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Commentary

International Humanitarian Law, Mengistu Haile Mariam and South Africa's Missed Opportunity

Human Rights Watch & John Daniel (Introduction and Postscript)

Introduction

The twentieth century in which an estimated 190 million people were killed or allowed to die (in man-made famines, for example) by non-natural means was the bloodiest in human history. Amidst the horrors of the holocaust and Hiroshima, the not infrequent genocides and the atrocities of the Soviet gulag (to mention only the worst of the century's excesses), there were, however, some hopeful and positive developments. Paradoxically, some of these were in the realm of international law where, for example, the principle of self-determination was universally recognised resulting in the decolonisation of Asia and Africa, a process which largely culminated in the end of apartheid in our own country.

Other significant advances were realised in the area of accountability for war crimes. The Nuremburg and Tokyo war crimes tribunals were important staging posts in this process. Apart from occasional individual cases, such as the trial of Adolph Eichmann trial and other alleged Nazi war criminals, a lull of some 50 years followed, where the crimes of the Vietnam war and other cold-war excesses went unpunished and largely unaccounted for. But in the last decade of the century forward momentum was regained with a number of significant developments in the area of international criminal law. These included the convening of the international tribunals for Rwanda and former Yugoslavia, the signing of the Rome Statute for an International Criminal Court, the arrest in England (at a Spanish magistrate's behest) and near trial of the Chilean dictator General Pinochet and the

subsequent revocation by the Chilean Supreme Court of his self-awarded amnesty from prosecution. This new willingness to make those allegedly responsible for war crimes also had an African echo in the arrest in late 1999 of Chad's former dictator Hisssein Habre and his arraignment on charges relating to the horrors he imposed on his people in his blood-stained reign of terror in the 1980s.

Simultaneous with the Pinochet and Habre cases, the South African government was provided with an opportunity further to advance the development of international law, as well as to strike a positive blow in regard to Africa's wretched recent human rights record, when the Ethiopian dictator Mengistu arrived late last year in this country for medical treatment. Despite urgent pleas from the international community and some pressure from within the country, the ANC government – itself so recently a beneficiary of a global international human rights campaign – refused the chance and allowed one of the continent's most notorious thugs to slink back to the Zimbabwe refuge provided him by another of Africa's notorious human rights abusers.

Amongst those who appealed to South Africa to do the right thing was the New York-based humanitarian campaign group, Human Rights Watch. Set out below is a fact paper prepared by its Africa division which accompanied letters it sent on November 24, 1999 to South Africa's Ministers of Justice and Foreign Affairs. The letters are also reproduced below:

The Human Rights fact paper:

Col. Mengistu Haile Mariam headed a junta which in 1974 overthrew the government of Emperor Haile Selassie in a bloody coup. Known as the 'Derg' or 'Dergue' (the 'committee'), the junta consisted of about a hundred junior officers drawn from all regions of Ethiopia. Proclaiming a revolutionary agenda for the country, the Dergue legitimated its rule by sending some 60 senior officials of the emperor's government to the firing squad. The emperor and the Patriarch of the dominant Ethiopian Orthodox church were both secretly killed in the months that followed. The Dergue's early victims included members of the group itself. Col. Mengistu emerged as its undisputed leader after orchestrating the physical elimination of rivals from within.

In 1976, Col. Mengistu gave a dramatic send-off to a campaign of terror that he officially dubbed the 'Red Terror'. He threw to the ground before a huge crowd in the capital Addis Ababa bottles filled with a red substance representing the blood of enemies of the revolution:

the 'imperialists', and the 'counter-revolutionaries', as members of rival leftist groups were labeled by the Dergue. In particular, the campaign targeted students and young people suspected of membership in the Ethiopian People's Revolutionary Party (EPRP). Thousands of young men and women turned up dead in the streets of the capital and other cities in the following two years. They were systematically eliminated mainly by militia attached to the 'Kebeles', the neighbourhood watch committees which served during the Dergue period as the lowest level local government and security surveillance units. The Kebeles required families to reimburse the administration for the price of bullets used to kill victims when they reclaimed their bodies for burial.

The process of eliminating the 'counter-revolutionaries' was quite organized. Each neighbourhood committee would meet to discuss how to eliminate individual suspects, and each member would sign on documents to confirm the decision reached at the meeting. Copies of the document would be sent to different levels of the administrations and the party apparatus. The centralized killing enterprise thus left mountains of documentary evidence of its crimes.

Cold-war rivalries helped the Dergue to flourish and tighten its hold on power. It became the main client of the Soviet block in Africa, and received massive shipments of arms to help it counter serious challenges from several armed insurgencies by ethnic and regional liberation movements seeking to break away from centuries of centralized hegemony by Ethiopia's ruling elite. The counter-insurgency campaigns unleashed by the Dergue were characterized by widespread violations of international humanitarian law. Civilians were deliberately targeted and fell victims by the hundreds of thousands as a result of the indiscriminate violence against them.

When famine in 1984 hit areas in northern Ethiopia partially held by rebels of the Tigray and Eritrean People's Liberation Fronts (TPLF and EPLF respectively), Mengistu's government for a while blacked out information about the famine. It later used the disaster as a pretext to forcibly relocate hundreds of thousands of villagers from northern Ethiopia to areas in the south. The Dergue argued that its 'villagization' campaign, as it came to be known, was meant to relocate people from food deficient areas to the fertile plains of the south. In reality, the move was meant to empty rebel-held areas from potential supporters. Again, victims of government action during the forced relocation were in the hundreds of thousands. A 1991 Human Rights Watch report, *'Evil Days: 30 Years of War and Famine in Ethiopia'*, gives a detailed account of this dark period in Ethiopia's recent history during which

it is estimated that at least half a million civilians were killed as a result of the Dergue actions.

The Dergue was deposed in 1991 by the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of regional and ethnic rebel groups led by the TPLF. In the province of Eritrea the EPLF established a provisional government that steered the province to full independence by 1993, with the blessing and cooperation of its former ally the TPLF.

In 1992, the new government established a Special Prosecutor's Office (SIPO) to investigate the widespread crimes committed during the Dergue period and prosecute those responsible for them. However, the trials on charges of war crimes and crimes against humanity of the 72 top-ranking Dergue officials, including Col. Mengistu Haile Mariam, who had fled to Zimbabwe shortly before the fall of Addis Ababa to the EPRDF, are still pending. As for the majority of those detained in relation to their suspected role during the Dergue dictatorship, it was only in the first quarter of 1997 that the SPO announced their charging with criminal offences.

In January 1997, the Office charged a total number of 5,198 people, of whom 2,246 were already in detention, while 2,952 were charged in absentia. The vast majority of the defendants were charged with genocide and war crimes, and faced alternative charges of having committed aggravated homicide and wilful injury. All charges were based on the Ethiopian penal code of 1957. New additional trials of Dergue era defendants opened before the Federal High Court in Addis Ababa during March 1997. However, a serious crisis in the Ethiopian judiciary has left federal courts with a backlog of thousands of 'ordinary cases'. These court proceedings are now running into constant delays. Many of the defendants were in pre-trial detention for almost six years before they were first brought to court.

The SPO subdivided the defendants in three groups by degree of responsibility: policy and decision makers; intermediary level officials who relayed orders, but initiated some decisions on their own – and the hands directly involved in committing the crimes. Mirroring the Dergue's preferred mode of operation, the SPO had structured the prosecutions by committee, leading to 172 cases, each of multiple defendants. There is no special tribunal hearing the Dergue cases. They are heard in both the central and regional courts of Ethiopia's decentralized federal court system. The SPO opted to prosecute the central authorities, such as the central politburo of the Dergue, in the central court system, and prosecute cases of other suspects in regions where they operated.

As the leader of the Dergue, Col. Mengistu Haile Mariam is already being tried in absentia, together with his closest collaborators. But the manner in which the trials are being conducted has caused serious concerns to Human Rights Watch. In particular, excessive delays in the investigative phase led to the pretrial detention of hundreds of suspects for years at length. Additionally, Ethiopian law provides for the death penalty. Two Dergue officials were sentenced to death in absentia this month in these trials. Trial lawyers repeatedly complained about due process flaws in that their access to their detained clients was rendered difficult because of restrictions imposed by the government. The government was also slow in providing legal representation to some of the defendants.

Letters to South African Ministers of Justice and Foreign Affairs from Peter Takirambude, Executive Director, Africa Division, Human Rights Watch:

Dear Minister Penuell Mpapa Maduna,

We write to urge that South Africa bring Mengistu Haile Mariam to justice for crimes against humanity committed during his rule in Ethiopia. We understand that Mengistu is currently in South Africa seeking medical treatment.

As you are probably aware, from 1974 to 1991, Mengistu's 'Dergue' regime was responsible for human rights violations on a massive scale. Tens of thousands of Ethiopians were tortured, murdered or 'disappeared'. Tens of thousands of people were also killed as a result of humanitarian law violations committed during Ethiopia's internal armed conflicts. Many others, perhaps more than 100,000, died as a result of forced relocations ordered by Mengistu's regime. A background paper on Mengistu is attached. His crimes are more fully documented in our 1991 book-length report *Evil Days: 30 Years of War and Famine in Ethiopia*.

Ethiopia has in the past sought Mengistu's extradition from Zimbabwe. Zimbabwe refused the extradition requests. Mengistu is the leading defendant in trials of 2,000 former officials that began nearly five years ago in Addis Ababa. Two men were sentenced to death in absentia this month in these trials. Because of our concerns about the fairness of the Ethiopian trials, and the use of the death penalty, we do not recommend Mengistu's return to Ethiopia.

We do urge, however, that South Africa investigate Mengistu before its own courts. The South African Constitution (*article 232*) expressly incorporates customary international law. Under customary international law, all countries have a right and a duty to exercise

jurisdiction over crimes against humanity and a right to exercise such jurisdiction over torture. Alternatively, South Africa could extradite Mengistu to a country which is willing to prosecute him and guarantee a fair trial.

Given the scale of Mengistu's crimes, we believe that South Africa would set a terrible precedent if it failed to bring this terrible tyrant to justice. Human Rights Watch would be pleased to provide any information concerning Mengistu and his crimes which your government might find useful. We also believe that this case underscores the need for South Africa to enact domestic legislation implementing its obligation under the *UN Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment*, which South Africa ratified in 1998, to prosecute or extradite accused torturers who enter its territory. South Africa should also enact legislation to establish its jurisdiction over genocide, crimes against humanity and war crimes committed anywhere in the world, as required under customary international law.

Please let us know if we can be of assistance in this matter. Thank you in advance for your consideration.

Dear Minister Nkosazana Zuma,

On November 24, Human Rights Watch wrote to the South African Minister of Justice, Penuell Mpapa Maduna, urging that South Africa bring Mengistu Haile Mariam to justice for crimes against humanity committed during his rule in Ethiopia.

Although we have not received a response to our letter, we have read statements in the press, attributed to Foreign Ministry spokesman Khangelani Mongwane, that South Africa will not bring Mengistu to justice because he is a 'refugee', because South Africa does not have an extradition treaty with Ethiopia, and because it would be inconsistent to insist on Mengistu's prosecution, given South Africa's reconciliation process. Respectfully, we would like to address each of these assertions.

First, Mengistu Haile Mariam is not deserving of the international protection offered to refugees, pursuant to the 1951 Convention relating to the Status of Refugees. As you know, that Convention specifically excludes from protection 'any person with respect to whom there are serious reasons for considering that ... he has committed ... a war crime, or a crime against humanity'. Similar terms are used in the 1969 OAU Convention governing the specific aspects of refugee problems in Africa. South Africa is a party to both these conventions. Mengistu is accused of both war crimes and crime against humanity. From 1974 to 1991, Mengistu and his subordinates were responsible

for atrocities on a massive scale. Tens of thousands of Ethiopians were tortured, murdered or 'disappeared'. Tens of thousands more were killed as a result of war crimes. Many others, probably well in excess of 100,000, died as a result of forced relocations ordered by Mengistu's regime.

Second, in our letter, we did not recommend that South Africa extradite Mengistu to Ethiopia, because of our concerns regarding his right to a fair trial and the application of the death penalty. We did urge, however, that South Africa investigate Mengistu before its own courts. The South African Constitution (*article 232*) expressly incorporates customary international law. Under customary international law, all countries have a right and a duty to exercise jurisdiction over crimes against humanity and a right to exercise such jurisdiction over torture. We also note that South Africa in 1988 ratified the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which requires South Africa to prosecute or extradite accused torturers – such as Mengistu – who enter its territory. South Africa has not, however, met its treaty commitment by enacting implementing legislation to incorporate this.

Finally, we believe that it is a disservice to the South African truth and reconciliation process to use that carefully-devised mechanism as a pretext to provide impunity to one of the most blood-stained tyrants of modern times, a man who has never told the truth about his crimes, who has never sought nor received an amnesty and whose government wishes to prosecute him for crimes against humanity. In South Africa, amnesty from prosecution was predicated on truth-telling, which Mengistu has not done. In addition, the route to reconciliation is not something for others to decide but for each country to determine for itself – Ethiopia has clearly decided that reconciliation is best achieved through justice – a fair assessment given the horrendous atrocities committed. South Africa should not seek to impose its model on a fellow country.

South Africa is regarded as a country which places the highest value on human rights. Our organization has had the privilege of working with your government in developing an effective International Criminal Court to bring to justice those accused of the worst atrocities. We believe that South Africa has an opportunity to break the unfortunate cycle of impunity that has developed in many parts of Africa by bringing Mengistu to justice before its courts and providing him with a fair trial.

Thank you in advance for your consideration.

Postscript

According to Human Rights Watch, no official response was received to these two letters. This silence is particularly poignant when one considers how so recently the ANC in its struggle against apartheid invoked human rights and international legal principles in its demand on governments to place principle above profit or other 'political' motives to cease trade ties with, and impose economic sanctions against, apartheid South Africa or cut diplomatic and other (like sporting and cultural) links. Yet in government the ANC itself has seemed no more ready than Thatcher's Britain to govern by principle. Consider how the post-apartheid regime snuggled up to the Indonesian government at the expense of its one-time fellow East Timorese freedom fighters. It refuses to this day to act against Morocco on its continued denial of the rights of the Polisario movement in Western Sahara, another former ANC ally. It has stood silently by and retained diplomatic ties with the government of Sudan while it continues with its genocide directed at the non-Islamic African majority in the south of that country.

In the absence of an official explanation, one can only speculate as to the government's motives. Perhaps it was the result of a prior arrangement made with Mengistu's host, the increasingly fascist Mugabe regime; or perhaps there was no need for such a deal for, as some close to government have suggested, the ANC does not move against those that supported it in its exile past. Mengistu's Ethiopian government was one such ally. While understandable at a superficial level, there can be no morality in a stance which places considerations of friendship above those of law and justice.

Whatever the case, the result is the South African government's shame and the losers the relatives of those countless thousands of victims of Mengistu's terror who have again been denied their day in court.