

Case Comment: Dutch Court Convicts Ethiopian War Criminal to Life Imprisonment

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By: Joseph Rikhof

There have been a number of proceedings against officials of the brutal Mengistu regime in Ethiopia, from criminal proceedings in that country to immigration and extradition processes in countries in Europe and North America. The decision of the Dutch court represents a unique contribution to this developing jurisprudence with respect to Ethiopia and international criminal law in general.

In December 15, 2017, a Dutch trial court convicted Eshetu Alemu to life imprisonment for the commission of war crimes in Ethiopia as a functionary of the so-called Red Terror regime. While there have been a number of other proceedings against such officials, this is the first time that a criminal court outside Ethiopia has rendered such a judgment. Before analyzing the decision, this article will first provide a brief historical overview of the Red Terror regime as well as an overview of other proceedings taken against officials of that regime.

The Red Terror regime

During a popular revolution in Ethiopia in 1974 against Emperor Haile Selassie I, who was deposed in September of that year, a military junta which became known as the Derg (meaning “Council”[1]) exploited the upheaval to seize power of the state apparatus, a regime that remained in power under Mengistu Haile Mariam until it was overthrown by the military forces of the Ethiopian People’s

Democratic Force (EPDF) in 1991. During its reign, the Derg actively sought to eliminate anyone that posed a threat to their incumbency by unleashing a campaign called the Red Terror, which was based on its Marxist-oriented ideology. The Derg used its security forces during this campaign to eliminate, torture or otherwise impose grave suffering on individuals and groups which they labelled as either "subversives, "anti-revolutionaries" or generally "anti-people".[2] Hundreds of thousands were killed in Ethiopia due to the Red Terror, by forced deportations, or from using hunger as a weapon.[3]

Trials in Ethiopia

After the Mengistu regime was overthrown, the new government established a Special Prosecutors' Office to investigate and prosecute officials who engaged in Red Terror activities and in other international crimes.[4] It has been estimated that over 5000 persons were put on trial in a number of mass trials. For instance, in the most well-known trial, that of Mengistu and others, there were a total of 106 defendants, while other cases have joined up to 200 accused in one single trial.[5]

With respect to Mengistu trial, Mengistu himself, who is in exile in Zimbabwe, was convicted of genocide on December 12, 2006 by a court in Addis Ababa and sentenced to life in prison on January 11, 2007; this sentence was increased on appeal on May 26, 2008 to a death sentence. Another 54 accused were convicted of genocide as well and, of these 54 accused, 35 were core members of the Derg, the ruling party in Ethiopia between 1977 and 1991, while the remainder were ordinary members of the Derg and officials in urban dwellers' associations (Kebeles), all of whom had been involved in the Red Terror campaign.[6]

An interesting legal issue in this trial is how the crime of genocide was given a broad interpretation at two levels. First of all, when ruling on a preliminary objection raised by the defence regarding the argument that the charges did not sufficiently distinguish the crime of humanity from genocide, the court was of the view that crimes against humanity were, under Ethiopian law, to be understood more as an elucidation of the concept of genocide rather than as an independent crime.[7]Secondly, the notion of "protected groups" in relation to the crime of genocide was also extended under Ethiopian law to cover political groups, which is broader than most other international instruments[8] (although this phenomenon has become much more prevalent after 1998 when countries started to implement the Rome Statute into domestic law).[9] In an interlocutory decision in 1995, the court in the Mengistu case held that this expansion was not inconsistent with international law,[10] as it was of the view that the Genocide Convention only provided for a minimum standard, which could be expanded in domestic law.[11] This extended scope of the notion of genocide allowed for the possibility to employ the crime of genocide in the Ethiopian trials, as the victims of the Derg were mostly political opponents, rather than ethnic, racial, national or religious groups.

Proceedings in other countries

In the United States, two persons from Ethiopia have been made subject to judicial proceedings.

On October 21, 2006, Kelbessa Negewo was deported to Ethiopia to serve his sentence of life imprisonment for crimes committed during the Red Terror campaign as result of committing fraud during his citizenship application in the United States.[12]

On October 11, 2013, Kefelegn Alemu Worku was convicted by a federal jury in Denver, Colorado of unlawful procurement of citizenship, aggravated identity theft, and fraud and misuse of visas, based on evidence that he assumed the identity of another man to hide his past, to enter the United States and to become a U.S. citizen; evidence was presented that Worku persecuted, tortured, and murdered people in the late 1970s in Ethiopia during the Red Terror campaign.[13] He was sentenced to 22 years imprisonment on May 22, 2014.[14]

In Belgium and Canada two persons were denied refugee status as a result of having committed crimes against humanity by providing information about fellow Ethiopians to the Ethiopian security services during the Red Terror time period.[15]

As well, in Canada, two other persons were made subject to immigration remedies for the commission of the same international crime; Anbessie Debele Tiky was issued a deportation order for direct involvement at the Kebele level[16] while Tewolde Gebremedhin was refused a visa because he had been a senior official in the Relief and Rehabiliation Commission (RRC) in the Mengistu regime during a time that this regime carried out a policy of starvation of inhabitants of Eritrea.[17]

The Dutch case – background

There is a connection between the Mengistu case in Ethiopia and the Alemu case in the Netherlands in that Alemu was one of the co-accused in the Mengistu case and had received the death penalty *in absentia*.[18] Alemu had been a senior official in the Derg with responsibility for the Gojjam region, where he was in charge of two prison camps, namely at Debre Marcos and at Metekel, between 1 February 1978 and 31 December 1981.

The investigation by the Dutch police and investigative judge resulted in obtaining a large amount of documentary evidence (even though the co-operation by the Ethiopian government was limited) as well as the evidence of almost 20 witnesses located in the Netherlands, Canada and the United States.[19]

The court convicted him of indirect liability for a number of war crimes against 637 civilians, namely arbitrary imprisonment, killing, torture and cruel treatment. The latter was based on the deplorable conditions in the prison camps, while the first was based on prison sentences imposed by the accused without any fair trial guarantees.[20] He received a life sentence.[21]

The Dutch case- legal analysis

The Alemu case represents the logical extension of a number of legal concepts explored in other criminal cases involving international crimes in the Netherlands,[22] from the notion of war crimes to the use of superior responsibility as a form of extended liability.

First, the court relied heavily on international jurisprudence, which has been a feature of Dutch jurisprudence from the beginning, for the overarching aspects of international crimes, the elements of the underlying crimes and the parameters of extended liability. In the Alemu case, the court relied on the jurisprudence of both International Criminal Tribunals for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) to flesh out the requirement of what constitutes a war crime of a non-international character taking place in the territory of one country, namely a high level of organization of the parties involved in the conflict as well a high level of intensity during the carrying out of hostilities.[23] The Court was of the view that both requirements were met in Ethiopia in the conflict between the Derg regime and various liberation movements.[24] While the application of the international jurisprudence regarding the criteria for a non-international armed conflict in general is not unusual, the Dutch jurisprudence is unique in that it applied these parameters to conflicts during time periods not recognized as such in international criminal law. While the ICTY first postulated the position that war crimes could be committed in non-international armed conflicts, this was applied to a situation occurring after 1990.[25] The Dutch jurisprudence has applied this notion to such conflicts well before 1990,[26] including in the case at hand.

Second, for the four underlying crimes of arbitrary imprisonment, killing, torture and cruel treatment, the court used the language of common article 3 of the Geneva Conventions, the International Committee of the Red Cross (ICRC) Commentary in relation to that article, the Statutes of the ICTY and ICC, the ICC Elements of Crime document and the ICTY and ICC jurisprudence to provide further clarification and content for these crimes.[27]

Last, the parameters of the forms of liability were based both on precedents in Dutch jurisprudence as well as international caselaw. The forms of liability charged were instigation, co-perpetration, aiding and abetting and superior responsibility. Instigation had been discussed in detail in a genocide case arising out of Rwanda in 2015[28] while the notions of co-perpetration and aiding and abetting were canvassed in a case involving a Dutch businessman exporting weapons to Liberia to be used in the conflict in Sierra Leone.[29] Superior responsibility had been first addressed in another Afghani case where both the district court and the court of appeal came to the conclusion that, given the fact that this form of liability found its origins in customary international law and was applied by the ICTY, the jurisprudence of that tribunal should be taken into consideration for liability under Dutch law.[30] The Alemu case discussed this concept while examining ICTY and ICC precedents.[31]

Conclusion

The Dutch case sets an important precedent by utilizing, for the first time, the notion of universal jurisdiction to convict a high official of the Ethiopian Derg regime and it is hoped that this example will be followed in other countries. Having said this, it is unlikely that other countries can employ the same legal techniques as used in the Netherlands or for that matter Ethiopia, as the crimes with which the accused were charged in those countries will likely not be duplicated in other countries. It is interesting to note that the judiciary in both countries acknowledged that the use of genocide in Ethiopia and war crimes in the Netherlands was possible due to national legislation that went beyond what customary

international law allowed at the time of these judgments or even now. In most countries, genocide could not be charged due to the lack of the special intention to destroy a group for genocide, which does not appear to be factually the case in the Ethiopian context, or to commit war crimes in a non-international armed conflict before 1990 as was the case in the Netherlands. Extra-territorial jurisdiction for crimes committed in Ethiopia in the seventies would have been limited in most countries to crimes against humanity (or the distinct crime of torture), a difficult proposition for most European countries due to concerns about the retroactivity of the legislation allowing for such crimes, which was typically passed to implement the ICC Statute. In North America, the United States, as seen above, does not have legislation to prosecute crimes against humanity. However, none of the above legal concerns related to crimes against humanity are apparent in the Canadian legislation.

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Globally-recognized as an expert in cases of war crimes, Dr. Joseph Rikhof was with the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and teaches International Criminal Law in the Faculty of Law at University of Ottawa. Dr. Rikhof was a visiting professional with the International Criminal Court in 2005 and Special Counsel & Policy Advisor to the Modern War Crimes Section of Canada’s Department of Citizenship and Immigration between 1998 and 2002. Extensively published, Dr. Rikhof lectures around the world on organized crime, terrorism, genocide, war crimes, and crimes against humanity.

References

1. Firew Kebede Tiba, “The Mengistu Genocide Trial in Ethiopia”, *Journal of International Criminal Justice*, 2007, pp. 513-528, at p. 515.
2. See for more details Firew KebedeTiba, “The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia”, in Chacha Murungu and Japhet Biegon (eds.), *Prosecuting International Crimes in Africa*, Pretoria University Press, Pretoria, South Africa, 2011, pp. 163-165; Firew Kebede Tiba, “Mass Trials and Modes of Criminal Responsibility for International Crimes: The Case of Ethiopia”, in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013, pp. 307-310.

3. Tiba, 2011, pp. 163-165. These figures are, however, likely quite conservative given the total number of deaths associated with the campaign of the regime, which by some estimates are suggested in the range of 1,5 million dead, disappeared or injured on all sides, see Tiba, 2007, p. 516

4. See Sarah Vaughan, The Role of the Special Prosecutors Office, in Kjetil Tronvoll, Charles Schaefer and Girmahew Alemu Aneme (eds.), *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, Woodbridge: James Currey, 2009, pp. 51-67.

5. These last figures are reported by Tiba, 2007, p. 514, which cite as representative cases that of Special Prosecutor v. Kassayie Aragaw et al., File No. 923/89 and Special Prosecutor v. Debela Dinsa et al., File No. 912/89, heard at the Ethiopian Federal High Court.

6. Tiba, 2007, p. 513-528.

7. Ruling of the Court as cited in Kjetil Tronvoll, Charles Schaefer and Girmahew Alemu Aneme, pp. 17-18.

8. Compare, Convention on the Prevention and Punishment of the Crime of Genocide Article 2; ICTY Statute Article 4; ICTR Statute Article 2; Rome Statute Article 6, which only refer to the following four groups: national, ethnical, racial or religious.

9. Joseph Rikhof, “Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity”, in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, TOAEP, Oslo, 2010, pp. 21-81.

10. Special Prosecutor v. Mengistu and Others, File No. 1/87, Federal High Court (9 October 1995).

11. Kjetil Tronvoll, Charles Schaefer and Girmahew Alemu Aneme, pp. 16 and 32.

12. See http://www.internationalcrimesdatabase.org/Case/903/Abebe-Jira-v-Negewo/.

13. The United States has not regulated in its Criminal Code (Title 18 of the United States Code) crimes against humanity although some other international crimes such as genocide (Chapter 50A), torture (Chapter 113C), war crimes (Chapter 118), and recruitment of child soldiers (Chapter 118) have been included; instead federal authorities have relied on the criminal provisions in immigration and citizenship statutes to obtain sentences at the higher end of incarceration spectrum for forms of misrepresentation during the immigration and citizenship process where the misrepresentations were connected to serious human rights abuses.

14. See https://www.justice.gov/usao-co/pr/denver-man-who-lied-about-war-crimes-he-committed-ethiopia-order-come-united-states-and and https://www.ice.gov/news/releases/convicted-human-rights-criminal-ethiopia-living-denver-sentenced-22-years-federal.

15. CPRR (Permanent Refugee Appeal Commission) No. 94-1502/W1916, 9 August 1995 and CE (Council of State) No. 93.579, 27 February 2001, in Belgium and Bamlaku v. Canada (Minister of Citizenship and Immigration), Federal Court No. IMM-846-97, 16 January 1998, in Canada.

16. Tiky v. Canada (Minister of Citizenship and Immigration), 2005 FC 615.

17. Gebremedhin v. Canada (Citizenship and Immigration), 2013 FC 380.

18. See Decision by Dutch District Court in The Hague, Case Number LJN 09/748013.12 (which can be found under Case Number ECLI:NL:RBDHA:2017:14782 at this website: https://uitspraken.rechtspraak.nl/), para. 3.1.
19. Idem.
20. Idem, para 17.
21. Idem, para. 23.3.
22. Since 2004 there have been 10 cases involving 15 accused, the highest of any country relying on extra-territorial jurisdiction.
23. Alemu case, para. 7.4.
24. Id. para. 7.5; the parties in opposition to the government mentioned were the Ethiopian People's Revolutionary Party (ERRP), the Eritrean People's Liberation Front (ERLF)/Eritrean Liberation Front (ELF), the Ethiopian Democratic Union (EDU) and the Tigrayan People's Liberation Front (TPLF).
25. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ***Tadi?*** (IT-94-1), Appeals Chamber, 2 October 1995, paras. 128-134; see also Jean-Marie Henkaerts and Louise Doswald-Becks (eds), *Customary International Humanitarian Law*, *Volume 1: Rules*, Cambridge University Press, 2005, pp. 552-554 for the observation that there was no evidence in customary international law for such a proposition before 1990.
26. This notion was first approved by the Dutch Supreme Court in 2008 in a case involving two persons from Afghanistan (Heshamuddin Hesham and Habibullah Jalalzoy) who were convicted in 2005 for torture and war crimes due to their involvement in the KhAD in Kabul between 1979 and 1989 (Case umber LJN BG1476); the main reason given was that Dutch legislation in the fifties when implementing the 1949 Geneva Conventions already recognized war crimes based on common article 3 of the Geneva Conventions, which applied to non-international armed conflicts and that national legislators were allowed to go beyond the confines of the international treaties they are implementing. Incidentally, it was impossible to charge Alemu with either genocide or crimes against humanity as those crimes only became part of Dutch criminal law after the implementation of the Rome Statute in 2003, which did not allow for retroactive application; while crimes against humanity were new in that legislation, genocide had been known but could until 2003 only be used against nationals of the Netherlands.
27. Alemu case, paras. 12.4.
28. This is the case of Yvonne Ntacyobatabara (Basebya), Case Number ECLI:NL:RBDHA:2013:8710.
29. This is the case of Guus van Kouwenhoven; Case Number ECLI:NL:GHSHE:2017:1760.
30. This was the Abdoullah Faqirzada case; see Case Numbers LJN BA9575and LJN BJ2796 for the respective judgments at the first and appeal levels.
31. Alemu case, para. 13.5.2