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The Legal Characterization of Facts During the Red Terror in Ethiopia: Genocide, War Crimes, or Crimes Against Humanity?

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Abstract

Multiple countries have investigated and prosecuted the perpetrators of crimes committed during the Red Terror in Ethiopia. In bringing the perpetrators to account, each country adopted a unique approach, resulting in a variation in the situation's legal characterization. The charges against the Red Terror perpetrators in the U.S. were based on violations of immigration laws, while the perpetrators in Ethiopia were charged and convicted of the crime of genocide. In contrast, one suspect, who had already been convicted of genocide by the Ethiopian High Court, has recently been convicted of war crimes by the Hague District Court, the Netherlands. The article investigates whether the Red Terror crimes constitute war crimes, genocide, or crimes against humanity. Accordingly, this analysis shows that while countries have used genocide or war crimes when prosecuting crimes perpetrated during the Red Terror, the best fit to the situation's legal characterization would be crimes against humanity.

Keywords Red Terror; the Derg; genocide; war crimes; crimes against humanity

INTRODUCTION

In the past three decades, the domestic prosecution of international crimes has increased. Nevertheless, bringing suspects of core international crimes to justice is not without challenges. Through domestic prosecutions being carried out in several countries, it is evident that there are tensions between the willingness of those countries to prosecute suspects of international crimes and the necessary legal framework available to be applied in bringing perpetrators to justice. This tension is illustrated through differential legal treatment when investigations and prosecutions of the same situation are carried out in multiple forums. It appears that to resolve this tension, states often legally characterize a situation to align with their existing legal framework even if this disregards the factual situation on the ground.

A differential legal interpretation has been applied to bring perpetrators of international crimes to justice and reject the legal characterization of a situation as constituting one of the core international crimes. For instance, Turkey has historically rejected the legal characterization of the crimes committed against Armenians as genocide (Smith, Markusen, and Lifton 1995). Similarly, Serbian politicians have historically declined to acknowledge the legal characterization of the Srebrenica massacre as genocide (Obradovic-Wochnik 2009; Ramet 2007), even after the International Criminal Tribunal for the Former Yugoslavia (ICTY) recognized the situation as genocide. More recently, the crimes committed against the Rohingya people by the Myanmar Army have been qualified as genocide (The National World 2018) – a qualification that the Myanmar government has fiercely rejected.

Differential legal treatment may arise when multiple forums involve themselves in investigating and prosecuting the same situation. Multiple jurisdictions (namely Ethiopia, the Netherlands, and the United States (U.S.)) have investigated the situation during the Red Terror in Ethiopia and prosecuted suspected perpetrators of crimes committed during this period. When bringing the perpetrators to account, each country adopted its unique approach, which resulted in a variation in the situation's legal characterization. While the U.S. prosecuted and held suspects responsible for violations of immigration laws, Ethiopia convicted suspects of the Red Terror of the crime of genocide. On the contrary, one of the suspects, who had previously been convicted of genocide by the Ethiopian High Court, has recently been tried and convicted of war crimes by the Hague District Court, the Netherlands.

This differential legal treatment raises whether or not the legal characterizations by Ethiopia, the Netherlands, and the U.S. reflect the factual situation that constitutes the Red Terror in Ethiopia. If not, to what extent could another international crime be applied in the legal characterization of the situation? To answer this, this article explores the legal characterizations of the situation by the Netherlands' criminal justice system. Restricting the analysis to this is justified for various reasons. The first reason is that the U.S. held the perpetrators responsible for immigration frauds rather than core international crimes. The second reason is that the perpetrators' genocide conviction by the Ethiopian High Court is not in line with the definition found in the Genocide Convention. In Ethiopia, genocide can be committed against political groups, while per the Genocide Convention, crimes against political groups cannot be characterized as genocide. Thus, by analyzing the Hague District Court's findings concerning war crimes, this article seeks to answer the question of whether the crimes allegedly committed during the Red Terror are best classified as war crimes or crimes against humanity.

This article proceeds as follows: The first section provides a brief background regarding the Ethiopian Revolution and the situation in Ethiopia during the Red Terror. Following this, efforts that have so far been undertaken by the above three countries to bring the perpetrators of the Red Terror to justice will be introduced. A brief overview of the legal treatment of the situation in Ethiopia and the Netherlands is provided. Following this, the article answers whether the perpetrators' crimes during the Red Terror more closely constitute war crimes or crimes against humanity.

THE CONTEXT OF THE RED TERROR IN ETHIOPIA

Rather than arising in a vacuum, a range of factors – ideology, lust for power and others – contributed to the occurrence of the Red Terror in Ethiopia (Tareke 2008). In 1974 the government of Emperor Haile Selassie, the last monarch of Ethiopia, faced an unprecedented call for wide-ranging economic, political, and social reforms (Tiruneh 1993). The quest for social reform came from various sections of Ethiopian society, including the armed forces, teachers, students, trade unions, and civil servants (Tiruneh 1993). Of these sections of society, Ethiopian students studying both domestically and abroad were the most vigorous protesters against the government of King Haile Sellassie (Tronvoll, Schaefer, and Aneme 2009). The Emperor's 40-year reign was brought to an end in February 1974 after a wave of spontaneous protests and demonstrations engulfed the country (Zewde 2009).

Subsequently, the Provisional Military Administrative Committee, known by its acronym the Derg, took over in September 1974. The Derg was born out of crisis when it became clear that the Emperor's government would likely fall. The ability to control the means of violence allowed the officers to rise as an organized group, even without a clear social ideology (Abbink 1995). Representatives from each division across Ethiopia congregated in Addis Ababa for the first official meeting of the Derg (Anbesse 2001). A total of 120 military officers were in attendance, proclaiming the Derg establishment as an organized group (Anbesse 2001). The meeting also accomplished more operational matters, including forging the council's objectives, establishing committees, and giving appointments (Anbesse 2001).

Accordingly, the officers declared that guarding and leading the popular revolution with no bloodshed was the Derg's primary political objective. They presented themselves as a transitional authority, though shortly after coming into power, they began to terrorize the population through violence (Abbink 1995). First, the Derg summarily executed 60 former high officials of the Emperor's regime and immediately outlawed the freedom of assembly, association, and demonstration (Zewde 2009).

Alongside the establishment of the Derg, another unprecedented development was in Ethiopia's progress – the emergence of two civilian parties. Although they varied in approaches, they were both leftist parties with roots in the 1960s Ethiopian student movement. Established in 1972, the Ethiopian People's Revolutionary Party (widely known in short as EPRP), was the first civilian party to join the Ethiopian Revolution (Tola 1989). In the wake of the revolution, the EPRP demanded the formation of a provisional popular government and accused the Derg of usurping the popular revolution (Tola 1989). However, the Derg resisted the EPRP's demand for the immediate formation of a popular government, an issue that became a source of serious friction between the two groups (Tola 1989). The second civilian party was the All-Ethiopia Socialist Movement, which was known as MEISON. As opposed to the EPRP, MEISON chose to provide the Derg with "critical support" (Tareke 2009). This support is a key reason why the party could form a political alliance with the Derg, and secure key positions in the Derg's government, albeit short-lived. The EPRP viewed this support to the Derg as a betrayal of the revolution's cause, ultimately driving the root cause of the hostility between the two parties (Zewde 2009).

Their differences grew deeper in the following year, further plunging Ethiopia into one of the bloodiest periods of its history. The Derg's refusal to transfer power to a civilian government as demanded by the EPRP drove these factions to resolve their disputes by force. There is no definite answer as to which party began the violence, with the debate remaining highly controversial to this day. Factually, the EPRP began an urban armed struggle involving a targeted killing of high Derg officials when the Derg refused to transfer power to a civilian government (Tiruneh 1993). However, because the Derg was no stranger to violence, it met the EPRP's urban struggle with greater violence. In this way, events occurring in the aftermath of the Ethiopian Revolution set the stage for further escalating the violence that eventually led to the Red Terror.

THE RED TERROR

The Red Terror consisted of institutionalized and state-sponsored indiscriminate violence against the civilian population (Tronvoll et al. 2009). As stated by Colonel Mengistu, its objective was simple and straightforward: destroy and crush any form of political opposition to the revolution, by extension to the Derg, as well as the elimination of members of the EPRP (Zewde 2009). As such, not only members of the EPRP but also everyone suspected of being associated with opposition groups or considered as "anti-revolutionary and reactionary elements" were targeted (Tronvoll et al. 2009). As claimed by the Derg, the Red Terror was declared in response to what the Derg claimed was a White Terror, referring to the EPRP's minuscule violence against the Derg (Tola 1989).

As a result, there are many unresolved issues and debates regarding the Red Terror situation in Ethiopia. However, in most standard works, the Red Terror typically covers events from February 1976 to May 1978 (Zewde 2009). This period was characterized by the excessive use of violence and gross human rights violations, the degree and intensity of which fluctuated over the years (Tola 1989). The Derg employed various methods in executing the Red Terror, including arbitrary and unlawful detentions, summary executions, impositions of sentences with no trials, and murder (Tola 1989). Severe torture was also a common practice and a hallmark of the Red Terror (Tareke 2008). Flogging, hanging by the arms, ripping out fingernails and suspending heavy objects from testicles were some of the torture methods employed to extract confessions from unlawfully detained prisoners (Tareke 2008).

During the Red Terror, the Derg also restricted the powers of democratic institutions that could have checked the Derg's excessive use of violence. In contrast, the Derg empowered what it called revolutionaries with unrestricted powers. Such powers were employed when torturing and executing individuals they thought to be members or supporters of resistance movements. As observed by Zewde, "every revolutionary became a law unto himself" (Zewde 2009:28). Furthermore, the Derg stripped the judiciary's power to see political matters. As a result, political matters were dealt with by the revolutionary system of justice put in place by the Derg. As observed by Toggia, "anarchic revolutionary justice had prevailed during that period as the judicial system was viewed as irrelevant and extraneous in the revolutionary process" (Toggia 2012:265). As such, extrajudicial killings, torture, and

imprisonments were not subject matters to be examined by the judiciary, as they fall under the umbrella of revolutionary measures.

The consequences stemming from the Red Terror are another highly controversial aspect of the discussion. Well-documented data on the exact numbers of injuries, deaths, and torture are lacking. Estimates of human lives lost in the Red Terror vary widely, making it a point of significant disagreement. Certain figures released placed the death toll at 10,000 people while others estimate it at 55,000, 150,000, and even 500,000 (Zewde 2009). However, these figures do not include those imprisoned or tortured who survived, as these estimates are only death tolls.

EFFORTS TO BRING PERPETRATORS TO JUSTICE

In this section, the article addresses Ethiopia's, the U.S, and the Netherlands' efforts to bring the perpetrators of crimes during the Red Terror to justice. There are striking differences in their legal treatment of the situation during the Red Terror. Although not always, the variations in legal systems in these states can likely explain these divergences.

After the collapse of the Derg regime, Ethiopia took the first initiative to bring the leadership of the Derg to justice. A crucial question for states transitioning from repressive regimes pertains to how the past should be dealt with (Elster 2004; Teitel 2000). Ethiopia chose to prosecute Derg members suspected of being responsible for the gross human rights violations during the Red Terror. Consequently, in 1992, Ethiopia established a Special Prosecution Office (SPO), an organ responsible for the investigations and prosecutions of higher officials of the Derg.¹ Ethiopia's primary motivation in establishing the SPO was bringing the Derg's leadership to account for crimes perpetrated at the beginning of its repressive rule. Besides, the trials were also thought to have the potential to play a distinct role in educating the public about the atrocities committed during the Derg regime and preventing the recurrence of a similar form of atrocities in the future.²

High officials of the Derg were put on trial based on provisions of the 1957 Ethiopian Penal Code. Thus, it was not necessary to frame the charges under international law. The SPO brought genocide charges against the Derg's top officials, with aggravated homicide as an alternative charge (Aneme 2009; Haile-Mariam 1999; Tiba 2007). At the end of the trials, the SPO obtained convictions on genocide charges (Tiba 2007). Nevertheless, many suspects involved in the perpetration of the Red Terror had managed to escape the Red Terror trial process in Ethiopia.³ Ethiopia made unsuccessful requests for extradition to the countries where the perpetrators fled (Human Rights Watch 1994). Subsequently, the SPO decided to try some officials of the Derg in absentia; this included former president Mengistu Hailemariam.

¹See the Special Public Prosecutor's Office Establishment Proclamation No. 22/1992. Retrieved August 11, 2020 (<https://www.usip.org/sites/default/files/Ethiopia-Charter.pdf>).

²See Proclamation No. 22/1992.

³It is believed that around 300 government and military officials fled Ethiopia when the Derg regime collapsed.

Among countries where the Derg's former officials fled to, the U.S. and the Netherlands are the only ones that attempted to bring perpetrators of the Red Terror to justice. In contrast, for instance, Zimbabwe has so far failed to extradite or prosecute former president Mengistu Hailemariam, who was the alleged mastermind of the Red Terror (DW 2017; Dzirutwe 2007). The U.S. has prosecuted perpetrators of the Red Terror. However, the prosecutions have been limited to violations of immigration laws. In 1993, a court in Atlanta, Georgia, charged one of the Derg officials for violations of human rights under the United States Alien Tort Claims Act and was ordered to pay 1.5 million dollars in damages to the three women.⁴ Similarly, in 2012, another member of the Derg suspected of having committed torture was charged with immigration fraud, including identity theft, making false statements on immigration documents, and for denying ever having persecuted anyone (U.S. Attorney's Office Colorado 2012). More recently, a similar charge has been brought by the U.S. Attorney's Office, Eastern District of Virginia, against a former civilian interrogator during the Red Terror for violation of immigration law (U.S. Attorney's Office Eastern District of Virginia 2018). Thus far, no charges brought in the U.S. have invoked the core international crimes such as war crimes, genocide or crimes against humanity.

Finally, the Netherlands recently prosecuted and convicted a former founding member of the Derg for his alleged involvement in atrocities committed during the Red Terror. In contrast to the U.S, however, the accused in the Netherlands was charged with war crimes. This is the first time a former official of the Derg faced a charge for one of the core international crimes outside of the Red Terror trial process in Ethiopia.

However, the multiplicity of laws applied and the differential treatment of the situation during the Red Terror point to difficulties in bringing persons responsible for atrocity crimes to justice and understanding the various forms of international crimes. The efforts to bring perpetrators of the crimes during the Red Terror to justice are commendable. However, the differential treatment of the situation within the three different criminal justice processes discussed above raises several questions, especially as to what extent the trials based on inconsistent laws were in congruence with the fundamental rights of the suspects found responsible in these countries. It also leads to broader questions about the nature of core international crimes. Are the core international crimes distinct crimes, or do they overlap? The following sections of the article seek to address the situation's legal characterization during the Red Terror in Ethiopia and answer these questions.

Ethiopia's and the Netherlands' Legal Characterization of the Situation During the Red Terror

While the Ethiopian High Court found former Derg officials guilty of genocide, the Hague District Court convicted Eshetu Alemu of war crimes. These two crimes have quite distinct contextual elements in international criminal law. Thus, it is

⁴See Hirute ABEBE-JIRA *et al.* v. Kelbessa NEGEWO, Case No. 93-913, Judgment United States Court of Appeals, Eleventh Circuit (January 10, 1996). Retrieved December 25, 2019 (https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Abebe-Jira_Appeals_judgement_10-1-1996.pdf).

important to examine how the Red Terror situation meets the contextual elements of these two classifications of crime.

The Ethiopian High Court: Politicide

In Ethiopia, the SPO characterized the facts forming the Red Terror primarily as genocide, aggravated homicide being the alternative charge (Haile-Mariam 1999; Tiba 2007). When it is doubtful what offense has been committed, filing an alternative charge is permissible under the Ethiopian criminal procedure code.⁵

Like several Derg officials, Mr Alemu was tried in absentia alongside other top Derg officials in the Special Prosecutor v. Colonel Mengistu Hailemariam et al. case, which was the leading case in the Red Terror trials because the defendants were the top policymakers and senior government and military officials of the Derg (Aneme 2009). In this case, the accused stood trial for 209 counts of crimes allegedly committed in their capacity as top military and government officials of Ethiopia. The indictment charged “provocation and preparation to commit genocide, the commission of genocide, aggravated homicide, grave and willful injury, abuse of power and unlawful detention” (Aneme 2009:3). The geographical scope of the SPO’s indictment included various areas across the country, including Addis Ababa (Aneme 2009; Haile-Mariam 1999). Eventually, the Ethiopian Federal High Court convicted Mr Alemu and his co-perpetrators, including former president Mengistu Hailemariam, of genocide (Tiba 2007).

Article 281 of the 1957 Ethiopian Penal Code defines the crime of genocide and expands the list of protected groups by including political groups among protected groups.⁶ In this sense, the Ethiopian Penal Code departs from the Genocide Convention. As a result, this article does not analyze the Ethiopian Federal High Court’s legal and factual findings concerning the crime of genocide. However, it is worth noting that the SPO failed to include war crimes charges in the indictment against Derg officials, even though the 1957 Penal Code contains comprehensive provisions that would have allowed the SPO to bring war crimes charges.⁷ Therefore, it could be suggested that the SPO’s failure to characterize the situation as war crimes was a deliberate choice rather than a result of the inexistence of a legal foundation to bring charges of war crimes. In contrast, there was no clear legal foundation in Ethiopia to characterize the situation as constituting crimes against humanity, even though, as shown below, the situation meets the contextual elements of crimes against humanity.

The Hague District Court: War Crimes

Mr Alemu, one of the 120 founding members of the Derg, was convicted of war crimes in the Netherlands (Bouwknegt 2018). He stood accused on four counts of war crimes: arbitrary detention and cruel and inhuman treatment of 321 civilians,

⁵See Article 113 of the Criminal Procedure Code of Ethiopia (Proclamation No. 185 of 1961).

⁶Article 281 of the 1957 Penal Code of Ethiopia 1957 (Proclamation No. 158 of 1957).

⁷See Article 282-29 of the 1957 Penal Code of Ethiopia (Proclamation No. 158 of 1957).

torture, incarceration and inhumane treatment of 240 people, and ordering the execution of 75 young prisoners.⁸ On December 15, 2017, he was convicted of all four counts of war crimes and sentenced to life imprisonment by The Hague District Court.⁹ The court's decision addressed, among other things, whether there was a non-international armed conflict (NIAC) in Ethiopia during the time frame of the charges. It is worth noting that the defense for Mr Alemu did not contend with this issue, but the court needed to establish if there was a NIAC in Ethiopia. After assessing the relevant rules and jurisprudence of international tribunals and Ethiopia's situation during the charges' time frame, the court decided that there was enough evidence to classify the conflict as a NIAC.

Hague District Court's Analysis of The Law

The court first proceeded to analyze the legal elements of a NIAC as defined by international law and practice. By relying on the relevant international instruments and jurisprudence, the court identified two criteria: the intensity of the conflict and the organized nature of the parties to the conflict.¹⁰ Also, the court cites the 2008 International Committee of the Red Cross's (ICRC) definition of a NIAC, according to which NIACs "are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]," in which the armed confrontation "must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization."¹¹

The court then proceeds to analyze the meaning of each criterion. To determine the organization of the parties, the court relied on the test of an organization defined by the ICRC.¹² The court also applied the test of organization established by the International Criminal Court (ICC) in the Lubanga Case.¹³ Besides, the court mentions the indicators stipulated in the 2010 final report of the International Law Association (ILA) on the meaning of armed conflict in international law.¹⁴

⁸Prosecutor v. Eshetu A., Case No. 09/748013-12, District Court of The Hague, Judgment (December 15, 2017), paragraph 2.

⁹See Prosecutor v. Eshetu A, paragraph 2.

¹⁰See Prosecutor v. Eshetu A, paragraph 7.4.

¹¹See Prosecutor v. Eshetu A, paragraph 2.

¹²Defined as organized armed groups, that is, groups who "develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces."

¹³The ICC applied it by holding that: "When deciding if a body was an organized armed group (to determine whether an armed conflict was or not international), the following non-exhaustive list of factors is potentially relevant: the force or group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group's ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement."

¹⁴Indicators are: "1. the presence of a command structure; 2. whether the group can carry out operations in an organized manner; 3. the level of logistics; 4. determine whether an armed group possesses the level of discipline and the ability to implement the basic obligations of common article 3; 5. whether the armed group was able to speak with one voice."

Concerning the intensity requirement, the court relied on the indicators stipulated in the ILA's final report of 2010.¹⁵ Finally, the court briefly analyzed the ICC's jurisprudence for the meaning of protracted violence and the jurisprudence of the ICTY's appeal chamber regarding the geographical scope of hostilities and the reach of international humanitarian law.¹⁶

Factual Basis of the Hague District Court

As for whether there was a factual basis to support the legal requirements, the court examined Ethiopia's situation when the alleged violations took place to see if the established requirements for the existence of a NIAC were fulfilled, and it concluded that it did.

The first requirement for a NIAC is the organization of the relevant parties within the conflict.¹⁷ For this requirement, the court based its conclusion in part on the organizational structure of the EPRP, and noted that "the EPRP had a central leadership, a political program, and it issued a publication named *Democracia*, and that it was organized in committees in different Zones."¹⁸ It further observed that "the EPRP had armed wings, the *Ethiopian People's Revolutionary Army* (... EPRA), commanded by the central committee and guided on an operational level by the *Military Committee*", and *Urban Armed Wings*.¹⁹

The second requirement is the intensity of the conflict. The court relied on three instances of armed violence carried out by the EPRP against the Derg, namely, attacks and actions carried out by the armed members of the EPRP in the last month of 1977, in July 1978, and in December 1978.²⁰ The court's decision reveals that in the first attack, "officers were taken prisoner and weapons and ammunition were captured"; in the second, "officers of *Nebelbal* were killed," and in the third, a "camp was destroyed but many EPRA troops were killed."²¹ The court also noted that "At the hearing in court, the accused stated that Gojjam and Gondar were conflict areas when he was in Gojjam as representative of the Derg."²² It also emphasized that "The accused also declared that during his stay in Gojjam for the Derg, attacks took place in Gojjam, which were carried out by the EPRP. During his time, the EPRP founded a military guerrilla camp in Metekel, in the western part of Gojjam."²³

¹⁵These are, namely: "the number of civilians forced to flee from the combat zones; the type of weapons used, in particular, the use of heavy weapons and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by the shelling or fighting; the number of troops and units deployed; existence and change of frontlines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; closure of roads."

¹⁶See Prosecutor v. Eshetu A, paragraph 7.5.1.

¹⁷See Prosecutor v. Boskoski and Tarculovski, IT-04-82-T, International Criminal Tribunal for the Former Yugoslavia, Trial Judgment (July 10, 2008) paragraphs 194–203; Prosecutor v. Thomas Lubanga Dilo, ICC-01/04-01/06, International Criminal Court, paragraphs 537–8.

¹⁸Prosecutor v. Eshetu A, paragraph 7.5.1.

¹⁹Prosecutor v. Eshetu A, paragraph 7.5.1.

²⁰Prosecutor v. Eshetu A, paragraph 7.5.1.

²¹Prosecutor v. Eshetu A, paragraph 7.5.1.

²²Prosecutor v. Eshetu A, paragraph 7.5.1.

²³Prosecutor v. Eshetu A, paragraph 7.5.1.

First, the court's decision may be criticized for failing to provide a sufficient analysis showing how the EPRP qualified as an organized armed group. As noted, among others, the groups' internal hierarchy, command structure, possession of weapons, ability to plan military operations and put them into effect, and level of discipline were some of the indicators cited by the court to assess whether the parties were organized parties to the conflict. However, in its assessment of the situation, the court did not cite evidence indicating, for instance, the existence of an internal hierarchy or a chain of command within the EPRP's organizational structure. Instead of evaluating the level of organization of the EPRP in light of each indicator, the conclusion of the court is based on the overall EPRP's organizational structure. As a result, the judgment does not address the question of whether the EPRP possessed the following: internal hierarchy, a command structure, organizational stability and effectiveness, the ability to train and equip its recruits, the ability to speak in one voice, and whether it possessed the necessary logistics to carry out effective operations.²⁴

Second, the International Criminal Tribunal for Rwanda (ICTR) decision in the Akayesu case indicates that the parties' subjective opinion to a conflict is irrelevant in determining the existence of an armed conflict.²⁵ Accordingly, determining whether an armed conflict exists depends on objective factors rather than on the parties' subjective opinions. In contrast to this established jurisprudence, the Hague District Court largely relied on the accused's subjective description of the situation as a condition evidencing both the existence of armed conflict and the organized nature of the EPRP. The accused stated that the area in which he was representing the Derg was a conflict area, that the EPRP was a violent organization, that the EPRP was carrying out attacks, that the EPRP had a military guerrilla camp in Metekel, and that the Derg military went to Metekel to dismantle the EPRP's camp.²⁶ Such excessive reliance on Mr Alemu's description of the situation for ascertaining the existence of armed conflict deviates from the ICTR's reasoning in the Akayesu case. In principle, any unsupported statements of the accused regarding the situation should have been deemed irrelevant.

Third, the evidence in the case does not support the court's finding that there was an intense conflict meeting the threshold set within international law. First, the judgment does not offer sufficient analysis of how the situation in question meets the threshold of intensity as required by international law.²⁷ As noted above, the court cited indicators of intensity as proposed by the ILA, which includes the type of weapons used, the extent of destruction and the number of casualties, the number of troops and units deployed, existence and change of frontlines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; and closure of roads. Generally, courts see if a conflict's intensity meets the required threshold by a combined assessment

²⁴See, e.g., how the ICTY's Trial Chamber evaluated the organized nature of the Kosovo Liberation Army (KLA) in the Limaj case (Limaj et al., IT-03-66-T, judgment, paragraph 94–134).

²⁵Or not. See Prosecutor v. Akayesu (Case No. ICTR-96-4), Trial Chamber Judgment, September 2, 1998, paragraph 603.

²⁶Prosecutor v. Eshetu A, paragraph 7.5.1.

²⁷See how the ICTY's Trial Chamber assessed the required threshold of intensity in the Limaj et al. case (Limaj et al., IT-03-66-T, judgment, paragraphs 135–70).

of various factors rather than only by a single factor. However, the court failed to show in its decision how each factor, either in combination or isolation, contributed to its finding that the intensity level required for the existence of a NIAC was met in the conflict in Ethiopia.

Fourth, it is doubtful whether the attacks carried out by the EPRP, as cited by the court for the recognition of the situation as an armed conflict, were more than isolated or sporadic acts of violence. As stated by Rodenhäuser, “The classification of armed violence normally changes when armed groups develop the capacity to carry out operations in an increasingly coordinated manner, with high frequency and longer duration.” (Rodenhäuser 2018:93) As noted above, the court’s judgment is based on attacks carried out by the EPRP in the last month of 1977, in February 1978, and in July 1978 against Derg forces.²⁸ By the first attack carried out by the EPRP, “officers were taken prisoner and weapons and ammunition were captured”; in the second, “officers of *Nebelbal* were killed”; in the third, a “camp was destroyed, but a lot of EPRA troops were killed.”²⁹ The intensity of these acts of violence carried out by the EPRP was not analyzed by the court. It is unknown whether they were intense enough to meet the intensity threshold as per international law.³⁰ The nature and consequences of the attacks referred to in the assessment bear more resemblance to contemporary forms of low-intensity violence in weak or failed states (Geiss 2009). No other factual basis evidencing the escalation of the attacks into a sufficiently intense armed conflict between the parties to the conflict is stated in the decision. Given that international humanitarian law does not apply to low-intensity conflicts involving isolated or sporadic attacks, it is doubtful whether acts of violence referred to in the decision support the conclusion that there was a NIAC. In this sense, the court’s decision in this regard improperly blurred the distinction between armed conflict meeting the required level of intensity and isolated or sporadic acts of violence.

The above analysis shows that the Red Terror facts do not support each of the legal elements of genocide or war crimes as defined in international criminal law. Besides, the Hague District Court’s finding that the conflict during the defined period was sufficient enough to be categorized as a NIAC is not supported by the evidence brought forth in the case. As such, the next section examines whether the facts during the period and the available evidence support the traditional elements of crimes against humanity.

CRIMES AGAINST HUMANITY

Crimes against humanity consist of five core elements: (1) an attack directed against any civilian population; (2) a widespread or systematic attack; (3) a state or organizational policy; (4) knowledge of the attack; and (5) commission of one of the

²⁸Prosecutor v. Eshetu A, paragraph 7.5.1.

²⁹Prosecutor v. Eshetu A, paragraph 7.5.1.

³⁰As stated by the ICTY, “what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities.” (see Prosecutor v. Boskoski and Tarculovski, IT-04-82-T, International Criminal Tribunal for the Former Yugoslavia, paragraph 185).

underlying offenses.³¹ Except for a state or organizational policy, all of these elements are the constitutive elements of crimes against humanity recognized in international tribunals' jurisprudence. In a departure from the other statutes, the Rome Statute explicitly recognizes a State or organizational policy as one element of crimes against humanity.³² The following part of the article examines the extent to which the facts during the Red Terror in Ethiopia fit these elements of crimes against humanity.

An Attack Directed Against a Civilian Population

One of the core contextual elements of crimes against humanity is the requirement that there be an attack against the civilian population. Through case law, this requirement has been interpreted as being comprised of two core concepts: (1) there must be an attack; and (2) the attack must be directed against the civilian population.

The term attack is defined in the Rome Statute as "a course of conduct involving a multiple commission of prohibited acts."³³ The prohibited acts include murder, extermination, enslavement, deportation, sexual slavery, enforced prostitution, forced pregnancy, other sexual violence, enforced disappearance, apartheid, persecution, and other inhumane acts.³⁴ Based on the analysis of the conflict, there can be no doubt that the common practice during the Red Terror, including extrajudicial killings, torture, arbitrary detentions, and inhuman treatment, constitutes an attack within the meaning of the term as defined by both law and practice (De Waal 1991; Haile-Mariam 1999; Tola 1989). During the Red Terror, the Derg's security forces summarily executed thousands of suspected EPRP members and other opposition groups in a government campaign to eliminate the civilian parties (Wiebel 2015; Zewde 2009). Moreover, thousands of men, women, and children were tortured, arbitrarily imprisoned, and subjected to inhuman treatment by the Derg's security forces in a search and destroy campaign against anti-revolutionary elements (Abbink 1995; Zewde 2009).

Similarly, the attacks form a pattern of behavior or a course of conduct. A pattern of behavior or a course of conduct is defined as: "a series or overall flow of events instead of a mere aggregate of random acts" or "campaign or operation carried out against the civilian population".³⁵ The violence during the Red Terror was a highly organized violence carried out by "the Union of Marxist Organizations (Emaledh), the 'revolution defense squads,' the {} urban dwellers' associations, and the security and paramilitary forces" (Tareke 2009:196). As Tareke puts it, "It was premeditated, planned, deliberate and pitiless" (Tareke 2009:194). Supporters or members of the

³¹See Situation in the Republic of Kenya, March 31, 2010, International Criminal Court, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, paragraph 79. Article 5 of the Statute of ICTY requires that the underlying acts of crimes against humanity to be committed in armed conflict. The ICTR's Statute requires the underlying acts to be committed on national, political, ethnic, racial or religious grounds.

³²See Article 7(2) of The Rome Statute of International Criminal Court, July 12, 1998.

³³See Article 7(2)(a) of the Rome Statute.

³⁴See Article 7(1) of the Rome Statute.

³⁵See Situation in the Republic of Kenya, ICC-01/09-19, paragraph 80.

EPRP or other opposing groups were identified using various highly coordinated methods of identification such as search and destroy campaigns, exposure meetings and denunciation, and self-denunciation campaigns (Tareke 2009; Wiebel 2015). This, along with other available evidence, shows that the measures taken against the civilian population during the Red Terror were highly coordinated attacks rather than random acts of violence.

As for the second element, judicial decisions actively make use of the definition of the term “civilian population” in the Additional Protocol I. Article 50 of the Protocol describes a civilian population as made up of persons who are not members of the armed forces.³⁶ Besides, it is now well established in case law that “although [...] combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance.”³⁷

The existing evidence regarding the Red Terror indicates that victims of the campaign were part of a “civilian population,” meeting one of the requirements of crimes against humanity listed above. War crimes can also be committed against a civilian population, but on the condition that the attack on the civilian population has a nexus to an armed conflict (Cullen 2010). As shown above, the conflict during the Red Terror in Ethiopia was violence that did not meet the armed conflict threshold. Thus, there can be no nexus within the meaning of international humanitarian law without an armed conflict.

As an armed conflict is not needed for crimes against humanity, the attacks on the civilian population during the Red Terror can constitute an attack on the civilian population within this core international crime. As noted by Gebru, the Red Terror “exterminated a generation of Ethiopians without regard for class, ethnic, religious or gender distinctions” (Tareke 2008:194). Besides, one could easily take a look at the compositions of victims of Red Terror on the website known as Assimba, a memorial page dedicated to remembering victims of the Red Terror (Assimba 2006). A cursory look at the website indicates that the attack launched by the Derg’s security forces intended to spare no one. Additionally, as stated by the ICTY’s Trial Chamber, “the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.”³⁸ During the Red Terror, the victims were targeted not because they took up arms against the Derg or for being members of an armed force, but because they were suspected of being members of opposition groups or sympathizers for opposition groups (Haile-Mariam 1999; Wiebel 2015; Zewde 2009). Thus, based on victims’ type, the reason they were targeted, and the means and methods employed against them by the Derg, the Red Terror’s victims could easily be classified as a civilian population.

³⁶See Prosecutor v. Germain Katanga, March 7, 2014, International Criminal Court, Judgment according to Article 74 of the Statute, ICC-01/04-01/07, paragraph 1102.

³⁷See Report of the Commission of Experts established according to Security Council Resolution 780, Doc. S/1994/674, paragraph 78.), Prosecutor v. Zoran Kupre{ki} et al., Case No.: IT-95-16-T, Judgement, January 14, 2000, paragraph 548.

³⁸Prosecutor v. Zoran Kupre{ki} et al., Case No.: IT-95-16-T, Judgement, January 14, 2000, paragraph 549.

Widespread or Systematic Attack

For individuals to be responsible for crimes against humanity, the attack against the civilian population must be either widespread or systematic. Because no statute provides the meaning of these terms, it is unclear what constitutes a widespread or systematic attack. However, there is a wealth of case law providing the threshold that must be met for an attack to be regarded as a widespread or systematic attack. The term widespread refers to the scale of the attack, which is a large-scale attack or involves a substantial number of victims.³⁹ The term systematic refers to the organized nature of the attack, excluding isolated and random attacks.

The attacks carried out against Ethiopia's civilian population during the Red Terror were both widespread and systematic. While the number of victims is controversial, estimates range from 5,000–150,000; to 500,000 (Zewde 2009). Society was victimized for a prolonged time, covering several provinces and regions and leaving all Ethiopia affected. As Babile observes, "The red terror was not only an open call to outright carnage, but it was also extensive" (Tola 1989:138). He further notes that "It was unchecked orgy of violence. The Red Terror gave no quarter, it knew no mercy" (Tola 1989:138). Thus, there is no doubt that it was a widespread attack.

The Red Terror was also systematic. As per the interpretation of the term by the ICTR in Akayesu, "an attack is systematic when it is thoroughly organized, following a regular pattern, based on a common policy and involving substantial public or private resources."⁴⁰ No one disputes that the Derg planned, organized, and financed the attacks against the civilian population (Haile-Mariam 1999; Wiebel 2015; Zewde 2009). For instance, the search and destroy campaigns, exposure meetings, and denunciation, and self-denunciation meetings that were taking place throughout the country indicate how the campaign was well-organized and well-coordinated (De Waal 1991; Tola 1989; Wiebel 2015; Zewde 2009). Government organs formed to execute the Red Terror – the security, the underground squads, peasant, workers, and urban dwellers squads and the revolutionary defense squads placed at the disposal of local actors (*kebeles*) – substantiates the claim that the Red Terror was systematic, rather than spontaneous or isolated acts of violence.

The Policy Element of Crimes Against Humanity

As noted earlier, Article 7(2)(a) of the ICC Statute explicitly requires that the attack be committed "according to or in furtherance of a State or organizational policy to commit such attack."⁴¹ Actively promoting or encouraging an attack against the civilian population by a state or organization satisfies this requirement.⁴² The policy element excludes random and unconnected widespread acts of violence from crimes against humanity (Robinson 2014). Thus, opportunistic or spontaneous instances of

³⁹See Situation in the Republic of Kenya, March 31, 2010, International Criminal Court, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, paragraph 95.

⁴⁰Prosecutor v. Akayesu, Judgement, No. ICTR-96-4-T September 2, 1998, paragraph 580.

⁴¹Article 7(2)(a) of the Rome Statute.

⁴²See Article 7(3) of The Elements of Crimes of International Criminal Court, 2011.

violence that are not connected and do not form a behavior pattern may not imply systematic violence. In this sense, the policy element is similar to the requirement that the attack be systematic. While the requirement is not defined clearly, it has been emphasized that formal adoption or orchestration and explicit approval are not required.⁴³

As to the above notion of the policy requirement, there is clear and compelling evidence showing that the violence during the Red Terror was committed according to or in furtherance of a formally approved policy of the Derg. The Red Terror was officially authorized by proclamation 121 of 1977,⁴⁴ supplemented by directives and orders. Moreover, the attacks were “largely inspired and orchestrated by Mengistu and a small group of close ideological advisors” (Abbink 1995:135). They created several structures, such as the *kebele* defense squads, to perpetrate the widespread and systematic attacks on the civilian population. The Derg armed and organized these defense squads and gave them the mandate to use violence (Wiebel 2015). Moreover, the Derg introduced search and destroy campaigns and exposure meetings to counter opposition groups (Wiebel 2015).⁴⁵ These campaigns were also part of the Derg’s strategies to achieve its organizational policy of eliminating opposition groups. Certain events that happened just before and during the Red Terror could also indicate the existence of organizational policy behind the Red Terror. These, for instance, include Mengistu’s theatrical performance of violence, involving a smashing of a bottle filled with a red ink signifying what was to come after that (see YouTube 2016), “the elaborate rhetoric of the state media and political leaders on the ‘necessity’ of the killings and the elimination of opponents ‘to defend the Revolution’” (Abbink 1995:137), the daily report by the media showing bodies of victims who were shot dead, and the public displaying of the bodies of murdered victims lying in the street with a placard saying “I was a counter-revolutionary” (Abbink 1995:137). In general, the Red Terror attacks were highly coordinated and connected attacks carried out in pursuance of the Derg’s organizational policy of eliminating opposition groups.

Underlying Acts

Article 7(1) of the ICC Statute provides the most comprehensive *actus reus*, widely known as underlying acts, of crimes against humanity. The list includes murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution, enforced disappearance of persons, the crime of apartheid and other inhumane acts of a similar character intentionally

⁴³See Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, March 3, 2000, paragraph 204.

⁴⁴See Proclamation No. 129/77, A Proclamation to Establish a National Revolutionary Operations Command.

⁴⁵The Revolution Defense Squads carried out search campaigns, and their main purpose was to identify and destroy opposing group activists, weapons and other materials. Exposure sessions, on the other hand, consisted of “gatherings at which employees and citizens were cajoled or threatened, using elaborate and lengthy performances, into denouncing colleagues and neighbors or into confessing their counter-revolutionary activities.” (Wiebel 2015:11)

causing great suffering, or serious injury to body or mental or physical health.⁴⁶ The scope of conduct covered by Article 7(1) of the ICC Statute is broad. There is a wealth of international case law defining the scope of each *actus reus* and its distinguishing features. However, it is beyond the scope of this article to discuss each underlying act's defining elements.

As noted earlier, the most common crimes committed during the Red Terror were murder, torture, unlawful detentions, and inhuman treatment. These crimes are also listed among the underlying acts of crimes against humanity. Thus, the underlying acts of crimes against humanity could accurately describe acts committed during the Red Terror in Ethiopia.

CONCLUSION

By analyzing the legal characterization of the situation during the Red Terror in Ethiopia, this article aimed to assess whether the violence perpetrated during the Red Terror is best characterized as constituting genocide, war crimes, or crimes against humanity.

This article has shown that the three countries involved in the investigation and prosecution of crimes during the Red Terror approached it in their unique way. The U.S. held perpetrators of the Red Terror accountable for immigration violations. This, however, is quite different from being brought to justice for the actual crimes perpetrated during the Red Terror. In this sense, although the trials in the U.S. are related to crimes committed during the Red Terror, they were not meant to bring the perpetrators to justice for the actual acts they committed during that period.

Ethiopia characterized the situation as genocide and convicted the perpetrators of the crime of genocide. However, this article has shown that the situation cannot be characterized as genocide in international law, as the Genocide Convention does not protect political groups. Therefore, Ethiopia's approach is not compatible with international law. However, this avenue of prosecution does not violate the principle of non-retroactive laws. The 1957 Penal Code of Ethiopia has a broader definition of genocide than the Genocide Convention.

In contrast, the Netherlands held Mr Eshetu Alemu, one of the Derg members, for war crimes. The analysis also shows that both the available evidence and facts of violence committed during the Red Terror do not support the situation's characterization as constituting war crimes. The arguments advanced in this article were based on the inexistence of an armed conflict of sufficient intensity as required by the law. Besides, the attacks cited in the Hague District Court's judgment were sporadic or isolated acts of violence.

In this analysis it has become clear that the factual elements of crimes committed during the Red Terror support their characterization as constituting crimes against humanity. The analysis has shown that the acts of violence committed during this period fit the contextual element of crimes against humanity. First, the situation meets the requirement that there must be an attack directed against the civilian population. As shown, there can be no doubt that the common practice during the Red

⁴⁶Article 7(1) of the Rome Statute.

Terror, including extrajudicial killings, torture, arbitrary detentions, and inhuman treatment, constitutes an attack within the meaning of the term as defined by both law and practice. It also shows that victims of the Red Terror campaign were part of a civilian population. Second, the attacks carried out against Ethiopia's civilian population during the Red Terror were widespread and systematic. Third, the violence during the Red Terror was committed according to or in furtherance of a formally approved policy of the Derg, meeting the policy element of crimes against humanity. Finally, underlying acts of crimes against humanity, such as murder, imprisonment, torture, severe deprivation of physical liberty in violation of international law's fundamental rules, and other inhumane acts, could correctly describe acts committed during the Red Terror in Ethiopia.

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TRANSLATED ABSTRACTS

Abstracto

Varios países han investigado y enjuiciado a los autores de crímenes que se cometieron durante el Terror Rojo en Etiopía. Al hacer que los perpetradores rindan cuentas, cada país adoptó un enfoque único, lo que resultó en una variación en la caracterización legal de la situación. Los cargos contra los perpetradores del Terror Rojo en los EE. UU. Se basaron en violaciones de las leyes de inmigración, mientras que los perpetradores en Etiopía fueron acusados y condenados por el crimen de genocidio. En cambio, un sospechoso, que ya había sido condenado por genocidio por el Tribunal Superior de Etiopía, ha sido condenado recientemente por crímenes de guerra por el Tribunal de Distrito de La Haya, Países Bajos. El artículo investiga la cuestión de si los crímenes cometidos durante el Terror Rojo constituyen crímenes de guerra, genocidio o crímenes de lesa humanidad. En consecuencia, este análisis muestra que si bien los países han utilizado el genocidio o los crímenes de guerra al enjuiciar los crímenes perpetrados durante el terror rojo, lo que mejor se ajusta a la caracterización jurídica de la situación serían los crímenes de lesa humanidad.

Palabras clave Terror rojo; el Derg; genocidio; crímenes de guerra; crímenes contra la humanidad

Abstrait

Plusieurs pays ont enquêté et poursuivi les auteurs de crimes commis pendant la Terreur rouge en Éthiopie. Pour amener les auteurs à rendre des comptes, chaque pays a adopté une approche unique, entraînant une variation dans la qualification juridique de la situation. Les accusations portées contre les auteurs de la Terreur rouge aux États-Unis étaient fondées sur des violations des lois sur l'immigration, tandis que les auteurs en Éthiopie étaient inculpés et reconnus coupables du crime de génocide. En revanche, un suspect, qui avait déjà été condamné pour génocide par la Haute Cour éthiopienne, a récemment été condamné pour crimes de guerre par le tribunal de district de La Haye, aux Pays-Bas. L'article examine si les crimes de Terreur rouge constituent des crimes de guerre, un génocide ou des crimes contre l'humanité. En conséquence, cette analyse montre que si les pays ont utilisé des crimes de génocide ou de guerre pour poursuivre des crimes perpétrés pendant la terreur rouge, le mieux adapté à la qualification juridique de la situation serait les crimes contre l'humanité.

Mots-clés Terreur rouge; le Derg; génocide; crimes de guerre; crimes contre l'humanité

抽象

多个国家已经调查并起诉了在埃塞俄比亚红色恐怖期间犯下的罪行的肇事者。每个国家在追究肇事者责任时，都采用了独特的方法，导致局势的法律特征有所不同。在美国，对红色恐怖袭击者的指控是基于违反移民法的，而在埃塞俄比亚的肇事者则被指控犯有种族灭绝罪。相反，已经由埃塞俄比亚高等法院判定犯有种族灭绝罪的一名嫌疑人最近被荷兰海牙地方法院判定犯有战争罪。本文调查了红色恐怖罪行是否构成战争罪，种族灭绝罪或危害人类罪。因此，这一分析表明，尽管各国在起诉红色恐怖期间所犯的罪行时曾犯有灭绝种族罪或战争罪，但最符合该国法律特征的是反人类罪。

关键词： 红色恐怖；Derg；种族灭绝战争罪行；危害人类罪。

ملخص

قامت دول متعددة بالتحقيق مع مرتكبي الجرائم التي ارتكبت خلال الإرهاب الأحمر في إثيوبيا ومحكمتهم. عندهم محاسبة الجناة، اعتمدت كل دولة نهجاً فريداً أدى إلى نتائج في التوصيف القانوني للوحدات. استندت التهم الموجهة لمرتكبي الإرهاب الأحمر في الولايات المتحدة إلى انتهاكات قوانين الهجرة، وبينما تم اتهام الجناة في إثيوبيا وإدانتهم بارتكاب جريمة الإبادة الجماعية. في المقابل، أدين أحد المشتبه بهم، الذي سبق إدانته بارتكاب جريمة الإبادة الجماعية من قبل المحكمة الإثيوبية العليا، بارتكاب جرائم حرب من قبل محكمة مقاطعة لاهاي بهولندا. يبحث المقال في مسألة ما إذا كانت الجرائم التي ارتكبت خلال الإرهاب الأحمر تشكل جرائم حرب أو إبادة جماعية أو جرائم ضد الإنسانية. وفقاً لذلك، يظن هذا التحليل أنه في حين أن الدول قد استخدمت الإبادة الجماعية أو جرائم الحرب عند مقاضاة الجرائم التي ارتكبت خلال الإرهاب الأحمر، فإن أفضل ما يتناسب مع التوصيف القانوني للوحدات هو الجرائم ضد الإنسانية.

الكلمات المفتاحية: الإرهاب الأحمر، الإبادة الجماعية، جرائم حرب، جرائم ضد الإنسانية

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