to investigate grave acts of violence in El Salvador from 1980 through 1992. The Commission's purpose was to report the truth to the Salvadoran people regarding the abuses of the civil war, so that they could reclaim their society and ensure that these atrocities would not be repeated.[151] The final report, of over 200 pages, was translated into all U.N. official languages for distribution to the Security Council. In addition, a simplified 60 page version of the report was produced to provide a historical record of human rights violations to the Salvadoran general public and the international community.

[151] Informe de la Comision de la Verdad, p. 12, *Informe del Secretario General Sobre la Mision de Observadores de las Naciones Unidas en El Salvador, May 21, 1993, U.N. Doc. S/25812.*

The Truth Commission report was different from previous U.N. involvement in exposing human rights abuses in two ways. First, never before had an exercise in official truth-telling been carried out by an international commission under UN auspices; its very existence was testimony to the extreme polarization of El Salvador and the view of the parties to the conflict that impartiality was best guaranteed by a panel of international figures.[152] Second, the Truth Commission specified, by name, individuals responsible for ordering, carrying out or covering up human rights abuses, an element seen as crucial in light of historical impunity for human rights crimes. These two aspects of the Truth Commission report contributed to the mostly successful result of the U.N. Mission. By including independent international observers and naming those implicated in abuses according to reliable testimony, the report gained credibility with both the Salvadoran people and the international human rights community.

In Argentina, a presidential panel prepared a report called "*Nunca Mas*" ("Never Again"), which documented thousands of disappearances. The effect of this report was to expose the actual whereabouts of the remains of many individuals and to enable their families to grieve for their losses. While an amnesty law prevented the prosecution of most of the perpetrators of the crimes reported, public exposure of the crimes created a historical record which aided the families of the victims as well as creating a collective memory for the international human rights community.

Chile is another example where restraints on the government prevented the prosecution of alleged human rights abusers. However, families were vindicated and even financially compensated as a result of disclosing the truth about the abuses that occurred.

Ethiopia is in a unique situation among the examples mentioned above, in that the government responsible for the human rights violations is no longer in power. Thus, the political constraints and pressures for amnesty are significantly lower than in other countries. The importance of the evidence gathering process in allowing the Ethiopian people to grieve and heal should not be overlooked. In furtherance of the mandate to create and preserve a historical record, not only the record of the trials, but also the data base and other evidence collected by the SPO should be carefully analyzed and preserved for the Ethiopian people, and ultimately released to the public in an appropriate form.

If the SPO fulfills its double mandate, to create an accurate record of the Dergue's abuses and to prosecute their perpetrators in fair trials, this will serve as an example of Ethiopia's commitment to the rule of law. The entire SPO enterprise will best be justified if it helps in this way to strengthen the democratic institutions of the future Ethiopia. "A nation's unity depends on shared identity, which in turn depends largely on a shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from reoccurring."[153]

IX. CONCLUSIONS AND RECOMMENDATIONS

To the SPO and the Transitional Government of Ethiopia:

1. It is essential that the SPO bring formal charges against all of the more than 1,300 SPO detainees immediately or release those it does not charge from detention pending trial.

2. Those detainees who are still being held without charge or trial should be promptly released.

3. The SPO has ample authority under the 1957 Ethiopian Penal Code to try detainees for indiscriminate attacks on the civilian population in recent conflicts, and for other crimes in the context of armed conflict, as well as crimes recognized as crimes against humanity in international law—notably responsibility for torture,

[152] *Ibid.* at 28.

[153] José Zalaquett, The Matthew O. Tobriner Memorial Lecture, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," 43 Hastings Law Journal (1992) p. 1432.

"disappearance" and murder carried out in a systematic manner or on a mass scale. Debate about whether to base charges on international customary law or the provisions of the Ethiopian Penal Code should not be allowed to delay the charging or trial of defendants.

4. The SPO should guarantee that defendants extradited or otherwise returned to Ethiopia to face trial will be ensured the full protection of international human rights law and will not be subject to the death penalty. The SOP should continue to seek the extradition or deportation to Ethiopia of persons abroad accused of human rights violations during the Mengistu regime.

5. The SPO should take special steps to address the needs of vulnerable and traumatized victims in the trial process.

6. The death penalty should not be imposed on those convicted in SPO proceedings.

7. The TGE should develop a comprehensive program, within available or potentially available resources, to meet the needs of victims for restitution, compensation and rehabilitation.

8. The defendants must be given adequate resources for their defense, including reasonable access to the SPO's data base, and an adequate period of time to prepare for trial.

9. The Public Defender's Office should receive adequate support from the Ethiopian government and the international donor community. Private lawyers should be enlisted at government expense to represent defendants who cannot afford lawyers, especially in cases requiring experienced defense counsel.

10. The procedures for the trial of the SPO detainees should adhere to international fair trial standards.

11. The trials and pre-trial proceedings should be open to the public, including the media, and to international observers. The SPO should provide international observers with a reliable source of information about the scheduling of trials and other information about the prosecutions.

12. Plea bargaining should be considered as a way of bringing more violators to justice so long as the process is not used to excuse the most culpable members of the Mengistu regime. Such procedures should require defendants to make full disclosure of their activities and require them to cooperate fully in the trials.

13. Amnesty for human rights violators should not be considered at this stage of the accountability process.

14. The SPO must complete the truth-telling process and publish its findings about the human rights violations of the Mengistu regime in a manner fully accessible to the Ethiopian people and the international community.

<u>To the International Community and the United States Government</u>:

1. The international community should cooperate more actively in the SPO's efforts to obtain the presence of accused human rights violators now living abroad.

2. The United States should negotiate an extradition treaty with Ethiopia or, at a minimum, initiate deportation proceedings where there is reliable evidence that persons in this country have committed such human rights violations, subject to guarantees that the death penalty will not be imposed.

3. The international community should insist that international fair trial standards be observed in the upcoming trials.

4. The international community should provide financial support so that all defendants will be represented by

counsel and have sufficient resources for their defense.

5. The international community should continue to support the accountability and truth-telling process in Ethiopia through financial and technical assistance, including assistance for the compensation and rehabilitation of victims.

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