

## Notes & Comments

### THE PROSECUTION OF WAR CRIMES AND RESPECT FOR HUMAN RIGHTS: ETHIOPIA'S BALANCING ACT

The Office of the Special Prosecutor has been mandated to create a historical record of the abuses of the Mengistu regime and to bring those criminally responsible for human rights violations and/or corruption to justice.

The ambitious nature of this task has been clear from the beginning, given the scope and legal complexities involved. We must balance many factors: our international and domestic legal obligation to investigate and bring to justice gross human rights violators, our international and domestic legal obligations to respect due process, and our role in the construction of a society based upon the rule of law.

There is no easy or apparent magic balance of these factors. We must consider our legal obligations, our moral obligations, the future of our country . . . [1]

#### I. INTRODUCTION

Ethiopia is at an important crossroads. The current government has an opportunity to do something no other new government has had the chance to do: prosecute hundreds of people for years of brutal human rights violations, including murder, torture, disappearances, famine manipulation, and forced resettlement. [2] The world has seen trials for crimes against humanity and war crimes, most notably at Nuremberg and Tokyo following World War II, but never have there been trials on this scale or in the same context. One particularly remarkable aspect of these trials is the government's commitment to holding them in the face of seemingly insurmountable domestic challenges.

The Transitional Government of Ethiopia (TGE) came to power in May 1991 following seventeen years of terrifying and destructive rule by Mengistu Haile Mariam. At that time, the TGE arrested over 2,000 former officials, [3] but it did not have the necessary financial or legal resources to investigate and prosecute these individuals. [4] In light of the other challenges facing the young government, such as creating a new governmental structure, a constitution, and a new judiciary, the TGE could have chosen to deal with these human rights violators in any number of ways that would have been less taxing. The new leaders, however, chose to punish through the law and asked for international assistance in carrying out the trials according to international standards. [5] These trials are as much a part of the country's healing process, however, as they are about establishing the rule of law and fulfilling Ethiopia's legal obligation to prosecute the offenders. [6]

Despite the TGE's commitment to using international standards to govern both the trial procedures and the laying of charges, [7] the government of Ethiopia may have already breached important provisions of the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"), [8] which Ethiopia ratified on June 11, 1993. The main areas of concern are detention without charge or trial, the right to counsel, and the right to prepare an adequate defense. There remain in detention roughly 1200 uncharged former officials, and the TGE only established the Public Defender's Office in January 1994. [9] The Special Prosecutor's Office (SPO), established in August 1992 to prosecute these cases, freely admits the problem concerning detention, [10] but has remained committed to holding the trials on its own schedule. There are other potential problems in trying to meet the standards of the ICCPR, such as the right to a fair trial and to have a competent and independent judiciary, that may arise after the trials are well underway.

This Comment raises the question of the proper balance between respecting the human rights of individuals accused of crimes against humanity and a country's moral and legal obligation to prosecute them. These

trials will undoubtedly be a source of healing for thousands of Ethiopians who were affected by the terror of the Mengistu regime,<sup>[11]</sup> but at what price? Given that the detainees are entitled to have their human rights respected, regardless of their crimes, a question arises with respect to which obligation is more important-- the obligation to respect human rights or to prosecute? In addition, are there any exceptions to be made for a government that is struggling to create itself anew and is understandably slow in developing the structures and resources to handle such a monumental task?

This Comment will examine the recent history of Ethiopia, focusing mainly on the abuses of the Mengistu regime; the transition to the TGE; and the creation, mandate, jurisdiction, and current work of the SPO. The Comment then will discuss briefly the debate over the use of international law or domestic law and the duty to prosecute. Finally, it will focus on the current and potential human rights concerns.

## II. HISTORY

### A. *The Revolution*

Ethiopia is a diverse country, consisting of roughly eighty-two ethnic groups with numerous languages and local dialects.<sup>[12]</sup> Ethiopia was never colonized by the European powers, and despite its diversity, it was controlled by one man for forty-four years.<sup>[13]</sup> Haile Selassie was crowned in 1930 as the ruler and Emperor of Ethiopia, and he ruled until he was deposed in a bloodless revolution in 1974.<sup>[14]</sup> Haile Selassie created a modern state consisting of a structured, centralized government, local governments, and a judicial system, all of which were governed by codified laws and a constitution.<sup>[15]</sup> Though highly successful in many aspects, his rule was not without many challenges and internal conflicts. Throughout his tenure, revolts and moves for independence arose in many sections of the country, in large part due to ethnic differences.<sup>[16]</sup> Toward the end of his rule, there also came to be a great deal of unrest among the educated in the capital city of Addis Ababa and abroad, in part, as people became frustrated with Haile Selassie's lack of attention to economic development and his refusal to end the feudal system.<sup>[17]</sup> This economic system left the vast majority of Ethiopians in poverty, while a small group of wealthy landowners controlled the country economically and politically.<sup>[18]</sup>

Beginning in early 1974, as the government continued to be unresponsive to the economic and political needs of its people, several different groups, including students, Moslems, labor unions, and military units, staged widespread protests.<sup>[19]</sup> One of the loudest voices demanding attention was that of the military, and when the government seemed unable to respond to the soldiers' economic demands, the military set up a 108-person body called the Coordinating Committee of the Armed Forces.<sup>[20]</sup> This body, also known as the Dergue,<sup>[21]</sup> while initially an apolitical body, soon began to make and enforce government policy.<sup>[22]</sup> The political aspect of its work came about as a result of pressure from two Marxist student groups,<sup>[23]</sup> which advocated political and economic reform, and which saw the Dergue as the only group with influence over the government.<sup>[24]</sup> Slowly, the Dergue adopted a form of socialism that was intended to honor fairness and justice and which would provide for positive changes in the political and economic systems in Ethiopia.<sup>[25]</sup> At the same time, the intellectual groups convinced the Dergue that the Emperor, as a vestige of the old order, had to be removed.<sup>[26]</sup> The Dergue began arresting government ministers and other officials, and on September 12, 1974, Haile Selassie was peacefully arrested and taken to prison.<sup>[27]</sup>

### B. *Mengistu's Reign*

The "revolution" had a slogan which said in part, "[w]ithout blood, without blood," and through the deposing of Haile Selassie the Dergue honored this slogan.<sup>[28]</sup> The jailing of the Emperor, however, proved to be just the beginning of the revolution, for then there developed a power struggle within the Dergue. In the resolution of this struggle, the goal expressed in the phrase "without blood" was lost.

The first leader of the Dergue following the overthrow of Haile Selassie was General Amman Andom, and he was soon followed by General Teferi Banti.[29] The control exerted by both of these leaders was severely undermined by a man named Mengistu Haile Mariam, who, as a powerful leader in the Dergue, ordered Amman's arrest and later Teferi's execution.[30] In between these two acts, in November 1974, Mengistu initiated action which culminated in the execution of the sixty former government officials who had been arrested earlier in the year.[31] The Dergue told the public these people were "enemies of the Revolution," and thus began the use of lies and brutal force that came to symbolize the rule of Mengistu.[32]

Once Mengistu solidified power in February 1977, following the murder of Teferi, he moved to quell the civilian groups who opposed the Dergue. Following the revolution, two student groups had emerged, and while both espoused Marxism, only one expressed a willingness to work with the Dergue. The All-Ethiopian Socialist Movement (MEISON) supported and worked with the Dergue, and the Ethiopian Peoples' Revolutionary Party (EPRP), which opposed the idea of a revolution "imposed from above," became the Dergue's enemy.[33] The EPRP had begun killing members of the Dergue in mid-1976 in response to a crackdown on its membership, and Mengistu began answering these crimes with assassinations of his own in a campaign called the Red Terror.[34]

To assist in the government's murderous campaign, Mengistu issued arms to members of the Urban Dweller's Associations, also known as *kebeles*, and gave them the freedom to kill anyone suspected of being an EPRP member.[35] The ensuing Red Terror lasted two years, during which thousands of people, beginning with EPRP members, were arrested, disappeared, tortured, and murdered, their bodies left in the street as a warning to others. Sometimes families of the disappeared and murdered had to pay the government for the bullet used to kill their family member, and only by doing this could they recover the body.[36] Amnesty International estimates that in the first four months of the Red Terror, in the capital of Addis Ababa alone, the government killed at least 2500 young, educated people.[37]

In the second phase of the Red Terror, having crushed the EPRP in Addis Ababa, Mengistu turned on MEISON and those members of the *kebeles* whose loyalty, he suspected, lay more with MEISON than with the Dergue. The pattern was much the same as before, with an estimated 3000 to 4000 people killed from August to October 1977 in Addis Ababa.[38] The third phase, lasting from December 1977 to February 1978, saw roughly 5000 people killed[39] and an estimated 30,000 people jailed in *kebele* prisons, again, in Addis Ababa alone.[40] The Red Terror also stretched outside the capital into the provinces, where the number of people killed, mostly merchants and uneducated peasants, roughly equaled the more than 10,000 people killed in Addis Ababa.[41]

In addition to the methodical destruction of the Red Terror, the Mengistu regime engaged in many other tactics to terrorize and destroy the rural insurgencies that continued to threaten his control. Throughout his rule, fighting occurred in several provinces, including a short war with Somalia over the southwest part of the country called the Ogaden. The tactics used during this fighting 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." [42] An example of this kind of action is the day-long market raid in the province of Tigray in 1988, in which government forces killed 2500 market-goers.[43] While fighter planes bombarded the village, helicopters circled the perimeter of the town, preventing anyone from escaping.[44] In Eritrea, the government used phosphorous and cluster bombs, and in the Ogaden, the government used phosphorus and napalm to bomb villages, herds of animals, and refugees.[45] In the Ogaden, an estimated 25,000 civilians were killed in 1980 following the defeat of the Somali army,[46] and in Eritrea, between 70,000 and 80,000 combatants and civilians were killed between 1978 and 1980, when that war was not yet at its worst.[47]

The forced relocation policy, while publicly billed as a famine relief operation,[48] was in fact an attempt to

separate the insurgencies from their bases of support and supplies.<sup>[49]</sup> Roughly 600,000 peasants were moved from the northern part of the country to the south between 1984 and 1986, and the TGE estimates that 100,000 people died in this operation.<sup>[50]</sup> This relocation policy, and the government's manipulation of relief aid, had a profound effect on the drought in the early 1980s, turning it into a severe famine. By hampering migration and trade, and by channeling the relief aid coming into the country only to the military and to government-secured areas, the Mengistu government made the famine "come earlier, strike harder, and extend further than would otherwise have been the case."<sup>[51]</sup> Over half of the 400,000 deaths during the famine are attributable to these governmental policies.<sup>[52]</sup>

Despite this sheer brutality and terror, the famine and dwindling financial and military support from the Soviet Union allowed several long-standing liberation movements to gain strength.<sup>[53]</sup> The insurgencies in Tigray and Eritrea in the north were the strongest movements, and in 1989 the Tigray movement joined together with several smaller groups to form the Ethiopian People's Revolutionary Democratic Front (EPRDF).<sup>[54]</sup> The EPRDF and the Eritrean People's Liberation Front (EPLF) launched new offensives in February 1991,<sup>[55]</sup> and after three months of fighting, they overpowered the army, which had become unstable and frustrated with the brutality of Mengistu.<sup>[56]</sup> On May 21, 1991, the EPRDF entered the capital city and took control, close on the heels of Mengistu, who had fled to Zimbabwe earlier that day.<sup>[57]</sup>

### III. THE TRANSITIONAL GOVERNMENT OF ETHIOPIA

#### A. *The Transitional Government*

In July, the EPRDF called a National Conference made up of representatives of a majority of the different political and ethnic groups.<sup>[58]</sup> That conference produced the Transitional Period Charter of Ethiopia ("Charter") which acted as an interim constitution until a government was elected and a permanent constitution drafted and adopted.<sup>[59]</sup> In an attempt perhaps to show the world that this government intended to be different, the first article of the Charter states, "[b]ased on the Universal Declaration of Human Rights of the United Nations . . . individual human rights shall be respected fully, and without any limitation whatsoever."<sup>[60]</sup> The Charter goes on to mention specifically the "freedom of conscience, expression, association and peaceable assembly" and "[t]he 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."<sup>[61]</sup> These rights are particularly important as they are rights Ethiopians have never enjoyed under previous governments.<sup>[62]</sup>

The governing body created in the Charter was the Council of Representatives, which, with the Head of State, Prime Minister, and a smaller Council of Ministers, held exclusive legislative and executive authority during the interim period.<sup>[63]</sup> Elections for a constituent assembly occurred in June 1994, and that body adopted a new constitution in December 1994.<sup>[64]</sup> The adoption of the new constitution does not appear to have affected the progress of or the law directing the trials.

#### B. *The Special Prosecutor's Office*

As mentioned previously, when the EPRDF took control of Addis Ababa in May 1991, it detained roughly 2000 former government officials, including *kebele* leaders and members, on the suspicion that they authorized or were in some way involved in the brutality of the Mengistu government.<sup>[65]</sup> In August 1992, the TGE finally began to put a mechanism in place for handling the detainees, all of whom had yet to be charged. The Council of Representatives adopted Proclamation 22/1992, which created the SPO and gave it the following mandate:

1. To establish for public knowledge and for posterity a historical record of the abuses of the Mengistu regime.

2. To bring those criminally responsible for human rights violations and/or corruption to justice.[66]

In September 1992, the TGE appointed Girma Wakjira, an experienced and respected prosecutor, to head the SPO, but another four months elapsed before enough staff had been hired for the office to function.[67] The SPO created four teams, each of which focuses on gathering evidence relevant to a particular abuse committed by the Mengistu government: the Red Terror, forced relocation, war crimes, and the manipulation of famine relief.[68] There is a fifth team which has been gathering evidence on the structure of the government and the security and military forces in an attempt to see how this structure was used to carry out the human rights abuses.[69] Two additional groups provide support to all of these areas; one support group is responsible for obtaining the government documents relevant to the investigation, and the other group is charged with creating a computer system that will catalogue and make easily available all the information collected by the SPO.[70]

The SPO has done an immense amount of work in collecting and cataloguing evidence. The Mengistu regime was meticulous about official orders and paperwork, and for many abuses there is clear documentation.[71] By the opening of the trials in December 1994, the SPO had gathered 309,215 pages of relevant government documents,[72] many with clear signatures of high ranking officials.[73] A U.S. attorney who visited Ethiopia later wrote:

Not since Nuremberg has such documentary evidence been assembled suggesting the degree of complicity on the part of senior government officials. In many instances, there were verbatim transcripts made of critical meetings. There are over 200 volumes of these transcripts as well as audio tapes of many of these meetings.[74]

In addition to this kind of documentation, forensic teams have been searching for and exhuming dozens of mass graves which contain the bodies of murdered civilians.[75] The SPO stated in February 1994 that it has "tens [sic] times more evidence than needed to successfully prosecute several of the detained and many of the exiles for serious criminal offenses." [76]

### *C. Habeas Corpus Proceedings*

The process of collecting and processing the evidence is one reason the trials have been delayed, but another reason for delay was the hundreds of habeas corpus petitions filed with the courts soon after the SPO became operational.[77] Article 9(4) of the ICCPR requires that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." [78] While the exercise of this right had been much delayed, once begun, this process presented an opportunity for the TGE and the SPO to demonstrate their commitment to the rule of law.

When presented with a habeas corpus petition, the SPO examined the evidence relating to that individual it had gathered to that point. If the evidence proved insufficient, the SPO released the detainee on bail or unconditionally. If the SPO wanted to continue the detention, it petitioned a lower court for a remand order.[79] According to the Criminal Procedure Code, a remand of the detainee into custody of up to fourteen days is permitted while the authorities gather more evidence.[80] Once the SPO had that remand, the SPO presented it to the Central High Court hearing the habeas corpus petition as evidence of proper detention, and the High Court was not allowed to look into propriety of the remand order.[81] By the time the fourteen days had passed, the habeas corpus petition had been dismissed.[82] If the individual filed another habeas corpus petition, the SPO could always request an additional remand.[83]

Judges of the High Court criticized this process and expressed concern that the SPO obtained the initial

remand orders without sufficient evidence or without the detainee being present in the courtroom.<sup>[84]</sup> The lower courts apparently granted these initial remand orders "as a matter of course," and human rights groups are concerned that extensions on the remand orders might have been given without the SPO having met its burden of producing enough evidence to justify continued detention.<sup>[85]</sup>

Despite this questionable process, the SPO, by its own decision, released 900 detainees on bail, and the High Court ordered an additional 130 people released on bail and at least fifty-four others released unconditionally.<sup>[86]</sup> Over 1000 people, however, were still detained without charge. The High Court cut off their avenues of appeal for release in 1993 by ruling that the SPO was not required to bring charges within the requisite fourteen days.<sup>[87]</sup>

#### *D. The Charges and the Opening of the Trials*

In late October 1994, the SPO finally began laying charges against some of the roughly 1315 detainees.<sup>[88]</sup> The SPO filed charges against Mengistu and seventy-two other top former officials, alleging 269 acts of genocide and other human rights violations, including "the killing of 1,823 identified victims including former Emperor Haile Selassie, bodily harm to 99 identified victims and enforced disappearances of 194 identified victims."<sup>[89]</sup> These officials were charged under Article 281 of the Ethiopian Penal Code,<sup>[90]</sup> which incorporates into Ethiopian law the international crimes of genocide and crimes against humanity.<sup>[91]</sup> These individuals, who include policymakers and senior government and military officials, constitute the first group of detainees to be charged. The other two groups defined by the SPO are the military and civilian field commanders who carried out some orders as well as passed orders down, and the individuals who actually carried out many of the brutal and deadly orders.<sup>[92]</sup> The SPO grouped the defendants "according to their level of responsibility and the sphere of activity in which they were primarily engaged."<sup>[93]</sup> The SPO has not yet announced what charges will be brought against the other defendants, but it has said that at least half of them will be charged with first-degree homicide.<sup>[94]</sup>

On December 13, 1994, the trial opened with the court reading aloud the 269-page document of charges against these sixty-six living defendants, twenty-one of whom are being tried in absentia, and all of whom could face the death penalty if convicted.<sup>[95]</sup> The court read aloud the names of the murder victims, one by one; the list included names of school children as well as Emperor Haile Selassie, his ranking government officials who were killed shortly after the Dergue came to power, the patriarch of the Ethiopian Orthodox Church, and many others.<sup>[96]</sup> Following the full recitation of the charges, which lasted several days, the court granted a defense motion to adjourn the trials for three months in order to give defense attorneys time to study the charges.<sup>[97]</sup>

The trial resumed on March 7, 1995, at which time the defense attorneys presented their objections to the December 13 charges.<sup>[98]</sup> On March 16, the trial again adjourned for two months in order to allow the prosecutor to prepare his rebuttal to defense objections.<sup>[99]</sup> The trial began again on May 23, 1995, and the prosecution presented its arguments before the court adjourned for a third time.<sup>[100]</sup> The court reconvened on October 10, 1995, and denied two important defense motions.<sup>[101]</sup> One motion challenged the TGE's ability to bring the charges, and the other requested the cases be heard by an international tribunal.<sup>[102]</sup> The court did require the prosecution to amend the charges to make more specific the charges of abuse of power and unlawful detention.<sup>[103]</sup> The court adjourned until November 1995 to give the prosecution time to make these changes.<sup>[104]</sup>

Three of the defendants--Mengistu, former Prime Minister Fikre Selassie Wogdereyes, and former Second Lieutenant Tesseam Belay--have publicly denied any wrongdoing. From his home in Zimbabwe, Mengistu said, "We were not perpetuating the Red Terror in our country . . . . It was not the Dergue, not the Workers Party, not my government. We were bogged down defending our territory, trying to keep our country united."<sup>[105]</sup> In court on the third day of the trial, former Prime Minister Fikre Selassie Wogdereyes said,

"We stepped in to save the country . . . . We did not conspire, we were welcomed," and "Everything was done according to the law and the will of the people."<sup>[106]</sup> Former Second Lieutenant Tesseam Belay, also in detention, stated, "Considering the situation at the time and to defend the socialist revolution to which the Dergue was committed, there was no alternative but to eliminate our opponents."<sup>[107]</sup>

#### IV. THE USE OF INTERNATIONAL AND DOMESTIC LAW

##### A. *Duty to Prosecute*

A threshold issue in the discussion of the use of international and domestic law is the "duty", as the Ethiopians deem it, of the TGE to prosecute the detainees.<sup>[108]</sup> This duty arises from treaties, such as the Genocide Convention and the Geneva Conventions, and various U.N. resolutions.<sup>[109]</sup> One international law publicist has said there exists a "general duty to investigate allegations of torture, extra-legal killings, and forced disappearances, and . . . to prosecute those who are responsible. A state's complete failure to punish repeated or notorious instances of these offenses violates its obligations under customary international law."<sup>[110]</sup>

Article IV of the Genocide Convention states that, "[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."<sup>[111]</sup> Article VI states that these persons are to be "tried by a competent tribunal of the State in the territory of which the act was committed," or by an international tribunal.<sup>[112]</sup> Through these terms, the Genocide Convention delineates a clear obligation to prosecute perpetrators of genocide within the victimized country.

The U.N. resolutions most on point in requiring prosecution of war crimes are General Assembly Resolutions 2840 (XXVI) and 3074 (XXVIII). Resolution 2840 "[u]rges all States to implement the relevant resolutions of the General Assembly and to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes . . . ."<sup>[113]</sup> Taking a stronger stance, Resolution 3074 reads, "[w]ar crimes and crimes against humanity, whenever or wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."<sup>[114]</sup> Resolution 3074 further states, "[e]very State has the right to try its own nationals for war crimes or crimes against humanity."<sup>[115]</sup> Similar to the Genocide Convention, U.N. Resolutions 2840 and 3074 describe an explicit duty for all countries, with special permission given to the state of the offenders, to prosecute war crimes and crimes against humanity.

The four Geneva Conventions of 1949 echo this duty to prosecute perpetrators of crimes against humanity. The applicable articles contained in the four Conventions declare that each party "shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts."<sup>[116]</sup> This language implies universal jurisdiction for the prosecution of war crimes, placing the same obligation to prosecute on the country in which the crimes took place as on other countries.

##### B. *Domestic or International Law?*

Convinced of its duty to prosecute the offenders, Ethiopia then faced the question of whether domestic or international law should apply as a basis for the charges. Under the Penal Code of the Empire of Ethiopia of 1957, most of the detainees could be charged with common crimes such as homicide, wilful injury, assault, coercion, illegal restraints, abuse of power, use of improper methods, and conspiracy.<sup>[117]</sup> The SPO indicated, however, that it intended to apply only "those rules of international humanitarian law which are beyond any doubt part of customary law."<sup>[118]</sup> Ethiopia's Penal Code incorporates rules of customary international law<sup>[119]</sup> in the form of provisions pertaining to genocide, crimes against humanity, and the

grave breaches of the Geneva Conventions.<sup>[120]</sup> Ethiopia, therefore, had the choice of using international law as incorporated into its domestic law or as an independent basis for charges.

While the choice of law may appear irrelevant, the use of the domestic code to lay charges of genocide and war crimes would provide an advantage from the SPO's point of view. The provisions of Article 281 of the Penal Code, which concern genocide and crimes against humanity, are drawn largely from the Genocide Convention. As defined in the Genocide Convention, genocide consists of acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ."<sup>[121]</sup> As incorporated into the Ethiopian Penal Code, however, political groups are added to that list, and thus the scope of targeted groups is widely expanded. This distinction is especially important since many of Mengistu's actions were directed at political groups such as the EPRP, MEISON, and the several insurgent movements in the country. Using the domestic law will allow the SPO to cast a more inclusive net, and the courts will not be faced with determining if the targeted group falls outside the narrower requirements of the Genocide Convention.<sup>[122]</sup>

The use of international law as an independent basis for charges of war crimes poses a different problem. The Charter of the International Tribunal governing the Nuremberg trials defines war crimes to include, "murder, ill-treatment or deportation . . . of civilian population . . . murder or ill-treatment of prisoners of war . . . killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."<sup>[123]</sup> Many of the Ethiopian detainees could be charged with these offenses, but because these offenses took place in an internal conflict, as opposed to an international conflict, this provision of the Tribunal is inapplicable.<sup>[124]</sup> Given this limitation, the only way to charge the detainees with war crimes is to charge them under the domestic code, which does not require the conflict to be international in scope.<sup>[125]</sup>

Whether the conflict is international or domestic is not an issue in charging individuals with crimes against humanity under independently applied international law. Independent international law defines crimes against humanity in Article 3 of the four Geneva Conventions, and the language specifically states the provisions are applicable "[i]n the case of armed conflict not of an international character."<sup>[126]</sup> As incorporated into the Charter for the International Military Tribunal, crimes against humanity were required to be connected with either crimes against peace or war crimes.<sup>[127]</sup> This requirement, however, has since been dropped in many instances, including in the statute of the International Tribunal, which will govern the trials resulting from the war in the former Yugoslavia.<sup>[128]</sup>

An additional reason the SPO may want to lay charges under the Penal Code is to be able to use the death penalty. Articles 281 and 282 of the Penal Code provide for the use of the death penalty for all three categories of international crimes, as well as for first-degree homicide.<sup>[129]</sup> While there is not a clear consensus in the international community on the use of the death penalty, it is noteworthy that the International Tribunal created by the United Nations to try similar cases arising from the war in the former Yugoslavia is not permitted to issue a sentence of death.<sup>[130]</sup> The potential use of the death penalty in Ethiopia has concerned the international community, and its use may inhibit the extradition of absentee defendants.<sup>[131]</sup>

From the charges initially laid against Mengistu and seventy-two of his top officials, the SPO appears to have settled the debate and chosen to charge the detainees under the Penal Code, thus allowing the possibility of death sentences.<sup>[132]</sup>

## V. CURRENT HUMAN RIGHTS CONCERNS

In addition to the international debate over what law to apply in laying the charges, there has been a continuing concern on the part of the international community that the trials will not, or cannot, be held in

conformance with international procedural safeguards. As a party to the ICCPR, Ethiopia is obligated to honor the provisions of the Covenant, regardless of the domestic procedural code used.<sup>[133]</sup> Ethiopia's handling of these cases may have already resulted in several violations of the ICCPR, and there is the potential for even more violations once the trials are fully underway. The most pressing concerns at this point are the prolonged detention without charge or trial, the delay of trial, and the lack of resources for defense preparation. Human rights issues that may arise at trial are the use of the death penalty, trials *in absentia*, the right to a fair trial, and the right to a competent and independent judiciary.

The international community is concerned with possible violations of Articles 9 and 14 of the ICCPR. Article 9 addresses the right to "liberty and security of person"<sup>[134]</sup> and actions, such as arrest and detention, which might violate that liberty. Article 14 is concerned with a person's rights at trial. Because Ethiopia did not ratify the ICCPR until June 11, 1993, however, the TGE was under no obligation to honor it until then. In considering acts that would have been violations of the ICCPR had they not occurred before ratification, the U.N. Human Rights Committee is able to consider only those violations that "*continued* or occurred" after the Covenant's entry into force for that country.<sup>[135]</sup> In the case of Ethiopia, this means that the only acts to be considered as possible violations of the ICCPR are those that "continued or occurred" after June 11, 1993. All of the potential violations discussed in this section, with the possible exception of detention without charge and the clear exception of habeas corpus proceedings for those detained in 1991, could be considered "continuing" in that the situations arose when the covenant was not in force in Ethiopia, and the situations continued after June 11, 1993.

#### A. *Detention Without Charge*

One of the main criticisms of the TGE in this process has been the long detention of the suspects without charge or trial. Articles 9 and 14 address different aspects of this problem. Article 9(2) states, "[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."<sup>[136]</sup> The Ethiopian detainees were not afforded the right to be promptly informed of the charges against them,<sup>[137]</sup> perhaps because no government existed to charge them and no one knew what charges to bring. It is unclear from the case law whether the fact that most of the detainees remain uncharged constitutes a continuing violation. In *Carballal v. Uruguay*, the U.N. Human Rights Committee found a continuing violation when the prisoner was arrested before the ICCPR came into force in Uruguay, was never charged, and was not released until after the Covenant entered into force.<sup>[138]</sup> In three other cases, however, in which the detention without charge crossed over the date of the Covenant's entry into force, the Committee failed to mention a violation of Article 9(2).<sup>[139]</sup> If in these three cases, the Committee simply failed to mention this particular violation, and if it could be considered a continuing violation, as suggested by several human rights groups,<sup>[140]</sup> then clearly the TGE has violated and continues to violate this right for most of the detainees.

#### B. *Right to a Hearing and Habeas Corpus*

Two additional provisions of Article 9 that should cause the TGE concern are sections 3 and 4. Article 9(3) states, "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."<sup>[141]</sup> This portion of Article 9 has two distinct provisions: being brought promptly before a judge and trial within a reasonable time or release. Article 9(4), as quoted above, is a guarantee of the availability of habeas corpus.<sup>[142]</sup>

The habeas corpus proceedings, however irregular, may have legitimized the detention of the prisoners under the Ethiopian Penal Code, satisfied the first part of Article 9(3), and satisfied the habeas corpus requirement of Article 9(4). It is likely, however, that anyone arrested after the Supreme Court ruling barring any challenge to the detentions will be held in violation of these provisions. In *Carballal v.*

Uruguay, the U.N. Human Rights Committee found a violation of the first part of Article 9(3) when the petitioner had not been brought before a judge until four months after being detained and forty-four days after the Covenant came into force for Uruguay.<sup>[143]</sup> Much more time than this has passed since the Supreme Court ruling, so clearly anyone arrested after that ruling and held without an opportunity to appear before a judge or to utilize the habeas corpus proceedings is being held in violation of part one of Article 9(3) and Article 9(4).<sup>[144]</sup>

### C. *Trial within a Reasonable Time or Release*

Perhaps a more pressing issue is the provision of Article 9(3) which requires a trial within a "reasonable time" or release. In analyzing this provision, it is helpful to look to the decisions of the European Court of Human Rights ("European Court") that interpret similar language found in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").<sup>[145]</sup> To determine whether a particular detention violates Article 5(3) of the European Convention, the court asks two questions: What is the justification for the detention and its continuation, and is the detention reasonable?<sup>[146]</sup> The European Court has held that the length of detention should be measured from the point detention begins to the point at which judgment is rendered.<sup>[147]</sup> Whether that length is "reasonable" must be examined "in each case according to its special features."<sup>[148]</sup> Courts must determine whether, given the circumstances of the case, the length of detention has, at some stage, exceeded a reasonable limit. That is to say, courts must decide whether, given the circumstances of the case, the length of detention has imposed a greater sacrifice than could reasonably be expected of a person presumed to be innocent.<sup>[149]</sup>

The factors examined in making the determination that a detention is unreasonably long are different from those used in determining whether the trial has occurred within a "reasonable time."<sup>[150]</sup> Continued detention requires an independent justification and "an accused person *in detention* is entitled to have his case given priority and conducted with particular expedition . . ."<sup>[151]</sup> A long delay in trial may be justified, but detention until trial in the same case may become unreasonable at some point, either due to lack of justification or because the government has not given the case its due priority. Some of the justifications a government may offer for continued detention are danger of the defendant's flight, risk of further offense, suppression of evidence, and suborning of witnesses.<sup>[152]</sup>

At some point, the TGE could have asserted all of these as bases for the continued detention of the prisoners, but the danger of flight was perhaps the most relevant. The European Court held that "when the only remaining reasons for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance."<sup>[153]</sup> One such assurance would be the posting of bail, which the TGE has allowed for only some of the accused. According to the European Court's decisions, if bail for the remaining detainees would assure their presence at trial, the TGE is obligated to release them because "the detention [would have lost] its reasonable, and thus its lawful character . . ."<sup>[154]</sup>

Article 5(3), however, does not guarantee a right to release on bail. Thus, if the financial situation of the detainees and any international connections they have, along with other factors such as the weight of the expected sentence, might indicate a continued flight risk, the TGE remains justified in holding them.<sup>[155]</sup> Given that many of the potential defendants have already fled the country, it is likely that the detainees who were high up in the Mengistu regime would try to join their comrades were they allowed to leave detention on bail. There are, however, many defendants who were not part of the government's leadership and who might not have the resources to flee; these people should be considered for bail.

Though the answer to the first question indicates there might be continued justification for detention of some of the defendants, such detention still must be reasonable. The European Court held that "[i]t cannot

be doubted that, even when an accused person is reasonably detained . . . for reasons of the public interest, there may be a violation of Article 5(3) if, for whatever cause, the proceedings continue for a considerable length of time."[\[156\]](#) The factors the court examines here are similar to those examined under Article 6(1) concerning a hearing within a "reasonable time": whether the authorities used the requisite expediency, giving the case the priority it deserved, and the complexity of the case.[\[157\]](#)

The court has wide latitude in making this judgment. In the "*Wemhoff*" Case, due to the complexities of the case and the fear that Wemhoff would abscond, the period of detention the European Court determined as acceptable extended from November 9, 1961, to April 7, 1965.[\[158\]](#) The complexities the court cited include the extensive and time-consuming investigation, interviewing witnesses in other countries, and obtaining numerous expert opinions.[\[159\]](#) Given these factors, the extended detentions in Ethiopia, if justified, may not in fact violate the guarantee of a "trial within a reasonable time or to release" due to the complex system of gathering evidence and setting up the structure and personnel to handle the cases.

#### D. Trial Without Undue Delay

Closely related to the reasonableness of detention is the guarantee in the ICCPR for trial "without undue delay"[\[160\]](#) and in the European Convention for a hearing "within a reasonable time."[\[161\]](#) Unlike the previous discussion, these provisions are concerned with the time before trial, regardless of whether the defendant is in detention. Again, the U.N. Human Rights Committee gives very little guidance on meeting this standard, but the Committee apparently does allow the state an opportunity to justify the delay of trial by showing any particular difficulties in trying an individual case.[\[162\]](#) Absent such a showing, the Committee found a delay of two years between arrest and judgment to be in violation of Article 14(3)(c).[\[163\]](#) By the time the Ethiopian trials opened in December 1994 for a few defendants, the delay in trial stretched for three years, seven months.

A clearer understanding of the concept of undue or unreasonable delay in trial is found again in the decisions of the European Court of Human Rights. Though the language of the European Convention differs from that of the ICCPR, the European Court's decisions offer guidance as to the factors that may be considered when the court makes a determination on the reasonableness of the delay. The European Court approaches this determination with the opinion that "[t]he reasonableness of the length of the proceedings must be assessed in each instance according to the particular circumstances."[\[164\]](#) The commencement of the period to be considered is when the person is "charged," meaning "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."[\[165\]](#) This includes the date of arrest, not just the date the individual is charged with a particular offense.[\[166\]](#) The end point is the judgment which determines the charge on the merits.[\[167\]](#) The court will examine factors such as "the complexity of the case, the applicant's conduct and . . . the manner in which the matter was dealt with by the administrative and judicial authorities."[\[168\]](#)

In applying these factors to the "*Neumeister*" Case, the court determined that a seven-year delay in trial was not unreasonable due to the complexities of the case, which involved twenty-two defendants charged with fraud.[\[169\]](#) The investigation required the Austrian authorities to reconstruct business transactions that took place over the course of several years and to request assistance from authorities in various foreign countries in interviewing witnesses and conducting other forms of investigation.[\[170\]](#) It was not the charge, but rather the investigation required to prosecute the crime, that was highly complex. It is noteworthy that the court found a violation of Article 5(3) for Neumeister's twenty-six month detention because the government's fear of the defendant's flight had diminished to a point that it was no longer a justification for his detention.[\[171\]](#)

Another case that discusses these factors is the *Case of Foti and Others*. Here, the delays were between three and almost six years for six defendants, and the court found a violation of Article 6(1).[\[172\]](#) The court found the crimes, which occurred during a street demonstration, were not complex, and the court found that

the conduct of the applicants in filing interim appeals did not account for the long delays.<sup>[173]</sup> In evaluating the conduct of the Italian authorities, the court considered the "unusual political and social climate" in that region of the country, the climate's effect on the courts, and the fact that the courts had become overwhelmed with cases.<sup>[174]</sup> Despite the overloaded courts, which is also a concern in Ethiopia, the delays were deemed unreasonable.

The charges in the Ethiopian cases are anything but simple. Perhaps the debate on whether to use international law independently or as incorporated into the domestic law continued too long, but even so, the charges of genocide, crimes against humanity, and war crimes are, in themselves, quite complex. Add to this the large number of defendants, the complexity of gathering and cataloguing the immense amount of evidence, interviewing thousands of witnesses, and securing adequate personnel as well as international experts to assist in nearly all areas of the prosecution process, and the delay in trial for the detainees begins to appear reasonable when compared to the seven years in the "*Neumeister*" Case. Additionally, if the political situation could be taken into account, the fact that the government has been working to recreate itself, develop a new constitution, and create a new and independent judiciary might further justify the delay. The delay of trial has been the focus of the most criticism of the prosecution process,<sup>[175]</sup> and while there is no doubt that the delay has been long, the TGE has several arguments on its side to justify that delay.<sup>[176]</sup> As previously discussed, however, justifications for a delay in trial do not also justify continued detention in the face of that delay.<sup>[177]</sup>

#### *E. Adequate Facilities to Prepare a Defense*

Another central issue relating to the basic human rights of the detainees is the right of an individual to have "adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing,"<sup>[178]</sup> and "to have legal assistance assigned to him . . . without payment by him . . . if he does not have sufficient means to pay for it."<sup>[179]</sup> The second of these provisions is less problematic since the SPO and the courts created a public defender office in January 1994 to assist those detainees who cannot afford their own counsel.<sup>[180]</sup> Originally the office consisted of five attorneys, only one of whom was an experienced trial attorney, but, as of January 1995, the staff had grown to twenty attorneys.<sup>[181]</sup>

While this office may satisfy the requirement for free legal assistance, concerns remain about adequate facilities for preparation of the defense. Under the Ethiopian Criminal Procedure Code, attorneys are not given pre-trial access to their clients, and they are not given access to the prosecution's evidence until after the evidence is introduced at trial.<sup>[182]</sup> These two provisions clearly threaten the validity of the proceedings under the above mentioned provisions of the ICCPR. The U.N. Human Rights Committee has held that the denial of access to an attorney prevents the defendant from having the requisite "adequate facilities" for the preparation of the defense.<sup>[183]</sup> In other cases, in which the Committee does not connect access to an attorney with the "adequate facilities" requirement, the Committee has repeatedly found violations of Article 14(3) when the defendant is denied access to counsel at any time during the detention.<sup>[184]</sup>

To meet its obligations under the ICCPR, the TGE should have amended the Criminal Procedure Code to allow counsel access to defendants before the trials began. Research has revealed no information on whether such access was granted despite a failure to change the Code.<sup>[185]</sup>

As for access to the evidence before trial, while research uncovered no case law on this point, intuition suggests that examining the evidence is an important part of preparing a defense. Given the mass of evidence collected in these cases and the possibility that the SPO possesses exculpatory evidence beneficial to some of the defendants, the public defenders should be given ample time to familiarize themselves with the evidence.<sup>[186]</sup> Before the trials adjourned in December 1994, the court denied a defense motion requesting access to the evidence, stating, "Only in civil proceedings [do] you have all the evidence given to the defense, but not in criminal proceedings."<sup>[187]</sup>

## VI. POTENTIAL HUMAN RIGHTS CONCERNS AT TRIAL

### A. *Use of the Death Penalty*

While the concerns discussed in this section are speculative at this point, case law exists which sheds light on the potential problems raised here and which may provide guidance on avoiding violations. The first issue is the possibility of the use of the death penalty for defendants charged with genocide, crimes against humanity, war crimes, and first-degree homicide under the Penal Code. Ethiopian officials argue that Ethiopians support the use of the death penalty, especially in these cases, because the defendants may be found guilty of serious and terrible crimes.<sup>[188]</sup> Early in the debate over whether to allow the imposition of the death penalty, the SPO said it was considering the issue and that it was "acutely aware that our purpose is to strengthen democratic institutions and to promote human rights."<sup>[189]</sup> Given the widespread support for capital punishment in Ethiopia, the SPO apparently felt that the newly created democratic institutions would not be compromised by its use and that the public would not consider its use a violation of human rights. The Chief Special Prosecutor, Girma Wakjira, has said, however, that his office "would not go to the extent of embarrassing the international community by seeking the death penalty to every case."<sup>[190]</sup>

Use of the death penalty in Ethiopia is problematic not because the ICCPR, or any other international convention to which Ethiopia is a party, prohibits its use. Rather, concern arises when courts hand down the death penalty in a case in which there have been other violations of the ICCPR. Article 6(2) of the ICCPR reads in part, "the sentence of death may be imposed only . . . in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant . . . ."<sup>[191]</sup> In *Monguya Mbenge v. Zaire*, the U.N. Human Rights Committee determined that the death sentences given violated Article 6(2), because there had also been a violation of several provisions of Article 14(3).<sup>[192]</sup> The Committee held that "the failure of [Zaire] to respect the relevant requirements of Article 14(3) lead to the conclusion that the death sentences pronounced against [the defendant] were imposed contrary to the provisions of the Covenant, and therefore in violation of Article 6(2)."<sup>[193]</sup> If it were ever determined that the rights of the Ethiopian detainees under the ICCPR had been violated, the imposition of the death penalty in their cases would constitute an additional violation.

### B. *Trials In Absentia*

A second potential problem is that some defendants are not in the country and may be tried *in absentia*. Article 14(3)(d) of the ICCPR provides a defendant the right to be "tried in his presence . . . ."<sup>[194]</sup> A defendant, however, can waive the right to be present, and the proceedings against him may go forward "in the interest of the proper administration of justice."<sup>[195]</sup> Many Ethiopian defendants probably will be held to have waived their right to be present by failing to appear for their trial. Waiver, however, may occur only when the defendant has been "sufficiently" informed in advance about the proceedings against him or her.<sup>[196]</sup> Although the absentee defendants will probably know about the proceedings against them from the press, if not from their contacts inside Ethiopia, the SPO cannot rely on the press to notify these absent defendants.<sup>[197]</sup> The SPO has an affirmative obligation to see that "due notification has been made to inform [the defendant] of the date and place of his trial and to request his attendance."<sup>[198]</sup>

The SPO estimates that roughly 300 military and civilian leaders fled the country in 1991, when the EPRDF took control, and are currently residing in several countries, including the United States.<sup>[199]</sup> While the SPO has filed extradition requests for the return of these individuals, the response to these requests has been slow. This may be due to the fact that Ethiopia has extradition treaties only with Sudan and Djibouti.<sup>[200]</sup> For any defendant not extradited to face trial in Ethiopia, the SPO must take steps to notify the defendant of the time and place of his trial so that the defendant can voluntarily waive the right to be present if he so wishes. The U.N. Human Rights Committee allows that there "must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused," but the

Committee does not clearly establish those limits.<sup>[201]</sup> In the *Mbenge* case, the authorities knew of the defendant's address in Belgium, so there was no reason notification could not be given to him. If the SPO really has no information about an individual defendant's location, notice will be difficult to provide, but if the SPO knows where the defendants are, the SPO must give notice or be held to violate Article 14(3)(d).

The European Court adds another requirement, under Article 6(1) of the European Convention, to trials *in absentia* in which the defendant is unaware of the proceedings. In the *Case of Colozza and Rubinat*, the court held that the defendant, "once he becomes aware of the proceedings, [should] be able to obtain . . . a fresh determination of the merits of the charge."<sup>[202]</sup> The court also held that "waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner," but the court did not say what would constitute evidence of a waiver.<sup>[203]</sup> This case would impose obligations on the SPO to obtain a clear waiver from a defendant or be prepared to reopen the proceedings against an individual who returns to Ethiopia and can show he did not waive his right to be present and was unaware of the proceedings.

### *C. Competent, Independent, and Impartial Tribunal*

A third potential problem with these trials is the right to have a "competent, independent and impartial tribunal" sit in judgment of the case.<sup>[204]</sup> Each aspect of this requirement could be called into question in these trials, and concern about this has already been expressed by the international community, most notably the International Human Rights Law Group.<sup>[205]</sup> The concern regarding the independence of the judiciary is that, despite the requirement that judges not hold membership in a political organization, there is a widespread perception that this exclusion applies only to those individuals who are not associated with the EPRDF.<sup>[206]</sup> The perception exists that many of the judges appointed since May 1991 are in fact quite closely affiliated with the EPRDF and are susceptible to political pressures.<sup>[207]</sup> The Judicial Administration Commission (JAC), which appoints the judges, is viewed as unable to challenge the TGE,<sup>[208]</sup> and as a result, the belief exists that the JAC appoints people recommended by the EPRDF without fully examining them to see if they fulfill the requirements of appointment.<sup>[209]</sup>

The EPRDF government appointed a large number of judges,<sup>[210]</sup> in part due to a complete prohibition on the appointment of individuals who were members of Mengistu's political party or engaged in "security activities" during the Dergue regime.<sup>[211]</sup> While this desire to de-politicize the judiciary is understandable, this prohibition has pushed out some experienced judges who may have had only nominal contact with the ruling political party and the Dergue, thereby causing a shortage of experienced judges.<sup>[212]</sup>

This shortage, in turn, raises the issue of the competency of the recently appointed judges. The requirements of appointment in terms of legal training are that the person have "legal training or acquired legal skill through experience," which allows for people who have no formal legal training.<sup>[213]</sup> While there are many new judges who are not lawyers either by training or experience, the judges of the Central High Court, which will hear these cases, are all attorneys by training or experience and are somewhat familiar with judicial responsibilities.<sup>[214]</sup> Many of these judges, however, are viewed by private attorneys as inexperienced.<sup>[215]</sup> These judges are largely unfamiliar with international law and may have difficulty if it comes into play in the trials.<sup>[216]</sup> An American Bar Association (ABA) report on a visit to Ethiopia concurred that the court is "inadequately trained" to try these cases and suggested "judicial education for the entire judicial system."<sup>[217]</sup>

Another issue of competency unrelated to the training of the judges, grows out of the lack of resources available to the courts to carry out these trials. The same ABA report concluded that Ethiopian courts are "ill-equipped" to handle the cases, saying the court needs computers, technical advice from attorneys experienced in prosecuting war crimes, and research support.<sup>[218]</sup> Experts view the lack of computerization as a serious problem, because the courts are unable to record or publish court proceedings.<sup>[219]</sup> As a result,

no written body of precedent exists for attorneys or the court to use in these, or any other, cases.<sup>[220]</sup>

#### *D. Fair Trial*

All of the issues mentioned in this section, and in the previous section concerning Article 14, raise the overall issue of whether it is possible for these defendants to receive a fair trial, a right granted by Article 14(1).<sup>[221]</sup> The sheer number of defendants may overwhelm both the court and the public defender's office, forcing the judiciary to take short cuts in order to try everyone.<sup>[222]</sup> Several additional provisions of Article 14(3) could be sacrificed, including the right to be presumed innocent until proven guilty, the right to examine the witnesses, and the right to have an interpreter if the defendant does not understand the language used in court.<sup>[223]</sup> These are in addition to the right for adequate time and facilities to prepare a defense as discussed above.<sup>[224]</sup>

While no substantive proof exists to indicate that the courts or the SPO will engage in breaches of this nature, the international community, which is free to attend and observe the trials,<sup>[225]</sup> should be aware of the fair trial provisions of the ICCPR and should be diligent in seeing that they are all honored. Ethiopia has an opportunity to establish the rule of law, as well as establish a model for other countries which find themselves in the unfortunate position of needing to prosecute similar crimes. If

the trials prove not to be fair, both of those important opportunities will be lost.

### VII. CONCLUSION

The international community is justified in its concern that the TGE is not fully respecting the human rights of the Ethiopian defendants in several key areas, but sharp criticism of the process is perhaps slightly premature. The Ethiopian government and judiciary have undergone a complete reincarnation since 1991, presenting a set of obstacles no other country has faced in attempting to prosecute similar crimes. That the TGE was initially, and has remained, determined to punish these defendants under the rule of law instead of extra-judicially testifies to the respect Ethiopians have for their new institutions and their desire to live by the rule of law.

Admirably, the government has persevered and created new systems, such as the public defender's office, to facilitate the prosecutions when it need not have undertaken any special measures at all. That the government signed and ratified the ICCPR represents an attempt to join the group of nations which strives to protect their citizens' human rights. That they may have failed in that protection in some areas should not automatically provoke intense international condemnation. Again, Ethiopia is doing something no other country has ever done, and for that, the government deserves praise and assistance, not skepticism. The government has received all of these in the course of bringing these cases to trial, but perhaps the praise turned to skepticism too quickly.

In regard to the two main concerns of the international community, the long detention and delay in trial, it remains unclear that the TGE has violated the ICCPR. There appear to be valid justifications for the continued detentions, including the fear of flight, as well as valid reasons for the delay in trial given the number of defendants, the volume of evidence, the complexity of the law, and the practical obstacles presented by the country being newly created. The clearest instance of a violation of the ICCPR could perhaps be the problem most easily rectified: allowing the defense attorneys pretrial access to the evidence. Having met its obligation to provide free legal representation, the SPO should not now deny that office the ability to discharge its responsibilities to the fullest. Denying attorneys access either to the defendants or to the evidence will seriously impair the defendants' right to have "adequate time and facilities"<sup>[226]</sup> to prepare a defense. This denial could constitute a serious, and perhaps even irreparable, violation of the ICCPR.

All of the issues presented here are serious concerns, and the SPO and the courts should be well aware of them and take care to see that clear violations of the ICCPR are avoided. While the author is yet unprepared to conclude definitively that the SPO has failed in its obligations to the defendants, there clearly exists the very real potential for serious violations. Perhaps it will come down to a matter of opinion as to whether the SPO has successfully balanced the many factors it had to consider in undertaking these prosecutions, and, of course, much of the process has yet to occur. The government and the SPO both want to gain international approval of these proceedings, but they view these trials as being primarily for the moral and psychological benefit of the Ethiopian citizens and to establish the rule of law in their "new" country. At this point, only time will show if these two goals are ultimately consistent.

JULIE V. MAYFIELD[\*]

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