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TRANSITIONAL JUSTICE: FRAMING A MODEL FOR ERITREA

THESIS SUBMITTED IN ACCORDANCE WITH THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF LAWS IN THE DEPARTMENT OF CONSTITUTIONAL LAW AND PHILOSOPHY OF LAW FACULTY OF LAW UNIVERSITY OF THE FREE STATE

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BLOEMFONTEIN **MAY 2008**

Declaration

I, the undersigned, hereby declare that the work contained in this study for the degree of Doctor of Laws at the University of the Free State is my own independent work and that I have not previously in its entirety or in part submitted it at any university for a degree. I furthermore cede copyright of the thesis in favour of the University of the Free State.

Signed at Bloemfontein on the 30th day of May 2008

Daniel Rezene Mekonnen

Dedicated

To the memory of Medhanie Haile Afle

For he represents
all victims of injustice in Eritrea

‘From the cowardice that shrinks
from the truth, from the laziness
that is content with half-truths,
from the arrogance that thinks it
knows all the truth, O God of
Truth, deliver us.’

-- A prayer of an ancient scholar

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‘ዓወት ዘልበሱኺ ፍጡር ዘዛረቡ
ኣይስለፉልክን ዲዮም ሰላምታ ክህቡ፡
ከመይ ዲዩ ነገሩ ጕንበት ዘይትነግሪ
ኣስደሚሙኪ ዲዩ ተኽሚሩ ነውሪ፡’

-- ረድኢ ክፍለ (ባሻይ) ‘ወርሒ ጕንበት’፡ 24 ጕንበት 2003

SUMMARY

Since its independence in 1991, Eritrea has seen egregious violations of human rights and humanitarian law. This study examines the perpetration of international crimes in Eritrea between 24 May 1991 and 30 May 2008. A factual and legal analysis of the major incidents and events that took place during the above period of time reveals that crimes against humanity, war crimes and crimes of aggression have been perpetrated in Eritrea in an alarming manner affecting hundreds of thousands of people. In most cases, human rights violations have been perpetrated under a clear and premeditated government plan of persecution and repression of political dissent and certain religious convictions. Although some of the incidents discussed in this work appear to be sporadic events occurring only in a specified time and with a specific objective, most of the violations portray a clear, coherent, systematic and comprehensive government policy of repression.

The widespread and systematic violation of human rights in Eritrea constitutes crimes against humanity as defined by the relevant provisions of international law. There are also violations perpetrated in the context of the 1996 Eritrea-Yemen border conflict, the 1998-2000 Eritrea-Ethiopia border conflict, as well as other incidents of internal and international armed conflicts. These cases portray categories of crimes perpetrated with political motive of a cross-country nature. It is concluded that a certain group of high-ranking government officials can be tentatively identified as the most responsible perpetrators and accordingly they bear individual criminal responsibility for serious violations of international law since 1991.

To end the culture of impunity, this study proposes that international criminal justice, administered by the International Criminal Court, foreign municipal courts, or national or mixed tribunals, should be instituted. However, in the event of a negotiated and peaceful political transition, conditional amnesty administered by a democratically constituted truth and reconciliation commission is also regarded as an acceptable option.

Key terms: transitional justice, international law, human rights, humanitarian law, individual criminal responsibility, truth and reconciliation commission, persecutions, accountability, impunity, perpetrators

OPSOMMING

Sedert onafhanklikwording in 1991, het Eritrea onder ongehoorde skendings van menseregte en humanitêre reg gebuk gegaan. Hierdie studie ondersoek die pleging van internasionale misdade in Eritrea tussen 24 Mei 1991 en 30 Mei 2008. ‘n Feitlike en juridiese ontleding van die belangrikste gebeurtenisse en insidente wat plaasgevind het in hierdie tydperk, bring aan die lig dat misdade teen die mensdom, oorlogsmisdade en dade van aggressie in Eritrea gepleeg is op ‘n ontstellende wyse waardeur honderde duisende mense getref is. In die meerderheid van gevalle het menseregteskendings plaasgevind in die loop van ‘n duidelike en voorbedagte regeringsplan van vervolging van politieke andersdenkendes en onderdrukking van sekere godsdienstige oortuigings. Alhoewel sommige van die gevalle wat in hierdie studie bespreek word voorkom as sporadiese insidente, beperk tot ‘n spesifieke plek en met ‘n beperkte oogmerk, vertoon die meeste gebeurtenisse die kenteken van ‘n duidelike, samehangende, sistematiese en omvattende regeringsbeleid van onderdrukking.

Die sistematiese en wydverspreide skending van menseregte in Eritrea stel misade teen die mensdom daar, soos gedefinieer in die relevante voorskrifte van die internasionale reg. Daar is ook skendings wat plaasgevind het tydens die 1996 Eritrea-Jemen grensgeskil, die 1998-2000 Eritrea-Ethiopië grensgeskil, sowel as ander insidente tydens interne en internasionale gewapende konflikte. Hierdie gevalle kom neer op interstaatlike misdade met ‘n politieke motief. Daar word tot die slotsom gekom dat ‘n bepaalde groep van hooggeplaaste regeringsamptenare tentatief geïdentifiseer kan word as die mees verantwoordelike groep daders en wat gevolglik individueel strafregtelik aanspreeklik gehou kan word vir ernstige skendings van die internasionale reg sedert 1991.

Ten einde die kultuur van straffeloosheid te beëindig, word voorgestel dat internasionale strafregtelike vervolging ingestel moet word deur die Internasionale Strafhof, die howe van buitelandse jurisdiksies, nasionale of gemengde tribunale. In die geval van ‘n onderhandelde en vreedsame politieke oorgang egter, kan voorwaardelike amnestie, geadministreer deur ‘n demokraties saamgestelde waarheids- en versoeningskommissie as ‘n aanvaarbare alternatief beskou word.

Sleutelterme: oorgangsgeregtigheid, internasionale reg, menseregte, humanitêre reg, individuele strafregtelike aanspreeklikheid, waarheids- en versoeningskommissie, vervolging, verantwoordbaarheid, straffeloosheid, skenders van menseregte.

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ACKNOWLEDGEMENTS

When I obtained approval for my research proposal for this study in September 2004, I hardly believed that Eritrea would be ruled until 2008 by the same clique of notorious human rights violators who have done so much harm to the Eritrean people. Yet, I sincerely hope that by writing this doctoral thesis I am contributing something in combating impunity in Eritrea. This task could not have been concluded successfully without the contribution and assistance of the following people.

First and foremost, I extend my heartfelt gratitude to my promoter, Professor J Loot Pretorius, who has immensely contributed towards the successful completion of this study. His criticism, suggestions and perceptive advice were all invaluable throughout the development of this work. He was there any time I needed his assistance and guidance. His role was not limited to academic guidance and mentorship. A crucial factor for the successful finalisation of this study was the generous financial assistance offered by the Research Directorate of the University of the Free State. I am most grateful for Professor Pretorius for facilitating the financial support.

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Daniel R Mekonnen
30 May 2008
Bloemfontein, South Africa

ABBREVIATIONS AND ACRONYMS

ABC	Australian Broadcasting Corporation
ACRWC	African Charter on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AFP	Agence France-Presse
African Charter	African Charter on Human and Peoples' Rights
AGOA	African Growth and Opportunity Act
AI	Amnesty International
AIAI	Al Ithad Al Islamia
AMIS	African Union Mission in Sudan
ANC	African National Congress
ATJRN	African Transitional Justice Researchers Network
AU	African Union
BBC	British Broadcasting Corporation
BMA	British Military Administration
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CIA	Central Intelligence Agency
CJA	Centre for Justice and Accountability
CPJ	Committee to Protect Journalists
CRC	Convention on the Rights of the Child
CRJ	Centre for Restorative Justice
CSVR	Centre for the Study of Violence and Reconciliation
DMLEK	Democratic Movement for the Liberation of Eritrean Kunama
DRC	Democratic Republic of Congo
DWHH	German Agro Action
EDHR-UK	Eritreans for Human and Democratic Rights-UK
EDA	Eritrean Democratic Alliance
EDP	Eritrean Democratic Party
EIJM	Eritrean Islamic Jihad Movement
EISM	Eritrean Islamic Salvation Movement
ELA	Eritrean Liberation Army
ELF	Eritrean Liberation Front
ELF-PLF	Eritrean Liberation Front – Popular Liberation Forces
ELF-RC	Eritrean Liberation Front - Revolutionary Council
ELM	Eritrean Liberation Movement
EMDHR	Eritrean Movement for Democracy and Human Rights
EPLF	Eritrean People's Liberation Front
EPM	Eritrean People's Movement

EPRDF	Ethiopian People's Revolutionary Democratic Front
ESJHR	Eritrean Solidarity for Justice and Human Rights
EU	European Union
FAO	Food and Agriculture Organisation of the United Nations
GDP	Gross Domestic Product
GHI	Global Hunger Index
HRC-E	Human Rights Concern - Eritrea
HRW	Human Rights Watch
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross and Red Crescent
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFPRI	International Food Policy Research Institute
IHRDA	Institute for Human Rights and Development in Africa
IJR	Institute for Justice and Reconciliation
ILC	International Law Commission
ILO	International Labour Organisation
IJTJ	*International Journal of Transitional Justice*
IMT	International Military Tribunal
JEM	Justice and Equality Movement
KHRC	Kenya Human Rights Commission
NECS-E	Network of Eritrean Civil Society in Europe
NGO	Nongovernmental Organisation
NIF	National Islamic Front
NMDF	National Movement for Development and Reform
NMSP	National Military Service Programme
NP	National Party
OAS	Organisation American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OMCT	World Organisation Against Torture
PFDJ	People's Front for Democracy and Justice
POWs	Prisoners of War
RC	Revolutionary Council
RSF	Reporters without Borders
SLM	Sudan Liberation Movement
TCPC	Topeka Centre for Peace and Justice

TFGS	Transitional Federal Government of Somalia
TPLF	Tigrean People's Liberation Front
TJI	Transitional Justice Institute
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UICC	Union of Islamic Courts Council
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNSG	United Nations Secretary-General
UNTAET	United Nations Transitional Administration in East Timor
US/USA	United States of America
Vienna Convention	Vienna Convention on the Law of Treaties
VOA	Voice of America
WIC	Walta Information Centre
WYDC	Warsay Ykealo Development Campaign
ZLHR	Zimbabwe Lawyers for Human Rights

CHAPTER ONE

INTRODUCTION

Outline

1.1 Contextual background[1]

Eritrea is one of the newest countries in the world and the youngest in Africa. Like most African countries, the modern state of Eritrea is a product of European colonialism. The present map and shape of the country came into being at the end of the nineteenth century when Eritrea was occupied by the Italians. The Italians ruled the country until 1941. From 1941 until 1952, Eritrea was a British protectorate. In 1952, the United Nations (UN) adopted a federal arrangement under which Eritrea was federated with neighbouring country, Ethiopia. In 1962, the Ethiopian Emperor Haile Selassie I unilaterally abrogated the federal arrangement thereby declaring Eritrea the fourteenth province of Ethiopia. This triggered a long war of liberation which culminated in 1991 with a *de facto* independence when Eritrea was fully liberated under the dominant leadership of the Eritrean People's Liberation Front (EPLF).[2]

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1 This section relies heavily on Daniel R Mekonnen and Yoel Alem 'Waging Nonviolent Struggle under Fear and Repression: The Case of Eritrea' in Matt Mayer and Judith Atiri (eds) *Seeds of New Hope: Pan Africanist Peace Studies for the 21st Century* (2008, forthcoming); Daniel R Mekonnen 'The reply of the Eritrean Government to ACHPR's landmark ruling on Eritrea: A critical appraisal' 31(2) 2006 *Journal for Juridical Science* 26-56.

2 In 1994, the EPLF changed its name to People's Front for Democracy and Justice (PFDJ).

In 1993, Eritrea was officially recognised as an independent state after a national referendum which resulted in an overwhelming vote for national sovereignty. In the early years of independence, Eritrea enjoyed a relatively peaceful political transition. However, between 1998 and 2000, the country was plunged into a fresh and catastrophic border conflict with Ethiopia. The period before and after the recent Eritrea-Ethiopia border conflict saw flagrant violations of human rights. Some of these violations were exceedingly brutal even when compared to those perpetrated by previous colonial rulers. Human rights violations intensified after September 2001 when the government unleashed a deliberate and widespread crackdown on democratic dialogue and popular demands for political transformation.

Eritrean independence was a hard won victory. However, the vigilance required to consolidate the victory via the establishment of a viable democratic order was sadly absent. Like its pre-independence history, the post-independence history of Eritrea is also characterised by a constant threat of natural and man-made calamities. The following facts are irrefutably true about the overall legal and political situation in Eritrea.

Virtually all countries of the world have an enforceable national covenant called a constitution. Most governments also have functioning parliaments, even if for purposes of lip service. Governments conduct regular and periodic elections irrespective of whether they are free or fair in real terms. Governments also allow private media outlets, although media laws can be so restrictive that the press in fact has no freedom. The Eritrean government adopted a constitution in 1997, but has never implemented it. It had a nominal parliament, only until February 2002. There were also private media outlets, only between 1997 and 2001. There have never been free and fair elections in Eritrea since its independence in 1991. Currently, with bread lines 'common in the streets of Asmara,'[3] life is much harsher for the average Eritrean than it was in the *Derg* era, the period in which the last colonial power ruled Eritrea from 1974 to 1991.[4] There is now a

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[3] *Newsweek* 'Waiting for war,' 30 October 2007. See also *New York Times* 'Resentment and rations as Eritrea nears a crisis,' 16 October 2007.

[4] Awate Team 'A phrase heard at every meeting: "How long?,"' available at http://www.awate.com/portal/content/view/4804/3/ (accessed 19 March 2008). Similarly, Michela

very common adage among Eritreans that the only difference between the *Derg* regime and the current authoritarian rule of the PFDJ is that the officials of the *Derg* regime used to speak in Amharic (the Ethiopian official language) while the PFDJ officials converse in Tigrinya, a popular Eritrean vernacular with a *de facto* official status in Eritrea.

In spite of its protracted struggle for freedom, justice, peace and human rights, Eritrea continues to be ruled by the draconian decrees and military edicts of the PFDJ. The practice negates the fundamental rights of citizens, conventional doctrines and principles such as constitutionalism, the rule of law, the principle of legality, the separation of powers and the judicial review of administrative action. In terms of human rights and humanitarian law violations, Eritrea's post-independence record is shocking. With an estimated number of close to one million direct and indirect victims of egregious violations of international law, Eritrea makes a typical case study of transitional justice. The latest politico-legal development in Eritrea is so frightening that unless there is an effective intervention there is a strong possibility of the disintegration of the Eritrean state. With all its potential for recovery, Eritrea represents a bleak picture of a failed state in the making. The relevance of transitional justice in Eritrea must be seen against such a background.

Wrong quotes the desperate words of an Eritrean taxi driver who pronounced words she had heard said 'about the Belgian in Congo, Portuguese in Angola and British in Zambia.' The taxi driver said: 'Things were better under the Italians.' Wrong laments that she never dreamed that she would hear these words in Eritrea – 'all the more heart-rending for being said with such quiet resignation.' See Michela Wrong *I Didn't Do it for You: How the World Betrayed a Small African Nation* (2005) 383. Another comparable observation on the sad state of affairs in Eritrea is that of a former lecturer at the University of Asmara, who describes Eritrea as a centre of attraction 'for all the wrong reasons.' Indeed, it has become a country where 'obsession with discipline and unity has … contaminated the political process and society more broadly.' Richard Reid 'Traumatic transitions: Open season on the Eritrean state' 105 (2006) *African Affairs* 638. The Eritrean government dismantled the University of Asmara in 2004 under a disguised 'expansion' policy which has literally disintegrated the academic institution into several incompetent 'colleges' and 'schools,' poorly managed by military personnel. This is one of the best examples of the anti-intelligentsia history of the EPLF, as will be revisited in Chapter 2 section 2.7 and Chapter 4 section 4.5.2.

1.2 Relevance of the study

This work is motivated primarily by the recurring injustices of the post-independence era such as those still being perpetrated with impunity. To correctly understand the relevance of transitional justice issues in Eritrea, it is appropriate to investigate the general political situation under which the institutional templates of transitional justice are applicable. In the first place, where does the relevance of transitional justice begin? The answer to this question is to be found in the definition of transitional justice itself, a field of study which deals with:

> a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuses as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights.[5]

Inherent in the definition of transitional justice is 'a framework for confronting past abuse as a component of a major political transformation,'[6] such as when a regime change from dictatorship to democracy has taken place, for example. The requisite factor, political transformation, is noticeably missing in Eritrea. Transition has not yet unfolded

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[5] This is the definition adopted by one of the leading policy and research institutions on transitional justice, the International Centre for Transitional Justice (ICTJ, www.ictj.org). Ruti G Teitel 'Transitional justice genealogy' 16 (2003) *Harvard Human Rights Journal* 69 defines transitional justice as 'the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes.' Richard Siegel also defines it as the study of 'the choices made and quality of justice rendered when new leaders replace authoritarian predecessors presumed responsible for criminal acts in the wake of the "third wave of democratisation."' Richard Siegel 'Transitional justice: A decade of debate and experience' 20(2) (1998) *Human Rights Quarterly* 433. See also generally Ruti G Teitel *Transitional Justice* (2002); Alex Boraine, 'Transitional Justice,' in Charles Villa-Vicencio and Erik Doxtader (eds) *Pieces of the Puzzle: Key Words on Reconciliation and Transitional Justice* (2004) 67-72; Guillermo O'Donnell *et al* (eds) *Transitions from Authoritarian Rule: Prospects for Democracy* (1986); Samuel P Huntington *The Third Wave: Democratization in the Late Twentieth Century* (1995). For an historical exposition on transitional justice, see John Elster *Closing the Books: Transitional Justice in Historical Perspective* (2004). Perhaps the most resourceful compilation on transitional justice is Neil J Kritz (ed) Vol I-III *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1997). This work contains selected writings and excerpts on transitional justice from different sources, including scholarly works, reports of truth and reconciliation commissions (TRCs), legislation, cases and others. It serves as a good starting point for transitional justice discourse. For a recent collection of contemporary scholarly writings on transitional justice, see Naomi Roht-Arriaa and Javier Mariezcurrena (eds) *Transitional Justice in the Twenty First Century: Beyond Truth Versus Justice* (2006).

[6] Louis Bickford 'Transitional Justice' in *Macmillan Encyclopaedia of Genocide and Crimes Against Humanity* vol III (2004) 1045-1047.

sufficiently[7] to determine what kind of an option will take course in Eritrea. There are even concerns that Eritrea is still ruled by a notorious, violent and repressive government 'which is nowhere near even the beginnings of democratic rule.'[8] Hence, it is argued, 'the question of transitional justice is … somewhat abstracted from the reality of today in the case of Eritrea.'[9] This gives rise to a cautious query: Is it practically possible to discuss transitional justice when the requisite political factor is not in place? The readymade logical answer for this question is a bold 'yes,' as is demonstrated below.

In the modern world order, no authoritarian regime has lasted forever. There is always hope for a transition; there is every reason that the current authoritarianism in Eritrea will also come to a standstill at some stage. In the meantime, it is proper to sell the idea of transition justice and advocate for the most visible options for Eritrea. Advance planning around future possible options of transitional justice can take place anytime and anywhere, although it is true that such plans can only be implemented in Eritrea when a favourable political transition allows. The experience of some African countries demonstrates that it is not compulsory to wait for the actual 'transitional' moment before relevant studies on these issues can take place. A typical example in this regard is Uganda. Civil society organisations in the country are already actively involved in national deliberation on transitional justice issues in the midst of ongoing virulent conflict and without waiting for a change in government which is 'the usual indicator of political transition.'[10]

The Zimbabwean experience is also instructive in the context of the current debate. Zimbabwe Lawyers for Human Rights (ZLHR) is one of the leading civil society

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7 Priscilla Hayner, for example, considers the unfolding of a transition as a major factor for the discussion of transitional justice issues. See Priscilla B Hayner *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2001) 23, 271.

8 Professor Lovell Fernandez, email message to author, 4 May 2004. However, the valid concern raised by Professor Fernandez can serve as one of the major policy considerations that inform transitional justice discourse in Eritrea. This will be discussed in detail in Chapters 6 and 7. Nonetheless, this concern cannot be taken as a terminal obstacle for ongoing discussions on transitional justice in Eritrea.

9 Ibid.

10 *Report of the Stakeholders Dialogue - Beyond Juba: Building Consensus on a Sustainable Peace Process for Uganda* (1-3 December 2006, Kampala), available at http://www.refugeelawproject.org/resources/seminars/beyondjuba.pdf (accessed 20 June 2007).

organisations actively involved in transitional justice issues in the context of Zimbabwean human rights crisis. The organisation recognises that Zimbabweans are disillusioned by 'the political and socio-economic situation currently prevailing in the country, and that they have a desire to move to a new situation, which offers more positive opportunities to all.' This represents a need for a transition 'with capacity to administer justice in a transitional environment, be it through trials, truth commissions, reparations or reconstruction programmes.' Building on such firm understanding, ZLHR devotes its resources towards developing a transitional justice project 'so that when transition takes place, there is internal capacity to handle and manage the process.'[11]

With the undemocratic and extremely vengeful nature of the Eritrean government, a discourse on transitional justice does not have a place in today's Eritrea. However, academic and other arenas are always open to the accommodation of discussions around the issue. It may also appear too early to predict which of the major transitional justice toolboxes is suitably applicable to post-PFDJ Eritrea. Nonetheless, some tentative conclusions can be drawn based on the protracted history of human rights violations in Eritrea with the objective of predicting the normative guidelines that should inform the post-PFDJ transitional period.

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[11] Zimbabwe Lawyers for Human Rights (ZLHR) 'Transitional justice project,' available at http://www.zlhr.org.zw/program/justice_project.htm (accessed 23 April 2008). ZILH defines the objectives of the transitional justice project as follows: 'to create capacity among lawyers to handle and manage transitional justice in the event of change; to learn the best practices from other countries that have gone through transition after a period of conflict; to prepare lawyers for the challenges ahead in transitional justice.' Compare this with the 'consensus document' on transitional justice and the Truth, Justice and Reconciliation Commission Bill, drafted by Kenya civil society organisations. The documents call for the establishment of a truth, justice, and reconciliation commission not only as a result of the 2007/2008 post-election crisis but also as a result of historical and systematic injustices which remain unresolved in the history of Kenya. For details, see email message circulated by Davis M Malombe in the listserv of ATJRN, 13 March 2008 and 31 March 2008;.Kenya Human Rights Commission (KHRC) 'Campaign for transitional justice,' available at http://www.khrc.or.ke/subsubsection.asp?ID=3 (accessed 23 April 2008). The recent experience in Kenya and Zimbabwe (especially the later) denote a paradigm shift in the transitional justice discourse. Transitional justice is widely understood as a preventive-remedial discourse, as it mainly focuses on the challenges of post-conflict or post-dictatorship scenarios. In this sense, it emphasises on the prevention of recurrence of one or more conflicts. However, newly developing dimensions, such as that of Kenya and Zimbabwe, have necessitated the need to make transitional justice responsive to ongoing conflicts without necessarily waiting for a post-conflict scenario. These experiences offer valuable lessons to Eritrea.

1.3 Objective of the study

The question of how societies should attempt to heal the wounds of massive human rights violations and past virulent conflicts, in the context of transitional justice, has recently received renewed interest by members of the press, policy makers, researchers, scholars and NGO communities around the globe.[12] In this sense, transitional justice denotes the means by which societies move from less to more democratic regimes. In its contemporary context, it has become a process towards liberalisation.[13] This developing discipline is particularly relevant for Eritrea. Motivated by such a need, the present work aims at framing a practical model of transitional justice for Eritrea. This is done by way of comparative assessment of the experience of selected and successful transitions which have overcome brutal and repressive regimes. The objective of such a comparative assessment and overview is to forge a paradigm that best suits Eritrea's situation. The study also intends to provide insights and examples for Eritrea as it confronts the challenges and dilemmas of post-authoritarian transition. An overall strategy and possible options of transitional justice that can be adopted in post-PFDJ Eritrea comprise the central theme of this work.

A study of the options of transitional justice in the context of Eritrea constitutes two major investigative tasks under a broader historical research: firstly, an examination of the nature of international human rights and humanitarian law violations, and secondly, identification of the most responsible perpetrators of such crimes with a view to ensuring that those responsible are held accountable. This also complements efforts aimed at ending the climate of impunity in Eritrea. Accordingly, the study proposes possible mechanisms for ensuring the accountability of the most responsible perpetrators and suggests other alternative forms of accountability for low- and middle-level perpetrators. However, even in the case of the most responsible perpetrators, the permissibility of alternative forms of accountability, notably conditional amnesty administered by a TRC and which is subject to the fulfilment of certain basic requirements, is also carefully

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12 Rosalind Shaw 'Rethinking truth and reconciliation commissions: Lessons from Sierra Leone,' United States Institute of Peace, *Special Report* 130, February 2005, 1.

13 Teitel 2002 (n 5 above) 5.

evaluated. By such a balanced assessment, the study aims at framing the most appropriate model of transitional justice that best serves the interests of Eritrea.

In this regard, an investigation of the nature of international human rights and humanitarian law violations requires at a minimum the establishment of the most representative of facts, trends and patterns relevant to the determination of violations of international law since the country's independence in 1991. On the one hand, the study proposes a solution to fix the current problems in Eritrea. On the other, it aims at discussing the possible approaches for dealing with the excesses of the current authoritarianism as would be confronted in the post-PFDJ era.

1.4 Scope of the study

By its nature, the Eritrean history of political violence can be categorised into two broad classifications: pre- and post-independence events. The resultant violations can also be categorised into several other sub-classifications, for example, those committed by foreign forces and those perpetrated by Eritreans against Eritreans. From the viewpoint of international law, the Eritrean history of political violence falls under two broad categories of international law: violations of international human rights law and violations of international humanitarian law.[14] This thesis focuses on those violations perpetrated by *Eritreans against Eritreans* since the country's independence on 24 May 1991, namely only those violations perpetrated in the post-independence era. This represents the period when the EPLF was internationally recognised as a *de facto* government, although Eritrea was officially recognised as an independent state only in 1993. The injustices of the pre-independence era would best be examined in a separate study which, for practical reasons, should not be intermingled with the present study. The mere fact that those violations were perpetrated before the establishment of an independent Eritrean state is one major reason to treat them separately. However, for purposes of historical account, a background of the injustices perpetrated by Eritreans

[14] For a discussion of the difference between these two realms of international law, see Chapter 3 section 3.1.

against Eritreans during the liberation struggle will briefly be visited with the objective of shedding some light on the historical development of political violence in Eritrea.

The study covers the period from 24 May 1991 (Eritrea's *de facto* Independence Day) to 30 May 2008, when the final draft of the work was submitted to the panel of external examiners. The analysis is based on available materials as at 30 May 2008. The research examines major violations of international human rights and humanitarian law perpetrated within the aforementioned time-span. While the research considers all major events relevant to the perpetration of international crimes in Eritrea, its focus is, however, limited to incidents and trends that are regarded as the most representative in terms of magnitude, intensity and consistency as well as historical significance.

1.5 Research methodology

This research is a theoretical study based on a literature review and survey of the following materials:[15]

- Human rights and humanitarian law treaties
- Soft law as developed by reports of UN agencies, UN treaty bodies, resolutions of the UN General Assembly and Security Council as well as regional bodies such as the African Union (AU)
- The case law of regional and international judicial bodies as well as domestic courts of democratic dispensations
- The works of publicists of international law, international human rights and humanitarian law, international criminal law and transitional justice
- Reports of governments and intergovernmental organisations, including reports of truth and reconciliation commissions (TRCs)
- Reports of global research and policy institutions

[15] The study also uses five illustrative tables and graphs depicting the ethno-linguistic stratification of Eritrean society, an estimate and categorisation of the total number of Eritrean prisoners detained without trial, the high level of defection of senior government officials since 2001, the alarming scale of refugee outflow in recent years, and the distinction between restorative and retributive justice.

- Reports and analyses of popular news agencies
- Reports of Eritrean and non-Eritrean rights groups
- Official documents of Eritrean political organisations
- Interviews of victims and witnesses

The research is written in such a way that possible answers could be given to relevant questions such as:

- What is the significance of transitional justice in Eritrea? Is it relevant for Eritrea?
- Why is transitional justice an important issue for national and international law?
- What accountability mechanisms are available to end impunity in Eritrea?
- What are the national and international legal standards used to judge a given paradigm of transitional justice?
- How can long-term reconciliation between perpetrators and victims be promoted?
- How should the Eritrean society come to terms with its protracted history of massive human rights violations?
- What should be the role of different actors: the state, educational institutions, religious institutions, civil society, international community and other organisations, in combating impunity and promoting reconciliation?
- What could be the essential form and features of the transitional justice model envisaged in Eritrea?
- What current malpractices are likely to influence future options in terms of dealing with gross human rights violations of the current government?

Methodologically, the research is designed in such a way that it will provide concrete recommendations for methods of dealing with the continued perpetration of injustice in Eritrea, with feasible proposals for mechanisms of advancing accountability and combating impunity. In spite of the apparent bias towards public international law, transitional justice is generally understood as a multidisciplinary study. It also involves history and is society-specific. As a result, the methodology adopted in this study is both descriptive and analytic, combing both purely legal and socio-legal approaches to the discussion.

With regard to proposals for the identification of the most responsible individuals, this work borrows the methodology adopted by the International Commission of Inquiry on Darfur (the Darfur Commission).[16] Although the final determination on the guilt of individual perpetrators is to be made by a competent judicial body, by examining existing reports of violations of international human rights and humanitarian law, the present work has established reliable factual and legal findings implicating the individual criminal responsibility of some senior government officials in the perpetration of international crimes. The factual findings established in this work have been classified, catalogued and assessed under a legal appraisal, the standards of which are proportionate with the international benchmark developed by the Darfur Commission.

The Darfur Commission[17] is a commission of inquiry established by the United Nations Secretary General (UNSG) with the objective of, among other things, identifying the

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16 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 (2004)*, 25 January 2005, para 15 (further reference to this report throughout the present study will be made as '*Report of the Darfur Commission*'). The methodology borrowed from the *Report of the Darfur Commission* is also discussed in Chapter 5 section 5.12. See also generally Christine Byron 'Comment on the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,' 5(2) 2005 *Human Rights Law Review* 351-360.

17 The Commission was chaired by Antonio Cassese, the former President of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY). Other members of the Darfur Commission were: Mr Mohammed Fayek, from Egypt; Ms Hina Jilani, from Pakistan; Mr Dumisa Ntsebeza, former member of the South African TRC and Ms Theresa Striggner-Scott, from Ghana. The Darfur humanitarian crisis, in the exacerbation of which Eritrean government officials played a very destructive role, was once regarded as one of the deadliest humanitarian crises since the establishment of the ICC. On the destructive role of Eritrean government officials in the Darfur crisis, see the discussion in Chapter 4 section 4.13.3.

most responsible perpetrators of international crimes in the Darfur crisis of Sudan. As a non-judicial fact-finding body, the Darfur Commission could not comply with the standard of proof normally adopted by criminal courts (proof of facts beyond a reasonable doubt)[18] or that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a prima facie case).[19] Reflecting on 'the limitations inherent in its powers,' the Darfur Commission concluded that:

> [T]he most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.[20]

The Darfur Commission did not make final judgements as to criminal guilt. It only made assessments and recommendations that would pave the way for future investigations and possible indictments by a prosecutor. Reflecting on the credibility of the findings of the Darfur Commission, its recommendations were finally used as the basis for the indictment of two individuals by the Prosecutor of the ICC.[21] In identifying the most responsible individuals for the perpetration of international crimes in Eritrea, the present work adopts the same methodology. However, the conclusions drawn in this regard are only tentative observations. As indicated earlier, the final determination on the individual criminal responsibility of perpetrators is to be decided by a competent court of law.

1.6 Limitations of the study

There are some apparent limitations of this work that must be made clear to the reader. Transitional justice is a newly developing discipline. Although of a multidisciplinary

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18 See, for example, article 1 of the Transitional Criminal Procedure Code of Eritrea as amended by Proclamation No 5/1991; rule 87 of the Rules of Procedure and Evidence of the ICTY; article 66 (3) of the Statute of the International Criminal Court (hereinafter 'ICC Statute').

19 See, for example, Judge R Sidhwa 'Review of the Indictment against Ivica Rajic' in ICTY *Judicial Reports* 1994-1995 vol II 1065; Judge G Kirk McDonald 'Review of the Indictment against Dario Kordic and Others' in ICTY *Judicial Reports* 1994-1995 vol II 1123.

20 *Report of the Darfur Commission*, para 15. The Commission further notes that this standard was adopted from the definition of a 'suspect' as provided by rule 2 of the ICTY Rules of Procedure and Evidence which defines a suspect as: 'a person concerning whom the [ICTY] Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction.'

21 *British Broadcasting Corporation* (*BBC) News* 'ICC issues Darfur arrest warrants,' 2 May 2007. The individuals indicted by the Prosecutor of the ICC are Humanitarian Affairs Minister Ahmed Haroun and Janjaweed leader Ali Muhammad Ali Abdal Rahman (alias Ali Kushayb).

nature, transitional justice can also be seen as a major growing body of public international law. With regard to the ever-growing nature of public international law, Strydom correctly notes:

> At the heart of the matter lies the problematic nature of the traditional conceptualisation of the sources of international law in view of the impact of several fast developing new fields and the uncertainties these developments have brought in their wake with regard to law-creating competence of various international law organs and the legal status of the documents they produce.[22]

Transitional justice can be described as one of the 'fast developing new fields' to which the writer has alluded. Until recently, little of consequence has been written about this field of study. In fact, as an independent discipline, transitional justice is in its infancy. Naomi Roht-Arriaza correctly describes transitional justice as a term which is 'a bit slippery.'[23] However, with the establishment of thematic institutions and journals specifically focusing on this newly developing area, such as the New York-based ICTJ,[24] the TJI[25] at the University of Ulster, the Cape Town-based IJR,[26] the Johannesburg-based CSVR,[27] the *International Journal of Transitional Justice,*[28] and others, the discipline is growing fast as a cross-cutting multidimensional discourse.

Nonetheless, in the context of Eritrea, there is a dearth of information in academic writing and publication in transitional justice discourse.[29] This is one of the major limitations of

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22 A H Strydom *et al International Human Rights Standards: Administration of Justice* vol I (1997) 3.

23 Naomi Roht-Arriaza 'The New Landscape of Transitional Justice' in Roht-Arriaza and Mariezcurrena (n 5 above) 1.

24 The ICTJ (n 5 above) was founded in 2000 by the former deputy chairperson of the South African TRC, Alex Boraine.

25 Transitional Justice Institute, www.transitionaljustice.ulster.ac.uk, established in 2003.

26 Institute for Justice and Reconciliation, www.ijr.org.za. With Charles Villa-Vicencio, former Director of Research of the South African TRC as its Executive Director, the IJR was established in 2000.

27 Centre for the Study of Violence and Reconciliation, www.csvr.org.za.

28 The *International Journal of Transitional Justice*, www.ijtj.oxfordjournals.org, is a recently launched multidisciplinary journal published by Oxford University Press on behalf of the CSVR and the Human Rights Centre at the University of California, Berkeley.

29 The most relevant academic writings with some contribution on transitional justice in the Eritrean context are: Tesfatsion Medhanie *Towards Confederation in the Horn of Africa: Focus on Ethiopia and Eritrea* (2007); Tesfatsion Medhanie *Eritrea and Neighbours in the 'New World Order': Geopolitics, Democracy and Islamic Fundamentalism* (1994); Tesfatsion Medhanie *Eritrea: Dynamics of a National Question* (1986); Wolde-Yesus Ammar *Eritrea: Root Causes of War and Refugees* (1992); David Pool *From Guerrillas to Governments: The Eritrean Peoples*

the present work. As a reflection of such apparent limitation, many of the sources cited in this work, often Eritrean writers or groups, are internet sources. Eritrean legal literature is characterised by a perceptible lack of academic and professional discourse in all areas and most importantly on constitutional, human rights and international law issues. As asserted by French,[30] legal development in Eritrea is in its infancy and as such the present contribution intends to make a contribution to help rectify this apparent shortcoming by stimulating scholarly debate and legal discourse.

Perhaps another visible limitation of this study is the lack of geographical proximity with the target country and people. The ideal place for the conduct of the study would have been a university situated in Eritrea. As an alternative, this research should have been conducted with constant visits to and contacts with the target country and people. For obvious reasons, this was not possible from the outset. In a legal system typically characterised by judicial underdevelopment, unconstitutional governance, disrespect for the rule of law, and most of all a repressive political culture,[31] a research project such as the present one cannot be conducted in the country under discussion. However, as a largely theoretical study, the proximity factor need not impact unduly on the quality of the research. In fact, the conduct of this research at a South African university has had clear advantages. South Africa represents one of the most successful[32] models of transitional justice and conducting this kind of research at a South African university

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Liberation Front (2001); Dan Connell *Conversations with Eritrean Political Prisoners* (2005); Martin Plaut 'The birth of the Eritrean reform movement' 91(29) (2002) *Review of African Political Economy* 119-122; Richard Reid 'Traumatic transitions: Open season on the Eritrean state' *African Affairs* 105 (2006) 638; Tricia M Redeker Hepner 'Transnational governance and the centralisation of state power in Eritrea and exile' *Ethnic and Racial Studies* 1-27 (forthcoming 2008); Tricia M Redeker Hepner 'Religion, nationalism, and transnational civil society in the Eritrean Diaspora' 10 (2003) *Identities: Global Studies in Culture and Power* 269–293; Assefaw Bariagaber 'Eritrea: Challenges and crises of a new state,' a Writenet Report Commissioned by UNHCR, Status Determination and Protection Information Section – DIPS, 1 October 2006. However, it must be noted that there are other academic contributions in the form of internet posting, reports by media and rights groups as well as declarations, pronouncements and manifestos of opposition groups and others.

30 Thomas R French 'Legal literature of Eritrea: A bibliographic essay' 24 1999 *North Carolina Journal of International Law and Commercial Arbitration* 430.

31 Since 2003, the author has been forced into exile on account of political dissent which is not tolerated in the political culture of the EPLF/PFDJ.

32 However, this does not mean that the South African model of transitional justice is an entirely perfect paradigm. Some of the shortcomings will be discussed in Chapters 6 and 7.

creates closer proximity to the relevant lessons that can be gleaned from by any forthcoming African model of transitional justice.

Current academic discourse on legal development in Eritrea must take into account the difficulty of obtaining first-hand information using rigorous empirical research methods inside the country. Primary empirical data to support and articulate some of the arguments in this work was not easily available. Conducting qualitative legal and historical research supported by exploratory fieldwork is currently impossible in Eritrea. Therefore, much of the analysis is based on secondary sources, although there are a few references in the form of primary empirical data. As a result, in some aspects, this study develops only a tentative set of recommendations. A clear example is the identification of perpetrators. However, the identification of perpetrators with regard to human rights violations is based not only on reliable information collected from secondary sources, but also on a broad range of international case law on Eritrea (as will be discussed in Chapter 4). Similarly, the identification of perpetrators with regard to humanitarian law violations has a firm legal basis emanating from a landmark ruling of The Hague-based Eritrea-Ethiopia Claims Commission (as will be also discussed in Chapter 4).

One major concern, which is difficult to overcome, is the dilemma that arises from the author's dual role in the present work: as victim and researcher. As an outspoken activist and human rights lawyer, who co-founded and chaired a prominent Eritrean human rights advocacy group, EMDHR,[33] the author is one of several Eritrean professionals who have

[33] The Eritrean Movement for Democracy and Human Rights, www.emdhr.org, was founded in 2003-2004. The EMDHR is legally registered in South Africa as a non-profit organisation and has its head offices in Pretoria. Through nonviolent means of struggle, it strives for a peaceful political transition in Eritrea. In so doing, it reports on human rights violations and conducts many other projects on human rights and democratisation, including a daily radio broadcast from Pretoria and California. Approval of the organisation's application for observer status at the African Commission on Human and Peoples' Rights (ACHPR) is anticipated in the near future. Recently, a volunteer at EMDHR (Simon M Weldehaimanot) lodged a communication against the Eritrean government at the ACHPR on behalf of hundreds of thousands of Eritrean citizens who are unable to do so. The communication exhaustively expounds the violation to the right of freedom of movement which has affected hundreds of thousands of Eritrean youths. Discussed in the same context is also the violation of several other fundamental rights and freedoms. Throughout this work, the communication will be referred to as *ACHPR-EMDHR Communication*. This author co-founded and chaired the EMDHR in 2003-2004. Currently, he is a research associate with the same organisation. In her balanced observation, the American anthropologist Tricia M Redeker

been targeted by the Eritrean government's dodgy schemes of illegal deportation from South Africa, especially during 2003-2004.[34] Since then he has apparently been denied legal services, such as the renewal of his passport and citizenship rights, by the Eritrean government. This makes the author himself a victim of the human rights violations of the Eritrean government.[35]

Although such personal background and experience may cloud the judgement of the author, every effort has been made to be as objective and balanced as possible. In an effort to minimise the risk of bias, the author has not made consistent use of any exaggerated or unfounded assertions based on purely individual experiences of his own. In fact, the author prefers citation of sources and references even for facts that he personally is aware of. In this regard, considerable effort has been made to obtain critical information from independent sources, such as foreign writers and governments, human rights organisations, and the reports and statements of international institutions. The analysis on past and current contentious issues is sufficiently backed by conventional academic sourcing. However, as a stakeholder in the political process, the author has at times used his personal knowledge and value judgment in articulating some of his

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Hepner defined EMDHR as 'a self-defined non-partisan civil society movement founded in 2003 by tertiary-level students sent by the Eritrean government to study in South Africa, and now includes other Eritreans living there.' Hepner (n 29 above) 13. Hepner is a long-time friend of Eritrea and its people and is a member of Amnesty International -USA. She is Assistant Professor of Anthropology at the University of Tennessee.

34 The danger was permanently averted at a later stage with the generous assistance that the founders of the EMDHR secured from pro bono legal aid organisations such as Lawyers for Human Rights in Pretoria (www.lhr.org.za) and the Legal Resources Centre in Cape Town (www.lrc.org.za). See for example, *Yoel Alem v The Minister of Home Affairs and Others,* High Court of South Africa, Transvaal Division, Case No 2597/2004 (unreported). See also Hepner (n 29 above) 19.

35 Although this author has not made a specific application on a specific date for the renewal of his passport, the common practice with all Eritrean government embassies is that anyone believed or perceived to be a political opponent is denied their right to citizenship and renewal or issuance of a new passport. Routinely, any such person who applies for a renewal or issuance of a passport is asked to sign self-incriminating statements of treason. This author knows a close friend and a member of the EMDHR who was asked to do this in September 2007 in the Eritrean embassy in Pretoria. The person had no option but to renew his passport by signing an explicit self-incriminating statement of treason. In eight separate cases, the Eritrean embassy in South Africa has thus far revoked some eight passports arbitrarily. This constitutes one of the core violations discussed in this study. It is also one of the central legal arguments in the *ACHPR-EMDHR Communication*. See Daniel R Mekonnen and Samuel B Abraha 'The plight of Eritrean students in South Africa,' a paper presented at the Workshop on Constitutionalism, Regional Peace and Security in the Horn of Africa, University of Pretoria, 22 October 2004; Hepner (n 29 above) 18.

arguments without compromising conventional writing and academic ethics or moral values.

1.7 Outline and overview of chapters

This study consists of eight chapters which are structured as follows:

In this chapter (Chapter 1) a general introduction is presented. The contextual background to the research is discussed. It articulates the relevance, objective, scope, methodology and limitations of the study.

Chapter 2 discusses the political history of Eritrea with a view to providing the relevant background information on the historical development of political violence since the era of the liberation struggle and the unfortunate continuity of such violence in the post-independence era. The need for a special paradigm of transitional justice for Eritrea is also explored in greater detail in the same chapter.

Eritrea's legal obligations, emanating from treaties and peremptory norms of international law, are discussed in Chapter 3. The discussion reveals that although the status of international law in Eritrean domestic law is not clearly defined, there are a number of international human rights and humanitarian law treaties binding on Eritrea. Eritrea has ratified a number of international treaties at different times, albeit in a vague and inconsistent manner. The chapter also provides the legal characterisation of violations based on international standards. It is concluded that the most important categories of international crimes relevant to the discourse on Eritrea are crimes against humanity, war crimes and the crime of aggression.

Chapter 4 examines the factual findings as related to the perpetration of international crimes in Eritrea. The analysis is limited to the most important and representative acts, trends and patterns of abuse relevant to the determination of individual criminal responsibility. Heinous violations of international human rights law such as major

incidents of mass murder, killings, torture, religious and political persecution, detention without trial, extra-judicial executions and other forms of violation against tens of thousands of civilians are discussed in detail. Factual findings representing violations of international humanitarian law and their legal implications are also discussed in this chapter. These constitute violations perpetrated in the context of the 1996 Eritrea-Yemen border conflict, the 1998-2000 Eritrea-Ethiopia border conflict as well as other internal armed conflicts of lower level fought between government troops and Eritrean armed rebel groups. Other forms of violation of international law, such as state sponsorship of terrorism and interference in the domestic affairs of others, are also discussed. The summarised description of the factual findings of the human rights and humanitarian law violations of the Eritrean government discussed in Chapter 4 provides a sufficient foundation on which to base some serious considerations on the international legal implications of such violations.

The legal appraisal of the factual findings in Chapter 4 is the most important basis for the conclusions drawn in Chapters 5 and 6. Chapter 5 discusses one of the two major ways of dealing with the systematic and large scale violations of rules of international law in Eritrea. It departs from the conclusion of Chapter 4 that the atrocities perpetrated by Eritrean government officials are flagrant and pervasive in nature. They constitute crimes against humanity, war crimes and the crime of aggression, all of which are criminal conduct condemned by the international community. The chapter then explores the various available mechanisms for criminal prosecution under international law. Based on a reliable body of information, the chapter also draws tentative conclusions on the identification of some senior government officials (as the most responsible offenders) who are reasonably suspected to bear individual criminal responsibility for the grave violations of rules of international law perpetrated in Eritrea since 1991.

In contrast, Chapter 6 discusses the permissibility under international law of the other major alternative form of transitional justice, namely conditional amnesty, as implemented by TRCs established via a democratic and participatory process. It is submitted that the current state of amnesty in international law is not clearly delineated.

However, with the estimated large number of low- and middle-level perpetrators in Eritrea, resort to a comprehensive prosecutorial option may prove too difficult, costly or time-consuming in the case of Eritrea. Therefore, the establishment of a TRC is seen as a useful and appropriate supplement to criminal justice; this should be done without compromising the strictest application of retributive justice mechanisms against those who are most responsible and are currently frustrating all possible ways for a peaceful political transition. The growing international support for such a proposal is discussed in Chapter 6.

Based on the methodical evaluations conducted in Chapters 4 to 6, Chapter 7 aims at outlining the major features of a workable transitional justice model for Eritrea. In pursuing this goal, the two major options of transitional justice discussed in Chapters 5 and 6 will be revisited and evaluated as mutually reinforcing rather than diametrically opposed paradigms, as far as the transitional justice needs of Eritrea are concerned. The chapter revisits some of the most important research questions and defines the essential form and features of the transitional justice model envisaged in Eritrea. It concludes that the pervasive political crisis in Eritrea, together with the regional instability fomented by Eritrean government officials, constitutes a threat to international peace and security. The situation is evaluated as one meriting intervention by the international community. Accordingly, Chapter 7 recommends that the situation in Eritrea be immediately referred by the Security Council to the ICC pursuant to article 13(b) of the ICC Statute. On the other hand, the chapter concludes that given an enabling political environment, conditional amnesty administered by TRC can also be taken as a viable transitional justice option for Eritrea.

Finally, the study offers a synthesis in order to summarise the main findings, draw conclusions and make recommendations for future improvement. Based on the contextual, factual and legal discussion of all the previous chapters, it concludes by adopting practical recommendations for purposes of combating impunity and ensuring accountability in Eritrea. To give practical effect to the proposed prosecutorial and non-prosecutorial options discussed in Chapters 5, 6 and 7, the study recommends that a

consortium of legal academics, professionals, experts and eminent personalities should be established as a matter of urgency within or outside the Eritrean opposition camp to take the recommendations further.

1.8 Note on citations

Throughout the work, the names of regional and international organisations, regional and international judicial bodies, international treaties, prominent Eritrean and non-Eritrean rights groups, Eritrean political organisations, reports and others will only be referred to in their abridged form or by acronyms. When referred to for the first time, such sources will be cited fully. Any subsequent reference to such sources will be abbreviated throughout the work. However, a comprehensive list of all abbreviations and acronyms used in this work is provided at the beginning of the work. This work follows the style of footnoting and referencing adopted by the *African Human Rights Law Journal*.[36] Attempt has been made to adopt a consistent style of citation, footnoting and referencing according to the house style and rules of the same journal, with minor and rare amendments. Accordingly, the bibliographic information of any source is provided only when a given source is cited for the first time in each chapter. Thereafter, sources are cited in an abridged format with accompanying remarks in parentheses: (n xx above) or (n xx below). At the end of the work, a comprehensive list or bibliography of all works and authorities cited in this study is provided. In terms of formatting, binding and other requirements, the study fully complies with the standards set by the Faculty, the Registrar and the Student Academic Services of the host university.

[36] Published by the Centre for Human Rights, Faculty of Law, University of Pretoria.

CHAPTER TWO

THE POLITICAL HISTORY OF ERITREA

Outline

2.1 Introduction

In countries emerging from a repressive past, the focal point of the legal and political debate is the rapid achievement of successful democratic order. Eritrea is a country which has suffered for a long period of time from excessive concentration of power in the executive branch of government. A remarkable feature of Eritrean history is the emergence of the nation as an independent state at the end of the twentieth century. This has placed the country in an extraordinary position to benefit from the successes and failures of other societies (especially African countries) in transforming themselves into democratic systems. Sadly, the problem of abuse of executive power still persists in Eritrea, almost seventeen years after the liberation of the country from repressive colonial rulers and hundred years after the creation of Eritrea as a state.

Eritrean history is predominantly characterised by a constant threat of natural and man-made calamities. Foremost among such disasters have been the 30-year war for

independence (1961-1991); the major famines of the 1940s, 1970s, 1980s and the continued challenges in terms of food security; the border conflicts with Yemen (1996) and Ethiopia (1998-2000); the suppression of fundamental rights by former colonial rulers and its continuation by the current government; unfriendly relations with all its neighbours and the rest of the world, especially in the post-independence era; and harmful traditional practices and beliefs[1] which still persist, affecting several segments of the Eritrean society. The overall impact of the above unfortunate developments has been the creation of an impoverished society with several population groups detrimentally affected by the imbalances. Of particular relevance to this study is the perpetration of injustices of the post-independence era by the first ever independent Eritrean government which has ruled the nation in its brief post-independence history. The perpetration of injustices during the post-independence era and the ramifications thereof cannot be adequately studied without first casting some light on the general political history and background of Eritrea.

This chapter presents a general account of the political history of Eritrea relevant to the overall theme of the study. Although the focus of this study remains the violations of international law perpetrated since 1991, when the country was liberated by the EPLF and the latter was immediately recognised as a *de facto* government, some general background on the history of injustices perpetrated by *Eritreans against Eritreans* during the liberation struggle era are also briefly discussed with the objective of offering general historical background to the continued history of injustices.

2.2 Eritrea before colonialism

2.2.1 Early history

The 'poly-ethnic, poly-national state'[2] of Eritrea is a product of European colonialism. Trevaskis describes this as follows:

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1 For a discussion on the detrimental role of harmful traditional beliefs in human rights violations, see the discussion in section 2.9 below.

2 Tesfatsion Medhanie *Eritrea: Dynamics of a National Question* (1986) 6.

> Italy created Eritrea by an act of surgery: by severing its different peoples from those with whom their past had been lined and by grafting the amputated remnants to each other under the title of Eritrean.[3]

According to Ammar, 'this is not a situation unique to modern Eritrea.'[4] European colonialism in Africa and parts of Asia has mindlessly fragmented peoples and regions to form colonial boundaries suitable to their expansionist dreams. Eritrea has been known for many years as one of the major spots of man-made calamities which were the result of costly armed hostilities. In fact, one of the longest wars in Africa was waged in Eritrea, between two main antagonistic forces. The one party was constituted of Eritrean nationalists who fought for their inalienable right to self-determination. They claimed that Eritrea should exist as an independent political entity distinct from Ethiopia. The claim succeeded in 1991, culminating in the national independence of Eritrea. The other party to the conflict was the successive Ethiopian governments, who adamantly claimed that they were preserving the sovereignty and territorial integrity of their nation.[5]

Kings and emperors who reigned in what is today's Eritrea and northern Ethiopia (mainly Tigrai) ruled the peoples of Eritrea sporadically.[6] Consequently, the early history of Eritrea shares some common background with what is known today as northern Ethiopia. This common background dates back to the time between the 1st and 6th centuries AD when the ancient city-state of Axum, also known as the Axumite Kingdom, was a dominant political entity in the region. The Axumite Kingdom was an ordered society which demanded and secured a high standard of living as one of the greatest civilizations of its time. This can be easily traced from the momentous historical remnants of the grand kingdom which are still widely dispersed in today's Tigrai (northern Ethiopia) and Eritrea.[7]

Before the advent of the Axumite Kingdom, there was another capital of major political significance in the early history of east African civilisation. This was the ancient port of

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3 G Ken N Trevaskis *Eritrea: A Colony in Transition 1941-1952* (1960) 10-11.
4 Wolde-Yesus Ammar *Eritrea: Root Causes of War and Refugees* (1992) 7.
5 Ibid 1.
6 Medhanie (n 2 above) 6.
7 Trevaskis (n 3 above) 5.

Adulis, near today's Massawa. A neighbour of other Sabaean principalities in Akele Guzai and Seraye provinces of modern Eritrea, this Greek-speaking city-state was an important commercial port which imported and exported goods to and from India, the Persian Gulf, East Africa, the Greco-Egyptian world and the Arabian Peninsula.[8] After the decline of the Axumite Kingdom in about 600 AD, the Five Beja Kingdoms (Bazin, Baqlin, Jarin, Naquis and Qata) reigned in most parts of the present-day Eritrea. They were later replaced by the Ottoman Turks in the first decade of the 16th century.[9] Egyptians replaced the Ottoman Turks in 1860s. The replacement of the Turks by Egyptians precipitated battles with the Tigrean Emperor of Ethiopia Yohannes IV. The defeat of the Egyptians by Yohannes IV, remarkably, coincided with the opening of the Suez Canal. This made Eritrea's maritime location a centre of attraction to European powers and at the same time gave momentum to the scramble for Africa.[10]

2.2.2 Religious and ethno-linguistic origin of the Eritrean people[11]

In spite of its size, which is a total of only 121 320 square kilometres, Eritrea is a linguistically and ethnically heterogeneous country. The semi-arid, semi-fertile land is the home of peoples of various ethnic and linguistic origins. Eritrea is inhabited by nine major ethnic groups which are almost evenly divided between Christian and Islamic denominations, except for a few whose beliefs are indigenous African, and which also include the veneration of ancestral saints. The nine ethnic groups are, according to their size: Tigrinya (ትግርኛ), Tigre (ትግረ), Afar (ዓፋር), Saho (ሳሆ), Hdarb (ሕዳርብ), Bilen (ቢለን), Nara (ናራ), Kunama (ኩናማ) and Rashaida (ራሻይዳ), each of which speaks its own distinct language. The name of an ethnic group denotes also the language spoken by that specific group and a member or members of that particular society. In the Eritrean context, every ethnic group is addressed as a ብሄር (*bher*), a term equivalent to the

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8 Osman Saleh Sabbe *The History of Eritrea* (no date) 28, as quoted in Ammar (n 4 above) 9.

9 Ammar (n 4 above) 10-11.

10 Medhanie (n 2 above) 7.

11 This section draws heavily on David Pool's *From Guerrillas to Governments: the Eritrean Peoples Liberation Front* (2001), the chapter which deals with the social and historical context of Eritrea. See also generally the chapter on the political history of Eritrea in Yohannes Gebremedhin *The Challenges of a Society in Transition: Legal Development in Eritrea* (2004); Tom Killion *Historical Dictionary of Eritrea* (1998).

English *nationality*. The term is usually prefixed before each name, for instance, as in the *bhere-Afar* (ብሄረ ዓፋር), the *bhere-Hdarb* (ብሄረ ሕዳርብ), and so forth.

Although no reliable data exists as to the proportion of the ethnic groups, some sources have indicated that the two dominant nationalities are Tigrinya and Tigre, the former constituting half of the total population. The World Fact Book of 2007 provides estimates of ethnic groups, although it has mixed the Tigre and the Kunama nationalities under one category, which is not strictly correct. According to the same source, the ethno-linguistic composition in Eritrea can be roughly indicated as in the following table:

Ethnic group	Percentage
Tigrinya	50%
Tigre and Kunama	40%
Afar	4%
Saho	3%
Others [Hdarb, Bilen, Nara and Rashaida]	3%

Table I: The proportion of Eritrean ethnic groups in percentage[12]

[12] Central Intelligence Agency (CIA) *The World Fact Book: Eritrea* (2007), also available at https://www.cia.gov/library/publications/the-world-factbook/geos/er.html. According to the same source, the Eritrean population is estimated to be 4 906 585 (as estimated in July 2007). According to a report of the International Coalition for Religious Freedom (2004), the religious composition of the Eritrean population is as follows: Sunni Muslim 50%, Orthodox Christian 43%, Roman Catholic 3%, Protestant 2% and other religions 2%. The last category includes Buddhists, Hindus, Jews, Jehovah's Witnesses and Bahais. Although the report does not specifically mention the recently persecuted churches such as Bethel Church, Faith Mission, Full Gospel, Seventh Day Adventist, the Rhema Charismatic Church and others, the assumption is that these churches might have been included either in the 'Protestant' or the 'other religions' category. The report, which also does not refer to non-Christian and non-Muslim indigenous beliefs, is available at http://www.hri.ca/partners/forob/e/instruments/africa/eritrea.htm. With regard to the total population of Eritrea, Hepner asserts that 'no official census and different modes of migration make estimates difficult.' However, she correctly adds that the total population figures are around 3.8 to 4 million, and estimates for the Diaspora vary. Quoting other sources, she further indicates that based on the 1993 referendum, the government claimed that there were 530 000 exiles worldwide. However, 'including recent out-migrants and Eritreans born abroad, the number would perhaps be double that figure.' The observation that 'migrations have continued into the present, and today the Diaspora comprises approximately one-quarter to one-third of Eritrea's total estimated population' is correct. See Tricia M Redeker Hepner 'Transnational governance and the centralisation of state power in Eritrea and exile' *Ethnic and Racial Studies* (forthcoming 2008) 2.

The Nara, Kunama, Hdarb, Bilen and Rashaida speakers are among the minorities in Eritrea. The two Nilotic populations, the Kunama and the Nara, reside in the two major provinces known as Barka and Gash-Setit, provinces located around the Gash and Setit rivers or the western lowlands.[13] Originally, these two ethnic groups adhered to indigenous beliefs before many of their members were converted to Christianity and Islam. Apart from the Kunama and the Nara, the western lowlands are also home to the Hdrab ethnic group, a Muslim community interchangeably known as the Beja. This group has close ties to its Sudanese kin across the border. In the case of Rashaida, a small Arabic-speaking pastoralist community, there appears to be a preserved language and pastoralist tradition which descended from the people of the Arabian Peninsula. Apart from their pastoralist tradition, the Rashaidas are also known for their smuggling business on the border between Sudan and Eritrea. Members of this ethnic group reside on the coast of the Red Sea, stretching from the province of Semhar to the province of Sahel. Semhar is the province of the port city of Massawa, one of Eritrea's two major ports, and Sahel is the historic home of the Eritrean armed struggle.

The Bilen ethnic group is another minority community residing predominantly in the province of Senhit, 'the geographical and social "bridge" between the plateau and western and northern Eritrea.'[14] The Senhit Province is a diversified place populated by Bilen, Tigre and Tigrinya ethnic groups, the latter having migrated from the plateau. This has enabled the people of Bilen to speak two more languages, Tigre and Tigrinya, besides their mother tongue, Bilen. The Bilen nationality, whose ancestral line is believed to have

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13 Although the number and name of the old provinces were unilaterally changed in 1996 by the PFDJ, this chapter uses the old provincial names of Eritrea which are: Akele Guzai, Barka, Denkalia, Hamasien, Sahel, Semhar, Senhit, Seraye and Gash. The number of provinces was changed in 1996 from 8 to 6, with the following names: Anseba, Debub, Debubawi Keyh Bahri, Gash-Barka, Maekel, Semienawi Keyh Bahri. The decision was so unpopular that many people reflect a strong feeling of resentment in that regard. In their political programmes, several opposition groups strongly oppose the unilateral renaming of provinces by the PFDJ. Since 2001, the government installed five 'military operation zones' on top of the six nominal provinces. The military operation zones and their commanders have effectively controlled every aspect of social, political and religious life in Eritrea. In reality, Eritrea has been governed since 2001 by a military junta which is characteristically authoritarian.

14 Pool (n 11 above) 6.

connections with the Agew of Lasta in Ethiopia, is evenly divided between Christian and Muslim.[15]

Two of the other nine Eritrean ethnic groups, the *bhere-Saho* and the *bhere-Afar*, are of Cushitic origin. Unlike other largely Muslim communities, the Saho nationality consists of both agro-pastoralists and settled agriculturalists. They reside in the eastern escarpments of Eritrea, which is part of the Tigrinya-dominated province of Akele Guzai, adjacent to the Tigre-dominated province of Semhar. At various times, the Tigrinya and the Saho communities have been engaged in serious conflicts instigated by contesting claims of ownership over arable and grazing land, particularly in the areas known as Tora (ሖርዓ) and Tsenadegle (ጸንዓደግለ), in the vicinity of the town of Segeneiti. Similar hostilities also existed between the Kunama and the Nara ethnic groups in the western lowlands. Pool refers to the existence of hostile relations between the Tigrinya nationality and the Tigre-speaking Muslim minorities residing in western Seraye Province.[16] The causes are similar to those in the conflict between the *bhere-Saho* and the *bhere-Tigrinya* in the province of Akele Guzai. The hostilities between the Kunama and the Nara, and the Tigrinya and the Tigre-speaking minorities in the Seraye Province, might not be as intense as those of the Saho and the Tigrinya nationalities, as the latter were occasionally fuelled by Ethiopian forces during the Ethiopian occupation.

In the case of the *bhere-Saho* and the *bhere-Tigrinya* animosity, the Eritrean government claims to have effectively reconciled hostilities in the post-independence era. The appointment by President Isaias Afwerki (who is a member of the Tigrinya ethnic group) of a minister of local government[17] belonging to the Saho ethnic group was seen by some observers as a token of healing, an attempt at mitigating the animosity between the two ethnic groups. However, facts on the ground imply that the wounds have not been

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15 Michael Gaber *The Bilen of Bogos* (1993), as quoted in Pool (n 11 above) 9.

16 Pool (n 11 above) 12.

17 The former Minister of Local Government, Mr Mahmud Ahmed Sherifo, has now been in jail for more than six years, together with other high-ranking officials who challenged the president's autocratic leadership in 2001. The Minister of Local Government is regarded in Eritrea as a vice president, although this title is not officially used by the incumbent.

properly healed, having in fact been suppressed by coercive government machinery without attention to the genuine concerns of the two communities.

The other nationality of Cushitic origin, the *bhere-Afar*, lives on the southern coast of the Red Sea which is known as the Denkalia Province. Members of this ethnic group are entirely Muslim and share the language, culture and religion of the Afar of Ethiopia and Djibouti. Several key EPLF military leaders and freedom fighters of the pioneering liberation front, the Eritrean Liberation Front (ELF), are from this ethnic group. Like the Afar ethnic group, kith and kin of other Eritrean ethnic groups, namely the Kunama, Saho, Hdarb and Tigrinya, also reside on the far side of the border in Ethiopia and Sudan. The life of the Afar-speaking community is mainly associated with activities along the Red Sea, and several of them trade in goods to and from Eritrea and the Arab countries in the Red Sea basin.

The second large ethnic group, the Tigre, is widely scattered in the country stretching into almost all provinces except Denkalia, the southern desert coastal lowlands of the Red Sea. Although largely dominated by Muslim communities, this group has the same linguistic origins as the Tigrinya ethnic group. Both languages originate from the classical Semitic language, Geez (ግእዝ). This language is now, like Latin, confined to ecclesiastic use only.[18] Several of the early ELF fighters belonged to the Tigre ethnic group, as was the case with the Bilen nationality. Generally, all Eritrean ethnic groups have proportionally provided freedom fighters to the ELF, the EPLF or both fronts. Compared to other ethnic groups however, the Rashaida and the Kunama nationalities are said to have had little involvement in the struggle for independence.[19]

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[18] Apart from Tigrinya and Tigre, the popular Ethiopian language, Amharic, also originates from Geez. These three belong to the group of languages known as Semitic languages. The most widely spoken Semitic language today is Arabic with 206 million first-language speakers, followed by Amharic with 27 million first-language speakers, Tigrinya with about 6.7 million total speakers, Hebrew with 5 million first-language speakers and Tigre with about 800 000 first language speakers. The term 'Semitic' emanates from the name Shem, the son of Noah in the Bible. See generally, Raymond G Gordon (ed) *Ethnologue: Languages of the World* 15th ed (2005), online version available at www.ethnologue.com.

[19] For the involvement of the Kunama and the Rashaida ethnic groups in the Eritrean armed struggle, see Pool (n 11 above) 9 and Zekre Lebona 'The Rashaida: maybe our "Tuaregs," not our

The central highlands or the plateau of the country is populated by the largest ethnic group, the Tigrinya. This area includes three of the country's provinces namely, Akele Guzai, Hamasien and Seraye. The capital city, Asmara, is at the heart of the Hamasien Province, where most of the country's economic and industrial sectors are also located. The majority of Tigrinya-speaking people belong to the Coptic Orthodox Christianity, a dominant religion in the southern neighbouring country, Ethiopia. By reason of geographical immediacy to Ethiopia and cultural and religious similarity, the people of these three provinces are historically linked to Ethiopia. The Tigrinya ethnic group consists mainly of village-based, Christian peasant cultivators, with a small number of Muslims, who are traditionally known as Jeberti.

Since independence, the Jeberti group has persistently claimed official recognition as a separate ethnic group under the name it has been identified with for several years. A number of people have reportedly been victimised due to this claim because such official recognition was regarded undesirable by the ruling party. In a recently launched official website,[20] the Eritrean Jeberti have assertively declared that they 'have questions and concerns' relating to formal recognition of their ethnic status and have demanded independent mechanisms for such recognition. The same website claims that a person by the name Dr Yassin Aberra, belonging to the Jeberti group, was assassinated by agents of the Eritrean president for enlightening his fellow countrymen about their identity, history and culture. Similarly, in the Saho ethnic group, members of the Asawrta tribe 'view themselves as distinct from others on the grounds of their Arabian descent and separate lineage.'[21]

"Gypsies,"' available at http://www.awate.com/artman/publish/article_4022.shtml (accessed 17 March 2005), respectively.

20 Jeberti.com 'About us,' available at http://www.jeberti.com/index.php?jeberti=about_us (2004?) and http://www.jeberti.com/index.php?jeberti=an1. The Tekurir community who live in the Gash Province, Tokombia area, also claim recognition as an independent ethnic group. They constitute 'a small group of recently settled migrants said to be descendants of the Hausa tribe in Nigeria.' See *Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in Eritrea*, Draft Report commissioned by the ILO and ACHPR, drafted by the Centre for Human Rights, University of Pretoria, 2007 (hereinafter '*ILO/ACHPR Draft Report*').

21 Pool (n 11 above) 10.

According to Pool, the large number of Tigrinya speakers has struck a balance between Islam and Christianity in the country. For many writers, *plateau* has been synonymous with peasantry and Christianity, and *lowlands* with pastoralism and Islam. In the words of Pool:

> Religion has been a significant historic source of community and political identification, and there is a high correlation between Christianity and Islam and the Tigrinya and Tigre speakers, respectively. Most analysts of Eritrea view the major divide between Eritreans as based on differences of religion and language and forms of production, that is agro-pastoralist lowland Muslims and peasant highland Tigrinya Christians.[22]

The same author asserts that the most important distinction perceived by Eritreans is between highlands and lowlands, a distinction which derives from climate, ecology, culture, religion and modes of production associated with such factors. The exploitation of these perceived distinctions by foreign forces have helped in creating a complex regionalism and problems of national unity in the country which in turn has had a significant impact on Eritrean politics and nationalism. During certain periods, such distinctions have become 'instruments for imperial and colonial rulers and sources of mobilisation for competing Eritrean nationalist forces.'[23] The impact of the exploitation of the ethno-linguistic and religious dichotomy was costly during the armed struggle. Certain episodes of Eritrean history are heavily influenced by it. Consequently, this background is one of the most important factors in the current discourse of transitional justice and the politics of reconciliation in Eritrea.

2.3 Eritrea under colonialism

The opening of the Suez Canal in 1869 gave strategic importance to the Red Sea coast of Eritrea. That was one of the major factors which prompted Italy to buy, via a shipping corporation know as Rubattino Company, a plot of land in the port city of Assab. After 21 years, on New Year's Day of 1890, Italy declared Eritrea an Italian colony and on that specific date the name Eritrea was given to the nation, denoting for the first time a new political entity. The name, which denotes the colour red, originated from the Greek word 'Erythraea.' It had been used by the Ptolemaic Greeks in connection with the Red Sea

22 Ibid 11.
23 Ibid 34.

since the 3rd century BC.[24] Italian occupation of Eritrea was followed by the ratification of the famous Wuchale Treaty between Italy and the Ethiopian Emperor Menelik, who formally acceded to Italy the territory of Eritrea.[25] This treaty clearly demarcated the boundaries of the colony with its neighbour Ethiopia, and left irreversible historical facts and legacies decisively linked with the latest Ethio-Eritrea conflicts.[26]

Initially, the Italian colonisers divided the country into 6 administrative zones (provinces) which were later expanded to 8 by successive rulers. The 8 administrative zones were effective until 1996 with some modification. The traditional provincial administration was unilaterally changed in 1996 by the victorious PFDJ.[27] Italians also introduced a modern agricultural sector, mining, light industries and an infrastructural network, such as railways, which connected the main regions of Eritrea. The overall impact of this was rapid urbanisation. Apart from this, however, Italian colonial rule was harsh and enforced by unforgiving military discipline and conscription aimed at promoting Italy's expansionist wars in the Horn of Africa. As a result, numerous Eritreans were killed and wounded in Italy's attempt to conquer Ethiopia and in the war in today's Libya. According to Ammar, such a common suffering became a major factor for a common destiny.[28] Italian colonial rule is, therefore, believed to have furnished all the essential ingredients for the development of a distinct Eritrean identity which has been central to the Eritrean question in the years that followed. In this regard, Ammar[29] asserts by quoting Halliday and Molyneux, the extended exposure of the Eritrean people to foreign

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24 Ibid 7; see also Ammar (n 4 above) 8.

25 Medhanie (n 2 above) 7.

26 Ammar (n 4 above) 15. As will be seen in Chapter 4 section 4.12.2, the 1998-2000 border conflict with Ethiopia had to be settled finally based on pertinent colonial treaties, such as the Wuchale Treaty. See Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, signed on 12 December 2000 in Algiers (Algiers Peace Agreement), article 4(2).

27 The initial names of the provinces given by the Italians were: Hamasien, Seraye, Akele Guzai, Bassopiano Orientale, Senhit and Bassopiano Occidentale. The names were later modified by Ethiopian rulers as they appear in n 13 above.

28 Ammar (n 4 above) 16-17; Medhanie (n 2 above) 9. See also generally Michela Wrong *I Didn't Do it for You: How the World Betrayed a Small African Nation* (2005) 52-77.

29 Ammar (n 4 above) 2.

influences has paved the way for 'an Eritrean social entity and a distinct Eritrean consciousness of a kind that did not previously exist.'[30]

Italian colonialism in Eritrea lasted for 50 years. The Italians were replaced by the British in 1941 after their defeat in World War II.[31] At that time, Eritrea was a relatively coherent entity, although many painful and deep-cutting socio-political transformations had yet to be undergone during the British Military Administration (BMA) which followed Italian colonialism. That part of Eritrean history is believed to have given more meaning to Eritrea's separate identity and nationhood. If Italians are to be accredited for having provided the material basis for an Eritrean body politic, then the British should be recognised for providing new ideas which have contributed immensely to Eritrea's recent history.[32]

Certain things that were never experienced under the Italians, such as educational facilities, political participation and economic responsibilities, were introduced to Eritrea by the British. This created a politically sensitised population which had not existed previously. In the words of Trevaskis, the revolutionary effect of the brief period of BMA is explained as follows:

> A deliberate and indeed cynical, policy of keeping the Eritrean's belly full and his head empty had earned the Italians political tranquillity. During the [British] occupation, the process was reversed. Eritrean heads were now filled with new ideas gleaned from lectures and books provided by the English Institute and British Information Office, the weekly Tigrinya newspaper, contact with Indians and Sudanese serving in the British forces, and the liberalism of the British administration. Influences of this kind, married to the economic distress which followed, bred discontent and then political consciousness.[33]

The fairly short, albeit influential, BMA did not last longer than had Italian colonial rule. By 1952, Eritrea was federated with Ethiopia and that brought to an end the period of BMA in Eritrea. By the time the British landed in Eritrea, Emperor Haile Selassie of Ethiopia had intensified his groundless claim to Eritrea for the simple reason that he dreamed of replacing the defeated Italians and his country was anxious to own a port. He

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30 Fred Halliday and Maxine Molyneux *The Ethiopian Revolution* (1981) 176.
31 Medhanie (n 2 above) 15.
32 Ammar (n 4 above) 17.
33 Trevaskis (n 3 above) 32 and Ammar (n 4 above) 18.

therefore laid (illegitimate) claim to his neighbouring countries, including today's Djibouti, Somalia and Eritrea. Early British responses to Ethiopia's claim to Eritrea were unequivocal rebuttals based on historical and legal grounds.[34]

After the defeat of Italy in World War II, the fate of former Italian colonies, including Eritrea, became highly contentious in the international arena, particularly among the victorious Allied Powers of the Second World War. The case of Eritrea was controversial because several states claimed a material interest in it, which is why Eritrea provisionally fell under BMA from 1941-1951, until the UN General Assembly could determine the future of the nation.

In the meantime, successive commissions of inquiry were sent to Eritrea to identify the wishes of the Eritrean people. None of them truly reflected these wishes, however, as their reports were heavily influenced by the interests of the Allied Powers. Finally, on 2 December 1950, in complete disregard of the will of the Eritrean people, the UN General Assembly decided that Eritrea should be federated with Ethiopia under the sovereignty of the Ethiopian crown.[35] Before this resolution, there was a malicious, albeit unsuccessful, plan which proposed the partition of Eritrea between Ethiopia and Sudan in complete contradiction to the will of the majority of Eritreans at that time.[36]

The unreasonableness of the UN resolution was later frankly admitted by the American statesman John Foster Dulles, who became Secretary of State in the Eisenhower Administration. Dulles said:

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34 See Ammar (n 4 above) 23 where he quotes relevant British documents of the Second World War and top secret conversations, known as the 'Cairo Conversations,' between Emperor Haile Selassie and Winston Churchill that took place on 15 February 1945. Accordingly, the British concluded that 'most parts of modern Eritrea … were at one time or another ruled by Arabs, Turks, Egyptians and Italians … It follows, therefore, that on treaty or judicial grounds, [Emperors of Ethiopia] can have no claim on Eritrea.'

35 UN General Assembly Resolution 390 A (V).

36 The plan is known as the Bevin-Sforza Plan. It was so dubbed after the names of the Foreign Ministers of Great Britain and Italy, who secretly deliberated on the issue with the United States of America. The foreign ministers were Ernest Bevin and Count Carlo Sforza, respectively. See Medhanie (n 2 above) 16 and Ammar (n 4 above) 28.

> From the viewpoint of justice, the opinion of the Eritrean people must receive consideration. Nevertheless, the strategic interests of the United States in the Red Sea basin and consideration of security and world peace make it necessary that the country has to be linked with our ally, Ethiopia.[37]

At the outset, the proposed federation of Eritrea with Ethiopia was a miscalculation due to several incompatibilities that existed between Eritrea and Ethiopia. For instance, Eritrea had a constitution drafted by the UN which provided for principles of democratic governance, while Ethiopia's constitution was one founded on the divine right of the king. Such deficiencies, merged with Ethiopia's incessant claims over Eritrea, made the federal proposition a fragile arrangement. The Emperor of Ethiopia kept systematically undermining the autonomy given to Eritrea under the federal arrangement. Finally, on 15 November 1962, in violation of the UN General Assembly Resolution, Ethiopia dissolved the federal status of Eritrea, thereby declaring Eritrea part and parcel of Ethiopia.[38] This was 'a recipe'[39] for one of the longest wars in Africa for it prompted the armed struggle in Eritrea.

Medhanie asserts that even before the formal dissolution of the federation, anti-Ethiopian sentiment was growing in Eritrea, as Ethiopia was suppressing democratic rights, harassing critical journalists and writers and controlling the executive and legislative branches in Eritrea. It was before the official dissolution of the federation that all Eritrean political parties, except the Unionist Party, were outlawed by Ethiopia.[40]

The period between 1941 and 1962 is exceptionally remarkable in Eritrean history. As Ammar correctly concludes, the politico-legal arguments for the latter-day liberation movement and social divisiveness in Eritrea originated mainly from this crucial era. Initially, the idea of self-determination was introduced to Eritrea by the British who, in trying to win the support of Eritreans in the war against Italy, promised Eritreans that

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37 *Market Intelligence Report* 'Report on Eritrea' (Greenwich CT) February 1977 2, as quoted in Ammar (n 4 above) 31.

38 Medhanie (n 2 above) 26. See also **ኣለምሰገድ ተስፋይ ኣይንፈላለ - ኤርትራ** *1941-1950* (Alemseged Tesfai *Let Us Not Be Put Asunder 1941-1950*) (2001) 458-461 and 516-520; Tekie Fessehatzion 'A brief encounter with democracy: From acquiescence to resistance during Eritrea's early federation years' 2 (1982) *Eritrean Studies Review* 19-64; and Bereket Habteselassie *The Making of the Eritrean Constitution: The Dialectic of Process and Substance* (2003) 9.

39 Ammar (n 4 above) 23.

40 Medhanie (n 2 above) 25.

they would have their flag and choose the government they desire. This was unequivocally told to Eritreans during the Anglo-Italian War via leaflets dropped by airplanes on the towns and countryside of Eritrea. However, the British did not keep their promises and when put to the test, it was their own interests that mattered most.[41]

2.4 Eritrea during the armed struggle

The Eritrean armed struggle marks the beginning of injustices on a greater scale.[42] The dissolution of the federal arrangement by Ethiopia was preceded by several other significant incidents which had important consequences in the years that followed. Right after the arrival of the British, Eritrea witnessed a proliferation of political parties. Political divisions were mainly characterised by tribal and feudal sentiments, which overlapped with regional and religious divisions.[43] As was noted in the preceding section, this characteristic feature of the political landscape of the 1940s was a result of the Eritrean ethno-linguistic and religious dichotomy, which by that time, was deliberately fuelled by foreign forces as a means of pursuing their own interests.

The major political parties of the 1940s were the Unionist Party, which advocated unification with Ethiopia and consisted predominantly of Christian highlanders, and the Muslim League, which opposed union with Ethiopia and consisted mainly of the Muslim communities in the western lowlands. The first was founded in 1944 and the second in 1946. Other political parties of the time included the Liberal Progressive Party, which

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41 Ammar (n 4 above) 22. On this particular issue, see generally Wrong (n 28 above) 98-99. Wrong's book owes its title to the betrayals of the British and other foreign powers against Eritrea. The following story narrated by Wrong illustrates the situation vividly. After the defeat of the Italians by the British, 'a British captain leading his weary men on the march from Keren into Asmara was met on the road by an old Eritrean woman' who 'was ululating in traditional greeting, celebrating her country's liberation from Italian Fascist rule and the start of a new era of hoped-for-prosperity.' The captain 'is said to have stopped her in mid-flow with one throwaway line designed to crush any illusions about why he and his men were fighting in Eritrea.' He said to the woman: 'I didn't do it for you, nigger.'

42 Although injustices took place in Eritrea before the armed struggle and as early as the 1940s, they were committed mostly by Ethiopians or Eritrean forces backed by Ethiopians. This heading refers, therefore, to those which were perpetrated during the armed struggle exclusively among Eritreans without backing by external forces. However, as will be seen later, during the Eritrean Civil War involvement of foreign forces worsened the outcome of the fratricidal war between the two rival Eritrean forces, the ELF and the EPLF. See the discussion in section 2.7 below.

43 Medhanie (n 2 above) 12.

also favoured independence, and the New Eritrea (Pro-Italy) Party.[44] This era was when conflict and strife began to take shape among Eritreans in their harshest form, characterised by an intense inter-party struggle. The Unionist Party, fully backed by the Ethiopian government and the Orthodox Church as its members were mostly Christian, was notoriously unruly. Groups espousing independence were victims of the Unionist Party's terrorist activities aided by bandits fully sponsored and financed by the Ethiopian government.[45] This contributed greatly in creating a rift in the Eritrean population which in turn resulted in tragic disunity.

In promoting their hegemonic and expansionist plans, Ethiopian rulers, as early as the 1940s, had been fuelling the religious and ethnic differences of Eritreans, the wounds of which lasted for many years. Therefore, it was quite understandable that half of the Eritrean population failed tragically in accepting the other half as trustworthy.[46] Although the impact of the divisions of the 1940s was minimised for some time during the Eritrean liberation struggle, it kept hindering integration and national unity among Eritreans even after independence. Despite the continued plea of Eritrean political forces, particularly those of the Independence Bloc, to international law and organisations, violation of Eritrea's autonomy by Ethiopia could not be averted. Amidst such efforts, a clandestine liberation movement, the Eritrean Liberation Movement (ELM),[47] was founded in the late 1950s to promote the idea of establishing an independent Eritrean state. This movement was quickly disbanded by Ethiopia's ruthless and suppressive machinery, although political skirmishes among Eritrean forces are also believed to have contributed to its demise.[48]

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44 Ammar (n 4 above) 29.

45 Medhanie (n 2 above) 12-16.

46 Ammar (n 4 above) 3.

47 This movement is widely known as **ማሕበር ሸውዓት** or **ሓራካት** (the group of seven). The initial rendition (**ማሕበር ሸውዓት**) denotes the proliferation of the movement in cells of seven. The second rendition (**ሓራካት**) is an abridged form of the Arabic name *Harakat Al-Tahrir Al Eritria* which is the equivalent of ELM. See Ammar (n above) 50.

48 Ammar argued, for instance: '[The movement's] belated attempt to launch an armed struggle in May 1965 was frustrated at Ela Tsada in the Sahel when its 50 fighters were forcibly disarmed and six of them killed in an Eritrean-Eritrean skirmish.' Ammar (n 4 above) 51-52. This can be regarded as one of the earliest incidents of civil war in Eritrea. On the same page, Ammar describes the disintegration of the ELM as '… an introduction to the wider ramifications of the Eritrean struggle and the perennial disunity that bedevilled the liberation movement.' Medhanie (n

It was against such a background that the Eritrean armed struggle for liberation was launched on 1 September 1961 by the liberation struggle hero Hamid Idris Awate. The organisation which launched the armed struggle was the well-known Eritrean Liberation Front (ELF) or the Great *Jebha* (ጀብሃ ዓባይ),[49] as it is widely known. That war came to be known in the 1980s as 'Africa's longest war.'[50] The ELF, whose leadership consisted predominantly of Muslim lowlanders with strong feudal tendencies, was a pre-emptive project launched against the development of the ELM. Some Eritrean writers assert that the early leaders of the ELF were organised along sectarian lines and that their foreign policy was religion-oriented; they thus portrayed the Eritrean cause as a Muslim struggle against Christian oppressors. This emanated from their assumption that most Christians in Eritrea favoured union with Ethiopia under the Christian Emperor Haile Sellassie.[51]

The first leadership of the ELF, in a meeting held in the Sudanese capital of Khartoum in 1965, appointed a Supreme Council (with its chairperson Idris Mohammed Adem). The Supreme Council was known for its destructive policy of divide and rule which caused the division of the Eritrean Liberation Army (ELA) and its areas of operation into five zones based on religious and regional lines. It was also known for promoting religious and regional feuds which at certain times resulted in the execution of many Christian freedom fighters[52] by their Muslim comrades, an account of which will be given in the next section. Apart from that, the leadership was suffering from mounting tribal conflicts and fierce power struggles, the most acute of which was the one between the Semhar group and Gash-Barka lowlanders, known as the 'Alighidir-Hirghigo feud.'[53]

The above shortcomings prompted disillusion among several freedom fighters who were then forced to defect to Ethiopia. Some others, in the late 1960s, came to oppose the anti-revolutionary practices of the Supreme Council. This led to the first reform movement in

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2 above) 28 also described the incident as 'the first of internecine battles in the Eritrean movement.'

49 This name derives from the Arabic rendition of the ELF, Jebha *Al-Tahrir Al-Eritria,* which literally stands for the Eritrean Liberation Front.

50 Medhanie (n 2 above) 28.

51 Ibid.

52 Ibid 29.

53 Ibid.

the ELF which demanded, among other things, the unification of the ELA, the establishment of the ELF leadership inside Eritrea and a national congress at which the problems of the liberation movement could be addressed properly.[54]

The reform movement bore some fruitful results, such as the step by step unification of the ELA under one command which later came to be known as the Provisional General Command. A major shortcoming was that there was no equal representation of all the divisions of the army which constituted the General Command. The reform movement also paved the way for the appointment of a Preparatory Committee for the National Congress. As a result of this and other related developments, by December 1969 the Supreme Council was overthrown. The removal of the Supreme Council resulted in the proliferation of splinter groups, which by 1970 had reached three in number. These were: the Popular Liberation Forces – the Semhar group – led by Osman Saleh Sabe; the Obelites – the Barka group– led by Adem Saleh; and the Christian highlanders – the Isaias Group – initially led by Abraham Tewelde and then by Isaias Afwerki, the current Eritrean President. Later on, an alliance was formed by these three splinter groups which in turn provided fertile ground for the development of the EPLF.[55] The latter organisation liberated the nation in 1991 and remains the sole dominant political force in Eritrea with its new name, the PFDJ.

In spite of the rise of splinter groups, the ELF managed to host its First National Congress in October-November 1971. The Congress came out with a national democratic programme which clearly defined the ultimate objective of the revolution - to build a new democratic Eritrea – and the organisation's internal and external policies. This was believed to be a result of the successful infiltration of advanced and progressive Eritrean elements into the operation of the ELF. The Congress also elected a new leadership, the Revolutionary Council (RC), with Idris Mohammed Adem as 'figurehead' chairperson. This was an indication of the transformation of the ELF from a clan-based movement to a national-democratic front. Nevertheless, the ELF was not yet free from sectarian Muslim

54 Ibid.
55 Ibid 30-32.

cliques whose activities supplemented those of the splinter groups and dampened the hopes generated by the Congress.[56]

Several of the backward elements of the ELF were members of the newly elected RC with a predominant role in the military office. The appointment of Idris Mohammed Adem as figurehead was attributable to such factors, but also aimed at deterring the splintering attitude of some elements. While the ELF emerged victoriously from its First National Congress, the already splintered groups were devising their own plans to attain a dominant role in the unsteady Eritrean political landscape. Such tendencies added more internal strain to the Eritrean liberation struggle, which was already suffering from acute disunity. This was a prelude to the bitter Eritrean Civil War which took place in the years that followed, the wounds of which remained unhealed for decades.

One of the splinter groups, the Isaias Group, launched its controversial document **ንሕናን ዕላማናን** (*Nhnan Elmanan*)[57] which portrayed the ELF as an Islamic movement and a sworn enemy of Christians. The document claimed that in spite of the successful reform movement which had resulted in the unification of the ELA under a central command, the supposedly reformed leadership was infiltrated by destructive elements which stirred up religious antagonism. The document also accused the General Command of the ELF of murdering more than two hundred Christian freedom fighters and of giving further orders for the assassination of Christian peasants.[58]

However, the claims made by *Nhnan Elmanan* are emphatically dismissed by some writers as exaggerated allegations intended to justify the split by the Christian group in 1970. One of those writers is Medhanie who is supported in this by Ammar.[59] Medhanie has gone to the extent of criticising other Eritrean writers who have described the

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56 Ibid 34.

57 Literally meaning 'we and our goals.'

58 *Nhnan Elamanan Liberation*, vol II, No 3, March 1973, as quoted in Medhanie (n 4 above) 36.

59 Medhanie (n 2 above) 36; see also Wolde-Yesus Ammar '*Nhnan Elamanan* was an influential message,' available at http://www.awate.com/artman/publish/article_3002.shtml (accessed 2 February 2004a) and Wolde-Yesus Ammar 'From the mysteries of "*Siriyet* Addis,"' available at http://www.awate.com/artman/publish/article_3269.shtml (accessed 25 April 2004b)

document as 'a clearly articulated political programme.'[60] To Medhanie such characterisation of the document is incorrect as *Nhnan Elmanan* was not a political programme in form or substance. In fact, the document is regarded as the source of all discord which led to that bitter episode of Eritrean history in the 1980s - the gruesome Eritrean Civil War. In this regard, Ammar maintains:

> [T]he message Isaias Afwerki conveyed through the documented *Nhnan Elmanan* and other related means has been dangerous in modern Eritrean politics. The point of raising the issue is, for sure, not to stoke up fire by revisiting old wounds but to accept our past mistakes as they were and try to correct them with correct understanding of what has gone wrong and how. In other words, no Eritrean should have interest in revising or distorting our history. *Nhnan Elamanan* must be understood as the negative influence that it was.[61]

Such was the background of the development and aggravation of the bitter strife among Eritrean liberation movements. Arguably, 'even by 1970 … no degree of reform in the ELF could have totally erased the mistrust and suspicion built up in the minds of the Christian freedom fighters throughout the years of the Supreme Council.'[62] However, the move of the splinter groups, especially that of the Christian or the Isaias Group, should not have been utilised in a way that weakened the progressive changes that were taking place within the ELF. The situation deteriorated when the Revolutionary Council's 1971 attempt to settle the problem by dialogue was frustrated by the stubborn rejection of the Isaias Group. A quote from Medhanie elaborates the situation more clearly:

> In December 1971 the Revolutionary Council set up a Dialogue Committee to approach the Isaias Group … By the time the Committee set out on its mission a few changes had taken place in the Isaias Group. Isaias had secured a dominant position in the leadership. The initial leader, Abraham Tewelde, had died under mysterious[63] circumstances. According to former EPLF fighters, he was actually poisoned by Isaias and a few associates. Abraham was killed just prior to ELF's National Congress: he had favoured attending the Congress and solving the problem through dialogue … Isaias and the

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60 Bereket Habteselassie "Conflict and intervention in the Horn of Africa," *Monthly Review* (1980: New York) 66, as quoted in Medhanie *Dynamics of a National Question* 36.

61 Ammar 2004a (n 59 above).

62 Medhanie (n 2 above) 37.

63 Medhanie claims that the information about the mysterious death of Abraham Tewelde has been transmitted to him by several former EPLF fighters in Sudan. This was, according to him, also reported by official publications of the ELF such as *Awet* No 5 (an ELF publication in Tigrinya). The mysterious death of Abraham Tewelde is one of the liberation era puzzles awaiting proper investigation. The total number of the Isaias or Ala Group is estimated between 11 and 13. See Medhanie (n 2 above) 36 and Ammar 2004a (n 59 above) (footnote added).

> substantial majority in the group refused to face the Dialogue Committee whose mission thus failed.[64]

ELF's call for dialogue was also refuted by the other splinter groups. An alliance with a professed aim to unite forces against Ethiopia and named Eritrean Liberation Front – Popular Liberation Forces (ELF-PLF), was then formed in 1972 in Beirut by the leaders of all the splinter groups. In February of the same year the ELF, which considered itself the first target of the newly formed alliance, was so alarmed that it unleashed its military offensive against the Obelites Group, one of the three splinter groups; most of the members of the latter group were killed and captured. The harshest face of the Eritrean Civil War was now beginning to manifest itself. Until the end of 1974, fratricidal battles of Eritreans against Eritreans were fought which involved the ELF and the three splinter groups.[65]

At the same time, the splinter groups were doing their best to recruit more fighters. Particularly, the Isaias Group's alarming propaganda had attracted the attention of the highland population which resulted in the enlistment of peasants and a few revolutionary intellectuals from the plateau of Eritrea. The amalgamation of almost all departments of the leaders of the ELF-PLF groups came about in 1973 and this led to the formation of the EPLF. The Isaias Group had been growing strong through the increasing number of recruits from the Christian highlands. This gave Isaias more courage to involve himself in a power struggle with Osman Saleh Sabe who was most powerful in the EPLF, but who spent most of his time representing the front in foreign countries through its office of the Foreign Mission.[66]

2.5 The *menkae* and *yemin* movements

Soon after the formation of the EPLF, another reform movement emerged from the new liberation front with the objective of democratising and transforming the EPLF itself. Sadly enough, the EPLF was found to be a victim of the same problem for which reason

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64 Medhanie (n 2 above) 37.
65 Ibid 38.
66 Ibid 43.

its founders claimed separation from the ELF. According to Isaias Afwerki, the EPLF broke away from the ELF in order to form 'a new organisation that would meet the demands and aspirations of the people.'[67] The soon to emerge corrupt behaviour of the EPLF leadership, driven by a regionalist feud and aimed at achieving narrow power objectives, nullified the authenticity of the leaders' commitment to the above claim. The revolutionary intelligentsia, who were to be known as *menkae* (መንካዕ),[68] easily detected the seriousness of the problem and strongly opposed such despotic attitudes. The leadership of the EPLF was also blamed for the use of physical force against freedom fighters and the civilian population who voiced criticism against the leadership.[69]

Apparently, the emergence of the *menkae* was not welcomed by the EPLF leadership who responded by curtailing democratic rights and unleashing a smear campaign against the enlightened group which had severely nullified the leadership's credence in the eyes of the ordinary fighters.[70] In one of the shadowy moments of EPLF's early history:

> [The leadership] spread rumours branding several among the intelligentsia as spies for this or that enemy. In 1973 a revolutionary intelligentsia, Melles Gebre Mariam, was charged with being an agent of the Ethiopian government. On the basis of flimsy evidence and a 'confession' obtained under torture, he was found 'guilty' and executed.[71]

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67 See James Firebrace and Stuart Holland *Never Kneel Down: Drought, Development and Liberation in Eritrea* (1980) 130; Martin Plaut 'The birth of the Eritrean reform movement' 91(29) (2002) *Review of African Political Economy* 119-122.

68 In Tigrinya, *menkae* (መንካዕ) means 'bat.' Medhanie contends that this term was deliberately used in reference to the reformers so as to denounce their democratic move with the intention of attributing to it opportunistic features by comparing them with the mammal that also flies like a bird. In the Eritrean Tigrinya/highland tradition, a bat symbolises dishonesty. Remarkably, the Tigrinya word 'menkae' also stands for 'left,' denoting at the same time left wing conservatism.

69 For an authoritative account of the *menkae* and *yemin* movements, as depicted by two long time supporters of the EPLF, see Pool (n 11 above) 76-82 and Dan Connell *Conversations with Eritrean Political Prisoners* (2005), especially the interview with Eritrea's former foreign minister, Petros Solomon.

70 Medhanie (n 2 above) 44. The official EPLF account of the crisis *The Destructive Movement of 1973* (as quoted in Medhanie) and other official publications of the front such as *Fitawrari* (also as quoted in Medhanie) portrayed the *menkae* movement as a destructive initiative. As late as 2001, some erstwhile EPLF leaders described members of the *menkae* movement as anarchists, while others have acknowledged that the EPLF handled its internal crises badly. Compare the interviews of two former ministers of foreign affairs, Haile Welde'nsea (alias Drue) and Petros Solomon in Connell (n 69 above) 9, 132. The two of them have remained in detention without trial since September 2001.

71 Medhanie (n 2 above) 44.

This is one of the early incidents of perpetration of injustice within the EPLF. It has become widely known that the formative stage of the EPLF was characterised by internecine conflicts and recourse to violence as a means of resolving them. As a result, all members of the *menkae* movement were summarily executed some time in the mid 1970s. There are varying accounts as to the total number of the victims of that massacre. The latest and most authoritative account of the casualties of the vicious repression of the *menkae* movement is that given by a war disabled veteran, Meharena Hadgu.[72] In a topical interview, the veteran fighter disclosed the names of more than thirty freedom fighters that are believed to have been executed as a result of their involvement in the *menkae* movement.[73] Another writer, by the name Alem Tesfu, mentioned the names of 106 civilian and freedom fighters believed to have been extra-judicially executed by the EPLF in different times and under different pretexts.[74]

In the early years of independence, when the victorious EPLF officially announced the names of the fallen heroes of the liberation struggle, it did not officially acknowledge the extra-judicial killings of the same episode. Arguably, this was one of the major tasks the Front failed to accomplish at an early stage before such a failure incited post-independence public discontent. The liquidation of the *menkae* movement is one of the most sensitive issues awaiting full clarification and investigation. It reflects the dark side of the Eritrean liberation struggle on which light must be shed so as to save the nation from violent strife that may erupt at any time. In the light of such repercussions,

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72 'An interview with veteran fighter Meharena Hadgu,' electronic archives of www.asmarino.com (accessed 23 January 2004). Until his exile to the USA, Meharena Hadgu served as the financial manager of the Association of Eritrean War Disabled Fighters. He joined the liberation movement in 1973. For similar stories, see also Aklilu Zere 'The birth of despotism,' available at http://www.awate.com/artman/publish/article_2844.shtml (accessed 23 December 2004); Zekere Lebonna 'The plastic rope: Memories of a foot soldier,' available at http://www.awate.com/artman/publish/article_2857.shtml (26 December 2004); Zekere Lebonna 'Eritrea's disappeared: The death of a former school mate,' available at http://www.awate.com/artman/publish/article_2900.shtml (accessed 7 January 2004); Aklilu Zere 'The poison manifesto that quarantined the dream,' available at http://www.awate.com/artman/publish/article_2975.shtml (accessed 25 January 2005); and Zekere Lebonna 'Foto: A manjus, a hostage and a martyr,' available at http://www.awate.com/artman/publish/article_2967.shtml (accessed 24 January 2004).

73 Some of the names mentioned by Mr Hadgu and others are mentioned in Pool (n 11 above) 79 and in other sources which reported on the *menkae* movement.

74 **ኣለም ተስፉ 'ካብ መዝገብ ታሪኽ'** (Alem Tesfu 'From the archives of history'), available at http://www.eritreana.com/news/April/tarik3_alem.htm (accessed 3 April 2004).

Medhanie concludes that 'though its foremost leaders were decimated, *menkae* continued to live as a tendency and as a work symbolising opposition to the EPLF leadership.'[75]

The repression of the *menkae* movement was followed by another topical issue which remained publicly sensitive during the post-independence era. This was the brutal suppression of another democratic opposition group from within the EPLF, known as the *yemin* (የማን)[76] or rightist opposition. The *yemin* group is also believed to have challenged the EPLF leadership's early undemocratic tendencies. As elucidated by a former EPLF/PFDJ official, Ambassador Adhanom Gebremariam, the *yemin* movement was branded a regionally particularistic group by the EPLF leaders, just like the *menkae* movement was branded 'left wing communism and infantile disorder.'[77] Like other mystifying affairs of the EPLF, the predicament of the *yemin* group is clouded in secrecy. According to the version of Pool, the movement dates back to 1976 and a dozen or more of its members were executed in 1980. The rest of the members were incarcerated and afterwards deployed in the front lines. Pool describes this event as the last challenge to the consolidated leadership of the EPLF.[78]

The EPLF's history is full of mystifying episodes, which has forced some writers to conclude that certain incidents are better left to further investigations. One such event is the death of Ibrahim Afa in 1985. Ibrahim Afa, then one of the Front's high-ranking commanders and a skilled military expert, died under obscure circumstances. In illuminating his death, Pool writes:

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75 Medhanie (n 2 above) 47. Another credible account on the liquation of the *menkae* movement comes from the testimonial of the prominent human rights activist Paulos Tesfagiorgis. In an interview with Michela Wrong, Mr Tesfagiorigis admits that he was one of two envoys sent to Eritrea to investigate the matter on behalf of the Eritrean community in North America. Although they sensed an atmosphere of fear and suspicion they could barely understand, in their report they said: 'Those executed were guilty of incitement, indiscipline and creating division.' Mr Tesfagiorgis states that this was done completely in good faith in order to keep the momentum of a fragile liberation struggle. However, looking back, he 'tortures himself with the thought that he was responsible for what amounted to a whitewash, a ringing endorsement delivered at a time when the young Isaias, facing his most serious challenge to date, might have been either reined in or sidelined.' Wrong (n 28 above) 386-387.

76 Arabic word for right wing conservatism.

77 Awate Team 'A conversation with Adhanom Gebremariam,' available at http://www.awate.com/artman/publish/article_3441.shtml (accessed 28 June 2004a).

78 Pool (n 11 above) 85-86.

> His death has become a matter of controversy. ELF sources imply a power struggle between him and Isaias Afwerki. Other explanations include an organisational difference over the role of the military committee, of which he was the head, to be abolished in the 1987 congress, while the reader of a draft of this book suggests an additional disagreement over military strategy. Controversy and suspicion arise from the two-year gap between Ibrahim's death and its announcement. The detail involved in assessing the circuitous interpretations of Ibrahim Afa's death will be left to an Eritrean Agatha Christie.[79]

These mysterious events coupled with the continued suppression of democratic elements provided favourable conditions for the EPLF to continually condemn genuine progressive movements as reactionaries and calls for democratic changes as threats to national security. Characteristically, the EPLF's hegemonic political culture starts exactly at this historic juncture. This behaviour of stubborn disregard of the voices of others accompanied the EPLF in the years that followed until it victoriously marched into Asmara, the capital of Eritrea. As will be seen in the next chapters, the EPLF/PFDJ continues to 'misrepresent the views of its opponents, accuses dissenters of being foreign agents and of sowing seeds of disunity.' Worst of all, 'it lumps the party, the government, the country and the people into one entity and equates nationalism with support for the government and treason with opposing it.'[80] This has remained a distinguishing feature of the political force dominating pre- and post-independence Eritrea.

2.6 The *falul* and the *sriyet* Addis incidents

Perpetration of injustices during the pre-independence era is not only attributable to the EPLF camp. This era also produced other incidents of extra-judicial killings within the camps of the second major Eritrean liberation movement, the ELF. At times, the leadership of this group was caught up in situations where it resorted to silencing its own members who were believed to have dissenting opinions or 'irreconcilable issues' with the leaders in the highest echelon. Several Tigrinya writers have extensively written on this and similar matters in a series of articles widely published in the Eritrean electronic

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79 Ibid. Compare Ibrahim Afa's death with the death of Abraham Tewelde discussed at n 63 above. Pool has, however, contradicted his previous account of Ibrahim Afa's death on page 87 of his book by saying 'Ibrahim Afa was killed by Ethiopian artillery (and not at the behest of Isaias Afwerki, as a false but continuing ELF-inspired rumour has it) …'

80 Awate Team 'Eritrean embassy in Washington incites religious intolerance,' available at http://www.awate.com/portal/content/view/4651/9/ (accessed 30 October 2007).

media. Some of the major writers are Antonio Tesfai,[81] Gebrehiwet Weldemichael[82] and Alem Tesfu.[83]

The most heinous of the injustices allegedly perpetrated by the ELF were those against its own freedom fighters under what is known as the incident of *sriyet* Addis.[84] As quoted by Ammar,[85] the manuscript of the notorious *Nhnan Elmanan* and another official document[86] of the EPLF, accused the ELF leadership of massacring more than 300 Christian freedom fighters in 1966 and 1967 and again in 1969 and 1970. The documents claimed that the purpose of such killings was to keep Christian freedom fighters in the ELF minority. This allegation is also reiterated by other writers in the Eritrean Diaspora. For instance, Tesfu[87] mentions two prominent freedom fighters, Kindane Kifle and Welday Gidey, as some of the early victims of the injustices perpetrated by the ELF's leadership in Khartoum, Sudan, around 1967-1968. Another source[88] mentions Dr Fitsum Gebreselase, Dr Yahya and Dr Aregai (last names unknown) as the victims of similar incidences of injustice.

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81 **ኣንቶንዮ ተስፋይ 'ምንቅስቓስ ፋለል'** (Antonio Tesfai 'The *falul* movement'), available at http://news.asmarino.com/msmerAwditariK/Images/121_1.gif (accessed 12 September 2002); **ኣንቶንዮ ተስፋይ 'ኩናት ሕድሕድ 1980'** (Antonio Tesfai 'The Civil War of 1980'), available at http://news.asmarino.com/msmerAwditariK/articles/2003/Images/x1_11.gif (accessed 28 July 2003a); **ኣንቶንዮ ተስፋይ 'ዘይርሳዕ ቃላት ተዳጋላይ መልኣከ ተኽለ'** (Antonio Tesfai 'The unforgettable words of Melake Tekle') available at http://news.asmarino.com/Comments/July2003/Images/AntonioTesfay_28_1.gif (accessed 29 January 2003b). See also the Editor's Note in Awate Team's 'Interview with Ambassador Abdela Adem,' available at http://www.awate.com/artman/publish/article_2973.shtml (accessed 25 January 2004b).

82 **ገብረሂወት ወልደሚካኤል 'ጥልመት'** (Gebrehiwet Weldemichael 'Betrayal'), available at http://news.asmarino.com/Comments/July2003/Images/GhebrehiwetWwoldemichael_18_1.gif (accessed 18 July 2003).

83 Tesfu (n 74 above).

84 This incident refers to the alleged summary extra-judicial killing of Christian freedom fighters, most of whom are university and secondary school students, who joined the ELF from Addis Ababa and other parts of Ethiopia. See Ammar 2004b (n 59 above) and Tesfu (n 74 above).

85 Ammar 2004b (n 59 above).

86 The other document quoted by Ammar, 2004b n 59 above, is EPLF's **ሓፊሻዊ ፖለቲካዊ ትምህርቲ ንተጋደልቲ** (Manual of Political Education for Fighters, official Tigrinya publication of the EPLF, 1975, 47-48).

87 Tesfu (n 74 above).

88 **ታደሰ ሞንትርያል** (Tadese Montreal) (presumably a pseudonym) '**ኣባ ጉንባሕ በረኻ** …,' ('The vulture …') available at http://www.zetedelina.com (accessed 24 January 2004).

In a powerful Tigrinya verse titled **ኣበይ ከይንሳደድ** (*No Way Out*),[89] scribed in elegiac and lamenting phrases, a prominent Eritrean poet vigorously portrays the nature of the atrocities perpetrated by the leaders of the ELF. The poem, one of the most influential and contemporary works of Bashai, metaphorically describes the leaders responsible for the extra-judicial killings as 'Kings of Massacre' and their lethal weapon as 'a dagger which cuts human flesh like a vegetable.'[90] Some of the above claims, however, have been firmly dismissed by certain writers who claim that they are only allegations fabricated by the notorious declaration, *Nhnan Elmanan*, and are not yet confirmed by any other independent source. One such writer is Ammar, who writes:

> The Eritrean armed struggle has its share of mysterious occurrences that to this day remain little told and little known to many of us. One of such perceived occurrences that continue to adversely affect mutual trust and reconciliation among many forces and segments in the society is the … incident … commonly known as … '*Sriyet Addis.'* The key source of the allegation was *Nhnan Elamanan.* Subsequent publications by the same author(s) continually hammered to make a point and make many believe that such a grisly killing actually happened. Yet, no concrete proof has been presented to show that the allegedly horrendous criminal act indeed took place and for the reasons presented in *NHnan Elamanan*.[91]

Ammar's contention seems to be in line with the rebuttal of Medhanie, who previously described *Nhnan Elamanan* as 'a clarion call for Christian Eritreans to rally behind the Isaias Group.'[92] According to Medhanie, the allegations of *Nhnan Elamanan* against the General Command were amplifications planned to justify the split of the Christian group from the ELF in 1970.[93] Ammar does acknowledge, however, the fact that 'knowing the whole truth is definitely part of the required package of tools in building mutual trust and initiating reconciliation among mistrustful forces and population sectors' of Eritrean society.[94]

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89 **ረድኢ ክፍለ (ባሻይ) 'ኣበይ ከይንሳደድ'** (Redi 'Bashai' Kifle 'No Way Out'), available at http://www.dekebat-eritrea.com (accessed 20 June 2003).

90 Ibid, author's translation.

91 Ammar 2004b (n 59 above). Ammar is the current chairperson of the Eritrean Liberation Front – Revolutionary Council (ELF-RC), one of the successor organisations to the ELF, whose leaders have remained in exile since the defeat of the ELF by the EPLF in 1981.

92 Medhanie (n 2 above) 36.

93 Ibid.

94 Ammar 2004b (n 59 above).

In what is referred to as the equivalent of the *menkae* crisis of the EPLF, the ELF is also blamed for liquidating an opposition group who challenged the unacceptable practices of the leadership. The group, which was known as *falul* (ፋለል) (literally meaning anarchist), is believed to have been liquidated extra-judicially by ELF leaders.[95] Other writers such as Tesfai conversely argue that members of the *falul* movement were also engaged in killing the freedom fighters of ELF. He mentions as an example Hadgu and Nebiat who were allegedly killed by the *falul* group in 1975-1977 at Meqerka.[96]

The ELF, like the EPLF, is also blamed for mysterious killings of people such as Weldedawit Temesgen, Said Saleh, Abraha Garza and others, something which still tarnishes the image of the early leaders of the ELF. The ambivalent circumstances surrounding the death of renowned ELF freedom fighters such as Melake Tekle (who is believed to have been killed in a scuffle at a meeting) is itself one of the shadowy episodes of the Eritrean armed struggle awaiting clarification.[97] What follows in the next episode of the Eritrean history is the Eritrean Civil War, which resulted in the demise of the ELF from the Eritrean field of struggle.

2.7 The Eritrean Civil War

As indicated earlier, the Eritrean history of disunity dates back to the 1940s when Eritrean political parties of the time were bitterly divided into two main streams: one which supported union with Ethiopia and which was fully backed by Ethiopian support, and another which claimed independence from Ethiopia with its scarce material resources. That background went on to be a perennial factor which bedevilled the Eritrean armed struggle for years. The ELF, which 'grew from a unit of a dozen ill-armed Muslim tribesmen in 1961 to a force of about 30 000 fighters and peasant militiamen by early 1980,' collapsed all of a sudden in the same year as an outcome of a fratricidal civil

95 Weldemichael (n 82 above).
96 Tesfai 2002 (n 81 above).
97 Tesfai 2003b (n 81 above) and Weldemicahel (n 82 above).

war between the EPLF and the ELF.[98] A series of frictions dating back to the 1960s erupted in early 1970, leading to the two fronts commencing on a path of committing numerous injustices. It was the largest civil war Eritrea has ever seen, the causes and consequences of which are yet to be examined holistically in a comprehensive package of national reconciliation and healing.

The purpose of the defeat of the ELF by the EPLF was, mainly but not only, to ascertain the political dominance of the EPLF in Eritrea in a situation of no rivalry; to liquidate the top ELF leaders and thereby exclude them from the liberation struggle; to enable the EPLF to fully control the liberated Eritrean territories; to capture the freedom fighters of the ELF and recruit them into the EPLF so that the EPLF could be strengthened by military capacity and personnel; and to control strategic areas and people who were under the control of the ELF.[99]

The atrocities of the Eritrean Civil War committed from the early 1970s up to the early 1980s were never addressed wisely in terms of a negotiated settlement and peaceful political transition after the country's independence in 1991 or before that. This is true in spite of the fact that the ELF was forced to leave Eritrea after a complete but vengeful defeat by the EPLF which was backed by the Tigrean People's Liberation Front (TPLF). The TPLF is a rebel group which originated from the northern part of Ethiopia.[100] The defeat of the ELF enabled the EPLF to have full control over logistics and diplomatic support in the liberated parts of Eritrea which were previously divided into two rival forces. This emboldened the EPLF to the extent that it did not cease chasing former senior political cadres and military leaders of the ELF wherever they went, including in the neighbouring countries where such people took refuge. The EPLF is accused of the

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98 Ammar (n 4 above) 52. Some sources indicate that the ELF-EPLF Civil War is estimated to have caused some 3000 deaths. RSF 'Naizgi Kiflu, the dictatorship's *éminence grise*,' available at http://www.rsf.org/IMG/pdf/Download_the_full_report.pdf (accessed 21 May 2008).

99 See Tesfu (n 74 above); Tesfai 2003a (n 81 above); and Weldemichael (n 82 above).

100 After 1991, the TPLF became the dominant political force within in the ruling party in Ethiopia, the Ethiopian People's Revolutionary Democratic Front (EPRDF). The same ruling party went to war with the PFDJ from 1998 to 2000 under the pretext of a border conflict.

assassination of several prominent ELF figures in Ethiopian and Sudanese towns since 1983.[101]

As an outcome of the split between the EPLF and the ELF (a Muslim-dominated organisation) and the subsequent defeat of the ELF by the EPLF, the latter has been significantly deprived of Muslim members. This has made the EPLF unavoidably a Christian highlander bloc, or at least it is perceived to be so by former ELF leaders and freedom fighters as a well as certain segments of the Eritrean society. The inevitable consequence of that was, according to Ammar, not only the proliferation of loser-complexes among non-EPLF nationalists, but also the emergence of 'Tigrinya chauvinism' within the EPLF.[102]

After the defeat of the ELF and as a continuation of its hegemonic ideology, the EPLF ruthlessly forbade its freedom fighters and followers from knowing the positive side of the ELF. Instead, through its concerted indoctrination and propaganda machination, the EPLF kept on portraying the ELF as a sworn enemy of the Eritrean people. Intensified sectarian policies were utilised under misguided Marxist rhetoric which aimed at praising the EPLF as the vanguard of a progressive movement in Eritrea and denouncing any other forces outside of it as reactionaries and enemies of the Eritrean people. The number one targets of such baseless accusations were all progressive ELF veterans as well as EPLF freedom fighters who were prone to ideals of democratic transformation and national reconciliation, the majority of whom were from the intelligentsia.[103]

The early reform movements within the EPLF, the *menkae* and *yemin* movements, made leaders of the Front fearful and suspicious of the possibility of the emergence of any movement akin to *menkae* and *yemin*. Thus, the leadership destroyed the credibility and influence of the intelligentsia by promoting negative stereotypes about them. It was simple for the EPLF leadership to exploit the low level of consciousness of other freedom fighters, especially the peasants, to create a rift between them and the intelligentsia. The

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101 Ammar (n 4 above) 113 and Tesfu (n 74 above).
102 Ammar (n 4 above) 119.
103 Medhanie (n 2 above) 67-70.

intelligentsia were portrayed as 'opportunists,' 'reactionaries' and 'petty bourgeoisie' with a deep lust for the comforts of life and devoid of the stamina to engage in the just war of liberation.[104] This has enabled the EPLF leaders to successfully contain the emergence of any dissent from the freedom fighters and it also prompted the majority of the intelligentsia to maintain very low profiles until independence.[105] Only a few of the intelligentsia supported the leadership's sectarian policies and secured bureaucratic privileges in the Front.

Furthermore, the genuine patriots of the EPLF who sought unity with the ELF, as well as others who showed any hint of dissent, became targets of the EPLF's spy machinery. They languished in prisons and suffered physical and psychological torture. The EPLF is well known for its brutal methods of punishment, which, even after independence, are commonly and indiscriminately practised against members of the Eritrean army and civilians. Some of the methods of punishment employed during the armed struggle were sleep deprivation, forcing prisoners to maintain a certain position for hours on end, severe beatings, burning with red hot scythes and tormenting with electric generating devices.[106] The most shocking part of EPLF's political culture was the waging of calculated and premeditated wars against Ethiopian forces to systematically clear out certain elements from the front. Medhanie depicts this as follows:

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104 The negative attitude of the EPLF leadership against the intelligentsia was pervasive even in the post-independence era. Two of the best examples in this regard are: (a) the summary dismissal of more than thirty university lecturers from the University of Asmara in the early years of independence under mysterious circumstances; (b) the offensive and derogatory public pronouncement of the state president against university students (especially law students) uttered scornfully during his 1996 annual public session of questions and answers. See the electronic archives of www.asmarino.com and Awate Team 'President Isaias Afwerki in South Africa,' available at http://www.awate.com/portal/content/view/1017/9/ (accessed 12 July 2002).

105 Medhanie (n 2 above) 67-70. See also Adhanom Gebremariam (Translated by T Giorgis Zewde) 'The Warsay/Yikaalo campaign: A campaign of slavery,' available at http://news.asmarino.com/Articles/2002/09/TesfagiorgisZewde-1.asp (2002). Ambassador Gebremariam, who, according to unconfirmed sources, survived the vilification of EPLF leaders during the silencing of the *menkae* movement, has given one of the most authoritative accounts of the agonising years spent by the intelligentsia under the EPLF.

106 Medhanie (n 2 above) 69. After independence, the front introduced many more methods of brutal punishment, especially in the army. Amnesty International (AI), in its 2004 report, identified five types of brutal punishment applied by government authorities in Eritrea. For details, see AI '*You Have No Right to Ask' – Government Resists Scrutiny on Human Rights* (AI Index: AFR 64/003/2004, May 2004).

> [T]he leadership frequently initiated [adventurous] battles to dispose of [the] 'unwanted' fighters. Such was the battle at the Port of Massawa to which about 2000 carefully selected potential opponents were sent. Almost all were killed.[107]

Some of the above allegations were confirmed by Teklai Gebremariam (alias Aden) on 23 December 1980. Mr Gebremariam was a senior leader of the EPLF, and became the first high-ranking official of the Eritrean revolution to defect to the Ethiopian side. In an interview he gave to Ethiopian journalists in Addis Ababa, he divulged all the secrets he knew about the EPLF in which he had served as a member of the central committee, its highest legislative organ, and as the chief of the department of intelligence, known as ሓለዋ ሰውራ (*halewa sewra*), meaning the Revolutionary Guard. Mr Gebremariam claimed, among other things, to have witnessed the murder of thousands of people by the intelligence and security section of the EPLF.[108] He also mentioned the names of several victims of the brutality of the EPLF, information which has since been substantiated by other sources.

ELF leaders attribute the final defeat of their organisation to the unreserved assistance secured by the EPLF from the TPLF, a political force alien to the Eritrean struggle. This is one of the main reasons for the strong sentiments of resentment of ELF veterans.[109] The fact that the EPLF defeated the ELF with military assistance secured from an external force left former combatants of the ELF with vengeful memories as a result of which many of them remain in exile even after the liberation of the country. After the independence of the country, when the victorious EPLF formed the Provisional Government of Eritrea, no genuine reconciliation took place between the ruling EPLF and its ELF rivals, for which reason the prominent leaders of the latter remained in exile as major opposition forces.[110] In 1991 and before, although the victorious EPLF allowed

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107 Medhanie (n 2 above) 69.

108 ELF Foreign Information Centre *Eritrean News Letter,* Special Issue, February 1981, as quoted in 'EPLF and inside history,' available at http://www.dekebat-eritra.com/MenkaaE_01.html (accessed 13 October 2004). As seen from the history of Gebremariam, his claims may seem like exaggerated and vindictive accounts. However, such allegations underscore the need to investigate thoroughly the mysterious past of the EPLF.

109 *Ibid*. See also Tesfatsion Medhanie 'First things first: Reconciliation before "national" conference,' a paper presented at the Seminar on Dialogue for National Reconciliation in Eritrea (Stockholm, 23 May 2002).

110 They include, among others, the current leaders of most of the thirteen political organisations that formed an umbrella grouping called the Eritrean Democratic Alliance (EDA).

members of the ELF to return to the country, it allowed them to do so not in their capacity as ELF members but as individuals. This was hardly acceptable to many ELF veterans, especially after independence. Ambassador Abdela Adem, who served as a top military commander of the EPLF during the armed struggle and a senior government official and diplomat of the PFDJ after independence, admitted this fact in his interview with Awate Team, when he said:

> When we had the upper hand, when the ELF was forced out, we in the EPLF adopted the philosophy of 'the Eritrean field cannot accommodate more than one organization.' The EPLF began to mouth the [old] ELF slogan: if another front existed, it had to dissolve itself and join the EPLF. We did not want to see anyone besides us. After independence, when it came time to test the 'multi-party' slogan of the EPLF, which was adopted in 1987, it became obvious that that was just a ሞዮራሑ (slogan). We had no readiness to accept other organizations; they had to join in as individuals.[111]

It was with such attitude that the EPLF liberated Eritrea in 1991. With the defeat of the Ethiopian army in the same year, Eritrea's long awaited dream was only partly realised. There was a possibility of adopting a flexible policy of 'forgive and forget' the past. The lost optimism and confidence of a large part of the Eritrean population had to be revived. On the contrary, however, the declaration of a Provisional Government of Eritrea in 1991 by the EPLF with the complete exclusion of all other Eritrean political forces exacerbated the ever-lingering resentment of veteran ELF fighters. The EPLF was not willing to end its belligerent policies, which by that time had prevailed for more than a decade. It kept on categorically denying the existence of other nationalistic forces other than the EPLF

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111 Awate Team 2004b (n 81 above). Ambassador Abdela Adem disassociated himself from the ruling party in 2002 after he concluded that the 'the regime is deformed and cannot be reformed' on account of its undemocratic and unconstitutional conduct. Relate his observations with the following report: ኤምዲሰመ 'ኤርትራዊ ዲሞክራሲያዊ ኪዳን፡ ካበይ ናበይ? (ሳልሳይ ክፋል)' (EMDHR 'EDA from where to where' – Part III), available at http://cs.asmarino.com/index.php?itemid=869 (access 25 March 2008). This report mentions a sweeping military attack code-named 'Operation 500' which was launched on 6 January 1992 by the Eritrean government. The attack targeted the armed wing of the ELF-RC, which at that time was operating in the border with Sudan. The attack is regarded as a manifestation of the Eritrean president's previous 'warning' that post-independence Eritrea will not tolerate 'a vicious circle' of political organisations. This was interpreted by the traditional opposition groups, such as the ELF-RC, to mean that the EPLF was not open for a multiparty political system. The same source further reports that in April 1994, the EPLF (assisted by the EPRDF) tried to abduct some 26 political cadres of the ELF-RC from Addis Ababa. However, the individuals were finally rescued when political asylum was offered to them by Australia and other countries upon the intervention of some international NGOs.

and as late as 1992 it kidnapped two Executive Committee members of the ELF-RC.[112] Up to this day, the Eritrean political landscape is still characterised by complex conflict, strife and bitter ideological differences. This was aggravated in the post-independence era by the ever-worsening hegemonic, repressive and non-reconciliatory character of the political force ruling the country.

2.8 Post-independence Eritrea[113]

The fact that Eritrea was under colonial rule for over a hundred years means that its people did not live in an atmosphere favourable to the development of a democratic government of their own. Soon after the country was liberated by the EPLF in 1991, the front established a Provisional Government to govern the country until the country could draft its constitution. In 1997, the nation's first 'democratic'[114] constitution, although still highly controversial among the opposition, was finalised and swiftly adopted with full support from the government.[115]

The 1997 Constitution did not come into effect immediately after its adoption. The establishment of the Supreme Court (the court solely responsible for the interpretation of

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112 Ammar (n 4 above) 113 and 116.

113 Portions of this section draw heavily on Daniel R Mekonnen and Samuel B Abraha 'The plight of Eritrean students in South Africa,' a paper presented at the Workshop on Constitutionalism, Regional Peace and Security in the Horn of Africa, University of Pretoria, 22 October 2004; organised by the EMDHR. See also generally Kjetil Tronvoll 'The process of nation-building in post-war Eritrea: Created from below or directed from above?' 36 (1998) *Journal of Modern African Studies* 461-482; Richard Reid 'Caught in the headlights of history: Eritrea, the EPLF, and the post-war nation-state' 43 (2005) *Journal of Modern African Studies* 467-488; Sara Rich Dorman 'Eritrea's nation and state-building: Re-assessing the impact of "the struggle,"' a paper presented at the Conference on Globalisation and Self-Determination, London, 4 April 2003.

114 Tesfatsion Medhanie is one prominent Eritrean scholar who strongly contends that the Eritrean Constitution of 1997 is not a legitimate one. See **ተስፋጽዮን መድሃኔ 'ደምበ ተቓወምትን ጉዳይ ቅዋምን - ቅዋም ንምንዳፍ መበገሲ ሰነድ ኣለናዶ፧**,' (Tesfatsion Medhanie 'Do we have a source document for purposes of drafting a constitution?'), paper presented at the seminar organised by the Association for Peace and Democracy (Stockholm, 24-26 March 2004). See also Daniel R Mekonnen 'The reply of the Eritrean Government to ACHPR's landmark ruling on Eritrea: A critical appraisal' 31(2) 2006 *Journal for Juridical Science* 49-51.

115 Habte-Selassie (n 38 above); Richard A Rosen 'The Eritrean constitutional process: An interview with Dr Bereket Habte Selassie' 3 (1999) *Eritrean Studies Review* 172.

the constitution)[116] and other institutions had to precede the coming into effect of the constitution. This was not done on time mainly due to the absence of political will[117] on the part of the EPLF leadership to facilitate democratic transition. Added to this was the 1998-2000 border conflict with Ethiopia. The conflict came to an official end in June 2000.[118] After that the major shortcomings could have been addressed in an acceptable manner. However, the constitution is yet to be implemented. It became one of the most contentious issues in Eritrea.[119]

As from September 2001, under the pretext of the war with Ethiopia and fabricated 'threats to national security,' the government embarked on the persecution of government critics, civil servants, business people, former liberation movement fighters and elders who sought to mediate between the government and its critics. Moreover, the government postponed the proposed general elections and refused to implement the constitution,

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116 Article 49(2) of the Eritrean Constitution provides: 'The Supreme Court shall have sole jurisdiction of interpreting this Constitution and the constitutionality of any law enacted or any action taken by government.'

117 See, for example, Dorman (n 113 above) and Mekonnen (n 114 above).

118 In spite of a protracted peace process which finally led to a final and binding ruling on the border issue, there is a possibility of renewed war between the countries. See, for example, *South African Broadcasting Corporation* (*SABC) News* 'Eritrea accuses Ethiopia of invasion plans again,' 3 November 2007, in which it was reported that the Eritrean government alleged for a third time in a week that Ethiopia is preparing to invade Eritrea. A latest account by the Amharic service of the *Deutsche Welle* reports an incident of a military clash that took place on 18 March 2008. See *Deutsche Welle News*: *Amharic Service*, available at http://www2.dw-world.de/amharic/nachrichten/2.278526.1.html (accessed 21 March 2008). According to UN sources, Eritrea has been obstructing the peacekeeping efforts of the UNMEE for more than a year 'with its military occupation of part of the buffer zone, and restrictions on UN night patrols, supply routes and diesel fuel. Eritrea also banned UN helicopter flights in its airspace in October 2005.' As a result of such sad developments, UN peacekeeping forces have recently relocated out of Eritrea. See, for example, *UN News Centre* 'Over 700 blue helmets relocated out of Eritrea,' available at http://www0.un.org/apps/news/story.asp?NewsID=25935&Cr=unmee&Cr1= (accessed 11 March 2008). In contrast, Eritrea claims that the border has been 'virtually' demarcated by the Boundary Commission. The remaining task is for the Security Council 'to ensure Ethiopia's compliance with its treaty obligations and ensure the evacuation of its occupation from sovereign Eritrean territories.' However, the UN Security Council unanimously lamented that the way the peacekeepers have been treated in Eritrea is totally unacceptable. The US Ambassador to the UN, Alejandro Wolff, also expressed great dissatisfaction with the manner in which Eritrea has handled this issue and warned that 'in the long run Eritrea will pay a very big price for this misjudgement.' See *International Herald Tribune* 'Security Council members agree Eritrean treatment of UN peacekeepers is unacceptable,' 23 April 2008. See also the discussion in Chapter 4 section 4.12.2.

119 Habteselassie (n 38 above) xi and 91-92; Mekonnen (n 114 above).

enabling itself to rule in a despotic fashion. The Special Court[120] of the nation, which continues to try suspects behind closed doors with no right to a defence counsel and no right of appeal, remains one of the worst manifestations of the government's autocracy.

The government in Eritrea is now identified by many reliable sources as one of the worst violators of international human rights and humanitarian law principles. Reports about the government's ever-growing draconian rule are abundant in every quarter of human rights advocacy groups. The government's brutalities are correctly depicted by periodic reports and documentations such as the annual reports of Amnesty International (AI), the Committee to Protect Journalists (CPJ), Human Rights Watch (HRW), and Reporters without Borders (RSF),[121] and various concerns have been expressed by many democratic dispensations such as the European Union (EU) and the United States of America (US) and others. In substantiating the massive scale of human rights violations in Eritrea, a 2004 report by AI quoted an Eritrean soldier who escaped the country as having said:

> In May 2000 I was sent to a rehabilitation centre [military prison] at Tessenei for protesting against the war. I and about 30 others were arrested for talking among ourselves about why we needed this war. This was because I was having nightmares from my work in the medical unit with wounded patients. On the first day there I was beaten. Beating is a normal thing … My feet were tied, and my hands were tied separately behind my back, and I was left outside in this position for three days continuously, lying on my front … One day while I was in the army, three soldiers were brought in front of us and shot. We were told they were traitors but we were not told what the charges were. They had no trial and we didn't know who they were or what they had done.[122]

In another account, the Eritrean President, Mr Isaias Afwerki, was included in the list of the *World's Worst Dictators and Dishonoured Mentions.*[123] In responding to this kind of report and most particularly, in a reaction to the 2004 Country Reports on Human Rights Practices, released by the US Department of State, the Eritrean Government, via its Ambassador to the US, claimed that such reports are fabricated stories copy-pasted from

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120 See also the discussion in Chapter 4 section 4.11 on the Special Court of Eritrea.

121 The acronym derives from the French name of the organisation, *Reporters sans frontières*.

122 AI (n 106 above). See also the following documentation: *International Religious Freedom Report* (2007) and *Country Reports on Human Rights Practices* (2007), both of which are published by the US Department of State; Human Rights Watch (HRW) *Human Rights Overview: Eritrea* (2005); European Parliament *Resolution on Eritrea*, February 2002; Inter-Parliamentary Union *Resolution Adopted Unanimously by the Governing Council at its 173rd Session*, October 2003.

123 *Parade* 'The World's Worst Dictators and Dishonourable Mentions,' available at http://archive.parade.com/2004/0222/0222_dictators.html#anchor (accessed 22 February 2005).

unreliable internet sources and rumours. Furthermore, the ambassador categorically denied that any such reports do no reflect the objective reality, truth and history of Eritrea.[124]

It is undeniable, however, that in several respects, such as according to freedom and development indicators, Eritrea ranks last or near to last in the world and indeed below most countries in Africa. Regarding press freedom, a prominent media report published in October 2007 ranked Eritrea the worst country in the world.[125] Compiled by RSF, the report is one of the most acclaimed annual press freedom reports in the world. In this report 'Eritrea has replaced North Korea in last place in an index measuring the level of press freedom in 169 countries throughout the world.'[126] The report, published for the sixth year, decried the sad state of affairs in Eritrea as follows:

> There is nothing surprising about [Eritrea] … Even if we are not aware of all the press freedom violations in North Korea and Turkmenistan, which are second and third from last, Eritrea deserves to be at the bottom. The privately-owned press has been banished by the authoritarian [government] and the few journalists who dare to criticise the regime are thrown in prison. We know that four of them have died in detention and we have every reason to fear that others will suffer the same fate.

According to another study, Eritrea is said to have moved away from the 'cautious authoritarianism' of the pre-1997 years to a 'full-fledged authoritarianism' after the 1998-2000 border conflict with Ethiopia.[127] The authoritarianism of the Eritrean Government was also persuasively revealed by a recent online survey conducted by Eritrean Diaspora civil society organisations from France, Germany, Holland, Italy, Saudi Arabia, Sweden, Switzerland, UK and North America. Although the survey may not be taken as a perfect indicator of authoritarianism, it draws tentative observations on the sad state of affairs in

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124 *VOA Tigrinya Programme* 'Interview with Girma Asmerom, Eritrean Ambassador to USA,' 18 March 2005.

125 RFS 'Annual worldwide press freedom index,' available at http://www.rsf.org/article.php3?id_article=24025 (accessed 16 October 2007). The report ranks Iceland as the first country with regard to press freedom. South Africa is ranked 40th. The report by RSF is based on a questionnaire completed by 15 freedom of expression organisations throughout the world, 130 correspondents, journalists, researchers, jurists and human rights activists.

126 Ibid.

127 Assefaw Bariagaber 'Eritrea: Challenges and crises of a new state,' a Writenet Report Commissioned by UNHCR, Status Determination and Protection Information Section – DIPS, 1 October 2006, 19.

Eritrea. From a total number of 520 Eritrean voters, 91% asserted their opposition to the government in Eritrea and 86% said that the government is a dictatorship.[128] In its annual global comparative assessment of the state of political rights and civil liberties, Freedom House has ranked Eritrea as a 'not free' and the Eritrean government as one of the most repressive regimes of the world for the seventh consecutive year with a score of seven in political rights and six in civil rights. A score of seven signifies a 'not free' and one signifies a 'free' country. In the assessment, Freedom House utilises two main factors – political liberties and civil liberties enjoyed by citizens of a given country and countries are ranked accordingly as 'free', 'partly free' and 'not free.'[129]

As a result of its alarming record of human rights violations, Eritrea has also been ranked the fourth highest refugee-producing country in the world, with a total number of 19 400 new claims during 2005-2006. With its small population, estimated to be less than four million, the country's refugee crisis is frightening. In terms of refugee outflow, Eritrea is preceded only by failed or chaotic countries such as Somalia, Iraq and Zimbabwe.[130] The following illustrative graph by Awate Team portrays a revealing account of refugee outflow between March and November 2006.

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128 Eritrean Room for Strong and United Opposition (virtual debate room at www.paltak.com) '2007 Survey,' available at http://cs.asmarino.com/Erfsauo.php?itemid=378 (accessed 02 July 2007). Compare this with the various protest marches hosted in front of Eritrean embassies in different parts of the world, including the one hosted in Pretoria in October 2006, which was attended by hundreds of protesters. Another recent protest march was hosted on 29 October 2007 in Washington, DC as broadcasted by *VOA Tigrinya Programme*, 'Report of the protest march in front of the Eritrean Embassy in Washington DC,' 30 October 2007.

129 Freedom House *The Worst of the Worst: World's Most Repressive Societies* (2007). Founded in 1941 by Eleanor Roosevelt and other Americans of high reputation, Freedom House is a US-based think tank which, among other things, assesses the extent and expansion of freedom in the world. It publishes surveys detailing the state of civil liberties, political rights, economic freedom and governance in countries of the word. See also Freedom House *Countries at the Crossroads* (2007).

130 UNHCR *2006 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons* (2007), also available at http://www.unhcr.dk/Pdf/statistics/global_trends_2006.pdf. Another report also states that 'in terms of refugee repatriation and resettlement, Eritrea holds the record for the second highest refugee outflow per capita (after Burundi). In terms of absolute numbers, Eritrea's refugee outflow at 377,000 is the fifth highest.' See Awate Team '2003: Defending indefensible, indulging incompetence,' available at http://www.awate.com/portal/content/view/2748/2/ (accessed on 11 January 2004c). See also Baraiagaber (n 127 above) 35; Neil R Brown et al 'The insecurity of Eritreans and Ethiopians in Cairo' 16 (2004) *International Journal of Refugee Law* 675-678; Simon M Weldehaimanot 'Guide to Eritrean asylum seekers: Compilation of cases' (unpublished paper, 2007).

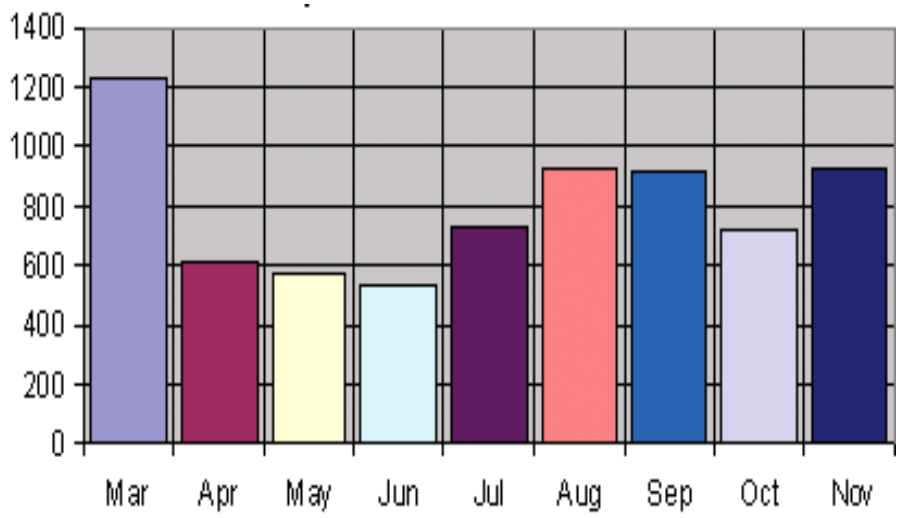

Table II: A fraction of Eritrean refugees who fled to Sudan between March and November 2006 (total number of refugees 7148)[131]

In recent years, Eritrea has suffered from severe economic meltdown. A latest report by the International Monetary Fund (IMF) revealed that Eritrea's inflation is the second highest in the world, the first being that of Zimbabwe.[132] Eritrea is governed by one of the most corrupt governments in the world. According to Transparency International, Eritrea was ranked 111 out of 180 countries surveyed by a 2007 global corruption perceptions index.[133] The country has one of the lowest literacy rates in the world. As much as 42.4% of the total population lacks basic literacy.[134] Development and nutrition indicators regarding Eritrea also disclose shocking revelations. One of the most reliable worldwide

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131 Awate Team 'Eritrean escapees to The Sudan,' available at http://www.awate.com/portal/content/view/4460/6/ (accessed 30 January 2007). A recent report by the *Reuters* indicates that up to 25 000 Eritreans leave 'illegally' each year for neighbouring Sudan and Ethiopia. See *Reuters* 'Eritrean leader blames CIA plot for youth exodus,' 13 May 2008.

132 IMF *World Economic and Financial Surveys* (2007), available at http://www.imf.org/external/pubs/ft/weo/2007/02/pdf/text.pdf. According to the 2007 *World Economic Outlook Database*, Eritrea's GDP was US$ 1.425 billion. Eritrea's GDP per capita in 2007 was US$ 293.178. Other African countries with less than US$ 300 GDP per capita are Burundi, DRC, Ethiopia, Gambia, Guinea-Bissau, Liberia, Malawi and Sierra Leone. Relatively, Zimbabwe, which is widely considered by the international media as one of the most repressive countries in Africa, had a GDP per capita of US$ 1 378.409 and a GDP of US$ 1.425 billion in 2007. The highest GDP per capita in Africa is that of the Seychelles, which is US$ 8 852.307. South Africa had a GDP per capita of US$ 5 723.928 and a GDP of US$ 274.501billion in the same year. See IMF *World Economic Outlook Database* (October 2007), available at http://www.imf.org/external/pubs/ft/weo/2007/02/weodata/weoselgr.aspx.

133 Transparency International *Corruption Perceptions Index* (2007), available at http://www.infoplease.com/world/statistics/2007-transparency-international-corruption-perceptions.html.

134 CIA (n 12 above).

indicators on nourishment is the Global Hunger Index (GHI) published by the German Agro Action (DWHH) and the International Food Policy Research Institute (IFPRI). This report, released on 12 October 2007, has ranked Eritrea third from bottom in terms of hunger; this means 116th out of 118 countries assessed by the report.[135] Ironically, on the same day that the report by the DWHH and IFPRI was released, the Eritrean President made a diametrically opposed comment in which he claimed:

> We can say that we have successfully implemented programmes on food security and we may have reached a level where we do not need any food aid from outside. The economy is performing well - not in terms of statistics - that would be very misleading. The performance could only be measured by the changes in the quality of life of people here.[136]

The statement by the president underscores the dismissive denial and distortion of facts routinely practised by the Eritrean government. In 2003, Eritrea ranked first in the world for being the most militarised state and in terms of percentage of its gross domestic product (GDP), Eritrean military expenditure ranked the third highest after North Korea

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135 DWHH and IFPRI *Global Hunger Index: Facts, Determinants and Trends* (2007), also available at http://www.welthungerhilfe.de/fileadmin/media/pdf/Pressemitteilungen/DWHH_GHI_english.pdf.

136 The comment was given in an interview with *IRIN News:* 'President says border issues "must be resolved,"' available at http://www.irinnews.org/Report.aspx?ReportId=74764 (accessed 12 October 2007). Similarly, according to the 2007/2008 UNDP *Human Development Report* (available at http://hdr.undp.org/en/media/hdr_20072008_en_complete.pdf), the Human Development Index (HDI) for Eritrea is 0.454, which gives Eritrea a rank of 157th out of 177 countries. As a country exhibiting the lowest indicators of socioeconomic development, Eritrea is one of the 33 least developed countries (LDCs) in Africa. The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) defines a given county as a LDC mainly based on low levels of GDP and economic vulnerability. See UN-OHRLLS 'The criteria for the identification of the LDCs,' available at http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm (accessed 25 March 2008). According to the 2007/2008 *Human Development Report*, an HDI of 0.800 and above represents a high human development index. An HDI between 0.500 and 0.799 represents a medium human development index, while an HDI of 0.499 and below represents low human development index. Countries with an HDI of 0.488 and below are called LDCs. At 0.336, the HDI of Sierra Leone represents the lowest in the world and at 0.968 that of Iceland represents the highest. With an HDI of 0.674, South Africa is ranked 121st out of 177 countries assessed by the report. Sout Africa has a medium human development index. As a simplified measurement of life expectancy, literacy, education, standard of living, and GDP per capita for countries worldwide, the HDI determines and indicates whether a country is a developed, developing or an underdeveloped entity and measures the impact of economic policies on quality of life. See generally Antony Davies and Gary Quinlivan 'A panel data analysis of the impact of trade on human development' 35 (5) (2006) *Journal of Socioeconomics* 868-876.

and Angola.[137] As will be seen in detail in Chapter 4, only the number of victims of arbitrary detention (detention without trial and *incommunicado* detention) during the post-independence era is estimated to be more than 20 000.[138] Since 1991, violations of international humanitarian law have also victimised an estimated number of close to one million people.[139] Contrary to popular expectations of democratisation and a culture of human rights founded on the rule of law, post-independence Eritrea is characterised by gross violations of human rights and humanitarian law which comprise mainly, but not only, murder and mass killings, imprisonment or severe deprivation of physical liberty, torture, rape and sexual slavery, detention without trial, enforced disappearance of persons and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to mental or physical health. Any examination of the post-independence Eritrean legal and political reality, as related to transitional justice and the politics of reconciliation must be seen within this context. The post-independence era, especially the post-2001 period, has seen egregious violations of international law no less pervasive than those perpetrated during the armed struggle. The need for a special paradigm of transitional justice is as apparent as ever.

In spite of its protracted struggle for freedom, justice, peace and human rights, Eritrea continues to be ruled by one of the most violent regimes in Africa. The sad thing is that the brutalities and negative developments are not adequately covered by the international media and as a result the international community knows little or hardly bothers about what is happening in Eritrea. With regard to the little attention paid by the international media and community, Medhanie commented at an earlier time that reports of international media on Eritrea 'are lacking on the issue of internal political and organisational differences. They are inattentive to the existence and grievances of the Eritrean forces opposing the [EPLF] which is in state power.'[140] Writing from Eritrea under a penname, Events Monitor similarly laments that:

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137 Awate Team 2004c (n 130 above). According to the same report, Eritrea's GDP was the third lowest in the world in 2003. Economic deprivation has worsened in recent years.

138 See the discussion in Chapter 4 section 4.14.

139 In this regard, see the discussion in Chapter 4 section 4.15.

140 Tesfatsion Medhanie *Eritrea and Neighbours in the 'New World Order': Geopolitics, Democracy and Islamic Fundamentalism* (1994) 2.

> As someone living in Eritrea, I am deeply troubled by the discrepancy between the scale of crimes being committed against the people on the one hand, and the inadequacy of reporting them on the other. Not that there is total absence of human rights activists … My contention is that what has been exposed is just the tip of the PFDJ's iceberg of horrors.[141]

A brief contrastive analysis needs to be drawn here between Eritrea and Zimbabwe to assess the attention given to the human rights crises in the two countries by the international community. Perhaps the most eloquent observation in this regard comes from Woldu Mikael who argues that 'there is a clear case of European double standard' as regards the treatment of Isaias Afwerki and Robert Mugabe.[142] According to Mikeal, Mugabe is unwelcome in Europe for rigging or stealing elections in 2002 and 2008, while Afwerki surprisingly 'has never allowed elections to rig or not to rig.' Unlike Zimbabwe, laments Mikael correctly, 'Eritrean opposition parties may not operate inside the country.'[143] Irrespective of the continuous and deliberate harassment unleashed by the Zimbabwean government, the country still has (relatively speaking) a forceful constitution, a functioning parliament and judiciary, officially recognised opposition party, some independent civil society organisations and a limited number of private media. None of these is available in Eritrea.

For Nunu Kinda, what makes Zimbabwe different from Eritrea is the fact that Mugabe has at one time hit the race card, triggering the West to respond furiously.[144] Fortunately or unfortunately, the Eritrean human rights crisis does not involve racism to an extent which disgusts the Western world.[145] In spite of the alarming record of human rights violations in the country, the EU has recently approved a development aid amounting to €122 million to the Government of Eritrea[146] In May 2007, in a peculiar diplomatic

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141 Events Monitor 'PFDJ's reign of terror (II) - Subjugation of the Eritrean Police,' available at http://www.awate.com/portal/content/view/4037/14/ (accessed 18 September 2005).

142 Wodlu Mikael 'Europe and African dictators,' available at http://www.awate.com/portal/content/view/4685/5/ (accessed 12 December 2007).

143 Ibid.

144 Nunu Kidane 'Comparing Isaias and Mugabe,' available at http://www.awate.com/artman/publish/article_4534.shtml (accessed 7 July 2006).

145 See Daniel R Mekonnen 'Comparing Mugabe and Afwerki: A sequel' *e-CIVICUS*, Issue No 334, 25 April 2007; Daniel R Mekonnen 'The abolition of female circumcision in Eritrea: Inadequacies of new legislation' 7(2) (2007) *African Human Rights Law Journal* 403-404.

146 See *Europe Information Service* 'Commission seeks to strengthen political dialogue,' available at http://www.meskerem.net/EU_ERITREA%20COMMISSION%20SEEKS%20TO%20STRENGT

gesture during an official meeting with the Eritrean President, the European Commissioner for Development and Humanitarian Aid, Mr Louis Michel, 'said he was "very, very honoured" to receive Isaias Afwerki at the European Commission.'[147]

Surprisingly, the Eritrean people do not also talk openly and critically about what has befallen their nation to an extent that a recent publication by the Catholic Information Service for Africa (CISA) concluded that 'Eritreans are so quiet you would think they have no problems.'[148] In the words of Ruth Iyob, 'shying away from providing information on activities that may offend traditional and/or official sensibilities' is very common in Eritrea.[149] Harmful traditional practices and beliefs, some of them expressed in popular Tigrinya axioms, are some of the major contributing factors in Eritrea for a continued history of human rights violations. Although not representative of all ethnic groups of Eritrea, the following two axioms are typical in the context of the current discussion: (a) **ዝበረቐ ጸሓይና ዝነገሰ ንጉስና** (b) **ሰማይ ኣይሕረስ፡ ንጉስ ኣይኽሰስ።** Michela Wrong translates the first proverb to mean: 'Whatever sun rises in the morning is our sun, and whichever king sits on the throne is our king.' It denotes a deeply rooted traditional belief of the Eritrean highland society that anyone who comes to power should be obeyed submissively. Although some Eritreans may not agree with her, Wrong describes this as a 'proverb which summaries the bittersweet philosophy of a people accustomed to having

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HEN%20POLITICAL%20DIALOGUE.htm (accessed 7 May 2007). See also *Reuters* 'EU embraces Eritrea in search for Horn peace,' 4 May 2007.

147 This move has triggered infuriated response from Eritrean and non-Eritrean rights groups. See RFS 'On eve of meeting with African leaders, EU urged to declare Eritrean President and aides *persona non grata*,' available at http://www.rsf.org/article.php3?id_article=24652 (accessed 06 December 2007). RFS contends that 'one cannot carry on making an issue about Mugabe's presence or absence and yet ignore the question of Eritrea.' See also Network of Eritrean Civil Societies in Europe 'NECS-E urged EU to take President Isaias to task over the gross human rights abuse in Eritrea,' available at http://cs.asmarino.com/?itemid=586 (accessed 8 December 2007). A story, of which this author has intimate knowledge, reveals that some human rights activists and concerned individuals from a certain international NGO recently met a EU official to register their strong objection against the uncritical policy of the EU on Eritrea. Sadly, the EU official told the individuals that as long as Eritrea remains one of the regional partners of the EU, the policy of the latter towards the former will not change, at least in the near future.

148 CISA 'A caged people in urgent need of global action and prayers,' available at http://www.cisanewsafrica.org/story.asp?ID=2783 (accessed 13 December 2007).

149 Ruth Iyob 'Book review of Tom Killon's *Historical Dictionary of Eritrea*' 47(2) (1998) *Africa Today* 197.

things done to them.'[150] The second proverb denotes another deeply rooted Tigrinya traditional belief that the authority of a ruler is unchallengeable.[151]

Some of the submissive tendencies discussed above are perhaps the dire consequences of the conservative patriarchal mould of the greater proportion of Eritrean society as well as a long history of abuse and repression. In this regard, Wrong observes that Eritreans are 'dangerously impervious to criticism and bafflingly quick to anger.' She then adds that 'an entire society is suffering from posttraumatic stress disorder.' Wrong also notes that colonial masters and superpowers have contributed a lot in this crisis by complicating the political history of the nation.[152]

2.9 The need for transitional justice in Eritrea

As can be seen from the discussion in the preceding sections, Eritrea presents a bleak picture of a failed state in the making. Although the nation has potential, given the requisite political commitment, to competently recover from the current crisis, urgent action is needed to reverse the sad state of affairs prevailing in the country. As a result of the excessive brutalities of the current government, the danger of civil war is imminent in Eritrea. Popular defiance and challenge of government authority is rampant in today's Eritrea in several forms. The large number of youths fleeing[153] the country and the increasing number of top government officials who have defected since September 2001 are some of the most credible demonstrations. As can be seen from the following table, at least thirty-two prominent government officials have abandoned the ruling party and asked for political asylum or sought jobs in other countries since September 2001.

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150 Wrong (n 28 above) 77. See also EMDHR's periodic educational manuals.

151 For a most comprehensive work on Tigrinya proverbs, which are apparent reflections of the Eritrean highland customary laws, see **ሊቀ መዘምራን** (**መ. ገ.**) **ሞገስ ዑቕበጊዮርጊስ ናይ ኣቦታት ጥንታዊ ምሳሌ, 2ይ ሕታም** (Liqe Mezemran Moges Ouqbegiorgis *Ancient Proverbs of the Forefathers* (1969).

152 Wrong (n 28 above) 387.

153 See UNHCR (n 130 above). The unprecedented outflow of the youth is one of the best manifestations of withdrawal of the people's allegiance towards the government.

No	Name of government official	Post during defection
1.	Mr Abdella Adem	Ambassador to the Sudan
2.	Mr Abdella Mohammed Ali	Head of Consular Affairs, Eritrean Embassy in Sudan
3.	Mr Adhanom Gebremariam	Ambassador to Nigeria
4.	Mr Afeworki Abraha	First Secretary, Eritrean Embassy in the United Kingdom (UK)
5.	Dr Amanuel Mihretab	Deputy Head of the Demobilisation Commission of Eritrea
6.	Mr Andebernah W Giorgis	Ambassador to the EU
7.	Dr Asefaw Tekeste	Dean of the Medical College, University of Asmara
8.	Ms. Belaynesh Araya	Executive Member of the National Union of Eritrean Women
9.	Mr Bereket Desta	Head of the PFDJ North America Branch
10.	Mr Dawit Solomon	First Secretary, Eritrean Embassy in Denmark
11.	Mr Derei Mohammed Debas	Director in the Ministry of Foreign Affairs
12.	Mr Endrias Habtegiorgis	Chargé d'Affaires, Eritrean Embassy in the Netherlands
13.	Mr Fesseha Tedla Oqbit	Head of Asmara Brewery
14.	Mr Habteab Tesfaselase	Director of Consular Affairs, Eritrean Embassy in Canada
15.	Mr Habtom Kidane	A member of the Eritrean Embassy in the UK
16.	Mr Haile Menkorios	Ambassador to the UN
17.	Mr Hamid Drar	First Secretary, Eritrean Embassy in Djibouti
18.	Ms Hibret Berhe	Ambassador to the Scandinavian Countries
19.	Mr Ibrahim Osman Hamid	Senior Diplomat, Eritrean Ministry of Foreign Affairs
20.	Mr Kibreab Habteselasie	Political Officer, Eritrea's Permanent Mission to the UN
21.	Mr Mesfin Hagos	Governor of Zoba Debub Province and former Minister of Defence
22.	Mr Mohamed Nur-Ahmed	Ambassador to China
23.	Mr Mohammed Burhan Abdulkadir	First Secretary, Eritrean Embassy in Egypt
24.	Mr Mohammed Nur Osman Degoule	Consul General, Eritrean Embassy in Saudi Arabia
25.	Mr Mohamed Saleh Shumm	Political Advisor, Ministry of Foreign Affairs
26.	Mr Muhyedin Shengeb	Head of the National Union of Eritrean Students and Youths
27.	Mr Teclu Ugbamicael	Senior Diplomat, Eritrean Embassy in Australia
28.	Mr Temesgen Debessai	Director of the English Desk, Ministry of Information
29.	Dr Tesfay Ghirmazion	Ambassador to the EU
30.	Mr Tomas Tewelde	First Secretary, Eritrean Embassy in Kenya
31.	Mr Younis Hussein	Director in the Ministry of Foreign Affairs
32.	Dr Weldeab Isaac	President of the University of Asmara (the country's only university)

Table III: Officials of the PFDJ who have defected since September 2001[154]

[154] The names in this table are those of popular government officials who have defected since September 2001, most of them cited in Daniel K Kifle 'Peace army from exile,' (Unpublished Masters Thesis, submitted to the University of Peace, Costa Rica, 2004). Many other middle level defecting officials, including army officers, are not mentioned in the table. It should be noted that

Ketema[155] asserts that repression often ironically weakens the government's authority and strengthens resistance against the same. Continually, the Eritrean general population is denying all support of power to the repressive government and this is one of the core components for the disintegration of authoritarian systems. However, there is no unified opposition in Eritrea (even in exile) which can effectively take over any time after the collapse of the current military dictatorship. As a result, there is always a serious concern regarding destabilisation and the possibility of the creation of another Somalia in the Horn of Africa (a failed state without effective central government). Therefore, the possibility cannot be discounted of the current regime disintegrating unexpectedly.[156] The excessive repression in present-day Eritrea has created the need for a peaceful and negotiated transition to democracy. Such a transformation can only be achieved by the involvement of all political forces who believe they have a stake in the nation. A transformation of this kind, which must provide for appropriate procedures of transition of the country to democracy, is a major priority for Eritrea. This position has been powerfully stressed by several Eritrean writers who have called for national reconciliation in Eritrea since the early years of independence. One leading writer, Medhanie, states:

> To be sure, this is not the first time that calls are being made for national reconciliation … in respect of Eritrea. Those in the opposition have been making such calls since 1991 and even before. But the group in power … did not heed them. It still does not … The government in power is opposed to it. In fact it insists we don't need one. We are all reconciled; we are one united people, it claims.[157]

National reconciliation is one of the possible mediums of transitional justice by means of which societies can move from repressive to democratic systems. Almost all Eritrean opposition forces are now calling for a national conference that would facilitate the process of Eritrean national reconciliation.[158] In a very similar way a group of 18 Eritrean

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some of the seemingly private sector institutions cited in the table are core institutions of the ruling party.

155 Ibid.

156 The latest skirmish between army generals, as discussed in Chapter 4 section 4.12.3 is just one example.

157 Medhanie (n 109 above). See also Seyoum Tesfaye 'Notes on the strategy of negotiated peaceful revolution,' available at http://eritrea1.org/home/articles/100202st.htm (2002).

158 See, for instance, Eritrean Reconciliation Forum - UK 'Report of a meeting held in London,' available at http://www.eritreana.com/news/Nov/NC_London.htm (accessed 14 November 2004);

intellectuals and human rights activists who gathered in the Netherlands in September 2002 to discuss, amongst other things, 'the magnitude of the problems confronting Eritrea,' have declared their concerns as follows:

> We believe that Eritrea is in a state of political, economic and social crisis. We fear that if the crisis is not attended to within a short period of time, Eritrea faces a high risk of collapsing into chaos and becoming a failed state. Our society is fragmented, disenfranchised, disempowered, demoralized and its sense of unity and purpose placed in question. Our society needs to be an integrated whole and Eritrea currently lacks a mechanism to bring this about. We believe that the sad state of affairs that Eritrea faces are a result of a culture of polarisation, irresponsible governance, an uncoordinated opposition and lack of will to dig deeper into the root causes of Eritrea's persistent problems of identity and inequity.[159]

All the above assertions reiterate that Eritrea is facing the great danger of descending into more violence or even a destructive civil war if preventive measures are not taken. Sooner or later the government will be replaced by a democratic system which will be called to face the challenges of transitional justice in a more holistic manner. Preparations must be in progress with the objective of studying possible paradigms that would serve the transitional needs of the nation. Such studies must suggest a means for tackling the perpetration of injustices which have occurred in the history of the nation and must recommend alternatives for the proposed transition. By the same token, mechanisms that help to end the perpetration of injustices with impunity should also be correctly identified.

2.10 Conclusion

For many Eritreans it seemed that the victorious leaders of the EPLF, who liberated the country in 1991, would be willing to relinquish power to its legitimate source soon after the end of the scheduled years of provisional governance in 1997. There was even an honest conviction, according to the words of Plaut, 'that once the EPLF came to power in

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'ELF-RC Proposal for unity of the Eritrean opposition, available at http://eritrea1.org/ELFUnityProposal.htm (2004).

159 Citizen's Initiative for the Salvation of Eritrea (CISE) 'National salvation: A citizen's approach,' available at http://news.asmarino.com/ (accessed 25 September 2002); see also Concerned Citizens 'Nation at risk,' available at http://news.asmarino.com/runnewssection.asp?s=/Information/2002/10/NationAtRisk.asp (accessed 7 October 2002).

1991 that it would be committed to a broadly democratic course, even though this might take time to emerge.'[160] Contrary to this expectation, the government has completely frustrated the political transition of the nation to a democratic system under the perennial pretext of the recent war with Ethiopia, which in turn aggravated the already existing violations of international law.[161]

In spite of the Eritrean people's struggle for self-determination and nationhood, the long-awaited national dreams and hopes have been shattered by the current illegitimate government which has governed the country since its independence in 1991. The government's legitimate transitional tenure expired in 1997 but it has imposed itself forcefully on the Eritrean people. It continues to commit violations of international law with impunity, causing the death and suffering of hundreds of thousands of Eritreans. The post-independence legal and political situation in general and the post-2001 crisis in particular are so frightening that unless there is effective intervention, they may even lead to the disintegration of the Eritrean state. As such, Eritrea is in dire need of a special paradigm of transitional justice.

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160 Plaut (n 67 above) 119-120.

161 In an interview conducted with the official magazine of the PFJD, President Isaias Afwerki once asserted that his government cannot expedite prevalent conditions for a peaceful transition of the nation to a democratic system due to the 'abnormal situation' the country finds itself in. For many Eritreans this is a lame excuse. The government's persistent pretext of the 1998-2000 border conflict with Ethiopia can be nothing more than a transient shelter from the test of accountability. See ሕድሪ 'ዘተ ምስ ፕረዚደንት ኢሰያስ ኣፈወርቂ,' ታሕሳስ 2003 (*Hidri* 'Discussion with President Isaias Afwerki,' December 2003). By contrast, see Berhane Habteab 'What is at stake for President Isaias and the PFDJ Central Office?," available at http://news.asmarino.com/Comments/September2001/Berhane_Habteab_19.ASP (accessed 19 September 2001).

CHAPTER THREE

ERITREA'S LEGAL OBLIGATIONS UNDER INTERNATIONAL LAW

Outline

3.1 Introduction

In order to correctly understand the nature of the human rights and humanitarian law violations of the Eritrean government, one has first to determine the exact rules of international law against which the violations are evaluated. The relevant international legal obligations that are binding on the Eritrean government consist of two main bodies of international law:[1] international human rights law and international humanitarian law. Although both bodies of law mutually reinforce each other, some of their differences lie in the following features. International human rights law basically protects the individual at all times. This body of law represents the universally espoused yet occasionally disregarded concept of basic rights which comprise fundamental civil, political, economic, social, cultural, environmental and other rights as belonging to every

[1] The analysis in this regard follows the findings of the International Commission of Inquiry on Darfur (hereinafter 'Darfur Commission'). See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 (2004)*, 25 January 2005 (hereinafter '*Report of the Darfur Commission*'), para 145.

individual by virtue of their being human.[2] International humanitarian law, on the other hand, is the *lex specialis* which only applies in situations of armed conflict.[3] By limiting the use of violence in armed conflict, international humanitarian law spares those who do not take part in hostilities. To do this, international humanitarian law differentiates between civilians and combatants, prohibits attacks against *hors de combat* and proscribes unnecessary suffering.[4]

Both bodies of law, however, aim to protect human life and dignity, and prohibit discrimination and suffering of various types, such as murder, torture, cruel, inhuman and degrading treatment and other abhorrent violations which debase the dignity of humans. The focus in the chapter is on massive violations of such nature. The standards set by international human rights and humanitarian law principles are enshrined in several international treaties binding on states that ratify them or are obligatory on all states by reason of their international recognition. The practice of ratification of international treaties is not clearly defined in Eritrea. However, a number of international human rights and humanitarian law treaties are binding on Eritrea. The legal characterisation of violations based on international standards reveals that the most important categories of international crimes relevant to the discourse on Eritrea are crimes against humanity, war crimes and the crime of aggression.

3.2 The Eritrean practice of ratification of international treaties

A most important feature of international treaties is that they aim to produce a commonly acceptable set of standards and are developed by a process of negotiation among UN member states. The discretion whether to be legally bound by an international treaty is conventionally reserved by any given state.[5] If a state wishes to be bound by a certain treaty, it can do so either by 'ratification,' 'acceptance,' 'approval' or 'accession.' The

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2 See generally J Shand Watson *Theory and Reality in the International Protection of Human Rights* (1999).

3 *Report of the Darfur Commission,* para 143.

4 Marco Sassoli and Antonie A Bouvier *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (1999) 67-68.

5 UNICEF 'Signature, ratification and accession: The process of creating binding obligations on governments,' http://www.unicef.org/crc/index_30207.html (accessed 5 November 2007).

Vienna Convention on the Law of Treaties[6] defines ratification as an 'international act' by which 'a State establishes on the international plane its consent to be bound by a treaty.' According to the same provision, 'acceptance,' 'approval' and 'accession' also have similar meanings which may, however, apply differently in diverse contexts. The most common procedures are ratification and accession. Both of them have the same legal effect except that the procedures are different. Ratification is preceded by signature, an act which 'constitutes a preliminary endorsement' of a certain treaty. Accession, on the other hand, 'has only one step' and 'is not preceded by an act of signature.'[7]

Depending on the nature of their legal systems, countries follow different procedures for ratification or accession and a state's approach to international law is accordingly different. In some legal systems, where national and international law are seen as one, international law supersedes national law to such an extent that the latter has to be seen through the lens of the first. This theory is called monism.[8] The second theory, called dualism, holds that international law and national law are totally separate and that they operate on separate and distinct horizontal planes. According to this theory, international treaties ratified by a state have no application in national jurisdiction in so far as they are not enacted domestically.[9]

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6 Article 2(1)(b).

7 UNICEF (n 5 above).

8 See generally George Slyz 'International law in national courts' 28 (1996) *New York University Journal of International Law* 65. In a monist approach, 'conventional international law will be self-executing or automatically incorporated into domestic law, prevailing over national legislation and enabling the courts of such a state to exercise jurisdiction without further ado.' See Neels Swanepoel Neels 'Universal jurisdiction as procedural tool to institute prosecutions for international core crimes' 32(1) (2007) *Journal for Juridical Science* 120; A Mbaka B Mangu 'Universal jurisdiction and the International Court of Justice: A comment on the Congo cases,' 29(3) 2004 *Journal for Juridical Science* 83; Johan D van der Vyver 'Universal jurisdiction in international criminal law' (1999) *South African Yearbook of International Law* 116; Jessberger Florian and Cathleen Powell 'Prosecuting Pinochets in South Africa: Implementing the Rome Statute of the International Criminal Court' 14 (2001) *South African Journal of Criminal Justice* 253.

9 In a dualist approach, the implementation of international law in national jurisdictions is subject to the particular state enacting national legislation to that effect. See generally Brian R Opeskin 'Constitutional modelling: The domestic effect of international law in Commonwealth countries: Part I' (2000) *Public Law* 607; Swanepoel (n 8 above) 120; Mangu (n 8 above) 83.

However, prominent human rights NGOs are increasingly recognising the supreme status of international law over domestic law. In this regard, the Institute for Human Rights and Development in Africa (IHRDA) has recently warned that 'the ramifications of subordination of international treaties to municipal law go deep and as a result, international treaties are seen through the lenses of municipal law.'[10] The IHRDA considers this as contradictory to a prominent principle of customary international law which holds that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'[11] Accordingly, the IHRDA recommends that international human rights treaties should be regarded as superior to municipal law unless the latter provides a more favourable clause. As a result, states shall not invoke the provisions of their national law as justification for failure to respect a certain human rights treaty.[12]

Eritrea has no implemented constitution and its legal system is not well developed. The issue of ratification of international treaties is not clearly defined in the prevailing transitional legal framework, which is largely based on the Interim Constitution of 1993.[13] The transitional legal framework offers little help in this regard. According to a recent report drafted by the Centre for Human Rights at the University of Pretoria,[14] Eritrean courts do not make reference to international human rights treaties, nor were

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10 IHRDA's Statement Delivered at the 42nd Ordinary Session of the African Commission on Human and People's Rights, November 2007, Brazzaville, Republic of Congo (copy in possession of the author).

11 This principle is codified in article 27 of the Vienna Convention on the Law of Treaties (Vienna Convention).

12 IHRDA's Statement (n 10 above).

13 Proclamation No 37/1993 (Proclamation to Provide for the Establishment, Powers and Functions of the Government of Eritrea, the 'Interim Constitution of Eritrea'). This law together with Proclamations No 23/1992 (which was repealed by Proclamation No 37/1993) and No 52/1994 (which amends Proclamation No 37/1993) is regarded as the Interim Constitution of Eritrea. See also the reference of Eritrea's former Minister of Foreign Affairs to Proclamation No 37/1993 as the 'transitional constitution' in Dan Connell *Conversations with Eritrean Political Prisoners* (2005) 113. In Eritrea, a statute is called a proclamation. It is the equivalent of what is commonly called an act in other jurisdictions. Legislation issued in furtherance of a proclamation is called a legal notice and is equivalent to what in other jurisdictions is commonly known as a regulation. See Simon M Weldehaimanot and Daniel R Mekonnen 'The nebulous lawmaking process in Eritrea' *African Human Rights Law Journal* (forthcoming, 2008).

14 *Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in Eritrea*, Draft Report commissioned by the ILO and ACHPR, drafted by the Centre for Human Rights, University of Pretoria, 2007) (hereinafter '*ILO/ACHPR Draft Report*').

there any important human rights cases handled by the judiciary.[15] Article 32(4) of the unimplemented 1997 Constitution provides that 'the National Assembly shall ratify international agreements by law.' It is clear from this provision that the ratification of international treaties is a domain clearly reserved to the National Assembly. However, article 42(6) of the same constitution also empowers the state president to 'negotiate and sign international agreements and delegate such powers.' Apart from the apparent contradiction between the constitutional provisions, the constitution has never been implemented in Eritrea.[16]

Legal practice and development also offer little help in this regard. Modern litigation characterised by the use and development of case law or precedent is virtually non-existent in Eritrea. With a very small number of trained lawyers, 'cases are not well argued in courtrooms; judgments are not well reasoned and well articulated.'[17] Legal development is further hindered by the lack of capacity of the Eritrean judiciary, which is severely under-budgeted.[18] In spite of the inconsistent practice, Eritrea is generally regarded by various sources[19] as a state party to a number of international treaties ratified at different times.[20] Although it is not clear how Eritrea normally deposits instruments of ratification with the UN or AU treaty bodies, the international instruments generally accepted as binding on Eritrea and relevant for purposes of this study can be divided into the two main areas of human rights and humanitarian law. However, as discussed by

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15 As a former member of the Eritrean judiciary, who worked as a magistrate and provincial court judge for about 5 years, this author is privy to the prevalence of judicial underdevelopment, the hallmark of the Eritrean legal system.

16 *ILO/ACHPR Draft Report.*

17 Ibid.

18 Ibid.

19 See, for example, 'Eritrea' in James T Lawrence (ed) *Human Rights in Africa* (2004), Chapter 16; Muluberhan B Hagos 'Eritrea' in Christof Heyns (ed) *Human Rights Law in Africa* (2004) 1060; Ministry of Justice of Eritrea *Consolidated Electronic Files of Eritrean Proclamations and Legal Notices* (hereinafter '*Consolidated Electronic Files*'), section 39, List of International Agreements. See also the status of ratification of different international treaties as displayed on the websites of the OHCHR: www.ohchr.org and the AU: www.african-union.org; Bayefsky.com 'Ratification of treaties by Eritrea,' available at http://www.bayefsky.com/./html/eritrea_t1_ratifications.php (accessed 10 November 2007).

20 On Eritrea's inconsistent practice of ratification of international treaties, see generally Weldehaimanot and Mekonnen (n 13 above); Simon M Weldehaimanot 'Summoning PIA to the ICC,' available at http://www.awate.com/portal/content/view/4655/5/ (accessed 6 November 2007).

Weldehaimanot and Mekonnen, it must be noted that Eritrea has also ratified a number of international agreements on government borrowing, which according to the definition of the Vienna Convention,[21] are duly regarded as international treaties.[22]

3.3 International human rights treaties

As a new member of the international community, Eritrea has had few opportunities to ratify international treaties. In most cases, Eritrea has simply been acceding to treaties, most of which were already ratified by many states long before Eritrea's independence. Treaties in which the government participated in signature and ratification are those developed after 1991, such as the Convention on the Rights of the Child (CRC) and the AU Constitutive Act.[23]

The following international treaties ratified by Eritrea are of particular relevance to the current debate: the International Covenant on Civil and Political Rights (ICCPR), ratified on 23 January 2002, entered into force on 22 April 2002; the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified on 17 April 2001, entered into force on 17 July 2001; the Convention on the Elimination of Racial Discrimination (CERD), ratified on 31 July 2001, entered into force on 30 August 2001; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified on 05 September 1995, entered into force on 05 October 1995; the CRC, 03 August 1994, entered into force on 02 September 1994; the Protocol to the CRC - Armed Conflict, ratified on 16 February 2005, entered into force on 15 March 2005; the Protocol to the CRC - Sexual Exploitation, ratified on 16 February 2005, entered into force on 15 March 2005. At regional level, Eritrea has also ratified the African Charter on Human and

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21 Article 2(1)(a) of the Vienna Convention defines a treaty as 'an international agreement concluded between States in written form and governed by international law … and whatever its particular designation.' This definition understandably includes any international agreement of whatsoever nature entered into between two or more states. See Weldehaimanot and Mekonnen (n 13 above).

22 Examples of international agreements on government borrowing discussed by Weldehaimanot and Mekonnen (n 13 above) include the following proclamations: No 56/1994, No 57 /1994, No 70/1995, No 78/1995, No 79/1995, No 80/1995, No 81/1995, No 87/1996, No 97/1997, No 98/1997, No 99/1997 and No 100/1997.

23 Weldehaimanot (n 20 above).

Peoples' Rights (African Charter), ratified on 14 January 1999; and the African Charter on the Rights and Welfare of the Child (ACRWC), ratified on 22 December1999.

As a state party to these various treaties, Eritrea is legally bound to respect, protect and fulfil the human rights of those within its jurisdiction. In spite of this, Eritrean government officials have flagrantly violated a number of international human rights standards stipulated in the above treaties. The following constitute the most important violations:[24] (i) the right to life and the right not to be 'arbitrarily deprived' thereof;[25] (ii) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;[26] (iii) the right not to be subjected to arbitrary arrest or detention;[27] (iv) the right of persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity;[28] (v) the right to freedom of movement;[29] (vi) the right to a fair trial;[30] (vii) the right to an effective remedy for any serious violations of human rights;[31] (viii) the right to reparation for violations of human rights;[32] and (ix) the obligation to

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24 Compare this with the legal analysis on the human rights violations of the Sudanese government as discussed in the *Report of the Darfur Commission,* paras 147-148. The factual findings on the human rights violations of the Eritrean government will be discussed in detail in Chapter 4.

25 Article 6(1) of the ICCPR and article 4 of the ACHPR. According to the UN Human Rights Committee, this right is laid down in international norms that are peremptory in nature, or *jus cogens*. See UN Human Rights Committee, General Comment 29, States of Emergency (article 4), UN Doc CCPR/C/21/Rev1/Add11, 31 August 2001 (hereinafter 'General Comment 29'), para 11.

26 Article 7 of the ICCPR and article 5 of ACHPR. According to the UN Human Rights Committee, this right is also recognised in norms that belong to the corpus of *jus cogens*. See General Comment 29, para 11.

27 Article 9 of the ICCPR and article 6 ACHPR. In this regard, the UN Human Rights Committee has stated that 'the prohibitions against … unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.' See General Comment 29, para 13(b)).

28 Article 10 of the ICCPR.

29 Article 12 of the ICCPR and article 12(1) of the ACHPR.

30 Article 14 of the ICCPR and article 7 of the ACHPR.

31 Article 2(3) of the ICCPR and article 7(1)(a) of the ACHPR. The UN Human Rights Committee declared that this right 'is inherent in the Covenant as a whole' and therefore may not be derogated from, even if it is not expressly provided for in article 4. See General Comment 29, para 14).

32 Articles 2(3), 9(5) and 14 (6) of the ICCPR. According to the UN Human Rights Committee, 'Article 2(3) requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2(3), is not discharged.' See UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev1/Add13, 29 March 2004 (hereinafter 'General Comment 31'), para 16).

bring to justice the perpetrators of human rights violations.[33] The ratification by the Eritrean government of the international treaties containing the above human rights standards clearly evinces the will of the government to abide by the legal obligations contained in the treaties.

3.4 International humanitarian law treaties

In the area of international humanitarian law, Eritrea has also ratified the four Geneva Conventions of 12 August 1949 which include: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War. Eritrea ratified the four Geneva Conventions on 14 August 2000. However, Eritrea has yet to ratify the three Protocols to the Geneva Conventions.[34] The provisions of the four Geneva Conventions contain the most important rules limiting the barbarity of war and armed conflict in international and non-international contexts;[35] they govern the way wars or armed conflicts may be fought and the protection of individuals under the circumstances. They also give protection to people who do not take part in the fighting, such as civilians, medics, chaplains, aid workers, and those who can no longer fight, namely the wounded, sick and shipwrecked troops and prisoners of war. The provisions also call for measures to be taken to prevent or put an end to what are known as 'grave breaches' and for those

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33 Article 2(3) of the ICCPR. See General Comment 31 which states that 'a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy,' para 15. The Committee further elaborates that 'where the investigations [of alleged violations of human rights] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with the failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognised as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6),' para 18.

34 International Committee of the Red Cross (ICRC) '1949 Conventions and Additional Protocols,' available at http://www.cicr.org/ihl.nsf/CONVPRES?OpenView (accessed 31 June 2007a).

35 ICRC 'The Geneva Conventions: The core of international humanitarian law,' available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions (accessed 31 June 2007b). See also Sassoli and Bouvier (n 4 above) 67-68.

responsible to be punished.[36] Such an international obligation is also common in many of the provisions of international human rights treaties extensively cited in the preceding paragraphs.

In the context of the scope of this study, the following violations[37] are the most important provisions violated by the Eritrean government: (i) the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder;[38] (ii) the prohibition on deliberate attacks on civilians;[39] (iii) the prohibition on indiscriminate attacks on civilians,[40] even if there may be a few armed elements among civilians;[41] (iv) the prohibition on attacks aimed at terrorising civilians;[42] (v) the prohibition on torture and any inhuman or cruel treatment or punishment;[43] (vi) the prohibition on outrages upon personal dignity, in particular humiliating and degrading

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36 ICRC 2007b (n 35 above).

37 Compare this with the legal analysis on humanitarian law violations of the Sudanese government as discussed in the *Report of the Darfur Commission,* paras 166-171. The factual findings on the humanitarian law violations of the Eritrean government will be discussed in detail in Chapter 5.

38 Laid down in Common Article 3 of the 1949 Geneva Conventions, this rule has been restated in many forms. See, for example, UK Ministry of Defence *The Manual of the Law of Armed Conflict* (2005) (hereinafter 'UK Manual), para 15.6. According to a report of the Inter-American Commission on Human Rights (IACHR) on the human rights situation in Colombia issued in 1999, international humanitarian law prohibits 'the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and parties actively taking part in the hostilities and to direct attacks only against the latter and, inferentially, other legitimate military objectives.' (IACHR *Third Report on the Human Rights Situation in Colombia*, Doc OAS/Ser L/V/II102 Doc 9 rev1, 26 February 1999, para 40). See also *Tadić*, ICTY Appeals Chamber, decision of 2 October 1995, para 98, 117, 132; *Kordić and Cerkez*, ICTY Trial Chamber III, ICTY Trial Chamber, judgment of 26 February 2001, paras 25-34 (recognising that articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II constitute customary international law).

39 See *Tadić* paras 100-102. In its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons (para 78), the International Court of Justice (ICJ) held that: 'States must never make civilians the object of attack.' The general rule on the matter was also restated and specified in Article 51(2) of the First Additional Protocol of 1977. A similar provision is contained in article 13(2) of the Second Additional Protocol of 1977. See also article 8(2)(e)(i) of the ICC Statute and article 4 (a) of the Statute of the Special Court for Sierra Leone.

40 This rule was held to be of customary nature in *Tadić* paras 100-102. It is also restated and codified in article 13 of Additional Protocol II, which is to be regarded as a provision codifying customary international law, and is also mentioned in the *UK Manual*, para 15.6.5 and 15.15-15.15.1.

41 In a press release concerning the conflict in Lebanon, in 1983 the ICRC stated that 'the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people' (ICRC, Press Release No 1474, Geneva, 4 November 1983).

42 See the *UK Manual*, para 15.8.

43 See common article 3(1) (a).

treatment, including rape and sexual violence;[44] (vii) the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognised as indispensable by the world community;[45] (viii) and the prohibition on collective punishments;[46]

3.5 The status of the ICC Statute in Eritrea

The status of the ICC Statute in Eritrea is contentious. Given the inconsistent practice of Eritrea in the ratification of international treaties, there are two competing views in this regard. On the one hand, the ICC website mentions Eritrea in the list of countries which have not ratified the ICC Statute.[47] This is the kind of state practice referred to by Ferreira and Ferreira-Snyman as widespread among individual states of the world, a factor detrimentally affecting the international commitment to human rights protection.[48] On the other hand, as argued by Weldehaimanot and Mekonnen, Eritrea's practice of ratification of international treaties indicates that the ICC Statute may be regarded as having been ratified by Eritrea on 7 October 1998, the same date the treaty was signed by Eritrea. This argument stems from the established fact that some international treaties signed by Eritrea immediately attain the status of ratification after they are signed by the state president (without the approval of the National Assembly).[49] Weldehaimanot and Mekonnen have discussed some examples in this regard, which mainly constitute international treaties on government borrowing. Accordingly, several proclamations were promulgated by the state president in which the ratification of treaties on government borrowing was unilaterally announced.[50]

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44 See common article 3(1) (c).

45 See common article 3(1) (d); see also General Comment 29, para 16.

46 See article 4(b) of the Statute of the ICTR and article 3 (b) of the Statute of the Special Court for Sierra Leone; see also General Comment 29, para 11, according to which any such punishment is contrary to a peremptory rule of international law.

47 See ICC Website, 'The States Parties to the Rome Statute,' available at http://www.icc-cpi.int/statesparties.html (accessed 15 September 2007).

48 Gerrit M Ferreira and Anél Ferreira-Snyman 'The impact of treaty reservations on the establishment of an international human rights regime' 38(2) 2005 *Comparative and International Law Journal of Southern Africa* 150.

49 Weldehaimanot and Mekonnen (n 13 above); see also Ministry of Justice of Eritrea (n 19 above).

50 Some examples are mentioned in n 22 above.

Article 11 of the Vienna Convention provides that 'the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.' Article 14(1) of the same treaty further stipulates that the consent of a state to be bound by a treaty is expressed by ratification when such a treaty explicitly provides for the consent to be expressed by means of ratification. It is clear that article 125(2) of the ICC Statute requires this. However, the practice in Eritrea reveals that several treaties have been ratified by a simultaneous act of signature and ratification of the state president. Articles 4(5)(f),[51] 5(4)(h)[52] and 6(4)(c)[53] of the Interim Constitution vaguely empower the National Assembly, the Cabinet of Ministers and the state president to ratify international treaties and agreements on behalf of Eritrea, respectively. In practice, however, several international agreements have been ratified (through promulgation of proclamations)[54] by the state president. Albeit inconsistent with the practice of other countries, several international treaties are deemed ratified in Eritrea when they are signed by the state president or possibly an official personally appointed to do so by the president. In this sense, it can be said that presidential signature is equivalent to ratification in Eritrea.[55] It

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51 This article reads: 'The National Assembly has … the power to ratify international treaties on defence, economic and political affairs on behalf of Eritrea.'

52 This article reads: 'The Cabinet of Ministers has … the power to decide Eritrea's relations with other countries and to enter into agreements.'

53 This article reads: 'The President has … the power to negotiate, sign, approve and ratify international agreements and treaties and oversee their implementation.'

54 Several of the proclamations that gave effect to government borrowing (cited in n 22 above) have been promulgated after the treaties were actually signed by the state president. In effect, it means that the proclamations are implementing legislation rather than ratifying legislation. The point is that in many instances the state president has acted as the sole ratifying 'body' and his manner was so inconsistent that no one can easily differentiate between 'signature' and 'ratification.' The following information (narrated to the author in confidence) clearly illustrates the inconsistent practice of ratification of international treaties in Eritrea. At one time, a national committee was established to study ILO conventions that Eritrea wanted to ratify. While the national committee was still working on this issue, the state president happened to be at an event in Europe, where some ILO staff members approached his delegation and lobbied in favour of ratification of the said treaties. The state president ratified seven major ILO conventions on the spot. The national committee was taken by surprise when a congratulatory letter was sent to the State of Eritrea from the ILO on account of the sudden ratification.

55 In particular, see Proclamation No 33/1993 (Proclamation to Authorize the Project Agreement between the Government of Eritrea and the International Development Association). See Weldehaimanot and Mekonnen (n 6 above). See also Ministry of Justice of Eritrea (n 19 above). In practice, 'the National Assembly has never been presented with regional or international treaties for its consideration.' With no known offices, it 'often gets into long periods of hibernation and skips many of its consecutive regular sessions that should be held in every six months.' However, with regard to the binding nature of the African Charter on Eritrea, a guiding interpretation can be

is accordingly arguable that Eritrea can be considered a state party to the ICC Statute as from the date of signature, that is, 7 October 1998.[56]

Nonetheless, if the position maintained by the ICC website prevails,[57] the ICC Statute is to be regarded as not binding on Eritrea. However, this holds true only as regards certain aspects of jurisdictional trigger mechanisms. With regard to certain ICC referral mechanisms, the ratification or non-ratification of the ICC Statute by Eritrea is not that important. These points, jurisdictional trigger and referral mechanisms, make a focal point in the context of the debate on prosecutorial options; hence, they will be revisited in Chapter 7.[58] However, the general provisions of the ICC Statute may acceptably be regarded as having broader applicability on all states. With regard to a state which has signed but not ratified the ICC Statute, it was recently argued that the international obligations of such a state vis-à-vis the duties emanating from the ICC Statute should be understood to mean that such state is bound to respect the object and purpose of the ICC Statute.[59] This argument stems from article 18 of the Vienna Convention. Accordingly, a state which has signed but not ratified an international treaty is obliged to refrain from 'acts which would defeat the object and purpose of a treaty … until it shall have made its intention clear not to become a party to the treaty.'[60] The same line of argument is

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extrapolated from the position of the Eritrean government before the ACHPR. The government did not challenge this fact in two of the landmark rulings rendered by the ACHPR. The government's unambiguous acceptance of the binding nature of the African Charter is apparent from the fact that it defended itself before the ACHPR. However, the African Charter has never been ratified by the National Assembly. The landmark cases are: *Article 19 v Eritrea*, Communication No 275/2003, Twenty-second Activity Report of the ACHPR, Annex II; *Liesbeth Zegveld and Mussie Ephrem v The Government of Eritrea*, ACHPR, Communication No 250/2002, Nineteenth Activity Report of the ACHPR. The above arguments rely heavily on Weldehaimanot and Mekonnen (n 13 above) and Weldehaimanot (n 20 above). See also Tesfai Sherif 'A crisis of a ruling regime or an international conspiracy?: A glance at the administration of the battle,' available at http://www.awate.com/artman/publish/article_3989.shtml (accessed 25 February 2005; originally posted on 19 April 2001). Possibly written under 'a pseudonym for "one or more" PFDJ reformers,' this document was dubbed by Awate Team 'the first comprehensive manifesto for reform.' See Awate Team 'The chronology of the reform movement,' available at http://www.awate.com/cgi-bin/artman/exec/view.cgi/17/578/printer (accessed 5 December 2002).

56 The ICC Statute is a newly adopted international treaty. International precedent to back the above claim is yet to be seen with the development of ICC jurisprudence.

57 It is not clear, however, what this position is based on.

58 See the discussion in Chapter 7 on the possible forums for prosecution.

59 This is a conclusion reached by the *Report of the Darfur Commission* (para 154) with regard to Sudan.

60 Article 18 of the Vienna Convention.

applicable to Eritrea with regard to its international obligations emanating from the ICC Statute.

Important in the international human rights discourse is the role of the Universal Declaration of Human Rights (UDHR) on the global movement for the protection of fundamental rights and freedoms. International scholars agree on the fact that the UDHR marks a milestone development in the history of human rights. Ferreira and Ferreira-Snyman are of the view that although not a treaty, as a recommendatory resolution of the UN General Assembly,[61] the UDHR has attained a status equivalent to other major human rights treaties.[62] In fact, the authors emphasise that at least some provisions of the UDHR have attained the status of customary international law.[63] These provisions have now become peremptory norms of international law, *jus cogens*, from which no derogation is permitted.[64] However, quoting Dugard[65] the authors argue that 'there is little agreement as to which norms qualify for the status of *jus cogens*.'[66] Dugard is of the view that the prohibition on the aggressive use of force certainly qualifies for the status of *jus cogens*. The prohibition on genocide, slavery, torture and racial discrimination are also some of the possible categories that may qualify for the status of *jus cogens*.[67] A prominent international judgement on *jus cogens* comes from the finding of the ICJ in the *Nicaragua* case in which the court refers to the prohibition on the use of force as a 'conspicuous example of a rule of international law having the character of *jus cogens*.'[68]

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61 General Assembly Resolution 217 A(III) of 10 December 1948. Marking the historic significance of the day, 10 December is commemorated every year by the UN and the global human rights movement. Because of its historic significance and in the light of the protracted history of human rights violations in the country, this study proposes that the date should be declared as a national public holiday in post-PFDJ Eritrea. It can be combined with a proposed day of reconciliation that should also be proclaimed as is already done in other countries. The South African Day of Reconciliation commemorated as a public holiday every year on 16 December is a good example.

62 Ferreira and Ferreira-Snyman (n 48 above) 148-149.

63 Ferreira and Ferreira-Snyman (n 48 above) 153.

64 Ibid 154. According to the authors, the source of the concept of *jus cogens* is article 53 of the Vienna Convention, which defines a peremptory norm of international law as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

65 John Dugard *International Law: A South African Perspective* 3rd ed (2005) 41.

66 Ferreira and Ferreira-Snyman (n 48 above) 154.

67 Dugard (n 65 above) 41.

68 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, para 100. For further discussion on *jus*

In the context of soft law development and its role in human rights protection, Strydom mentions the UDHR as the best example of non-conventional instruments (soft law) on international human rights standards. The author submits that:

> Ordinarily conceived as a statement of principles devoid of any legal obligatory character, it has developed into as a universal yardstick for measuring the respect governments show towards the protection of human rights. It is often convincingly argued that many of its principles have attained the status of customary international law and its impact on national constitutions and jurisprudence is well known.[69]

According to the same author, the relevance of non-conventional instruments is underscored by the fact that 'conventional ways of creating international law, such as treaty and custom … cannot adequately explain new forms of rule creation and standard setting by states and international organisations.'[70] The submission of the author is most relevant when seen against the ever-growing nature of public international law and the emerging discipline of transitional justice. Ever since the advent of the UN, numerous non-conventional instruments in the form of recommendations and declarations of the UN General Assembly, standard rules, codes of conduct, basic principles, general guidelines, model treaties and others have been authored by a variety of international institutions, contributing immensely to the growing body of soft law. A common feature of these documents identified by Strydom is the absence of legal obligatory force and 'hence the reference to them as "soft law" or non-legal rules.'[71] Nonetheless, it is correctly noted that:

> [T]here is a growing body of consensus that such documents embody some form of pre-legal, moral or political obligation and can play a significant role in the interpretation, application and further development of existing law. Quite often they become more

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congens, see generally Gennady M Danilenko 'International *jus cogens*: Issues of law-making' 2(1) (1991) *European Journal of International Law* 42-65; Anthony Carty 'Critical international law: Recent trends in the theory of international law' 2(1) (1991) *European Journal of International Law* 66-96; Lee M Caplan 'State immunity, human rights, and *jus cogens*: A critique of the normative hierarchy theory' 97 (2003) *American Journal of International Law* 741-781. The discussion on the peremptory norms of international law will be revisited in Chapter 4 sections 4.14 and 4.15 and Chapter 5 sections 5.4, 5.5 and 5.14.2.

69 H A Strydom *et al International Human Rights Standards: Administration of Justice* vol I (1997) 3.

70 Ibid. See also Egon Schwelb 'The influence of the Universal Declaration of Human Rights on international and national law' in *Proceedings of the American Society of International Law* (1959) 217, as quoted in Strydom *et al* (n 69 above) 4.

71 Ibid 3.

> directly relevant through incorporation in binding international instruments, domestic laws and court judgements.[72]

According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), the UDHR, the ICCPR and its two Optional Protocols, and the ICESCR are now collectively regarded as the International Bill of Rights.[73] Ferreira and Ferreira-Snyman contend that to this must be added a considerable body of multilateral treaties, declarations and instruments dealing with the international protection of human rights. The authors[74] further assert that the international commitment to the protection of human rights is a phenomenon inspired by article 55 of the UN Charter 'which links the international protection of human rights to the maintenance of international peace and order.' In the preamble to the UN Charter, the international community has also committed itself to:

> reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources on international law can be maintained … and have resolved to combine … efforts to accomplish these aims.[75]

The UN Charter gives high regard to the creation of favourable conditions for the stability and well-being of the world as well as peaceful and friendly relations between states of the world. It commits itself to 'promote universal respect for, and observance of human rights and fundamental freedoms for all, without distinction as to sex, language or religion.'[76] As a member of the UN, Eritrea's international obligations to human rights protection must also be seen within the broader perspective of the global movement towards such an end.

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72 Ibid. The author quotes the following important cases illustrating the role of soft law instruments in human rights protection: *S v Switzerland* 17 EHRR 670 (1991); *Filartiga v Pena-Irala* US District Court 630 F 2d 876 (1980); *In Re The School Education Bill of 1995* 1996 4 BCLR 537 (CC) 577-578. See also M Boothe 'Legal and non-legal norms' in XI (1980) *Netherlands Yearbook of International Law* 65, cited in Strydom *et al* (n 69 above) 3.

73 OHCHR 'Fact Sheet No. 2 (Rev 1), The International Bill of Human Rights,' available at http://www.unhchr.ch/html/menu6/2/fs2.htm (accessed 19 October 2007).

74 Ferreira and Ferreira-Snyman (n 48 above) 148-149, citing David P Forsythe *Human Rights in International Relations* (2000) 35.

75 See also articles 55 and 56 of the UN Charter.

76 Ferreira and Ferreira-Snyman (n 48 above) 149.

3.6 Eritrea's ambivalence regarding its international obligations

The initial commitment of Eritrea to ratify some of the major human rights and humanitarian law instruments is promising. However, in terms of a genuine commitment to human rights, much is still expected of Eritrea, starting with the ratification of the ICC Statute – perhaps the most important treaty in the history of human rights. The current Eritrean institutional practice of treaty ratification is exceptionally ambivalent. Another crucial element, as will be discussed in greater detail later in this study, is the ongoing perpetration of human rights and humanitarian law violations which has severely undermined the country's initial commitment to human rights protection. Apart from respect for the fundamental rights and freedoms contained in the relevant international treaties, there are some important indicators to measure a country's commitment to human rights protection. In terms of the fulfilment of other international obligations, such as periodic reporting and communications as required by the UN treaty bodies, the Eritrean experience is disappointing. According to core UN human rights treaties, every state party is required to submit periodic reports to treaty monitoring bodies on the legislative, administrative and other measures it has taken to give effect to the treaties. However, the *ILO/ACHPR Draft Report*[77] reveals that Eritrea has thus far submitted only two reports under its UN human rights treaty obligations: the CRC report (examined in 2003),[78] and the CEDAW report (examined in 2006).[79] The *ILO/ACHPR Draft Report* also indicates that with at least nine periodic reports overdue, Eritrea has not yet submitted any other reports in fulfilment of its obligations under UN and African Charter treaties.[80]

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77 *ILO/ACHPR Draft Report*.

78 See *Concluding Observations of the 33rd Session of the CRC Committee*, UN Doc CRC/C/15/Add.204, 2 July 2003 (hereinafter '*Concluding Observations of the CRC Committee*').

79 See Concluding Comments of the 34th Session of the CEDAW Committee, UN Doc CEDAW/C/ERI/CO/3, 3 February 2006 (hereinafter '*Concluding Comments of the CEDAW Committee*').

80 *ILO/ACHPR Draft Report*. In the African human rights system, three periodic reports of the Eritrean government are already overdue. See *Twenty-second Activity Report of the ACHPR* (June 2007) 14.

As noted by the World Organisation Against Torture (OMCT),[81] Eritrea has yet to sign other international treaties and protocols such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Optional Protocols to the CRC, the Optional Protocols to the CEDAW and the Optional Protocols to the ICCPR, all of which are vital for the full realisation of individual rights and freedoms.[82] A similar concern about Eritrea's international commitment was noted by the 34th Session of the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee). While praising the Eritrean government for ratifying the CEDAW and other international instruments, the CEDAW Committee regretted that Eritrea has yet to sign the Optional Protocols to CEDAW and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[83] Eritrea has also not signed the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court). As noted before, with regard to international humanitarian law, Eritrea has also not signed the three Protocols to the four Geneva Conventions.

Moreover, the Eritrean government was criticised by the CEDAW Committee for its delay in the submission of its report[84] to the CEDAW Committee, which also did not comply with the guidelines for the preparation of reports. The Eritrean government was specifically urged to ratify the Optional Protocol to CEDAW and involve its *parliament* in the preparation of periodic reports before their submission to the CEDAW

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81 The acronym emanates from the French name of the organisation, Organisation Mondiale Contre la Torture, OMCT (www.omct.org).

82 World Organisation Against Torture (OMCT) 'OMCT expresses its concern regarding violence against girls in Eritrea at the 33rd Session of the Committee on the Rights of the Child' (2003), available at http://www.omct.org/pdf/VAW/Publications/2003/Eng_2003_05_Eritrea.pdf (accessed 06 June 2007).

83 *Concluding Comments of the CEDAW Committee,* paras 2, 33-37.

84 *Combined Initial, Second and Third Periodic Report of the Eritrean government to the Committee on the Elimination of Discrimination Against Women*, UN Doc CEDAW/C/ERI/1-3/2004 (hereinafter '*Report to the CEDAW Committee*').

Committee.[85] The CEDAW Committee also urged the government to implement other obligations under CEDAW and relevant international declarations.[86]

3.7 The nature of international crimes

Having established the relevant rules of international law under which the violations of the Eritrean government can be evaluated, the next aspect to be addressed concerns the legal characterisation of the violations perpetrated in Eritrea since 1991. This section lays the groundwork for a discussion of the factual and legal findings on the nature of massive violations that have been perpetrated since Eritrea's independence. The term 'massive violations,' as used in this study, refers to all types of serious violations perpetrated in the post-independence era. As indicated in section 3.1 above, such violations can be classified into two broad sub-categories: violations of international human rights law and violations of international humanitarian law. According to the findings of the Darfur Commission, massive violations of human rights and humanitarian law may amount to international crimes subject to certain conditions set out by the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and the codification of such jurisprudence in the ICC Statute.[87] The definition, terminology and legal analysis attached to this will be discussed in the following paragraphs. Before that a brief discussion on the definition of international crimes is in order.

From the viewpoint of international law, the investigation of the nature of international human rights and humanitarian law violations in Eritrea requires the legal characterisation of these violations, that is, whether these violations amount to

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85 *Concluding Comments of the CEDAW Committee,* paras 2, 33-37 (emphasis added). The recommendation of the CEDAW Committee on parliamentary involvement is particularly relevant in the context of the full blown authoritarianism in Eritrea. See also Daniel R Mekonnen 'The abolition of female circumcision in Eritrea: Inadequacies of new legislation' 7(2) (2007) *African Human Rights Law Journal* 389-411.

86 *Concluding Comments of the CEDAW Committee,* para 35, 38. See also *Concluding Observations of the CRC Committee,* para 62, in which the Eritrean government was similarly urged to ratify the Optional Protocols to the CRC.

87 *Report of the Darfur Commission,* para 175. See also, for example, *Tadić* paras 100-102.

international crimes and if so, under which categories of international crimes they fall.[88] Legal characterisation is important firstly for the classification of the nature of violations. Secondly, it is also important for purposes of identifying the most responsible perpetrators and for suggesting possible mechanisms for holding them accountable[89]. In other words, it is also helpful for proposing the most practical paradigm of transitional justice for Eritrea. As is quite common in all other authoritarian systems, the crimes perpetrated by Eritrean government officials are continuing with impunity.[90] As a result, international criminal law represents itself as the only viable legal regime under which to consider the nature of the violations.[91]

As will be argued below, the types of human rights and humanitarian law violations perpetrated by Eritrean government officials are so grave that they can appropriately be defined as international crimes. According to Cassese, the former President of the Appeals Chamber of the ICTY, international crimes are 'breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs).'[92] Bassiouni, the former Chairman of the Drafting Committee of the ICC Statute, on his part, defines international crimes as 'those international criminal law normative proscriptions whose violation is likely to affect the peace and security of humankind or is contrary to fundamental humanitarian values.'[93] The most striking feature of international crimes is that apart from the international responsibility of the state or a non-state entity, they entail

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88 This discussion adopts the methodology utilised by the *Report of the Darfur Commission,* para 175-181.

89 Ibid para 175-181.

90 This issue will be discussed in the context of the unavailability of domestic remedies in Chapter 5 section 5.14.

91 Compare this with the observations of Max Du Plessis and Andreas Coutsoudis 'Serious human rights violations in Zimbabwe: Of international crimes, immunities, and the possibility of prosecutions' 21 (2005) *South African Journal on Human Rights* 340, where the authors discuss the possibility of prosecution of international crimes in the context of grave human rights violations of the Zimbabwean government.

92 Antonio Cassese *International Criminal Law* (2003) 23.

93 M Cherif Bassiouni *Introduction to International Criminal Law* (2003) 24. In another source, international crime is defined as 'conduct on the part of individuals which a multilateral treaty obliges states to suppress through criminal sanctions.' See M Cherif Bassioini and E M Wise *Aut Dedere Aut Judicare: the Duty to Extradite or Prosecute in International Law* (1995) 8. See also M C Bassiouni *A Draft International Criminal Code and Draft Statute for an International Criminal Court* (1987) 21-65.

the individual criminal responsibility of the author or authors. In the case of the state, responsibility means that the state would have to prosecute the authors of the crimes and compensate the victims for the violations. In the case of the author, it means that the individual perpetrator will be criminally responsible and sentenced for her or his acts.[94]

According to the above definitions, international crimes have the following important components. In the first place, they embrace violations of international rules spelled out by customary law or international provisions codified by treaties. International crimes violate certain values considered important by the whole international community and consequently binding on all states and individuals. These values, contends Cassese,

> are not propounded by scholars or thought up by starry-eyed philosophers. Rather, they are laid down, although not always spelled out in so many words, in international instruments, the most important of which are the 1945 UN Chapter, the 1948 UN Declaration on Human Rights, the 1950 European Convention on Human Rights, the two 1966 UN Conventions on Civil and Political Rights, and on Economic, Social and Cultural Rights, the American Convention on Human Rights of 1969, the UN Declaration on Friendly Relations of 1970, the 1981 African Charter on Human and Peoples' Rights. Other treaties also enshrine these values, although from another viewpoint: they do not proclaim the values directly, but prohibit conduct that infringes them: for instance, the 1948 Convention on Genocide, the 1949 Geneva Conventions on the protection of victims of armed conflict and their two Additional Protocols of 1977, the 1984 Convention against Torture, and the various treaties providing for the prosecution and repression of specific forms of terrorism.[95]

The second important component of international crimes is that, except under certain conditions, the perpetrators of such crimes are subject to universal jurisdiction.[96] Regardless of any territorial and nationality link with the perpetrator or the victim, there exists a universal interest in punishing and prosecuting international crimes by any

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94 *Report of the Darfur Commission,* para 175.

95 Cassese (n 92 above) 23.

96 This argument has gained wide currency after the *Pinochet* case. See *R v Bow Street Stipendiary Magistrate and others, ex part Pinochet Ugarte*, UK, House of Lords, judgment of 24 March 1999 in [1999] 2 All ER 97-192, speeches of Lord Browne-Wilkinson (112-115), Lord Hope of Craighead (145-52), Lord Saville of Newdigate (169-70), Lord Millet (171-191) and of Lord Phillips of Worth Matra1vers (181-190); see also *Fidel Castro,* Spain*, Audiencia Nacional,* order *(auto)* of 4 March 1999 (No. 1999/2723) (Legal Ground 1-4); and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* ICJ Reports (2002) 3 ('*Arrest Warrant* case'), paras 57-61. See also generally Naomi Roht-Arriaza *The Pinochet Effect: Transitional Justice in the Age of Human Rights* (2005); Naomi Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (1995).

state.[97] The most important aspect of international criminal law is repression of conduct perceived to be harmful to the interests of the international community as a whole. This dictum requires that states accept an obligation either to try international offenders before their own courts or surrender them for trial before a foreign or international court. This obligation appears in several international instruments in the form of an explicit provision requiring states to either prosecute or extradite offenders of international crimes. As a basic postulate inherent in the concept of a world community, it is becoming a matter of definite legal obligation solidified not only by treaty but also by customary or general international law.[98] In this regard, remarkable progress in the development of international case law is demonstrated in several countries.[99]

3.8 Categories of core international crimes

There are numerous categories of international crimes which are unambiguously condemned in various international treaties. Bassiouni and Wise have catalogued international crimes into twenty-four groups:[100] aggression, war crimes, prohibited use of weapons, crimes against humanity, genocide, racial discrimination and apartheid, slavery and related offences, torture, unlawful human experimentation, piracy, aircraft hijacking and related offences, offences against the safety of maritime navigation, violence against internationally protected persons, hostage-taking, drug offences, international traffic in obscene publications, destruction or theft of national treasures, environmental offences, theft of nuclear material, unlawful use of mails, interference with submarine cables, falsification and counterfeiting of currency, corrupt practices in international commerce

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97 Cassese (n 92 above) 24; see also Antonio Cassese 'When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium* Case' 13 (2002) *European Journal of International Law* 857-858; Mangu (n 8 above) 76.

98 Bassiouni and Wise (n 93 above) xi. See also Edward M Wise 'The obligation to extradite or prosecute,' 27 (1993) *Israel Law Review* 268; Diane Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' 100 (1991) *Yale Law Journal* 2537.

99 See for example, *Gadhafi*, France, Paris Court of Appeal (*Cour d'appel de Paris*), *Chambre d'accusation*, decision of 20 October 2000, No 1999/05921, in RGDIP (2001) 451-456, where the court quoted the Preamble of the ICC Statute as evidence of the international obligation to prosecute authors of international crimes. The relevant part of the ICC Preamble reaffirms 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'

100 Bassiouni and Wise (n 93 above) 7; M Cherif Bassiouni *International Crimes: Digest/Index of International Instruments* vol II (1986) 1815.

and mercenarism. However, according to the latest definition adopted by the Darfur Commission, the basis of which is article 5 of the ICC Statute, the main categories of international crimes can be condensed to war crimes, crimes against humanity and genocide. In addition, the crime of aggression, although it does not currently fall under the jurisdiction of the ICC, is also categorised under article 5 of the ICC Statue, which serves as the basis for the definition of international crimes.[101] The crime of aggression and war crimes will be discussed in greater detail in Chapters 4 and 7.

As far as genocide is concerned, there are generalised claims by some segments of the Eritrean opposition groups that the Eritrean government has committed at different times the crime of genocide by persecuting certain categories of the Eritrean society on account of their ethnic, religious or political status. However, compared to other severe instances of political violence in the region, for example the Darfur crisis in Sudan, the atrocities of the Eritrean government can hardly be characterised as genocide. In terms of the magnitude and intensity of the violations, the Darfur crisis in Sudan has been treated by the international community as graver than the situation in Eritrea. Yet, the Darfur Commission concluded that the Government of Sudan has not pursued a policy of genocide, because 'the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned.'[102] According to the Genocide Convention of 1948 and the corresponding customary international rules, two of the major elements of genocide are *actus reus* (the objective element) and *mens rea* (subjective element). The objective element, as related to a prohibited conduct, consists

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101 The crime of aggression does not currently fall under the jurisdiction of the ICC because it is not yet defined by the ICC Statute. Article 5 of the ICC Statute stipulates that the ICC shall exercise jurisdiction over such crime once a provision defining the act is adopted through an amendment of the ICC Statute. Such an amendment is foreseen for 2009, at the first Review Conference of the ICC, which, according to articles 121 and 23 of the ICC Statute, is to be held seven years after the entry into force of the ICC Statute. See also Cassese (n 75 above) 112; Kriangsak Kittichaisaree *International Criminal Law* (2001) 208.

102 *Report of the Darfur Commission,* para 640. However, it should be noted that in terms of the humanitarian crisis and its threat to international peace and security, the overall crises in Eritrea, including the repercussions of the stalemate with Ethiopia, are far reaching and no less threatening than the situation in Sudan. In spite of this, the Eritrean crisis has not received the required attention from the international community, especially as compared to the Darfur crisis.

of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction.[103]

The subjective element of genocide involves the criminal intent required for the underlying offence and the intent to destroy in whole or in part a group protected by the Genocide Convention. The Darfur Commission, citing the most relevant case law,[104] asserted that unlike other international crimes, genocide requires an aggravated criminal intention or *dolus specialis* in that:

> It implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such.[105]

The objective elements of genocide, such as killing of people belonging to a certain politically or religiously identifiable group, are pervasive in the Eritrean case. However, such acts do not necessarily evince a specific intent to annihilate, in whole or in part, a group protected by the Genocide Convention. Rather, it appears that Eritrean government officials are planning and organising attacks against innocent victims primarily for purposes of suppressing dissent and political defiance in whatsoever form. In the case of low level internal armed conflicts, the Eritrean government persecuted people with the objective of 'countering insurgency plans,' although violations were excessively disproportional. As will be discussed in Chapter 4, it appears that the government is settling political scores violently, which hardly amount to the crime of genocide. However, as in all other tentative conclusions of this study, a final determination on this issue is also to be made by a competent court of law. Nonetheless, the tentative conclusion that no genocidal policy appears to have been pursued and implemented by Eritrean government authorities should not be taken as in any way detracting from the

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103 Ibid para 490.

104 See *Kayishema and Ruzindana,* ICTR Trial Chamber, judgment of 21 May 1999, para 97; *Jelisić,* ICTY Trial Chamber, judgment of 14 December 1999, para 82, *Bagilishema,* ICTR Trial Chamber, judgment of 7 June 2001, para 64; *Semanza,* ICTR Trial Chamber, judgment of 15 May 2003, para 316; *Krstić*, ICTY Trial Chamber, judgment of 2 August 2 2001, para 590. See also generally *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN4/Sub2/1985/6, 2 July 1985 (Prepared by Benjamin Whitaker), para 29; and William A Schabas *Genocide in International Law* (2000).

105 *Report of the Darfur Commission,* para 491.

gravity of the human rights violations perpetrated by government officials. In fact, massive atrocities have been committed in Eritrea on a very large scale and have so far remained unpunished. As will be seen later, most of the crimes characteristically constitute the basic features of crimes against humanity, war crimes and the crime of aggression. As far as crimes against humanity are concerned, the Darfur Commission has correctly asserted that such violations 'may be no less serious and heinous than genocide'[106] and as such they merit the same international indignation and condemnation as in the case of genocide. Before examining the factual findings that constitute crimes against humanity, a definition of the term under international law needs proper attention.

3.9 The definition of crimes against humanity[107]

Particularly odious, crimes against humanity constitute a serious attack on human dignity.[108] Crimes against humanity are a wide-ranging but sufficiently well-defined sphere of international crimes. One of the early definitions of crimes against humanity was provided by the Court of Assizes of Hamburg. The court defined the term as

> any conscious or willed attack that, in connection with [a] system of violence and arbitrariness, harmfully interferes with the life and existence of a person or his relationship with his social sphere, or interferes with his assets and values, thereby offending against his human dignity as well as humanity as such (*die Menscheit als solche*).[109]

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106 Ibid para 642.

107 For a detailed exposition of crimes against humanity starting from the early development of the concept under international law, see Egon Schwelb 'Crimes against humanity' 23 (1946) *British Year Book of International Law* 178-226; M Cherif Bassiouni *Crimes against Humanity in International Law* (1999); Darryl Robinson 'Defining "crimes against humanity" at the Rome Conference,' 93 (1999) *American Journal of International Law* 43-57; Kelly D Askin 'Crimes within the jurisdiction of the International Criminal Court,' 10 (1999) *Criminal Law Forum* 40-49; Guenael Mattraux 'Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda,' 43 (2002) *Harvard International Law Journal* 237-316; Cassese (n 92 above) 64-95; Kittichaisaree (n 101 above) 85-128.

108 *Report of the Darfur Commission,* para 178.

109 *Harlam Veit (Jud Suss case)*, Germany, Court of Assizes (*Schwurgericht*) of Hamburg, decision of 29 April 1950, unpublished typescript 52, as quoted in Cassese (n 92 above) 66. Similarly, in the *Albrecht* case, the Dutch Special Court of Cassation described crimes against humanity as offences 'characterised either by their seriousness and their savagery … or by their magnitude, or by the circumstances that they were part of a system designed to spread terror … or that they were a link in a deliberately pursued policy against certain groups of the population.' See The Netherlands Special Court of Cassation, judgement of 11 April 1949, *Neder J*, 747-751 (English excerpts in *Annual Digest 1949*).

There are four essential characteristic elements of crimes against humanity. First, the crimes are characteristically abhorrent attacks on human dignity which most of the time take place in the form of grave humiliation or degradation of one or more persons.[110] Second, their perpetration is intentionally tolerated, condoned or acquiesced in by a government or a *de facto* authority having the effect of a *systematic* or *widespread*[111] practice of atrocities.[112] Systematic and widespread refers to the fact that such crimes are backed by state authorities or by leading officials of a *de facto* state-like organisation or organised political group.[113] Furthermore, it means that the practice is not limited to a sporadic event but that it takes place as a pervasive pattern of misconduct. This is one of the most important elements of crimes against humanity in that the crimes in question must be committed on a large scale by the 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.'[114] In elaborating on the systematic nature of crimes against humanity, the ICTY Trial Chamber held that for an action to be systematic it requires an organised nature and the improbability of random occurrence.'[115] The ICTY Appeals Chamber also enumerates the following traits as amongst the most important factors for the determination of the widespread or systematic nature of an attack:

> The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable pattern of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack.[116]

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110 *Report of the Darfur Commission,* para 178.

111 Cassese (n 92 above) 64. See also Antonio Cassese, 'Crimes Against Humanity' in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* vol I (2002) 361; Kittichaisaree (n 101 above) 97.

112 See also *Naletilić and Martinović*, ICTY Trial Chamber, judgment of 31 March 2003, para 236; *Akayesu*, ICTR Trial Chamber, judgment of 2 September 1998, para 579; *Kunarac and others*, ICTY Trial Chamber, judgment of 2 February 2001, para 431; *Blaskić*, ICTY Trial Chamber, judgment of 3 March 2000, para 206; *Kunarac and others*, ICTY Appeals Chamber, judgment of 12 June 2002, para 94; *Semanza*, para 329; *Kordić and Cerkez*, para 179; *Kayishema and Ruzindana*, para 123.

113 For further discussions on what constitutes a systematic and widespread attack under international criminal law, see Cassese (n 92 above) 64; Kittichaisaree (n 101 above) 96; William A Schabas *An Introduction to the International Criminal Court* 2nd edn (2004) 36.

114 *Kordić and Cerkez* para 179.

115 *Naletilić and Martinović*, para 236; see also *Kunarac and others*, para 94.

116 *Kunarac and others*, para 95; *Jelisić*, para 53.

In the third place, crimes against humanity may be punished irrespective of whether they are committed in time of peace or war.[117] Fourth, the victims of the violence may be civilians or enemy combatants.[118]

Like all other crimes, crimes against humanity consist of two major elements: subjective and objective. Most of the fundamental features of crimes against humanity discussed above fall under the objective or material element of the crime (*actus reus*).[119] According to the Darfur Commission, the subjective element or *mens rea* required for crimes against humanity is twofold: (a) the mental element required for the underlying crime (such as murder or torture) and (b) the knowledge that the offence is part of a widespread or systematic practice.[120] However, the Darfur Commission notes that *persecution* as a specific category of crimes against humanity requires in addition a further mental element. Such a mental element must be manifested in the form of persecutory or discriminatory animus 'to subject a person or a group of persons to discrimination, ill-treatment or harassment on religious, racial, political, ethnic, national or other grounds.' This must be accompanied by great suffering or injury to that person or group.[121]

3.10 Crimes against humanity under international law

According to Bassiouni and Wise, there are eight major international instruments, dating from 1945 to 1974, which deal specifically with crimes against humanity. The most

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117 Cassese (n 92 above) 285.

118 Schwelb (n 107 above) 207. In the early development of the notion of crimes against humanity, a link or nexus with an armed conflict was required. The requirement of a nexus was clearly spelled out by the most prominent instrument which defined crimes against humanity for the first time: the London Charter of the IMT. Article 6(c) of this document required that for crimes against humanity to come under the jurisdiction of the IMT, they must be perpetrated 'in execution of or in connection with' war crimes or crimes against peace. Presently, no importance is attached to such a nexus in international law. The Statute of the ICC, for instance, explicitly ruptures the link between crimes against humanity and armed conflict. The link was reinstated in the ICTY Statute. Nonetheless, the current understanding remains the other way round. The distinguishing feature between crimes against humanity and war crimes is that the former are to a large extent predicated upon international human rights law, while the latter derive from and are closely linked to international humanitarian law, in other words the law of warfare. See Cassese (n 92 above) 64.

119 *Report of the Darfur Commission,* para 179.

120 Ibid para 180.

121 Ibid para 180, quoting *Zoran Kupreškić and others*, ICTY Trial Chamber, judgment of 14 January 2000, para 616-627.

important of these documents are the two[122] international instruments which established the International Military Tribunals (IMTs) at Nuremberg and Tokyo in the aftermath of the Second World War. Initially, the term was used in a slightly different way (as 'laws of humanity') in the Preambles of the First Hague Convention of 1899 on the Law and Customs of War and in the Fourth Hague Convention of 1907.[123] However, the modern concept of the term 'crimes against humanity' was introduced for the first time by the London and the Far East Charters of the IMT. The London Charter, by way of delineating the jurisdiction of the Nuremberg Tribunal, defined crimes against humanity as follows:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> …
>
> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[124]

Article VI of the London Charter is regarded as an important provision of international law which crystallised and codified an emerging rule of international criminal law prohibiting crimes against humanity. As was stated by the British Chief Prosecutor, Sir Hartley Shawcross, the purpose of proscribing such acts was to show the limits to the 'omnipotence of the State.' In his words, 'the individual human being, the ultimate unit of the law, is not disentitled to the protection of mankind when the State tramples upon

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122 Bassiouni and Wise (n 93 above) 112. The two instruments are: the Charter of the International Military Tribunal for Nuremberg (herein after the 'London Charter'); and the Charter of the International Military Tribunal for the Far East (herein after the 'Far East Charter'). The basis for the Charters is the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945.

123 See Bassiouni 1999 (n 107 above) 60-61.

124 London Charter, article VI; see also Far East Charter, article V.

his rights in a manner which outrages the conscience of mankind.'[125] What was crystallised from the major war trials of the 1940s was then supported by momentous resolutions of the UN General Assembly which paved the way for the category of crimes against humanity becoming a rule of customary international law. The most important resolutions are those of 11 December 1946 affirming the principles of the London Charter and the judgement of the Nuremberg Tribunal, and of 13 February 1946 (resolution 3(1)) which recommended the extradition and punishment of persons accused of the crimes defined in the London Charter.[126]

Although the London and Far East Charters did not explicitly impose a duty upon states to prosecute or extradite offenders, the parties jointly committed themselves to prosecute offenders through the machinery established by the Charters. Nonetheless, Article III of the London Charter explicitly bound the parties to cooperate in the investigation of proscribed conduct and in bringing offenders to trial. The Nuremberg Tribunal was supplemented by Allied Control Council Law No 10[127] which established separate tribunals within occupied Germany. Germany was divided into four military zones and in each zone appropriate tribunals were established for the prosecution of others accused of crimes of lesser gravity.

Other international instruments which explicitly suppress crimes against humanity are the Statutes of the recently created ad hoc tribunals of former Yugoslavia and Rwanda. In a very similar fashion to that of Article VI of the London Charter, these two instruments provided for individual criminal responsibility for crimes against humanity.[128] They also required states to cooperate in the investigation and prosecution of persons accused of

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125 Sir Hartley Shawcross, in Speeches of the Chief Prosecutor at the Close of the Case Against the Individual Defendants (London: Her Majesty's Stationary Office, Cmd 6964, 1946) 63, as quoted in Cassese (n 92 above) 7.

126 Bassiouni 1999 (n 107 above) 60-61.

127 Control Council Law No. 10, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946, reprinted in Benjamin B Ferencz *An International Criminal Court: A Step Towards World Peace* (1988) 488.

128 See articles 3 and 5 of the ICTR and ICTY Statutes, respectively. Related to crimes against humanity are the four Geneva Conventions of 1949, as updated by the two Additional Protocols of 1977 and the 1984 CAT also impose an obligation on states to prosecute international crimes defined in the respective contents. Closely related to crimes against humanity in this regard is torture.

crimes against humanity. At a final stage, article 7 of the ICC Statue, with its bulk of customary law foundations, codified the notion of crimes against humanity with an exhaustive definition which runs as follows:

> 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Du Plessis and Coutsoudis correctly note that the article 7 of the ICC Statute 'can generally be considered to be a crystallization of customary international law in relation to what constitutes a crime against humanity.'[129] Crimes against humanity are normally perpetrated by individuals acting in an official capacity, such as military commanders, servicemen and others who act under a general state policy. It is possible, however, that the perpetrators could be individuals acting in their private capacity as long as they act in unison with a general state policy; or as long as government authorities approve of or condone their action or their action fits into a widespread or systematic practice of misconduct.[130] Cassese indicates that article 7 of the ICC Statute is in some ways broader than customary international law in the sense that it expands the category of crimes against humanity by adding some sub-sections such as forced pregnancy, enforced disappearance of persons and the crime of apartheid. It also expands the category of

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129 Du Plessis and Coutsoudis (n 91 above) 344.

130 Cassese (n 92 above) 94.

discriminatory grounds by adding cultural grounds, gender, as well as 'other grounds that are universally recognized as impermissible under international law.'[131]

Crimes against humanity, unlike other international crimes, are not dealt with by means of a special convention adopted particularly for such purposes. The formulations of the London and Far East Charters as well as the provisions of the statutes of the ad hoc tribunals of Rwanda and Yugoslavia were tailored to fit the situations and facts to which they were to apply. They were not essentially customised with a view toward a future application. As asserted by Bassiouni 'the historic legal journey of affirming the existence of "crimes against humanity" as an international category of crime which is deemed part of *jus cogens* and which raised obligations *erga omnes* still needs a specialized convention.'[132] In spite of this, many of the wrongs classified under crimes against humanity arise as infringements of several international and regional human rights standards enshrined, mainly but not only, in the UDHR, ICCPR, ICESCR, CEDAW, CRC, the four Geneva Conventions, ACHPR and ACRWC, which are all ratified by Eritrea. In the next two chapters, the factual matrix on the ground as related to the perpetration of international crimes in Eritrea will be discussed. The factual findings will be analysed under a thorough legal appraisal.

3.11 Conclusion

Although the practice of ratification of international law in Eritrean domestic law is not clearly defined, there are a number of international human rights and humanitarian law treaties binding on Eritrea. Eritrea is generally regarded as bound by a number of international treaties ratified at different times, albeit in a vague and inconsistent manner. In the realm of human rights law, the most important international treaties ratified by Eritrea are the ICCPR, ICESCR, CERD, CEDAW, CRC, the Protocol to CRC - Armed Conflict, the Protocol to CRC - Sexual Exploitation, ACHPR and ACRWC. In the area of international humanitarian law, Eritrea has also ratified the four Geneva Conventions of 12 August 1949. The legal characterisation of the violations of international law

131 Ibid.

132 Bassiouni 1999 (n 107 above) 198-199.

perpetrated in Eritrea since 1991 reveals that the most important categories of international crimes relevant to the discourse on Eritrea are crimes against humanity, war crimes and the crime of aggression.

The ratification by the Eritrean government of the aforementioned international treaties clearly evinces the will of the government to abide by the legal obligations contained in the treaties. As a result, Eritrea is bound to respect the following fundamental obligations emanating from the relevant provisions of the international human rights treaties it has signed since 1995: the right to life; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest or detention; the right of persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity; the right to freedom of movement; the right to a fair trial; the right to an effective remedy for any serious violations of human rights; the right to reparation for violations of human rights; and the obligation to bring to justice the perpetrators of human rights violations. Furthermore, the most important obligations emanating from international humanitarian law treaties which are binding on Eritrea include: the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder; the prohibition on deliberate attacks on civilians; the prohibition on indiscriminate attacks on civilians, even if there may be a few armed elements among civilians; the prohibition on attacks aimed at terrorising civilians; the prohibition on torture and any inhuman or cruel treatment or punishment; the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence; the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognised as indispensable by the world community; and the prohibition on collective punishments.

Eritrea has signed but not ratified the ICC Statue. However, according to article 18 of the Vienna Convention, Eritrea is obliged to refrain from ‘acts which would defeat the object and purpose of’ the ICC Statue ‘until it shall have made its intention clear not to become

a party to' the same treaty. As far as international obligations are concerned, Eritrea is also bound by the commitments enshrined in the UDHR and the UN Charter, certain provisions of which are now regarded as peremptory norms of international law. As a member of the UN and the international community of states, Eritrea's international obligations to human rights protection must also be seen within the broader perspective of the global movement to human rights protection. The initial commitment of Eritrea to ratify some of the major international instruments is promising. The country has, however, failed to ratify several other treaties which are vital for the full realisation of individual rights and freedoms.

CHAPTER FOUR

FACTUAL FINDINGS ON VIOLATIONS OF INTERNATIONAL LAW IN ERITREA

Outline

4.16 Conclusion

4.1 Introduction

This chapter provides a summary of the most important factual findings regarding violations of international law by Eritrean government officials. In a research project as limited in scope as this one, an in-depth, systematic and descriptive chronicling of all violations that attract universal concern cannot be provided exhaustively. Practically, it is not possible to analyse the hundreds of individually documented incidents or reports of violations compiled by different sources, which would literally constitute a body of documentation running into thousands of pages. As such, only the most important and representative[1] acts, trends and patterns of abuse relevant to the determination of individual criminal responsibility will be discussed in this chapter. Further information about the substance of the alleged violations can be obtained from the reports and publications of a number of reliable human rights advocacy groups and other sources.[2] The summarised description of the factual findings on violations of international law is believed to provide a sufficient foundation on which to base the consideration of the international legal implications of the violations.[3]

4.2. General trend

It is generally accepted that individuals who do not subscribe to state ideology are systematically targeted and receive the severest of punishments by the security and military apparatus of the Eritrean government. Fear of retribution for independent political and religious thought is part of daily life in Eritrea. As will be seen in detail, most of the crimes committed in Eritrea characteristically display the basic features of crimes against humanity. In a latest initiative by a volunteer at the EMDHR, a

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1 This approach is borrowed from the *Report of the Darfur Commission,* para 61.

2 See the sources cited in notes 6-14 below.

3 In this regard, the study draws on the methodology adopted by Max Du Plessis and Andreas Coutsoudis 'Serious human rights violations in Zimbabwe: Of international crimes, immunities, and the possibility of prosecutions' 21 (2005) *South African Journal on Human Rights* 338-339. The authors discuss the possibility of prosecution in the context of grave human rights violations of the Zimbabwean government.

communication[4] lodged with the ACHPR against the Eritrean government exhaustively narrates the violation of the right to freedom of movement of hundreds of thousands of Eritrean youths, in the context of which the violation of several other fundamental rights are discussed. Most of the accounts and allegations in the communication have been sufficiently verified, directly or indirectly, by UN-mandated bodies, immigration tribunals, foreign municipal courts and regional judicial bodies which include the following:[5] UN Working Group on Arbitrary Detention,[6] the European Court of Human Rights,[7] the ACHPR,[8] the Federal Court of Australia,[9] US District Courts,[10] High Court of South Africa, Transvaal Division,[11] South African Refugee Appeal Board[12] and the UK Asylum and Immigration Tribunal.[13] The information analysed by all such independent sources reasonably indicates that atrocities have been committed in Eritrea with the acquiescence of senior government officials and army commanders.[14]

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4 See the communication lodged (by a volunteer at EMDHR) with the ACHPR in September 2007 and the accompanying body of evidence (hereinafter '*ACHPR-EMDHR Communication*').

5 See generally Simon M Weldehaimanot, 'Guide to Eritrean asylum seekers: Compilation of cases' (unpublished paper, 2007).

6 *Mahmoud Sherifo et al v Eritrea*, UN Working Group on Arbitrary Detention, UN Doc E/CN4/2003/8/Add1, 54 (2002), 5 March 2002. See also UN Working Group on Arbitrary Detention, Opinion No 23/2007, adopted on 27 November 2007.

7 *Said v The Netherlands*, No. 2345/02 (Sect. 2) (bil.), ECHR 2005-VI – (5.7.05); *Bereket Okubay v Sweden* [Application No. 17276/05].

8 *Liesbeth Zegveld and Mussie Ephrem v The Government of Eritrea*, ACHPR, Communication No 250/2002, 19th Activity Report of the ACHPR; *Article 19 v Eritrea,* Communication No 275/2003, 22nd Activity Report of the ACHPR, Annex II.

9 *VSAI v MIMIA* [2004] FCA 1602.

10 *Selamawit Kifleyesus v Attorney General of the United States*, US Court of Appeals for the Eighth Circuit, no 05-3304; *Selamawit Zehatye v Attorney General of the United States*, US Court of Appeals for the Ninth Circuit, No 04-73295; *Ghebregziabher Gheberemedhin v Attorney General of the United States*, no 03-1815 & 03-3836; *Nuru v Gonzales*, 404 F 3d 1207 (9th Cir)).

11 *Yoel Alem v The Minister of Home Affairs and Others,* Case No 2597/2004 (unreported).

12 *Tesfalidet Abraha Asfaha v Refugee Status Determining Officer,* Appeal No. 1760/06, Department of Home Affairs, South Africa (unreported).

13 *MA (Draft evaders – illegal departures – risk) Eritrea* CG [2007] UKAIT 00059; *AH (Failed asylum seekers – involuntary returns) Eritrea* CG [2006] UKAIT 00078; *KA (draft-related risk categories updated) Eritrea* CG [2005] UKAIT 00165; *WA (Draft related risks updated – Muslim Women) Eritrea* CG [2006] UKAIT 00079; *YL (Nationality – statelessness – Eritrea-Ethiopia) Eritrea* CG [2003] UKAIT 00016.

14 See also generally the periodic reports of AI, HRW, CPJ, RSF, Article 19, InteRights, CIVICUS World Alliance for Citizen Participation, and other rights groups; UK Home Office *Country of Origin Information Report on Eritrea* (2007); US Department of State, Bureau of Democracy, Human Rights, and Labour *Country Reports on Human Rights Practices* (2007); US Department of State, Bureau of Democracy, Human Rights, and Labour *International Religious Freedom Report* (2006). See also generally the periodic reports and publications by Awate Team, Asmarino.com, Release Eritrea, Human Rights Concern-Eritrea (HRC-E) and other Eritrean groups and websites; most reports and publications by Eritrean groups on the human rights

In order to correctly define the categories of crimes against humanity perpetrated since the country's independence in 1991, a thorough survey of a multitude of reports and compilations (in addition to those cited above) has been conducted, which include reports of governments, inter-governmental organisations, UN treaty bodies, non-governmental organisations, international rights groups, exiled civil society and opposition groups, as well as publications and research outputs of recognised individuals and publicists. The sources contain a consistent and reliable body of information, persuasively indicating the individual criminal responsibility of a certain category of high ranking government leaders in Eritrea. This is one of the major tentative conclusions drawn in this study and is supported by a legal appraisal of the violations as evaluated against established principles of international law. In view of this, collective and individual incidents are presented according to the type of violation involved or international crimes identified.

Analyses of facts by most observers indicate that the magnitude, intensity and consistency of crimes against humanity increased noticeably after September 2001, when, as a result of a widespread political crackdown, the country was literally turned into a police state. It is generally agreed that the escalation coincided with the arrest of eleven top government officials,[15] scores of private media journalists, business people, the elderly and others, who initiated or supported a popular call for democratisation. A common conclusion is that in response to growing political dissent, the government consistently implemented repressive policies, which amount to international crimes.

There are consistent accounts of a recurrent pattern of attacks against purported opponents, minority religious groups, members of the national military service programme (NMSP) and civilians. Hundreds of incidents have been reported involving massacres, isolated killings, incidents of assassinations, summary executions, rape and other forms of sexual violence, torture, abduction, enforced disappearance, detention without trial and other categories of international crimes. While a majority of the reports

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violations of the Eritrean government are now available at the newly-launched Eritrean Human Rights Electronic Archive: www.ehrea.org. However, it must be noted that in spite of the ongoing initiatives by different individuals and groups, much work is yet to be done for a systematic documentation and cataloguing of violations.

15 See the discussion in section 4.6 below.

are consistent in the description of events and violations, information on the exact number of victims of such violations is yet to be established. Nonetheless, several reports indicate that thousands[16] of people have been directly affected by the violations. This strengthens the argument that crimes against humanity have been committed to achieve common or specific objectives and interests of Eritrean government officials. Most of the crimes discussed in this chapter are violations of international human rights law. However, violations of international humanitarian law are also discussed; such violations were perpetrated in the context of domestic and international armed conflicts that have taken place in Eritrea since 1991.[17]

4.3 Common categories of crimes against humanity

The most common categories of crimes against humanity perpetrated in Eritrea include the following: murder;[18] imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law; torture, which can also be committed as a self-standing international law violation;[19] rape and sexual slavery; detention without trial; enforced disappearance; other inhuman acts of a similar character intentionally causing great suffering, or serious injury to mental and/or physical health.[20] The discussion of international crimes in the following sections is organised according to the type of violations and the resulting category of crimes against humanity, as defined by article 7 of the ICC Statute and other rules of international law. In order to give a first-

16 See, for example, AI '*You Have No Right to Ask': Government Resists Scrutiny on Human Rights* (AI Index: AFR 64/003/2004, May 2004).

17 On the distinction between human rights law and humanitarian law, see the discussion in Chapter 3.

18 Murder in the current context should be understood to mean extra-judicial execution of thousands of people since the country's independence in 1991 in violation of established standards of international law.

19 Compare this, for example, with the Zimbabwean situation as discussed by Du Plessis and Coutsoudis (n 3 above) 342.

20 For a definition of these crimes, see generally article 7 of the ICC Statute. On the importance of categorisation of crimes, Max du Plessis and Stephen Peté note that 'labelling and categorising is an inevitable and essential means by which to make sense of human rights violations perpetrated against individuals.' Max du Plessis and Steven Peté 'Reparations for Gross Human Rights Violations in Context' in Max du Plessis and Steven Peté *Repairing the Past?: International Perspectives on Reparations for Gross Human Rights Abuses* (2007) 17.

hand account of some major allegations, the verbatim words of diverse sources are quoted extensively.

A greater proportion of the violations perpetrated in recent years are the outcomes of the controversial and compulsory national military service programme (NMSP) in the country. Effectively implemented since 1994, the NMSP is perhaps the most unjust government policy with far-reaching direct implications for the fundamental rights of hundreds of thousands of citizens. The abusive implementation of this plan has caused immense suffering to a large number of Eritreans. Thus, the analysis of the gravest violations perpetrated in the context of the NMSP puts into perspective the discussion on all other violations of the past few years.

4.4 The abuses of the NMSP

There are a number of government policies in Eritrea which have caused immense suffering and vulnerability to a large number of Eritreans. The NMSP stands out as the most devastating government policy of the post-independence era. The NMSP was officially launched in 1991 by Proclamation No 11/1991, the 'First' National Service Proclamation of Eritrea. According to this proclamation, every adult member of the Eritrean society is required to complete an 18-month NMSP, which includes a harsh military training period of six months in the notorious Sawa Military Training Camp. Lately, other military training camps have been established in different parts of the country, such as Kiloma and Wia, which are known for their harsh climates. The military camps are deliberately located in unfriendly and remote geographical locations with the sole objective of isolating the conscripts. The military training is accompanied by crude and aggressive programmes of indoctrination, deliberately intended to weaken critical thinking and defiance among the youth.

Although not an outcome of a democratic process, the NMSP was initially welcomed with substantial popular support. Its initial purported objective was nation-building and reconstruction. In recent years, especially during and after the 1998-2000 border conflict

with Ethiopia, it became a major instrument of repression of political dissent. The initial law[21] exempted certain categories of people, such as married women, mothers and newly-weds, from the requirement of national military service. For no clear reason, however, the exemption was withdrawn in 1995 by an amending law.[22] Another law, Proclamation No 82/1995,[23] extended the age limit of forty years to include people up to fifty years of age. This indicates the arbitrariness of the government in the implementation of the plan.

From 1994 until June 2007,[24] the government implemented twenty-one rounds of the NMSP.[25] Each round recruited tens of thousands of participants. One source, for example, indicated that 18 000 youths were conscripted in the twentieth round to remain in conscription for an unknown period of time.[26] Forceful conscription was intensified after the 1998-2000 border conflict with Ethiopia, in spite of the fact that the conflict officially came to an end in June 2000. Nearly seven years after that and irrespective of the 18 months limit stipulated by law, the programme continues effectively with no end to the abusive practices it involves. The government justifies its continuation as a necessary reaction to the threat of a new war with Ethiopia. There are, however, no democratic safeguards against abuse and no state of emergency was promulgated in the country after the end of the 1998-2000 border conflict. In 2002, to disguise the abusive continuation of the NMSP, the government proclaimed a purported 'national development plan' called the Warsay-Ykealo Development Campaign (WYDC).[27] This programme was devised to frustrate the long-awaited demobilisation programme of soldiers, who were conscripted in large numbers during the 1998-2000 border conflict with Ethiopia. Strictly regulated by military rule and discipline, the WYDC was dubbed

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21 Article 5(4)-5(9) of the First National Service Proclamation.

22 Article 2 of Proclamation No 71/1995 (A Proclamation to Amend the 'First' National Service Proclamation).

23 Articles 3 and 6 of the 'Second' National Service Proclamation. See also article 13(2) on the duration of the NMSP. This law repeals the two previous proclamations on national service.

24 See *Shabait.com News* 'Twentieth round national service participants take oath,' 30 June 2007.

25 This author is a member of the fourth round of the NMSP, implemented between December 1995 and June 1996.

26 See **ኣሰና.ነት 'ተቐያያሪ ሜላ ንሓደ ፍሽ.ል ፖ'ሊሲ** ' (Asena.net 'Ever-changing ploy for a failed policy'), available at http://asena-online.com/index.php?option=com_content&task=view&id=226&Itemid=103 (accessed 8 July 2007).

27 See *ACHPR-EMDHR Communication*.

by a famous liberation struggle hero 'a campaign of slavery'[28] and is believed to have kept under constant yoke of tyranny hundreds of thousands of youths.[29]

4.4.1 The NMSP and the WYDC as methods of repression

The NMSP and WYDC are manifestly abusive and their only purpose is the continuity of a militarised system of governance aimed at the subjugation of the whole of Eritrean society, especially the youth. The stated concern of AI in this regard is one of the most credible accounts of the harsh realities of the NMSP. The concern of AI is based on the fact that the NMSP has become a major cause of arbitrary detentions and the use of torture as standard military punishment.[30] The government uses the programme as a common pretext to arrest real or perceived opponents at any time and any place. Army commanders have full discretion to implement whatever type of punishment, including extra-judicial execution, against NMSP or WYDC conscripts. According to eyewitness accounts,[31] brutal methods of punishment which lead to amputation of arms and other forms of permanent bodily injury are common among any conscripts who demonstrate the slightest sign of defiance against the draconian policies of the government.[32]

Virtually all foot soldiers of the regular army are conscripts of the NMSP and WYDC. Variable estimates of the total number of Eritrean soldiers exist. In October 2001, a senior official of the National Commission for Demobilisation and Reintegration

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28 Adhanom Gebremariam (Translated by T Giorgis Zewde) 'The Warsay/Yikaalo campaign: A campaign of slavery,' available at http://news.asmarino.com/Articles/2002/09/TesfagiorgisZewde-1.asp (2002).

29 See Awate Team. See Awate Team 'The genesis of Eritrea's slavery project,' available at http://www.awate.com/portal/content/view/4646/9/ (accessed 23 October 2007b).

30 See, for example, AI (n 16 above). Compare this with the findings of several European and other asylum tribunals cited in n 7-13 above.

31 See, for example, Informal Interview with Dr Yosief Fessehaye, 8 March 2007; HRC-E *Eritrea: Voices of Torture* (Documentary, 2006); Daniel R Mekonnen 'Piercing the veil of impunity: An account of an eyewitness,' available at http://zete9.asmarino.com/?itemid=855 (accessed 15 March 2007).

32 Human Rights Watch, '2006 World Report: Eritrea,' http://hrw.org/english/docs/2006/01/18/eritre12307.htm (accessed 18 January 2006). HRW indicates that Eritreans fleeing conscription are granted asylum elsewhere 'on the grounds that national service is used as a measure of political repression and that anyone forcibly returned to Eritrea is likely to be tortured.' See also the case law cited in the same report, some of which are cited in n 7-13 above.

indicated that 'by mid-2000, Eritrea [had] 300 000 army personnel, more than any other time in the history of the liberation struggle.'[33] This number is believed to have increased exponentially in the last seven years, during which time the government has aggressively continued to conscript new batches of tens of thousands of youths every six months.[34] According to the report[35] of the Eritrean government to the Committee on the Elimination of Discrimination Against Women (CEDAW), women constitute, in an aggregated form, 45.27% of the total number of army members, including those in the 'civilian' police force. This is close to half of the total number of the national army.[36] The vulnerability of women army members is proportional to their numbers. There are reports that women have been sexually abused, raped and tortured by army commanders in the infamous Sawa Military Training Camp and elsewhere. Sara Rich Dorman, for example, quotes two foreign newspapers that interviewed women who claim to have been raped in the military training camp.[37]

Frustrated by the abusive practices in the NMSP and WYDC, Eritreans have fled to neighbouring countries in unprecedented numbers. All border posts in the country are heavily guarded by security personnel and a special force, called the border surveillance units. Citizens between the NMSP age margins are strictly forbidden to leave the country

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33 Amanuel Mehreteab 'Renewed demobilization in Eritrea,' 21 (2001) *Bonn International Centre for Conversion Bulletin* 1.

34 According to latest reports, the total number of NMSP conscripts is estimated to be more than 400 000. See Awate Team 2007b (n 29 above).

35 *Combined Initial, Second and Third Periodic Report of the Eritrean Government to the Committee on the Elimination of Discrimination Against Women*, UN Doc CEDAW/C/ERI/1-3/2004 (hereinafter '*Report to the CEDAW Committee*'), 34.

36 The disaggregated data provided by the *Report to the CEDAW Committee* is as follows: 3.09% in the ground-force, 3.30% in the naval force, 8.92% in the air force, 10.36% administration/support staff within the Ministry of Defence, and 19.6% in the police force.

37 The two newspapers cited by Dorman are *Sette Corriere della Sera,* 'Eritrea, gioivane e arruolata,' 26 September 2002; and *The Age,* 'When Rape is a Requirement of Military Service,' 5 December 2002. See Sara Rich Dorman, 'Past the Kalashnikov: Youth and the State in Eritrea,' in Jon Abbink and Ineke van Kessel (eds) *Vanguard or Vandals? Youth, Politics and Conflict in Africa* (2004). See also Saba and Giday from Asmara, 'Rape, torture and cover-up of innocent girls in Sawa, available at http://news.asmarino.com/Information/2002/05/SabaGiday_5_5.asp (accessed 19 May 2004); Cecilia M Bailliet 'Examining sexual violence in the military within the context of Eritrean asylum claims presented in Norway,' 19 (2007) *International Journal of Refugee Law* 471-510. In a society where patriarchal conservatism is so pervasive, women do not go public and report sexual violence and rape. Problems of underreported gender-based violence in the army are very common. As indicated by the Director of HRC-E: 'There are so many female victims of torture and rape, but … they are not willing to share their experiences due to fear, insecurity and culture.' Elisabeth Chyrum, Director of HRC-E, email message to author, 8 June 2007.

regardless of whether they have fulfilled the NMSP or not. The border surveillance units are authorised to shoot anyone who is caught crossing the borders of the country. Therefore, many people make use of 'illegal' methods to flee the country. They pay exorbitantly prohibitive prices to smugglers. In their attempts to escape, many face violations such as killings, and in the case of women, rape and sexual violence. Most of the escapees experience harsh conditions in refugee camps in neighbouring countries, where their right to freedom of movement is severely curtailed.[38] Such a severe restriction on the right to freedom of movement has unavoidable wider repercussions. Several other fundamental rights have also been flagrantly violated, causing immense suffering to hundreds of thousands of Eritreans.[39]

4.4.2 The NMSP and the WYDC as collective forms of punishment

The government continues to implement harsh and indiscriminate methods of control, including random roundups and house-to-house searches purportedly targeting 'draft evaders,' and conscripts suspected to be away without leave. Such indiscriminate roundups are implemented all over the country under the command of the five major military commanders in charge of the current military administrative operations which replaced civil administration in 2001. The objective of the roundups is to terrorise the entire society and prevent any form of political disobedience. A clear indication of the spread of terror is apparent from a recent government policy, which collectively targets the parents or relatives of 'absconders.'

In typical authoritarian fashion, the Eritrean government has begun to punish parents whose children have left the country to escape from continued subjugation and abuse. This has caused a popular outrage as it affects thousands of poor families. AI reports that

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38 A recent report from *Reuters,* for example, narrates the nightmarish life of some 15 600 Eritrean escapees living in the Shimelba Refugee Camp in northern Ethiopia. See *Reuters* 'War fears swell refugee camp near Eritrea border,' 1 November 2007. Of the 15 600 refugees, 'some 3000 are university students or graduates fleeing forced conscription.' The UNHCR estimates that more than 20 000 Eritreans have taken refuge in Ethiopia. See *AFP* 'Ethiopia claims 3 000 Eritreans crossed border in six months,' 20 March 2008. See also *Newsweek* 'Waiting for war,' 30 October 2007; *Haaretz* 'Refugees say returning home means certain death,' 25 March 2008.

39 Evidence No 1 as attached to *ACHPR-EMDHR Communication*.

in a sweep that started on 6 December 2006 'the Eritrean government has arrested over 500 relatives, mostly parents, of young men and women who have either deserted the army or avoided conscription.'[40] Paradoxically, the authorities ordered the detainees to 'either produce the missing conscripts or pay a fine of 50,000 nafka [sic].'[41] According to the same source, parents of relatives who failed to do so were also told to serve six months in the army in place of their missing family member. In the words of HRW, this is one of the best examples of 'rule by force and caprice' aggressively implemented by the government to terrorise and intimidate the whole population and to isolate it from the outside world.[42]

AI and HRW note that this type of collective punishment is contrary to the widely held principle of individual criminal responsibility that no one may be penalised for an act for which they are not personally liable. This fundamental principle of law is reflected not only throughout international human rights law[43] but also in article 48(1) of the Transitional Penal Code of Eritrea.[44] The Minister of Justice, Ms Fozia Hashim, was questioned in regard to this typical infringement of fundamental rights, in a public meeting of Eritreans in Johannesburg in late 2006. In response, the Minister said that as long as the youths continue to flee the country with the support and encouragement of

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40 AI 'Over 500 parents of conscripts arrested' (AI Index: AFR 64/015/2006 (Public)), News Service No 329, 21 December 2006.

41 Ibid. According to official figures, US$ 1 is approximately equivalent to 15 Eritrean Nakfa. AI has wrongly calculated the equivalent of Nakfa 50 000-00 to be US$ 1 200-00. The most probable figure would be US$ 3333-00.

42 HRW (n 32 above). On the harshest ramifications of the Eritrean NMSP, the UK Asylum and Immigration Tribunal observed that: 'The issue of military service has become politicised and actual or perceived evasion of military service is regarded by the Eritrean authorities as an expression of political opinion. The evidence also supports the contention that the Eritrean Government uses National Service as a repressive measure against those perceived as opponents of the government.' *MA Case*, para 227(v); see also *IN Case* para 10. For scholarly writings on this issue, see Neil R Brown *et al* 'The insecurity of Eritreans and Ethiopians in Cairo' 16 (2004) *International Journal of Refugee Law* 675-678; Assefaw Bariagaber 'Eritrea: Challenges and crises of a new state,' a Writenet Report Commissioned by UNHCR, Status Determination and Protection Information Section – DIPS, 1 October 2006, 35.

43 See, for example, in this regard article 4(b) of the Statute of the ICTR and article 3 (b) of the Statute of the Special Court for Sierra Leone; see also UN Human Rights Committee, General Comment 29 para 11, according to which any such punishment is contrary to a peremptory rule of international law. See also article 7(2) of the ACHPR: 'Punishment is personal and can be imposed only on the offender.' See also article 25 of the ICC Statute.

44 The law provides: 'The offender who is responsible for his [or her] acts is alone liable for punishment under the provisions of the criminal law.'

their parents, the policy will remain intact. By this response, the minister has demonstrated uncompromising support for the atrocities currently committed by the Eritrean government.[45]

4.5 Major incidents of mass murder

4.5.1 The Adi Abeito Massacre

On 4 October 2004, government forces went in full force into the streets of Asmara to roundup suspected 'draft-dodgers,' and ended up herding thousands of youngsters at gunpoint to the Adi Beito Detention Camp, in the outskirts of Asmara.[46] Inside the detention camp, 'trouble erupted as pushing and shoving started by the frustrated youngsters,' who were brutally packed into an overcrowded detention facility. Reports indicated that the detainees, from frustration, pushed the fences and walls of the camp until they fell outwards, killing five guards. Soon after, shooting and chaos reigned in the area: some twenty people were killed and more than a hundred injured immediately after the breakout by the detainees. The majority of the victims were reportedly shot dead or severely wounded by guards of the detention facility, while attempting to escape.

On 5 October 2006, during the second anniversary of the massacre, a total number of 54 victims were identified to have been killed in the Adi Abeito Massacre. The list of names was widely publicised by the Eritrean Anti Tyranny Global Solidarity, a coalition of several Eritrean rights groups, civil society and opposition organisations in exile.[47] As usual, the Eritrean government has dismissed the allegations as exaggerations. In an interview with the *VOA Tigrinya Programme*, the Acting Minister of Information stated

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45 Compare this with the comments of the Acting Minister of Information (Mr Ali Abdu), who said, in relation to the report by AI, that the rights group does not have 'any right to intervene in our internal affairs.' See UK Home Office (n 14 above) para 11.10.

46 See, for example, Asmarino.com 'Breaking news: Many youngsters are reported dead in Asmara overnight,' available at http://news.asmarino.com/Information/2004/11/Asmara_E_5.asp (accessed 4 November 2004); Events Monitor 'Loss of human life: Tragedy in Adi Abeito,' available at http://zete.delina.org/zete/341.asp?quSri=341 (accessed 10 November 2006); *BBC News* 'Eritrean jail deaths "overblown,"' 8 November 2004.

47 Eritrean Anti Tyranny Global Solidarity 'In memory of Adi Abeito martyrs: Fax message to PFDJ's chieftains,' available at http://e.asmarino.com/content/view/39/26/ (accessed 16 November 2006).

that only two 'outlaws' died in the incident.[48] He then described reports by other sources as part of an overblown smear campaign against the Ethiopian government.[49]

4.5.2 The Wia Massacre

Another reprehensible mass killing was the Wia Massacre. Quoting the London-based Eritreans for Human and Democratic Rights-UK (EHDR-UK), the US Department of State, in its 2006 *Country Reports on Human Rights Practices* reported that 'on June 10 [2005] military personnel shot and killed 161 youths at Wia Military Camp who were trying to escape.'[50] As in the case of the Adi Aabeito Massacre, no action was taken against military personnel who shot and killed the 161 youths. The victims were conscripts of the NMSP, who were being kept in the detention camp for several reasons. The massacre was meant to terrorise other conscripts, lest they decide to leave the country 'illegally' or escape once they were in detention. Wia Military Camp was the same place where, in 2001, some 2000 university students were arbitrarily detained for several weeks after protesting against the unpopular government policy of summer work. During the detention, two university students, Yirga Yosief and Yeman Tekie, died as a result of the harsh living conditions in the camp.[51]

4.5.3 The Mai Habar Massacre

Concentration of excessive power within the executive branch of government has been the major cause of repression in Eritrea. One of the earliest manifestations of this sad development was the brutal repression of the mutiny of disabled war veterans on 11 July

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48 *VOA Tigrinya Programme* 'Interview with Mr Ali Abdu,' 9 November 2004.

49 *BBC News* (n 46 above).

50 US Department of State *Country Reports on Human Rights Practices* (n 14 above).

51 Awate Team 'Wia: Testimony of University of Asmara students,' available at http://www.awate.com/artman/publish/article_4246.shtml (accessed 12 September 2005). Since 2003, the University of Asmara, the only university in the country, has been dismantled into several incompetent 'colleges' and 'schools,' poorly managed by military personnel. At the time of the deaths of Yirga Yosief and Yeman Tekie, Dr Weldeab Isaac, the president of the university, was the highest official at the academic institution. In spite of his prominent position, he is widely blamed for having done nothing to avert the situation. Dr Weldeab is also known for his notorious role in the structural adjustment programme which has caused immense suffering to a large number of civil servants.

1994, known as the Mai Habar Massacre.[52] In this incident, an unknown number of protestors were shot dead, allegedly on direct orders from the state president. During the second anniversary of the Mai Habar Massacre, the official newsletter of the EFL-RC lamented that on that fateful day the disabled war veterans were killed simply for peacefully protesting and firmly demanding to meet the state president, who obstinately refused to meet them.[53] Other victims associated with the Mai Habar Massacre are some 25 disabled war veterans, who were immediately arrested on the pretext of instigating rebellion. They remained in detention without trial for several years. The same source has quoted the state president as referring to the disabled war veterans as 'spoilt brats.' The president has also blamed the incident on alleged irresponsible acts of the protestors themselves.[54]

4.6 Detention without trial

4.6.1 The case of the G-15 and the journalists

Arbitrary arrest is one of the most commonly perpetrated violations in Eritrea. With the advent of a popular reform movement in September 2001, the number of victims of arbitrary arrest has increased considerably. The reform movement was initiated by a group of fifteen high-ranking government officials, ministers, ambassadors, governors, parliamentarians, and others, who collectively challenged the state president for his misconduct during the 1998-2000 border conflict in particular, and the conduct of

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52 *ዲሞክራሲያዊት ኤርትራ* 'ካልኣይ ዓመት ዝኽሪ ደማዊ ሞጉፍጨፋ ማይ ሓባር,' ቁ 19፣ ሰነ-ሓምለ 1996፣ ገጽ 10። (*Dimokrasyawit Eritrea* 'Second anniversary of the Mai Habar Massacre,' June-July 1996, 10). See also Martin Plaut 'The birth of the Eritrean reform movement' 91(29) (2002) *Review of African Political Economy* 121; አንቶንዮ ተስፋይ 'ማይሓባርን ዓዲ ኣበይቶን' (Antonio Tesfai 'Mai Habar and Adi Abeito'), available at http://www.eritreana.com/pdf/November/1994.pdf (accessed 7 November 2004).

53 *Dimokrasyawit Eritrea* (n 52 above). This happened after several persistent calls on the part of the disabled war veterans in which they asked the state president to come and see how they were living in the impoverished town of Mai Habar.

54 *Dimokrasyawit Eritrea* (n 52 above). The state president is notoriously known for his disdainful comments with regard to different societal groups such as families of the fallen heroes, the disabled war veterans, university students, NMSP conscripts, members of minority religious groups, and others. See the thematic and catalogued video clips of interviews and speeches of the state president, collected from several sources and available at the archives of www.asmarino.com (accessed September 2007).

national affairs in general.[55] The unfortunate and draconian measure taken against the peaceful reform movement of the G-15 has changed the course of history to the severe detriment of Eritrea.[56] The reform movement was a by-product of the post-independence political crisis, which manifested itself overtly after the end of the 1998-2000 border conflict with Ethiopia. Since the outbreak of the border conflict in 1998, Eritrea has been ruled under an undeclared state of emergency. Using this as an excuse, the government deviated from democratisation and postponed previously scheduled general elections indefinitely.[57]

A combination of the reluctance of the government to facilitate democratic transition and the devastating consequences of the 1998-2000 border conflict precipitated economic, social and political crises, including severe disagreement among senior government officials, what Connell describes as 'a behind-the-scenes power struggle.'[58] The major cause of such a disagreement was 'the president's conduct of the war, his hard-line approach to peace negotiations, and his resistance to democratisation.'[59] The deeply rooted disagreement spilled into the public arena only in mid 2001 when the G-15 publicised their widely acclaimed Open Letter.[60]

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55 The leaders of the reform movement came to be known as the Group of 15 or the G-15.

56 For further discussion on the predicament of the G-15, see generally Daniel R Mekonnen 'The reply of the Eritrean government to ACHPR's landmark ruling on Eritrea: A critical appraisal' 31(2) 2006 *Journal for Juridical Science* 26-56.

57 According to article 3(2) of the Interim Constitution, the first democratic election was scheduled for 1997. Due to reluctance of the ruling party, it was not conducted at that time. In September 2000, the government ostensibly committed itself to conduct general elections in December 2001. With the emergence of the reform movement and the sad developments after that, the election has been postponed indefinitely.

58 Dan Connell 'Eritrea' in Freedom House *Countries at the Crossroads: A Survey of Democratic Governance* (2005a) 234.

59 Ibid.

60 *An Open Letter to all Members of the PFDJ: A Call for Peaceful and Democratic Dialogue* [English version], available at http://news.asmarino.com/PFDJ_Membership/Introduction.asp (accessed 14 June 2006) (hereinafter 'Open Letter'). It should noted that the reform movement of the G-15 was preceded by another milestone development which transpired in the form of 'the Berlin Manifesto,' a letter addressed to the state president by thirteen prominent Eritrean intellectuals. The Berlin Manifesto criticised the president for single-handedly plunging the country into a devastating crisis. The authors were later to be known as 'G-13.' See G-13 'Berlin Manifesto: Open letter to President Isaias Afeworki,' 3 October 2000, available at http://www.eritreaone.com/Docu/Eng/OpenLetterBerlin.html.

The Open Letter of the reformers was authored after the persistent but unjustified refusal on the part of the state president to convene government and party deliberative organs for purposes of critical assessment. This call had been made by the reformers, albeit clandestinely, immediately after the last round of war between Eritrea and Ethiopia. By that time, senior government officials were already bitterly divided on how the nation should be governed, in general, and the inefficient performance of the government during the 1998-2000 border conflict, in particular. The reformers intended to rectify the situation by way of critical deliberation and evaluation in all national deliberative organs, namely: the National Assembly, the Cabinet of Ministers and the ruling party's Central and Executive Councils. The president of the country, who chairs all of these government and party deliberative organs, refused to call any special or regular meetings as demanded by the reformers. The regular sessions of the deliberative organs were excessively delayed at the time of the call. As a last resort, the reformers publicised their Open Letter in May 2001.[61]

In their letter, the reformers called for a peaceful political transition to democracy via the implementation of the 1997 Eritrean Constitution and the conduct of free and fair elections. The Open Letter was addressed to all ruling party members and criticised the government, particularly the state president, for acting in an 'illegal and unconstitutional' manner. In their letter, the reformers called upon 'all PFDJ members and [the] Eritrean people in general to express their opinion through legal and democratic means and to give their support to the goals and principles they consider just.'[62]

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61 The Central Council of the PFDJ and the National Assembly last convened in August and September 2000, respectively, 13 to 14 months before the arrest of the reformers. According to article 4(3) and article 5(5) of the Interim Constitution, the regular sessions of the National Assembly and the Cabinet of Ministers must be convened every six months and every six weeks, respectively. According to article 5(A)(5) and article 6(A)(4) of the Transitional Constitution of the PFDJ 10-16 February 1994, the Central and Executive Councils of the PFDJ are required to convene every six months and every month, respectively. The Fourteenth Session of the National Assembly was convened in February 2002, 18 months after the Thirteenth Session and six months after the arrest of the reformers.

62 Open Letter (n 60 above).

On 18 and 19 September 2001, when the international community was still stunned by the September 11 attacks in the US, the Eritrean government detained eleven[63] of the fifteen officials who were inside Eritrea at that time and accused all of the reformers 'of crimes against the nation's security and sovereignty.'[64] Three[65] of the fifteen senior officials managed to avoid imprisonment as they were outside of Eritrea at the time. In continuation of its rigorous repression, the government shut down all privately owned newspapers and arrested more than a dozen of their writers, publishers and editors,[66] who were believed to have sympathised with the cause of the G-15. Since then, there have been numerous arrests of elders who sought to mediate between the state president and the G-15, more journalists, mid-level officials, business people and others.[67] None of

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63 The eleven were those who were in the country at the time of arrest

64 Ministry of Foreign Affairs of the State of Eritrea: Letter to the Chairman of the ACHPR (22 March 2004) (hereinafter 'Letter'), para 1.

65 Two of the three officials who escaped prison are now leading opposition figures in exile. The third, Ambassador Haile Menkerios, is currently the Assistant Secretary-General in the UN Department of Political Affairs. One of the fifteen reformers, Mohammed Berhan Belata, recanted shortly before the summary arrest and was, therefore, spared jail.

66 According to RSF, at least sixteen journalists of the private media are still under *incommunicado* detention while four others reportedly died in jail. 'Their bodies were never handed over to their families. They were probably buried behind the administration building at Ira-Iro [Prison].' The sources of information for the RSF report are former prison guards at Ira-Iro who defected to Ethiopia in 2006. RSF 'Naizgi Kiflu, the dictatorship's *éminence grise*,' available at http://www.rsf.org/IMG/pdf/Download_the_full_report.pdf (accessed 21 May 2008).

67 Connell 2005a (n 58 above) 234. In March and April 2005, the government arrested three trade union leaders: the chairperson of a trade union affiliated to the International Union of Foodworkers; the secretary of a trade union affiliated to the International Textile, Garment and Leather Workers' Federation; and the chairperson of the Red Sea Bottlers (Coca-Cola) Workers' Union. The ILO notes that 'the three have been detained incommunicado since their arrest and the authorities have refused to give any information on their whereabouts or on the reasons for their arrest.' See International Labour Organisation (ILO) 'ILO Governing Body concludes 297th Session: Considers labour situation in Myanmar, Belarus and other countries,' 17 November 2006, also available at http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_080622/index.htm. In the relation to the fate of the trade union leaders, the ILO Committee on Freedom of Association lamented that the Eritrean government 'has not replied in substance to the … allegations, although it has been invited on several occasions, including by means of an urgent appeal, to present its comments and observations on the case.' These violations are contrary to Eritrea's obligations that emanate from the relevant ILO conventions which are signed by Eritrea: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No 98). See ILO Committee on Freedom of Association, 343rd Report, November 2006, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_297_10_en.pdf, paras 696, 696. In para 704(b) 'the Committee deeply deplores the failure by the Eritrean authorities to ensure observance of the fundamental human rights of these three trade union leaders to be informed of the charges brought against them, to have access to legal counsel and to be brought without delay before the appropriate judge.'

them have been brought before a court of law, or convicted of any crime. With no visitation rights by family members, lawyers or international rights groups, no one knows the whereabouts of the prisoners.[68]

4.6.2 Other incidents of arbitrary arrest

Other major cases of arbitrary arrest come from the pre-2001 era. One incident involves the summary detention of a score of ex-freedom fighters who purportedly mutinied in protest to a certain government policy adopted in 1993. On 18 May 1993, shortly after the national referendum for independence, the Central Committee of the EPLF decided to prolong its term for four years. It also decided that all members the Central Committee would become members of the newly-established National Assembly of Eritrea. Furthermore, the Central Committee decided that all veteran freedom fighters of the EPLF would continue for those four years without a formal salary. This was done without proper consultation with the rank and file of the EPLF.[69] Disappointed by the undemocratic decision of the Central Committee, the freedom fighters of the EPLF mutinied on 20 May 1993, threatening to overthrow the provisional government established by the EPLF itself. The mutiny, albeit peaceful and disciplined, was inevitable due to the unreasonableness of the decision. However, as is common in the history of the EPLF, those believed to have led the mutiny were summarily arrested and secretly given prison terms by an executive committee. Since then, all of them remain in jail, where they have been for more than thirteen years.[70]

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68 However, the Eritrean government was found to be in violation of several provisions of the African Charter in two landmark cases dealing with the plight of the G-15 and the journalists of the private media. See *Liesbeth Zegveld and Mussie Ephrem v The Government of Eritrea* and *Article 19 v Eritrea*, cited in n 8 above. See also RFS 'New revelations about Ira-Iro prison camp: The journalist Seyoum Tsehaye is in cell No 10 of block A01,' available at http://www.rsf.org/article.php3?id_article=25251 (accessed 30 January 2008).

69 See 'A Conversation with Petros Solomon' in Dan Connell *Conversations with Eritrean Political Prisoners* (2005b) 84.

70 ***ቲቪ ዘተ*** '***ቃለ-መጠይቕ ምስ ካፕቴን ፍቕረ ወልዳይ*** (*TV Zete* 'Interview with Captain Fikre Welday'), 2003, also available at http://live.delina.org/TVZETE/CaptFikre/part_1.wma. Captain Woldai is a former army officer, who sought asylum in Sweden in 2003. See also '***ቃለ መጠይቕ ምስ ነጋሲ ጸጋይ ተኽለ***' (Interview with Negasi Tsegay Tekle), 2003, also available at available at http://zete.delina.org/zete/NegasiSegayInterview.gif. Mr Tecle is also a former member of the EPLF and a victim of human rights violations who sought asylum in the Netherlands. Other known incidents of arbitrary detention include the arrest of Semere Kesete, President of the Union

In its 2004 report, AI states that the practice of secret administrative or executive sentencing has been perpetrated in different ways in Eritrea since the early years of independence.[71] Bereft of any legitimate grounds, this practice is contrary to established international human rights standards of fair trial, such as article 14 of the ICCPR and article 7 of the ACHPR.[72] According to AI, this practice apparently started with the case of officials of the former Ethiopian government, commonly known as ex-members of the Workers' Party of Ethiopia (WPE) or the *Derg*.[73] The individuals concerned were automatically detained in 1991, when the EPLF liberated Eritrea. Denied of their right to be brought before an open and impartial court, hundreds of individuals have been given secret prison sentences ranging from a few to several years. AI mentions in particular the cases of Isaac Tsegai, former Chief Administrator of Eritrea under the Derg government and Tesfuney Measho, former Deputy Chief Administrator of Eritrea under the same government. Both of them were sentenced to prison terms of ten to fifteen years and served their sentences in official prison sites as if their sentences had been given by a competent court of law.[74] In a related story of injustice, a report by Awate Team indicates that other groups of Eritreans who were armed members of the former Ethiopian government were allegedly summarily detained by the EPLF in the early years of independence. This happened in the area known as Dembelas-Qohain. Since then, there has been no news about them.[75]

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of Asmara University Students and the arbitrary detention of some 2000 university students in 2001, as discussed in section 4.5.2 above. See also Awate Team 'Interview with Semere Kesete,' available at http://www.awate.com/cgi-bin/artman/exec/view.cgi/12/74 (accessed 15 August 2002); Awate Team 'Interview with Mehari Yohannes,' available at http://www.awate.com/portal/content/view/636/11/ (accessed 5 March 2003).

71 AI (n 16 above).

72 See also article 1 of the Eritrean Transitional Criminal Procedure Code (hereinafter 'Criminal Procedure Code'), as amended by Proclamation No 5/1991.

73 *Derg* represents the military government of Menghistu Hailemariam, which ruled Ethiopia and Eritrea between 1974 and 1991.

74 AI (n 16 above). A recent development which materialised in May 2008 reveals that the person who imposed the arbitrary prison terms against former *Derg* officials is the one time chief of national security, Mr Naizgi Kiflu. See HRC-E 'Naizgi Kiflu is returning to Eritrea from London,' available at http://cs.asmarino.com/?itemid=936 (accessed 1 May 2008); RSF (n 66 above). See also Tesfatsion Medhanie *Eritrea and Neighbours in the 'New World Order': Geopolitics, Democracy and Islamic Fundamentalism* (1994) 74-75.

75 Awate Team 'The "executed": No smoking gun, but plenty of circumstantial evidence,' available at http://www.awate.com/cgi-bin/artman/exec/view.cgi/11/1090 (accessed 13 March 2003b). In response to a question about the fate of former armed members of the Ethiopian government, the Eritrean president said that if there is any measure taken against, or any right denied to them, it

4.7 Incidents of death in prison

Many prisoners of conscience are reported dead in Eritrea as a result of neglect and lack of proper medical treatment. Coined by the founder of AI and civil rights lawyer, Peter Benenson, the term 'prisoner of conscience' denotes 'someone imprisoned solely for the peaceful expression of their beliefs,'[76] be it religious, political or any other kind of conviction. There are tens of thousands of such prisoners in Eritrea. In elaborating the definition of prisoner of conscience, AI mentions as one of the most known of such prisoners the Eritrean playwright, poet and journalist, Fessahaye Yohannes (alias Joshua). A long-term prisoner of conscience, Mr Yohannes reportedly died in a secret prison in January 2007 as a result of severe ill-treatment and denial of medical care.[77] In this regard, AI added that:

> Because Eritrea refuses to permit international human rights investigators, Amnesty International is unable to confirm by direct evidence the reports of Joshua's death. Nevertheless, Amnesty believes the reports to be highly credible. Eritrean authorities have failed to either confirm or deny the reports.[78]

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should only be seen in the context of the 'forgiving culture of the EPLF.' He then added that any claim that these individuals have been mistreated by the EPLF is inherently flawed. According to his claim, the individuals have not even received the 'punishment' they deserved for their 'misdeeds.' If it had indeed been the case, he claimed, it is only because they deserved whatever kind of punishment for their 'crimes.' See excerpts of the annual questions and answers session of the president given in 1996, available at the online compilation of video clips at www.asmarino.com.

76 AI 'Prisoners of conscience: Special focus cases,' available at http://www.amnestyusa.org/Prisoners_of_Conscience/Fessahaye_Yohannes/page.do?id=1101236&n1=3&n2=34&n3=53 (accessed 16 October 2007).

77 Ibid.

78 Ibid. See also AI 'Amnesty International labels "highly credible" reported death of Eritrean journalist in secret prison,' available at http://www.amnestyusa.org/document.php?lang=e&id=ENGUSA20070216002 (accessed 16 February 2007). A documentary filmed in honour of Joshua reported that at the time of his death he had already spent 65 months in prison; 'he could hardly walk, he had one hand paralysed, and his fingernails had been ripped out.' See Marginal Media Productions 'Eritrea – "A trip to Earth,"' available at http://asmarino.com/content/view/7/3/ (accessed 13 April 2007). The film was produced by an Australian media company. Compare this with the tragic death of Weletedawit Abraha Medhin (Letedawit of Hagaz), which is one of the earliest cases of death in prison as narrated by Woldeyesus Ammar 'The tragic death of Letedawit of Hagaz,' available at http://www.awate.com/artman/publish/article_3323.shtml (accessed 18 May 2004). Recently, Awate Team also reported the death in prison of Taha Mohammed Nur, one of the founding fathers of the Eritrean revolution. He was arrested in November 2005, together with the famous singer Idris Mohammed Ali, journalists Jimie Kmeil and Adem Selshel, and ten other civil servants and business people. The others remain in detention without trial. According to the report, the family of the deceased 'were summoned by government authorities to collect his body and no explanation was given to them - not even about the circumstances of his death.' In the 1990s, he served as a member of the Referendum and Constitutional Commissions of Eritrea. See Awate

In spite of the shocking revelation by AI and other rights groups, 'the Eritrean government has constantly refused to say where Joshua and others' have been detained and in what conditions. In the words of AI 'the Eritrean government, defying international concerns, has shrugged off all reports of human rights abuses as fabrications.'[79] For example, in July 2005, more than 50 members of the US Congress, led by Congressmen Mark Kirk and Mark Udall, called on the Eritrean President to free Fessahaye Yohannes and other prisoners of conscience in Eritrea but to no avail.[80] Previously, another nine prisoners of conscience were also reported dead in the infamous Ira-Iro Prison, a secret prison site built under the direct supervision of the state president in 2003.[81] It should also be noted that in the hundreds of prison sites scattered all over the country, there are many unreported deaths, killings and executions, the story of which can only be told in full after the demise of the current dictatorship.

According to a report by RSF, there are more than 300 prison sites in Eritrea, most of which are administered by the army.[82] A former member of the Crime Investigation Unit

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Team 'Taha Mohammed Nur, co-founder of ELF, died in prison,' available at http://www.awate.com/portal/content/view/4771/3/ (accessed 16 February 2008).

79 AI (n 78 above).

80 Ibid. For a similar petition signed by several US Congressmen, see http://www.friendsofaster.org/AsterYohannesLetter.pdf; see also the appeal signed by twenty-four national and international civil society organisations which urged all African states to take action on human rights abuses in Eritrea. The appeal, signed on the occasion of International Human Rights Day in 2005, was led by CIVICUS: World Alliance on Citizen Participation and is available at: http://www.civicus.org/csw/JointLetterofAppeal_Eritrea.htm (accessed on 20 June 2007).

81 See **ዓይጋ ፎረም 'ኣብ ኤርትራ ግፍዓዊ ቤት ማእሰርቲ ህግደፍ ብዛዕባ ዝርከቡ ኣባላት** G-15' (Aiga Forum 'A report on the G-15 prisoners at Ira-Iro'), available at http://www.aigaforum.com/Situation-report-on-eritrea.pdf (accessed 17 August 2006). The prisoners of conscience who reportedly died in the Ira-Iro prison are: former Minister of Local Government (who is also the vice-president), Mahmud Amhed Sherifo; former chief of staff of the Eritrean army, General Oqbe Abraha; former Minister of Transport, Saleh Kekya; a senior EPLF freedom fighter, Aster Fehatsion; administrator of the Tserona Sub-region, Tesfagiorgis [last name unknown]; Yousuf Mohammed Said, Editor of the weekly *Meqalih*; Medhanie Haile, the Assistant Editor of the weekly *Keste Debena*; Said Abelqadir, Editor of the weekly *Admas*; and Sahle Tsegazeab, a public prosecutor. See also RSF (n 66 above).

82 See RSF 'Democratic governments urged to summon Eritrean ambassadors on anniversary of 18 September 2001 crackdown,' available at http://www.rsf.org/article.php3?id_article=23674 (accessed 18 September 2007). The most notorious prison cites in Eritrea include: Adi Abeito, Adi Quala, Dahlak Islands, Gelalo, Hadish Measker, Karcheli, Mai Sirwa, Meiter, Nakura, Prima Country, Tracts A to F, Sawa, Shadishay Medeber, Wia, and others. A recent account on the infamous prison, Tract B, indicates that in the underground cells and metal shipping containers at this prison site, some 2000 people are currently detained in harsh conditions. Torture is routinely practised by commanders of the prison. The report also added that in mid September 2007, some

at the Eritrean Police reveals that many arbitrary arrests of civilians are executed under the 'sloppy operations' of the Crime Investigation Unit. Individuals arrested by this unit are not accounted for properly. In some instances, 'there is no record of who the arresting officer is, and what the charges against the arrested are.'[83] In most other cases, orders are given by phone calls and with no written record, where senior officials tell prison guards to detain persons under tight security. Orders are simply implemented without question. If an arresting officer in a given place is transferred to another place, the detainees in the charge of such arresting officer are often forgotten.[84] Agents of the Crime Investigation Unit use different types of tinted-glass cars, ranging from land cruisers to sedans, with different number plates: civil, governmental, rental or commercial. If by some chance released, prisoners are warned never to talk about what they have seen or heard. Prison guards are also warned in the same manner. This has spread a great deal of fear and suspicion throughout society, with many people spying on each other. Mr Yohannes also reported that there are many detention centres all over the country and every military unit has its own prison facilities.[85]

4.8 Religious persecution[86]

Christianity and Islam were first introduced to Africa during the time of the Axumite Kingdom. As a major part of the nucleus of the Axumite Kingdom, Eritrea has been

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13 university students escaped from the same site. Tracts A to F are located in the western outskirts of Asmara, the capital of Eritrea. See ዜና ደሊና '13 እሱራት ካብ ትራክ-ቢ ኣምሊጦም,' 8 ሕዳር 2007 (Zena Delina 'Thirteen prisoners escape from Tract B'). In relation to this, RSF recently revealed that Tura Kubaba, a journalist with the Kunama-language service of the state-owned radio, *Dimtsi Hafash*, was jailed in Tract B since 2006. See RSF 'Journalist employed by state-owned radio *Dimtsi Hafash* held since 2006,' available at http://www.rsf.org/article.php3?id_article=26695 (accessed 24 April 2008).

83 Awate Team Interview with Mehari Yohannes (n 88 above). In one example, Mr Yohannes mentions the case of an employee of the American Embassy in Asmara, who was allegedly arrested for arguing with the bodyguards of the state president. This person remained in detention for about two years but the arresting officers had no exact idea as to why he was arrested.

84 See also RSF 'Democratic Governments urged to summon Eritrean ambassadors on anniversary of 18 September 2001 crackdown,' available at http://www.rsf.org/article.php3?id_article=23674 (accessed 18 September 2007).

85 Awate Team Interview with Mehari Yohannes (n 70 above).

86 For an authoritative account on religious persecution in Eritrea, see the audio-visual testimony of gospel singer Helen Berhane who has been tortured, refused visits by her family, locked in a shipping container for about two years, and who has suffered paralysis as a result of this. See Release Eritrea 'The testimony of Helen Berhane,' available at http://cs.asmarino.com/index.php?blogid=15&archive=2007-12 (accessed 8 December 2007).

widely recognised as a symbol of religious tolerance for several centuries. Currently, however, Eritrea is perhaps the worst place in the world when it comes to religious freedom. Tanya Datta of the *BBC News*[87] has compiled one of the most authoritative accounts on religious persecution in Eritrea. Among the several victims of religious persecution interviewed, she quotes Paulos, who said that he was tied up[88] for 136 hours by security agents, in an attempt to force him to recant his faith. As is done with all other victims of religious persecution, Paulos was asked to sign a document in which he was required to recant his belief and agree to not participate in church activities or express his faith in any form. Several other sources report similar cases of religious persecution which include appalling stories, including those of murder.[89]

This kind of persecution has affected thousands of Eritreans since 2002, when the Eritrean government officially banned all religious groups in the country except the following: Islam, of the Sunni rite; the Eritrean Orthodox Tewahdo Church, part of the worldwide Coptic Orthodox Church of the eastern rite; the Eritrean Catholic Church, part of the worldwide Roman Catholic movement; and the Eritrean Evangelical Church, part of the Lutheran World Federation.[90] According to the 2002 executive decree, several

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87 *BBC World Service, Assignment Programme*, broadcast of 27 September 2007, 0800 GMT, 1100 GMT and 1900 GMT. See also *BBC News* 'Eritrean Christians tell of torture,' 27 September 2007.

88 The interviewee was referring to the type of torture called 'helicopter.' For a definition of this type of torture, see n 110 below. According to a report by *Reuters* (n 38 above) there are close to 16 000 Eritrean refugees in this particular camp. Conditions in the camp are deplorable. A 22-year old female resident, Miraf Gebremikael, says: 'Life is harsh for women. Most are dependant on men, and because they have nothing they exchange sex for shelter.' Another 23-year-old university graduate said: 'People are running because they're afraid they'll be conscripted.' 'One ex-soldier says he has heard that his family back in Eritrea were fined 50 000-00 Nakfa (about US$3300-00) because he fled. Others around him say the same fate befell their relatives.' One refugee said: 'My mother, father and sister were jailed because they couldn't afford.' See *Reuters* (n 38 above).

89 Various sources indicated that Magos S Semere, Amanuel Andegergesh, Kibrom Firemichel and Nigisti Haile were tortured to death in different times and places either for worshipping in a 'banned' church, holding a religious service in a private home or refusing to recant their beliefs. See *Compass Direct News* 'Eritrea: Christian woman tortured to death,' 7 September 2007; AI 'Eritrea: On 6th anniversary of mass detentions of dissidents, human rights violations continue unabated,' AI Index: AFR 64/009/2007 (Public), News Service No 178, 17 September 2007.

90 AI *Eritrea: Religious Persecution* (AI Index: AFR 64/013/2005, 7 December 2005). See also generally UK Home Office (n 14 above); US Department of State International Religious Freedom Report (n 14 above). Statistically, Islam and Orthodox Church have 90% of the total number of adherents in Eritrea. The Eritrean population is virtually evenly divided between Islam and Christianity. About 5% of the total population belong to the Eritrean Catholic Church. Of the rest of the population, 2% to 3% are adherents of indigenous beliefs. The remaining 2% belong to other religious denominations, which include Jehovah's Witnesses, the Bahai's faith, and 'born

religious institutions, including those which have been operating in the country for many years, have been arbitrarily ordered to close. In a recent interview with the *Los Angeles Times*, the Eritrean president tried to justify this policy by saying:

> There is no restriction on religion. What's new about the Bible that you want to teach me? What is new about the Koran? I say there is nothing new. Extremists who want to use [religion] as a political end for their ambitions should be asked that simple question. What do you want to do with this ideology? I say it's a pretence of using religion for ulterior aims. Religion is by default restricted because you have nothing new to teach me. You do not have the right to impose your beliefs on another person. That creates discord and confusion in the society. Government is there to guarantee everyone is respected. I don't believe that's a restriction.'[91]

Contrary to the above claim, thousands of Eritreans have been jailed in the past few years simply because they belonged to religious groups which are not officially sanctioned by the government. According to a 2005 report of AI, 'at least 26 pastors and priests, and over 1750 church members, including children and 175 women, and some dozens of Muslims, are detained because of their religious beliefs.' AI considers them prisoners of conscience.[92] In the same report, AI documents 45 incidents of religious persecution that took place between 2003 and 2005, affecting thousands of individuals.[93] In August 2005, in an unprecedented violation in the history of the Eritrean Orthodox Tewahdo Church and in contravention of canonical laws, the government dismissed the highest spiritual leader of the church, Patriarch Abune Antonios. A new patriarch was arbitrarily appointed in his place on 27 May 2007.[94]

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again' charismatic churches such as Seventh Day Adventist, Faith Mission, Kale Hiwet (Word of Life), Mulue Wengel (Full Gospel), Rhema Church and others. These churches or religious institutions, which all in all constitute 36 in number, have been officially banned since 2002 by an executive decree.

91 *Los Angeles Times* 'Questions and answers with President Isaias Afwerki,' 2 October 2007.

92 AI (n 90 above). According to AI, a prisoner of conscience is a person imprisoned on account of his/her belief, be it political, religious of other. See AI (n 76 above).

93 AI (n 90 above). RSF also indicates that since May 2002, the government has banned thirty-six churches and religious groups, closing their centres of worship and imprisoning their priests, pastors and lay members. The main reason for the religious crackdown is that some religious institutions are allegedly suspected of encouraging 'insurrection' and 'supporting networks of deserters.' RSF (n 67 above).

94 Online Petition: Restore Patriarch Antonios to his throne,' available at http://www.abuneantonios.com/index.php (accessed 16 October 2007); see also the report by BBC's Africa Analyst, Martin Plaut: *BBC News* 'Christians protest over Eritrea,' 28 June 2007. Patriarch Antonios was dismissed after he protested the arrest of prominent Eritrean Orthodox Tewahdo Church leaders and opposed government interference in church affairs. Since his dismissal, the patriarch has been kept under house arrest, where he is denied medication and treatment for his severe diabetes.

As correctly mentioned by AI, the history of religious persecution can be traced back to the Marxist-Leninist background of the PFDJ.[95] However, the oldest and most known post-independence incidence of religious persecution dates back to 1993, when a small number of Jehovah's Witnesses refused to vote in the Eritrea referendum for national independence on purely religious grounds. This group had also refused to participate in the NMSP on the same grounds. The 'punishment' for this, ordered directly by the state president himself, was harsh. On 25 October 1994, in an executive order given to the then Minister of Internal Affairs, the state president imposed the following arbitrary punishment against all Jehovah's Witnesses:

> Those Eritreans, who claim to be 'Jehovah's Witnesses,' by refusing to vote on the national referendum for independence, unilaterally abrogated their right to citizenship. They have repeated this abrogation and defiance by refusing to participate in the national military service programme. For this reason:
>
> (1) They are prohibited to work in any government institution; if they are already working, they must be dismissed.
> (2) No commercial license should be given to them; if they already have, it must be revoked.
> (3) They should never be given any documentation such as travel and identity papers. The Ministry of Internal Affairs must take the necessary measures to give effect to these orders.[96]

The executive order is not only morally abhorrent but also legally repugnant. As far the refusal to vote in the national referendum is concerned, there is no clearly defined

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95 The Marxist-Leninist tendency of the EPLF/PFDJ is derived, among other things, from the formal one year training given to the state president and other senior leaders by Chinese Communist Party leaders in the 1960s. See *People's Daily Online* 'Eritrean President revisits his military alma mater in east China,' available at http://english.people.com.cn/200502/23/eng20050223_174334.html (accessed 23 February 2005). Compare this with the words of a certain military commander, who was quoted by an anonymous victim of religious persecution to have said the following: 'Like in North Korea, this type of religion should never be allowed to spread in our country because this is a religion of the CIA and accordingly no one should be allowed to read and preach the Bible.' This story underscores the fact that religious persecution is perpetrated as a premeditated government policy. The victim who narrated this story was detained in a certain prison camp around Keren. In a very small room, he said, 45 people were detained for several months. The place was full of lice and mice. No adequate food was provided to the detainees and there was no medical treatment whatsoever. See ኤሪ ወንጌል.ኮም 'ታሪኽ ወዲ ኣስመራ ብቓላቱ' (EriWengel.com 'The story of Wedi Asmara in his words'), available at http://www.eriwongel.com/content/view/90/107/lang,en/ (accessed 22 October 2007).

96 Letter from the State President to the Minister of Internal Affairs, dated 24 October 1994, reproduced in ዲሞክራሲያዊት ኤርትራ፡ ቁ. 18 ሚያዝያ--ጉንበት 1996፡ ገጽ 10 (*Dimokrasyawit Eritrea*, April/May 1996, 10). The letter (presidential decree) was also copied to all government ministries. The position was restated by the Minister of Internal Affairs in March 1995, when he issued a public statement which partially read as follows: 'The Jehovah's Witnesses lost their right to citizenship because they refused to accept the Government of Eritrea and its laws.'

applicable Eritrean law upon which the refusal of Jehovah's Witnesses can be based. However, the law which introduced the NMSP has set clearly defined punitive provisions for those who refuse to comply with the requirements of the NMSP. The punishment provided by the law is two years imprisonment or a fine of 3000 Birr (now Nakfa), or both[97] without prejudice to graver penalties provided by the Transitional Penal Code of Eritrea.[98] None of the punitive prescriptions in the executive order are based on law. As a result of such erosion of the rule of law, Jehovah's Witnesses have become the most abused religious minority in the history of the nation.[99]

A very important point in the case of the Jehovah's Witnesses is that they did not reject non-military service alternatives. According to AI,[100] the NMSP requirement does not recognise international standards and best practices on the right to conscientious objection to military service, especially those based on one's religious, moral or ethical conviction. The law also does not offer alternatives for those who refuse to do military training on the basis of their beliefs. This, by itself, is a flagrant violation of international standards and best practices.[101] In relation to religious persecution, the fate of some 150 Muslim teachers, arrested in Keren on 5 December 1994 and reportedly extra-judicially

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97 See also articles 20 and 37 of Proclamation No 11/1991 and 82/1995, respectively.

98 'Offences by members of the armed forces, including conscripts who are also under military jurisdiction, are subject in theory to military law. Penalties for a range of military offences are set out in the Transitional Penal Code. These include up to five years imprisonment for desertion, except 'in time of emergency, general mobilisation or war,' where the penalty may be death 'in the gravest cases' (article 300). The death penalty is also applicable to mutiny 'in time of emergency, general mobilisation or war' (article 312). The offences in similar circumstances of 'demoralisation of troops' (article 324), cowardice in the face of the enemy (article 325), and capitulation by a commanding officer (article 326) are punishable by prison terms or, in exceptional circumstances, by death.' See *ACHPR-EMDRH Communication* para 33.

99 AI (n 90 above). Apart from arbitrary detention, some 250 families have fled the country and sought asylum elsewhere, 100 families have been dismissed from government employment, and at least 36 families have been evicted from their homes.

100 Ibid.

101 See, for example, US Department of Defence Directive 1300.6, Conscientious Objectors (August 20, 1971). The Directive defines a conscientious objector as a person who has 'a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief.' Those who object to war 'solely upon considerations of policy, pragmatism, expediency, or political views,' are not recognised by the definition. See also the relevant documentation by the Eritrean Anti-Militarism Initiative and the War Resisters' International 'Eritrea: Conscientious objection and desertion,' available at http://www.wri-irg.org/news/2005/eritrea-en.htm#Heading67. On the applicability of human rights standards for members of the army, see generally *Koster v the Netherlands* [1991] ECHR 53; *Carballal v Uruguay* (R.8/33), ICCPR, UN Doc A/36/40, 27 March 1981, 125.

executed in May 1997, comes as a shocking revelation.[102] There are some similarities between this incident and the Dirfo Massacre as discussed in section 4.12.3 below. In another incident of religious persecution, AI reports that a dozen Muslim students belonging to a new Islamic religious tendency (Wahabis) were arrested in Asmara in September 2004 and their whereabouts is still unknown.[103]

4.9 Torture

As correctly stated by Mujuzi, torture is one of the most common occurrences in some African countries, such as Eritrea, Sudan and Zimbabwe. Yet stories in this regard rarely make the headlines of international media.[104] Du Plessis and Coutsoudis assert that torture can be committed in one of two ways: either as a self-standing prohibited act of international law or as a prohibited act within the ambit of a widespread or systematic attack.[105] Torture as a self-standing international crime is defined by article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Eritrea is not a party to the CAT. However, in *Kunarac and others*, the ICTY held that torture even if committed as a single act constitutes an international crime when committed by a state official or an official of a *de facto* state-like organ.[106] Furthermore, in *Delalic and others*,[107] in *Furundzija*[108] and in *Kunarac and others*[109] the ICTY restated

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102 AI (n 90 above).

103 Ibid.

104 Jamil Mujuzi 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' 6(2) (2006) *African Human Rights Law Journal* 424.

105 Du Plessis and Coutsoudis (n 3 above) 342.

106 *Kunarac and others,* ITCY Trial Chamber, judgment of 2 February 2001, para 488-497.

107 *Delalic and others* ('*Celebici* case'), ICTY Trial Chamber, judgment of 16 November 1998, paras 455-474.

108 *Furundzija*, ICTY Trial Chamber II, judgment of 10 December 1998, para 257.

that the elements set out in the definition of torture are now generally considered to be customary in nature. They are thus binding on all states of the world as customary international law. Apart from murder, arbitrary detention, enforced disappearance and persecution, torture is one of the most shocking and typical of international crimes in Eritrea. AI recognises five major types of torturous punishments which are routinely practiced by the Eritrean security and military apparatus: 'helicopter,' 'otto,' 'Jesus Christ,' 'ferro' and 'torch.' These are defined as follows:[110]

> 'The helicopter': the victim is tied with a rope by hands and feet behind the back, lying on the ground face down, outside in the hot sun, rain or freezing cold nights, stripped of upper garments. This is a punishment allocated for a particular number of days, the maximum reported being 55 days in the Dahlak Kebir island prison, but it is more often one or two weeks. The prisoner is tied in this position 24 hours a day, except for two or three short breaks for meals and toilet functions.
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> 'Otto' (Italian for 'eight'): the victim is tied with hands behind the back and left face down on the ground, but without the legs tied.
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> 'Jesus Christ': the victim is stripped to the waist, wrists tied, and standing on a block with hands tied to a tree branch; the block is removed, leaving the victim suspended with the feet just off the ground in a crucifix-like posture. Beatings are inflicted on the bare back. This is said to be an extremely severe torture, restricted to only 10-15 minutes to avoid serious lasting injury. This method was first reported from Adi Abeito prison in 2003.
>
> 'Ferro' (Italian for 'iron'): the wrists are bound behind the back with metal handcuffs while the victim lies on the ground face down and is beaten with sticks or whipped with an electric wire on the back and buttocks.
>
> 'Torch' or 'Number eight': inside a special torture room, the victim is tied up by wrists behind the back and with the feet bound; a stick is placed under the knees and supported on a framework on both sides horizontally, and the body is turned upside down with the feet exposed. The soles of the feet are beaten with sticks or whipped. (This was a common punishment in Ethiopia and pre-independence Eritrea under the *Derg*).

The above and other methods of torture are inflicted mostly on members of the NMSP who are accused of 'defeatism,' 'cowardice,' and other legally unrecognised 'crimes.' The victims of these types of torture are estimated in their thousands. A most glaring example in this regard is the testimonial given by Habtom Tecleab, a survivor of torture, who escaped prison in 2004. In a documentary filmed by Human Rights Concern -

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109 Paras 483-497.

110 AI (n 16 above).

Eritrea (HRC-E), an Eritrean human rights advocacy group in exile, the victim narrates in detail the torturous punishment inflicted on him and others in the Dahlak Islands.[111]

A characteristic feature in the Eritrean history of human rights violations is that the Eritrean government has persistently denied visitation requests from different rights groups and regional bodies on human rights protection. Thus far, requests made by AI,[112] Article 19,[113] a London-based advocacy group on freedom of expression, and ACHPRs' Special Rapporteur on Prison Conditions[114] have all been denied by the Eritrean government. No other human rights organisation, from the UN, AU or otherwise, has visited or supervised the situation of human rights violations in the country.

4.10 Enforced disappearance

Enforced disappearance is one of the major categories of international crimes perpetrated in Eritrea since 1991. AI[115] characterises enforced disappearance, an act condemned by article 7(1)(i) of the ICC Statute, as a major form of repression of the Eritrean government's secretive political culture. In cases of enforced disappearance, nothing is acknowledged or admitted by the authorities about the fate, conditions and treatment of individuals abducted or arrested on political grounds. Eritrean security forces are known for their extremely secretive and excessively brutal methods of arrest and abduction. As a matter of routine state 'practice,' arrests are not officially acknowledged by government authorities, and prisoners are normally kept at secret detention sites. As a result, many have effectively 'disappeared' into custody once arrested or abducted.

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111 HRC-E (n 31 above). Compare this with the story narrated to this author by Dr Yosief Fessehaye (n 31 above).

112 AI *Arbitrary Detention of Government Critics and Journalists* (AI Index: AFR 64/008/2002, 18 September 2002).

113 See *Article 19 v Eritrea*, para 56.

114 Frans Viljoen 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' 27 (2005) *Human Rights Quarterly* 125 and 145; Simon M Weldehaimanot 'PIA government again found guilty by the ACHPR,' available at http://www.awate.com/portal/content/view/4641/5/ (accessed 10 October 2007).

115 AI (n 16 above). According to this report, 'disappearance' represents a situation where the authorities deny and conceal the detention. In contrast, secret incommunicado detention represents a situation where the authorities do not deny the detention but keep the prisoner isolated. See also AI (n 112 above).

AI notes that the whereabouts of victims of enforced disappearance are discovered occasionally through friendly guards or bribery. The practice of enforced disappearance of persons is continuing in Eritrea with impunity, contrary to established international standards that explicitly ban the practice. The earliest incidents of enforced disappearance or abduction involve two members of the Executive Committee of the ELF-RC, who were kidnapped by the EPLF from Kassala, a border town in Eastern Sudan, on 26 April 1992, and the assassination of two senior leaders of the Eritrean Democratic Movement (EDM) in Dessie, Ethiopia. The source that reported on these incidents, perhaps one of the earliest detailed reports on human rights violations in Eritrea, also lists the names of 57 victims of extra-judicial execution, arbitrary detention, enforced disappearance, torture and other forms of abuses, including violations perpetrated in third countries.[116]

4.11 'Drumhead' court-martials[117]

The Eritrean government is also known for its sham legal proceedings that deny due process or go through the motions of manipulated procedure that do not allow rights of defence and appeal. The best example in this regard is the Special Court[118] of Eritrea, which tries suspects in closed proceedings without the right to bail, defence counsel or appeal. Established with a purported objective to fight corruption, theft and embezzlement of public funds, this court has become one of the most lethal weapons against real or perceived opponents of the state president and his supporters. The law

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116 See Press Release by the International Relations Office of the ELF-RC issued on 10 March 1997, available at http://www.fas.org/irp/world/para/docs/humanr~2.htm. A prominent case mentioned in the press release is the assassination of Tesfamichael Giorgio, who was reportedly killed in April 1992 in Addis Ababa, Ethiopia, by EPLF agents. He knew too much about an alleged secret meeting of President Isaias Afwerki (then freedom fighter) and some CIA operatives in Asmara in the 1970s. The report also includes the account of some 47 individuals who were rounded up from four villages in the Gash district, and the predicament of over 160 employees of the PFDJ-owned Red Sea Corporation who were summarily arrested, allegedly on account of corruption. With regard to former members of the ELF-RC, the report says, 'From over 3205 … who were arrested and detained in the notorious Adi Quala Prison, an unspecified number have disappeared … extrajudicial measures is [sic] believed to have been taken against them.'

117 Compare this with the discussion in section 4.6.2 above and Chapter 5 section 5.12, especially the discussion on the grave violations perpetrated by the former chief of national security.

118 This court was established by Proclamation No 85/1996 (Proclamation to Provide for the Establishment of a Special Court to Adjudicate on Crimes of Corruption, Theft and Embezzlement).

establishing the Special Court of Eritrea has specifically abrogated the right to appeal.[119] However, no provision of this law has explicitly ignored the rights to defence counsel and bail. In practice,[120] however, anyone suspected of a crime subject to the jurisdiction of the Special Court may spend several months or years in detention until such time as her/his case is finally heard by the Special Court. Contrary to well established principles of criminal law, the Special Court has the power to re-open and adjudicate cases that have already been processed through the regular criminal justice system. The judges, who are personally appointed by the state president, are senior military officers with no formal legal training. Regardless of its purported motive, the law and practice of the Special Court has become one of the best examples of the repression of the Eritrean government. Moreover, the five most powerful army generals,[121] who have effectively superseded civilian governors since 2001, administer their own court-martials and prison sites in their respective administrative military zones.[122]

4.12 Violations of international humanitarian law

International humanitarian law is the *lex specialis* branch of international law. It regulates the use of violence in armed conflicts.[123] It only applies in situations of international and domestic armed conflicts.[124] Eritrea has been a land of armed conflict for several years. In spite of a popular expectation for peace and prosperity after the country's independence in 1991, the recurrence of armed conflicts has continued on an alarming scale. As a result, war crimes, the crime of aggression and other violations of international

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119 See article 5(1) of Proclamation No 85/1996. The article reads: '**ፍርዲ ወይ ውሳነ ፍሉይ ቤት ፍርዲ ብብዝሒ ድምጺ ዝወሃብ ኮይኑ፡ ናይ መወዳእታ፡ ይግባይ ዘይብሃለሉን ብኡ ንብኡ ተፈጻምን ይኸውን።**' The English equivalent is: 'The decision or judgment of this court shall be rendered by a majority vote. The decision or judgement is final, immediately implementable and non-appealable.'

120 Such practice was introduced by executive circulars, which were dispatched to all police and prison stations around the country arbitrarily.

121 The discussion on the role of the army generals and other senior officials will be revisited in Chapter 5. See also Awate Team, 'The accused: Isaias and his clique,' available at http://www.awate.com/portal/content/view/4599/9/ (accessed 15 September 2007c).

122 Events Monitor 'PFDJ's reign of terror (II) - Subjugation of the Eritrean Police,' available at http://www.awate.com/portal/content/view/4037/14/ (accessed 18 September 2005); Awate Team 2007c (n 121 above).

123 *Report of the Darfur Commission* para 143.

124 Marco Sassoli and Antonie A Bouvier *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (1999) 67-68.

humanitarian law, which entail individual criminal responsibility, have also been perpetrated by Eritrean government officials in different times and contexts. The armed conflicts of the post-independence era are a result of repressive domestic governance and a belligerent foreign policy of the government.[125] Geographically, Eritrea belongs to the Horn of Africa region, 'a rough neighbourhood,' which has been ravaged by at least one conflict since 1990 in each of the forms of inter-state conventional wars, guerrilla-style liberation struggle, coups or revolutions.[126] The Eritrean government is one of the major actors destabilising the whole Horn of Africa region. It has been actively involved in all such conflicts, either directly or indirectly, and this has serious legal implications under international humanitarian law.

4.12.1 The Eritrea-Yemen border conflict

One of the earliest examples of the Eritrean government's belligerent foreign policy was manifested in December 1995, when Eritrea and Yemen clashed militarily. The conflict was ignited as a result of controversy over the ownership of a group of islands in the Red Sea, the best known being Greater Hanish and Zukur Islands.[127] The actual war took place from 15 to 17 December 1995. Twelve soldiers were killed on the Eritrean side.[128] Eritrea captured 196 Yemeni soldiers and 17 civilians, who were all peacefully repatriated to their country after a few days.[129] After the initial clashes of December 1995, both parties agreed to resolve the dispute amicably by entering into the Agreement on Principles (on 21 May 1996) and the Arbitration Agreement (on 3 October 1996.) The matter was finally resolved by an Arbitral Tribunal, established in terms of the peace

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125 On the ill-defined foreign policy of the Eritrean government, see generally 'Conversation with Haile "Drue" Woldense' and 'Conversation with Petros Solomon' in Connell 2005b (n 69 above) 103-124 and 125-135, respectively.

126 James Swan 'US policy in the Horn of Africa,' paper delivered at the 4th International Conference on Ethiopian Development Studies, Western Michigan University, Kalamazoo, 4 August 2007. Mr Swan is the Deputy Assistant Secretary for African Affairs at the US Department of State.

127 Barbara Kwiatkowska 'The Eritrea/Yemen arbitration: Landmark progress in the acquisition of territorial sovereignty and equitable maritime boundary delimitation' 32 (2001) *Ocean Development and International Law* 3.

128 Saleh AA Younis 'The lessons of Yemen,' available at http://www.awate.com/artman/publish/article_3842.shtml (accessed 14 December 2004).

129 *Middle East International* 'Clash over islands,' 5 January 1996: 'During the fighting a passing Russian merchant ship was hit and damaged in mistake for a Yemeni naval vessel.'

accord. Friendly relations were restored with the ratification of the Treaty Establishing the Joint Eritrea-Yemen Committee for Bilateral Cooperation, on 16 October 1998.[130]

Compared to the death of 19 000[131] Eritrean soldiers in the 1998-2000 border conflict with Ethiopia, the casualties sustained by Eritrea in the Eritrea-Yemen conflict may appear negligible. However, the incident exposed the incompetence of the Eritrean government in handling international conflicts wisely.[132] This is true especially when seen in terms of the shadow cast by the conflict over one of the world's busiest shipping lanes and the short-lived war of words it instigated between the Arab League and the then Organisation of African Unity.[133] Eritrea's position during the initial stage of the conflict

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130 Kwiatkowska (n 127 above) 5-6. Yemen has already taken over all islands, which were under Eritrea's control since the conflict.

131 This is according to conservative official accounts. Unconfirmed sources indicate that the number of Eritreans killed in the 1998-2000 conflict exceeds 40 000.

132 Quoting the *Saudi Gazzette*, a prominent Eritrean writer has described the conflict as the 'odd war.' See Younis (n 128 above). Another writer has also indicated that the conflict escalated into a war due to mishandling on the part of the Eritrean government. Jeffrey A Lefebvre 'Red Sea security and the geopolitical-economy of the Hanish Islands dispute' 52(3) (1998) *Middle East Journal* 373, as quoted in Younis (n 128 above). See also Abdulla Mohammed Al-Saidi 'Comparative study between Yemeni-Eritrean ways of documentation in the arbitration over Red Sea South Islands,' *Yemen Times*, 2 January 2000. Recently, Djibouti accused Eritrea of incursions into its territory, for the second time since 1996; and urged the UN Security Council to intervene in the matter because contacts with Eritrea at the highest level have failed to elicit any credible response. Djibouti describes this as a misguided intimidation and ... naked provocation against its sovereignty and territorial integrity.' See *AFP* 'Djibouti seeks UN help to avert conflict with Eritrea,' 6 May 2008. The concerns of Djibouti resonate with a latest comment of the Yemeni Ambassador in Ethiopia, who said, in reference to Eritrea's belligerent attitude: 'We know that Eritrea has been behaving irresponsibly in the region. In 1995, everybody remembers the aggression that it took against Yemen. Eritrean government has a very bad history since Eritrea's independence.' See *WIC* 'The Eritrean government has a very bad history: Ambassador Gazem Ak Alaghbari, 2 May 2008. The Eritrea President has dismissed the claim by Djibouti as 'fabrication.' See *Reuters* 'Eritrea denies Djibouti border accusation,' 13 May 2008; For an insightful media commentary, see *International Herald Tribune* 'In Horn of Africa, Djibouti and Eritrea in face-off over border,' 25 May 2008. Apart from the Horn of Africa, Eritrean government officials were also involved in the Great Lakes conflicts, shortly before the breakout of the Eritrea-Ethiopia border conflict in 1998.

133 *Middle East International* (n 129 above). However, unlike the 1998-2000 Eritrea-Ethiopia border conflict, in the Eritrea-Yemen conflict, the issue of violations of international humanitarian law was not even raised by the Arbitral Tribunal. Established pursuant to the Arbitration Agreement of 3 October 1996, the Arbitral Tribunal was mandated only to decide on questions related to territorial sovereignty over the disputed islands and the delimitation of the maritime boundaries between the two countries. See article 2 of the Arbitration Agreement between the Government of the Republic of Yemen and the Government of the State of Eritrea. See also Eritrea-Yemen Arbitral Tribunal, *Territorial Sovereignty and the Scope of the Dispute Award*, award of 9 October 1998; Eritrea-Yemen Arbitral Tribunal, *Maritime Delimitation Award*, award of 17 December 1999. The Arbitral Tribunal was composed of Judges Sir Robert Jennings (President); Stephen M Schwebel and Rosalyn Higgins, appointed by Eritrea; Ahmed S El-Kosheri and the late Keith

was also described by the international media as one of aggressive overreaction, especially as 'the Eritrean attack took Yemen by surprise' in that it materialised after 'President Isaias Afwerki had sent a conciliatory note to his Yemeni counterpart, Ali Abdullah Salih, only a few hours earlier.'[134] The fact that Eritrea was able to capture 196 Yemeni soldiers and 17 civilians in a very short period of time also indicates the unforeseen nature of the attack. The same report asserted that on the Yemeni side there was a reasonable concern that Eritrean leaders, as adventurous guerrilla warfare leaders, were still inexperienced in governance and diplomacy. Yemeni officials were said to have been concerned by the 'rebel mind-set' apparent in Eritrean government officials during the conflict.[135] This assessment seems correct, especially as weighed against the unpredictability of the Eritrean President discussed by the then Eritrean Minister of Foreign Affairs, Mr Petros Solomon.[136]

The Arbitral Tribunal has not decided on the issue of violations of international humanitarian law. However, the fact that 'critical island groups'[137] were unanimously awarded to Yemen raises fundamental questions as to whether Eritrea had to go to war in the first place. Accordingly, a determination needs to be made on whether Eritrean government officials should bear any criminal responsibility for the loss of lives and destruction to property Eritrea sustained during the conflict. In this regard, instructive lessons are to be drawn from the judgements of the Eritrea-Ethiopia Claims Commission. The legal issues on violations of international humanitarian law involved in the Eritrea-Yemen conflict are to some extent similar to those which arise from the 1998-2000 border conflict with Ethiopia, as will be discussed in the next section.

Highet, appointed by Yemen. The International Bureau of the Permanent Court of Arbitration at The Hague served as the registry for the Arbitral Tribunal. The awards of the Arbitral Tribunal are obtainable from www.pca-cpa.org.

134 *Middle East International* (n 129 above).

135 Ibid.

136 'Conversation with Petros Solomon' in Connell 2005b (n 69 above) 128.

137 See W Michael Reisman 'Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)' 94 (2000) *American Journal of International Law* 722. Professor Reisman was later to be appointed as a judge to the Eritrea-Ethiopia Arbitral Tribunal. See also *Territorial Sovereignty and the Scope of the Dispute Award,* para 527(iv), in which the Eritrea-Yemen Arbitral Tribunal decided that the most symbolic islands of the conflict are subject to the territorial sovereignty of Yemen. These islands include, mainly but not only, 'the islands, islets, rocks, and low-tide elevations of the Zuqar-Hanish Group.' These islands were the flashpoint of the conflict.

4.12.2 The Eritrea-Ethiopia border conflict

Of all the post-independence wars Eritrea had with its neighbours, the 1998-2000 border conflict with Ethiopia was the most disastrous. It involves multidimensional issues. The brevity of this section does not allow a detailed investigation of all politico-legal issues stemming from this conflict. Therefore, the focus will be limited to those aspects of the conflict regarded as most relevant for the determination of violations of international humanitarian law by Eritrean government officials.[138]

The flashpoint of the conflict was a border village called Badme, over which both countries claimed ownership and went to full scale war in May 1998. After two years, the countries signed a peace accord, known as the Algiers Peace Agreement, in which they agreed to submit their disputes to two independent bodies, working separately from each other. The first one was the Eritrea-Ethiopia Boundary Commission (the Boundary Commission), whose mandate was 'to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law.'[139] The second was the Eritrea-Ethiopia Claims Commission (the Claims Commission), whose mandate was to decide through binding arbitration on all claims for loss, damage or injury that were related to the conflict and were the result of violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.[140] This was the most important component and the major factor distinguishing it from the Arbitral Tribunal in the Eritrea-Yemen conflict.

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138 A discussion on the international responsibility of Ethiopia and Ethiopian government officials shall, for obvious reasons, form the material for another research work.

139 Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, signed on 12 December 2000 in Algiers (Algiers Peace Agreement), article 4(2). The Boundary Commission was composed of Prince Bola Ajibola and Sir Arthur Watts, appointed by Ethiopia; Professor W Michael Reisman and Judge Stephen M Schwebel, appointed by Eritrea; Sir Elihu Lauterpacht, presiding. The Algiers Peace Agreement and the award of the Boundary Commission are obtainable from www.pca-cpa.org.

140 Article 5(1) of the Algiers Agreement. The Claims Commission is composed of Mr John Crook and Ms Lucy Reed, appointed by Eritrea; Judge George Aldrich and Dean James Paul, appointed by Ethiopia; Professor Hans van Houtte, presiding. The awards of the Claims Commission are obtainable from www.pca-cpa.org.

As regards the issue of ownership over Badme, the Boundary Commission, in its decision of 12 April 2002, decided that the town belongs to Eritrea.[141] Contrary to its declared commitment to honour the decision of the Boundary Commission, Ethiopia stipulated a set of preconditions before it would hand over Badme to Eritrea. In a strictly legal sense, the refusal of the Ethiopian government to implement the decision of the Boundary Commission and accordingly hand over Badme to Eritrea violates the obligations of Ethiopia emanating from the Algiers Peace Agreement and customary international law. However, merged with this issue comes the complicated background of the conflict, which is outside of the ambits of this study. The repercussions of this matter have proved more costly to Eritrea than to Ethiopia.[142] The failure of the peace process is not to be blamed entirely on the Ethiopian government, however. To a great extent, the Eritrean government's diplomatic and political ineptness has detrimentally prolonged the process. The failure of the peace process and the ensuing political stalemate between the two governments has now destabilised the entire Horn of Africa.[143]

Important to the debate on violations of international humanitarian law are the seven partial and two final awards of the Claims Commission delivered on 9 December 2005. According to Weeramantry, the arbitral awards of the Claims Commission have 'produced a significant body of case law on the subject of international armed

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141 Boundary Commission, *Decision on the Delimitation of the Border between Eritrea and Ethiopia, Chapter 8*, Dispostif.

142 Sadly, Ethiopia's intransigence has been used by the Eritrean government as a major pretext to rule Eritrea for about 10 years in a situation of undeclared state of emergency. Although the Boundary Commission and the Claims Commission have resolved on several fundamental issues, a multitude of other intricate issues remain unresolved between the two governments. These issues can only be resolved by a genuine political commitment (including political dialogue) from both governments, which is currently lacking, at least on the Eritrean side. Several sources have reported repeatedly on the danger of a renewed war between the two countries. As far as Eritrea is concerned, much of the blame is to be apportioned to the diplomatic and political ineptness of Eritrean government officials. For comparable views, see Sally Healy and Martin Plaut 'Ethiopia and Eritrea: Allergic to persuasion,' Chatham House, Briefing Paper, January 2007, AFP BP 07/01, 8. In emphasising the futility of the border conflict, *Newsweek* wrote: 'If there were an award for the most pointless war of the last 25 years, Ethiopia and Eritrea's 1998-2000 border battle might well take the prize.' See *Newsweek* 'Duelling dictators,' 28 November 2007. Equally frustrating is the failure of the international community to resolve this conflict effectively. See also the discussion in Chapter 2 section 2.8.

143 Compare this with the discussion on regional instability and state sponsored terrorism discussed in section 4.13.

conflict.'[144] In one of the awards,[145] the State of Eritrea was found to be in violation of international humanitarian law for unlawfully invading the flashpoint of the conflict, Badme, which before the war, was peacefully occupied by Ethiopia. Legally speaking, the border conflict escalated into a full-fledged war, when on 12 May 1998 Eritrean forces invaded some territories under the peaceful control of Ethiopia. According to the Claims Commission:

> The evidence showed that, at about 5:30 a.m. on May 12, 1998, Eritrean armed forces, comprised of at least two brigades of regular soldiers, supported by tanks and artillery, attacked the town of Badme and several other border areas in Ethiopia's Tahtay Adiabo Wereda, as well as at least two places in its neighbouring Laelay Adiabo Wereda. On that day and in the days immediately following, Eritrean armed forces then pushed across the flat Badme plain to higher ground in the east … Ethiopian defenders were composed merely of militia and some police, who were quickly forced to retreat by the invading Eritrean forces. Given the absence of an armed attack against Eritrea, the attack that began on May 12 cannot be justified as lawful self-defence under the UN Charter.
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> The areas initially invaded by Eritrean forces on that day were all either within undisputed Ethiopian territory or within territory that was peacefully administered by Ethiopia and that later would be on the Ethiopian side of the line to which Ethiopian armed forces were obligated to withdraw in 2000 under the Cease-Fire Agreement of June 18, 2000.
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> Consequently, the Commission holds that Eritrea violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force to attack and occupy Badme, then under peaceful administration by Ethiopia, as well as other territory in the Tahtay Adiabo and Laelay Adiabo Weredas of Ethiopia, in an attack that began on May 12, 1998, and is liable to compensate Ethiopia, for the damages caused by that violation of international law.[146]

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144 For a succinct summary of the awards of the Claims Commission, see J Romesh Weeramantry 'Eritrea Ethiopia Claims Commission Awards' 1(1) (2006) *Hague Justice Journal* 41-43; J Romesh Weeramantry 'International Decisions' 99 (2005) *American Journal of International Law* 465-472.

145 Claims Commission, *Partial Award, Jus Ad Bellum, Ethiopia's Claim 1-8*, ('*Jus Ad Bellum'*), award of 19 December 2005.

146 Ibid paras 14-16. See also the operative part of the same award. However, the decision of the Claims Commission on *jus ad bellum* claims was criticised by Christine Gray who argues that by stretching the terms of the Algiers Peace Agreement the Commission unduly asserted jurisdiction to hear Ethiopia's *jus ad bellum* claims. Gray further argues that the jurisdiction was asserted in the absence of express or unequivocal consent to that effect by the other party to the conflict. According to Gray, the absence of such consent should have been considered by the Commission as an obstacle to its jurisdiction. She then argues: 'Having asserted jurisdiction, the Claims Commission unfortunately did not treat the *jus ad bellum* claims with the rigour or in the depth that the subject matter required. It did not adequately address issues of evidence or explain its approach to the contested facts. In fact it seemed generally to take Ethiopia's version of events at face value, leaving itself open to the accusation, in the absence of adequate explanation, that this was indeed a partial award. And having undertaken this difficult task, it did not give a satisfactory decision on the substantive law on the use of force. It nevertheless found itself able to rule expressly that there had been a violation of Article 2(4) of the UN Charter by Eritrea.' See Christine Gray 'The Eritrea/Ethiopia Claims Commission oversteps its boundaries: A partial

Throughout the entire 1998-2000 border conflict, the Eritrean government was repeatedly requested by international mediators to withdraw its troops from the controversial territories and enter into political dialogue with Ethiopia. The Ethiopian government refused to enter into any political dialogue before Eritrea withdrew its troops from those territories occupied on or after 12 May 1998 and demanded a strict restoration of the *status quo ante*. In light of the final verdict of the Claims Commission on *jus ad bellum*, the precondition presented by the Ethiopian government since the start of the conflict seems acceptable. However, the Eritrean government rejected the precondition obstinately only to accept it after a humiliating defeat in May 2000. Much of the blame in this regard must go the state president, who since the start of the war, proved utterly incompetent in trying to resolve the dispute diplomatically. This was clearly asserted by several publications and research work conducted after the war, the leading of which is Connell's book. Connell draws his conclusions from interviews conducted with senior government officials, who were key players during the war. The most revealing account in this regard is given by Eritrea's two former ministers of foreign affairs, Haile Wolde'nsae (alias Drue)[147] and Petros Solomon,[148] both of whom blamed the state president.

At the time when Eritrea signed the Cessation of Hostilities Agreement on 18 June 2000, too much damage had already been done to the country and its people. Ethiopia had already occupied about a quarter of Eritrea's territory, displacing close to 700 000 people

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award?' 17 (2006) *European Journal of International Law* 721. Nonetheless, apart from the benefits of critical academic discourse, the exposition of Gray has no bearing on the decisions of the Claims Commission, which like that of the Boundary Commission, are final and binding on Eritrea and Ethiopia.

147 'Conversation with Haile "Drue" Woldense' in Connell (n 69 above) 103-124. In explaining the stubbornness of the Eritrean president (at 119), Mr Woldense said that 'I know how hard we fought against our President to accept [the peace] proposal. And later … we have to accept not only [the peace] proposal, even to accept a temporary security zone within our territory.' Throughout the border conflict with Ethiopia, Mr Woldense was the Foreign Minister of Eritrea and a key negotiator in the Algiers Peace Agreement. He was arrested in September 2001 together with 10 other senior government officials after challenging the president's autocratic leadership.

148 'Conversations with Petros Solomon' in Connell (n 69 above) 125-135. Mr Solomon also said that had the president and his cohorts accepted the peace proposal beforehand without being pushed, they would have been in a better position. He then adds (at 135), 'So to cover up all these things, [the President] says a lot of things … Now, he says that Eritrea is less than the President. The President is more than Eritrea.' Mr Solomon, who also once served as a foreign minister, was arrested in September 2001.

from their homes and villages. Apart from the humiliating defeat, according to conservative government figures 19 000 Eritrean soldiers were killed in the war.[149] Thousands were maimed, families and children abandoned. From the start of the war, 77 000 Eritreans and Ethiopians of Eritrean origin were inhumanely deported from Ethiopia, without any chance to bid a decent farewell to their loved ones or to collect their property and belongings. In the process, families were separated and many were subjugated to gross violations of international humanitarian law. The human suffering sustained by Eritreans in the 1998-2000 border conflict was exceedingly harsh.[150]

Although the excesses of the Ethiopian government have also contributed much to the immense suffering of Eritreans, the starting point of this misery was the unlawful act of aggression by Eritrean government officials and their obstinate refusal to withdraw from territories occupied after 12 May 1998. The determination of the Claims Commission on the culpability of the Eritrean government is the most important work to look for possibilities of prosecutorial options against senior Eritrean government officials for the crime of aggression and other violations of international humanitarian law.

Other violations by Eritrea include killing and abuse of prisoners of war (POWs) in violation of customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949.[151] Eritrea also arrested the Ethiopian

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149 Others indicate that this number is too conservative. See, for example, Awate Team 'A statistical report of Eritrea's casualties in the Eritrea-Ethiopia border war (1998-2000),' available at http://www.awate.com/martyralbum/statistics_files/statistics.htm (accessed 16 January 2005). Independent reports indicate that from both sides between 100 000 and 150 000 soldiers died during the war. See *Al Jazeera TV* 'Interview with President Isaias Afwerki,' 22 May 2008; *New York Times* 'Resentment and rations as Eritrea nears a crisis,' 16 October 2007; *BBC Monitoring* 'Number of war dead soldiers reportedly 123 000,' 10 April 2001. The war disabled some 150 000 soldiers. See International Crisis Group 'Ethiopia and Eritrea: Preventing war,' Africa Report No 101, 22 December 2005.

150 In terms of military expenditure and economic deprivation, Eritrea has lost a great deal. Woldu Mikael, for example, states that the two-year war cost Eritrea US$ 0.5 to 1 billion. See Woldu Mikael 'Why Eritrea is threat to peace,' available at http://blackstarnews.com/?c=122&a=4434 (accessed 13 April 2008). See also *BBC News* 'Will arms ban slow war?,' 18 May 2000; Awate Team '2003: Defending indefensible, indulging incompetence,' available at portal/content/view/2748/2/ (accessed 11 January 2004); Michela Wrong 'War brews on the new frontier,' available at http://www.newstatesman.com/200710250023 (accessed 25 October 2007).

151 Eritrea-Ethiopia Claims Commission, *Partial Award, Prisoners of War, Ethiopia's Claim 4,* award of 1 July 2003, para 11.

Chargé d'Affaires and retained Ethiopian Embassy correspondence in violation of articles 24 and 29 of the 1961 Vienna Convention on Diplomatic Relations.[152] Violations such as unlawful killings, beating and abduction of civilians, looting, forced labour, conscription, and failure to take effective measures to prevent the rape of women on the eastern and western fronts of the armed conflict were also committed by Eritrea.[153] All of the above violations are also acts criminalised by article 8 of the ICC Statue as international crimes for which individual criminal responsibility can be entailed. In the context of the 1998-2000 border conflict, Eritrean government officials, most notably the state president, perpetrated war crimes of a grave magnitude, with only few comparable examples since WWII.[154]

4.12.3 The Dirfo, the Qarora and other massacres

The violations discussed in this section were perpetrated in the context of low level internal armed conflict between Eritrean government troops and some armed Eritrean rebel groups. Although the violations apparently appear as violations of international humanitarian law, they also overlap with violations of international human rights law.[155] Mass murder is one of the most shocking international crimes in Eritrea. The Dirfo Massacre represents one dreadful example of en masse killing. As reported by Awate Team,[156] the incident involves the following violation:

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152 Eritrea-Ethiopia Claims Commission, *Partial Award, Diplomatic Claim, Ethiopia's Claim 8,* award of 19 December 2005.

153 Eritrea-Ethiopia Claims Commission, *Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1and 3,* award of 19 December 2005.

154 For violations perpetrated by the Ethiopian government, see the following judgments of the Claims Commission: *Partial Award, Diplomatic Claim, Eritrea's Claim 20,* award of 19 December 2005; *Partial Award, Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24*, award of 19 December 2005; *Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25, and 26*, award of 19 December 2005; *Partial Award, Economic Loss throughout Ethiopia, Ethiopia's Claim 7*, award of 19 December 2005.

155 For a distinction between human rights law and humanitarian law, see the discussion in Chapter 3.

156 Awate Team, 'Crimes committed in Zemene Isaias,' available at http://www.awate.com/artman/publish/article_2888.shtml (accessed 4 January 2004). Compare this with the report of the Eritrean Kumana Relief Association which lists the names of individuals from the Kunama ethnic group who were killed, detained and disappeared between 2001 and 2006. The report lists 31 victims of assassination and 164 victims of arbitrary detention and enforced disappearance, including the places of detention, death or disappearance and dates. The report is available at http://www.mesel-

On January 23, 1997, with a secret order from Abraha Kassa, the chief of the National Security Office of Eritrea, and under the direction of President Isaias Afwerki, security forces rounded up 150 Eritrean Moslem men under the guise of being collaborators with the Islamic Jihad movement. They were picked from their homes and workplaces. News coming from Asmara has confirmed that, six months after they were taken in custody, with the knowledge of both [Abraha Kassa and Isaias Afwerki] they were executed on 18 June 1997 from 8:20 p.m. to 2 a.m. the next day. With due considerations for the security aspects of this information, we will release a follow-up [on the news].[157]

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biherat.com/EKRA/lList%20of%20the%20Eritrean%20Kunama%20killed.htm (accessed 18 February 2007). The Kumana is one of the minority ethic groups in Eritrea. In August 2007, the UNHCR decided that on account of ethnic persecution some 4 000 Eritreans from the Kunama ethnic group in the Shimelba refugee camp (Ethiopia) were qualified for resettlement in third countries. See *The Connection* 'Kumana refugees coming to Utah,' Issue # 14, August 2007, also available at http://health.utah.gov/cmh/news/Connection/August07_files/Page298.htm.

157 Awate Team (n 75 above), quoting *TV Zete* broadcast of 23 January 2003. *TV Zete* is a television programme broadcast by Eritreans in Sweden. Parts of the report of *TV Zete* were confirmed by Mr Mehari Yohannes, a former member of the Eritrean Police, Crime Investigation Unit. Mr Yohannes was previously a member of 'Unit 72,' code name for EPLF's former intelligence specialists. See Awate Team Interview with Mehari Yohannes (n 70 above). Mr Yohannes said that the decision on the extra-judicial execution was carried out by a committee composed of seven to twelve people from the Crime Investigation Unit. This organ can be described as the 'secret police' of the PFDJ and it is one of the main security organs responsible for a greater proportion of violations since 1991. Colonel Simon Ghebredingil, who survived an assassination attempt in October 2007, is a notorious perpetrator who headed the Crime Investigation Unit for many years. He has recently been identified by Awate Team as one of the most responsible individuals for the perpetration of crimes against humanity in Eritrea. See Awate Team 2007b (n 121 above). The assassination attempt emerged as an unprecedented overt skirmish between top military commanders, as a result of which the state president reportedly had to stay out of the country for a couple of days. On 16 October 2007, in a very exceptional attempt at 'openness,' the official website of the Eritrean government acknowledged the assassination attempt. See *Shabait.com News* 'Assassination attempt against Colonel Simon Gebredingil fails, presently in good condition,' 16 October 2007. See also *Reuters* 'Eritrea makes arrests over assassination bid,' 23 October 2007, which quoting Eritrea's Acting Minister of Information, said that the government had made 'an undisclosed number of arrests in connection with the attempted assassination of the [country's] powerful internal security chief.' For a detailed account and background information on the attempted assassination, see **ኣዝማሪኖ ኢንዲፐንደንት 'ንሰብ ዝጨነቕ፡ ንፋስ ይብርቁቕ - ስርዓት ህግደፍ፡ ካበይ ናበይ፡'** (Asmarino Independent 'That which cannot be conquered by men can be destroyed by the wind'), available at http://cs.asmarino.com/?itemid=538 and http://cs.asmarino.com/index.php?itemid=517 (accessed 29 October 2007). According to this report, Eritrea is sadly heading down a dangerous path of regionalism which may at any time erupt into a deadly civil war. See also **ባውዛ ካብ ኣስመራ 'ፕረዚደንት ኢሰያስ ኣፈወርቂ ኩነታት ጸጥታ ሃገር ስጋዕ ዝረግኣሉ· ካብ ሃገር ኮብሊሉ·'** (Bawza from Asmara 'President Isaias leaves country until situation stabilise'), available at http://zete9.asmarino.com/index.php?itemid=1053 (accessed 19 October 2007).

The above incident reportedly took place at Dirfo,[158] between Asmara and Nefasit. In a related story, on 16 October 2004, Awate Team published an English translation of a letter,[159] formally written to the state president by family members of some of the victims of the Dirfo Massacre. In the letter, the family members asked about the whereabouts of the victims. Sadly, Awate Team reports, no response has been given to the family members by the Eritrean government.[160] Awate Team adds that the Dirfo Massacre is one incident of documented violations. According to the same source, 'many more remain unmentioned and will be chronicled only after … the people who are gripped by fear' will come forward to tell their stories.[161] Referred to by Awate Team as one of the 'revolutionary-ethic' styles of 'justice,' the Dirfo Massacre represents perhaps the most shocking en masse killing perpetrated in the post-independence era.

The reasons behind the Dirfo Massacre may be traced to perceived allegiance or sympathising of the victims with the EIJM, an armed opposition group operating from neighbouring Sudan, since the early years of independence. In this regard, AI also reports that 'Muslims, especially in the western areas bordering Sudan, have often been suspected of links with predominantly Muslim-armed Eritrean political opposition

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158 This place was mentioned by a pseudonymous commentator (**ሻምላ ፋሕ**/Shamla Fah), who wrote her/his comments in the following blog: Bawza from Asmara (n 157 above). Another source also indicates that members of the committee which decided on the Dirfo Massacre were the former chief of national security, Mr Naizgi Kiflu, the current chief of national security, Brigadier General Abraha Kasa, the current Eritrean Ambassador to the UK, Mr Tesfamichael Gerahtu, the former Attorney General, Mr Musa Naib, and a person identified as 'Telifa.' See the comment posted by *meftih* (menfit@yahoo.com), presumably a pseudonym, at the following blog: Asmarino Independent '*Deutsche Welle Radio* interview with Elsa Chyrum,' available at http://cs.asmarino.com/index.php?itemid=954 (accessed 8 May 2008). Implicated in the same blog are individuals such as the late Ali Said Abdela (former Minister of Foreign Affairs), Wedi Andu, Garibaldi (presumably a nickname), Memhir Fasil and Wedi Lijam. Some of them are also implicated in several extrajudicial killings that took place during the liberation struggle era. See also the comments in the same blog by Haile Abraha (HAbraha@yahoo.com) and **ግዳይ ሓለዋ ሰውራ** (a victim of *halewa sewra*). *Halewa sewra* denotes the special unit of the EPLF known as revolutionary guard, which is generally regarded as the most responsible organ for most extrajudicial killings that took place during the armed struggle.

159 'Be compassionate to those on Earth: He in the Heavens shall be compassionate to you' (Awate Team English translation of the letter), available at http://www.awate.com/artman/publish/article_3694.shtml (accessed 16 October 2004).

160 Ibid. The names of twenty victims are mentioned in the letter.

161 Awate Team 2003 (n 75 above).

organisations based in Sudan.'[162] This is true because of the fact that in post-independence armed rebellion the most visible and earliest opposition came from groups led by Islamist leaders primarily based in Sudan. The consequence was that the government associates any outspoken Muslim Eritreans with the Sudan-based armed opposition groups. As a result, some members of those communities have been viewed suspiciously by the government and therefore treated harshly.[163]

For several years, Eritrea and Sudan have been arming, financing, harbouring and training each other's armed rebel groups with the clear intention of one country interfering in the domestic affairs of the other and undermining each other's internal security. There are several reports of relatively low level military skirmishes that have taken place at different times between Eritrean government troops and the EIJM and other armed groups based in Sudan. The first military skirmish between Eritrean government troops and EIJM combatants is reported[164] to have taken place in January 1992. In another military skirmish that took place between December 1996 and January 1997, reports Awate Team, government troops fought a battle with the EIJM in the village of Mensura. The spill-over of this conflict led to the destruction by the EIJM of assets of an agricultural enterprise, known as HEDCO Company, situated in Daerotai. The company was partially owned by the ruling party, PFDJ. This incident was followed by the killing of a school principal in Mensura and a series of other killings in Maria, for which both parties blamed each other. Again in 1997, the EIJM reportedly killed four Belgian tourists in Mirara,[165] Semienawi Barhi, one of the major tourist attraction areas in Eritrea. In an alleged retaliation, a military squad under the command of Colonel Osman Bekhit detained scores of villagers from Shebab, Gedged and Shebah. Another military

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162 AI (n 16 above). On the genesis and development of the EIJM, see generally Medhanie (n 74 above) 78-89.

163 Ibid. See also AI (n 90 above).

164 Awate Team (n 75 above).

165 See Ministry of Foreign Affairs of Eritrea 'Press release: Ethiopia's repeated lies to mask a sinister scheme,' available at http://www.shabait.com/staging/publish/article_006399.html (accessed 31 March 2007). The killing of the Belgian tourists was mentioned in this press release in the context of Ethiopia's alleged subversive attacks against Eritrea. It came about 10 years after the alleged incident, perhaps as the first official government account of the killing of the Belgians by the EIJM. The press release also indicated that the EIJM had killed a Canadian citizen working with a gold prospecting company in 2003.

squad, commanded by Major-General Gerezgher Andemariam (alias Wuchu), reportedly detained another group of civilians. Both groups of people, unknown in number, were summarily executed for 'harbouring subversive elements.'[166]

In 1997, in what seems to be a related story of a retaliatory but unlawful act, government troops allegedly killed twenty civilians, including six teachers. The source of the allegation is the official monthly newsletter of the ELF-RC, one of the leading opposition groups in exile. In its report, the Tigrinya newsletter narrated the following story of the en masse killing:

> In April 1997, the troops of the government of the People's Front [the ruling party], entered the town of Qarora in Sudan. They had a list of names of individuals who are members of opposition groups and accordingly rummaged around the whole town in search of those people. The number of people who have been massacred in such circumstances has reached around 39. Most Eritreans residing in Qarora are refugees who have fled their homes during the massacres of previous Ethiopian rulers.[167]

Although no official explanation has been given by the government for incidents such as the Qarora Massacre, some tentative conclusions can be extrapolated from rare government official accounts. For example, on 24 May 1997, the president, in a closed meeting of ruling party cadres held in Asmara, asserted that the National Islamic Front (NIF) in Sudan was training subversive elements bent on destabilising the nation and as a result the Eritrean government would do whatever was needed to topple the government of Sudan.[168] The president had also reportedly told the participants of the same closed meeting that Eritrean soldiers were fighting alongside rebels in neighbouring Sudan.[169] Although not overtly stated by the president, the statement implies that incidents such as

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166 Awate Team (n 75 above).

167 See *ዲሞክስያዊት ኤርትራ* 'አሰንባዲ መ'ቕዘፍቲ ኣብ ቃሮራ,' *ሕታም* ቁ 23 *ሚያዝያ-ሰነ* 1997፡ *ገጽ* 13. (*Dimokrasyawit Eritrea* 'A shocking massacre in Qarora,' April-June 1997, 13). The newsletter then lists the names of twenty individuals who were killed by government troops and three who disappeared. In relation to atrocities perpetrated in another country, the UN Human Rights Committee decided that Uruguay violated the ICCPR when its security forces abducted and tortured a Uruguayan citizen living in Argentina. Accordingly, a state is responsible for human rights violations perpetrated by its agents abroad. See *Delia Saldias de Lopez v Uruguay*, Communication No 52/1979, UN Doc CCPR/C/OP/1 88 (1984), judgment of 29 July 1981, para 12.3. See also UN Human Rights Committee, Comments on United States of America, UN Doc CCPR/C/79/Add 50 (1995), of 31 March 1995.

168 *Dimokrasyawit Eritrea* (n 167 above).

169 See CPJ 'Ruth Simon, Imprisoned journalist,' available at http://www.cpj.org/awards98/1998/simon_bio.html (accessed 14 June 2007).

the Dirfo and the Qarora Massacres were meant to be attacks carried out on the basis of 'counter-insurgency' military imperatives. In fact, government officials also casually refer to victims of such incidents as 'Jihadists and Fifth Columnists,' who were bent on destabilising Eritrea. However, no formal charges were made against any individual. There is also no concrete proof to substantiate any possible claim on the part of the government that it acted in a manner proportional to the threats posed by the armed groups based in Sudan. Furthermore, it must be noted that as a matter of usual practice, the Eritrean government either categorically denies the perpetration of such crimes or claims that stories have been blown out of proportion or are deliberately fabricated by media outlets operating from 'enemy quarters.'

4.13 Other violations of international law

4.13.1 State sponsorship of terrorism

Another category of international crime perpetrated by Eritrean government officials is state sponsorship of terrorism. This is a new phenomenon, which has recently developed as a major issue after the US government threatened to include Eritrea in the list of terrorist sponsoring countries.[170] The threat from the US government was prompted by Eritrea's continued financial, military and political support to Islamist groups in Somalia. Thus far, the only countries in the world designated by the US as state sponsors of terrorism are: Cuba, designated on 1 March 1982; Iran, designated on 19 January 1984; North Korea, designated on 20 January 1988; Sudan, designated on 13 August 1993; and Syria, designated on 29 December 1979.[171]

Despite some controversy on a universally agreed definition of terrorism,[172] specific instances of violence explicitly prohibited by treaty law can be regarded as amounting to

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170 US Department of State 'On-the-record briefing of Dr Jendayi Frazer, Assistant Secretary of State for African Affairs on US-Eritrea relations,' 17 August 2007. In November 2007, the US government closed the Eritrean Consulate in Oakland in response to the deteriorating diplomatic relationship between the two countries.

171 US Department of State, 'State Sponsors of Terrorism,' available at http://www.state.gov/s/ct/c14151.htm (accessed 18 October 2007).

172 See, for example, *VOA Tigrinya Programme,* '**ቃለ-መጠይቕ ምስ ኣቶ ዳንኤል ረዘነን ኣቶ ሰለሞን ኣብራሃን**' (Interview with Daniel R Mekonnen and Solomon Abraha), 27 February 2008.

terrorist acts under customary international law. Cassese mentions, for example, article 33(1) of the Fourth Geneva Convention of 1949 as a good example of treaty law. This provision provides that 'collective penalties and likewise all measures of intimidation or terrorism are prohibited' conduct, which Cassese categorises with international crimes of terrorism.[173] Cassese furthermore asserts that there seems to be an overwhelming consensus within the UN organs, at least in the UN Security Council, that certain acts can definitely be defined as terrorist acts.[174] Accordingly, terrorism can be classified either as a war crime, a crime against humanity, or a crime of international terrorism per se.[175]

The stigma of international condemnation affixed to international terrorism was clearly marked after the terrorist attacks against the US on 11 September 2001.[176] A very important development after the September 11 attacks was the adoption by the UN Security Council of Resolution 1368 (2001), which called on the international community to redouble efforts for the full implementation of anti-terrorist measures.[177] Accordingly, sanctions were imposed against possible suspects involved in terrorism, such as the Al-

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173 Antonio Cassese *International Criminal Law* (2003) 124-125; Adam Roberts 'Can we define terrorism?' 14 (2002) *Oxford Today* 18. See also UN General Assembly Resolution 42/159 of 7 December 1987; International Convention for the Suppression of the Financing of Terrorism, adopted on 10 January 2000; Declaration of the UN General Assembly on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly Resolution 50/6 of 24 October 1995; General Assembly Resolution 49/60 of 9 December 1994. See particularly, General Assembly Resolution 51/210 of 17 December 1996, para 3(f); General Assembly Resolution 51/210 of 17 December 1996; General Assembly Resolution 52/165 of 15 December 1997; General Assembly Resolution 53/108 of 8 December 1998; and General Assembly Resolution 54/109 of 9 December 1999. See also *Suresh*, Canada, Supreme Court, 2002 SSC 1, judgment of 11 January 2002.

174 Cassese (n 173 above) 125. See also Daniel O'Donnell 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces' 864 (2006) *International Review of the Red Cross* 853-880; ICRC and CICTE 'Terrorism and international humanitarian law,' Statement of the International Committee of the Red Cross (ICRC), Inter-American Committee Against Terrorism (CICTE), Seventh Regular Session, Panama City, 28 February – 2 March 2007; Hans-Peter Gasser 'Acts of terror, "terrorism" and international humanitarian law' 847 (2002) *International Review of the Red Cross* 547-570.

175 Cassese (n 173 above) 125-129. Cassese argues that one of the most important distinguishing features that give terrorism the trait of a core international crime is a context of armed conflict. If there is a nexus with an international or internal armed conflict, the act becomes international crime proper. In this sense, armed conflict means a military clash between two armed groups, be it between two states or between armed groups within a state. The perpetration of the crime within such a context can give it a hallmark peculiar to other core international crimes. See also Gasser (n 134 above); *Galic*, ICTY, Indictment, judgment of 23 October 2001.

176 See Security Council Resolution 1368 (2001) and General Assembly Resolution 56/1 of 12 September 2001 (Condemnation of Terrorist Attacks in the United States).

177 Compare this with UN Security Council Resolution 1269 (1999).

Qaida network, Usama bin Laden and the Taliban, as well as individuals and entities belonging to or associated with them. These individuals and entities were designated by a committee, commonly known as the Al-Qaida and Taliban Sanctions Committee, established by the Security Council Resolution 1269 (1999).[178] The Committee oversees the implementation by UN member states of the sanctions imposed on the designated individuals and entities. Accordingly, all member states of the UN are required, among other things, to 'prevent the entry into or transit through their territories by designated' terrorists.

Sheikh Hassan Dahir Aweys, a national of Somalia, is one of the individuals designated by the UN Security Council in its list of suspected terrorists.[179] Formerly a leader of a Somali Islamic group known as Al Ithad Al Islamia (AIAI), Aweys is suspected of involvement in the 1998 terrorist attacks against US embassies in Kenya and Tanzania. His involvement in these attacks was allegedly funded by the leader of Al-Qaida, Usama bin Laden.[180] Since September 2007, Aweys has been offered sanctuary by the Eritrean government and has been living in Asmara for some time,[181] in contravention of the measures adopted by UN Security Council Resolution 1368 (2001).

4.13.2 Interference in the domestic affairs of Somalia

Media reports on Eritrea consistently reveal that the capital city, Asmara, has become a popular stopping point for all rebel groups from neighbouring countries, especially from Ethiopia, Somalia and Sudan.[182] In this regard, the *New York Times* reports that with the

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178 See also Consolidated List of Targeted Individuals and Entities Associated with Al-Qaida, Usama Bin Laden, and the Taliban, compiled by the Al-Qaida and Taliban Sanctions Committee, last updated on 09 October 2007.

179 Ibid. See also US Department of State, Office of the Coordinator for Counterterrorism 'Comprehensive List of Terrorists and Groups Identified under Executive Order 13224, 31 December 2001.

180 *BBC News* 'Profile: Sheik Hassan Dahir Aweys, Somalia's Islamist leader,' 30 June 2006a; see also *BBC News* 'Radical' heads new Somali body,' 26 June 2006b.

181 *Reuters* 'Militant Somali Islamist at Eritrea talks,' 6 September 2007; *Shabait.com News* 'Sheik Hassan Dahir Aweys dismisses Washington's accusation as baseless,' 11 September 2007. Aweys is one of the top leaders of a prominent rebel group in Somalia. See also Asian Tribune 'US Senate investigation reveals Eritrea providing military aid to Sri Lanka Tamil Tiger rebels,' 31 August 2007.

182 See, for example, *The Times* 'Eritrea hosts regional rebels,' 1 May 2007.

'bunker mentality and underdog complex' of its leaders, 'Eritrea has turned into a magnet for rebels from across Africa, including Islamist leaders from Somalia, who have been waging a guerrilla war against Somalia's weak transitional government.'[183]

There are various reasons for Eritrea's involvement in the internal affairs of its neighbours. Eritrea's latest involvement in Somalia is directly linked with the unresolved stalemate with Ethiopia. In the context of the 1998-2000 border conflict, the Eritrean government perceives that Ethiopia was unfairly favoured by the international community and most importantly by the US government. According to official Eritrean government accounts,[184] Ethiopia's refusal to hand over the controversial town of Badme, contrary to the findings of the Boundary Commission, has materialised as a result of 'unwarranted' political and diplomatic support offered by the US government to Ethiopia. As a result, by arming, training and financing major rebel groups in Somalia, Eritrea is trying to weaken the TFGS, which is a close ally of Ethiopia and the US.

Legally speaking, the interference of the Eritrean government in the domestic affairs of Somalia contravenes established principles of international law. In using Somalia as a proxy war, the Eritrean government has violated a UN Security Council sanction which has imposed, among other things, a travel ban and an arms embargo on certain groups in Somalia.[185] The embargo has been violated by several countries, Eritrea being one of the

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183 *New York Times* (n 149 above). Some Somali armed groups supported by Eritrea are linked with the al-Shabab armed group, an organisation which was recently designated by the US as a terrorist group. See *VOA News* 'United States designates Somalia's al-Shabab as a terrorist group,' 19 March 2008. The Eritrean government is also notorious for offering sanctuary to an armed Ethiopian group that abducted 5 European diplomats and their family members in March 2007. See *Shabait.com News* 'TPLF regime is the most repressive in Ethiopian history: ARDUF Chairman,' 20 March 2007.

184 See, for example, *Shabait.com Commentary* 'US policy in Eritrea: A pattern of unprovoked hostility,' 5 September 2007. An important observation on the Somalia issue is that of the former Nigerian President, Olusegen Obasanjo, who noted that Eritrea and Ethiopia 'have taken their enmity and exported it to Somalia. Anybody who is the enemy of Eritrea is a friend of Ethiopia. Anyone who is a friend of Eritrea is an enemy of Somalia.' See *The Independent* 'Africa unscrambled: Retired African presidents,' 11 April 2008. See also Garoweonline.com 'Sheikh Aweys' ICU under full Eritrean control,' available at http://www.garoweonline.com/artman2/publish/Opinion_20/Somalia_Sheikh_Aweys_ICU_under_full_Eritrean_control.shtml (accessed 28 May 2008).

185 The UN Security Council, by Resolution 733 (1992), urged all states to implement a general and complete arms embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise.

major violators. This has been verified by the periodic reports of the Panel of Experts and the Monitoring Group, established by the UN Security Council to oversee the sanctions imposed on Somalia.[186]

4.13.3 Interference in the domestic affairs of Sudan

Eritrea's involvement in the domestic affairs of Sudan dates back to early 1990s, as has been discussed in the context of other violations of international humanitarian law.[187] In recent years, Eritrea has also consistently violated UN Security Council sanctions imposed against Sudan, especially since 2004. The latest sanctions against Sudan by the Security Council seek to rectify the Darfur crisis, which, according to the Security Council, was defined as a serious crisis involving humanitarian catastrophe and widespread human rights violations.[188] The crisis has left one million people in need of urgent humanitarian assistance, caused the displacement of 200 000 refugees, who were forced to flee to the neighbouring State of Chad, creating in that country a serious burden. In short, the Darfur crisis was designated by the Security Council as 'a threat to international peace and security and to stability in the region.'[189] With a view to tackling this crisis, the UN Security Council imposed an arms embargo[190] on all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur and West Darfur of Sudan.

On 29 March 2005, the arms embargo was expanded to include all the parties to the N'djamena Ceasefire Agreement[191] and any other belligerents in the states of North

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186 See, for example, *Report of the Monitoring Group on Somalia, Submitted in accordance with Resolution 1724 (2006)*, UN Doc S/2007/436, 17 July 2007 (hereinafter '*Somalia Monitoring Group 2007 Report*); *Report of the Team of Experts, Submitted in accordance with Resolution 1407 (2002)*, UN Doc S/2002/722, 3 July 2002 (hereinafter '*Report of the Team of Experts on Somalia*'), Annex 4. In one of the reports, Eritrean Colonel Yusuf Negash Warque is mentioned as a person involved in violation of the armed embargo. See *Somalia Monitoring Group 2007 Report*, para 5.

187 See the discussion in section 4.12.3 above.

188 UN Security Council Resolution 1556 (2004).

189 Ibid.

190 See UN Security Council Resolution 1591 (2005).

191 The signatories to this agreement were the Government of Sudan and the two major rebel groups in the Darfur region: the Justice and Equality Movement (JEM) and the Sudan Liberation Army (SLA). The agreement was singed on 8 April 2004.

Darfur, South Darfur and West Darfur of Sudan. Furthermore, the sanctions regime was modified and strengthened and the scope of the arms embargo was expanded to include a travel ban and assets freeze on certain individuals designated by a Security Council Committee established pursuant to Resolution 1591 (2005). A Panel of Experts, established to oversee the implementation of the sanctions, identified the Eritrean government as one of the violators of the arms embargo.[192] The background of Eritrea's violation of the sanctions has been well explained by the Panel of Experts, which said that 'Eritrea has long had a hostile relationship with the Sudan, and both countries have hosted, trained and equipped their enemy's respective insurgent groups.'[193]

4.14 Legal appraisal of violations of international human rights law

With regard to the massive human rights violations perpetrated in Eritrea since 1991, the relevant principles of international law applicable to the situation are contained in all the international human rights treaties signed by Eritrea.[194] In this regard, the most important and applicable rules of international law are the provisions of the ICCPR and the African Charter, which are extensively cited in Chapter 3 section 3.3. However, as a universally accepted and recognised body of peremptory norms of international law, the relevant provisions of the UDHR[195] are also applicable in the current context. These being the major sources of applicable law for the legal appraisal of human rights violations, the assessment can also be supported by the relevant provisions of other international treaties namely: the ICESCR, CEDAW, CRC, and ACRWC, which are all ratified by Eritrea.

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192 *Final Report of the Panel of Experts, Submitted in accordance with Resolution 1591 (2005)*, UN Doc S/2006/65, 30 January 2006 (hereinafter '*Report of the Panel of Experts on Sudan*'), 3, para 9.

193 *Report of the Panel of Experts on Sudan*, paras 84.-86. In particular, the Panel of Experts mentions Eritrean Major General Tekle Manjus as a person involved in violations of the arms embargo.

194 The legal appraisal on violations of international humanitarian law will follow separately in the next section.

195 The relevant provisions of the UDHR as are applicable to the current debate include the following: articles 1 and 3 (the right to life and physical integrity); article 2 (the right to protection against discrimination); article 5 (the right to freedom from torture, inhuman and degrading treatment); article 30 (the right to religious freedom); etc. See also articles 1 and 55 of the UN Charter.

The ICCPR and the African Charter entered into effect in Eritrea on 22 April 2002 and on 14 January 1999, respectively. It may appear that with respect to violations perpetrated prior to these dates that the treaties have no applicability to Eritrea. Nonetheless, following the argument developed by the UN Human Rights Committee, a nexus of applicability can always be established in situations where human rights violations constitute a continuous act of perpetration. In *Carballal v Uruguay*, the UN Human Rights Committee found a continuing violation when a prisoner was arrested before the ICCPR came into force in Uruguay, was never charged, and was not released until after the ICCPR entered into force.[196] Most violations perpetrated by the Eritrean government constitute a perpetual act of continuity. For example, there are thousands of prisoners in Eritrea who have been detained without a court order before the coming into force of the ICCPR in Eritrea. All such detainees remain in prison after the entry into force of the ICCPR in Eritrea. In so far as a violation starts before the coming into force of the ICCPR in Eritrea, and continues after the entry into force of the ICCPR, and has the effect of constituting an international crime, the ICCPR is applicable. With regard to the applicability of the African Charter, the same line of argument can be followed.

Secondly, the discussion in the previous chapter reveals that most of the crimes perpetrated by the Eritrean government since Eritrea's independence in 1991 do qualify as crimes against humanity and torture. Crimes against humanity are 'crimes of a special nature to which a greater degree of moral turpitude attaches than to ordinary crimes.'[197] In *Furundzija,*[198] the ICTY Trial Chamber made it clear that the prohibition of crimes against humanity, war crimes, maritime piracy, genocide, slavery, and torture is now regarded a peremptory norm of international law. Accordingly, any state can prosecute and punish individuals suspected of these crimes. Moreover, in *Kunarac and others*, [199] the ICTY held that torture, even if committed as a single act, constitutes an international crime when committed by a state official or an official of a *de facto* state-like organ.

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196 *Carballal v Uruguay,* para 13.
197 *Tadić*, ICTY Appeals Chamber, judgment of 15 July 1999, para 100-102.
198 *Furundzija*, ICTY Trial Chamber II, judgment of 10 December 1998, paras 156-157.
199 See generally paras 488-497.

Furthermore, in *Delalic and others*,[200] and *Kunarac and others,*[201] the ICTY restated that the elements set out in the definition of torture are now generally considered to be customary in nature. They are thus binding on all states of the world as customary international law.

Torture and inhumane methods of punishment are inflicted indiscriminately against thousands of religious minorities, political dissidents, 'draft evaders' journalists and others. Normally inflicted as a method to extract information or as a punishment to terrorise people, the crime of torture is widespread and systematic in Eritrea.[202] Many have died as a result of torturous punishment, dire prison conditions or lack of medical treatment, and others have sustained permanent bodily injuries. According to the findings of the Darfur Commission, the discriminatory nature of attacks can give the crime of torture an attribute amounting to a *'crime against humanity'* or the crime of '*persecution'* as a crime against humanity.[203] There is a credible body of information testifying to the fact that torture is perpetrated against a multiplicity of victims. The attacks are systematic, carried out pursuant to a preconceived government policy and plan.[204] As such, they demonstrably warrant prosecution as an instance of the international crime of torture or crime against humanity as defined by article 7 of the ICC Statute.

Although international law has never sought to quantify a minimum number of casualties necessary to constitute a crime against humanity,[205] official accounts released by the Office of the Eritrean Attorney General reveal an appalling statistic of prisoners who were kept in detention without trial in the year 1999. The statistics, as seen in Table IV below, represent a conspicuous fact attesting to the pervasiveness of human rights

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200 See generally paras 455-474.

201 See generally paras 488-497.

202 AI (n 16 above); HRE-E (31 above).

203 *Report of the Darfur Commission* paras 378-379 (emphasis original).

204 For further discussions on what constitutes a systematic and widespread attack under international criminal law, see Cassese (n 173 above) 64; Kriangsak Kittichaisaree *International Criminal Law* (2001) 96; William A Schabas *An Introduction to the International Criminal Court* 2nd edn (2004) 36.

205 Michael P Scharf 'Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?,' 31 (1996) *Texas Journal of International Law* 33.

violations, even in those years when the human rights crisis was relatively at its 'lower peak.'

Month	Category A	Category B	Total
January	79	597	676
February	94	578	672
March	107	607	714
April	78	525	603
May	66	745	811
June	85	697	782
July	76	655	731
August	108	653	761
September	102	663	765
October	107	652	759
November	80	705	785
December	111	788	899
Total	**1093**	**7865**	**8958**

Table IV: The total number of Eritrean prisoners who remained in detention without trial in the year 1999
Source: Office of the Eritrean Attorney General[206]

Table IV shows the total number of prisoners who remained in detention without trial from January to December 1999, in different parts of the country. Those in 'Category A' were prisoners who 'were not able' to exercise their right to bail, although the reference to the alleged 'inability' is not clearly defined. There were 1093 of these. Those in 'Category B' are prisoners who were denied their right to bail and they were 7865 in number. There are claims that such a large number of victims of detention without trial was partly an outcome of the arbitrariness of the country's Special Court which tries

[206] **ቤት ጽሕፈት ዋና ኣኽባር ሕጊ 'መሰል ውሕስነት ምርግጋጽ'** (Office of the Eritrean Attorney General 'Asserting the right to bail'), unpublished Tigrinya paper presented at the Workshop on the Right to Bail, Headquarters of the Eritrean Police, 5 June 2001 (document in possession with author) 16. The subheadings in Table IV were slightly amended by the author to suit an abridged translation from the original Tigrinya version. The number of victims of human rights violations depicted in Table IV may pale in comparison to the number of atrocities committed in other regions of the world. However, when seen in conjunction with the number of victims of violations of international humanitarian law (discussed in section 4.12) as well as other violations discussed in this chapter, the number is not small. From estimations given by various sources, the total number of victims of human rights and humanitarian law violations in Eritrea is close to one million, with the major violations being war crimes, crimes against humanity and the crime of aggression.

suspects in closed proceedings without the right to bail, defence counsel or appeal.[207] The most important aspect of the data in Table IV is that in the year 1999 only, close to 9 000 prisoners were kept in detention without trial throughout the year. Although Eritrea was at war with Ethiopia at that time, atrocities against civilians or, generally speaking, human rights violations were on a relatively 'lower scale.'

Violations escalated exponentially after September 2001 in terms of magnitude, intensity and consistency of incidents. The total number of prisoners detained without trial after this time is believed to have increased significantly. Official information on the accurate number of individuals imprisoned since September 2001 is difficult to obtain. However, in recent years, secret jails controlled by military squads and army generals have considerably outnumbered regular prison sites in the country.[208] With the severity of post-2001 atrocities, and taking the 1999 data as a credible staring point, it is plausible to estimate that the number of prisoners could at least have doubled in recent years. If such an extrapolation can be taken as accurate, it may mean that close to 20 000 people have been victims of detention without trial.[209] In conservative estimates, Eritrea lost a total number of 19 000 combatants in the 1999-2000 border conflict with Ethiopia. Compared with the small population of Eritrea and the casualties of the recent war, the estimated

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207 This was the view of some participants at the Workshop on the Right to Bail. This view was prevalent especially among criminal investigation officers.

208 Events Monitor (n 122 above). Events Monitor, writing from Asmara, further reveals that what remains of the regular police force is a mere shadow. 'All army units, from the highest level … down to the divisions and brigades, have their own prison systems, which are not confined to those in uniform but are increasingly used for incarcerating civilians. These jails are secret, not authorised by any legal jurisdiction, and unfit for human beings … The same is said about the secret jails under the purview of the various security/intelligence units … The formal (authorised) prison system has also effectively come under the control of the army generals ... These units are not accountable to the police officer in charge of the station but take their orders directly from the respective military commands … The regular police here are like storekeepers with no authority to know the contents of what they are told to keep.'

209 A recent estimation given by the Eritrean Solidarity for Democratic Change (Toronto) claimed that the total number of prisoners in Eritrea exceeds 30 000. See 'From failed to terrorist state,' available at http://cs.asmarino.com/?itemid=562 (accessed 24 November 2007). A well informed mid-level government official, who recently fled Eritrea, has informed this author (confidentially) that in the infamous detention centre called Prima Country and its environs alone, there are close to 10 000 prisoners kept in large confinement compartments, including underground prison cells and shipping containers. Most of them are conscripts of the NMSP who have been given summary sentences and imprisoned in dire circumstances with their fundamental rights flagrantly violated.

number of individuals detained without trail is exceedingly high.[210] Clearly, the violations committed by Eritrean government officials are contrary to Eritrea's obligations as defined by the international human rights treaties ratified by Eritrea as well as by the relevant provisions of the ICC Statute, including peremptory norms of international law.

4.15 Legal appraisal of violations of international humanitarian law

With regard to violations perpetrated in the context of domestic and international armed conflicts, the most relevant source of law is international humanitarian law, as contained in the four Geneva Conventions of 1949. Eritrea has been bound by the four Geneva Conventions of 1949 only since 14 August 2000, when the country acceded to them.[211] It may appear that with respect to violations perpetrated prior to 14 August 2000 the four Geneva Conventions have no applicability to Eritrea. However, the Eritrea-Ethiopia Claims Commission, deciding in the context of the 1998-2000 border conflict, clearly asserted that given the universal acceptance of the four Geneva Conventions of 1949, their provisions have become part of customary international law.[212] The legal effect of this is that with respect to violations perpetrated prior to Eritrea's accession to the four Geneva Conventions of 1949, the applicable law is customary international law, including customary international humanitarian law as exemplified by the relevant sections of the four Geneva Conventions of 1949.[213] The Commission went on to further explain that:

> [T]reaties, like the Geneva Conventions of 1949, that develop international humanitarian law are, by their nature, legal documents that build upon the foundation laid by earlier

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210 Compare the above estimations with those provided by AI (n 16 above); UK Home Office (n 14 above); US Department of State (n 14 above) and *ACHPR-EMDHR Communication*. A report by RSF also indicates that there are '314 prison centres scattered throughout the country.' See RSF (n 82 above).

211 Eritrea Ethiopia Claims Commission, *Partial Award, Prisoners of War, Eritrea's Claim 17,* award of 1 July 2003 (hereinafter '*Eritrean POWs Award'*), para 32. See also Eritrean Ethiopia Claims Commission, *Partial Award, Prisoners of War, Ethiopia's Claim 4*, award of 1 July 2003 (hereinafter '*Ethiopian POWs Award*'), paras 23, 26.

212 *Eritrean POWs Award,* para 39; see also *Ethiopian POWs Award,* para 30.

213 *Eritrean POWs Award*, para 38; see also *Ethiopian POWs Award,* para 32

> treaties and by customary international law.[214] These treaties are concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations. The Geneva Conventions of 1949 successfully accomplished both purposes.[215]

Similarly, the law applicable to violations perpetrated in the context of domestic armed conflicts, such as the Dirfo and Qarora Massacres, is customary international law, including customary international humanitarian law as exemplified by the four Geneva Conventions. A provision of international law, such as the four Geneva Conventions, which has attained the status of universal acceptance, is regarded as a peremptory norm of international law or *jus cogens,* from which no derogation is ever permitted.[216] In this regard, Ferreira and Ferreira-Snyman mention the prohibition on the aggressive use of force as a typical example of a peremptory norm of international law.[217]

On the law applicable to non-international armed conflicts, the latest inspiration is to be drawn from the findings of the Darfur Commission. As submitted in the context of the civil war in Darfur, a set of customary rules of international law binding on all parties to a non-international armed conflict has already evolved as a body of international humanitarian law.[218] According to the Darfur Commission, this is a result of: (a) the jurisprudence of international, regional and national courts, such as the Nuremburg and Tokyo Tribunals, the Rwanda and Yugoslavia Tribunals as well as the ICJ; (b) state practice, such as military manuals developed by the armed forces of democratic nations,[219] and (c) pronouncements by states, international organisations and armed

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214 See Richard R Baxter 'Multilateral treaties as evidence of customary international law' 41 (1965-1966) *British Year Book of International Law* 275, 286 (footnote original).

215 *Eritrean POWs Award*, para 39; see also *Ethiopian POWs Award,* para 30.

216 *Furundžija*, ICTY Trial Chamber, judgment of 10 December 1998, para 144, 153-157.

217 Ferreira and Ferreira-Snyman (n 195 above) 153-154; see also footnotes 23-24.

218 *Report of the Darfur Commission,* para 156.

219 In this regard, see, for example, Federal Ministry of Defence of the Federal Republic of Germany *German Manual of Humanitarian Law in Armed Conflicts*, VR II 3, August 1992. In paras 211, 24, it is stated that: 'In a non-international armed conflict each party shall be bound to apply, as a minimum, the fundamental humanitarian provisions of international law embodied in the four 1949 Geneva Conventions (common Article 3), the 1954 Cultural Property Convention (article 19) and the 1977 Additional Protocol II. German soldiers, like their allies, are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflict however such conflicts are characterized.' See also UK Ministry of Defence *The Manual of the Law of Armed Conflict* (2005) 384-98, which sets out what the UK government considers to be 'certain principles of customary international law which are applicable to internal armed conflicts' (para 15.1, 382). With regard to the practice in the US, see 67 (1973) *American Journal*

groups.[220] Article 3 common to the Geneva Conventions encapsulates the core of such customary rules in the form of most fundamental principles related to respect for human dignity, which are strictly to be observed in all international and national armed conflicts. In this regard, the ICJ decided that the provisions of article 3 common to the Geneva Conventions 'constitute a minimum yardstick' applicable to any armed conflict 'and reflect what the Court in 1949 [in the *Corfu Channel* case][221] called elementary considerations of humanity.'[222]

In view of the conclusions reached by the Darfur Commission, based on relevant international case law, states and insurgent groups that have attained some measure of organised structure and effective control over a part of a territory of a given country are legally bound by customary rules of international law regulating internal armed conflicts.[223] In this regard, a global consensus has developed in the form of the legal regulation of internal armed conflict and the criminalisation of deviations from the applicable law. In furtherance of such a growing global consensus, in its judgment in *Tadic*, the ICTY Appeals Chamber held that the main body of international humanitarian law also applies to internal conflicts as a matter of customary law, and that serious violations of such rules constitute war crimes.[224]

To the same degree of international indignation, article 8(2)(c)-(f) of the ICC Statute expressly condemns violations of international humanitarian law in internal armed conflicts and defines such violations as war crimes. Accordingly, 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' against persons taking no active part in the hostilities of an armed conflict not of an international character is regarded as a war crime perpetrated in violation of 'article 3 common to the

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of International Law 124; 2 (1987) *American University Journal of International Law and Politics* 430-431.

220 *Report of the Darfur Commission*, para156.

221 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, Merits, ICJ Reports 1949, 22 (footnote added).

222 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, para 218.

223 *Report of the Darfur Commission*, para 157.

224 *Tadić,* ICTY Appeals Chamber, judgment of 5 July 1999, paras 96-127, 128-137.

four Geneva Conventions of 12 August 1949.' The approach adopted by the ICC Statute was emulated in 2000 by the Special Court for Sierra Leone, the Statute of which empowers the court to exercise jurisdiction over violations of common article 3 to the four Geneva Conventions and Optional Protocol II.[225] The Darfur Commission regards this as a 'culmination of a lawmaking process that in a matter of a few years led both to the crystallisation of a set of customary rules governing internal armed conflict and to the criminalisation of serious breaches of such rules.'[226] The motivation for this is quite understandable:[227]

> States came to accept the idea that it did not make sense to afford protection only in *international* wars to civilians and other persons not taking part in armed hostilities: civilians suffer from armed violence in the course of internal conflicts no less than in international wars. It would therefore be inconsistent to leave civilians unprotected in civil wars while protecting them in international armed conflicts. Similarly, it was felt that a modicum of legal regulation of the conduct of hostilities, in particular of the use of means and methods of warfare, was also needed when armed clashes occur not between two States but between a State and insurgents.[228]

The fact that the peremptory norms of international humanitarian law discussed above are binding on the Eritrean government is beyond contention.[229] What is unresolved is whether such rules are binding on insurgent groups, such as the EIJM. The standard developed in international law with regard to the applicability of customary rules of international humanitarian law to insurgents indicates that such rules are applicable only against armed groups that have attained some measure of organised structure and effective control over part of a territory of a given country.[230] In order to be bound by the relevant rules of customary international law on internal armed conflicts, an armed group must reach a certain threshold of organisation, stability and effective control of territory

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225 See article 3 of the Statute of the Special Court for Sierra Leone, as adopted by Security Council Resolution 1315 (2000).

226 *Report of the Darfur Commission*, para 163.

227 Ibid para 164.

228 Ibid (emphasis original). The Darfur Commission further held that: 'The powerful urge to apply humanitarian law to spare civilians from the horrors of civil wars was expressed in 2000 by the then US Ambassador at large for War Crimes David Scheffer, when he stated in 2000, if "the provisions of Protocol II were followed by rebel and government forces throughout the world, many of the most horrific human tragedies the world has documented within the past decade could have been avoided."' See Sean Murphy (ed) *United States Practice in International Law*, vol I (2002) 370.

229 *Eritrean POWs Award*, para 39; see also *Ethiopian POWs Award,* para 30.

230 *Report of the Darfur Commission*, para 157.

and possess international legal personality.[231] Moreover, in the context of two Sudanese armed groups, the Sudan Liberation Movement (SLM) and the Justice and Equality Movement (JEM), the power to enter into binding international agreements (so called *jus contrahendum*) was also regarded as a very important factor in deciding whether an armed group has attained the relevant organisational threshold to be bound by rules of customary international law.[232]

Whether Eritrean armed rebel groups, such as the Democratic Movement for the Liberation of Eritrean Kunama (DMLEK) and the EIJM, have attained the relevant organisational threshold remains contentious. At times, the rebel groups seem to be seen as well-structured armed organisations, especially in terms of their press releases and information dissemination channels. One of the major armed groups which have been involved in insurgency since the early years of independence is the EIJM, which later changed its name to the Eritrean Islamic Salvation Movement (EISM). According to Awate Team, 'at its zenith of power in 1995,' this armed group was estimated to have a fighting force of 500 men.[233] However, there is no persuasive record of effective and continuous control by any armed group over any part of Eritrean territory in such a way that any of the armed groups can be regarded as having attained the relevant legal threshold. Moreover, none of these armed groups have thus far entered into any binding international agreements with any state or *de facto* state-like organ – agreements which are internationally recognised as binding.

From the history of these armed groups, it appears that the groups have been mainly involved in 'sporadic acts of violence,' which according to article 8(2)(d) of the ICC Statute does not amount to armed conflicts of non-international character. As a result, the applicability of the rules of customary international law to such groups is less probable. The rules of customary international humanitarian law as regards the conduct of domestic armed conflicts are, however, always applicable against the Eritrean government.[234]

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231 Ibid para 172.
232 Ibid para 174.
233 Awate Team (n 75 above).
234 See *Eritrean POWs Award*, para 39; see also *Ethiopian POWs Award,* para 30.

For purposes of the Dirfo, Qarora and other massacres, as well as other violations, the set of peremptory norms of international humanitarian law legally binding on the Eritrean government are those provisions extensively quoted in Chapter 3 section 3.4. The applicable international customary rules on internal armed conflict contain explicit provisions on the protection of civilians and individuals who are not participants in an armed conflict, provisions which also apply equally to international armed conflicts. Accordingly, the major obligations of the Eritrean government in this regard are: (i) the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder; (ii) the prohibition on deliberate attacks on civilians; (iii) the prohibition on indiscriminate attacks on civilians, even if there may be a few armed elements among the civilians; (iv) the prohibition on attacks aimed at terrorising civilians; (v) the prohibition on torture and any inhuman or cruel treatment or punishment; (vi) the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence; (vii) the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognised as indispensable by the world community, and (viii) the prohibition on collective punishments.[235]

The international case law and practice discussed together with the factual and legal findings in the preceding paragraphs evince that the Eritrean government is legally bound by all such rules of customary international law, the violations of which are now criminalised under international law. Any violation of these rules, be it in an international

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[235] For the relevant provisions of international humanitarian law, see the discussion in Chapter 3 section 3.4. Compare this with Article 282 (War Crimes against the Civilian Population) of the Transitional Penal Code of Eritrea, which provides: 'Whosoever, in time of war, armed conflict or occupation, organises, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions: (a) killings, torture or inhumane treatment, including biological experiments, or any other acts involving dire suffering or bodily harm, or injury to mental or physical health … is punishable with rigorous imprisonment from five years to life, or in cases of exceptional gravity, with death. See also generally articles 281-292 (Special Part, Book III, Title II, Chapter I) of the Penal Code, which deal with war crimes and crimes against humanity. Many of the crimes criminalised by international humanitarian law are also defined by the relevant provisions of the Penal Code. Particularly, see article 292 which criminalises the denial of justice to civilians and POWs in times of armed conflict. Article 283 protects the wounded, sick and shipwrecked persons. Article 284 protects POWs and interned persons.

or non-international armed conflict, entails individual criminal responsibility on the part of the authors.[236] If the allegations on the Dirfo and Qarora Massacres, as well as other incidents, are proved correct, war crimes, crimes against humanity and other serious violations of international humanitarian law have been perpetrated at the instigation of state officials in contravention of established principles of international law. Accordingly, a case can be made for the prosecution of such crimes before competent courts. The arguments in this regard are also equally applicable in the context of violations, especially the crime of aggression and other transgressions, perpetrated in the armed conflicts with Ethiopia and Yemen.

4.16 Conclusion

The legal appraisal of factual findings on major violations of international law provides a sufficient basis for prosecutorial considerations. The international legal implication in this regard is clearly evident. An examination of the most important and representative acts, trends and patterns of abuse relevant to the determination of individual criminal responsibility reveals that individuals who do not subscribe to state ideology are systematically targeted and receive the severest of punishments under the security and military apparatus of the government. Fear of retribution for independent political and religious thought is part of daily life in Eritrea. There is a consistent and reliable body of information in the form of reports, eye witness accounts and documentary evidence gathered by international rights groups, exiled civil society and opposition groups, scholarly research and publications and other sources, reasonably indicating the individual criminal responsibility of a certain category of government leaders in Eritrea. The most reliable accounts in this regard come from regional and international judicial bodies, amongst others, as well as from the domestic tribunals of democratic dispensations.

Most accounts of international human rights violations depict a pattern of indiscriminate attacks against persons who demonstrate political defiance or dissent as well as religious

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[236] *Report of the Darfur Commission*, paras 167, 175.

inclination not officially 'recognised' by the government. Analysis of facts by most observers indicates that the magnitude, intensity and consistency of human rights violations noticeably increased after September 2001, when, as a result of a widespread political crackdown, the country was literally changed into a police state. A common conclusion is that in response to growing political dissent, the government consistently implemented repressive policies which amount to international crimes. Furthermore, most reports have consistently noted that those targeted by the security and military apparatus are individuals who are perceived by the government as opponents.

Hundreds of incidents have been reported by different sources, including massacres, summary executions, isolated incidents of killings and assassinations, rape and other forms of sexual violence, torture, abduction, enforced disappearance, detention without trial and other categories of international crimes. Most of the crimes bear the fundamental features of crimes against humanity. It is plausibly estimated that the number of victims of detention without trial may exceed 20 000. This strengthens the argument that crimes against humanity have been committed in a systematic and widespread manner to achieve common or specific objectives and interests of Eritrean government officials. Eritrean government officials have also committed violations of international humanitarian law. Two of the most important categories of international crimes in this regard are war crimes and the crime of aggression. The humanitarian law violations involved in the Eritrea-Yemen border conflict are, relatively speaking, of a minimal magnitude. However, in the context of the 1998-2000 Eritrea-Ethiopia border conflict, Eritrean government officials, most notably the state president, have perpetrated war crimes of a graver magnitude, with only few comparable instances since WWII.

Other violations of international humanitarian law include atrocities perpetrated by government officials in the context of low level internal armed conflicts between government troops and armed Eritrean rebel groups. These conflicts have resulted in intolerable violations such as the Dirfo, Qarora and other massacres in which hundreds of Eritreans were massacred extra-judicially. Eritrean government officials are also notorious for their interference in the domestic affairs of others and promoting state

sponsorship of terrorism, which involve flagrant violations of peremptory norms of international law, as well as UN Security Council Resolutions. By this, Eritrean government officials have destabilised the whole Horn of Africa. The legal appraisal of the factual findings reveals that the international crimes perpetrated by Eritrean government officials constitute violations of international obligations emanating from major treaties ratified by Eritrea. The crimes also violate a universally accepted and recognised body of peremptory norms of international law. As such, they entail individual criminal responsibility on the part of the authors.

CHAPTER FIVE

PROSECUTION AS A MAJOR INSTRUMENT OF ACCOUNTABILITY

Outline

5.1 Introduction

The legal appraisal of the factual findings in Chapter 4 has established the basis for the conclusion that international crimes of universal concern have been perpetrated in Eritrea with impunity. With the complete non-availability of domestic remedies, international criminal law is the only viable legal regime under which accountability mechanisms can

be considered. Grave violations of human rights and humanitarian law entail legal implications under international law. In relation to this problem, the eminent South African professor of international law, John Dugard, argues that there are two major ways to deal with systematic and large scale violations of international law in a given country. This can be done either through prosecutorial mechanisms implemented by national or international courts, or through truth and reconciliation commissions.[1] The discussion of the second option and the legal and political dimensions associated with it will be done in Chapter 6. The present chapter discusses prosecutorial responses as a major means of effecting transitional justice.

Drawing on the latest developments of international criminal law, the chapter explores the legal basis for the prosecution of the human rights and humanitarian law violations perpetrated since the country's independence in 1991. An increasingly important means of challenging the perpetration of international core crimes is the punishment of persons responsible for such violations through the principle of universal jurisdiction and the duty to prosecute graver violations of international law. The analysis in this chapter is based on the modern historical development of a system of enforceable international criminal law which dates back to the Nuremberg and Tokyo Trials up to contemporary prosecutorial forums for atrocities perpetrated in the former Yugoslavia, Rwanda, Sierra Leone and other parts of the world. This will help to reflect on the critical legal question of whether and to what extent states are under an international legal obligation to prosecute massive human rights violations. The objective is to identify the most important normative standards of international law which dictate the choice of a system in a given situation. Based on a reliable body of information, the chapter also draws tentative conclusions on the identification of the most responsible perpetrators for the grave violations of international law perpetrated in Eritrea since 1991.

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[1] John Dugard 'Possible conflicts of jurisdiction with truth commissions' in Antonio Cassese, P Gaeta and JWRD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* vol 1 (2002) 693. See also William A Schabas 'Introduction' in William A Shabas and Shane Darcy *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (2004b) 1-2.

5.2 The duty to prosecute under international law

No scholarly finding has yet proposed a generally satisfactory solution for the dilemma (Hobson's choice, according to Orentlicher[2]) societies may face during and after periods of massive human rights and humanitarian law violations. Consequently, scholars are sharply divided over what policy would best promote a democratic transition after an atrocious past. There seems to be, however, a common understanding on the importance of identifying relevant international law principles dealing with past human rights violations. Accordingly, international law scholars agree widely on the recognition that the legacy of grave and systematic violations generates obligations that the state owes to the victims, the society and the international community. One aspect of transitional justice is founded on this valid assumption.[3]

Prosecution is a necessary and desirable means of responding to past atrocities, but only with strict fair trial guarantees.[4] According to Mendez, the accountability problem in terms of massive violations of international law has three main dimensions: legal, moral and political. It would be impractical to address issues of transitional justice in an isolated context which considers only one of the above dimensions. This means that regard must be had to a sober and realistic view of political constraints and moral considerations when proposing accountability measures based on legal considerations. It is this multiplicity of dimensions that 'has changed how human rights [scholars and institutions] conceive their work and how they work to promote and defend fundamental freedoms,'[5] against the backdrop of rising global concern on the issue of human rights. However, mixing the above dimensions in one discussion might end up complicating the issue at hand. Clearly,

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2 Diane Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' 100 (1991) *Yale Law Journal* 2539.

3 Orentlicher (n 2 above). For a revised position of the same author (former UN Expert on Combating Impunity) on transitional justice issues, see generally Diane Orentlicher '"Settling accounts" revisited: Reconciling global norms with local agency' 1(1) 2007 *International Journal of Transitional Justice* 10-22.

4 Juan E Méndez 'Accountability for past abuses' 19 (1997) *Human Rights Quarterly* 255.

5 Ibid 256.

all factors must be discussed systematically and separately.[6] This section discusses legal dimensions.[7]

Current debate on massive human rights and humanitarian law violations emphasises prosecution, an option regarded as the classic response to such violations.[8] Seemingly instinctively, people widely accept that only such mechanisms can secure justice and accountability after a wave of disastrous atrocities. Therefore, criminal accountability is one of the main options societies can exercise in dealing with massive violations, particularly when the issues to be dealt with involve grave violations of international law. In this regard, national prosecutions are one of the ways by which states can prosecute individuals responsible for massive violations. Nonetheless, states may be found to be unable or unwilling to fulfil this obligation for various reasons (as is the case currently in Eritrea). International criminal law as one form of accountability comes into play when perpetrators of grave violations cannot be prosecuted by national courts. International criminal law functions in one of two ways: either as a substitute[9] to national criminal persecutions or as complementary[10] to such proceedings. The duty to prosecute under international law denotes the judicial response to violations of international law standards that reach *the legal threshold of international crimes* which were defined in Chapter 3.

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6 Ibid.

7 Moral and political dimensions will be discussed in Chapter 6.

8 See for example, Antonio Cassese *International Criminal Law* (2003) 6, where it is asserted that '[t]he normal response to atrocities … is to bring the alleged perpetrators to justice in the courts of the State where the crimes were perpetrated, or of the State of nationality of the alleged perpetrator.' This is what is known as the principle of *active nationality*. Cassese also takes note of the gradual development of the principle of *passive nationality* which enables the state of nationality of the victim to exercise jurisdiction over the matter. Compare this approach with universal jurisdiction which is gaining renewed attention in recent years, as discussed in section 5.5 below.

9 This is the fundamental guiding principle in the ICTY and ITCR. See William A Schabas *An Introduction to the International Criminal Court* 2nd edn (2004a) 67; Federica Gioia 'State sovereignty, jurisdiction, and "modern" international law: The principle of complementarity in the International Criminal Court' 19 (2006) *Leiden Journal of International Law* 1109.

10 This is the fundamental guiding principle in the ICC. See Schabas (n 9 above) 67; Gioia (n 9 above) 1109.

5.3 Relevant international standards

According to Bassiouni and Wise, the most important aspect of international criminal law is the repression of conduct perceived to be harmful to the interests of the international community as a whole. This requires that states accept an obligation either to try international offenders before their own courts or surrender them for trial before a foreign or international court.[11] This obligation appears in several international instruments in the form of an explicit provision requiring states either to prosecute or extradite offenders of international crimes (the principle of *aut dedere aut judicare*). As a basic postulate inherent in the concept of a world community, it has become a matter of definite legal obligation solidified not only by treaty but also by customary or general international law.[12] In this regard, remarkable progress in the development of case law is demonstrated in several countries.[13]

Generally speaking, treaties incorporating the principle of *aut dedere aut judicare* are said to have adopted the language of article 7 of the 1970 Hague Convention on the Suppression of Unlawful Seizure of Aircraft (The Hague Convention).[14] The approach adopted by this convention is believed to have been used as a model in a series of subsequent agreements; and it requires a state in which an offender is found either to extradite him to a state which is acknowledged to have jurisdiction over the offence or alternatively, if it does not extradite, 'to submit the case to competent authorities for the purpose of prosecution.'[15] One of the major treaties, which replicates the above approach,

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11 M Cherif Bassiouni and Edward M Wise *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) xi. See also Edward M Wise 'The obligation to extradite or prosecute' 27 (1993) *Israel Law Review* 268; Orentlicher (n 2 above).

12 Bassiouni and Edward M Wise (n 11 above) xi.

13 See, for example, the decision of a French court in *Gadhafi*, Paris Court of Appeal (*Cour d'appèl de Paris*), *Chambre d'accusation*, decision of 20 October 2000, no 1999/05921, in RGDIP (2001) 451 and further, where the court quoted the Preamble of the ICC Statute which reaffirms 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'

14 Bassiouni and Wise (n 11 above) 3.

15 Ibid. Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970. The full content of article 7 of this Convention reads: 'The Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.'

and important for the discussion in this chapter, is the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). A version of The Hague Convention formula also appears in several regional conventions such as the Organisation of American States (OAS) Terrorism Convention of 1971,[16] the European Terrorism Convention of 1977[17] and the OAS Torture Convention of 1985.[18]

There are numerous international crimes the authors of which must be either prosecuted or extradited by world states. Based on the classification of Bassiouni and Wise and other scholars of international criminal law, these international crimes have been thematically catalogued in Chapter 3.[19] Amongst these categories of international crimes four are most relevant for the purpose of this study. These are war crimes, crimes against humanity, aggression and torture. The latter category is often included and discussed under crimes against humanity. It is wise, therefore, to limit the discussion in this chapter to war crimes, crimes against humanity and aggression or generally to limited categories of international crimes. The underlying factor for focusing on these categories is that most of the atrocities perpetrated in Eritrea can be appropriately classified under these classifications of international crimes.

5.4 The principle of *aut dedere aut judicare*

The obligation expressed in the Latin phrase, *aut dedere aut judicare,*[20] is often referred to as an alternative duty. States have one of two possible choices: extradite if they do not prosecute and prosecute if they do not extradite.[21] Different international instruments incorporating the principle of *aut dedere aut judicare* use different wording to impose the duty to prosecute or extradite authors of international crimes. The formulae used include language binding the parties to

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16 OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 2 February 1971, article 7.

17 European Convention on the Suppression of Terrorism, 27 January 1977, article 1.

18 Inter-American Convention to Prevent and Punish Torture, 9 December 1985, article 14.

19 See the discussion in Chapter 3 section 3.8. See also Bassiouni and Wise (n 11 above) 7; and generally M Cherif Bassiouni *International Crimes: Digest/Index of International Instruments* II (1986) 1815-1985.

20 Bassiouni and Wise (n 11 above) xi.

21 See Wise (n 11 above) 268; Orentlicher (n 2 above) 37.

> cooperate to the fullest possible extent, in repressing prohibited conduct; to take the measures necessary to suppress it; to take or recommend the necessary measures to their respective legislatures; to enact effective laws or regulations for the purpose; to declare it an offence punishable by law, or provide that it shall be a punishable offence; to adopt measures for prohibiting and punishing it; to impose penalties or administrative sanctions; to enact the legislation necessary to provide effective, or adequate, penalties; to take the necessary steps to ensure that the offence is punished in accordance with its gravity; to make it a criminal offence punishable by severe penalties; to establish jurisdiction over it; to make it subject to legal proceedings; to take all measures to discover, prosecute, and punish offenders; to search for offenders, to prosecute and punish them; to submit the case to the competent authorities for the purpose of prosecution; or to bring offenders before its courts.[22]

Some of the instruments also contain an alternative obligation to extradite offenders to a foreign country. However, Bassiouni and Wise caution that a treaty imposing an obligation to extradite does not necessarily make a given offence an international crime. To consider extradition as an independent criterion of international criminality would have the adverse effect of turning virtually all major domestic offences into international crimes.[23]

The principle *aut dedere aut judicare* appears to have attained the status of customary international law. This is so because the principle has been duly endorsed by international legal proceedings as in the *Lockerbie* case.[24] The duty to prosecute is a matter of general international law with respect to certain kinds of international crimes such as crimes against humanity.[25] Such crimes are crimes against world public order and hence reprehended by the international community as a whole, the *civitas maxima*. The rules prohibiting international crimes constitute *jus cogens* norms. They are rules of paramount importance for the world public order. Therefore, the principle *aut dedere aut judicare,* in so far as it constitutes a rule of general international law, is a *jus cogens* principle.[26]

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22 Bassiouni and Wise (n 11 above) 8-9.

23 Ibid 11.

24 *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v United Kingdom*), Provisional Measures, order of 14 April 1991, [1992] ICJ Reports 3; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Arial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Provisional Measures, order of 14 April 1992, [1992] ICJ Reports 114.

25 See the discussion in Chapter 3 section 3.8.

26 Bassiouni and Wise (n 11 above) 22 and further. On *jus cogens* norms in international law see generally Gennady M Danilenko 'International *jus cogens*: Issues of law-making' 2(1) (1991) *European Journal of International Law* 42-65; Andreas O'Shea 'Doctrines of International Criminal Law' in Ben Brandon and Max du Plessis '*The Prosecution of International Crimes: A*

Once it is asserted that states have a general obligation under international law either to prosecute or extradite authors of certain categories of international crimes irrespective of where such crimes are committed and to which nationality the perpetrators or victims belong, the most likely issue to follow is: what happens if states fail to fulfil this obligation? One of the possible answers to this normative issue is found in the notion of universal jurisdiction.

5.5 The principle of universal jurisdiction[27]

The principle of universality empowers a state to bring to trial persons who are accused of international crimes. This can be done regardless of where the crime is committed or what the nationality is of the offender or the victim. The development of this principle dates back to the seventeenth century where it was first used in connection with piracy in order to combat a concern that affected all states.[28] The common concern of all states to collectively combat offences of a grave nature was the foundation of the principle of universality. By this principle states are authorised to prosecute and punish, on behalf of the international community, persons responsible for special crimes of a grave nature.[29]

According to Van der Vyver, the underlying justification behind this principle is a commonly shared interest in the protection of universally held values and norms.[30] As the

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Practical Guide to Prosecuting ICC Crimes in Commonwealth States (2005) 111; Neels Swanepoel 'Universal jurisdiction as a procedural tool to institute prosecution for international core crimes' 32(1) (2007) *Journal for Juridical Science* 124.

27 Universal jurisdiction is defined as: 'the exercise of jurisdiction by a State over a person who is said to have committed a limited category of international crimes, regardless of where the offense took place and irrespective of the nationality of the offender or the victim.' See Ben Brandon 'Jurisdiction and Complementarity' in Brandon and Du Plessis (n 26 above) 22. See also Menno T Kamminga 'Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offences' 23(4) 2001 *Human Rights Quarterly* 952.

28 See generally Luc Reydams *Universal Jurisdiction: International and Municipal Legal Perspectives* (2004).

29 Cassese 2003a (n 8 above) 285.

30 Johan D van der Vyver 'Universal jurisdiction in international criminal law' (1999) *South African Yearbook of International Law* 117. Swanepoel on his part describes this phenomenon as a one of the natural consequences of globalisation. Swanepoel (n 26 above) 140. In this regard, Chayes and Slaughter also argue that: '[T]he international community is no longer prepared to stand aside while a government commits gross violations of fundamental human rights under the rubric of internal affairs.' Abraham Chayes and Annie-Marie Slaughter 'The ICC and the Future of the

Supreme Court of Israel held in *Eichmann*,[31] the crimes over which universal jurisdiction may be exercised are of such a gravity and magnitude that they warrant universal prosecution and repression. It was further argued by the same court that:

> Not only do all the crimes attributed to the appellant [a former senior Nazi official] bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universality of jurisdiction and in the capacity of a guardian of international law and agent for its enforcement, to try the appellant.[32]

Therefore, should a territorial state (a state in which the crime was committed) or a national state (the state whose citizen has committed a crime or the state against whose citizen a crime was committed) fail to take action against an alleged perpetrator of international crimes, any state is authorised to substitute itself for the natural judicial forum. Strongly influenced by such international rules, several states[33] have domesticated the principle of universal jurisdiction in their national laws by what is generally called enabling legislation. The proposition was taken up by national courts in several countries, giving it a status of customary international law.[34] One can fairly argue that the principle of universal jurisdiction has become a well established rule of customary international law. This has been reflected in leading international cases such as *Yunis*,[35] *Demjanuk,*[36] *Pinochet,*[37] and *Arrest Warrant*[38] where the underlying assumption was that the grave

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Global Legal System' in Sara B Sewall and Carl Kaysen (eds) *The United States and the International Criminal Court* (2000) 240.

31 *Eichmann*, Israel Supreme Court, judgment of 29 May 1962, English translation in 36 ILR 277-342. The court further held that 'the peculiarly universal character of these crimes vests in every state the authority to try or punish anyone who participated in their commission.'

32 Although it could be argued that most of the surviving victims and the relatives of victims of Eichmann's offences were in Israel by the time of the prosecution, *Eichmann* appeared to be the first case in which a person accused of crimes against humanity was tried in a state with which he had no formal links. Cassese 2003a (n 8 above) 293, 394.

33 For a list of countries which have already enacted national enabling legislation for the prosecution of international crimes see AI 'Universal jurisdiction,' available at http://web.amnesty.org/pages/uj-index-eng (accessed 13 September 2007).

34 Cassese 2003a (n 8 above) 286; see also Max du Plessis and Andreas Coutsoudis 'Serious human rights violations in Zimbabwe: Of international crimes, immunities, and the possibility of prosecutions' 21 (2005) *South African Journal on Human Rights* 359-360.

35 *Yunis*, United States, US District Court for the District of Columbia, judgment of 23 February 1988, 681 F SUPP 909 (1989 US Dist) LEXIS 2262.

36 *Demjanjuk v Petrowsky et al*, US Court of Appeals for the Sixth Circuit, decision of 31 October 1985 in (1985) 776 F 2d 571 (6th Cir 1985), 1985 US App LEXIS 24541; also in 79 ILR 534-547.

37 *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, UK, House of Lords, judgment of 24 March 1999 in [1999] 2 All ER 97-192.

nature of international crimes justifies states taking universal jurisdiction over such crimes wherever committed.

Of all these cases, *Hirut Abebe-Jira and others v Kelbessa Negewo* in which the US Court of Appeals for the District of Georgia ordered the deportation of a former torturer of the former communist regime in Ethiopia, who had been living in the US for several years, is most relevant to the debate in Eritrea.[39] This happened after a US federal immigration judge passed an order of deportation against the 'suspected mastermind of the infamous tortures of dissidents during the 1970s in Ethiopia.'[40] Kelbessa Negewo is believed to have been 'on the top list of Ethiopia's most wanted extraditables for committing numerous acts of torture during the then military dictatorship rule in Ethiopia.' According to the same source, 'Kelbessa was responsible for arresting, torturing and killing perceived political opponents in Ethiopia during the 1970s as part of the military dictatorship led by Mengistu Hailemariam.' During that time, Kelbesa was 'a chairman of what was called the "Higher 9," one of several specialised units in Addis Ababa that employed a campaign of torture, arbitrary imprisonment and summary executions against perceived enemies of the government.'[41]

The growing international case law on universal jurisdiction has resulted in the broadening of the jurisdiction of national courts over international crimes. Another pertinent experience in this regard took place in the Netherlands as demonstrated in the *Bouterse* case.[42] The case involves a Surinamese political activist who allegedly

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38 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* ICJ Reports (2002) 3 ('the *Arrest Warrant* case').

39 See *Hirut Abebe-Jira and others v Kelbessa Negewo*, US Court of Appeals for the District of Georgia, decision of 10 January 1996, 72 F 3d 844 (11th Circ 1996), also in AILC, Third Series, vol 2, 643-647.

40 *People's Daily Online* 'US to deport torture suspect to Ethiopia,' 31 July 2005.

41 Ibid. Investigation against the torturer 'began after several of his reputed torture victims who had relocated from Ethiopia to Atlanta encountered him in the city by chance.' The investigation showed that Kelbessa made false statements about his past human rights violations to obtain his US citizenship, which led to its revocation in October 2004. He 'was arrested under provisions of the US Intelligence Reform Act.' US Immigration Judge William A Cassidy finally ordered Kelbessa be removed from the US.

42 *Bouterse*, The Netherlands, Amsterdam Court of Appeal, decision of 20 November 2000, as cited in Antonio Cassese 'When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium* Case' 13 (2002) *European Journal of International Law* 870.

perpetrated the killing of several political opponents in his country of origin. He was brought to trial for torture in a Dutch court under the universality principle laid down in the CAT, implemented in the Netherlands in 1989. The Amsterdam Court of Appeals decided that it had jurisdiction to try the offender based on the principle of universal jurisdiction.[43]

Du Plessis and Coutsoudis mention Belgium as one of the best examples of countries which have enacted legislation to enable their courts to prosecute international crimes.[44] Article 5 of the relevant legislation, *Loi relative à la repression des violations graves de droit international humanitaire*, as amended on 23 April 2003, provides that:

> Except in the event of abstention from jurisdiction as provided in one of the situations set forth in the following paragraphs, Belgian courts shall have jurisdiction over the violations provided by the present law, independently of where they have been committed and even if the alleged offender is not located within Belgium.[45]

Based on the above legislation, four Rwandan citizens were convicted on 08 June 2001 by the Brussels Criminal Jury Court, Cour d'Assises, for their involvement in the Rwanda Genocide.[46]

In all the above cases the corresponding findings underpinned the understanding that international crimes are contrary to a peremptory norm of international law so as to infringe *jus cogens* and as such they are regarded as an attack on the international legal

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See also *Adolfo Scilingo*, Spain, Central Criminal Court (*Audiencia nacional*), Order (auto) of 5 November 1998, No 1998/22605, Rec 173/1998, in EL DERECHO, 8.

43 Cassese 2002 (n 42 above) 870.

44 Du Plessis and Coutsoudis (n 34 above) 360.

45 As quoted in Du Plessis and Coutsoudis (n 34 above) 360. Compare this, for example, with Canada's *Crimes Against Humanity and War Crimes Act* (2000); the US *Alien Tort Claims Act* (2004) and the US *Torture Victim Protection Act* (1992).

46 Du Plessis and Coutsoudis (n 34 above) 360. See also AI (n 33 above); *Pinochet*, Belgium, Brussels Investigating Judge (*juge d'instruction*) order of 6 November 1998, in *Revue de droit penal et de crimologie*, 1999 278-300; as well as Brussels Court of Appeal (*Chambre de mise en accusation*), decision of 17 May 1995, in *Journal des Tribunaux*, 1995 542-543. Belgium is one of the leading countries where the principle of universal jurisdiction is notable in its national laws. Belgian courts have jurisdiction over grave breaches of international law no matter where such offences take place, by whom or against whom they are committed, and whether or not the offender is on Belgian territory. Crimes against humanity is one category of such crimes.

order.[47] Cassese contends that all such developments of customary international law are in line with the *Lotus*[48] principle in which it was affirmed (by the Permanent Court of International Justice) that states are authorised to prosecute extraterritorial offences provided that by so doing they do not breach a prohibitive rule of international law.[49] The principle of universal jurisdiction was later restated in the ICC Statute which requires all states to pass legislation by which their international obligation emanating from the ICC Statute should be implemented.[50] This means that states can exercise universal jurisdiction over crimes of an international nature in two major ways. One possibility is through general enabling legislation that allows a country's domestic courts to try international crimes. Such legislation generally emanates from international treaty obligations assumed by states party to relevant treaties, such as the CAT. The second option can be implemented through complementarity legislation enacted pursuant to the obligations of states party to the ICC Statute. Under these two scenarios, there is a general possibility for the prosecution of perpetrators by foreign municipal courts.[51]

5.6 Categories of universal jurisdiction

According to Cassese, there are two different versions of the principle of universal jurisdiction. In the first version, known as conditional universal jurisdiction (narrow notion), the presence of the accused on the territory of the state proposing to prosecute her or him is a condition for the existence of jurisdiction – *forum deprehensionis*. This approach does not only grant states the power to prosecute but also obliges them to do so or alternatively extradite the suspect to a state concerned.[52] The second approach is called the broad notion of universality or absolute universal jurisdiction. It allows a state to

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47 This same approach was adopted and restated by an Argentine judge in *Simon Julio, Del Cerro Juan Antonio*, Argentina, Federal Judge Gabriel R Cavallo, judgment of 6 March 2001, Case No 8686/2000, unpublished typescript, 1-133, as quoted in Cassese 2003a (n 8 above) 294.

48 *Lotus* (*France v Turkey*), Permanent Court of International Justice, judgment of 7 September 1927, Series A No 10.

49 Cassese 2003a (n 8 above) 294.

50 A best and recent example of ICC implementation statute is the South African Implementation of the Rome Statue of the ICC, Act 27 of 2002 – correctly called 'an African example.' (Hereinafter 'ICC Implementation Act).' See generally Max du Plessis 'South Africa's Implementation of the ICC Statute: An African example' 5 (2007) *Journal of International Criminal Justice* 460-479.

51 Du Plessis and Coutsoudis (n 34 above) 359-362.

52 Cassese 2003a (n 8 above) 294. See also Brandon (n 27 above) 27.

prosecute offenders accused of international crimes irrespective of their nationality, the place of commission of the crime, the nationality of the victim, and even whether or not the accused is in custody or at any rate present in the forum state. This approach is premised on the failure of the territorial or the national state to prosecute and can only be activated after such failure.[53]

Based on the above assumption, the House of Lords, in the *Pinochet* case, held that the UK courts had jurisdiction over the crimes of torture allegedly committed by Pinochet and that the suspect could therefore be extradited to Spain.[54] On the same grounds, the former Chadian dictator Hissène Habré was arrested and brought to trial in Senegal for the alleged crime of torture during his reign in Chad.[55] He was, however, subsequently released on purely legalistic or procedural grounds. Nonetheless, a Belgian judge has also issued an international warrant charging the former Chadian dictator of atrocities committed during his rule.[56] In the *Munyeshyaka*[57] case, French courts asserted jurisdiction over a case concerning a Rwandan priest accused of torture as well as crimes against humanity.[58]

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53 Du Plessis and Coutsoudis (n 34 above) 360.

54 *Pinochet* (n 37 above), as per Lord Millet 171-179 and Lord Phillips 186-190. Juan Méndez discusses the *Pinochet* case as one of the best instances in which states' increasing willingness to exercise universal jurisdiction was demonstrated clearly. This represents, according to the author, a developing restriction on immunity for international crimes. The author further comments that: 'For decades "universal jurisdiction" was largely a theoretical possibility … The arrest warrant issued by Spanish Judge Baltazar Garzon, and its serious treatment by British authorities changed all that.' See Juan E Méndez 'International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships' in Dinah Shelton (ed) *International Crimes, Peace and Human Rights* (2000) 65.

55 *Hissène Habré*, Senegal, Supreme Court, 20 March 2001, also available at www.icrc.org/ihl-nat.nsf. For a critical discussion in the Habré case, see generally Dustin N Sharp 'Prosecutions, developments, and justice: The trial of Hissène Habré' 16 (2003) *Harvard Human Right Journal* 147-177.

56 HRW 'Hissène Habré to face extradition to Belgium for human rights atrocities,' available at http://hrw.org/english/docs/2005/09/29/chad11802.htm (accessed 29 September 2005). According to the same source, the principle of universal jurisdiction has destroyed 'the wall of impunity behind which the world's tyrants had always hidden to shield themselves from justice.'

57 *Munyeshayka* (case of the Rwandan priest), France, Court de Cassation, decision of 6 January 1998, Bulletin Crim, 1998, 3-8.

58 However, international law scholars agree that due to the vagaries of political interests, the application of human rights treaties by national courts remains sporadic. See Cassese 2003a (n 8 above) 9-12. A state is also accountable for human rights violations perpetrated by its agents abroad in another country. Compare this with what diplomatic missions of the Eritrean government have done in the case of asylum seekers in several countries: Libya, Malta, South Africa and Sudan. Relevant to this issue is the finding in *Delia Saldias de Lopez v Uruguay*,

5.7 Challenges to universal jurisdiction

There are, however, fundamental impediments to the notion of universal jurisdiction. These are based on the age-old doctrine of state sovereignty which does not allow interference in the domestic affairs of another state. Although universal jurisdiction intends to further universal values, non-interference in the internal affairs of other states still constitutes an essential pillar of international law.[59] The second major objection to the principle of universal jurisdiction focuses on the disturbance courts may create in international diplomatic relations. This is true particularly when the suspect or the accused is a state agent still in office such as a head of state, a foreign affairs minister or a diplomat.[60]

One of the most pertinent examples in this regard is the *Fidel Castro* case.[61] In 2000 the Cuban head of state was accused of certain crimes before a Spanish court. The court did not exercise jurisdiction over the matter on the grounds that the law under which Castro was accused was not applicable to heads of state in office, and who thus enjoyed immunity by virtue of their office. This interpretation was also employed by the International Court of Justice (ICJ) in the *Arrest Warrant* case which involved the issuance of an arrest warrant by a Belgian court against a Congolese foreign minister.[62] Accordingly, Belgium was said to be prevented from exercising jurisdiction over the

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Communication No 52/1979, UN Doc CCPR/C/OP/1 88 (1984), judgment of 29 July 1981. This case deals with the fate of a Uruguayan citizen who 'was kidnapped in Buenos Aires [Argentina] by members of the "Uruguayan security and intelligence forces" who were aided by Argentine paramilitary groups, and was secretly detained in Buenos Aires for about two weeks.' Together with several Uruguayan nationals, the victim was 'illegally and clandestinely transported to Uruguay, where he was detained incommunicado by the special security forces at a secret prison for three months.' The UN Human Rights Committee decided that Uruguay was under an obligation 'to provide effective remedies' to the victim 'including immediate release, permission to leave Uruguay and compensation for the violations which he has suffered, and to take steps to ensure that similar violations do not occur in the future.' See, particularly para 14 of the ruling.

59 See, for example, article 2(1) of the UN Charter which provides that the UN 'is based on the principle of the sovereign equality of all its Members.' See also John Dugard *International Law: A South African Perspective* (2005) 126; Ilias Bantekas and Suzan Nash *International Criminal Law* (2003) 143; Edward M Wise and Ellen S Podgor *International Criminal Law: Cases and Materials* (2000) 28; Swanepoel (n 26 above) 125.

60 Cassese 2003a (n 8 above) 298.

61 As discussed in Dugard (n 59 above) 252.

62 *Arrest Warrant* (n 38 above), Joint Separate Opinion of Judge Higgins, Kooijmans and Buergenthal 454.

Congolese foreign minister as both countries are considered equal in international law. The practical limitations to the principle of universal jurisdiction in so far as incumbent high-ranking government officials are concerned are clearly evident from the *Arrest Warrant* case. The ICJ held that there are certain immunities attached to incumbent high-ranking officials, such as the head of state, diplomatic agents and senior members of cabinet, trumping the possibility of prosecution for international crimes in foreign municipal courts. The immunity remains intact while the person is in office, no matter what the nature of the action is, even if it constitutes a crime of international concern.[63] As such, the court may have delivered a balanced and legally suitable solution to an intricate matter. In the opinion of the court, high-ranking state officials may only be prosecuted for their crimes after leaving office. The underlying assumption of this type of objection to the principle of universality is that the arrest and prosecution of an incumbent top government official may seriously jeopardise the conduct of international affairs of the state for which that person acts as a senior official.[64]

Similarly, the international customary law on immunities appears to ensure in another jurisdiction that the incumbent President of Zimbabwe and his foreign minister are shielded from prosecution in a foreign municipal court as long as they continue to assume public office. In this regard, the US District Court held that:

> The emerging consensus points to a rule of law encompassing uniquely the scope of immunity of foreign heads of state from the jurisdiction of the United States courts. It holds that in enacting the [US Foreign Sovereign Immunities Act (FSIA)],[65] Congress did not envision disturbing the traditional practice of the State Department … conferring upon recognised heads-of-state absolute protection from the exercise of jurisdiction by courts in this country.[66]

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63 Cassese 2003a (n 8 above) 271.

64 In the *Arrest Warrant* (n 38 above) para 15, the ICJ held that an opposite approach 'would risk creating total judicial chaos' and arbitrariness in the international community. For criticism on the ruling of the ICJ in the *Arrest Warrant,* see generally Cassese (n 42 above) 853-875; also Dugard (n 59 above) 252; Swanepoel (n 26 above) 133.

65 28 USC § 1603 (footnote added).

66 *Tachiona v Mugabe* 169 F Supp 2d 259, per US District Judge Victor Marrero, 288. Similarly, in the *Mofaz* case, a British judge held that the personal immunity applicable to a minister of foreign affairs, as argued by the IJC in the *Arrest Warrant* (n 36 above), is also applicable to a minister of defence. However, it was argued by the same judge that it would be 'unlikely that ministerial appointments such as Home Secretary, Employment Minister, Environment Minister, Culture, Media and Sports Minister would automatically acquire a label of state sovereignty.' See *Application of Arrest Warrant against General Shaul Mofaz* as reported in 53 (2004) *International*

An application for an arrest warrant and extradition of the incumbent President of Zimbabwe was also rejected in the Bow Street Magistrate's Court on the grounds that President Mugabe, as a head of state, is entitled to immunity from prosecution in foreign municipal courts.[67] Although not in the form of a court case, a third important example regarding President Mugabe comes from South Africa, where a South African citizen who has considerable property interests in Zimbabwe, tried to utilise section 4(3) of the South African ICC Implementation Act. This was done when President Mugabe was attending the 2002 World Conference on Sustainable Development in Johannesburg. Du Plessis and Coutsoudis regret that no action was taken against Mugabe, because by the time a call for arrest was made, the President had already returned to his home country. The authors also contend that if Robert Mugabe were to be prosecuted in a South African court pursuant to the ICC Implementation Act, it would be a retrogressive step for a South African court to read the relevant sections of the ICC Implementation Act restrictively and to uphold immunity of heads of state by virtue of customary international law.[68] The authors draw support for their argument from the South African Constitution, which, in section 232, provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'[69]

All the above examples clearly demonstrate that there are considerable obstacles to the enforcement of universal jurisdiction in foreign municipal courts, the most impeding challenge being the doctrine of immunity on the basis of sovereign equality. This is true as far as the prosecution of incumbent high-ranking officials are concerned. On the other hand, some writers argue that there is no clear-cut demarcation according to which individuals, other than the head of state and a foreign minister, enjoy immunity under

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and Comparative Law Quarterly 771-773. This case involves an application for the issue of an arrest warrant against General Shaul Mofaz, an Israeli Defence Minister. The application was made on behalf of the families and relatives of those who are 'alleged to have been killed in Israeli occupied territory by troops under General Mofaz's command during reoccupation of the West Bank in 2002.'

67 *BBC News* 'UK court refuses Mugabe arrest,' 14 January 2004. The application was filed by a British activist, Mr Peter Tatchell. The case is reported as *Robert Mugabe* in 53 (2004) *International and Comparative Law Quarterly* 769-770. See also Du Plessis and Coutsoudis (n 34 above) 353, 360, where the authors discuss the call made by Dr Keith Martin on 9 October 2003 for the Canadian Act to be utilised against President Robert Mugabe.

68 Du Plessis and Coutsoudis (n 34 above) 365.

69 Constitution of South Africa, Act 108 of 1996.

customary international law.[70] Apparently, there might be a possibility of prosecuting those incumbent officials who do not enjoy immunity provided that they are to be found in the territory of a country whose courts are empowered to exercise universal jurisdiction over international crimes. However, as a result of the unfortunate ruling of the *Arrest Warrant*, the principle of universal jurisdiction over international crimes is said to be on the verge of serious danger. In this regard, the ruling of the ICJ in the *Arrest Warrant* was strongly criticised by leading international law scholars, such as the former President of the Appeals Chamber of the ICTY,[71] who asserted that by failing to refer to the customary rule lifting functional immunity in international crimes, the ICJ has arguably left the demands of international justice unheeded.

Cassese[72] holds the view that the aforementioned stance of the ICJ is hardly consistent with the current pattern of international criminality as demonstrated by the ICTY in *Tadic*. In this case, it was held that: 'It would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.'[73] Although there is an argument that immunity may not be a bar when explicitly scrapped by the constitutive instruments of international tribunals such as the ICTY,[74] ICTR[75] and ICC,[76] Cassese notes that the unfortunate ruling of the ICJ in the *Arrest Warrant* means that there is also a possibility for the defence of immunity to be raised in ICC proceedings when the accused happens to be a national of a state which is not a party to the ICC Statue.[77] He further argues that the ICJ ruling has significantly narrowed the range of criminal prosecutions against high-ranking government officials. This is to say that 'the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes.'[78]

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70 Du Plessis and Coustoudis (n 34 above) 352.

71 See generally Cassese 2002 (n 42 above) 853-875.

72 Antonio Cassese 'Is the bell tolling for universality? A plea for a sensible notion of universal jurisdiction' 1 (2003) *Journal of International Criminal Law* 589.

73 *Tadić,* ICTY Appeals Chamber, judgment of 2 October 1995, para 58.

74 See article 7(2) of the Statute of the ICTY

75 See article 6(2) of the Statute of the ICTR.

76 See article 27(2) of the ICC Statute.

77 Cassese 2003b (n 72 above) 589.

78 Ibid. Dugard has also noted similar regrets with regard to the far-reaching implications of the ICJ ruling in the *Arrest Warrant* (n 38 above). See Dugard (n 59 above) 252. Compare this with Dapo

Aside from the limitations emanating from the doctrine of immunities, states may also sometimes prove unwilling or unable to prosecute international crimes for several reasons. Unwillingness on account of the undemocratic or repressive nature of the government in power is the first of such reasons for countries to fail to prosecute international crimes. Furthermore, Cassese[79] elaborates on the reasons for failure to prosecute international crimes as follows. Firstly, international crimes are very often perpetrated by state agents; hence, their commission is condoned by governments. This accounts for a hesitant approach on the part of national courts. Secondly, if the crimes are committed by foreigners, the fear of interference in the domestic affairs of others disheartens the possibility of prosecution. The lack of a territorial or national link with a given crime discourages national courts from prosecuting foreigners who have committed crimes in a foreign land. National courts are often subject to short term objectives of national concern which may have prevalence over prosecution of international crimes.[80]

Moreover, the practice of states is that national courts do not immediately implement proceedings for international crimes emanating from international treaties or international customary law. In most instances, a national statute defining the crimes and granting national courts jurisdiction over such crimes is required. In practice, however, national parliaments may fail to pass legislation granting national courts universal jurisdiction over international crimes.[81] Some countries, while having passed implementing legislation, in effect restrict or narrow the scope of grounds of jurisdiction. Others develop a restrictive judicial practice to limit as much as possible the impact of international rules on the exercise of jurisdiction by national courts over international crimes. Furthermore, some states ratify international treaties with reservations.[82]

Akande 'International Immunities and the International Criminal Court' 98 (2004) *American Journal of International Law* 410; Salvatore Zappala 'Do heads of state in office enjoy immunity from jurisdiction for international crimes?: The Ghadaffi case before the French Cour de Cassession' 12(3) (2001) *European Journal of International Law* 597; Swanepoel (n 26 above) 127.

79 Cassese 2003a (n 8 above) 298.

80 Ibid.

81 Ibid 305-307. This is the current state of affairs in Eritrea.

82 Ibid. Compare the observations made by Gerrit M Ferreira and Anél Ferreira-Snyman 'The impact of treaty reservations on the establishment of an international human rights regime' 38(2) 2005 *Comparative and International Law Journal of Southern Africa* 166-167.

It was said that universal jurisdiction has been developed as a remedy for the failure by states to prosecute international crimes. The first option for the exercising of this mandate is by foreign municipal courts. Another possible option for the exercise of universal jurisdiction is through the jurisdiction of international *ad hoc* tribunals or mixed tribunals. These forums have become increasingly important. The next section will discuss the development of international judicial bodies and their contribution to the principle of universal jurisdiction, and ultimately to the suppression of international crimes.

5.8 Emergence of international and *ad hoc* judicial bodies

Historically, individuals who transgress international rules of conduct have been prosecuted and punished by the competent authorities of the state where the transgression occurred. However, a major challenge societies face during periods of massive violations or during transition from such a history is the inability to hold authors of international crimes accountable for their acts. After the defeat of dictatorships, most of the time repressive leaders manage to escape and secure safe havens in places outside their home countries.[83] In such situations, it becomes extremely difficult for national courts to locate the culprits and bring them to justice without the assistance of the country which hosts the perpetrators, or the international community at large. International criminal justice as enforced by international and *ad hoc* judicial bodies is a most appropriate option to deal

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[83] The following former dictators are pertinent examples in this regard: Menghistu Hailemariam of Ethiopia who is living in exile in Zimbabwe; Charles Tailor of Liberia who was living in exile in Nigeria but was recently indicted by the Special Court for Sierra Leone; Mobutu Sese Seko of Congo who died in exile in 1997 in Morocco; Idi Amin Dada of Uganda who also died in exile in Saudi Arabia in 2003; and Hissène Habré of Chad who is living in exile in Senegal, but faced criminal prosecution, albeit unsuccessfully, in the same country where he has taken refuge. Another charge is pending against him in a Belgian court and the government of Senegal was requested to surrender this former leader to the Belgian court. In similar manner, the former Ethiopian dictator Menghistu Hailemariam fled South Africa where he was seeking medical treatment because he feared a warrant for his arrest and extradition to Ethiopia. In this regard, Jessberger and Powell criticised the South African government for avoiding 'the issue with its statement that a formal extradition request had not yet been received from Ethiopia by the time Menghistu returned to Zimbabwe.' The authors submit that this position 'ignored South Africa's jurisdiction under international law to arrest Menghistu for crimes against humanity on its own initiative.' Florian Jessberger and Cathleen Powell 'Prosecuting Pinochets in South Africa: Implementing the Rome Statute of the International Criminal Court' 14 (2001) *South African Journal of Criminal Justice* 361.

with scenarios of this type. The historical development of international criminal prosecution will be briefly considered.

5.8.1 The Nuremberg and Tokyo Tribunals

Ever since the establishment of the Nuremberg and Tokyo Tribunals, the development of international criminal accountability has been going through a tremendous process of refinement. Scholarly writings indicate that it was only in the aftermath of the First World War that the earliest attempts to establish an international criminal tribunal were made by victorious states that were deeply concerned by the atrocities of the war.[84] A major attempt was the proposed establishment of a special tribunal which was intended to try supreme offences against international morality and the sanctity of treaties, as envisaged by the Versailles Treaty.[85] The early attempts, albeit far-sighted and laudable, did not bear commendable results for they were met by an international community overwhelmingly dominated by the principle of state sovereignty.[86]

In the immediate post-WWII period, the Nuremberg and Tokyo Tribunals were established in response to the horrors of the Nazi genocide in Europe and the Japanese crimes perpetrated during the wartime occupation of large parts of South East Asia. This was a reflection of the renewed conviction that never again would the abysmal disregard for human dignity be allowed to go unchecked and unpunished.[87] What induced the Allies to hold trials of the Germans and their collaborators in the aftermath of WWII was

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84 Schabas (n 9 above) 3. Schabas also adds the following observations: 'The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.' Schabas (n 9 above) 1. See also M Cherif Bassiouni 'From Versailles to Rwanda in seventy five years: The need to establish a permanent international criminal court' 10 (1997) *Harvard Human Rights Journal* 11. For a history of the ICC, see generally M Cherif Bassiouni *The Statute of the ICC: A Documentary History* (1998) 1-35.

85 See generally Robert Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 25-30.

86 Bassiouni 1998 (n 84 above) 23; Mangu also contends that 'international law remains predominantly the law of independent states, which remain its principal subjects.' See A Mbaka B Mangu 'Universal jurisdiction and the International Court of Justice: A comment on the *Congo cases* 29(3) (2004) *Journal for Juridical Science* 77.

87 Bassiouni 1998 (n 84 above) 23; Mangu (n 86 above) 77.

remarkably akin to the conviction of the international community to establish the *ad hoc* tribunals on war crimes and crimes against humanity in recent times. As such, the post-WWI experience demonstrated the extent to which international criminal justice can be compromised for the sake of political expediency, while the post-WWII experience was accompanied by the political will and necessary resources for effective international criminal justice.[88]

Nonetheless, the experience was not impeccable. One of the flaws of the post-WWII trials was that they imposed victors' justice over the defeated. The tribunals were not independent courts in the real sense, but rather judicial bodies which safeguarded the common interests of the appointing states under the veil of international accountability.[89] The Nuremberg International Military Tribunal (IMT) had the following to say in connection with the above concern:

> The making of the Charter [of the IMT] was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered, and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world … The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.[90]

Nevertheless, there are some notable contributions of the IMTs to international law. They introduced a means of prosecuting and punishing crimes of an international dimension by multi-national institutions established solely for that purpose.[91] They helped to develop new offences, such as crimes against humanity as envisaged in the London Charter. These crimes have now become the subject of international customary proscriptions as discussed elsewhere in this study. By developing new legal norms and standards of

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88 Cryer (n 85 above) 57 and further; Bassiouni 1998 (n 84 above) 23; Schabas (n 9 above) 13.

89 See generally Robert K Woetzel *The Nuremberg Trials in International Law* (1960) 254-276; Mathew Lippman 'Nuremberg: Forty-five years later' 7 (1991) *Connecticut Journal of International Law* 1; Bassiouni 1997 (n 84 above) 13.

90 As quoted in Cassese 2003a (n 8 above) 333.

91 Bassiouni 1997 (n 84 above) 13.

responsibility, they eventually contributed to a politically uncompromised system of international criminal justice.[92]

What followed the establishment of the IMTs was the effort by the UN in the late 1940s to establish more permanent and impartial mechanisms for dispensing international criminal justice. On 21 November 1947, the International Law Commission (ILC) was requested by the UN General Assembly[93] to formulate a draft code of offences against the peace and security of mankind as also recognised in the Charter of the Nuremberg Tribunal. This effort did not reach fruition because of a sharply divided world which was frequently at risk of war. The political stagnation, exacerbated by the antagonistic blocs of the Cold War, severely impeded the initiative until such time as a new world order emerged in the post-Cold War era.[94]

5.8.2 *Ad hoc* tribunals

One of the notable features of the post-Cold War era was the staggering increase in global violence, ethnic cleansing and bloodshed. Most of these atrocities were instigated by factors such as ultra-nationalist sentiments, ethnic and religious hatred, growing disparity between rich and poor, increasing poverty and hopelessness, religious fundamentalism, and so forth. In many parts of the world internal armed conflicts with much bloodshed and cruelty led to gross violations of humanitarian law on a scale comparable to those perpetrated during WWII.[95] In countries such as Eritrea authoritarianism is an additional problem.

In spite of the unprecedented increase of atrocious conflicts, the international community became exceedingly incompetent in discharging its duty of preventing large scale and serious violations of human rights amounting to threats to, or breaches of, international

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92 Lippman (n 89 above) 1.

93 General Assembly Resolution 177/II of 21 November 1947 (Formulation of the Principles Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal).

94 Cryer (n 85 above) 48.

95 M Cherif Bassiouni *Crimes against Humanity in International Law* 2ed III (1999) 178.

peace and security.[96] This required a renewed approach towards the suppression of international crimes. Moreover, the increased emphasis on human rights has also given a robust impulse to the need for the development of an effective international criminal justice system. The establishment of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda as well as the eventual adoption of the ICC Statute are all seen as the resultant factors of the above developments.

The same sense of outrage felt at the closing stages of WWII was elicited once again by the atrocities which erupted in the former Yugoslavia and Rwanda, and lately by the costly Eritrea-Ethiopia border conflict, the Darfur crisis in Sudan as well as the ongoing civil wars in Somalia, the DRC, Uganda and other parts of Africa. Developments such as these revived the fervour of the international community which, via its operating organ, the UN Security Council, responded by setting up *ad hoc* tribunals for at least two countries – the former Yugoslavia and Rwanda. The tribunals were meant to restore international peace and security by prosecuting perpetrators of grave violations and thereby contribute to ensuring that such violations were halted and effectively redressed.[97]

It is believed that the establishment of the *ad hoc* tribunals was preceded by a number of UN statements proclaiming the principle that the authors of grave breaches of international law should be held individually responsible and called to account. One such statement (UN Security Council Resolution 780 of 6 October 1992) was the result of continuous deliberations that took place intermittently in the year 1992 among the foreign ministers of France, Germany and the USA.[98] Unlike other judicial bodies, the ICTY and

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96 The UN Security Council is mandated under Chapter VII of the UN Charter to deal with threats to, or breaches of, international peace and security. In practice, it has proved ineffective several times. The inability of the UN to react promptly and effectively, and put an end to massacres or violence amounting to serious threats to peace and security was demonstrated in Somalia, the former Yugoslavia, Rwanda, Sierra Leone, Liberia, DRC, Eritrea and Ethiopia and of late in the Darfur region of Sudan. See *The Responsibility to Protect*: *Report of the International Commission on Intervention and State Sovereignty (ICISS)*, December 2001 (hereinafter '*Responsibility to Protect')*; *In Larger Freedom: Towards Development, Security and Human Rights for All,* Report of the UN Secretary-General UN Doc A/59/2005 (hereinafter '*In Larger Freedom').*

97 Security Council Resolution 827 of 25 May 1993.

98 Cassese 2003a (n 8 above) 336.

the ICTR are not the products of multilateral treaties. Rather, they were established by resolutions of the UN Security Council. The ICTY was established by Security Council Resolution 827 of 25 May 1993 in which it was determined that the situation in the former Yugoslavia constituted a threat to international peace and security under Chapter VII of the UN Charter. The operative paragraph (2) of Resolution 827 reiterated the purpose of the international tribunal as that of

> prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the … [Secretary-General's] report.

Similarly, the Statute and judicial mechanism for the ICTR were established by Security Council Resolution 955 of 8 November 1995. This was a result of a number of reports on the situation in Rwanda which indicated the perpetration of genocide and other systematic, widespread and flagrant violations of international humanitarian law, constituting a threat to international peace and security. Accordingly, article 1 of the Statute of the ICTR declared that the Tribunal

> shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

The driving factor for the establishment of the ICTR was the magnitude of the crimes committed in Rwanda. Added to this was a discernible concern of 'a disproportionate attention paid to the problems of Europe vis-à-vis the developing world.'[99] The establishment of the ICTR two years after the establishment of the ICTY is believed to have helped the international community to ease its conscience and shield itself from accusations of double standards. Both tribunals have demonstrated the need for ensuring some uniformity in administering international criminal justice.[100]

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99 Ibid 339.

100 Bassiouni 1997 (n 84 above) 10.

However, the establishment of the *ad hoc* tribunals of Yugoslavia and Rwanda was not free from criticism. A major critical comment[101] reveals that the tribunals were created to make up for the failure of the international community to find a swift and proper solution to atrocious conflicts. This implies the impotent diplomatic and political capabilities of the great powers and the UN in preventing conflicts which inflict severe human suffering. This concern is equally true in the current Eritrea-Ethiopia stalemate. Nevertheless, in so far as the Yugoslavian and Rwandan experiences are concerned, the former President of the Appeals Chamber of the ICTY, Antonio Cassese, contends that 'half a loaf is better than pie in [the] sky.' He further adds that 'as long as an international criminal court endowed with universal jurisdiction was lacking, the establishment of *ad hoc* tribunals proved salutary.'[102]

5.8.3 The ICC

What followed the Rwanda and the Yugoslavia Tribunals was the establishment of the ICC. The two *ad hoc* tribunals which preceded the ICC were typically characterised by impermanence and geographical limitations. They were meant to address issues peculiarly related to a given situation and context and for a limited period of time. However, their overall success has immensely contributed to the emergence of the ICC with a global jurisdiction and prospective approach to respond to violations occurring anywhere.[103]

The actual task of establishing a permanent ICC was revived in 1989 when the General Assembly, after decades of hiatus, asked the ILC to consider the idea of establishing such a court.[104] The interest was galvanized with the Iraqi invasion of Kuwait in 1991. The

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101 Geoffrey Robertson *Crimes against Humanity: The Struggle for Global Justice* (2000) 300.

102 Cassese 2003a (n 8 above) 338.

103 Bassiouni 1998 (n 84 above) 23; Bassiouni 1997 (n 84 above) 13; M Cherif Bassiouni 'Establishing an international criminal court: Historical survey' 149 (1995) *Military Law Review* 45; Margaret McAuliffe deGuzman 'The road from Rome: The developing law of crimes against humanity' 22(2) (2000) *Human Rights Quarterly* 335; Mahnoush H Asranjani 'The Rome Statue of the International Criminal Court' 93 (1999) *American Journal of International Law* 22. The relevance of the ICC jurisdiction for international crimes perpetrated in Eritrea will be discussed in section 5.13 below.

104 General Assembly *Resolution* 44/39 of 4 December 1989.

ILC submitted a preliminary report in 1991 to the General Assembly, which was followed by another report in 1993 and modified in 1994.[105] Subsequently, the General Assembly established a Preparatory Committee on the Establishment of an ICC. This Committee submitted a Draft Statute and a Draft Final Act to the Diplomatic Conference at Rome, held from 15 June to 17 July 1998. The ICC Statute was then adopted by 120 votes to 7 with 20 abstentions.[106] It was then open for signature on 17 July 1998. It entered into force on 1 July 2002 as the 60th instrument of ratification was deposited with the UN Secretary General on 11 April 2002, when 10 countries simultaneously deposited their instruments of ratification.[107]

After the establishment of the Rwanda and Yugoslavia Tribunals, the Security Council was said to have reached a point of 'tribunal fatigue.'[108] For some time, the *ad hoc* tribunals strained the capabilities and resources of the UN and consumed much of the Security Council's time. The result was less inclination to establish other similar tribunals. Nevertheless, the Security Council again demonstrated a revived enthusiasm towards other situations arising in different parts of the world. The circumstances in Sierra Leone, Cambodia and East Timor were considered to be suitable for the establishment of additional tribunals with unique features. These tribunals were meant to

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105 Report of the International Law Commission, 46th Sess, 2 May – 22 July 1994, UN GAOR, 49th Sess, Supp No 10, UN Doc A/49/10 (1994); see also Antonio Cassese 'On current trends towards criminal prosecution and punishment of breaches of international humanitarian law' 9 (1998) *European Journal of International Law* 8-9.

106 The seven countries that voted against the Statute were the US, Libya, Israel, Iraq, China, Syria and Sudan. Contrary to its long history of democratic culture, the approach of the US towards the ICC has been criticised by several authors. The US continues to undermine the jurisdiction of the ICC, *inter alia*, by entering into bilateral treaties with countries that are, or may become, parties to the ICC. See Antonio Cassese 'The Statute of the International Criminal Court: Some reflections' 10 (1999) *European Journal of International Law* 144; Cassese (n 8 above) 455-456; William A Schabas 'United States hostility to the International Criminal Court: It's all about the Security Council' 15 (2004) *European Journal of International Law* 701; Mohamed M El Zeidy 'The United States dropped the atomic bomb of article 16 of the ICC Statute: Security Council power of deferrals and Resolution 1422' 35 (2002) *Vanderbilt Journal of Transnational Law* 1400. Paradoxical as it may seem, Eritrea was one of the countries that entered into such a bilateral treaty with the US having the effect of barring the ICC's jurisdiction. However, this was before relations between the two countries soured and as such its detrimental effect on future ICC prosecutorial options is less likely.

107 Coalition for the ICC 'World signatures and ratifications,' available at http://www.iccnow.org/?mod=romesignatures (accessed 23 October 2007).

108 This term, according to Bassiouni, was fittingly coined by David Scheffer, then Senior Counsel and Advisor to the US Permanent Representative to the UN. See Bassiouni 1997 (n 84 above) 10.

deal with crimes committed by former repressive regimes. From an African perspective, the establishment of the Special Tribunal for Sierra Leone[109] is of paramount significance.

5.8.4 Mixed tribunals

Of late, the enforcement of international criminal accountability has been assigned not only to purely international tribunals but also to what are known as mixed criminal tribunals established in different parts of the world as a result of emergency situations involving the commission of large scale atrocities. Such courts are mixed in their composition and their statutes and rules combine aspects of international and municipal law. These judicial bodies, also known as 'internationalised tribunals,' consist of both international judges and of judges having the nationality of the state where trials are held. Mixed tribunals are set up under an international agreement and are not deemed to be part of the national judiciary. A typical example is the Special Court for Sierra Leone, which was established on 16 January 2002 after the conclusion of an agreement between the UN and the new government in Sierra Leone.[110]

As has been indicated earlier, tribunals such as these are the result of emergency situations whereby a breakdown of the national judicial system may have come about as an outcome of serious and widespread atrocities, civil war or international conflict. On the other hand, as a result of a series of historical factors, the judiciary may have become incapable of administering justice in an unbiased and even-handed manner. This could be due to continued presence in the government of persons closely linked to perpetrated atrocities, for instance, or the lack of a genuinely independent judiciary.[111]

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109 See Security Council Resolution 1315 (2000), on the situation in Sierra Leone. Similarly, in the case of Cambodia and East Timor, the establishment of special tribunals composed partly by nationals of those countries and by international judges was proposed. See William A Schabas 'A synergetic relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' in Schabas (n 1 above) 4.

110 Cryer (n 85 above) 61.

111 Cassese 2003a (n 8 above) 343-344.

In a recent attempt to ensure accountability, the Iraqi Governing Coalition established the Iraqi Special Tribunal which was meant to try the crimes of the deposed Ba'ath party of Saddam Hussein. However, Cryer points out that the tribunal's integrity was seriously 'compromised by the relationship between the Iraqi Governing Coalition and the US "Authority" in Iraq.'[112] Among other things, this court was also criticised for failing to meet international legal standards of due process or sufficiently protecting the rights of the accused by not allowing sufficient access to legal counsel. In fact, the harshest criticism of the Iraqi Special Tribunal comes from a prominent American human rights defender, former US Ambassador-at-large for war crimes issues, David Scheffer, who criticised the court for not responding to concerns about the court's legitimacy, an act he characterised as 'bizarre.'[113] Most of all the court was criticised by rights groups for imposing capital punishment upon the former Iraqi dictator, and not least the manner in which the hanging was executed.[114] In a practical sense, many people regard the Iraqi experience as nothing more than a political trial. Other recent experiences in mixed tribunals include those of Cambodia,[115] East Timor[116] and Kosovo.[117]

5.9 Appraisal of the different forms of criminal accountability

By way of contrast, it would be appropriate to assess briefly the major approaches towards international criminal accountability adopted by the international community

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112 Cryer (n 84 above) 71. See also generally Danilo Zolo 'The Iraqi Special Tribunal: Back to the Nuremberg paradigm?' 2 (2004) *Journal of International Criminal Justice* 313-318; Olaoluwa Olusanya 'The Statute of the Iraqi Special Tribunal for crimes against humanity: Progressive or regressive?' 5(7) (2004) *German Law Journal* 859-878; M Cherif Bassiouni, 'Post-conflict justice in Iraq: An appraisal of the Iraq Special Tribunal' 38 (2005) *Cornell International Law Journal* 327-390; *Washington Times* 'Pinochet judge doubts fair trial for Saddam,' 20 October 2005.

113 *Deseret Morning News* 'CNN analyst notes missteps in Saddam trial,' 24 February 2006.

114 *BBC News* 'Amnesty condemns Iraq executions,' 20 April 2007.

115 See generally *Report of the Group of Experts for Cambodia, Established Pursuant to General Assembly Resolution 52/135*, UN Doc A/53/850-S/1999/231 Annex; Balakrishnan Rajagopal 'The pragmatics of prosecuting the Khmer Rouge' 1 (1998) *Year Book of International Humanitarian Law* 43.

116 See UN Security Council Resolution 1244 (1999); Boris Kondoch 'The United Nations Administration of East Timor' (2001) *Journal of Conflict and Security Law* 245; Ralph Wilde 'From Danzig to East Timor and beyond: The role of international territorial administration 95 (2001) *American Journal of International Law* 583.

117 John RWD Jones and Steven Powles *International Criminal Practice* 3rd ed (2003) 26-29; Hansjorg Stohmeyer 'Collapse and reconstruction of judicial system: The United Nations Missions in Kosovo and East Timor' 95 (2001) *American Journal of International Law* 46.

since WWII. In the Nuremberg trials the central focus of the tribunals was on major perpetrators of international crimes. Criminal offences committed by minor culprits were left to national courts. The Rwanda and Yugoslavia *ad hoc* tribunals were designed as substitutes for national courts unable or unwilling to dispense justice.[118] Gradually, these tribunals shifted to the Nuremberg scheme and concentrated on the trials of major suspects, leaving the task of trying minor offences to local courts.[119]

The division of labour envisaged by the ICC Statute is different from that of the Nuremberg tribunals and the latest *ad hoc* judicial bodies. The role of the ICC comes into play only when local courts are unable or unwilling to prosecute.[120] Moreover, there must be a case of sufficient gravity to justify action by the ICC.[121] Adjudication by an international court of serious international crimes committed by major leaders has logical and consistent advantages over the other options. When serious and large scale crimes are committed by central authorities or with their approval, it would become difficult for national courts to prosecute the planner even when there is a change of government.

In a country where victims and their relatives live, an atmosphere of animosity and conflict that affect the impartiality of judges can easily develop. It is also possible that trials could face the risk of becoming witch-hunts or a way of settling political accounts. This undermines fair and impartial administration of justice. International courts are relatively free of such biases and limitations and may be found better suited to pronounce upon large scale and grave crimes perpetrated by political or military leaders. If enhancing the role of international courts as regards major perpetrators is said to be a better path, then combining the action of local courts with a mandate to deal with minor offences is equally important. The role of restorative justice as envisaged by TRCs is also vitally important in this regard.[122]

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118 Gioia (n 9 above) 1109.

119 Cassese 2003a (n 8 above) 353-356.

120 In the case of the Yugoslavia and Rwanda Tribunals the applicable rule is the principle of subsidiary, while in the ICC approach, the applicable rule is the principle of complimentarity. See Gioia (n 9 above) 1109.

121 Article 17(1)(d) of the ICC Statute.

122 Cassese 2003a (n 8 above) 355.

Cassese argues that punishment by international judges injures national feelings to a lesser degree and is met with less resistance than punishment by national judges. National judges are mostly perceived as part of the milieu in which the perpetration took place. This factor puts international judges in a better position in terms of impartiality and even-handedness. Inherent in international crimes is their ramification with other countries. It may appear that witnesses reside in other countries and evidence needs to be collected accordingly. This can lead to tricky legal issues arising from the varieties of national legislation involved. This requires the cooperation of several states and special expertise. International courts are more able to handle such situations than are national courts.[123]

Cassese also states that the use of a national judiciary under international scrutiny, such as in the Sierra Leone case, may prove more advantageous than other forms of judicial bodies. Firstly, it involves local personnel who are familiar with the mentality, language and habits of the perpetrators. This helps to assuage the nationalistic demands of local authorities unwilling to hand over an essential prerogative of sovereignty, the administration of justice. Such tribunals could have a spill-over in gradually promoting the democratic legal training of local members of the prosecution and the judiciary.[124] The fact that mixed tribunals are overseen by international scrutiny means that the trials can be conducted without compromising respect for international standards and international law in general. A very important advantage underlined by Cassese is the role that mixed tribunals play in reconciling the society and establishing a historical record. This means:

> By holding trials in the territory where the crimes have been perpetrated, [they expose] the local population to past atrocities, with the twofold advantage of making everybody cognizant of those atrocities, including those who sided with the perpetrators, and bringing about a cathartic process in the victims or their relatives, through public stigmatization of the culprits and just retribution; thus, exposure of past misdeeds to the local population contributes to the process of gradual reconciliation.[125]

123 Ibid.
124 Ibid 343-344.
125 Ibid.

Moreover, internationalised tribunals are deemed helpful in handling international crimes perpetrated in some authoritarian countries, where the political system still protects the alleged perpetrators and where neighbouring countries refuse to take action against such perpetrators on purely political grounds.[126] There are, however, some practical problems with mixed tribunals. Security and funding are the crucial factors. People working in the judicial process are always exposed to serious risks emanating from hatred, resentment and social conflict festering in those environments. Furthermore, without adequate financial resources the institutions may not operate effectively. For instance, the Special Court for Sierra Leone did not become operational in due time mainly because of a lack of funds.[127] In East Timor, unavailability of financial resources has severely hampered efforts at all judicial levels. This has led to delayed hearings and unduly prolonged detention of suspects.[128] It is also difficult to ensure the smooth cooperation of the national and international components of such trials which may have disparities in mentality, language, experience and legal philosophy. This may lead to a work environment devoid of close, constructive and constant accord.[129]

In addition, it may also be difficult for national courts to ensure uniformity in the application of international law. If the crimes at issue are serious breaches of international law, international courts are the most appropriate bodies to understand and apply international law and are the right bodies to pronounce on them.[130] International courts can more appropriately deal with problems of disparity in both the interpretation and application of international law and the penalties to be imposed on offenders according to international standards. The will of the international community to break with the past can best be demonstrated in trials by international courts, because international trials are more visible than national criminal proceedings.

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126 Ibid 457.

127 Suzannah Linton 'Colombia, East Timor and Sierra Leone: Experiments in international justice' 12 (2001) *Criminal Law Forum* 185.

128 See the Reports of the UNSG of 16 January 2001 (S/2001/42/, para 23) and of 18 October 2001 (S/2001/983, para 20). See also Strohmeyer (n 117 above) 46; and generally Hansjorg Strohmeyer 'Making multilateral interventions work: The UN and the creation of international justice systems in Kosovo and East Timor' 25 (2001) *Fletcher Forum of World Affairs Journal* 107-124; Linton (n 127 above) 185.

129 Cassese 2003a (n 8 above) 345-346.

130 Ibid 441.

Nonetheless, the advantages of international courts should be balanced against the numerous shortcomings which could undermine international trials. Lack of enforcement mechanisms in collecting evidence, searching premises, seizing documents or executing arrest warrants and other judicial orders is the most discernible problem of international criminal courts. International courts rely heavily on the cooperation of states. Refusal of states to cooperate can effectively cripple international criminal justice.[131]

Cassese also observes that international courts operate under the amalgamation of different judges with different cultural, philosophical and legal backgrounds. This is a characteristic challenge of international criminal proceedings. Furthermore, international trials are often lengthy. The protracted nature of the proceedings is complicated by several factors, the most important of which is language problems. In most international trials proceedings are conducted in at least two, and possibly in three or more languages. This means documents and exhibits need to be translated from one to another working language of the proceedings. Lengthy trials severely undermine the right to a fair and expeditious trial which is one of the principal tenets of international law.[132]

Aside from the encouraging international trend towards international crimes, it is advisable to invigorate the role of national courts with the necessary legal tools to enable them to exercise criminal jurisdiction. For practical and legal reasons, national courts are the judicial bodies most suited to deal with international crimes. They have all the coercive arms of the state at their disposal and can render justice more effectively. National parliaments should be empowered to pass legislation providing for universal jurisdiction over international crimes, whenever such crimes are committed and whatever the nationality of the alleged authors or victims may be; and to implement such legislation effectively.[133] They must also be prompted to ratify international treaties

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131 In this regard, Cassese, as the former President of the Appeals Chamber at the ICTY, recalls the assistance afforded to the tribunal by the multilateral forces operating under the UN. The presence of the UN and NATO forces in the region assisted in executing arrest warrants. See Cassese 2003a (n 8 above) 442.

132 Ibid 443. In this regard, see generally Salvatore Zappala *Human Rights in International Criminal Proceedings* (2003).

133 In this regard the experience of Belgian courts which thus far exercised jurisdiction over several perpetrators of international crimes, including heads of state, is commendable. Belgium has been

designed to impose the obligation to prosecute authors of grave human rights violations.[134]

5.10 A shift from the state to the individual

As a result of the staggering rise in international criminality, some ground-breaking developments have emerged in the area of international law recently.[135] As regards fundamental rights and mechanisms for the enforcement of individual rights and liability, state responsibility still assumes much importance.[136] On the other hand, attention has also been shifting from the inter-state to the inter-individual level, a radical change in the development of international law. Reactions to gross breaches and atrocities are now addressed more by prosecuting and punishing individuals rather than by invoking the responsibility of a given state. In ensuring compliance with international law, an increasing tendency has developed to target individuals via the tools of international criminal justice.[137]

Such a tendency is also discernible within the UN system. The UN Security Council has demonstrated a paradigm shift when in several recent cases it adopted resolutions, under Chapter VII of the UN Chapter, aimed at imposing sanctions not against states but against an individual or a group of individuals believed to have threatened world peace and security. Of remarkable importance in this regard are Security Council resolutions

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accordingly dubbed 'the world capital of universal jurisdiction.' However, to the dismay of the global movement of human rights, the country has amended its universal jurisdiction laws at the insistence of the US and also as a result of the decision of the ICJ in the *Arrest Warrant*. The last person to have been prosecuted under the previous Belgian law of universal jurisdiction, whose case is still pending, is the former Chadian dictator Hissène Habré. This has been possible because by the time the case was instituted the Belgian law of universal jurisdiction had not been amended. Other leaders and senior government officials against whom charges were brought before Belgian courts include: August Pinochet, Fidel Castro, Ariel Sharon, a foreign minister of Congo, former leaders of the Khmer Rouge, a former Moroccan minister and a former Iranian minister. See Cassese (n 8 above) 453; Diane Orentlicher 'Universal jurisdiction after Pinochet: Prospects and perils' (unpublished paper, 2003); HRW (n 56 above).

134 Cassese 2003a (n 8 above) 453.

135 Ibid 446-447; Olusanya (n 112 above) 859.

136 See *Report of the ICISS* (n 96 above).

137 Edoardo Greppi 'The evolution of individual criminal responsibility under international law' 835 (1999) *International Review of the Red Cross* 531.

1333 (2000)[138] and 1390(2002)[139] in which states were requested to 'freeze without delay funds and other financial assets of Usama Bin Laden and individuals and entities associated with him [and the September 11, 2001 terrorist attack in the USA].'[140]

The freezing of personal accounts and private assets belonging to individuals is a typical interim measure of criminal justice. The measures taken by the EU against Zimbabwean state officials, starting with the Head of State, Robert Mugabe, is another pertinent example in recent times. Zimbabwe's serious violations of human rights were met with sanctions of the Council of the EU aimed at freezing the private assets of senior Zimbabwean government officials.[141] In this regard, Cassese contends that:

> These examples show that the international institutionalized response to serious violations of human rights is in some respects moving away from the concept of 'collective responsibility' towards the more realistic and modern concept of 'individual accountability': in addition to holding accountable the State as such, resort has been made to the tools normally used for enforcing criminal liability in order to target the groups and individuals who act within and on behalf of the State; in other words, taking sanctions to target not only the State but also groups and individuals within the State.[142]

Another equally interesting development is the recognition of the rights of victims of gross human rights violations on the international level with demonstrable potential to hold accountable perpetrators of atrocities. As has been demonstrated in the *Pinochet, Habré* and other cases, individuals are proving that they no longer have to accept that their interests, legal claims and human concerns be managed by national states in diplomatic dealings. Individual victims have proved their capacity to take their rights into their own hands and to vindicate their claims through national or international criminal

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138 Para 8(c).

139 Para 2(a).

140 A pertinent latest example in this regard is the *Report of the Darfur Commission*, para 525. The Commission identified individual perpetrators possibly responsible for the international crimes committed in Darfur, whose names were submitted to the UNSG in a sealed file. The Commission recommended that the names of the individuals be handed over to the Prosecutor of the ICC for purposes of prosecution and accordingly some of the individuals are now already indicted by the ICC Prosecutor.

141 See Council of Europe Position of 18 February 2002 concerning restrictive measures against Zimbabwe (2002/145/CFSP), in *Official Journal of the European Communities* 21.32.2002, L50/1; Council Regulation (EC) No 310/2002 of 18 February 2002 on the same manner, ibid, L50/4; Council Position of 22 July 2002 amending Common Position 2002/145/CFSP, ibid, L1/195/1, Commission Regulation No 1643/2002 of 13 September 2002, ibid, L247/22; and Council decision of 14 September 2002 implementing Common Position 2002/145/CFSP, ibid, L247/56. This development is indicative of a deviation from universally accepted international standards for the purpose of effective enforcement of respect for human rights.

142 Cassese 2003a (n 8 above) 450.

justice. This is, again according to Cassese, a trend highlighting the forceful emergence of individuals in the international arena. That is why:

> The international community is gradually realising that it must deal directly with perpetrators of serious crimes by authorizing national courts to prosecute and punish them through the establishment of international tribunals or by taking sanctions that directly target individuals even if they are very high-ranking State officials. By the same token, the international community cannot any longer allow claims and complaints of victims to be 'filtered' through State channels and machinery. It is therefore trying to ensure that these victims are able to appear before national or international courts in order to vindicate their rights directly and without any intermediary.[143]

To borrow Cassese's expression, 'human rights have by now become a *bonum commune humanitatis* (a common asset of all humankind), a core of values of great significance for the whole of humankind.'[144] In order to give effect to such universal values, power must be granted to and a duty imposed on courts of all states to prosecute perpetrators of international crimes of grave magnitude. Courts must act as organs of the world community and in the name and on behalf of the whole international community. Only by these means can the promotion and protection of human rights be brought to fruition. In an international legal order which lacks the necessary enforcement organs, 'national organs may perforce have to fulfil a dual role: they may act as State organs whenever they operate within the national legal system; they may act qua international agents when they operate within the international legal system.'[145]

5.11 The legal basis for prosecuting Eritrean government officials

The prosecution of offenders who might be held accountable for the commission of international crimes in Eritrea involves consideration of three important factors: the legal basis for individual criminal responsibility, the identification of perpetrators, and the possible forum for prosecution. Apart from individual criminal responsibility, the principle of command responsibility and superior orders are some of the most important principles of international criminal law which serve as the legal basis for prosecution.

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143 Ibid.
144 Ibid 457.
145 Ibid.

The concrete possibilities for prosecuting Eritrean government officials are discussed in the following sections.

5.11.1 Individual criminal responsibility

The principle of individual criminal responsibility is the cornerstone of international criminal law. It emanates from the famous pronouncement of the Nuremberg IMT that 'crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[146] Other international judicial bodies, notably the ICTY and the ICTR, have firmly upheld this doctrine in their landmark judgements, facilitating the culmination of this cardinal principle of international criminal law in the ICC Statute.[147] International crimes are very rarely committed by single individuals. They involve a plurality of offenders at the centre of which lie organisations or a group of cooperating individuals.[148] The just determination of guilt in international crimes needs a fair assessment of the mutual relationships and forms of cooperation of those individuals and organisations.[149] Judgements and rulings on international crimes are based to a large extent on the assessment of criminal participation.[150] However, the determination always begins with individual criminal responsibility, which also has corresponding ancestors in both the common law and civil law legal traditions.[151] Article 25 of the ICC Statute recognises different modes of participation in the commission of international crimes.

In the first place, international criminal responsibility arises when a person physically commits a prohibited conduct in which case he or she is regarded as the perpetrator or the principal offender. A person can also be criminally liable when he or she has not

146 *Trial of the Major War Criminals*, Proceedings of the IMT, Nuremberg, pt 22 (H M Stationary Office, 1950), 447; 'Nuremberg IMT: Judgment and Sentence' 41 (1947) *American Journal of International Law* 172.

147 See article 25 of the ICC Statute.

148 Elies van Sliedregt *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 15.

149 Nico Keijzer 'Preface' to Van Sliedregt (n 148 above).

150 Van Sliedregt (n 148 above) 15.

151 See, for example, article 48(1) of the Penal Code of Eritrea which provides: 'The offender who is responsible for his [or her] acts is alone liable for punishment under the provisions of the criminal law.'

physically committed a crime but is engaged in the perpetration in several other forms or modalities of criminal conduct.[152] When two or more people are implicated in the commission of international crimes, the involvement of such people in the crimes can be either in the form of perpetrating, ordering, aiding, abetting, planning, conspiring, inciting or any other act which involves common criminal purpose or design.[153] In clarifying this position by means of a hypothetical case, Cassese writes:

> In the case of torture one person may order the crime, another may physically execute it, yet another may watch to check whether the victim discloses any significant information, a medical doctor may be in attendance to verify whether the measures for inflicting pain or suffering are likely to cause death so as to stop the torture just before the measures become lethal, another person may carry medicine, or food for the executioners, and so on.[154]

Although a varying degree of culpability is to be taken into account at the sentencing stage, argues Cassese, all participants in a common criminal action are equally responsible and are to be treated as principals if they '(i) participate in the action, *whatever their position and the extent of their contribution*, and in addition (ii) *intend to engage in the common criminal action*.'[155] In terms of the degree of responsibility, international law makes no distinction between 'the man who strikes, and a man who orders another to strike.'[156]

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152 Cassese 2003a (n 8 above) 179.

153 See article 25 of the ICC Statute. See also *Tadić,* ICTY Appeals Chamber, judgment of 15 July 1999, paras 191-192; and see generally Cassese 2003a (n 8 above) 180-200; Kriangsak Kittichaisaree *International Criminal Law* (2001) 237-257. Compare this with articles 32-40 of the Penal Code of Eritrea which deal separately with offenders and co-offenders, participation in cases of special offences, incitements, accomplice, criminal conspiracy, failure to report, accessory after the fact and non-transmissibility of personal circumstances. In particular see article 36(2) which defines an accomplice as 'a person who knowingly assists a principal offender either before or during the carrying out of the criminal design, whether by information, advice, supply of means or material aid or assistance of any kind whatsoever in the commission of an offence.'

154 Cassese 2003a (n 8 above) 181.

155 Ibid 182 (emphasis original).

156 *Pinochet* (n 37 above) as per Lord Steyn 946. The court further held that: 'It is inconceivable that in enacting the Act of 1978 Parliament would have wished to rest the statutory immunity of a former Head of State on a different basis.' See also Kittichaisaree (n 153 above) 236.

5.11.2 Command responsibility and superior orders

A major component in the discourse of individual criminal responsibility is the doctrine of command responsibility or superior responsibility.[157] Drawn from military law, this principle holds that:

> [A] superior is criminally responsible for the acts committed by his subordinates if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[158]

Kittichaisaree has vividly contrasted two major ways in which a superior can be held criminally responsible for his or her actions. The active involvement of a superior in a certain crime in the form of ordering, instigating or planning entails direct criminal responsibility of such a superior. This kind of responsibility is that defined by article 23(3) of the ICC Statute. On the other hand, a superior may incur criminal responsibility indirectly 'if he fails to take measures to prevent or repress his subordinate's criminal acts.' This is the type of responsibility defined by article 28 of the ICC Statute.[159] Similarly, Cassese recognises this as responsibility by omission in which a 'person is criminally liable not for an act he has performed, but for failure to perform an act required by international law.'[160] This principle applies to civilian and military superiors alike as long as they yield the requisite authority.[161] In differentiating the responsibility between civilian and military superiors, Schabas argues that:

> In order to incur liability, a military commander must know or 'should have known,' whilst a civilian superior must either have known or 'consciously disregarded information which clearly indicated' that subordinates were committing or about to commit crimes.'[162]

Of particular relevance in this regard are crimes against humanity, which, by definition, are perpetrated 'pursuant to or in furtherance of a state or organisational policy.'[163] There

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157 *Delalić and others,* ICTY Trial Chamber, judgement of 16 November 1998, paras 333-343; *Kayishema and Ruzindana*, ICTR Trial Chamber, judgment of 21 May 1999, para 210.

158 Kittichaisaree (n 153) 251.

159 Ibid.

160 Cassese 2003a (n 8 above) 205. The reference of Cassese to 'omission' also corresponds with article 23(1) of the Eritrean Penal Code which defines a criminal offence as 'an act or omission.'

161 *Kayishema and Ruzindana* (n 157 above), para 491.

162 Schabas (n 9 above) 107.

163 Article 7(2) of the ICC Statute.

is a general understanding amongst scholars of international criminal law that inherent in the nature of crimes against humanity is the element of 'government or organisational' acquiescence, a most important factor which implies the criminal responsibility of senior government officials in those crimes. Cassese is one such scholar who argues that crimes against humanity are the manifestation of a policy or a plan drawn up, or inspired by, state authorities or by the leading officials of a *de facto* state-like organisation, or of an organised political group. Crimes against humanity are atrocities 'tolerated, condoned or acquiesced by a government or a *de facto* authority.'[164] As such, criminal responsibility emanating from crimes against humanity is not merely attached to principal offenders but it also implies the criminal guilt of senior officials. The widespread and systematic nature of crimes against humanity means that their perpetration is difficult to contemplate without planning and incitement from above. Support for this argument is also to be found in *Kayishema and Ruzindana*[165] in which the ICTR concluded that the policy element in crimes against humanity means that such crimes are committed with the encouragement or direction of either a government or a group or an organisation.

As seen in Chapter 4, international crimes are committed in Eritrea not only with the acquiescence of senior government officials but also with their explicit approval. Repeated public pronouncements have been made by senior government officials at different times in which officials have openly condemned those who subscribe to any political conviction outside the dogma of the ruling party. The latest government pronouncement comes in the form of a pseudonymous public condemnation believed to have emanated from the Presidential Palace. The recent government statement, made on 5 September 2007, under the pseudonym ጎደና ሓርነት ካብ ኣስመራ (Goddena Harnet Kab Asmara),[166] has made it sufficiently clear that in Eritrea people will be killed continuously

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164 Cassese 2003a (n 8 above) 64. See also Kittichaisaree (n 157 above) 97.

165 *Kayishema and Ruzindana* (n 157 above), paras 124-126.

166 Meaning Harnet Avenue from Asmara. Harnet (Liberty) Avenue is a popular and historic street in the heart of Asmara. See ጐደና ሓርነት ካብ ኣስመራ 'ቅሉዕ መልእኽቲይ ናብ ኣስማሪኖ.ኮም' (Godena Harnet from Asmara 'Open Letter to Asmarino.com'), available at http://zete9.asmarino.com/index.php?itemid=974 (accessed 5 September 2007). The computer from which this pronouncement emanated was later traced by experts of software engineering to be bearing the following Internet Protocol (IP) address: eisaserver.eisa.gov.er. This IP address was then identified to be that of a server located at the Presidential Palace in Asmara, administered by a person called Tewelde 'Gobbo' [last name unknown]. Some commentators indicated that the

as long as they do not obey the policies of the ruling party, disguised as 'national 'interest.' In the original words of the commentator, if a person 'commits the slightest harmful act' to an alleged 'national interest of Eritrea,' it would be just for such a person to be even killed by her/his own biological brother.[167] This represents a deliberate plan to perpetrate international crimes. At the same time, in its formal communications, the Eritrean government categorically denies allegations of gross human rights violations or portrays them as part of an international smear campaign. However, in international law, denials of a general character offering no particular information or explanation are not legally acceptable.[168]

5.11.3 Aiding and abetting

A person may also participate in the commission of international crimes by facilitating the commission of an act or by assisting in its commission. In the current debate, the destructive role of some staunch supporters of the Eritrean government's repressive policies merits critical discussion. There are several individuals, residing in different parts of the world, who continuously support the perpetration of human rights violations of the Eritrean government by their continued public pronouncements, demonstrated via publications and other mediums. Some of them have openly called on the government to take serious measures against dissenters who, according to their arguments, are sell-outs,

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style of writing of the pseudonymous commentator resembles that of Mr Zemheret Yohannes or Mr Yemane Gebreab, two senior ruling party officials widely suspected of writing several misleading pseudonymous articles since 2001. See the comments at **ኣዝማሪኖ.ኮም 'ቅሉዕ መጻዋዕታ ንብጎደና ሓርነት ኢሉ ዝጽሕፍ ጸሓፊ'** (Asmarion.com 'Open Letter to Godena Harnet from Asmara'), available at http://zete9.asmarino.com/index.php?itemid=970 (accessed 5 September 2007).

167 Godena Harnet from Asmara (n 166 above). In the original Tigrinya version, the pseudonymous public condemnation read: **'ንረብሓ ሃገር እንተ ኾይኑ፣ ንእሽቶ ዘይግራውን ንኤርትራ ዘይጠቅምን ተግባር እንተ ገይረ ሓወይ ወደቦይ'ውን ክቕትለኒ ሓላል'ዩ።'** This translates as: 'If I commit the slightest harmful act to the national interest or to that of Eritrea, it would be just, even if I am killed by my own biological brother.' However, as rightly put by Awate Team, the meaning of 'national interest' has been deliberately distorted by the PFDJ. According to the language of the government, which is 'full of derision and disrespect,' political dissent is treason and dissidents are traitors or 'agents who sow seeds of disharmony.' The political culture of the PFDJ 'lumps the party, the government, the country and the people into one entity and equates nationalism with support for the government and treason with opposing it; and, finally, it calls for the blackmail, marginalisation and ostracisation of those targeted.' See Awate Team 'Eritrean embassy in Washington incites religious intolerance,' available at http://www.awate.com/portal/content/view/4651/9/ (accessed 30 October 2007a).

168 *Carballal v Uruguay* (R.8/33), ICCPR, UN Doc A/36/40, decision of 27 March 1981) 125, para 9.

traitors or enemies who do not deserve the slightest hint of mercy.[169] They intimidate, terrorise and defame outspoken Eritrean dissidents and human rights activists. In a sense, they are actively, wilfully, knowingly, unlawfully and continuously engaged in a well-designed propagandistic campaign guided by the official websites of the government, the ruling party and other mediums, including academic journals.[170] They whitewash the gross human rights violations of government officials, which, only after 2001, have victimised tens of thousands of civilians. By such acts, they have offered demonstrable support to the government's continued perpetration of international crimes.

Whether the concerted campaign of disinformation by some staunch supporters of the ruling party entails responsibility as an act of aiding or abetting is a determination that only a component court can make on a case by case basis. However, tentative conclusions can be drawn based on reliable and consistent information which reasonably indicate the

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169 The most prominent example in this regard is Sophia Tesfamariam. This person is a well-educated researcher currently working with the US Foundation for the Horn of Africa, supposedly a think-thank based in the US, where she has been living for about 20 years. She is one of the leading experts in disinformation as far as the continued perpetration of human rights violations is concerned. For example, in an online public speech delivered in October 2007, she accused members of the G-15 of treason and treachery. In particular, she said: 'These people have compromised and undermined the national security of the nation. These are not just everyday ordinary criminals … I know for a fact that these people are not in jail for no reason. It is not for no reason. So, if they have committed any crime against the state of Eritrea that cannot be told to us [now] …' She also said that 'the punishment for their crime is death.' The online speech, which has instigated a popular uproar, is available at the online archive of www.asmarino.com. Furthermore, when members of the G-15 have been kept in *incommunicado* detention for more than six years, she disingenuously argues that the government is 'handling this delicate issue of national concern with great care and magnanimity.' She also accuses the journalists of the private media of 'endangering the peace, stability and security in Eritrea and disrupting the unity of the nation,' violating Eritrea's Press Proclamation (No 90/1996), 'becoming mouthpieces for forces that sought to destabilise Eritrea in time of war.' See Sophia Tesfamariam 'US-Eritrea relations: Soured by design,' available at http://www.shaebia.org/artman/publish/article_5167.shtml (accessed 26 September 2007). In another glaring example of hypocrisy, the same person depicts the conscripts of the notorious WYDC/NMSP as 'Eritrea's Army Corps of Engineers.' See Sophia Tesfamariam 'Warsay-Yikalo "Eritrea's Army Corps of Engineers,"' available at http://www.shabait.com/staging/publish/article_007021.html (accessed 9 August 2007).

170 Another example is Astier A Almedom 'Rereading the short and long-rigged history of Eritrea 1941-1952: Back to the future? 15(2) (2006) *Nordic Journal of African Studies* 103-142. Contrary to the ethics of academic writing, the author of this article grossly and unacceptably defames, insults and slanders prominent Eritrean and non-Eritrean human rights defenders, including her ex-husband and the father of her two children, Alex de Waal. Defamed in the article are also the prominent American writer Dan Connell and the prominent Eritrean human rights defender, activist and winner of the 2003 Thorolf Rafto Memorial Prize, Paulos Tesfagiorgis. More bizarre still, the author preposterously lionises the Eritrean President, by quoting old and forgotten revolutionary songs.

responsibility of some suspected abettors who, not only categorically deny the gross human rights violations perpetrated by the government but, also portray atrocious government polices as popular national development programmes. In some instances, individuals writing or commenting in their private capacity have openly called on the government to tighten its grip on prisoners, or have unequivocally labelled political prisoners as traitors who have betrayed the nation in its difficult time.[171] Such individuals execute a purposeful and well coordinate campaign of distortion, fabrication, falsification and misinformation aimed at portraying all victims of political and religious persecution as 'traitors.'[172]

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171 A clear example in this regard again comes from the publications of Sophia Tesfamariam. In one publication, she refers to victims of religious persecution as 'self serving individuals and groups, who have jumped on the "religious persecution" bandwagon,' whose only purpose is the erosion of Eritrea's independence and the instalment of 'extra-constitutional and illegal regime change in Eritrea.' See Sophia Tesfamariam 'Eritrea: 10/40 window, religious proselytising, conversion and "persecution of Christians,"' available at http://www.americanchronicle.com/articles/viewArticle.asp?articleID=35399 (accessed 18 August 2007); Sophia Tesfamariam 'Eritrea - A model of religious and ethnic harmony and tolerance,' available at http://www.americanchronicle.com/articles/viewArticle.asp?articleID=35389 (accessed 18 August 2007); Sophia Tesfamariam's public speech (audio visual) delivered at the Horn of Africa Conference, Lund, Sweden, 24-26 August 2007), available at http://www.biddho.com/content/view/170/29/ (accessed 29 September 2007). Compare Daniel R Mekonnen 'A rejoinder to Sophia Tesfamariam's crude allegations,' available at http://zete9.asmarino.com/?itemid=1019 (accessed 27 September 2007); Simon M Weldehaimanot 'Summoning PIA to the ICC,' available at http://www.awate.com/portal/content/view/4655/5/ (accessed on 6 November 2007); Bereket Habtai 'Sophia Tesfamariam: *gual hidrtina* of Eritrean politics,' available at http://www.awate.com/portal/content/view/4639/5/ (accessed 8 October 2007). In other publications, she also defames prominent human rights activists and organisations. One of her victims is the co-founder of www.awate.com, Saleh A Johar (Gadi), who has recently launched a legal battle under US courts to challenge her impunity. See Daniel R Mekonnen 'The importance of accountability for immigrant human rights abusers in the United States,' accountability proposal submitted to the Centre for Justice and Accountability (CJA), 11 January 2008. CJA is a US-based pro bono human rights litigation organisation. The accountability proposal devises legal strategies for prosecutorial and non-prosecutorial actions that should be taken against notorious immigrant human rights abusers, such as Ms Tesfamariam, in the domestic courts of the US.

172 Such campaign of distortion, fabrication, falsification and misinformation squarely corresponds with the misrepresentations of the Eritrean president as repeated in his several interviews and public speeches. A most comparable interview in this regard is the one he gave to the *ABC* in 2004 (available at the online archives of www.asmarino.com), in which he accused members of the G-15 of 'treason, betrayal, vacillation, and compromising national security' and a number of other unfounded or legally incomprehensible 'crimes.' In a recent interview with the *Los Angeles Times*, the president again referred to all such political prisoners as 'crooks … degenerates … who have been bought' by others and 'provided themselves to serve something contrary to the national interest of this country' and accordingly whose case should never be taken '[as] a serious matter.' *Los Angles Times* 'Questions and answers with President Isaias Afwerki,' 2 October 2007.

In situations such as this, the most important element is intent on the part of the supporter or abettor 'to provide assistance thereto, or at least his knowledge that his assistance would have a possible or foreseeable consequence of supporting the commission of the crime.'[173] In this regard, some staunch supporters of the Eritrean government may be suspected of consciously participating in, abetting or aiding the perpetration of human rights violations in Eritrea.[174]

With all supporters of the ruling party, demagoguism is a common trait of argumentation. A problem arises when their emotive propaganda and indiscriminate political blackmailing contributes effectively to the anguish of innocent citizens. When such acts openly support the continued perpetration of massive human rights violations, the legal implications under international criminal law are evident. The continued campaign of misinformation is to be seen against the repeated government pronouncements on the issue of the G-15 and other victims of human rights violations. Several times, Eritrean government officials have claimed that the decision to detain the G-15 and other political prisoners was prompted and supported by a popular demand coming from the general public in the form of publications posted on the internet and comments expressed in public forums and meetings, especially from Eritreans in the Diaspora. By this, the officials are referring to comments made by their staunch supporters, who are normally disguised as 'ordinary citizens.' The Director of the Department of Political Affairs of the ruling party, Mr Yemane Ghebreab, in an interview[175] with the *VOA Tigrinya Programme* in 2002, specifically cited similar reasons for the government's decision to detain the G-15 in September 2001. This was an orchestrated government plan which maliciously purported to make the accusations against the G-15 appear as popular demands. Before and after the arrest of the G-15, senior ruling party officials worked relentlessly at fostering this misconception. A member of the G-15, Eritrea's former

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173 Kittichaisaree (n 153 above) 245, citing *Blaskić*, ICTY Trial Chamber, judgment of 3 March 2000, para 286.

174 *Tadic* (n 73 above), para 674; *Furundzija*, ICTY Trial Chamber II, judgment of 10 December 1998, paras 241, 247.

175 *VOA Tigrinya Programme* 'Interview with Mr Yemane Gebreab,' 2002 (date unknown), copy of audio available at the electronic archives of www.asmarino.com.

Minister of Foreign Affairs, correctly described this conspiracy in his interview with Dan Connell, shortly before his arrest, as follows:

> People, for example, Ali Abdu, who is the head of the television department in the Ministry of Information – him and [Aron Tadessay] … they were the ones who raised their hands and said: 'The government should take action. It should imprison them.' It was orchestrated … So the same people … went to another meeting and they were the ones that raised their hands there and said the government should take action and imprison us. They went to several different meetings, but they didn't know that people would tell me about it – that Ali and Aron Tadessay have said the same thing in another meeting. So it was something orchestrated.[176]

Under international criminal law, the conduct of some government apologists could represent aiding and abetting in the continued perpetration of human rights violations. In this regard, a pertinent comparable lesson is to be drawn from one of the decisions of the IMT for the Far East (the Tokyo Tribunal). An army officer by the name of Hashiomo, who never held high government office, was convicted by the Tokyo Tribunal for his publications and support devoted to warlike purposes.[177] Using an analogous line of argument, some staunch supporters of the PFDJ could also be held criminally responsible for the continued support and encouragement (mainly through information, publications and public speeches) they are offering to the perpetration of massive human rights violations in Eritrea. This argument can also borrow support from article 25 of the ICC which offers sufficient legal ground to back any prosecutorial proposals against individual abettors on the basis of common criminal purpose. As the predecessors to the ICC, the jurisprudence of the two prominent international criminal tribunals, the ICTY and the ICTR, also offers perceptive guidance on the concept of aiding and abetting.[178]

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176 Dan Connell *Conversations with Eritrean Political Prisoners* (2005) 108. Seen against such a background, there is a traceable nexus between the continued and orchestrated campaign of misinformation and the premeditated government policy of perpetration of massive human rights violations.

177 See BVA Röling 'Introduction,' in BVA Röling and CF Ruter (eds) *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE)*, 29 April 1946 – 12 November 1948, i, (1977), 444-445, cited in Kittichaisaree (n 153 above) 223.

178 According to the jurisprudence of the ICTY and the ICTR, which are the two most prominent predecessors to the ICC, the acts of some staunch supporters could constitute aiding and abetting. Aiding is defined as 'giving assistance to someone' and abetting is defined as 'facilitating the commission of a crime, being sympathetic thereto.' See *Akayesu*, ICTR Trial Chamber, judgment of 2 September 1998, para 484; *Tadić* (n 73 above) para 679. As noted by Van Sliedregt (n 148 above) 88, the *Krnojelac* judgement offers a most important review of relevant jurisprudence and case law on aiding and abetting which has been used widely since the Nuremberg Trials. See *Krnojelac,* ICTY Trial Chamber, judgement of 15 March 2002, para 88-90. The decision of the

An important development on aiding and abetting was recently elicited in a landmark ruling[179] of the US Supreme Court when the court was asked to rule on the application of the concept of aiding and abetting in civil litigations emanating from the perpetration of international crimes.[180] In this case, the US Supreme Court confirmed a ruling by the Second Circuit Court of Appeal which held that liability of corporations for aiding and abetting the perpetration of gross human rights abuses does exist and that it can be pled under the *Alien Tort Claims Act*.[181] Although given in the context of a purely civil litigation, the ruling of the US Supreme Court was hailed by rights groups as a promising development.

With regard to aiding and abetting, as related to immigrant human rights abusers, some rights groups raise valid concerns that should be addressed by democratic dispensations of the world. Reports indicate that some countries, which are regarded as beacons of justice and democracy in the world, host thousands of survivors of politically-motivated torture and others who escaped tyranny. At the same time, these countries host a large number of torturers and abusers. The fact that some democratic countries have become safe havens for immigrant human rights abusers is an affront to justice. Immigrant human rights abusers live legally, peacefully, openly and comfortably with their victims, causing extreme anxiety to such victims and undermining justice and accountability initiatives.[182]

US Court of Appeals for the District of Georgia in *Hirut Abebe-Jira and others* (n 39 above) also offers comparable relevant lessons for suspected abettors.

179 *American Isuzu Motors Inc et al v Ntsebeza et al* No 07-919 (US Sup Ct) (unreported).

180 The case involves a class action lawsuit against twenty three US and foreign corporations. It was instituted by victims of the atrocities of the South African apartheid government, who sough damages for international crimes perpetrated by the same government. Khulumani Support Group 'US Supreme Court Order clears the way for the Khulumani international lawsuit to go forward,' available at http://www.khulumani.net/index.php/press-releases/5-Press/226-united-states-supreme-court-order-clears-the-way-for-the-khulumani-international-lawsuit-to-go-forward-.html (accessed 13 May 2008).

181 The order of the US Supreme Court was given on 12 May 2008. For media reports and commentary, see *Fox News* 'Court won't block US lawsuit by apartheid victims,' 12 May 2008; *International Herald Tribune* 'Supreme Court allows apartheid victims' lawsuit against US companies to proceed,' 12 May 2008; For academic commentary, see generally Kristen Hutchens 'International law in the American courts – Khulumani v Barclay National Bank Ltd: The decision heard "round the corporate world"' 9(5) 2008 *German Law Journal* 639 and 645.

182 Testimony of Pamela Merchant (CJA Executive Director) before the US Senate, Judiciary Subcommittee on Human Rights and the Law, 14 November 2007, available at http://www.cja.org/projects/merchant_senate_testimony.pdf, citing US Department of Health and Human Services Office of Refugee Resettlement, available at

One of the unique features of the Eritrean human rights crisis is that the government's repressive policies are effectively supported by immigrant human rights abusers, who often misuse the citizenship and naturalisation rights offered to them by their host counties. The possibility of holding to account immigrant human rights abusers in the domestic courts of their respective residence countries is much easier than any legal measures that could be taken against senior government officials who still enjoy the protection of military and security apparatus in Eritrea. This study proposes that accountability measures against immigrant human rights abusers based on the concept of aiding and abetting should make a core component of the ongoing efforts aimed at combating impunity in Eritrea.[183]

5.11.4 Common plan, design or purpose[184]

The doctrine of common criminal purpose[185] or joint criminal enterprise is one of the prominent theories of criminal responsibility, widely espoused by leading international criminal law scholars. Kittichaisaree, for example, holds that 'international crimes do not result from the criminal acts of single individuals but from collective enterprises' pursued

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http://www.acf.hhs.gov/programs/orr/programs/services_survivors_torture.htm and AI USA 'A safe haven for torturers (2002), also available at http://www.amnestyusa.org/stoptorture/safehaven.pdf.

183 See Concept Paper of the Subcommittee of Legal Experts at the Awate Defence Fund (11 February 2008).

184 In this respect, see generally Cassese 2003a (n 8 above) 181 and further; Kittichaisaree (n 153 above) 237 and further; Schabas (n 9 above) 101 and further; Van Sliedregt (n 148 above) 16, 71 and further. See also *Tadic* (n 153 above), para 220; *Krnojelac* (n 178 above), para 77.

185 According to Van Sliedregt, the doctrine of common criminal purpose refers to co-perpetration or plurality of persons in crime. Peculiarly, it refers to a situation where two or more people embark on a criminal project with a common purpose that finally results in the commission of a criminal act. In this scenario, the participants are jointly liable for all that results from the acts and omissions occurring within the scope of their tacit or explicit agreement. Van Sliedregt (n 148 above) 75. In elaborating this concept, the High Court of Australia held that 'each of the parties to an arrangement or understanding is guilty of any crime falling within the scope of the common purpose which is committed in carrying out that purpose.' The court then concluded that it is sufficient to found a conviction for a crime if it can be established that in the course of the joint criminal enterprise a party might have acted with intent to commit a crime. See *McAuliffe v The Queen* 69 ALJR 621, para 624, 627. In South African aw, this theory is known as the doctrine of common purpose. For a detailed discussion on this, see generally CR Snyman *Criminal Law* 4ed (2002) 260-268. Compare this with the relevant provisions of the Eritrean Penal Code, as quoted in n 153 above. For a commentary on the general principles of Eritrean criminal law (which is inherited from Ethiopia), see generally Philippe Graven An *Introduction to Ethiopian Penal Law (Arts 1-84 Penal Code)* (1965).

with a common criminal design.[186] Similarly, Cassese also asserts that 'when the crime results from the *action of a multitude of persons*, it may happen that *not all participants perform the same act*.'[187] Schabas also offers instructive observations in this regard when he argues that 'under the concept of common purpose complicity, those who participate in a criminal enterprise are liable for acts committed by their colleagues.'[188] Schabas supports his argument by quoting the relevant provision of the ICC Statute which provides that a person shall be criminally responsible if s/he *contributes* to a commission of crime 'by a group of persons acting with a common purpose.'[189]

Accordingly, the other groups of people who may reasonably be suspected of involvement in international crimes are some members of the Cabinet of Ministers, some members of the ruling party's Central Council and Executive Committee, some members of the now defunct National Assembly of Eritrea, and many other senior members of the ruling party, including several ambassadors who have been directly and indirectly involved in the commission of international crimes in different capacities. As regards the common criminal purpose or design of the members of the National Assembly, a glaring example may be seen in the illegal detention of the G-15. The detainees were categorically condemned by the National Assembly for no legally recognisable crimes and in their absence.[190] This needs to be evaluated according to the doctrine of common criminal design or purpose.

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186 Kittichaisaree (n 153 above) 237. In elaborating this position, Kittichaisaree cites *Tadic* (n 153 above) para 191-192.

187 See Cassese 2003a (n 8 above) 181 [emphasis original].

188 Schabas (n 9 above) 103.

189 Article 25(3)(d). This article further provides that the *contribution* 'shall be intentional' and must either [b]e made with the aim of furthering the criminal activity or criminal purpose of the group' or be 'made in the knowledge of the intention of the group to commit the crime.' According to Schabas, this development merged with the case law of the ICTY has paved the way 'to what has come to be known as the "joint criminal enterprise" theory of liability.' He further agues that 'it would seem plausible that ICC judges will be strongly influenced by this case law in their application of Article 25.' Schabas (n 9 above) 104. In furthering his argument, Schabas cites *Tadic* (n 153 above), para 222 and *Krstic*, ICTY Trial Chamber, judgment of 2 August 2001, para 622. Most notably, in *Tadic* (para 220) the ICTY held that: 'What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to the result but nevertheless willingly took that risk.'

190 By condemning the reformers unequivocally, all members of the National Assembly involved themselves not only in approving an illegitimate resolution and thereby prolonging the illegal incarceration of the reformers, but also in condoning the continued perpetration of international crimes which by that time were all-encompassing throughout the country. Between 29 January and

The theory of common plan, design or purpose, refined during the Nuremberg trials, focuses on the criminal role of low level culprits who are seen most of the time as passive observers in the perpetration of international crimes.[191] Quoting Colonel Murray C Bernays, one of the pioneering proponents of the theory of collective criminality, Van Sliedregt argues that in international crimes, individual guilt can also be determined based on the mere fact of voluntary membership in organisations devised solely to commit such crimes. Van Sliedregt[192] adds that in one of the Nazi trials, individuals who did not physically participate in the commission of crimes 'were held responsible as accomplices to the crimes because of their functional involvement in carrying out the Nazi policy.'[193]

According to the aforementioned theory, crimes and criminals were collectivised during the Nuremberg trials where the Nazi Cabinet, the Gestapo, the SS and the SA would stand trial through their individual representatives. This approach focused on the basic criminal instigation of the Nazi doctrine and policy.[194] In this regard, the arguments put

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2 February 2002, the National Assembly heard a report on the 'crimes' of the reformers, compiled by the state president (who is also the chairman of the assembly). The report of the president, among other things, accused the reformers of plotting to overthrow the government, treason, incitement of violence and mutiny, collaborating with the enemy and foreign powers, and defeatism, especially in the context of the 1998-2000 border conflict with Ethiopia. After hearing such unilateral accusations, the National Assembly 'condemned' the reformers 'for the grave crimes they committed against the nation and the people.' It then 'affirmed that as a result of the crime of betrayal and defeatism they [have] committed, the members of this group have dismissed themselves from the National Assembly.' The National Assembly 'expressed full support for the patience and self-restraint with which the government has handled the matter.' The National Assembly never convened after that. See *Resolutions of the Fourteenth Session of the Eritrean National Assembly*, adopted on 2 February 2002, also available at http://www.shaebia.org/14th_session_resolution_english.html; Ministry of Foreign Affairs of the State of Eritrea *Letter to the Chairman of the ACHPR,* 22 March 2004, also available at http://www.shaebia.org/artman/publish/article_2592.html. See also Daniel R Mekonnen 'The reply of the Eritrean Government to ACHPR's landmark ruling on Eritrea: A critical appraisal' 31(2) 2006 *Journal for Juridical Science* 41-44; Daniel R Mekonnen 'The abolition of female circumcision in Eritrea: Inadequacies of new legislation' 7(2) (2007) *African Human Rights Law Journal* 404-406.

191 Van Sliedregt (n 148 above) 16.

192 Ibid 27.

193 The fact that the Nuremberg trials did not make any distinction between principals and accomplices, as far as the establishment of individual criminal guilt was concerned, was explained by the American military court in *Pohl and Others*. See Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, Nuremberg, Washington, DC: Government Printing Office (1949-1953) (TWC), vol III, 1063, as cited in Van Sliedregt (n 148 above) 27.

194 Van Sliedregt (n 148 above) 16-20, 353.

forward by Van Sliedregt are pertinently instructive. Responsibility for crimes committed in such circumstances is 'imputed on those individuals that participate in the system while being aware of its nature' and the participation is regarded as 'furthering the common criminal design of the system.'[195] The applicability of this theory in the Eritrean situation should be appreciated within the context of the general understanding that the criminal responsibility of every suspect must be evaluated on a case by case basis.

Barring a legitimate defence[196] acceptable under international criminal law, all of the individuals who are reasonably suspected of being involved in international crimes of universal concern could possibly be prosecuted by a competent court. There is a wealth of information accumulated by researchers, rights groups and other sources in this regard. The latest compilation by Awate Team, a report which identifies the most responsible perpetrators, is one such good example. The list of individuals compiled by Awate Team[197] could serve as groundwork for further prosecutorial action as far as the individual criminal liability of senior government officials and others is concerned. The list, as discussed in the next section, includes civilian superiors and military commanders who are reasonably believed to be at the core of the authoritarian system in Eritrea.

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195 Ibid 353. On the same page, the author further makes the following observations. For criminal responsibility to be established under the theory of joint criminal enterprise, membership in a certain organization is 'enough to generate criminal responsibility, as long as it could be shown that the members had knowledge of the system's purpose and had voluntarily joined the organisation.' Furthermore, it is important 'to establish whether a person voluntarily accepted that role within the criminal organisation and could have refused to occupy that position, before he can be held responsible for the role in the collective. This is particularly important with regard to those in lower and mid-level positions where the freedom to "vary one's roles" is more restricted.' Accordingly, Van Sliedregt concludes that joint criminal enterprise is a legal construction which seeks to establish criminal responsibility of those who are not principal offenders. Citing *US v Karl Brandt et al* (Medical Case), as quoted in Leon Friedman *The Law of War: A Documentary History* (1972), Van Sliedregt further discusses Karl Brandt as one of the Nazi officials who was held responsible for being a member of the SS.

196 Such defences, according to Cassese 2003a (n 8 above) 219-256, include: mental disorder, self-defence, intoxication, necessity, duress, mistake of law and mistake of fact. Similar defences are also applicable under the Eritrean Penal Code. See articles 64-78.

197 Awate Team 'The accused: Isaias and his clique,' available at http://www.awate.com/portal/content/view/4599/9/ (accessed 1 September 2007). Compare the list of names mentioned in this report with those mentioned in Eritrean Anti Tyranny Global Solidarity 'In memory of Adi Abeito martyrs: Fax message to PFDJ's chieftains,' available at http://e.asmarino.com/content/view/39/26/ (accessed 16 November 2006).

However, the forgoing discussion must be seen against the background of the following key observations. As an academic study dealing with available transitional justice options for a future model, the present study acknowledges that in most post-conflict models of retributive justice only a handful of perpetrators have ultimately been held accountable. In most cases, those who are prosecuted are the few men or women at the head of a repressive regime, who are regarded as most responsible for grave human rights violations. The history of prosecution of grave human rights violations yields no examples in which a large number of perpetrators were prosecuted after the demise of a repressive regime. Regardless of the destructive role they are playing in maintaining a repressive regime such as the PFDJ, the actions of some collaborators and abettors may not pass the rigorous threshold of individual criminal responsibility in any of the forms discussed in this chapter. This so because in a strict legal sense the benchmark for criminal responsibility may be too high to embrace all possible suspects discussed in this study. These limitations and other normative considerations necessitate the need to consider non-prosecutorial accountability options, as is broadly discussed in Chapter 6. However, as will be also discussed in Chapter 6, the important considerations are not limited to the restrictive confines of the criminal justice system in addressing the needs of a society in transition. Of equal importance are the societal needs of national healing, reconciliation and transformation, which are all inherent in every post-conflict agenda of nation-building.

5.12 Identifying the most responsible perpetrators

In identifying the most responsible perpetrators, this article borrows the methodology utilised by the Darfur Commission. Although the final verdict on individual criminal guilt can only be made by a competent court, the methodology[198] of the Darfur Commission indicates that a tentative assessment of the likely suspects can be done any time based on 'a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.' In totalitarian regimes and police states, such as Eritrea, where information is

[198] *Report of the Darfur Commission*, para 15.

intensely manipulated by the government, the most responsible perpetrators can be identified by studying the structure of the government and making a determination of who holds the reins of power or who occupies which key government position (or ruling party high position), who heads the top security and military apparatus, and so forth. This is one of the techniques utilised in the recent Awate Team report.[199] The report identifies the most powerful individuals who have effectively controlled every aspect of life in Eritrea, especially since 2001. Based on such an instructive but non-authoritative assessment, the report indicates that these individuals can be plausibly considered as the most responsible perpetrators of international crimes in Eritrea. The assessment is based on the contents of interviews and conversations with hundreds of Eritreans conducted at different times. According to the report, the informants come from different backgrounds:

> Some are still in Eritrea; others have escaped. Some were members of *agelgelot* (the so-called 'Warsay-Yeka'alo' initiative); others [are] long time members of the [ruling party]; some were veterans of the struggle era organizations and still others are ordinary citizens - brothers, sisters, fathers and mothers of those unjustly incarcerated. Throughout, we found that the same names of [perpetrators] were being repeated over and over.[200]

The perpetrators identified by Awate Team comprise officials regarded as persons in 'the first circle or the first tier of the ruling party.' As asserted by the same report, 'a second, a third and probably a fourth tier of persons may be included' in the report in the process of collecting more information. The report describes the perpetrators as collectively responsible for the grave crimes committed in Eritrea because they are either in a position to know or should have known of the commission of international crimes. Governments, rights groups, tribunals and others frequently cite the findings of Awate Team as reliable.[201] Seen against such a background, the report of Awate Team can be taken as a reliable starting point for further investigation and identification of perpetrators of international crimes in Eritrea. Tentatively, the Awate Team report mentions some

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199 Awate Team (n 197 above) See also the newly launched Eritrean Human Rights Electronic Archive: www.ehrea.org. Launched on 19 September 2007, this database is yet to be explored.

200 Awate Team (n 197 above).

201 One example is the UK Asylum and Immigration Tribunal which said the following about reports of Awate Team: 'Awate.com [is] a site independent of opposition political parties … [It] is one of the most reliable because it is rare to see a website that corrects itself if subsequently proven wrong on factual errors and it is a website upon which the [UK] Home Office often relies, indeed it is exemplified by the fact that it is quoted in [the UK's Central Office of Information].' See *MA draft evaders* para 67. See also *ACHPR-EMDHR Communication*.

seventeen individuals as the most responsible for perpetrating international crimes, ordering such violations, overseeing their implementation as well as aiding, abetting, planning or cooperating in their implementation through rigid and cruel institutional structures.[202]

The high-ranking military commanders mentioned by Awate Team have full discretion to implement whatever type of punishment they wish, including extra-judicial execution, and this has continued with impunity for several years. Each of the military commanders operates his own prison sites in his respective operation commands, where thousands of people are tortured and executed extra-judicially on a regular basis. In these prison sites, brutish methods of punishment, and degrading and inhumane treatment are meted out on a daily basis and indiscriminately against all who demonstrate the slightest sign of defiance against the draconian rules of the government or who are believed to be politically or religiously 'different.' The military commanders also operate kangaroo courts where people are sentenced to imprisonment or execution in utter disregard of the requirements of a fair trial. The commanders routinely execute indiscriminate round-ups, locally known as ግፋ (giffa), with the sole objective of terrorising the entire population. They imprison and fine tens of thousands of parents whose children have left the country 'illegally.' Their actions are bolstered by the support, cooperation, encouragement and acquiescence of the security and intelligence heads as well as top ruling party and government officials starting from the state president.

In addition to the above, perceptive guidance on the identification of most responsible perpetrators can also be gleaned from the case of Eritrea's former chief of national security, who is currently residing in the UK. Relevant information which surfaced in

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202 The individuals identified by the Awate Team report are categorised in four groups. In the first category is the state president, who enjoys absolute power over every aspect of Eritrean life, and is identified as a major perpetrator. The second category includes six top army generals who, next to the state president, have effectively controlled every aspect of life in the country. Included in the third category are three security and intelligence chiefs. The fourth group includes seven high-ranking and civilian ruling party officials, ministers and ambassadors. Perhaps another high-ranking official who should have been included in the list is the Acting Minister of Information, who is notoriously known for his active involvement in several atrocities. It should be noted that the list compiled by Awate Team cannot be taken as an exhaustive. It cannot also be taken as conclusive in regards the criminal responsibility of the individuals listed therein.

May 2008 reveals that this particular person was the most responsible government official who imposed arbitrary prison terms against hundreds of former *Derg* officials in January 1996. When imposing the prison terms, the perpetrator gathered all prisoners in the compound of the Adi Quala Prison and summarily read the names of individuals and their 'prison terms.' This was a flagrant violation of fair trial standards as stipulated in the relevant provisions of the Eritrean Criminal Procedure Code as well as in international law.[203]

Based on the report of Awate Team and other research outputs, the present study tentatively identifies the same individuals as the most responsible for the perpetration of international crimes in Eritrea. Without prejudice to any legitimate defence acceptable under international criminal law, all of these individuals may reasonably be suspected of being involved in the perpetration of international crimes of a universal concern and could possibly be prosecuted by a competent court. In the process of collecting more information, notes Awate Team, other persons may also be identified as possible perpetrators.[204] A pragmatic question that should follow is: Where, when and how are these individuals to be prosecuted? This question will be revisited in Chapter 7 in the context of the outlines of a workable model of transitional justice.

5.13 Conclusion

Throughout its brief post-independence history, Eritrea has seen grave violations of international human rights and humanitarian law which resulted in the perpetration of

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[203] HRC-E 'Naizgi Kiflu is returning to Eritrea from London,' available at http://cs.asmarino.com/?itemid=936 (accessed 1 May 2008). The report further elaborates that some 146 prisoners were sentenced for life imprisonment; 85 others were sentenced for prison terms of ten to fifteen years. Some 135 prisoners were sentenced to prison terms of eight to ten years. Some of the prisoners have since died due to harsh prison conditions. The report also indicates that in 2001 and 2004 the same perpetrator personally gave orders for the arrest of several journalists of the private media and the leaders of different religious groups. May of them remain in *incommunicado* detention and some have already died in prison. Although still at a preliminary stage, the Lonond-based HRC-E has recently initiated a case of criminal prosecution against the suspect under sections 134 and 135 of the 1988 UK Criminal Justice Act. The report indicates that the case is currently under investigation by the London Metropolitan Police and the British Crown Prosecution. See also RSF 'Naizgi Kiflu, the dictatorship's *éminence grise*,' available at http://www.rsf.org/IMG/pdf/Download_the_full_report.pdf (accessed 21 May 2008).

[204] Awate Team (n 197 above).

international crimes with impunity. Crimes against humanity, war crimes and the crime of aggression have been perpetrated in Eritrea on an alarming scale. There is a wealth of credible information which suggests that massive human rights and humanitarian law violations have been perpetrated by Eritrean government officials with impunity as part of a widespread, systematic and preconceived government plan or policy. This is more accurate especially with regard to grave human rights violations perpetrated before and after the 2001 crackdown on the popular demand for democratisation.

The violations perpetrated by Eritrean government officials sufficiently meet the threshold of international crimes (war crimes and crimes against humanity) as defined by articles 5 and 7 of the ICC Statute as well as the international crime of aggression as defined by the UN Charter and other peremptory norms of international law. With no local remedies for victims whatsoever, Eritrean government officials have been arrogantly dismissive of any allegations of violations. In fact, violations are continuing with the encouragement and acquiescence of senior government officials and army commanders. The perpetrators identified in this study and others who have to be identified in the future as further evidence comes to light have unlawfully, wilfully and knowingly committed grave human rights violations in a systematic and widespread manner. Most of these perpetrators have also flagrantly violated established rules of international humanitarian law.

In most cases, perpetrators have acted as principals or accessories either by perpetrating, ordering, encouraging, aiding, participating, abetting or taking a consenting part in, and were connected with, plans and enterprises involving the commission of international crimes which subjected hundreds of thousands of Eritreans and non-Eritreans to murders, brutalities, cruelties, tortures, atrocities, and other inhuman acts. It is reasonably apparent that all such perpetrators have acted with a common design and conspiracy, with plans and enterprises to commit international crimes in many instances against the Eritrean people but at other times also against the peoples of neighbouring countries and the international community at large. The available forums where the most responsible perpetrators can be prosecuted will be discussed in Chapter 7.

CHAPTER SIX

ALTERNATIVE FORMS OF ACCOUNTABILITY

Outline

6.1 Introduction

The accountability problem in regard to massive violations of international law has three main dimensions: legal, moral and political.[1] Legal dimensions as manifested in the form of prosecutorial options have been discussed in the previous chapter. Moral and political dimensions are the focal point of discussion in this chapter. This chapter begins with an

[1] Juan E Méndez 'Accountability for past abuses' 19 (1997) *Human Rights Quarterly* 256.

examination of the limitations of prosecutorial options and the need for consideration of non-prosecutorial options in the context of radical political change. Transitional justice scholars agree that an all-encompassing prosecutorial scheme is not always possible in the aftermath of massive violence. The choices of transitional societies are limited by the political, military and economic conditions prevailing in a given transition as well as by the affected society's legacies of injustice and its legal culture.

This chapter discusses the permissibility under international law of amnesty as an alternative form of accountability, as implemented by truth and reconciliation commissions (TRCs).[2] The analysis is informed by the understanding that many of the pervasive societal needs in the aftermath of massive human rights and humanitarian law violations are best served by non-prosecutorial options. In this regard, amnesty administered by TRCs appears as a most appropriate alternative form of accountability, while a clear distinction is to be made between blanket and conditional amnesty adopted through a democratic and participatory process. These options are now generally accepted as possible forms of accountability in periods of radical political change. The chapter discusses the theoretical foundations of amnesty, its legal basis in international law as well as the normative justifications that would necessitate amnesty as an option in periods of legal and political transformation. In so doing, the chapter thoroughly examines the limitations of prosecutions in addressing the pervasive needs of society in the aftermath of massive human rights violations. This will be linked up with the need for complementary and alternative forms of accountability. The normative justifications of amnesty and its contribution to restorative justice, as compared to retributive justice, are examined critically.

As an important aspect of contemporary transitional justice discourse, the discussion on amnesty will be preceded by an exposition of the conception of justice and law in periods of transition. As also noted by a prominent transitional justice scholar,[3] the chapter argues

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2 These institutions are variably referred to as truth commissions or truth and reconciliation commissions. This study adopts the second term, which is broader than the first. See Priscilla B Hayner *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2001) 22-23.

3 Ritu G Teitel *Transitional Justice* (2002) vi, 3.

that the study of the conception of justice in periods of political transition and the relation that law bears to democratic development are vitally important in determining what options a given society has to address its transitional needs. The legal status of amnesties under international law, which is not yet clearly demarcated, also constitutes an important part of the discussion in this chapter. It is noted that recent developments in international law are supportive of amnesties which are the result of a democratic process and popular participation. In this regard, the chapter shows that TRCs are widely recognised as the most appropriate forums for the administration of amnesties in a transitional context.

To provide context, the chapter discusses some of the most salient features of successful TRCs. In line with this, the chapter recognises the institutional guidelines developed by the UN thematic organ on human rights, the OHCHR, as one of the most authoritative guiding principles on the constitution and functioning of future TRCs.[4] However, the study also recognises that 'there is not one best model on which to pattern a truth commission,'[5] although the recently developed OHCHR guidelines[6] can be regarded as illuminating. Accordingly, the questions that come up with the establishment of TRCs will be answered differently in different countries, because many of these questions are

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4 OHCHR *Rule-of-law Tools for Post-conflict States: Truth Commissions* (2006). The development of the guidelines was supervised by Priscilla B Hayner, one of the leading scholars on TRCs. See also generally the following articles by the same author, all on TRCs: 'Fifteen truth commissions - 1974-1994: A comparative study' (16) 1994 *Human Rights Quarterly* 597-655; 'International guidelines for the creation and operation of truth commissions: A preliminary proposal' (59) 1996a *Law and Contemporary Problems* 173-180; 'Commissioning the truth: Further research questions' 17(1) 1996b *Third World Quarterly* 19-29; 'Truth commissions: A schematic overview' 88 (2006) *International Review of the Red Cross* 295-310.

5 Hayner 1994 (n 4 above) 652; Hayner (n 2 above) 247-248, 258.

6 These guidelines aim at ensuring sustainable, long-term institutional capacity in post-conflict environments. The tools have been designed to offer strategic and programmatic guidance in the decision-making process in critical transitional justice and rule of law areas. As the UN focal point for coordinating system-wide attention for human rights, democracy and the rule of law, the OHCHR was mandated to supervise the development of the rule-of-law tools. The development of such a comprehensive transitional justice policy by the UN and the financial and institutional support offered to the project by the EU and the ICTJ are indicative of the fact that TRCs are becoming relevant components of transitional justice with due recognition in international law. According to the United Nations High Commissioner for Human Rights, Louise Arbour, the development of the tools has marked 'the beginning of the substantive engagement of OHCHR in transitional justice policy development.' The tools outline four basic principles of transitional justice framed in the form of: Mapping the Justice Sector, Prosecution Initiatives, Truth Commissions, and Vetting and Monitoring Legal Systems. Of the four sets of principles, the rule-of-law tools on TRCs are of particular relevance for the development of future TRCs as well as the discussion in this Chapter. See OHCHR (n 4 above) v.

unique to these kinds of broad truth inquiries and do not usually appear in a standardised form. However, it is believed that 'a close study of the paths taken by others may provide at least some general guidance.'[7]

6.2 The limitations of prosecutorial options

In Chapter 5, prosecution was discussed as one of the necessary and desirable options to respond to massive violations of human rights. However, the complex questions of justice and accountability cannot be addressed merely by prosecutorial options, even when there are properly functioning courts with virtually no limits placed on their powers to prosecute wrongdoers. In actual terms, argues Priscilla Hayner, 'post-transition justice is rare.' In her words:

> Where there are trials, they are usually few in number and sometimes fail to convict even those who everyone 'knows' are guilty. In virtually every country I visited throughout Latin America, Africa, and elsewhere, I found a difficult struggle for justice and a frustration over the small numbers of victimisers prosecuted and the incapacity of the courts.[8]

Quoting the pioneering writers[9] on transitional justice, Hayner further argues that how and under what constraints democratic transitions take shape after a period of repressive rule is the central question that always arises in times of radical political change. Ruti Teitel poses this dilemma as follows:

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7 Hayner 2001 (n 2 above) 247-248, 258.

8 Hayner 2001 (n 2 above) 12. Compare this with the landmark judgement of the South African Constitutional Court in which it was held that: 'Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigors of the law.' According to the court, non-prosecutorial truth-telling mechanisms offer options 'to address this massive problem by encouraging … survivors and … dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible.' See *AZAPO v President of the Republic of South Africa* 1996 (4) SA 671 (CC) 691, para 17.

9 Guillermo O'Donnell *et al* (eds) *Transitions from Authoritarian Rule: Prospects for Democracy* (1986) 75. The authors argue that the dilemma of transitional justice revolves mainly around two major points: the desire to bury the past and the ethical and political demand to confront the crimes of the prior regime. See also Hayner 2001 (n 2 above) 10.

> How should societies deal with their evil pasts … How is the social understanding behind a new regime committed to the rule of law created? Which legal acts have transformative significance? What, if any, is the relationship between a state's response to its repressive past and its prospects for creating a liberal order? What is law's potential for ushering in liberalisation?[10]

Comparative and international law scholars agree widely on the assertion that the scope and limits of legal remedies for international crimes committed under defunct regimes differ from situation to situation. Nonetheless, countries undergoing a transition from authoritarian to democratic rule face certain common challenges. On the one hand, there exists a determination that past human rights violations should never be repeated, and a culture of human rights and respect for the rule of law be cultivated. On the other hand, there are colossal legacies of oppression which may give birth to a fragile government and a precarious unity.[11]

Teitel contends that 'the question of "punishment or impunity," whether there is an obligation to punish in democratic transitions,' forms the core of the debate on the implications of transitional justice for the liberalising prospects of states. In such cases, the choice to be made is mainly between 'the moral argument for punishment in the abstract, [and the] various alternatives for punishment [that] could express the normative message of political transformation and the rule of law, with the aim of furthering democracy.'[12] Likewise, Diane Orentlicher argues that issues of accountability during periods of transition frequently pose a daunting dilemma, because:

> On the one hand, the balance of power between the *ancien régime* and the new government is often precarious, and prosecuting depredations of the outgoing regime may seem to place an already fragile democracy at greater risk – particularly when the outgoing regime was dominated by military sectors that retain a monopoly on the use of force. On the other hand, impunity for atrocious crimes of the recent past undermines the law's authority just when a society is poised to reassert the supremacy of law. A Faustian pact with a brutal regime – a pact to allow impunity in exchange for the end of dictatorship – raises the spectre of perpetuating the very lawlessness that is meant to be ended.[13]

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10 Teitel (n 3 above) vi, 3.

11 Alex Boraine *A Country Unmasked* (2000) 379.

12 Teitel (note 3 above) vi.

13 Diane Orentlicher 'Addressing human rights abuses: Punishment and victim compensation' in Louis Henkin and John Laurence Hargrove (eds) *Human Rights: An Agenda for the Next Century* (1994) 425, 431.

In a perfect situation of political transformation, victims of atrocities are entitled to full justice, which takes place in the form of prosecution of perpetrators and adequate punishment to that effect. In essence, criminal accountability is justified on the grounds that it advances a democratic, rule of law abiding, state with a new democratic political order. It is said to be politically useful in drawing a line between regimes, advancing the political goals of a transition by de-legitimating the predecessor regime and legitimating its successor.[14]

Criminal accountability can be one but not the only means of ensuring a successful mechanism for addressing the legacies of massive violations.[15] Prosecutions do not always resolve the concrete needs of victims and communities that have suffered from excessive violence. There are several shortcomings of criminal accountability as an option for a given transition. An all-encompassing prosecutorial scheme is not always possible in the aftermath of massive and pervasive violence, such as the present situation in Eritrea, simply because there might be too many victims, too many perpetrators and not enough witnesses in a given circumstance. Apart from the most responsible perpetrators, mid- and low-level perpetrators may reach into the thousands. In most cases, the choices are limited by the political, military and economic conditions prevailing in a

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14 Diane Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' 100 (1991) *Yale Law Journal* 2537. In her latest and revised contribution to the launching issue of the *International Journal of Transitional Justice*, Orentlicher observes that: 'Among human rights professionals, few issues have proved as vexing as the set of challenges bound up in the notion of transitional justice. Should - must? - societies attempt to bring to justice those who bear key responsibility for past atrocities? Does justice inevitably entail prosecutions or does its meaning instead turn upon each society's historically and culturally specific experience? Besides trials, what roles can truth commissions, reparations programmes and other measures of transitional justice play in transforming a society that has been shattered by unspeakable crimes? Should - does? - international law constrain or shape States' responses to crimes of the past? How do the answers to these questions turn upon the political constraints that define a nation's transition? These questions only begin a long, and ever-lengthening, catalogue of quandaries that vex societies confronting the challenges bound up in political transition and the professionals who seek to assist them.' Diane Orentlicher '"Settling accounts" revisited: Reconciling global norms with local agency' 1(1) 2007 *International Journal of Transitional Justice* 10-11.

15 For the drawbacks of prosecutions in situations of massive violations, see generally Paul van Zyl 'Justice without Punishment: Guaranteeing Human Rights in Transitional Societies' in Charles Villa-Vicencio and Wilhelm Verwoerd *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 42-43. See also Carlos S Nino 'The duty to punish past abuses of human rights put into context: The case of Argentina' 100 (1991) *Yale Law Journal* 2619; Samuel P Huntington *The Third Wave: Democratization in the Late Twentieth Century* (1995) 165.

given transition as well as by the affected society's legacies of injustice and its legal culture.

In this regard, Paul Van Zyl elaborates that post-conflict governments inherit law enforcement personnel trained solely to master illegal methods of evidence gathering, prosecuting and adjudicating, which are all incompatible with a democratic order. In some cases, perpetrators may deliberately murder members of the criminal justice system or potential witnesses in an attempt to prevent future accountability.[16] In other cases, members of the criminal justice system remain strongly loyal to the old regime, blocking every possibility of effective prosecutions against former officials; or are themselves involved in past crimes, and it may take time to replace them with new recruits.[17] A most important observation made by Van Zyl refers to the cost of prosecutions involved in post-conflict trials. In such situations most perpetrators are important figures, wealthy or supported by powerful constituencies; an enormous amount of time and many resources are required to conduct trials against such actors. Naturally, such trials are lengthy due to their high-profile nature.[18]

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16 The assassination of Mr Tesfamichael Giorgio in April 1992, in Addis Ababa, may serve as a good example in this regard. He was assassinated by unidentified individuals allegedly sent by the state president, because he knew 'too much for his own good.' He was said to have been involved in the early contacts between the current Eritrean president, CIA agents and some Ethiopian government officials inside the American base (Kangew Station) in Asmara in the early 1970s. See Press Release by the International Relations Office of the ELF-RC, 10 March 1997, available at http://www.fas.org/irp/world/para/docs/humanr~2.htm.

17 Van Zyl (n 15 above) 44 and further. The writer further observes that most of the time political crimes are committed by highly trained security forces skilled in covert operations and destroying relevant evidence. Proving such crimes under the normal procedures of criminal justice is very difficult. Crimes are also committed under broad and ambiguous commands and can be easily and plausibly denied by political leaders as was the case in the South African experience. Security forces who appeared before the South African TRC testified that the commands given by the State Security Council during the apartheid era included instructions to 'eliminate' and 'neutralise' anti-apartheid activists. However, former political leaders contested that such orders were legal methods aimed to combat resistance. If such cases are brought before a court of law, the corroboration of the charges becomes extremely difficult.

18 An excellent example discussed by Van Zyl (n 15 above) 44 is the ordeal of the former Chilean dictator, General Augusto Pinochet in the UK, where a relatively narrow jurisdictional issue took almost six months from the date of arrest of Pinochet. The cost was estimated to be US$48 million. In South Africa, the Malan and De Kock Trials, the trials of two senior officials of the apartheid regime, took a combined period of almost two-and-a-half years with only one conviction secured at last. Van Zyl also indicates that the most comprehensive attempt to punish perpetrators was made in the Nuremberg Trials. However, out of the 85 882 cases brought before the court a conviction of only less than 7000 cases was secured by the tribunal. Similarly, the recent trials of former *Derg* officials in Ethiopia also took more than fifteen years. The challenge becomes more

In terms of the needs of a society in transition, criminal prosecutions have critical deficiencies. In connection with the option adopted by South Africa, Boraine notes that:

> [One option] would have been criminal trials, which would have been unworkable. Simply put, it was impossible for the ANC in particular to accept the protection of the security services throughout the negotiation process and then to say to them, 'Once the election is over we are going to prosecute you.' If they had done so there would have been no peaceful election. It is as simple as that. The generals of the old regime had made that adamantly clear. It follows that there would have been no democratic constitution and the country would have deteriorated into a state of siege with many more deaths and further destruction of property … It was on this basis that the [Truth and Reconciliation] Commission was established …[19]

Similarly, Archbishop Desmond Tutu, the former chairperson of the South African TRC, also testifies that reconciliation after conflict was not easy but was the only way forward, whether at a political or personal level.[20] Accordingly, the parameters of the choice between the competing theories of retroactive justice are defined by a country's particular mode of transition and levels of political restriction.[21] In furtherance of the approach adopted by South Africa, Boraine quotes Marvin Frankel as saying:

> The call to punish human rights criminals can present complex and agonising problems that have no single or simple solution. While the debate over the Nuremberg trials goes on, that episode – trials of war criminals of a defeated nation – was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators.
>
> A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed … If the army and the police have been the agents of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for

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pressing following the whole collapse of a judicial system and law enforcement personnel in a given country. The current complete non-availability of domestic remedies in Eritrea is virtually equivalent to a total failure of the justice system.

19 Boraine (n 11 above) 7. Dugard also comments similarly. See John Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question: *AZAPO v President of the Republic of South Africa*' 13 (1997a) *South African Journal on Human Rights* 258. Conversely, there are some writers who argue that with its enormous popularity, it would have been possible for Mandela's government to reverse the constitutional provision of amnesty. This did not happen because there was a genuine commitment to reconciliation on the part of the negotiators. This is perhaps the most distinguishing feature of South African leaders of the new constitutional order. See Lyn S Graybill *Truth and Reconciliation in South Africa: Miracle or Model?* (2002) 59. The shortcomings of the South African model of transitional justice will be discussed at the later part of this Chapter as well in Chapter 7.

20 Desmond Tutu *No Future without Forgiveness* (1999) 9. See also Carlos S Nino *Radical Evil on Trial* (1996) 188; Nino (n 15 above) 2619.

21 Boraine (n 11 above) 387; Teitel (n 3 above) 7.

> human rights … If they are treated too harshly – or if the net of punishment is cast too widely – there may be a backlash that plays into their hands.[22]

This means that a government's effort to prosecute a large number of perpetrators of human rights violations can be frustrated by factual situations that may have a risk of provoking further violence and a return to undemocratic rule.[23] The situation during the initial phase of the South African political negotiations is typically characterised by that kind of stalemate. That is why the South African TRC was moulded with amnesty as one of the cornerstones which constituted the transitional agenda and the interim constitution. From the very beginning, the concern of the major negotiating parties, the ANC and the National Party (NP), was how to reach a negotiated settlement that fulfils the crucial needs of the transition.[24]

If healing and reconciliation is to be achieved in a bitterly divided society, prosecution cannot do it perfectly. Even in the case of 'radical evils,'[25] such as ethnic cleansing and genocide, ordinary measures that usually apply in the field of criminal justice may be inadequate. Such pragmatic limitations necessitate the belief that 'abnormal atrocities demand abnormal measures,'[26] because the law on its own cannot be expected to deal with the consequences of such abnormalities. This is true, however, only when states demonstrate genuine commitment to address their past in a way compatible with their peculiar circumstances, without resorting to blanket amnesty. Accordingly, Richard Goldstone, the former Prosecutor of the ICTY, refines the most common options societies can adopt during political transition as appearing to be either: 'to prosecute the perpetrators or at least the leaders; or to establish truth commissions before which the victims would be given the opportunity of publicly testifying about their experiences.'[27]

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22 Marvin Frankel *Out of the Shadow of the Night: The Struggle for International Human Rights* (1989) 103-104, cited in Boraine (n 11 above) 283-284.

23 Nino 1996 (n 20 above) 188; Boraine (n 11 above) 281.

24 Boraine (n 11 above) 7.

25 To use the terminology of Nino (n 20 above) 188.

26 Boraine (n 11 above) 434. As will be seen later, this is related to Teitel's 'distinctive values peculiar to periods of transition' and 'law's phenomenology in such periods.' Teitel (n 3 above) 7.

27 Richard Goldstone 'Foreword' to Villa-Vicencio and Verwoerd (n 15 above) viii-xiii, ix.

The assessment of the drawbacks of prosecutorial options necessitates consideration of other forms of accountability. It is for this reason that societies have to look for other solutions, and invent new and distinctive legal forms to respond to the past.[28] In this regard, the need for complementary and alternative forms of accountability is becoming a very important aspect of contemporary transitional justice discourse.[29] However, as will be seen later, pragmatic considerations are not the only justifications for consideration of non-prosecutorial options of accountability. Societal needs of healing, reconciliation and social reconstruction, in other words, the exigencies of restorative justice, are most important considerations. All these factors must be analysed in conjunction with the conception of justice and law in periods of transition.

6.3 The conception of justice and law in periods of transition

An exposition of alternative forms of accountability during periods of transition would sound unconvincing if seen in isolation from the role of law, the rule of law and the conception of justice in the context of radical political change. According to Teitel, a study of the conception of justice in periods of political transition and the relation that law and justice bear to democratic development are vitally important in determining what options a given society has to adopt for its transitional needs.[30] The conception of justice in transition, on its part, must be examined in the context of differing circumstances of transition. According to Alex Boraine, the former chairperson of the South African TRC, there are three major contexts under which transitional justice options should be examined:[31] (a) in the context of a full military victory in an armed conflict (as in the Nuremberg Trials); (b) in the context of emergence of democracies from totalitarianism

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28 Richard Goldstone 'Foreword' to Martha Minow *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998) ix-x; see also Minow 4-5; Teitel (note 3 above) 219.

29 See generally Louise Mallinder 'Can amnesties and international justice be reconciled?' 1(2) 2007 *International Journal of Transitional Justice* 208-230.

30 Teitel (note 3 above) 4. See also generally Ruti G Teitel 'Transitional justice genealogy' 16 (2003) *Harvard Human Rights Journal* 69-94.

31 Boraine (n 11 above) 382-387. See also Neil J Kritz (ed) *Transitional justice: How Emerging Democracies Reckon with Former Regimes* vol I-III (1995) xxix.

after elections (as in Latin America and East Europe),[32] or (c) in the context of transition as a result of a process of peaceful negotiation between democratic forces and repressive regimes (as in South Africa).

A political transition conceived in the context of a full military victory in an armed conflict is the most retributive model of transitional justice. It emerges with the victor's own sense of justice and long-term strategic considerations. Apart from the Nuremberg Trials, the approach adopted by the Eritrean and Ethiopian[33] governments against former *Derg* officials is an example in this regard. However, in spite of the common[34] historical background of the atrocities, there are conspicuous differences between the approaches of the two countries. In Ethiopia, trials of former *Derg* officials, known as the Red Terror Trials, were held in public and were at least perceivably 'fair' trials, albeit in a very protracted process which finally led to the conviction of several perpetrators, including the conviction *in absentia* of the notorious dictator Menghistu Hailemariam who still

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32 Some of these transitions were accompanied by blanket amnesties and hence received international disapproval. Latin American countries offer illuminating experiences in this regard. For example, the Chilean blanket amnesty was not done to establish accountability; rather it was formulated by General Pinochet and his officers to immunise themselves. In this regard, Tutu wrote: 'In the absence of an amnesty designed, as it was in South Africa, to establish accountability, I am a strong supporter of the recent extradition proceedings against General Pinochet. It would be quite intolerable that the perpetrator should decide not only whether he should get amnesty but that no one else should have the right to question the grounds on which he so granted himself amnesty and for what offence … In the South African case there was not to be general amnesty … [Our] past, far from disappearing or lying down and being quiet, is embarrassingly persistent, and will return and haunt us unless it has been dealt with adequately. Unless we look the beast in the eye we will find that it returns to hold us hostage.' Tutu (n 20 above) 30-31. Compare this with the observations of Graybill (n 19 above) 59 on the Argentine experience. Goldstone also argues that unconditional amnesty is unacceptable by all measurements as it is 'a certain recipe for future hate and violence.' Furthermore, it sends 'an unambiguous message to all would-be war criminals that they could go about their own dirty work secure in the knowledge that they will not be called to account.' Indeed, it 'provides the toxic fuel available to evil leaders' as 'was certainly the experience in the Balkans and Rwanda.' See Goldstone 2000 (n 27 above) x; Richard Goldstone 'Preface' to Charles Villa-Vicencio and Erik Doxtader (eds) *Pieces of the Puzzle: Key Words on Reconciliation and Transitional Justice* (2004) vi.

33 On the Ethiopian experience, see generally Yacob Haile-Mariam 'The quest for justice and reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' 22 (1999) *Hastings International and Comparative Law Review* 667-745.

34 This is so because officials of the ousted *Derg* regime were equally responsible for the violations perpetrated in Eritrea and Ethiopia as Eritrea was also an annexed part of Ethiopia until 1991, when the *Derg* regime was defeated by joint EPLF and EPRDF forces. As a result, the two new governments in Eritrea (EPLF) and Ethiopia (EPRDF) came to power at the same time, in May 1991 and this happened after a full military victory over the *Derg* regime.

lives in Zimbabwe. The Eritrean experience in this regard offers no inspiring lessons as already discussed in Chapter 4.[35]

Teitel on her part recognises two competing theories on the conception of justice in times of transition: idealism versus realism.[36] The latter theory holds that as a state's transitional responses are explained largely in terms of the relevant political and institutional constraints, justice seeking in times of transition 'is fully epiphenomenal and best explained in terms of the balance of power.'[37] In this context, Teitel explains law as a mere product of political change as it has close relations to politics. Why a given action is taken is conflated with what response is possible. However, she warns that to simply contend that states do what is possible does not adequately justify a state's response to the transition and its prospects for liberalisation.[38]

On the other hand, idealists, according Teitel, draw a parallel between the question of transitional justice and universal conceptions of justice. They contend that ideas of full retributive or corrective justice regarding the past are necessary precursors to liberal

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35 See Chapter 4 section 4.6.2. See also the last paragraphs in Chapter 5 section 5.12 in which the summary prison terms arbitrarily imposed by the former chief of national security, Mr Naizgi Kiflu, against former *Derg* officials are discussed. With regard to the Ethiopian experience, see generally Girmachew Alemu Amene 'Apology and trials: The case of the Red Terror Trials in Ethiopia' 6 (2006) *African Human Rights Law Journal* 64, 76, 78. Amene notes that the Red Terror Trials 'are unique in the sense that they have largely taken place in Ethiopia, with local impetus and without the involvement of the international community, as was the case in Rwanda, Sierra Leone or the former Yugoslavia.' After the defeat of the *Derg* regime in May 1991, the transitional government in Ethiopia established a Special Prosecutor's Office to investigate and prosecute the massive human rights violations of the *Derg* era. By 1997, the government instituted charges against 5198 former military and civilian officials of the *Derg* regime. Of these, 2246 were charged while in detention and the remaining 2952 were charged *in absentia*. On 26 May 2008, Mengistu Hailemariam and eighteen of his most senior aides were sentenced to death by the Ethiopian Supreme Court. See *BBC News* 'Court sentences Mengistu to death,' 26 May 2008. According to Amene, one of the major drawbacks of the Red Terror Trials is that the process acutely suffered from skilled human power and resource limitations. For example, some judges were trained for a very short period of time or they had no formal training in law or experience in the courts. Resource limitations were also crucial. All such factors have 'put the symbolic importance of the trials into oblivion.' The process was also criticised for it lacked systematic public debate and participation. As a result, it was perceived as a highly politicised propaganda tool serving only the ends of victor's justice.

36 Teitel (note 3 above) 4.

37 Ibid. The observation of Teitel in this regard corresponds with one of the three contexts of transitions contemplated by Boraine (n 11 above) 382-387: a transition that comes as a result of a process of peaceful negotiation between democratic forces and repressive regimes, a transition best explained in terms of the balance of power between the negotiating parties.

38 Teitel (note 3 above) 5

change. Law is commonly conceived as following idealist conceptions largely unaffected by political context. However, this approach is criticised by Teitel for it misses what is distinctive about justice in times of transition. She holds the view that '[w]hile, in the abstract, certain legal ideals may be thought necessary to liberal transition, such theorising does not account well for the relation of law and political change' and most importantly for the nature and role of law in periods of radical political change. The idealist approach fails to explain the relation between normative responses to past injustice and a state's prospects for liberal transformation.[39]

From the foregoing Teitel concludes that the role of law in periods of radical political transformation is an extraordinary and constitutive one.[40] The move toward a more liberal and democratic political system does not imply a universal or ideal norm. In periods of transition, the conception of law and justice is distinctive. Transitions are characterised by the normative shifts in understanding of justice and law's role in the construction of the transition. This leads to a threshold dilemma which Teitel explains as:

> Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective. Accordingly, transitional justice is that justice associated with this context and political circumstances. Transitions imply paradigm shifts in the conception of justice; thus, law's function is deeply and inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation. Accordingly, in transition, the ordinary intuitions and predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a *sui generis* paradigm of transformative law.[41]

Another most important observation by Teitel is that in periods of radical political change law and justice are constituted by and constitutive of the transition itself. Since what is deemed just is contingent and informed by prior injustice, the conception of law and justice is informed by responses to the repressive past. Legacies of injustice have a profound bearing on what is deemed just or transformative. As such, law is shaped by the

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39 Ibid. See also Miriam J Aukerman 'Extraordinary evil, ordinary crime: A framework for understanding transitional justice' 15 (2002) *Harvard Human Rights Journal* 40.

40 Yohannes Gebremedhin has also discussed this issue in the context of the Eritrean political transition during the early years of independence, albeit not in the strict context of transitional justice conceived in this study. See generally Yohannes Gebremedhin *The Challenges of a Society in Transition: Legal Development in Eritrea* (2004) 79-81.

41 Teitel (note 3 above) 3-4.

political circumstances and it becomes not mere product but itself structures the transition.[42] A good example of Teitel's '*sui generis* paradigm of transformative law' is implicit in the post-amble of the South African Interim Constitution (Act 20 of 1993), which, before the establishment of the South African TRC, provided:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require the reconciliation between the people of South Africa and the reconstruction of society.
>
> …
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament … shall adopt a law determining … the mechanisms, criteria and procedure, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this new Constitution and these commitments, we, the people of South Africa, open a new chapter in the history of our country. [43]

Pertinent to the discourse on legal responses to a past regime is also an understanding of the rule of law in periods of radical political change. In this regard, Teitel again asserts that the understanding of the rule of law in transitional times is different from that in established democracies. In the latter case, adherence to the rule of law is ascertained by the application of principles constraining the purpose and application of the law; while in transitional periods, the law is unsettled and the rule of law is not well explained as a source of ideal norms in the abstract. Therefore, it is argued that:

> Within the context of a transitional jurisprudence, the rule of law can be better understood as a normative value scheme that is historically and politically contingent and elaborated in response to past political repression often perpetuated under the law. Thus, the transitional rule of law comprises distinctive values particular to such periods. While the rule of law ordinarily implies prospectivity in the law, transitional law is both settled

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42 Teitel (note 3 above) 4; see also Paul van Zyl 'Dilemmas of transitional justice: The case of South Africa's Truth and Reconciliation Commission' 52 (1999) *Journal of International Affairs* 661; Paulo De Greiff 'International courts and transitions to democracy' 12 (1998) *Public Affairs Quarterly* 79.

43 This is type of transformative law resonates with Teitel's observation that '[w]hat is deemed just is contingent and informed by prior injustice. Responses to repressive rule inform the meaning of adherence to the rule of law.' Teitel (note 2 above) 4.

> and unsettled; it is both backward- and forward-looking, as it disclaims past illiberal values and reclaims liberal norms.[44]

Accordingly, law's phenomenology in periods of political change and the analysis that follows can be termed as 'transitional jurisprudence.'[45] The idealised foundational norms of the rule of law are seriously challenged by transitional jurisprudence. On the other hand, transitional jurisprudence shows the rule of law concepts varying as a measure and in relation to past legacies of its abrogation. By doing so, it helps to elucidate the variation in the ideas of the rule of law across legal cultures and over time.[46] Transitional jurisprudence emerges as a distinct paradigmatic form of law responsive to and constructive of the extraordinary circumstances of periods of substantial political change. It aims at the normative construction of the new political order rooted in prior political injustice. As Teitel points out, the conception of justice in transitional jurisprudence is partial, contextual and situated between two major orders: legal and political. Hence, the legal responses to past atrocities are both performative and symbolic of transition; and the prospect for creating a liberal order remains a major yardstick.[47]

Teitel's philosophical underpinnings of transitional justice can be appropriately equated with the classical contribution of Guillermo O'Donnell *et al* who hold that the consolidation of political democracy after authoritarianism is subject to extraordinary uncertainties, surprises and dilemmas. For them, a period of transition denotes 'large-scale transformation' with insufficient structural or behavioural parameters, which also includes elements of accident and unpredictability, ethical dilemmas and ideological confusions, as well as 'dramatic turning points reached and passed without an understanding of their future significance.'[48] The authors call this a 'theory of abnormality' in which 'the unexpected and the possible are as important as the usual and the probable.'[49] As a result, the eventual outcome of a certain transition is profoundly

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44 Ibid 7; David Gray 'An excuse-centred approach to transitional justice' 74(5) (2006) *Fordham Law Review* 2623-2624.

45 Gray (n 44 above) 2623-2624; see also Guillermo O'Donnell *et al Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1986b) 6.

46 Teitel (note 3 above) 7.

47 Ibid 5, 7-9.

48 O'Donnell *et al* (n 45 above) 3.

49 Ibid 4.

affected by the actors' perception of this very abnormality surrounding regime change. When compared to periods of 'order,' the authors contend, it is this trait of uncertainty and indirection that creates the impression of abnormality implicit in periods of transition. The comparison between normality and abnormality is further explicated[50] by the following:

> When studying an established political regime, one can rely on relatively stable economic, social, cultural, and partisan categories to identify, analyse, and evaluate the identities and strategies of those defending the *status quo* and those struggling to reform or transform it … This 'normal science methodology' is inappropriate in rapidly changing situations, where those very parameters of political action are in flux. This includes transitions from authoritarian rule.[51]

Acknowledging the significant contribution of O'Donnell *et al,* André du Toit[52] similarly argues that the conception of justice that applies to periods of transition is 'special' by nature, as it suggests a connection with exceptional circumstances. This kind of justice responds to unfamiliar, developmental and transitional circumstances which require an exceptional conception of justice, compared with the norm that should be used in established liberal democracies. In this regard, Du Toit skilfully twists John Rawls' theory of justice[53] and renders it applicable in the context of transitional justice. For Du

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50 In explicating their analysis, O'Donnell *et al* (n 45 above) 6-7 utilise the following key terminologies as the basis of their arguments: (a) 'transition' which is defined as 'the interval between one political regime and another' and that which is normally launched by the dissolution of an authoritarian regime; (b) 'liberalisation' which is defined as 'the process of redefining and extending rights,' and (c) 'democratisation' which is defined as the guiding principle of *citizenship* which 'involves the *right* to be treated by fellow human beings as equal with respect to the making of collective choices and the *obligation* of those implementing such choices to be equally accountable and accessible to all members of the polity' [emphasis original].

51 Ibid 4. The authors further argue that other crucial reasons for the inadequacy of using 'normal' science concepts and approaches include factors such as the increasingly free expression of interest and ideals following liberalisation, the variations and shifts in the configuration of power and benefit within the authoritarian regime, and the high indeterminacy of interactions, strategies, and outcomes. At 5, they also argue that transition denotes an uncertain path with a high degree of indeterminacy toward consolidation of political democracy. It, therefore, needs conceptual tools that may be reasonably adequate for dealing with choices and processes. See also Boraine (n 11 bove) 434.

52 André du Toit 'The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Reconciliation' in Robert I Rotberg and Dennis Thompson *Truth v Justice: The Morality of Truth Commissions* (2000) 139. Du Toit correctly denotes the classical work of O'Donnell *et al* (n 45 above) as a point of departure for the comparative study of justice in transition. In his 'Foreword' to O'Donnell *et al* (n 45 above), Abraham F Lowenthal (at ix) also describes the contribution of the authors as 'the first book in any language that systematically and comparatively focuses on the process of transition from authoritarian regimes.'

53 John Rawls *A Theory of Justice* (1971) 6. With advocacy for constitutional democracy as its basic element, the central argument in Rawls' theory of justice calls for a principled reconciliation of

Toit, understanding transitional justice requires different principles applied in fundamentally different kinds of historical circumstances.[54] The formulation of Du Toit corresponds with that of Lowenthal who argues:

> [T]ransitions from authoritarian rule are conditioned and shaped by historical circumstances, unique in each country but patterned in predictable ways, by the way in which a previous democratic regime broke down, by the nature and duration of the authoritarian period, by the means the authoritarian regime uses to obtain legitimacy and to handle threats to its grip on power, by the initiative and the timing of experimental moves toward *abertura* [liberalisation], by the degree of security and self-confidence of the regime's elites and by the confidence and competence of those pushing for opening the political process, by the presence or absence of financial resources, by the counselling of outsiders, and by the prevailing international fashions that provide legitimacy to certain forms of transition.'[55]

The above observation can be exemplified more clearly by creating a link with one of the three major types of political transition identified by Boraine. According to him, the third major type of political transition manifests itself as a process of peaceful and genuine negotiation between democratic forces and repressive regimes.[56] It is this kind of transition which correctly explains Teitel's observations of 'distinctive values peculiar to periods of transition' and 'law's phenomenology' in such periods.[57] According to Boraine, the political tension in this type of transition is more heightened, as was the case in the South African experience. In negotiation politics, he argues, 'justice by necessity becomes a restorative project of establishing moral, if not legal, truth' and it takes the form of truth commissions and limited amnesty. It is according to such a contextualised understanding of transitional jurisprudence that scholars and researchers propose non-prosecutorial options as alternative mechanisms of accountability for societies emerging from a repressive past.[58]

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liberty and equality. Rawls argues that 'justice is the virtue of social institutions' and that it is 'the most important virtue of institutions.' See also DFM Strauss 'The mixed legacy underlying Rawls's theory of justice' 31(1) 2006 *Journal for Juridical Science* 64.

54 Du Toit (n 52 above) 124.

55 Lowenthal (n 52 above) x. The author further notes that: 'the dilemmas and choices faced by opposition groups pressing for *abertura* needs to be matched by equally empathetic and well-informed assessments of the choices made by those within authoritarian regimes who permit *abertura* to occur and push for its extension.' 'See also Orentlicher 2007 (n 14 above) 10-11.

56 Boraine (n 11 above) 382.

57 Teitel (n 3 above) 7. See also Dorothy Shea *The South African Truth Commission: The Politics of Reconciliation* (2000) 9; Timothy Garton Ash 'The truth about dictatorship,' *New York Review of Books*, 19 February 1998, 36.

58 Mallinder (n 29 above).

6.4 Amnesty as an alternative form of accountability

By definition, amnesty is 'an act by government that relieves a group of persons of punishment for a public offence.'[59] In a strict legal sense, amnesty should be distinguished from a pardon; the difference being that 'amnesty bars prosecution for the specified crimes, whereas pardon is granted after conviction.' Technically, 'amnesty, expressed or implied, often forms part of a treaty,'[60] a pact or an agreement; or in the context of transitional justice, it may take the form of a political compromise or a peace accord.[61] Traditionally, amnesty has been used in many countries as a political tool of compromise and reunion following a civil war, massive atrocities or past abuses. It serves as a guarantee to secure peace and a smooth political transition in volatile atmospheres. As noted by John Elster, its history dates back to the ancient Athenian city-states, where it was used by warring parties as a form of peace.[62] In relation to transitional justice, amnesty became most controversial during and after the Cold War era. During this time, amnesty laws were widely used by Latin American countries, mainly Argentina, Chile, Peru and Uruguay[63] in the 1970s and 1980s. Amnesty was given constitutional recognition for the first time in South Africa in 1994 via the post-amble of the South

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59 *Encyclopaedia Americana* vol I (1981) 751. See also *Encyclopaedia Britannica* vol I (1971) 807-808 which defines amnesty as 'a determination to forget past wrongs and animosities, to restore conditions of amity and to refrain from prosecuting persons guilty of political offences.' For an academic discourse on the history of amnesty, see generally John Elster *Closing the Books: Transitional Justice in Historical Perspective* (2004) 1-47, where the author also descriptively discusses the universe of transitional justice in historical perspective, starting from Athens to modern time transitions. Citing the Etiological Dictionary of English, Ben Chigara traces the origin of the word *amnesty* to the Greek work *amnestia*, 'which means forgetfulness.' See Ben Chigara *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (2002) 8. As will be seen later, Chigara is one of the ardent critics of amnesty.

60 *Encyclopaedia Americana* (n 57 above) 751.

61 For a critical discussion on recent African amnesties which are the result of peace accords, see generally Andrea Armstrong and Gloria Ntegeye 'The devil is in the details: The challenges of transitional justice in recent African peace agreements' 6(1) (2006) *African Human Rights Law Journal* 1-25.

62 Elster (note 59 above) 3; Jeremy Sarkin *Carrots and Sticks: The TRC and the South African Amnesty Process* (2004) 3; Norman Weisman 'A history and discussion of amnesty' 4 (1972) *Columbia Human Rights Law Review* 529.

63 On the Latin American experience of amnesty, see generally Naomi Roht-Arriaza *The Pinochet Effect: Transitional Justice in the Age of Human Rights* (2005); Naomi Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (1995); Naomi Roht-Arriaza and Lauren Gibson 'The developing jurisprudence on amnesty 20(4) (1998) *Human Rights Quarterly* 843-885.

African Interim Constitution and the Promotion of National Unity and Reconciliation Act, 34 of 1995 (the TRC Act).[64]

At the international level, the UN Subcommittee on Prevention of Discrimination and Protection of Minorities resolved in 1983 to appoint a special rapporteur on the study of amnesty laws and their role in the safeguarding and promotion of human rights. Accordingly, the special rapporteur, Louis Joinet, reviewed the principal elements of amnesty laws adopted by different countries at that time and presented his study to the subcommittee at its 1985 session.[65] It was during this time that amnesty began to play a catalyst role in transitions from illiberal to liberal orders. Yet, it raised serious concerns on the issue of past human rights violations which were sometimes left unattended to, due to the promulgation of blanket or unconditional amnesty laws. Such valid concerns aside, contemporary transitional justice discourse considers (conditional) amnesty as an alternative form of accountability based on the following normative justifications.

The underlying normative justification of amnesty is that it promotes truth-telling, which by itself could be another form of justice. Teitel elaborates this by referring to Alice H Henkin who concedes, 'Truth telling … responds to the demand of justice for victims [and] facilitates national reconciliation.'[66] Based on this, Teitel continues to argue eloquently:

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64 On the South African experience of amnesty, see generally Sarkin 2004 (n 62 above); Jeremy Sarkin 'The development of a human rights culture in South Africa' 20(3) (1998) *Human Rights Quarterly* 628-665; George Bizos *No One To Blame? In Pursuit of Justice in South Africa* (1998); Nkosinathi Biko 'Amnesty: The Burden of Victims' in Villa-Vicencio and Verwoerd (n 15 above) 193-198; Dugard 1997a (n 19 above) 258; John Dugard 'Retrospective justice: International law and the South African model' in A James McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies* (1997b) 269 and 276; John Dugard 'Dealing with crimes of a past regime: Is amnesty still an option?' 12(4) (1999) *Leiden Journal of International Law* 1001; Graybill (n 19 above); Van Zyl (n 42 above) 661.

65 *The Study of Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights*, reported by Special Rapporteur Louis Joinet, UN Doc E/CN4/Sub2/1985/16; see also the revised report: *Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations* (Civil and Political), UN Doc E/CN4/Sub2/1997/20/Rev1, UN ESCOR, 49th Sess (1997); see also Mary Margaret Penrose 'Impunity - inertia, inaction, and invalidity: A literature review' 17(2) (1999) *Boston University International Law Journal* 275-276.

66 Alice H Henkin 'Conference Report' in Alice H Henkin (ed) *State Crimes: Punishment or Pardon* (1989) 4-5, as quoted in Teitel (n 3 above) 69.

> The transitional history directed at a better future envisions a dialectical, progressive process. In the spirit of an earlier age, this harkens back to the Enlightenment view of history – of Immanuel Kant … whereby history itself is universalising and redemptive. On this view, history is teacher and judge, and *historical truth in and of itself is justice.* It is this view of the liberalising potential of history that inspires the popular contemporary argument for historical accountability in transitions.[67]

The restorative aspect of amnesty is highlighted by the fact that it allows for the provision of justice that is responsive to the needs of the victims and society as a whole.[68] This kind of justice aims at promoting reconciliation between previously warring communities and reinforces the rule of law. This is what Louise Mallinder refers to as restorative justice, that justice which must make 'international criminal justice more restorative' and 'enhance its legitimacy within the communities most affected by creating a greater sense of ownership over the process.'[69] In spite of such a wide concern, the driving forces of international opinion[70] sometimes pressurise transitional societies to opt for retributive rather than restorative justice. However, recent experiences reveal that combined multiple institutions of restorative justice, including community level initiatives drawing on traditional law and culture are gaining wider currency in transitional justice discourses.[71]

The Centre for Restorative Justice (CRJ) at Simon Fraser University defines restorative justice as 'a philosophy that views harm and crime as violations of people and relationships.' Furthermore:

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67 Teitel (n 3 above) 69-70 [emphasis added].

68 Tutu (n 20 above) 54-55. See also Louise Mallinder 'Book Review' 46 (2006) *British Journal of Criminology* 156, reviewing Mark Findlay and Ralph Henham *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (2005). See also generally Mallinder (n 29 above) 208-230.

69 Mallinder (n 29 above) 208. Mallinder highlights 'the ways in which international courts and quasi-judicial bodies address the dilemma of peace versus justice, in relation to amnesty laws.' The author also argues that 'international courts should recognise amnesties that are introduced with democratic approval to promote peace and reconciliation, provided that they are accompanied by mechanisms to fulfil … victims' rights.'

70 These forces are, according to Dugard, some NGOs and western activists 'who are strangers to repression.' They fail to pay sufficient attention to the circumstances of a given society which chooses amnesty above prosecution. See Dugard 1999 (note 64 above) 1006.

71 Mallinder (n 29 above) 208; Naomi Roht-Arriaza 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds) *Transitional Justice in the Twentieth Century: Beyond Truth Versus Justice* (2006) 12; Morton Winston 'A hybrid approach to transitional justice,' a paper presented at the 7th Congress of the International Society on Universal Dialogue (ISUD), 1-5 June 2007, Hiroshima, Japan.

> [Restorative justice] is a holistic process that addresses the repercussions and obligations created by harm, with a view to putting things as right as possible. Restorative justice is best practiced when guided by restorative values and principles and when those most affected are both the focus and the directors.[72]

Quoting James Dignan,[73] Mark Findlay and Ralph Henham also suggest that the philosophy upon which restorative justice is based can best be summarised in terms of three principles:

> Responsibility – to engage with offenders to try to bring home the consequences of their actions and an appreciation of the impact they have had on the victim(s) of their offences.
>
> Restoration – to encourage and facilitate the provision of appropriate forms of reparation by offenders towards either their direct victims … or the wider community.
>
> Reintegration – to seek reconciliation between victim and offender where this can be achieved and, even in cases where this is not possible, to strive to reintegrate both victims and offenders within the community as a whole following the commission of an offence.[74]

The authors further contend that the underlying rationale for restorative justice focuses on the establishment of truth rather than individual liability. Envisaged as a transformative mechanism, restorative justice links together notions of morality, law and behaviour around the pursuit of 'truth.' This purposive social function resonates with the universal appeal for constructive engagement,[75] a formulation also supported by Eric Gilman, one of the most articulate proponents of restorative justice. Gilman argues that restorative justice has a future focus, a focus on outcomes with three key groups who must

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72 CRJ 'What is restorative justice,' available at http://www.sfu.ca/crj/introrj.html (accessed 2 April 2008). The CRJ further adds that 'restorative justice requires a paradigm shift in thinking about reactions to harm. This becomes most apparent when we compare the values and principles of restorative justice to those of the current justice system, which emphasises punishment and retribution.' Susan Sharpe similarly defines restorative justice as justice fundamentally different from retributive justice and one 'that puts energy into the future, not into what is past. It focuses on what needs to be healed, what needs to be repaired, what needs to be learned in the wake of crime. It looks at what needs to be strengthened if such things are not to happen again.' Susan Sharpe *Restorative Justice: A Vision for Healing and Change* (1998), cited in CRJ, ibid.

73 'Restorative crimes prevention in theory and practice' *Prison Service Journal* 123 (1999) 2.

74 Findlay and Henham (n 68 above) xxii. Compare this with the five key points of restorative justice developed by Eric Gilman 'What is restorative justice?,' available at http://www.sfu.ca/cfrj/fulltext/gilman.pdf (accessed 2 April 2008). One of the observations of Gilman is that: 'Active community participation is essential to creating safe and healthy communities. The community as a whole, not the justice system in isolation, has the ability and resources to effectively respond to the harms of crime and to ultimately restore victims and integrate offenders into the community as healthy, whole contributing members of society.'

75 Findlay and Henham (n 68 above) xv, xxiii, xxiv.

meaningfully add their respective contribution to the reparation of harm. These groups are: the direct victims, the wider, impacted community and the offender.[76]

The approach adopted by Gilman and other scholars examines restorative justice within the framework of criminal behaviour and criminal justice models, a theoretical formulation which is also vital for any transitional justice discourse. Two fundamental theories commonly discussed in the study of criminal behaviour and criminal justice models are restorative and retributive justice. As is done by Kathleen Daly,[77] restorative justice can be best understood when contrasted with retributive justice, the focus of which is the offender. In restorative justice, conversely, harm is viewed through 'a different lens' which 'focuses on the harm [done] to the victim and how to repair that harm.'[78] It enables the offender to take responsibility for the harm and to make amends; while at the same time, the community supports the victim, holds the offender accountable for the harm, examines the conditions that caused the harm and then finds ways to change those conditions so that the likelihood of harm is reduced in the future.[79] Unlike retributive justice, restorative justice addresses violence in a broader framework, with an attempt to equally address the needs of victims, the community and the offender.[80]

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76 Gilman (n 74 above). Gilman further argues that outcomes for victims should focus on: 'being given the opportunity to be acknowledged and heard; having input regarding resolution to the offence; having the harms done to them meaningfully addressed; meaningful support services for healing and closure.' Outcomes for the community should focus on: 'creating safe and healthy communities; active and extensive partnerships with the justice system that lead to the integration of victims and offenders into the community as positive, contributing members.' And lastly, outcomes for offenders should focus on: 'being accountable for the harms done; taking an active role in determining how to make amends to victims and the community; integration into the community as positive and productive citizens.'

77 See generally 'Restorative versus retributive justice' 60(1) 2005 *Criminal Justice Matters* 28-37; see also generally Joseph W Ellwanger 'Restorative justice versus retributive justice' 4(3) (2004) *Journal of Lutheran Ethics,* also available at http://www.elca.org/scriptlib/dcs/jle/article.asp?aid=294 (accessed 24 April 2008); Charlotte V Witvliet *et al* 'Retributive justice, restorative justice, and forgiveness: An experimental psychophysiology analysis' 44(1) (2008) *Journal of Experimental Social Psychology* 10-25.

78 T Bennett Burkemper *et al* 'Restorative justice in Missouri's juvenile system,' *Journal of The Missouri Bar*, May/June 2007, also available at http://www.mobar.org/f11cff5b-86a7-4e65-9f8e-2605e210eb38.aspx.

79 Ibid.

80 Gilman (n 74 above). Compare this with Howard Zehr *Changing Lenses: A New Focus for Crime and Justice* (1990) 278.

According to the CRJ, a key difference between retributive and restorative justice paradigms is 'the idea that crime is sanctioned … more constructively through a process in which the community and the offender do something for the victim, rather than the state doing something against the offender.'[81] In relation to this comparison, Findlay and Henham also observe that retributive justice denotes exclusion through criminalisation and retributive penalty, while restorative justice denotes inclusion through reintegration and restoration. The authors appreciate that the need to establish responsibility for criminal harm should not be underestimated. However, they also note that the healing effect of such a process depends on whether the responsibility is the product of an adversarial argument or of a mediated agreement.[82] Gilman on his part adds that: 'At its heart restorative justice is about *encounter*. If we are working restoratively in our communities, individuals are encountered and humanised.'[83]

A clear contrast between retributive and restorative justice is shown on the table below, as depicted by the Victim Offender Mediation Project of the Topeka Centre for Peace and Justice.[84] The Project borrows the tabular contrast from Howard Zehr's[85] seminal model of comparison of justice systems.

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81 CRJ 'Restorative justice: Summary,' available at http://www.sfu.ca/cfrj/fulltext/summary.pdf (accessed 2 April 2008).

82 Findlay and Henham (n 68 above) 273.

83 Gilman (n 74 above).

84 See Topeka Centre for Peace and Justice (TCPJ), Victim Offender Mediation Project: 'Distinctions between restorative and retributive justice,' available at http://www.topekacpj.org/vomp/rest_vs_retr.htm (accessed 24 April 2008).

85 See Zehr (n 80 above) 181, 278; see also Howard Zehr 'Restorative Justice Retributive Justice' in Gerry Johnstone (ed) *A Restorative Justice Reader: Texts, Sources, Context* (2003) 69. According to Zehr, restorative justice emphasises the need for restitution, the need of victims to be heard, and the need for vindication and to have their power restored.

	Retributive justice	Restorative justice
Definition of crime	Crime is the violation of rules	Crime harms people and relationships
	State is the victim	Victim is a person
	Parties are state/offender	Parties are victim/offender
Needs and rights of participants	Wrong produces blameworthiness	Wrong produces liability/obligation
	Focus is on mark of guilt	Focus is on repentance and reparation
	Debt owed to society in abstract	Debt owed to victim first
	Debt paid by punishment	Debt paid by 'making right'
Outcome	Centred on fixing blame	Centred on problem-solving
	Victim's needs and rights secondary	Victims needs and rights essential
	Adversarial process	Talk-related process
	Victim on periphery of process	Victim active participant in process
	Offender has no role in resolution	Offender responsible in resolution
	Offender denounced	Harmful act denounced
	Assumes win/lose outcome	Promotes win/win outcome

Table V: Distinctions between restorative and retributive justice[86]
(Based on Howard Zehr's model of comparison of justice systems)

Gilman acknowledges that a broadened mandate aimed at achieving the objectives of restorative justice might be a huge challenge to the criminal justice system, implying the need to devise alternative institutions which can competently administer such a broad mandate.[87] As would be seen later in detail, a TRC could be an appropriate institution to do this. Indeed, Findlay and Henham recognise TRCs as appropriate institutions to inject restorative justice into state transition and reformation. According to the authors, TRCs are instrumental and procedural examples of the fusion of accountability and restoration. By making full disclosure of the truth and setting the historical record straight, TRCs play a significant role in the process of shaming and allocation of individual and collective responsibilities.[88]

In the context of societies emerging from massive violence, note Findlay and Henham, justice delivered by retributive tribunals may not satisfy the respective and shared needs of victim communities, offenders and other stakeholders in a holistic manner. In this regard, they mention the experience of Rwanda and East Timor in which retributive justice was rejected by large communities of interest which have chosen to empower and

86 Source: TCPJ (n 84 above).
87 Gilman (n 74 above).
88 Findlay and Henham (n 68 above) 287-288.

operate their own restorative mechanisms in their respective post-conflict scenarios.[89] According to the authors, in local, regional and international levels, restorative justice demonstrates common processes, themes and intentions manifested in the form of desire to get to the truth without requiring punishment as a core motivation.[90]

Nonetheless, amnesty as a form of restorative justice would not serve the desired purposes if it undermines the rights of victims under abstract justifications of individual rehabilitation and societal needs. In his balanced observation, Stuart Wilson notes that the moral balance of amnesty may be endangered 'unless a wrongdoer is, as far as anyone can reasonably tell, genuinely remorseful *and* the victim is capable of transcending the indignity done to him in fairly crucial ways.' According him, forgiveness and reconciliation result from airing the truth in the sense that victims can only forget after knowing whom to forgive and what to forgive them for.[91] Martha Minow also warns that 'forgiveness is a power held by the victimised and not a right to be claimed.' Therefore, forgiveness should be granted but not assumed. She limits forgiveness to 'instances where there are good reasons to forgive' and concludes that 'to forgive without good reason is to accept the violation and devaluation of the self.'[92] Noting this fundamental precondition, Braithwaite advises that any restorative justice model should basically incorporate the following standards: remorse over injustice, apology, censure of the act on the part of the wrongdoer, and forgiveness and mercy on the part of the wronged.[93]

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89 Findlay and Henham (n 68 above) 291, 292. The authors add that: 'This is not simply an inevitable consequence of selective and limited access to trial justice but is in recognition that this paradigm fails to offer processes and outcomes which are inclusive of wider victims' interests. Even if trial resources were available in these jurisdictions, the pressure for national healing will not be relieved by bulging prison alone.' See also Caitlin Reiger 'Hybrid Attempts at Accountability for Serious Crimes in Timor Leste' in Roht-Arriaza and Mariezcurrena (n 71 above) 143; Timothy Longman 'Justice in the Grassroots? Gacaca Trials in Rwanda' in Roht-Arriaza and Mariezcurrena (n 71 above) 206.

90 Findlay and Henham (n 68 above) 273. See also *UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UN Doc E/2002/INF/2/Add2, 13 August 2002.

91 Stuart Wilson 'The myth of restorative justice: Truth, reconciliation and the ethics of amnesty' 17 (2001) *South African Journal of Human Rights* 542.

92 Minow (n 28 above) 17.

93 John Braithwaite 'Setting standards for restorative justice' 42(3) (2002) *British Journal of Criminology* 570. According to Braithwaite, the core values of restorative justice are healing, moral learning, community participation and caring, dialogue, forgiveness, responsibility and making amends. See also John Braithwaite 'Restorative justice: Assessing optimistic and pessimistic accounts' 25 (1998) *Crime and Justice* 6. In this regard, the jurisprudence developed

In the preceding sections, the pragmatic limitation of prosecutorial options was discussed as one of the main reasons for consideration of amnesty as a non-prosecutorial option of transitional justice. Other important considerations are the normative justifications of amnesty and its contribution to restorative justice. It was also shown that the advantages of restorative over retributive justice are theoretically linked with the normative justifications of amnesty. The next obvious question that follows is: how should amnesty be administered? A discussion of this question presupposes analysis of the status of amnesty under international law. The latest developments in international law indicate that amnesty which follows certain acceptable procedures can be considered as a satisfactory transitional justice option. This again calls for consideration of another fundamental question: which approaches or procedures are considered acceptable under international law for purposes of granting amnesty? The above two important considerations will be discussed more fully in the next two sections. The overall objective is to link these considerations with the normative and pragmatic justifications of amnesty as discussed in the preceding sections.

6.5 Amnesty in international law

Given that the underlying normative justification of amnesty is its contribution for truth and individual rehabilitation, and that truth-telling and rehabilitation are essential components of restorative justice, the next section will discuss as to what extent amnesty is allowed under international law. This issue can be explored under two classifications: before and after the establishment of the ICC.

6.5.1 Amnesty before the establishment of the ICC

During the last decade of the past century, the internationalisation of crime in the global village created an ever-increasing demand for the prosecution of perpetrators of gross violations of international law.[94] Such a tendency was clearly manifested, for example, in

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by the South African TRC Act offers instructive lessons on the procedure that should be followed when amnesty is granted. See particularly section 1(1)(*ix*)(*a*-*b*) of the TRC Act.

94 Dugard 1999 (n 64 above) 1002.

the decisions of the Inter-American Court of Human Rights (IACHR), holding that amnesties were incompatible with the American Convention on Human Rights (ACHR). In the *Valázquez* case, the IACHR held that article 1(1) of the ACHR requires states to 'ensure the rights set forth in the Convention,' obliges states to investigate and punish any violation of the rights recognised by the ACHR.[95] Similarly, amnesties covering acts of torture were held 'generally incompatible with the duty of states to investigate such acts' by the UN Human Rights Committee.[96] With the same fervour, the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights called on states to prosecute those responsible for grave human rights violations, such as torture, and to abrogate legislation leading to impunity for such crimes. The Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968 also sent the same message at an earlier time. In the Statutes of the ICTY and ICTR emphasis was placed on prosecution of those responsible for the crimes punishable under international law. There is also a substantial body of academic writing decrying blanket amnesties.[97]

John Dugard, however, asserts that it was doubtful whether, in the pre-ICC era, international law had fully reached such a stage where amnesty was totally unthinkable as a possibility in periods of radical political change.[98] This corresponds with the latest observation of Naomi Roht-Arriaza that by the end of the last decade of the twentieth century a second generation of transitional justice experiences which stressed both conditional amnesty and justice had emerged, because a single method of amnesty may inadequately serve societies rebuilding after conflict or dictatorship.[99] It is further argued that in recent years successor governments have granted amnesty to officials of previous

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95 *Velasquez Rodriguez,* IACHR, judgment of 29 July 1988, Ser C No 4 (1988), para 174-176; see also *Barrios Altos,* IACHR, judgment of 14 March 2001, Ser C No 75 (2000), paras 41-44 and 53.

96 UN Human Rights Committee, General Comment No 20 (Article 7) of April 1992, UN Doc CCPR/C21/Rev1/Add3, para 15.

97 See, for example, Orentlicher (n 13 above); Roht-Arriaza 1995 (n 61 above); Roht-Arriaza 2005 (n 63 above); Roht-Arriaza and Gibson (n 63 above); Micheal P Scharf 'Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?,' 31 (1996) *Texas Journal of International Law* 33. Perhaps the severest criticism of amnesty is that of Chigara (n 59 above) 2, 13, 21, 121.

98 Dugard 1999 (note 64 above) 1003.

99 Roht-Arriaza (n 71 above) 11.

regimes guilty of torture and crimes against humanity; and 'in many of these cases, notably that of South Africa, the United Nations has welcomed such a solution.'[100] State practice in this regard also supports the grant of amnesty for purposes of achieving peace and reconciliation in societies emerging from a deeply divided past. National constitutional courts have held the position that international law not only failed to prohibit amnesty but rather encouraged it.

The constitutional courts of South Africa[101] and El Salvador[102] are pertinent examples in this regard. In both cases, the validity of national amnesty laws was upheld on the grounds that it was in consonance with article 6(5) of the Additional Protocol II (to the four Geneva Conventions) of 1977 which on the face of it encourages amnesty by providing that at the end of hostilities in internal conflicts the authorities 'shall endeavour to grant the broadest possible amnesty to perpetrators who have participated in the conflict.'[103] The implication is that amnesty was not explicitly prohibited by international law, but as will be seen later, that certain minimum requirements must be fulfilled before amnesty can be granted to perpetrators of international crimes.

On the other hand, Dugard[104] argues that most of the international crimes committed in recent years are not merely of national concern for a given country. They often constitute elements which render them international by character. Genocide, crimes against

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100 Dugard 1999 (note 64 above) 1003. See also Michael P Scharf 'The letter of the law: The scope of the international legal obligation to prosecute human rights crimes' 59 (1996) *Law and Contemporary Problems* 47. The former UN Secretary-General, Mr Kofi Annan, also suggests that it would be inconceivable for the ICC to set aside an approach like that adopted in the South African situation. See Kofi Annan 'Speech at the Witwatersrand University Graduation Ceremony,' 1 September 1998, quoted in Charles Villa-Vicencio 'Why perpetrators should not always be prosecuted: Where the International Criminal Court and truth commissions meet' 49 (2000) *Emory Law Journal* 222.

101 *AZAPO* (n 8 above).

102 Unconstitutionality Judgment Proceedings No 10-93 (20 May 1993), reprinted in Kritz (n 22 above) 549, 555.

103 This position is, however, disputed by the International Committee of the Red Cross (ICRC). See Douglass Cassel 'Lessons from the Americas: Guidelines for international response to amnesties for atrocities' 59 (1996) 59 *Law and Contemporary Problems* 196, 212. Compare this with the observations of HA Strydom *et al International Human Rights Standards: Administrative of Justice* vol I (1997) 312 on the South Africa amnesty process.

104 Dugard 1999 (note 64 above) 1004. However, as will be seen later, Dugard is not in principle against conditional amnesty that fulfils certain standards which he deems acceptable under international law. See ibid 1012.

humanity, war crimes, the crime of aggression and other offences are no longer national crimes. As they also concern the international community, they become subject to an increased international tendency which advocates for the punishment of the perpetrators of such acts before national or international courts.[105] Accordingly, 'the high priests of public opinion'[106] – NGOs, scholars and activists – are now reminding successor regimes of their obligation to prosecute under international law. It follows that current developments in international law are not in favour of amnesty. The Trial Chamber of the ITCY in *Furundzija*[107] spelled this out when it held that amnesties for torture are null and void and will not receive international recognition. In view of this, international law scholars are certainly predicting that both national and international courts will be vigorously pressurised by 'the high priests of public opinion' to prosecute international criminals. This may pose a great challenge to the granting of amnesty by future transitional societies to perpetrators of international crimes.[108]

6.5.2 Amnesty after the establishment of the ICC

With the establishment of the ICC, the leading international judicial organ designed to combat impunity and gross violations of international law, the permissibility of amnesties has become more controversial. The ICC Statute which adopts the principle of complimentarity gives both national and international courts jurisdiction over

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105 See generally the discussion on international crimes in Chapter 3 section 3.7.

106 Dugard 1999 (note 64 above) 1004.

107 *Furundzija*, ICTY Trial Chamber II, judgment of 10 December 1998, paras 151-157. See also the decision of the Special Court for Sierra Leone on the validity of amnesties in international law in *Prosecutor v Morris Kallon and Brima Buzzy Kamara*, Special Court for Sierra Leone, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction on Lomé Accord Amnesty, Appeals Chamber, 13 March 2004 (hereinafter '*Lomé Decision*'). This decision is regarded as 'the first ruling of an international criminal tribunal unequivocally stating that amnesties do not bar the prosecution of international crimes before international or foreign courts.' See also Simon M Meisenberg 'Legality of amnesties in international humanitarian law: The Lomé Amnesty Decision of the Special Court for Sierra Leone' 86 (2004) *International Review of the Red Cross* 837; William A Schabas 'The Sierra Leone Truth and Reconciliation Commission' in Roht-Arriaza and Marriezcurrena (n 71 above) 21; William A Schabas 'A Synergetic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' in William A Shabas and Shane Darcy *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (2004b) 4-5; Rosalind Shaw 'Memory frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone' 1 (2007) *International Journal of Transitional Justice* 183.

108 Dugard 1999 (note 64 above) 1004.

international crimes.[109] However, the ICC Statute is silent[110] about the permissibility or impermissibility of amnesties. The silence has been subject to varying interpretations.[111] Carsten Stahn has meticulously reviewed the relevant literature on this topical issue. His observation in this regard offers instructive guidance on the competing interpretations of the silence of the ICC Statute on amnesties.[112]

6.5.2.1 Interpretation rejecting amnesty

The silence of the ICC Statute on the matter of amnesty is interpreted by some writers[113] as one indication that amnesty is not a primary option at least for international crimes. It

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109 See Preamble of the ICC Statute, para 10 and article 17 of the same. On the principle of complimentarity, see generally Ben Brandon 'Jurisdiction and Complementarity' in Ben Brandon and Max du Plessis *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (2005) 17-34.

110 However, Ruth Wedgwood indicates that amnesty was on the agenda of the Rome Diplomatic Conference as it has been considered in the *travaux preparatoires*. Nevertheless, amnesty in the context of the defence of *ne bis in idem* was finally rejected against the insistence of countries such as the US that *a responsible decision by a democratic regime to allow an amnesty should be taken into account in judging the admissibility of a case* [emphasis added]. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court* vol 1, 40 (para 174) (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR, 51st Session, Supplement No 22, UN Doc A/51/22); UN Doc A/CONF/283/2/Add 1 (1998), 19. See Ruth Wedgwood 'The International Criminal Court: An American view' 10 (1999) *European Journal of International Law* 96.

111 Dugard, for example, notes that in spite of the growing international support for conditional amnesty as an alternative form of accountability, there is apparent failure in the ICC Statute to recognise this. This may be one of the manifest illustrations of international law not recognising conditional amnesty as an alternative mechanism of accountability. See Dugard 1997a (n 19 above) 258; Dugard 1997b (n 64 above) 269, 276; Dugard 1999 (n 64 above) 1001. See also paras 5 and 6 of the Preamble of ICC Statute.

112 The discussion in the following paragraphs draws heavily on Carsten Stahn 'Complementarity, amnesties and alternative forms of justice: Some interpretative guidelines for the International Criminal Court' 3 (2005) *Journal of International Criminal Justice* 695-720. Stahn notes that quite a number of academic contributions have discussed this issue critically, the most important of which include: Darryl Robison 'Serving the interests of justice: Amnesties, truth commissions and the International Criminal Court' 4 (2003) *European Journal of International Law* 481; Michael P Scharf 'The amnesty exception to the jurisdiction of the International Criminal Court' 31 (1999) *Cornell International Law Journal* 507; Mahnoush H Asranjani 'The International Criminal Court and national amnesty laws' (1999) *American Society of International Law Proceedings* 65; Jessica Gavron 'Amnesties in the light of developments in international law and the establishment of the International Criminal Court' 51 (2002) *International and Comparative Law Quarterly* 91; Anja Seibert-Fohr 'The relevance of the Rome Statute of the International Criminal Court for amnesties and truth commissions' (2003) *Max Planck Yearbook of United Nations Law* 553; Mohammed El Zeidy 'The principle of complementarity: A new machinery to implement international criminal law' 23 (2002) *Michigan Journal of International Law* 869.

113 See for example, Gerhard Hafner *et al* 'A response to the American view as presented by Ruth Wedgwood' 10 (1999) *European Journal of International Law* 108, 109-113.

is argued that the omission of amnesty from the provisions of the ICC Statute is deliberate. Proponents of this position support their argument by referring to the wording of the Preamble of the ICC Statute which affirms that 'serious crimes of concern to the international community as a whole must not go unpunished' and this means that the ICC is determined 'to put an end to impunity for the perpetrators of these crimes.'[114] The most prominent crimes which fall under the jurisdiction of the court, genocide and grave breaches of the Geneva Conventions, are crimes in respect of which states are obliged to prosecute. According to the proponents[115] of this interpretation, the fact that the ICC Statute failed to provide explicitly for special provisions dealing with amnesties, at least in the defence of *ne bis in idem*[116] and surrender[117] to the Court, reiterates the deliberate omission of amnesty.[118]

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114 Paras 4 and 5 of the Preamble of the ICC Statute.

115 One of the ardent supporters of this view is Chigara (n 59 above) 2, 13, 21, 121 and one of his main contentions holds as follows. Amnesty is problematic in that it refers to human rights which are considered inalienable 'property rights of victims whose title never passes to the state for it to be able to trade them off for any other good.' In strong terms, Chigara contends that 'the state is incapable of forgiving those that breached the rights of victims on behalf of the victims.' He further argues that as far as the 'property rights' of victims are not shown to have legitimately transferred to the state, the state cannot claim to be trading off these rights for any good cause. He then adds that how this legitimate transfer of rights can happen is beyond comprehension and warns that amnesty would only 'threaten to convert jurisprudence from a study of positive law to a study of sacrificial philosophy.' However, according to Mallinder (n 29 above) 210, there is a growing international understanding for the recognition of 'amnesties that are introduced with democratic approval' and which aim 'to promote peace and reconciliation, provided that they are accompanied by mechanisms' that safeguard the rights and interest of victims. This can be taken as an approach which facilitates a legitimate transfer of 'property rights' referred to by Chigara. See also Winston (n 71 above). An excellent observation in this regard also comes from Moses Chrispus Okello, an expert who has worked closely with the conflict-stricken communities of northern Uganda. He comments: 'I think the greatest justice one can deliver to a people living in conflict is to enable them to enjoy some sort of peace, and then to enable them to have a say in how *they* think justice should be done – and to whom!' See Moses Chrispus Okello 'The false polarisation of peace and justice in Uganda,' paper delivered in the International Conference on Peace and Justice, Nuremberg, 25-27 June 2007, available at http://www.refugeelawproject.org/resources/seminars/NurembergPresentation.pdf.

116 The defence of *ne bis in idem*, as provided by article 20 of the ICC Statute, exonerates a person from criminal prosecution only if such person has been tried by another court. Besides, the *travaux preparatoires* show that the exclusion of amnesty from the final text of the ICC Statute was deliberate. See n 131 above and accompanying text.

117 Scharf (n 112 above) 507. Surrender is to be distinguished from extradition in the context of the ICC. In intra-state relations, amnesty granted by either the requesting or requested state is a mandatory ground for the refusal of extradition. However, the fact that amnesty may be a bar to extradition between states has no bearing on surrender to the ICC. Article 102 of the ICC Statute clearly designates the difference between surrender and extradition. See also the 1990 UN Model Treaty on Extradition (General Assembly Resolution 45/116 of 14 December 1999) and art 3(e) of the 1996 European Union Extradition Agreement, OJEC, No 313/12 of 23 October 1996.

118 See, for example, Hafner *et al* (n 113 above) 109-113.

6.5.2.2 Interpretation in favour of amnesty

The second interpretation regarding the silence of the ICC Statute contends that certain provisions of the ICC Statute do indirectly allow for amnesty to be recognised as a transitional justice option.[119] During the deliberations of the Preparatory Committee of the ICC Statute, amnesty was considered in the context of the principle of *ne bis in idem*, but was not included in the final text of the ICC Statute. This deliberate omission, what Stahn calls 'creative ambiguity,'[120] was done to allow leeway in the extent to which the ICC may defer to amnesties. Yet, according to Dugard, it may still indicate a deliberate and total rejection of amnesty by the drafters of the ICC Statute.[121] However, an attentive interpretation of the ICC Statute provisions may allow for permissibility of amnesties in exceptional circumstances.[122] According to Stahn, there are three principal situations under the ICC Statute in which the Chambers of the Court may be called to deal with the issue of amnesty:

> in the case of the decision of the Prosecutor not to initiate an investigation or prosecution under article 53(3); in the context of a ruling on admissibility under article 18 and 19; and in the case of a deferral of the investigation or prosecution under article 16 upon request by the Security Council.[123]

Regarding one of the first possibilities, article 17(1)(a) and (b) of the ICC Statute provides that prosecution may not take place if a given case has been investigated by a state which has jurisdiction over it and such a state decides not to prosecute. This particular provision indirectly recognises the granting of amnesty as it allows the ICC to declare a case inadmissible, 'unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.'[124] Of particular relevance is the wording of article 17(1)(a) and (b) which does not expressly require criminal investigation. This provision simply calls for an investigation, which, according to several writers,[125] may

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119 Scharf (note 112 above) 507.

120 Stahn (note 112 above) 708; Wedgwood (n 110 above) 96.

121 John Dugard 'Possible Conflicts of Jurisdiction with Truth Commissions' in Antonio Cassese *et al* (eds) *The Rome Statute of the International Criminal Court* vol II (2002) 701.

122 Stahn (note 112 above) 708.

123 Ibid 696.

124 Article 17(1)(b) of the ICC Statute.

125 See, for example, Stahn (n 112 above) 697, 711; Hector Olasolo 'The triggering procedure of the International Criminal Court: Procedural treatment of the principle of complementarity and the role of the Office of the Prosecutor' 5 (2004) *International Criminal Law Review* 139; Seiber-Fohr

also pertinently refer to initiatives such as the granting of conditional amnesty with a combination of truth and reconciliation procedures. Such alternative forms of justice adequately satisfy the requirements set by article 17(1)(a) and (b) and would leave out the possibility of attendant ICC proceedings. An imaginative interpretation of this provision may provide ways to cover the kind of amnesty granted by the South African TRC – the granting of amnesty after thorough investigation.[126]

In respect of non-prosecution under article 53(1)(c) of the ICC Statute, the ICC Prosecutor has the discretion not to proceed with prosecution when there are 'substantial reasons to believe that an investigation would not serve the interests of justice.' Plausibly, the phrase 'interests of justice' leaves room for the permissibility of amnesty and alternative forms of justice, especially as seen against the varying circumstances that article 53(2)(c) requires the prosecutor to take into account when deciding whether to prosecute or not. These circumstances include 'the gravity of the crime, the interests of victims, and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.' The phrase 'interests of justice' may be invoked to justify departures from classical prosecution on the basis of conditional amnesties, which are also regarded as contemporary, complementary and alternative forms of justice. It embodies a concept which is not confined to considerations of criminal justice in the strictest sense.[127] Moreover, under article 15 the prosecutor may also refuse prosecution *proprio motu* (at his or her own motion) and such prosecutorial discretion is believed to offer a real opportunity for the recognition of amnesty. The prosecutorial discretion is not, however, without substantial checks and balances. The decision of the prosecutor not to proceed either on the grounds of the interests of justice or on the grounds of inadmissibility may be exercised at the behest of a state or the Security Council but is subject to review by the Pre-Trial Chamber.[128]

(note 112 above) 553; Robinson (note 112 above) 500; Carsten Stahn 'Accommodating individual criminal responsibility and national reconciliation: The UN Truth Commission for East Timor' 95 (2001) 95 *American Journal of International Law* 952; John Dugard 'Reconciliation and practice: The South African experience' 8 (1998) 8 *Transnational Law and Contemporary Problems* 277.

126 Dugard 1998 (n 125 above); Dugard 1999 (note 64 above) 1015.

127 Robinson (note 112 above) 481.

128 See article 53(3)(b) of the ICC Statute and Rule 110(2) of the Rules of Procedure and Evidence.

Nevertheless, it must be borne in mind that certain categories of international crimes, notably genocide, crimes against humanity, torture, war crimes and grave breaches of the Geneva Conventions may not qualify for the granting of amnesty. Such crimes have an international dimension that demands extradition or prosecution of at least the most responsible violators. In this regard, Dugard contends:

> Difficulties arise in respect of torture and crimes against humanity committed by a repressive regime or in the course of an internal conflict. Ideally the perpetrators of such crimes should be tried before a national or international court, as stressed by the ICTY in *Furundzija*.[129] Where, however, a state opts to undergo the type of screening process involved in the South African model, it is difficult for foreign and international courts simply to ignore these amnesties.[130]

Pursuant to articles 18 and 19 of the ICC Statute, states may seek a deferral of the investigation on the grounds that certain national efforts, which are already underway, may warrant the preclusion of the ICC's jurisdiction over the matter. National efforts in this sense may include initiatives of TRCs that may appropriately amount to investigations with respect to criminal acts which may constitute crimes under the relevant provisions of the ICC Statute. According to Stahn, alternative forms of justice, such as amnesty, genuinely designed to meet the goal of accountability can be regarded as investigations within the meaning of the article 17(a) and (b). Stahn also notes that a challenge of a similar nature may be raised by the accused himself or herself and by the states listed in article 19(2) who are entitled to challenge the admissibility of a case before the Court. [131]

In addition to the three scenarios discussed above, the discretion of the Security Council to bar prosecutions must also be taken into account. In furtherance of the powers vested in the Security Council by Chapter VII of the UN Charter, article 16[132] of the ICC Statute

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129 Paras 151-157 [footnotes original].

130 Dugard 1999 (note 64 above) 1015.

131 Stahn (note 112 above) 698; Dugard 1999 (note 64 above) 1015. According to article 19(2)(b), one of the challenges against the jurisdiction of the ICC can be raised by '[a] State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted' the case. In this sense, investigation may include, as noted by Stahn, non-prosecutorial enquiries accompanied by amnesty.

132 The full text of the article provides: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a

empowers the Security Council to temporarily bar investigations or prosecutions by the Court. This is a temporary device designed to delay proceedings for a period of twelve months with the possibility of renewal under the same conditions. Primarily, this is done with broader considerations of international peace and order in mind. In the context of transitional justice, it might be done in order to give peace negotiations or national reconciliation processes a chance, if the Security Council believes that proceedings before the ICC would conflict with international peace and order. In other words, to do this, the Security Council must be convinced that refusal to recognise national amnesty would constitute a threat to international peace. However, Dugard argues that it is difficult to contemplate a situation in which refusal to recognise national amnesty could constitute a threat to international peace.[133]

Others[134] suggest that the power vested in the Security Council by article 16 may serve as an instrument to ensure permanent respect for legally sustainable national amnesty laws.[135] Stahn warns, however, that a deferral to a national amnesty law upon the request

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resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

133 Dugard 1999 (note 64 above) 1014.

134 Gavron (note 112 above) 91.

135 However, the power granted to the Security Council by article 16 has thus far been used for other purposes, such as exempting UN peacekeepers from the jurisdiction of the ICC. See, for example, Security Council Resolutions 1422 (2002) and 1487 (2003). The former resolution was adopted at the staunch request of the US who wanted to protect its citizens participating in UN peacekeeping missions. According to Schabas, this started shortly before the entry into force of the ICC Statute when the US announced that it would exercise its veto power over all future prosecutions against UN peacekeepers unless the Security Council were to invoke article 16 so as to shield all UN-authorised missions from prosecution by the ICC. The Security Council implemented the request of the US by Resolution 1422 of 12 July 2002, to which Schabas refers as a bad 'example of bullying by the US, and a considerable stain on the credibility of the Security Council.' See William A Schabas *An Introduction to the International Criminal Court* 2nd ed (2004a) 83, 85. Because of its controversial nature, several writers have extensively written on this particular issue. See Stahn (note 112 above) 99; Carsten Stahn 'The ambiguities of Security Council Resolution 1422 (2002)' 14 (2003) *European Journal of International Law* 85; Salvatore Zappala 'Are some peacekeepers better than others? UN Security Council Resolution 1497 (2003) and the ICC' 1 (2003) *Journal of International Criminal Justice* 671-678; Mohammed El Zeidy 'The United States dropped the atomic bomb of article 16 of the ICC Statute: Security Council power of deferrals and Resolution 1422' 35 (2002) *Vanderbilt Journal of Transnational La*w 1503. See in contrast Security Council Resolution 1593 (2005), which deals with the situation in Darfur. This resolution remarkably emphasises 'the need to promote healing and reconciliation' in Sudan. In that respect, it 'encourages … the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary.'

of the Security Council may stand in contradiction to the general principles of the UN in relation to amnesties concerning certain types of international crimes.[136] Nevertheless, as has been asserted earlier, the focus of such principles is on blanket amnesty clauses, such as the one contained in the Lomé Peace Agreement against which a disclaimer was appended by the UN Secretary-General.[137] On the other hand, it should be noted that article 16 of the ICC Statute does not purport to cause a permanent bar of investigations and prosecutions. Rather, it is only meant as a temporary bar of twelve months which may also validate the strategic choice of a transitional justice model by a country with a long-term goal of accountability.[138] There is, however, another valid concern that the power of the Security Council envisaged in article 16 may undermine the judicial autonomy of the ICC, as the court may not have adequate legal grounds to disregard a Security Council resolution allowing the granting of amnesty. According to article 16, such a decision can only be overridden by the Security Council itself. William Schabas argues that a decision of this nature can be blocked any time by one of the permanent members of the Security Council, exercising its veto power, and rendering the judicial autonomy of the ICC subject to the routine squabbles of the Security Council.[139]

One possible remedy recommended by Schabas to overcome the above dilemma is drawing lessons from the jurisprudence of the Appeals Chamber of the ICTY.[140] This can be best understood in the context of the following illustrative comparisons.[141] The first comparison is about the relationship between the main judicial organ of the UN, the ICJ, and the Security Council. Schabas argues that since these bodies are established by the

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136 Stahn (note 112 above) 699 and 717. It is also argued that given the UN's own restrictive policy towards amnesty, it is less likely for the Security Council to establish implicitly that investigations or proceedings before the ICC stand in contradiction to the goals of international peace and security.

137 See *Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone*, UN Doc S/2000/915, 4 October 2000, para 23 in which it was argued that although amnesty is a gesture of peace and reconciliation at the end of an atrocious past, it cannot be granted to certain categories of international crimes. For similar conclusions, see the latest decision of the Special Court for Sierra Leone in the *Lomé Decision* (n 129 above); *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (3 August 2004) (herein after '*Report of the UNSG*'), para 64.

138 Stahn (note 112 above) 717.

139 Schabas (n 135 above) 83. See also n 156 above and accompanying text.

140 *Tadic*, ICTY Appeals Chamber, decision of 2 October 1995, para 28.

141 Schabas (n 135 above) 84. See also Dugard 1999 (note 64 above) 1014-1015; and Stahn (note 112 above) 695.

UN Charter, they are treated as equals. He ascribes this argument to the ICJ itself, adding that the ICJ firmly believes that the UN Charter 'does not establish a hierarchy in which one principal organ of the United Nations can review the decision of the other.'[142] The second comparison, important to the current debate, is on the relationship between regional or international judicial bodies and the UN Security Council. In this regard, the ITCY, in the *Tadic* case,[143] found that it had jurisdiction to review the same Security Council Resolution (827 of 25 May 1993) which in effect was the Court's constitutive act. This legal reasoning emanates from the assumption that the ICTY was not a UN organ established by the UN Charter and for that matter it is not an organ of the UN at all.

At least theoretically, asserts Schabas, the ICC can borrow the same arguments and hold that due to its independent legal personality, it is not formally bound by a resolution of the Security Council to defer an investigation or prosecution. In other words, this means that the ICC may have incidental powers to determine the scope of its own jurisdiction and exercise judicial review over a request of the Security Council under article 16. However, this power is to be exercised rarely; and if so, it would be applied more likely in the case of abuse of the power of the Security Council. Schabas concludes that 'this is probably unlikely to happen.'[144]

The following conclusions can be drawn from the foregoing analysis. As a general rule, the absolution by amnesty from criminal responsibility for crimes punishable under international law or for the core crimes which fall under the jurisdiction of the Court is incompatible with the ICC Statute. This is an established principle of the Statute as appears from the explicit provisions of paragraphs 5 and 6 of the Preamble. The ICC

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142 Schabas (n 135 above) 84.

143 *Tadic* (n 140 above), para 28.

144 Schabas (n 135 above) 84. However, at 82, Schabas also warns that: 'At the same time, it must be recognised that there may be times when difficult decisions must be taken about the wisdom of criminal prosecution when sensitive political negotiations are underway. Should the court be in a position to trump the Security Council and possibly sabotage measures aimed at promoting international peace security?' Similarly, Minow (note 28 above) 4-5 argues: 'Less aggressive responses than prosecution may satisfy the transitional needs if they are accompanied with other forms of justice … The variety of circumstances and contexts for each nation, and indeed each person, must inflect and inform purposes in dealing with the past and methods that work or can even be tried.'

Statute makes it a duty for 'every State to exercise its criminal jurisdiction over those responsible for international crimes' with the objective of putting an end to impunity for perpetrators of serious crimes. Support for this position is also to be found in soft law documents,[145] international treaty law[146] and in state practice.[147]

In any case, if the ICC decides to recognise amnesty, it is imperative to know whether the amnesty was issued by an *ancien régime* or by a democratically elected government which has replaced a repressive one. In this regard, Cassese points out a general disinclination of international law towards self-granted amnesties.[148] If the ICC disregards amnesty granted by a given state and decides to proceed with prosecution, it is recommended that prosecution be limited to the most serious crimes and the most responsible perpetrators – what is called *targeted prosecution*. In elaborating this position Stahn argues:

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145 See, for example, Principle 7 of the Princeton Principles on Universal Jurisdiction (2001), available at http://www.law.uc.edu/morgan/newsdir/unive_jur.pdf (accessed 12 January 2006), which provides: 'Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law' and '[t]he exercise of universal jurisdiction with respect to serious crimes under international law … shall not be precluded by amnesties.' See also para 2 of UN Commission on Human Rights, Resolution of 18 January 2002, UN Doc E/CN4/2002/79. Compare this with Stahn (note 112 above) 706 and article 17 of the UN Declaration on the Protection of all Persons from Forced Disappearance which states that persons who have committed acts of forced disappearance should not benefit from amnesty law; Menno T Kamminga 'Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offenses' 23 (2001) *Human Rights Quarterly* 940.

146 For the development of international treaty law on the duty to prosecute, see the discussion in Chapter 5 sections 5.2 – 5.3. For regional developments, see *Velasquez Rodriguez* (n 94 above), para 174; *Barrios Altos* (n 94 above), paras 41-44 and 53. See also General Comment No 20 (n 122 above), para 15; *Report of the Committee against Torture*, UN Doc A/55/44 (2000), para 61(d); Diane Orentlicher 'Amicus curiae briefing concerning the amnesty provided by the Lomé Accord in the case of the *Prosecutor v Morris Kallon*, SCSL-2003-07' in which she states that '[t]o the extent that amnesty encompasses crimes against humanity, serious war crimes, torture and other gross human rights violations, its legal validity is doubtful and in any event contravened the United Nations commitment to combating impunity for atrocious crimes.'

147 There is a growing trend in state practice towards the prohibition of amnesty. The decisions of the following national courts are indicative of such a growing trend: Federal Court of Appeal of the City of Buenos Aires, Case No 17.889 (*Simon Julio*), Judgment of 9 November 2001; and the decision of the Supreme Court of Argentina (CSJN) *Simon, Julio Hector and Others* with reference to the illegal deprivation of liberty, etc, Case No 17768 of 14 June 2005, para 16. After many years, the Argentine laws of Full Stop and Due Obedience were declared unconstitutional on the grounds that 'they tend to induce "forgetfulness" of gross violations of human rights … and become therefore, constitutionally intolerable.' See also Honduran Supreme Court, *Amparo en Revision*, Case 58-96 of 18 January 1996; see also the *Lomé Decision* (n 133 above), para 82.

148 Antonio Cassese *International Criminal Law* (2003) 315; Claus Kress 'War crimes and crimes committed in non-international armed conflict and the emerging system of international criminal justice' 30 (2001) *Israel Yearbook of Human Rights* 103; Robinson (note 138 above) 491.

> A compelling case may be made that under customary law, the duty of states to bring perpetrators to justice extends only to the persons most responsible, particularly in situations of transition. This limitation of the duty of states to the prosecution of planners, leaders and persons who committed the most serious crimes should be taken into account in the assessment of admissibility. The fact that a state is complying with its obligations under international law is a factor weighing in favour of deference.[149]

Support for the above argument is also to be found in article 17 of the ICC Statute which states that the gravity of the conduct must be taken into account in the proceedings before the Court. Besides, article 1 of the Statute limits the jurisdiction of the Court to 'the most serious crimes of international concern.' All such references together with article 53(1)(c) (another test of *gravity*) leave room for a differentiation of more serious and less serious crimes and this allows the Court to make a distinction between most responsible perpetrators and lesser offenders.[150]

As a newly established body, the ICC's jurisprudence on amnesty is yet to be seen in the future. Nonetheless, as a matter of principle, the Court is the final arbiter over interpretation of the jurisdiction and admissibility of a case and by implication this means that the Court enjoys full judicial autonomy to assess whether amnesties or other forms of accountability are compatible with the ICC Statute. In conclusion, a most important consideration for the ICC to recognise amnesty as a major option of accountability should come from the normative justifications of amnesty, which are discussed in greater detail in sections 6.4.1 and 6.4.2 above. Amnesty as a form of restorative justice should be given proper weight and recognition in the yet to be developed jurisprudence of the ICC.[151] To give full meaning to the objectives of this study and to create a unifying perspective to the discussions in the preceding sections, the discussion should now revisit the fundamental question asked at the end of section 6.4.2: what are the acceptable

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149 Stahn (note 112 above) 707. See also Orentlicher (note 13 above) 2599.

150 The practice of international criminal institutions is also moving progressively towards this trend. The jurisdiction of the *ad hoc* Tribunals of Yugoslavia and Rwanda was limited to leadership figures. Preference was given to inciters and leaders rather than to minor actors. See articles 1 and 7(1) of the ICTY Statute and article 1 of the ICTR Statute; Security Council Resolution 1329 of 30 November 2000. The same approach was adopted by article 1 of the Statute of the Special Court for Sierra Leone. It limited jurisdiction of the Court to 'persons who bear the greatest responsibility for serious violations.' See also John RWD Jones and Steven Powles *International Criminal Practice* (2003) 134-135; Robinson (note 138 above) 494.

151 In this regard, see Mallinder (n 29 above) 208 who correctly notes that 'international courts should recognise amnesties that are introduced with democratic approval to promote peace and reconciliation, provided that they are accompanied by mechanisms to fulfill … victims' rights.'

mechanisms for the granting of amnesty? What approaches should amnesty follow, in order to be deemed acceptable?

6.6 Acceptable mechanisms for the granting of amnesty

That unconditional, blanket amnesty is no longer acceptable has reached a state of consensus between proponents and opponents of amnesty. The controversy is about conditional amnesty as an alternative form of accountability, especially as regards low- and middle-level perpetrators.[152] This section begins by considering the most acceptable approaches and mechanisms for the granting of amnesty. This will involve a discussion on the most appropriate transitional justice institution for the administration of amnesty, namely a TRC.

It has been argued that the legal interpretation of article 17 of the ICC Statute allows enough flexibility for parallel and ongoing domestic investigations to be considered as alternative forms of accountability. However, it is logical to assume that an amnesty which does not provide for an investigation or that which cannot be acceptably considered as an alternative form of justice[153] is less likely to be invoked as a bar to ICC proceedings. By pre-empting prosecution and punishment, amnesty should not institutionalise forgetfulness and sacrifice justice.[154] If amnesties are to be permitted at all, they should only be permitted in exceptional cases. The strictest standards of article 17(1) require that:

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152 Cassese is one of the supporters of such a balanced approach of alternative forms of justice. See Cassese (n 148 above) 450-451.

153 According to Minow (note 28 above) 23, such other forms of alternative justice include 'commissions of inquiry into the facts; opening access to secret police files; removing prior political and military officials and civil servants from their posts and from the rolls of public benefits; publicising names of offenders and names of victims; securing reparations and apologies for victims; devising and making available appropriate therapeutic services for any affected by the horrors; devising art and memorials to mark what happened, to honour victims, and to communicate the aspiration of 'never again'; and advancing public educational programmes to convey what happened and to strengthen participatory democracy and human rights.' Compare this with the four basic principles of transitional justice developed by the OHCHR, as discussed in n 6 above.

154 Minow (note 28 above) 4-5.

> [F]irst, that the matter must have 'been investigated by a state,' secondly, that the state concerned has adopted a decision not to prosecute, and, thirdly, that this decision does not result from 'the unwillingness or inability of the state genuinely to prosecute.' This tripartite test suggests that any exemption from criminal responsibility must, as least, be accompanied by alternative forms of justice and be open to individualised sanction, including the possibility of criminal punishment.[155]

Pursuant to article 17(2), for an alternative form of justice to pass the test of inadmissibility, it must not be done with the sole intent of shielding perpetrators from criminal responsibility. Perpetrators shall not grant themselves protection from criminal responsibility.[156] To be acceptable, amnesties must be approved by a sufficiently independent and impartial decision-making process and should be conducted in a reasonably expeditious manner. As put by Maria Jose Guembe, any sort of devious intent leading to sham proceedings can apparently not pass the scrutiny of the ICC.[157] A clear example of such arrangements is an amnesty scheme which seeks to exempt certain groups of perpetrators or members of government leadership from prosecution.[158]

Finally, an alternative form of justice must be conducted in a manner which is 'consistent with intent to bring the person concerned to justice.'[159] Such a circumstance can be any proceeding which bears traces of a quasi-judicial process of fact finding which is accompanied by testimony and written evidence before an independent body having the powers to make full disclosure and public identification of perpetrators and crimes committed by them. Such mechanisms can be regarded as credible alternative forms of classical prosecution and the most appropriate institutions to accomplish this task are TRCs.[160] What is then the normative theoretical basis that makes TRCs most fitting

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155 Stahn (note 112 above) 710. Compare this with the case law of the IACHR. See *Garay Hermosilla et al*, IACHR, Case No 10.843, 1996 Annual Report IACHR (1997) para 57; *Ellacuria*, Report No 136/99, paras 119-230. See also El Zeidy (note 112 above) 942. For a recent comparable model, see also section 27.6 of United Nations Transitional Administration in East Timor (UNTAET) Regulation No 10/2001 of 13 July 2001.

156 This also corresponds with the position of renowned international law publicists such as Dugard 1999 (n 64 above) 1012 and Cassese (n 148 above) 450-451.

157 See generally Maria Jose Guembe 'Reopening of trials for crimes committed by the Argentine military dictatorship' 2(3) 2005 *Sur International Journal on Human Rights* 114-131.

158 See *Barrios Altos* (n 94 above), para 41-44 and 53. Reference can also be made to the latest approach of Argentine courts towards amnesty as commented by Guembe (n 157 above) 114-131.

159 Article 17(2)(b) and (c) of the ICC Statute.

160 The South Africa TRC is a typical example in this regard. A similar model is the East Timorese TRC which has the power to investigate matters which do not constitute a serious criminal offence. Furthermore, the granting of amnesty is dependent on the performance of a visible act of

transitional justice institutions for the granting of amnesty? The answer to this comes from the moral foundations of TRCs.

According to Du Toit, the most important moral foundations[161] of TRCs are truth and reconciliation, which also squarely resonate with the normative and theoretical foundations of amnesty. This can be explicated more specifically in the context of the South African model of transitional justice, which denotes a changing meaning of truth and reconciliation in transitional context. In this regard, Du Toit defines *truth as acknowledgment* and *justice as recognition*.[162] Truth and reconciliation are best served by the restorative aspect of amnesty. Implicitly, it is this particular moral justification that makes TRCs the most appropriate institutions for the administration of amnesty. What Du Toit discusses as moral foundations of TRCs are explained by Hayner as the major objectives of TRCs.[163] She argues that TRCs aspire to discover, clarify and formally acknowledge past abuses. By so doing, they respond to specific needs of victims and contribute to justice and accountability. By outlining institutional responsibility and recommending reforms, TRCs also seek to promote reconciliation and reduce conflict over the past.[164]

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remorse serving the interests of the people affected by the original offence, such as community service, reparation, public apology or other acts of contrition. See Sections 22.2, 27.6 and 27.7 of UNTAET Regulation. See also Boris Kondoch 'The United Nations Administration of East Timor' (2001) *Journal of Conflict and Security Law* 245; Suzannah Linton 'Colombia, East Timor and Sierra Leone: Experiments in international justice,' 12 *Criminal Law Forum* (2001) 185; Stahn (n 135 above) 952.

161 Du Toit (n 52 above) 123.

162 Ibid 123, 129, 132, 135. Robert Rotberg similarly implies that the moral foundation of TRCs is uncovering the past 'in order to answer questions that remain unanswered.' See Robert I Rotberg 'Truth Commissions and the Provision of Truth, Justice, and Reconciliation' in Rotberg and Thompson (n 52 above) 3. See also Amy Gutmann and Dennis Thompson 'The Moral Foundations of Truth Commissions' in Rotberg and Thompson (n 52 above) 23.

163 Hayner 2001 (n 2 above) 24; see also OHCHR (n 4 above) 1; Joanna R Quinn and Mark Freeman 'Lessons learned: Practical lessons gleaned from inside the Truth Commissions of Guatemala and South Africa' 25 (2003) *Human Rights Quarterly*) 1127.

164 These objectives can be best summarized as: lifting the lid of silence, a response to victims' needs, contribution to accountability and institutional reform, promotion of national reconciliation. According to Hayner 2001 (n 2 above) 24 and 98, the literal recording of hidden history combined with a detailed accounting of the patterns of violence over time and across regions allows TRCs to unearth the hidden truth. By doing so, they clarify uncertain events and lift the lid of silence and denial from a touchy and painful past. This must be seen in conjunction with the right of individuals to know generally the truth about the past and specifically about the fate of disappeared persons or information about other past abuses. See OHCHR (n 4 above) 1-2; *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, UN Doc

According to Du Toit, the core principles embedded in the moral foundations of TRCs provide a coherent alternative to retributive notions of justice that require criminal prosecution and punishment and this alternative is nothing but restorative justice; in the moral foundations of TRCs lays the urge for restorative justice. This *restorative justice factor* creates a unifying perspective between the two concepts: amnesty and TRCs. In this sense, truth is believed to contribute more to reconciliation than does retributive justice and this purpose is best served by TRCs.[165] Amnesty in the current context also denotes an investigative arrangement accompanied by a thorough truth-seeking and truth-telling process. As a form of restorative justice, amnesty presupposes a meticulous balancing of victims' needs and society's interests. In many post-conflict transitions, experience shows that this task is best accomplished by a TRC.[166] TRCs, as the most appropriate forums for amnesty, are justified not only by merely pragmatic considerations but also by their contribution to restorative justice and their moral foundations which are intrinsically related to the normative foundations of amnesty as a restorative form of justice. Again, one aspect of restorative justice is repairing the damage caused by abuses of the past which is also one of the major objectives of TRCs.[167] Having established a unifying perspective between amnesty and TRCs in the foregoing paragraphs, the following section will discuss more broadly the appropriateness of TRCs as forums of alternative accountability.

6.7 TRCs as appropriate forums of amnesty and accountability

In spite of the radical progress in the development of international criminal law, TRCs as innovative institutions are attracting a wide range of attention among international law scholars. Some writers have even argued for the formation of a permanent international TRC with the sole objective of promoting restorative justice, unlike the ICC which

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E/CN4/2004/88. See also *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc E/CN4/2005/102 and Add 1, prepared by Diane Orentlicher.

165 Rotberg (n 162 above) 6.

166 Dugard 1999 (n 64 above) 1009 and 1012.

167 Rotberg (n 162 above) 3.

focuses mainly on retributive justice.[168] Hayner, one of the leading scholars in the study of TRCs, indicates that since 1974 several[169] TRCs have been established in different parts of the world with the objective of enquiring into the past of particular societies and telling the truth of what happened.[170] The best known of these commissions, according to Hayner,[171] are those of Argentina, Chile, El Salvador, Guatemala and South Africa.[172] All TRCs share one basic characteristic feature – healing by means of truth telling. However, they differ from each other in respect of composition, independence and mandate. Theoretically, TRCs are not adverse to prosecution. Yet experts[173] recommend that an extrajudicial commission of enquiry into the events of the past must go hand in hand with the granting of amnesty as an alternative to prosecution and punishment of human rights violations.

In practice, TRCs are established for one of two major reasons. One is that the new regime may lack the prerequisite power to embark on prosecution. The other is that the democratic transition might be a political pact premised on a compromise between old and new regimes and as such the pact may preclude prosecution of members of the old

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168 Carrie J Neibur Eisnaugle 'An international 'truth commission': Utilising restorative justice as an alternative to retribution' 36 (2003) *Vanderbilt Journal of Transnational Law* 209-241. Some scholars argue that the term 'restorative justice' is the precursor to 'transitional justice.' Elster (note 59 above) xii, for example, argues that in the 1990s the now-standard term 'transitional justice' had not yet taken hold; but 'restorative justice' was already in use in relation to the dilemmas societies face in periods of radical political change.

169 Another study reveals that in the last three to four decades more than forty TRCs have been established around the word with similar purposes. Patricia Lundy and Mark McGovern 'A truth commission for Northern Ireland?' 46 (2006) *Research Update.* Kathryn Sikkink and Carrie Booth Walling on their part indicate that although the number of TRCs has been rapidly increasing in the last two decades, between 2000 and mid-2004 there was a dramatic increase. When analysed by region, 38% of all TRCs operated in Latin America with the rest scattered over the following regions: Africa 36%, Asia and the Pacific 17%, Europe and Central Asia 6%, and the Middle East and North Africa 3%. The authors predict that given the overall trend of transitions to democracy, the pattern is anticipated to remain consistent. See Kathryn Sikkink and Carrie Booth Walling 'Argentina and Global Trends in Transitional Justice' in Roht-Arriaza and Mariezcurrena (n 71 above) 309-310.

170 Hayner 1994 (n 4 above) 600; Hayner 2006 (n 4 above) 295.

171 Hayner 2001 (n 2 above) 32.

172 Although Uganda inaugurated the first TRC in 1974, followed by Bolivia in 1982, these two commissions are seen as unsuccessful because of the fact that they did not produce a final report. Sikkink and Walling (n 169 above) 308 regard the Argentine commission as the first major commission with a final report and a lasting impact regionally and globally.

173 See *Report of the Special Rapporteur* (n 65 above).

regime.[174] The first scenario depicts the experience of Chile where President Aylwin's new government had to operate in the shadow of the Pinochet-led military. A typical example falling under the second scenario is the South African transition which was founded on an agreement between the NP of the former government and the ANC and other political forces which finally resulted in the first ever conditional amnesty formally endorsed by a constitution.[175]

From a scholarly point of view, Hayner suggests that any truth-seeking efforts must be crafted to fit the particular national circumstances of a given country. In fact, Hayner regards TRCs as one form of justice and not simply as a replacement to prosecutions.[176] It is, therefore, healthy for any country to insist on adopting its own model that fits its own needs. In recognition of such contextual needs, the *Report of the UNSG*[177] stands as a one of the most important points of reference. The report states that: 'Where transitional justice is required, *strategies must be holistic*, incorporating integrated attention to individual prosecutions, reparations, truth-telling, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof.'[178] Therefore, future

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174 This is discussed broadly by Boraine (n 11 above) 382-387 in the context of transitional justice scenarios.

175 Dugard 1999 (note 64 above) 1005.

176 Hayner 2001 (n 2 above) 88, 106, 250, 258. Hayner repeats this argument elsewhere in her seminal book which is widely recognised as one of the pioneering comprehensive studies on TRCs. Compare this with the position of the OHCHR (n 4 above) 1 on the status of TRCs which says: 'While [TRCs] do not replace the need for prosecutions, they do offer some form of accounting for the past, and have thus been of particular interest in situations where prosecutions for massive crimes are impossible or unlikely owing to either a lack of capacity of the judicial system or a *de facto* or *de jure* amnesty.' Equally, TRCs are believed to 'strengthen any prosecutions that do take place in the future.' Goldstone similarly asserts that transitional justice should be understood to mean 'not only criminal prosecutions, but also mechanisms such as [TRCs].' Goldstone 2004 (n 32 above) v.

177 N 137 above. See also *In Larger Freedom: Towards Development, Security and Human Rights for All,* Report of the UN Secretary-General UN Doc A/59/2005, paras 137-139. Charles Villa-Vicencio argues that 'a TRC need not, and should not, circumvent international human rights law or subvert the demands of international criminal law; in fact, it can and should be consistent with international law.' See Charles Villa-Vincencio 'Truth Commissions' in Villa-Vincencio and Doxtader (n 32 above) 89.

178 *Report of the UNSG* (n 137 above), para 26 [emphasis added]. See also *Set of Principles for the Promotion of Human Rights through Action to Combat Impunity* (prepared by Louis Joinet), UN Doc E/CN4 Sub2/1997/20/Rev I, Annex II, 2 October 1997, Principle 1 and 2; see also the comments of Hayner 2001 (n 2 above) 183-184 on the Policy Statement of AI on Impunity and that of HRW on Accountability for Past Abuses. Hayner's observation emanates from the content of interviews she has conducted with former senior legal counsellors of the advocacy groups. This also resonates with the major transitional justice tools of OHCHR discussed in n 6 above.

transitional justice options 'will be shaped in a variety of different ways, with powers, mandates and expectations changing as local circumstances and priorities dictate.'[179] Timothy Garton Ash echoes this, remarking that TRCs have become one of the major ingredients of the new model revolution by which societies are enabled to tackle the unique challenges of transition.[180] This resonates with Samuel Hunntigton's 'third wave democratisation,' a characteristic phenomenon of the late twentieth century that takes place when political leaders in governments and oppositions dare 'to challenge the *status quo* and … subordinate the immediate interests of their followers to the long-term needs of democracy.' According to Samuel Huntington, a negotiated political settlement or transition to democracy through the supplementary role of TRCs is one of the major third wave democratisation syndromes.[181]

The discussion in the following sections takes the aforementioned global understanding as a good point of departure for the study of TRCs. At the centre of this understanding lays the need for a *holistic approach* to transitional justice; the indispensability of TRCs for the success of such a holistic approach is beyond contention. This argument will be supported in the next section by identifying the most salient features of TRCs, as drawn from a comparative analysis of major TRCs which have operated in the last four decades.[182] In identifying these features, the study reviews a considerable amount of literature contributed by leading scholars on TRCs. The summarised comparative assessment lays the foundation for the most important lessons that should inform any

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179 Hayner 2001 (n 2 above) 23.

180 Timothy Garton Ash 'Ten years after,' *New York Review of Books*, 18 November 1999, 18, as quoted in Hayner 2001 (n 2 above) 250.

181 Huntington (n 15 above) 165.

182 For purposes of operational definition, this study prefers the following definition of TRCs offered by Hayner: TRCs are 'official bodies set up to investigate a past period of human rights abuses or violations of international humanitarian law.' Hayner 1994 (n 4 above) 598; Hayner 2001 (n 2 above) 5, 23. The United States Institute for Peace, one of the leading research and policy institutions on peace, also defines TRCs as quasi-judicial 'bodies established to research and report on human rights abuses over a certain period of time in a particular country or in relation to a particular conflict.' United States Institute for Peace 'Truth commissions digital collection,' available at http://www.usip.org/library/truth.html (accessed 28 February 2007); see also generally Villa-Vicencio (n 177 above) 89-95. According to Hayner 1994 (n 4 above) 598, the most important development which has marked an increased interest in TRCs has been the publication of the report of the UN Commission on the Truth for El Salvador in 1993. See also OHCHR (n 4 above) 1.

truth-seeking, truth-telling, reconciliation, social reconstruction, transformation and justice efforts in Eritrea.

6.8 Salient features of successful TRCs

Transitional justice researchers indicate that in the last three or four decades over forty[183] TRCs in more than thirty[184] countries have been established around the world, recent examples being those of Liberia, Sierra Leone, Nepal, Peru, Panama, Republic of Yugoslavia, Timor-Leste, and Kenya.[185] A striking observation is that although there have been many TRCs in Africa, Latin American TRCs are, comparatively speaking, more highly acclaimed for accomplishing a more successful job of transitional justice than have their African counterparts, except for South Africa.[186] Of all TRCs that have been active in the past four decades, the following five have been consistently identified as the most successful, comprehensive, extensively documented, highly instructive and intuitively appealing examples based on their size, the impact they had on their respective political transitions and the national and international attention they received. These are the TRCs of Argentina, Chile, El Salvador, South Africa and Guatemala, appearing in

183 Lundy and McGovern (n 169 above).

184 Hayner 2006 (n 4 above) 295.

185 On the Kenyan experience, see the discussion in Chapter 1 section 1.2.

186 Hayner 2001 (n 2 above) 32; See also Rotberg (n 162 above) 6 who refers to the South African TRC as a good model of transitional justice. A critical analysis of the drawbacks of the South African transitional justice model may stretch beyond the general objectives of this study. A detailed discussion on this particular topic should better be reserved for a separate academic contribution. However, it should be briefly noted that in spite of its much acclaimed fame, the South African TRC was not beyond any criticism. One of the major criticisms focuses on its amnesty process which was preceded, according to Sarkin, by a pre-TRC indemnity agreement entered between the ANC and the former government. This resulted in the Indemnity Acts of 1990 and 1992 on the basis of which thousands of perpetrators were granted immunity (blanket amnesty). Sarkin laments that this undermined the 'carrot' of amnesty thereby dooming the notion of learning the full truth about the past. It is also argued that the criminal justice system did not offer a sufficient 'stick' to coax potential applicants into the amnesty process. See generally, Sarkin 2004 (n 62 above) 5-20, 44, 53, 127 and 194. However, at 12, Sarkin concludes that the South African TRC 'was the first truth commission to be given the power to grant amnesty. The mere fact that it had such power was problematic to many.' See also Narandran Kollapen 'Accountability: The debate in South Africa' 37(1) 1993 *Journal of African Law* 1-9; Graybill (n 19 above) 59; Biko (n 64 above) 193-198; Bizos (n 64 above) 39-100. Some also argue that the South African TRC has not achieved the goal of reconciliation. However, Hayner 2001 (n 2 above) 157 argues that 'in a society such as South Africa, where communities had been long separated not only by race and physical space, but also by economic conditions and opportunity' the achievement of reconciliation may take several years. She quotes Tutu as having said that the goal of the TRC was promoting reconciliation and not achieving per se.

order of time of occurrence.[187] Because of the similarity of the history of the two countries, the TRC of East Timor may offer peculiar lessons to Eritrea which needs to be explored in a separate contribution.[188]

In practical terms, it is impossible to assess exhaustively all TRCs that have operated in the last forty years and are still operating in different parts of the world in a study as limited in scope and objective as the current one. What can feasibly be done is to look at the most important and representative features of successful TRCs in terms of achievement, failure, timing and overall relevance, and ultimately glean some practical lessons and identify the characteristic features of a successful TRC. Researchers generally agree on the fundamental premise that every TRC operates in a very different legal and political environment.[189] Accordingly, each TRC confronts its own unique problems. There is no universal formula on how to set up a TRC or guarantee its success, because 'no two countries are the same and models cannot be transported from one country to another.'[190] Similarly, Lowenthal also argues that 'all authoritarian regimes are not equated with each other' and accordingly each case merits 'a much more detailed and sustained analysis.'[191] In a comparable approach, Ellen Lutz asserts that 'to be effective,

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187 See generally Hayner 2001 (n 2 above) 32-71. Other less known truth commissions identified by Hayner include the following: Uganda (1974), Bolivia (1982), Uruguay (1985), Zimbabwe (1985), Uganda (1985), Nepal (1990), Chad (1990), the first TRC of ANC (1992), Germany (1992), the second TRC of ANC (1993), Sri Lanka (1994), Haiti (1995), Burundi (1995), Ecuador (1996), Nigeria (1999), Sierra Leone (2000). Of late, other truth commissions have been established in such countries as Liberia, Ghana, East Timor, Peru, Bosnia and Colombia. An ongoing discussion of civil society organisations in Uganda is also exploring the possibility of establishment of a TRC for the country. See *Report of the Stakeholders Dialogue - Beyond Juba: Building Consensus on a Sustainable Peace Process for Uganda* (1-3 December 2006, Kampala). In the aftermath of the post-election violence in Kenya and Zimbabwe, civil society organisations in the two countries are similarly exploring the possibility of establishing TRCs. See the discussion in Chapter 1 section 1.2.

188 The similarity lies in the fact that both counties were occupied by foreign powers until the last decade of the 21st Century and their transitional justice options are accordingly profoundly informed by such common background.

189 See, for example, Du Toit (n 52 above) 122.

190 Sarkin 2004 (n 62 above) 1.

191 Lowenthal (n 52 above) ix, x. Compare this with O'Donnell *et al* (n 45 above) 4 who argue that in periods of radical political change, 'it is almost impossible to specify *ex ante* which classes, sectors, institutions, and other groups will take what role, opt for which issues, or support what alternative.' For this reason, a period of transition 'should be analysed with distinctly political concepts' and conceptual tools, however vaguely delineated and difficult to pin down they may be.'

transitional justice mechanisms must be both contextually and culturally appropriate.' She then adds:

> While diffusion from prior experiences of ideas and examples creates the range of examples and potential strategies, each place adapts, develops, and shapes its own transitional justice experience in light of its own context and culture. There are no "off-the-shelf" answers.'[192]

However, there are always some underlying issues and challenges which are common to all TRCs, and certain minimum requirements that every TRC is expected to fulfil. The success or failure of TRCs is dependent on the assessment of such factors.[193] The most important features of successful TRCs will, therefore, be summarised in the form of salient traits which include political milieu, mandate, appointment of commissioners, wide distribution of reports and contribution towards the indigenous context of restorative justice.

6.8.1 Political milieu

The most important aspect in the life of TRCs is political setting. To be successful, a TRC must emerge from a contextualised political transition to democracy.[194] The OHCHR advises that 'the strongest truth commissions are founded through a process of consultation and careful consideration of what kind of commission would be most

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192 Ellen Lutz 'Transitional Justice: Lessons Learned and the Road Ahead' in Roht-Arriaza and Mariezcurrena (n 71 above) 333-334. See also *Report of the Stakeholders Dialogue* (n 187 above).

193 On what might be considered minimum requirements for the creation and operation of TRCs, see also generally Hayner 1996b (n 4 above) 19-29; Hayner 1996a (n 4 above) 173-180; Dugard 1999 (note 64 above) 1012; Shea (n 57 above) 45; Quinn and Freeman (n 163 above) 1117-1149; Boraine (11 above); Villa-Vicencio (n 177 above); Du Toit (n 52 above); *Report of the UNSG* (n 137 above), para 26. Of equal importance are the guidelines developed by the OHCHR (n 4 above). Developed by the UN thematic organ on human rights, the OHCHR guidelines will have an enduring effect on future TRCs. The set of principles developed by the UN Sub-commission (n 63 above) are also important. The latter set of principles, for example, outlines a right to truth, recommends a universal standard for the protection and accessibility of documentary evidence and calls for extrajudicial commissions of inquiry to be set up to establish the facts. Principle 1 ("The Inalienable Right to the Truth) provides that: 'Every society has the inalienable right to know the truth about past abuses and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.' On the right to truth, see also OHCHR (n 4 above) 1-2; *Updated Set of Principles* (n 164 above); *Valasquez Rodriguez* (n 94 above), paras 174-176. This resonates with one of the major objectives of TRCs, which is truth-telling.

194 Du Toit (n 52 above) 122-123; Boraine (n 11 above) 385; Teitel (note 3 above) 4; Minow (n 28 above) 13.

appropriate for the context.'[195] In addition, TRCs cannot properly function when violence and abuse continue. Thus, they are:

> [u]sually set up during or immediately after a political transition in a country – which may take the form of a gradual democratisation, as in Chile and South Africa, a negotiated settlement of civil war, as in El Salvador, or a military victory by rebels, as in Uganda and Chad, or a rapid democratic opening after repressive military rule, as in Argentina and Uruguay.[196]

Similarly, Erich Brahm argues that the most appropriate time for the establishment of a TRC is soon after the establishment of an effective transitional government. Normally, this takes place in a country which has just emerged from a conflict or authoritarian regime. A TRC is more likely established when there is a relatively even balance of forces at the transition. Establishment of a TRC before such time is hardly possible and a long time after the transition would mean that witnesses and evidence will become more difficult to find.[197]

Hayner further exemplifies the situation by a discussion of what happened in Sri Lanka in the early 1990s. In 1994, the newly-elected president of Sri Lanka appointed three commissions of inquiry, which operated simultaneously, to investigate into the country's past abuses. The country was in the middle of an ongoing war which had understandably weakened the role of the commissions of inquiry. The president was helplessly dependent upon the support of the military and as such the continued conflict between the government and the rebel groups was a severe impediment to any effort aimed at fostering a successful paradigm of transitional justice.[198]

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195 OHCHR (n 4 above) 7.

196 Hayner 1996b (n 4 above) 22.

197 Erich Brahm 'Truth commissions,' available at http://www.beyondintractability.org/essay/truth_commissions/ (accessed 15 January 2007). In this regard, the injustices perpetrated during the pre-independence era may be considered as remote experiences in terms of the extended time factor. But this does not indicate the irrelevance of any future plans regarding such investigations.

198 Hayner 2001 (n 2 above) 62; Hayner 1996b (n 4 above). Surprisingly, the conflict between the Sri Lankan government and Tamil Tiger rebel groups still makes the headlines with allegations that the Eritrean government is providing military assistance to the rebel groups. See *Asian Tribune* 'US Senate investigation reveals Eritrea providing military aid to Sri Lanka Tamil Tiger rebels,' 31 August 2007. As in the case of Somalia, Eritrean government involvement in the Sri Lankan civil war possibly comes as a manifestation of antagonism to US regional interests.

Similarly, in the Philippines, commissioners were forced to resign as a result of continued military attack against civilians during the commission's operation. The experience in Rwanda reveals that a continuous threat against people who would potentially cooperate with a TRC might frustrate the efforts of such a commission. In Bolivia and Equator, TRCs did not complete their work due to changed political circumstances and lack of political support, while in Burundi and Zimbabwe reports of TRCs were kept confidential because they were considered too risky in the changed political environment (in the former case) and contrary to the interests of the political leadership (in the latter case). The general understanding is that TRCs which investigate institutions and individuals that still wield significant power may find their ability to function and their access to information difficult and dependent on the strength of their political backing.[199]

Moreover, TRCs cannot do justice if they are formed with a wrong political objective. A typical example mentioned by Hayner is the 1974 Ugandan TRC which was formed with the sole objective of heading off international criticism during Idi Amin's regime. An imperative objective of a TRC is the reversal of human rights violations which can only be realised after the end of authoritarianism or a negotiated transition to democracy.[200] Such was not the case in Uganda in 1974. However, Uganda is currently engaged in a vibrant discussion of transitional justice, in which all stakeholders are perceivably given the opportunity to add their input in an ongoing discourse on whether the country needs a national process that addresses tensions, divisions and conflicts of the past and present.[201]

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199 Hayner (n 2 above) 24, 50-51.

200 Ibid 51. See generally, Richard Carver 'Called to account: How African governments investigate human rights violations?' 1991 *African Affair* 89.

201 *Report of the Stakeholders Dialogue* (n 187 above). The current Ugandan experience underscores the position that advance planning around future possible options of transitional justice can take place anytime and anywhere, although it is true that such plans can only be implemented whenever a ripe political transition allows. Civil society organisations in the country are already actively involved in national deliberation on transitional justice issues in the middle of ongoing virulent conflict and without waiting for a change in government which is 'the usual indicator of political transition.' The Ugandan experience demonstrates that it is not compulsory to wait for the actual 'transitional' moment before relevant studies on these issues can take place. This is also applicable to the current transitional justice discourse in Kenya and Zimbabwe, best understood in the context of the post-election crises in the two countries. At the same time, the Kenyan and Zimbabwean discourses are influenced by the historical and systematic injustices which remain unresolved in both countries. See the discussion Chapter 1 section 1.2.

6.8.2 A well defined mandate

Transitional justice literature reveals that TRCs normally work under much public pressure, with little time and limited resources.[202] Yet they are expected to confront the most sensitive issues in the political sphere and focus on the large pattern of overall events. They assume a most difficult task of writing a report that must be universally accepted as an impartial, fair and accurate representation of history. To be able to accomplish all such difficult objectives, a TRC needs to have a well-defined mandate and structure.[203]

Joanna Quinn and Mark Freeman assert that the most important mandate of a TRC is implied in its name: 'to establish a common truth and to report on that truth which has been found.'[204] As argued by Tutu, TRCs' unique role, official and public recognition of past abuses, reclaims a country's history and opens it for public review.[205] This cannot be accomplished without a clear set of conceptual guidelines that define, for example, whether the goal of the commission is simply to collect the testimony of victims or whether the overarching goal also envisions reconciliation measures. The commission's conceptual foundation, its actual shape and anticipated impact on society are all to be defined in well-structured terms of reference. The theoretical parameters of a TRC are defined most of the time by presidential advisors, government ministers, parliamentarians and UN officials.[206] If the framers are not appropriately equipped with requisite knowledge, the desired objective of a TRC may remain hardly attainable. Experts advise that a TRC must be provided with a precise definition of violations that are to be the subject of investigation. It is also important for a commission to be explicitly mandated whether to name names or not. Furthermore, the terms of reference must be designed in

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202 OHCHR (n 4 above) 8. The same study (at 24) estimates that 'the budget of a truth commission is typically over US$5 million and can easily total US$12 million or more. While the cost of a truth commission is significant, it is often noted that a truth commission generally costs far less than prosecutions undertaken by international or hybrid tribunals, which can run into … tens of millions of dollars per year.'

203 OHCHR (n 4 above) 8 and further.

204 Quinn and Freeman (n 163 above) 1127; Du Toit (n 52 above) 122.

205 Tutu (n 20 above) 31 and 54.

206 Ibid.

such a way that they encourage willing and active participation by ordinary citizens, as well as perpetrators, as part of the effort to procure accurate information.[207]

A former chairperson of one of the exemplary TRCs in Latin America, Christian Tomuschat,[208] argues that the mandate of a TRC must be developed according to the specificities of the national situation and the objectives of the particular country. Although the Guatemalan TRC borrowed some comparative experiences from Chile and El Salvador, he further argues, it has also developed its own unique methods and approaches in dealing with the past. In spite of an extremely broad mandate by the peace accord, the commission's 'centre of gravity focused on violations of basic human rights, where questions of life and death were at issue.'[209] Hayner echoes this, remarking that it would be unrealistic to expect a TRC to document the whole truth. In practice, what it can do is select the most important or representative cases for in-depth study, and then summarise others by outlining patterns of abuse. Obtaining the full truth on an individual level may simply be impossible when a commission is dealing with a massive number of atrocities.[210] In contrast, a very limited mandate may prevent investigation into many repressive acts, especially illegal imprisonment or torture, which are, most of the time, common practices in the suppression of political dissent. A pertinent example in this regard is Uruguay.[211]

Having the truth publicly told can to a large extent provide some sense of justice. A TRC whose mandate is defined flexibly can reveal a bigger, if not a fuller, picture of the truth about the past.[212] In this regard, Michael Ignatieff asserts, 'The past is an argument and

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207 Ibid. See for example, in this regard the South African Promotion of National Unity and Reconciliation Act, 34 of 1995 (the TRC Act) on how it defines a violation, the procedures of amnesty and what actions qualify for amnesty.

208 Christian Tomuschat 'Clarification Commission in Guatemala' 20 (2001) *Human Rights Quarterly* 239-240.

209 Ibid.

210 Hayner 1996a (n 4 above) 177; Hayner 1996b (n 4 above) 24-25.

211 Hayner 2001 (n 2 above) 53-54.

212 Ibid. This must be seen against the obligation of states under international law to find and make public the truth about abuses. See *Valasquez Rodriguez* (n 94 above), paras 174-176. See also Méndez (n 1 above) 255; Yasmin Naqvi 'The right to the truth in international law' 88 (2006) *International Review of the Red Cross* 246. Inherent in international human rights law that obliges states to investigate and punish human rights violations, is the right of victims and society to know

the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies.' He further argues that 'all that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse.'[213] Similarly, the former executive director of HRW, Aryeh Neier, avers that the need for truth-seeking is determined by the degree of repugnancy of the atrocities.[214] Most of the time, abuses are accompanied by the practice of deception and crimes are committed deliberately in an unidentifiable manner, using a number of disguising techniques. In light of the deceptive nature of repressive regimes, Neier adds, 'everything about these crimes was intended to be deniable.' When deception is so central to the abuses, 'truth takes on a greatly added significance' and 'the revelation of truth in these circumstances takes on a certain amount of power.'[215]

The aforementioned challenge is highlighted by the testimony of a former member of the Eritrean Crime Investigation Unit (CIU), Mr Mehari Yohannes. In his revealing account, Mr Yohannes testifies that agents of the CIU use different types of tinted-glass cars, ranging from land cruisers to sedans, with different number plates such as civil, governmental, rental or commercial, to disguise the perpetration of human rights violations.[216] Understandably, crimes committed under such mysterious circumstances are easily denied and most of the time the rarely available evidence to prove such crimes may not easily pass the rigorous test of 'proof beyond reasonable doubt' in criminal justice standards.[217] The justice system in periods of massive atrocities is deliberately rendered dysfunctional,[218] as is conspicuous in current-day Eritrea. In the aftermath of atrocities, the judiciary barely manages to meet the basic requirements of retributive justice.

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the truth. See for example, UN Sub-commission for Prevention of Discrimination and Protection of Minorities (Set of Principles), Annex II, 10, UN Doc E/CN.4.Sub.2/1996/18 (1996). Compare this with n 219 above.

213 Michael Ignatieff 'Articles of faith' 25(5) 1996 *Index on Censorship* 113.

214 Aryeh Neier, interview by Priscilla Hayner on 31 July 1996, as quoted in Hayner 2001 (n 2 above) 26.

215 Ibid.

216 Awate Team 'Interview with Mehari Yohannes,' available at http://www.awate.com/portal/content/view/636/11/ (accessed 05 March 2003a).

217 Compare this with the concerns expressed by the South African Constitutional Court in *AZAPO* (n 8 above), para 17.

218 Van Zyl (n 42 above) 44.

Moreover, if there are two or more parties to the atrocities, facts may also be intentionally misrepresented to serve political ends. In such cases, the role of each party and the atrocities committed by both parties must be spelled out adequately.[219] The Eritrean Civil War of the 1980s (ELF - EPLF War) is a typical example in this regard. In the last twenty seven years or so, each side interpreted the causes of the war according to its own political agenda. This has been a main point of contention between the two fronts since 1981, by which time the ELF had been violently driven from Eritrea by the EPLF as a result of substantial military support received by the EPLF from the TPLF, another rebel movement in neighbouring Ethiopia. Since then, the leaders of the ELF have remained in exile as leading opposition figures and are resentful of the legacies of the civil war. Most importantly, the exact cause of the civil war and other crucial issues surrounding the violent conflict have remained inadequately addressed and acknowledged, with far-reaching repercussions and spill-over in the post-independence era. The Eritrean general public knows little about this.[220] In elaborating on a similar experience from another European country, Hayner opines that:

> Despite close reporting of the Bosnian war, there are three contradictory versions of official truth in Bosnia about what really happened in that war, each version taught in different schools to different communities – Muslim, Croat, or Serb – and reinforcing fundamental points of conflict that could well flare up in future violence. In 1998, Bosnians began to consider the idea of a truth commission in order to establish one agreed-upon and well-documented historical account.[221]

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219 Kritz (n 31 above) 453; Thomas Buergenthal 'United Nations Truth Commission for El Salvador' 27 (1994) *Vanderbilt Journal of Transnational Law*.498-500. The involvement of foreign actors must also be given adequate attention. Valuable lessons can be gleaned from the experience of Chad, El Salvador and Guatemala in this regard.

220 Most recently, Awate Team wrote in reference to the atrocities of the Eritrean Civil War the following: 'The Eritrean regime solidified its friendship with the current government of Ethiopia, in blood, in 1980, and then solidified its enmity, in blood again, in 1998.' Awate Team 'A stubborn refusal to be relevant,' available at http://www.awate.com/portal/content/view/4445/2/ (accessed 18 January 2007).

221 Hayner 2001(n 2 above) 27. In a very similar manner, Michael Ignatieff asserts that in a situation like that of Bosnia, truth can never be full enough to connect profoundly different perceptions of what happened. Therefore, 'either the siege at Sarajevo was a deliberate attempt to terrorise and subvert the elected government of an internationally recognised state or it was a legitimate pre-emptive defence of the Serb's homeland from Muslim attack. It cannot be both.' Michael Ignatieff 'Elusive goal of war trials' March 1997 *Harpers Magazine* 16.

A TRC aspires to rectify such controversies by in-depth investigation and truth-seeking efforts. These tasks are rarely accomplished by trials. Equally, a TRC whose mandate is not well defined cannot accomplish these objectives.

A very important component of the mandate and structure of a TRC is the period of operation of the commission. To meet obligations and expectations, framers of TRCs must define the time frame within which a commission must operate.[222] According to Hayner, most TRCs operate for six months to two years. However, allowing too much time to elapse between the appointment and conclusion of a TRC can cause the commission to lose momentum.[223] From a practitioner point of view, the time frame must also include a discrete preparatory phase of a few months for a commission to set itself up. The experience of the South African TRC shows that the commission was set in motion well before any of the necessary preparations had been made. The former deputy chairperson of the South African TRC notes that this was one of the crucial challenges in the commission's life.[224]

6.8.3 Appointment of commissioners

With the trust and support of local level community structures, a TRC can easily make the best of its mandate and terms of reference, and can take advantage of the powers it is given. Quoting a former member of the South African TRC, Quinn and Freeman argue that 'selecting the wrong person to head the commission will cause the commission to have only a mitigated success.' The appointment of a long-time anti-apartheid activist and the leader of a substantial faith community as the chairperson of the South African TRC was one of the primary factors for the success of the TRC.[225]

Equally important in the South African experience was the selection process for the appointment of commissioners which was much acclaimed for creating the requisite

222 OHCHR (n 4 above) 8 and further.
223 Hayner 2001 (n 2 above) 14.
224 Boraine (n 11 above) 76.
225 Quinn and Freeman (n 163 above) 1128.

environment for public participation and deliberations. This is also true about the crafting of the law which established the TRC.[226] The extensive public participation, including deliberative parliamentary hearings on the draft legislation and submissions of comments from many organisations and interested parties will remain the most important lesson future TRCs have to learn from the South African experience.[227] Many TRCs have been established by presidential decrees without little public participation in the crafting of their terms of reference. This might not be helpful in maintaining proper balance between different groups whose stake might be affected by the work of the commission.[228]

In a similar fashion, Hayner asserts that appropriately-qualified staff and a competent manager, who must have the ability to lead, administer, raise money and withstand intense public and political pressure, are some of the most crucial factors for the success of a TRC.[229]

Commitment to real change needs more than the mere establishment of a TRC. In order to operate impartially and in good faith, it is argued, a commission must represent a range of expertise and political views, proving its independence from political forces.[230] The success of a TRC can also be guaranteed by the inclusion of interdisciplinary teams, ranging from lawyers to politicians, psychologists, religious and traditional leaders, whose catalyst role will enable commissioners to create deeper pools of knowledge. If need be, a TRC can also include foreign staff in situations where trust cannot be easily built among nationals of a given country because of the nature of the conflict.[231]

6.8.4 Wide distribution of the commission's report

Quinn and Freeman build a convincing argument in support of the importance of making a TRC's report widely available. The findings of a TRC will mean nothing if they are

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226 Graybill (n 19 above) xiii; Sarkin 2004 (n 62 above) 3, 32.
227 Sarkin 1998 (n 64 above).
228 Hayner 1996a (n 4 above) 178; Hayner 1996b (n 4 above) 23-25.
229 Ibid.
230 OHCHR (n 4 above) 15.
231 Hayner 1996a (n 4 above) 178; Hayner 1996b (n 4 above) 23-25; Quinn and Freeman (n 163 above) 1132-1133.

kept distant from the general public.[232] Similarly, Minow argues that the wide distribution of the findings of a TRC helps in re-establishing a moral framework, in which wrongs are correctly named and condemned. This is a crucial ingredient in restoring the dignity of victims. By doing so, TRCs contribute to public acknowledgment of harms and build the trust of survivors in the new democratic order. This is the best way of enabling victims to understand that their society as a whole acknowledges what has happened to them.[233]

To substantiate the importance of the above argument Minow quotes Pumla Gobodo-Madikizela, a psychologist who served on the human rights committee of the South African TRC. According to Gobodo-Madikizela, many victims conceive of justice in terms of revalidating oneself and of affirming the sense 'you are right, you were damaged, and it was wrong.'[234] The most appropriate mechanism of transitional justice to facilitate this is the process and report of a TRC. Acknowledging the indispensable role of TRCs' reports in responding to the needs of victims, Thomas Buergenthal, an American professor of law and one of the three commissioners in the UN Truth Commission for El Salvador, opines:

> Many of the people who came to the Commission to tell what happened to them or to their relatives and friends had not done so before. For some, ten years or more had gone by in silence and pent-up anger. Finally, someone listened to them, and there would be a record of what they have endured. They came by the thousands, still afraid and not a little sceptical, and they talked, many for the first time. One could not listen to them without recognising that the mere act of telling what had happened was a healing emotional release, and that *they were more interested in recounting their story and being heard than in retribution*. It is as if they felt some shame that they had not dared to speak out before and, now that they had done so, they could go home and focus on the future less encumbered by the past.[235]

To highlight the importance of the wider distribution of a final report, it is worth noting that the summary and recommendations of the Guatemalan TRC report were translated into several local languages. This allowed for a wider distribution of the report in the country.[236] Similarly, short versions of the South African TRC report were prepared in

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232 Quinn and Freeman (n 163 above) 1145-1146; OHCHR (n 4 above) 31.

233 Minow (n 28 above) 71-72.

234 Pumla Gobodo-Madikizela as quoted in Minow (n 28 above) 60; Antjie Krog *Country of My Skull* (1998) 31.

235 Buergenthal (n 209 above) 292 and 321 [emphasis added].

236 Tomuschat (n 209 above) 234.

eleven of the languages used in South Africa.[237] In contrast, the experience of Bolivia, Burundi, Uganda and Zimbabwe in this particular context is not enlightening, where in all cases the reports were either kept confidential or no final report was produced at all.[238] The experiences in Chad and Chile in this regard are, however, to be emulated by future TRCs.[239]

6.8.5 Reconciliation and social reconstruction

Perhaps the most important index for the success of a TRC is its contribution towards reconciliation and social reconstruction: in other words, its combined effect on restorative justice. Hayner argues that the strength of a TRC is in advancing reconciliation on a national and political level. This means building relationships that are not haunted by the conflicts and hatreds of yesterday.[240] Accordingly, Hayner points that one needs to ask the following fundamental questions in order to gauge whether reconciliation is taking root: How is the past dealt within the public sphere? What are the relationships between former opponents? Specifically, are relationships based on the present, rather than on the past? Is there one version of the past, or are there many? A TRC which does not tackle fundamentally different versions or which continues denial about such important and painful events of the past cannot be said to have achieved its objective of reconciliation.[241]

A TRC should confront the conflicts of the past directly. By so doing, it should lessen the risk of conflicts exploding into severe political violence. Hayner again argues in this regard:

> Bury your sins and they will re-emerge later. Stuff skeletons in the closet, and they will fall back out of the closet at the most inauspicious time. Try to quiet the ghosts of the

237 Quinn and Freeman (n 163 above) 1146.
238 Hayner 2001 (n 2 above) 24, 50-51. See also Sikkink and Walling (n 169 above) 309.
239 Joanna R Quinn 'Dealing with a legacy of mass atrocity: Truth commissions in Uganda and Chile' 19 (2001) *Netherlands Quarterly on Human Rights* 20; Hayner (n 2 above) 102.
240 Hayner 2001 (n 2 above) 155, 161.
241 Ibid, 161-163.

> past, and they will haunt you forever – at the risk of opening society to cycles of violence, anger, pain, and revenge.[242]

However, reconciliation cannot be examined in isolation from other important factors such as reparation which are essential components for the success of a TRC. Victims and survivors who suffer a range of physical and psychological injuries as a result of widespread abuse cannot be easily reconciled with perpetrators if their needs are not addressed properly. Minow argues that 'restorative justice requires to repair the injustice, to make up for it, and to effect corrective changes in the record, in relationships, and in future behaviour.'[243] Socio-economic imbalances are pervasive in societies which emerge from a divisive past. Reparation programmes which do not address such imbalances undermine the achievements of a TRC. The following example by Antjie Krog illustrates the scenario of an unsuccessful 'reconciliatory' effort:

> Once, there were two boys. Tom and Bernard. Tom lived right opposite Bernard. One day Tom stole Bernard's bicycle and every day Bernard saw Tom cycling to school on it. After a year, Tom went up to Bernard, stretched out his hand and said, 'Let's reconcile and put the past behind us.' Bernard looked at Tom's hand. 'And what about the bicycle?' 'No,' said Tom, 'I'm not talking about the bicycle – I'm talking about reconciliation.'[244]

Apart from its reconciliatory role, reparation should also be seen as an obligation of states well recognised by international law.[245] According to Max du Plessis and Steven Peté, 'the concept of reparation must be understood against the development of international law and the body of norms that today [are recognised] as "human rights."'[246] The

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242 Ibid. Compare this with Tutu's comments: 'Unless we look the beast in the eye we will find that it returns to hold us hostage.' Tutu (n 20 above) 31. Similarly, Yasmin Sooka, former chairperson of the Human Rights Violations Committee of the South African TRC, advises that: 'It is only by looking its own past directly in the eye, acknowledging failings which have resulted in gross violations of human rights, and addressing injustices which have occurred, that a society is able to move forward. Failure to do so will result in the past returning to haunt the present and the future being rooted in a morass of injustice characterised by disputed national narratives.' See Yasmin Sooka 'Foreword' in Max du Plessis and Stephen Peté *Repairing the Past?: International Perspectives on Reparations for Gross Human Rights Abuses* (2007) viii, ix.

243 Minow (n 28 above) 91

244 Krog (n 234 above) 109.

245 UN Commission on Human Rights *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Final Report, Theo van Boven, rapporteur, UN Doc ECN4/Sub.2/1993, 8 July 1993.

246 Max du Plessis and Steven Peté 'Reparations for Gross Human Rights Violations in Context' in Du Plessis and Peté (n 242 above) 11. The authors assert that the right of the individual to redress for state crimes was first recognised in a legal document drafted at the Paris Reparation Conference in 1945.

argument of the authors promotes reparation as a human rights ideal, an entitlement which is closely linked to the right to bring a claim for a violation of internationally recognised human rights, as established in various international instruments. According to the authors, reparation is an integral part of the obligation imposed on states by international human rights law and humanitarian law.[247] One of such provisions of international law mentioned by the authors is article 8 of the UDHR which states that '[e]very one has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.'[248] Du Plessis and Peté also note that the need for reparations in the context of gross human rights violations is also recognised by the ICC Statute which establishes a trust fund for the benefit of victims and their families.[249] Citing the UN Basic Principles on Reparations, the authors further emphasise that reparation should respond to the needs and wishes of the victims and be proportionate to the gravity of the violations and the resulting harm. Accordingly, reparations may include a multi-faceted and wide range of measures such as restitution in kind, compensation, rehabilitation, satisfaction, affirmative action, and assurances and guarantees of non-repetition.[250]

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247 Du Plessis and Peté (n 242 above) 12, 13.

248 Another comparable provision of international law is article 2(3)(a) of the ICCPR which states that '[e]ach State Party to the present Covenant undertakes to: (a) ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity …' Other pertinent international law provisions are article 6 of the CEDAW and article 14 of CAR. The latter requires each state party to 'ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensations, including the means for as full rehabilitation as possible.' For further discussions on this issue, see generally Catherine Jerkins 'After the dry white season: The dilemmas of reparation and reconciliation in South Africa' 16 (2000) *South African Journal on Human Rights* 423-429. See also generally the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by UN General Assembly on 16 December 2005 (UN Doc A/RES/60/147) (hereinafter 'UN Basic Principles on Reparations'). This document obliges states, among other things, to provide victims with equal and effective access to justice; to provide appropriate remedies to victims; and to provide for or facilitate reparation to victims (articles 1-3).

249 Du Plessis and Peté (n 242 above) 15. See also article 75 of the ICC Statute on reparations to victims. Article 79(1) particularly provides: 'A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.'

250 Du Plessis and Peté (n 242 above) 14, 15. See also Max du Plessis 'Reparations and International Law: How are Reparations to be Determined (Past Wrong or Current Effects), against Whom and What Form Should They Take?' in Du Plessis and Peté (n 242 above) 147, 167, 177; Hayner (n 2 above) 171.

Yasmin Sooka, former chairperson of the Human Rights Violations Committee of the South African TRC, advises that when devising reparatory measures it is important 'to adopt a pragmatic view of what is possible in order to avoid raising expectations or making false promises which are often not capable of being fulfilled.' Her observation arises from the fact that in most post-conflict scenarios, competing interests of development and reconstruction of an entire society may considerably undermine the rights of individuals for reparations.[251] Similarly, Du Plessis and Peté recommend that as far as reparations are concerned, limited resources and capacity would necessitate inevitable focus on abuses that are most serious.[252] In recognition of such limitations, the authors further contend that 'any debate on the question of reparation … must acknowledge that it is an immense task even to describe the true magnitude and scale of human suffering, much less seek to repair the consequences of this suffering.'[253]

6.8.6 Gender and transitional justice

The most enlightening material on international best practices for TRCs[254] emphasises the importance of incorporating a gender-sensitive approach in transitional justice initiatives. In this regard, it is recommended that mechanisms should be created within TRCs to ensure that abuses suffered by women, in particular sexual abuses, are not underreported. [255] This study proposes that the legacies of gender-based violations require tailor-made mechanisms that should purposefully address the needs and experiences of women in a post-conflict situation.[256] Future planning and engagement in post-

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251 Sooka (n 242 above) viii, ix.

252 Du Plessis and Peté (n 242 above) 17.

253 Ibid v, 11. Similarly, Du Plessis and Peté note that 'of the millions of people whose lives have been shattered by torture, rape, the murder of loved ones, or other gross violations of their human rights, only a tiny fraction have any hope of receiving any meaningful form of reparation.' In elaborating on other formidable challenges of reparations, the authors ask: When is 'gross' gross enough and when is 'the past' too long ago? The authors refer to the guidelines developed by Theo van Boven (n 245 above) as a most perceptive reference to address such fundamental questions. Du Plessis and Peté (n 245 above) 18, 19. See also Jeremy Sarkin 'Reparations for Gross Human Rights Violations in Africa - The Great Lakes' in Du Plessis and Peté (n 245 above) 198.

254 OHCHR (n 4 above) 22.

255 Ibid.

256 This emanates from the growing interest of the international community on gender rights in the context of transitional justice. In this regard, see UN Security Council Resolution on Women, Peace and Security (1325 of 31 October 2000), which calls 'on all actors involved, when

dictatorship Eritrea must be informed by normative guidelines drawn from the increasingly nuanced understanding of how women are affected by and how they can influence transitional justice efforts. With regard to gender-based violations, remarks Vasuki Nesiah, feminism should provide a major source of critical thought and consciousness. It should inform the conversation between theory and practice in gender and transitional justice.[257] The emphasis on feminism emanates from the fact that global legal standards which draw up transitional justice mechanisms are not fully developed in a gender-sensitive manner. Nesiah characterises this trend as the 'deprioritisation of dimensions of women's lives and struggles from the human rights radar screen.'[258]

It is generally submitted that any framework for confronting gender-based violations would be incomplete without the relevant consideration of feminist theory. According to Bell and O'Rourke, what needs to be done in this regard is a paradigm shift from the conventional transitional justice discourse.[259] The authors further contend that the traditional pillars of transitional justice should be revisited to allow for the engagement of feminist critical inquiry which in turn shall contribute in mediating the dilemmas transitional societies face in periods of radical political change.[260]

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negotiating and implementing peace agreements, to adopt a gender perspective, including, *inter alia*: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.'

257 See generally Vasuki Nesiah 'Discussion lines on gender and transitional justice: An introductory essay reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice' 15 (2006) *Colombia Journal of Gender and Law* 799-812.

258 Vasuki Nesiah, 'Gender and truth commission mandates,' paper presented at the Open Society Institute Forum on Gender and Transitional Justice, 7 February 2006; Nesiah discusses the following examples as deprioritised women's issues: 'the experience of internally displaced women, women who became sole breadwinners as a result of human rights abuse against spouses, women refugees who fled to other countries, or women prisoners.'

259 Christine Bell and Catherine O'Rourke 'Does feminism need a theory of transitional justice?' 1(1) (2007) *International Journal of Transitional Justice* 25, 35; Nesiah (n 257 above) 800.

260 Bell and O'Rourke (n 259 above) 35.

6.8.7 Contribution to accountability and institutional reform

Apart from unearthing the truth and responding to the needs of victims, TRCs should contribute to justice and accountability. Following the successful completion of a TRC's task, prosecutions can follow based on the report of such a commission, especially when the TRC also publicises the names of perpetrators.[261] Follow-up prosecutorial policies depend on the existence or continuance of a functioning judicial system, sufficient evidence and requisite political will. However, even if prosecutions do not follow, the publication of perpetrators' names alone is a moral sanction which promotes the purposes of justice in a transitional context.[262]

On the other hand, TRCs are appropriate mechanisms for the evaluation of institutional responsibilities for massive violence. They help in identifying weaknesses in the institutional structure or existing laws. By recommending reforms of such structures and institutions[263] and by publishing an accurate record of past abuses, TRCs help prevent the recurrence of repressive rule in the future. As an independent institution standing separately from the system under review, a TRC is uniquely positioned to undertake a remedial and prescriptive task. The recommendations and conclusions of TRCs are based on a close scrutiny of the record. As such, they are relevant in providing a road map for change and creating pressure points around which transformative plans can be pushed forward.[264] Equally, TRCs should provide for mechanisms for the removal of abusive members of the military and security apparatus. Reform of judicial and other institutions should also form a major component of proposals to be developed by TRCs. The need for institutional reform should be given adequate weight by TRCs.[265]

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261 However, the naming of perpetrators by TRCs should always be followed by due process requirements; perpetrators must always be given the opportunity to raise a defence against accusations before their names are published. See, for example, the guiding principles developed by Dugard 1999 (n 64 above) 1012.

262 Hayner 2001 (n 2 above) 29; Minow (n 28 above) 9-25; Teitel (n 3 above) 49-50.

263 These institutions and structures include not only the police and military but also the judiciary.

264 Hayner 2001 (n 2 above) 30.

265 OHCHR (n 4 above) 28-29.

6.8.8 Indigenous context of restorative justice

The overall success of TRCs is to be judged by the restorative effect it has on society. In this regard the former chairperson of the South Africa TRC comments:

> Retributive justice is largely Western. The African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people.[266]

By this, Tutu was referring to *ubuntu*, a traditional African notion of justice premised on the assumption that 'no one can be healthy when the community is sick.'[267] One of the best lessons the South African model of transitional justice offers is the incorporation of the African notion of justice in the TRC. *Ubuntu* is a traditional African concept denoting 'humanity to others.'[268] In a typical indigenous approach, the South African Interim Constitution explicitly recognised the role of *ubuntu* in the protracted process of nation healing when it urged in its post-amble, focus on the future, rather than on the past 'on the basis that there is a need for understanding, but not for vengeance, a need for reparation, but not for retaliation, a need for *ubuntu* but not for victimisation.' The concept is perhaps best illustrated by the following remarks of the South African Constitutional Court, as given in *S v Makwanyane and Another*[269]:

> The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of the community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

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266 Minow (n 28 above) 81.

267 Tutu (n 20 above) 9. For a purely human rights discourse on *ubuntu*, see generally Drucilla Cornell and Karin van Marle 'Exploring *ubuntu*: Tentative reflections' 5 (2005) *African Human Rights Law Journal* 195-220. For comparable concepts of restorative justice under Eritrean customary laws, see the discussion in Chapter 7 section 7.5.

268 Dani W Nabudere '*Ubuntu*' in Villa-Vincencio and Doxtader (n 32 above) 10.

269 1995 (3) SA 391 (CC), para 224. Similarly, James Gibson quotes Tutu's words on *ubuntu* as follows: '*Ubuntu* says I am human because you are human. If I undermine your humanity I dehumanise myself. You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That's why African jurisprudence is restorative rather than retributive.' James L Gibson 'Truth, justice and reconciliation: Judging the fairness of amnesty in South Africa' 46 (2002) *American Journal of Political Science* 543.

Building on a similar proposition, Minow opines:

> When a democratic process selects a truth commission, a people summon the strength and vision to say to one another: Focus on victims and try to restore their dignity; focus on truth and try to tell it whole. Pursue a vision of restorative justice, itself perhaps major causality [of the past]. Redefine the victims as the entire society, and redefine justice as accountability. Seek repair, not revenge; reconciliation, not recrimination. Honour and attend in public to the process of remembering.[270]

In this sense, the role of indigenous legal tradition in transitional justice initiatives must also be studied carefully. The generally understood purpose of TRCs is societal healing and reconciliation. Through truth-telling, acknowledgement and forgiveness, TRCs foster reconciliation, national healing and ultimately accountability. By creating the bonds of social capital and social trust, TRCs foster the utmost democratic goals sought by transitional societies.[271] In most instances, however, TRCs focus on formal mechanisms of truth-telling, acknowledgement and reconciliation which are at times alien to indigenous African legal traditions. Little attention has been given by previous TRCs to informal and traditional mechanisms of healing, truth-telling, acknowledgement and reconciliation which are deeply rooted in many African societies. The mechanisms by which TRCs are pursued become more effective if they build upon established and indigenous practices of healing and social coexistence.[272]

Most African cultures place emphasis on communality and on the interdependence of the members of a community. Indigenous legal traditions, which include mechanisms for acknowledgement, truth-telling, accountability, healing and reparations, continue to assume a prominent role in the lives of societies and individuals. As noted by Rosalind Shaw, in relation to the experience in Sierra Leone, a TRC which ignores the

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270 Minow (n 28 above) 82.

271 Joanna R Quinn 'What of reconciliation? Traditional mechanisms of acknowledgement in Uganda,' paper presented at the Reconciliation Conference organised by the Nationalism and Ethnic Conflict Research Centre at the University Western Ontario, 14-15 May 2005) 15. See also generally Joanna R Quinn 'Beyond truth commissions: Indigenous reconciliation in Uganda' 4(1) (2006) *Review of Faith and International Affairs* 31-37; Joanna R Quinn 'Social reconstruction in Uganda: The role of customary mechanisms in transitional justice' 8(4) 2007 *Human Rights Review* 389-407; Phill Clark 'Hybridity, holism and "traditional" justice: The case of the gacaca community courts in post-genocide Rwanda' 2008 *George Washington International Law Review* (forthcoming).

272 Ibid.

fundamental facets of societal values jeopardises social recovery.[273] Likewise, the former chairperson of the Historical Clarification Commission of Guatemala asserts that as outcomes of a deliberate policy of compromise or results of a stalemate in a political power play, TRCs must be crafted according to the specificities of the national situation and the objectives of the particular country.[274] The success of African TRCs rests on a broad-based support among ordinary survivors; and this factor is inherently intermingled with due recognition that must be given to indigenous legal tradition. A foundational edifice based on purely foreign standards can seriously undermine the overall effort of TRCs. In this regard, particular attention must be paid to ideas concerning the conciliatory and therapeutic efficacy of truth-telling as weighted against established societal values.[275]

Having the said above about the salient features of a successful TRC, the discussion should now focus on the following question: What could be the essential form and features of the forthcoming Eritrean model of TRC? This is one of the main topics which will be discussed in Chapter 7 in the context of the outlines of a workable model of transitional justice for Eritrea.

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273 Rosalind Shaw 'Rethinking truth and reconciliation commissions: Lessons from Sierra Leone,' United States Institute of Peace, *Special Report* 130, February 2005, 1-2.; Shaw 2007 (n 107 above) 183-207; Mallinder (n 29 above) 208-230.

274 Tomuschat (n 208 above) 235-240.

275 Shaw 2005 (n 273 above) 2. Reference to African indigenous legal tradition in the context of transitional justice discourse is also understood to mean an examination of one aspect of African Indigenous Knowledge Systems (IKS). Philip Nel defines IKS as 'a systemic reference to the knowledge and practices of indigenous communities constitutive of their meaning and belief systems, as well as the substantive dimension of their practices and customs … IKS is about the knowledge, practices, values and ways of knowing and sharing in terms of which communities have survived for centuries.' Philip J Nel 'Indigenous Knowledge Systems: Contestation, rhetorics and space' 4(1) 2005 *Indilinga African Journal of Indigenous Knowledge Systems* 6. At 4-5, Nel in particular discusses the role of IKS discourse on post-conflict societies and the better alternatives IKS offers towards the realisation of a new humanity and civility. Compare Nel's definition of IKS with that adopted by the University of the Free State in its 'Transformation in Highly Diverse Societies,' Concept Paper on Strategic Cluster 3, November 2007, available at http://www.uv.ac.za/faculties/documents/01/Kluster3-proposal-Sept_1.doc. Accordingly, IKS was defined as the knowledge system distinctive from 'the international knowledge systems generated through universities, government research centres and private industry, sometimes incorrectly called the Western Knowledge System.' For an insightful academic discourse on IKS in the context of African contemporary problems, see generally José P Castiano 'Can indigenous knowledge provide solutions to current problems?' 4(2) (2005) *Indilinga African Journal of Indigenous Knowledge Systems* v-vii.

6.9 Conclusion

The current state of amnesty in international law is not clearly delineated. The jurisprudence of international judicial organs, such as the ICTY, the ICTR and the Special Court for Sierra Leone, seems to favour prosecution over amnesty; whereas the jurisprudence of the leading international criminal tribunal, the ICC, is to be seen only in future developments. The final decision on the available interpretational options on amnesties depends on the future jurisprudence of the ICC.

Currently, there is no strict zero tolerance policy under the ICC Statute towards amnesties and alternative forms of accountability. The ICC Statute leaves room for the recognition of conditional amnesties accompanied by alternative forms of justice which may eventually lead to prosecution. To that end, a balance must be struck by the Prosecutor and the Judges of the Court, between the needs of a society in transition and the requirements under universal and regional treaty instruments and customary international law.[276]

The silence of the ICC Statue on the issue of amnesty might be seen as the result of a deliberate choice for flexibility and hence as one aspect of its strengths. However, it has the apparent disadvantage of legal uncertainty. Institutional designs of transitional justice permissible under the ICC Statute will remain uncertain until such time that the interpretational issues under the Statute are resolved by jurisprudence. In the meantime, societies in transition will continue to face a wide degree of uncertainty as to which models are permissible and which are impermissible.[277]

With regard to certain crimes such as genocide, war crimes and crimes against humanity, amnesty may be inconceivable. Similarly, unconditional amnesty for any kind of crime is no longer permissible. There is, however, some room which allows for ‘prosecutions to proceed where they will not impede peace but at the same time permit societies to “trade”

[276] Stahn (note 112 above) 719.
[277] Ibid.

amnesty for peace where there is no alternative.'[278] Furthermore, with the large number of low- and middle-level perpetrators in Eritrea, resort to comprehensive prosecution may prove too difficult, costly or time-consuming. In such situations, the role of TRCs is indispensably relevant. These institutions will serve a functional middle ground to ensure that justice is not entirely sacrificed to the cause of peace. An international TRC may also be found to be of some help in the global movement to end impunity.[279] In the last few decades, TRCs have become one of the major options of transitional justice for societies emerging from civil war and repressive or authoritarian regimes. Experience in several post-conflict transitions has proved that the complex questions of justice and accountability cannot entirely be addressed merely by prosecutorial options even when there are properly functioning courts with virtually no limits placed on their powers to prosecute wrongdoers. Aside pragmatic limitations, the adoption of non-prosecutorial options derives its justification from the exigencies of restorative justice as well as the normative foundations of amnesty. Studies reveal that all of these factors are inherently intermingled with the moral foundations of TRCs, making the latter the most appropriate institutions for the administration of amnesty.

The discussion in this chapter has revealed that any truth-seeking efforts must be crafted to fit the particular national circumstances of a given country. However, in a new global order where the interest in TRCs is growing considerably, the many and varied dimensions of previous TRCs as well as their potential contributions and possible risks must be studied and recognised thoroughly. As there is no universal model applicable to all situations, creativity and sensitivity to national needs are the most crucial factors that have to be noted when proposing alternative options. The many demands and needs of a transitional period as well as the legacies of past abuse can be satisfied only by a range of possibilities which shall come out as a result of innovative and interlinked approaches of justice. Strength can be gained when the various approaches to justice are designed to complement and reinforce each other and the interplay between various mechanisms is harmonised.

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278 Ibid.

279 Eisnaugle (note 168 above) 209.

The UN, international actors, civil society, activists and the media have demonstrated a growing interest in TRCs thus providing for newer and more creative models in the past few years. The publication of the *Report of the UNSG* (on the rule of law) and the OHCHR tools have resulted in an unprecedented international recognition of TRCs. This may be described as a promising beginning for the internalisation of TRCs. As a result, any truth-seeking effort without a coordinated assistance from, and cooperation with, the relevant agencies of the UN as well as prominent international actors may not bear any fruitful results.

In the Eritrean case, in the absence of the requisite enabling political circumstance, any TRC proposal for the country may remain a farfetched dream, at least in the near future. There are some crucial factors that will continue to inform any truth-seeking efforts in Eritrea. These factors together with the fundamental features of a proposed Eritrean TRC will be discussed in Chapter 7.

CHAPTER SEVEN

OUTLINES OF A WORKABLE TRANSITIONAL JUSTICE MODEL FOR ERITREA

Outline

7.1 Introduction

The aim of this chapter is to outline the major features of a workable transitional justice model for Eritrea. In pursuing this goal, the two major options of transitional justice discussed in this study are revisited and evaluated as mutually reinforcing rather than diametrically opposed paradigms, as far as the transitional justice needs of Eritrea are concerned. Some of the most important questions that are revisited are: Why is transitional justice relevant in Eritrea? Which transitional justice mechanisms would be suitable in the Eritrean context and what should inform the choice of policies to deal with the abuses of the current authoritarian government? What should be the essential form and features of the transitional justice model envisaged in Eritrea?

This chapter draws the conclusion that international criminal justice, as one of the major mechanisms of accountability, is still a viable option to hold to account the most responsible perpetrators of international crimes in post-independence Eritrea. The pervasive nature of the human rights and humanitarian law violations means that a vast number of people are involved in the perpetration of these crimes. At the same time, victims constitute a substantial part of the population. Given the possible large number of low- and middle-level perpetrators, resort to comprehensive prosecution may prove too difficult, costly or time-consuming; and hence, the consideration of non-prosecutorial accountability mechanisms will become imperative. These are what are generally referred to as pragmatic legal or political considerations in the assessment of transitional justice options. Furthermore, the exigencies of restorative justice combined with the societal needs of healing and social reconstruction may warrant the adoption of non-prosecutorial holistic approaches of transitional justice in Eritrea. In this sense, the establishment of a TRC as an alternative mechanism of accountability is seen as a useful and appropriate supplementary transitional justice paradigm. Indeed, it should make an indispensable component of the forthcoming Eritrean model of transitional justice. On the other hand, with regard to the most responsible perpetrators, the international standards of accountability as codified by the ICC Statute may require the adoption of prosecutorial mechanisms against such individuals. These two major considerations, at times competing, make the core of the findings of this study. By providing contextual

background to these two core considerations, the chapter evaluates the major findings of this study and their relevance in framing a workable model of transitional justice for Eritrea.

7.2 Enabling political environment as a precondition for transitional justice

In societies suffering from massive violations of international law or countries emerging from a repressive past, the focal point of the legal debate is the achievement of a successful democratic order. Eritrea is a country which has suffered for a long period of time from excessive concentration of power in the executive branch of government. A remarkable feature of the Eritrean history is the emergence of the nation as an independent state at the end of the twentieth century. This has placed the country in an extraordinary position to benefit from the successes and failures of other societies transforming themselves into democratic systems. Sadly,[1] the problem of abuse of executive power still persists in Eritrea, seventeen years after the liberation of the country from repressive colonial rulers and a hundred years after the creation of Eritrea as a state.

For many Eritreans it seemed that the victorious leaders of the EPLF, who liberated the country in 1991, would be willing to relinquish power to its legitimate source soon after the scheduled years of provisional governance in 1997. There was even an honest conviction that the newly-formed Provisional Government of Eritrea would be committed to a broadly democratic course after the expiry of its temporary tenure in 1997.[2] However, the provisional government led by the victorious EPLF (later PFDJ) has completely frustrated the political transition of the nation to a democratic system due to a

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1 In the context of the lost opportunities in Eritrea, Luca Castellani notes that 'the State of Eritrea frequently asserts that its recent independence gives it the opportunity to learn from other developing countries' mistakes and to avoid them.' Nonetheless, basic patterns in Eritrea are common to the rest of Africa. In recent years, Eritrea has proven beyond doubt to have failed to learn from those 'lessons.' Luca G Castellani 'Recent developments in land tenure law in Eritrea,' University of Wisconsin-Madison, Land Tenure Centre, Working Paper No 37, June 2000, available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=2132&ftype=.pdf. See also Richard Reid 'Traumatic transitions: Open season on the Eritrean state' 105 (2006) *African Affairs* 638; Tesfatsion Medhanie *Eritrea and Neighbours in the 'New World Order': Geopolitics, Democracy and Islamic Fundamentalism* (1994) 54.

2 See, for example, Medhanie 1994 (n 1 above) 54.

lack of the requisite political commitment. In recent years, the government has continued to utilise the perennial pretext of the possibility of renewed war with Ethiopia as a ploy to prolong authoritarianism. This has led to aggravation of the already existing heinous violations of international law. In spite of the Eritrean people's protracted struggle for self-determination and nationhood, the long awaited national dreams and hopes have been shattered by the current illegitimate government which has governed the country since its independence in 1991. The government's legitimate transitional tenure expired in 1997,[3] but the ruling party has unilaterally and forcefully imposed itself on the Eritrean people.

The government continues to commit heinous violations of international law with impunity. The political crisis has exacerbated in 2001, with the advent of the most radical reform movement of the post-independence era. The post-2001 politico-legal development is so frightening that unless effective intervention takes place, it may even lead to the disintegration of the Eritrean state. This is the most important factors which makes the debate on a peaceful political transition one of the top of priorities for Eritrea. Indeed, Eritrea is in dire need of a peaceful political transition to democracy and the relevance of transitional justice for Eritrea arises in connection with such a dire need.

It is true that as a country still ruled by a notorious, violent and repressive government, the relevance of transitional justice may look elusive in the case of Eritrea.[4] This issue needs to be put in perspective. Since the country's independence in 1991, the policy of the Eritrean government has not been forgiving and conciliatory. The government has

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[3] According to article 3(2) of the 1993 Interim Constitution (Proclamation No 33/1993, Proclamation to Provide for the Establishment, Powers and Functions of the Eritrean Government), the provisional government established in 1991 (renamed transitional government in 1993) had to end its term of tenure in 1997. National elections should have taken place accordingly in 1997. This turned out to be a hollow promise. With all its shortcomings, Proclamation No 33/1993, as mended by Proclamation No 52/1994, is regarded as the Interim Constitution of Eritrea. See, for example, Daniel R Mekonnen 'The reply of the Eritrean Government to ACHPR's landmark ruling on Eritrea: A critical appraisal' 31(2) 2006 *Journal for Juridical Science* 27.

[4] See, for example, Professor Lovell Fernandez, email message to author, 4 May 2004, who argues that the Eritrean government 'is nowhere near even the beginnings of democratic rule.' Consequently, the question of transitional justice may look 'somewhat abstracted from the reality of today in the case of Eritrea.'

persistently blocked all possibilities for national reconciliation by, among other things, categorically denying such a need for Eritrea.[5] This attitude has continued unabatedly and remains a very crucial challenge. As recent as May 2008, the Eritrean government has adamantly refused to heed repeated calls for a negotiated political transition. The recent call was made by the umbrella organisation of thirteen Eritrean opposition groups, Eritrean Democratic Alliance (EDA). At the conclusion of its congress, held in May 2008, the EDA resolved that:

> To the extent that the [Eritrean government] is ready to seek a peaceful political solution for the current problems, to promote democratic transition, to enhance the will of the people and their aspirations and to ensure the establishment of a constitutional government, the EDA is also ready to engage in a peaceful political dialogue with the same.[6]

The above call was frustrated by a recent interview of the Eritrean president with the *Reuters* news agency.[7] In the interview, the president categorically denied the irrefutable political crisis in the country and blamed all problems of Eritrea on external elements. In particular, his response to questions related to human rights and democratisation deserve critical analysis. In undermining the relevance of free and fair elections, the president said, 'I wouldn't like an election a la Kenya-style or the Zimbabwean style, or the

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5 The PFDJ frequently claims that Eritrean society is all reconciled. A clear example in this regard is one of its populist mottos, ሓደ ህዝቢ ሓደ ልቢ, translated as 'one heart one nation.'

6 See the resolutions of the EDA Congress which are available at http://www.awate.com/images/stories/20080514%20EDA%20Final%20statement.doc; Awate Team 'EDA Congress ended today,' available at http://www.awate.com/portal/content/view/4839/3/ (accessed 12 May 2008); *AFP* 'Eritrean opposition elect new leader, vow to oust Asmara regime,' 11 May 2008; *VOA* 'Eritrean exile groups discuss Afwerki ouster,' 5 May 2008. The EDA Congress was one of the most successful endeavours of Eritrean opposition groups which are characterised by squabbles and skirmishes. Most EDA members claim to have armed wings determined to overthrow the government.

7 *Reuters* 'Text-key quotes from Eritrea's President Isaias Afwerki,' 13 May 2008; *Reuters* 'Where is Eritrea headed?,' 14 May 2008. Remarkably, this interview was given two days after the conclusion of the historic EDA Congress.

Palestinian style, or the Afghani style.'[8] He maintains that he will stay in power 'as long as it takes.'[9] On the human rights crisis, he says:

> It is very small numbers (arrested) and we are not shy to say these are individuals who have done harm to the national security of this country. We are not questioning the fact that we have done this and we will continue to do it. This has nothing to do with human rights. No one has the right to point a finger at us. [10]

Under the circumstances, it appears that Eritrean government officials are not yet ready to engage in any initiative that aims at promoting national reconciliation and a peaceful political transition in the country. According to transitional justice experts, this means that one of the basic preconditions for transitional justice, an enabling political environment, is patently lacking in Eritrea.[11] This concern is valid. However, it can only serve as one of the major policy considerations that should inform transitional justice discourse in Eritrea. It is by no means a terminal obstacle to halt preparatory discussions on transitional justice in Eritrea. This is so because advance planning around future options of transitional justice can take place anytime and anywhere, although it is true that such plans can only be implemented in Eritrea when a favourable political transition allows.

7.3 Accountability mechanisms

The legal appraisal of the factual findings in Chapter 4 established a sound basis for the conclusion that international crimes of universal concern have been perpetrated in Eritrea with impunity. In Chapter 5, it was held that the violations perpetrated by Eritrean

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8 On 22 May 2008, two days before Eritrea's seventeenth anniversary of 'independence,' the president gave another interview to the *Al Jazeera TV Channel* in which he was asked as to when elections are going to be held in Eritrea. He said, 'What elections? … We will see what the elections in the US will bring about and we will wait for about three, four decades until we see genuine natural situations are ripe in Eritrea.' He then added, 'I can tell you it may never happen. It may take decades.' *Al Jazeera TV* 'Interview with President Isaias Afwerki,' 22 May 2008.

9 *Reuters* (n 7 above). In his own words, he will not be 'scared' by someone telling him to step down and to find a way for a change.

10 See *Reuters* (n 7 above). On the flight of thousands of youngsters, the president said that the escapees 'have been misled that there is heaven outside' and he calls this 'an orchestrated attempt to deplete [the] nation of its young,' a deliberate project 'financed by the CIA.'

11 André du Toit 'The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Reconciliation' in Robert I Rotberg and Dennis Thompson *Truth v Justice: The Morality of Truth Commissions* (2000) 123.

government officials sufficiently meet the threshold of international crimes (war crimes and crimes against humanity) as defined by articles 5 and 7 of the ICC Statute as well as the international crime of aggression as defined by the UN Charter and other peremptory norms of international law. Violations are continuing in Eritrea with the encouragement and acquiescence of senior government officials and army commanders. The perpetrators identified in this study and others who have to be identified in the future, as further evidence comes to light, have unlawfully, wilfully and knowingly committed grave human rights violations in a systematic and widespread manner. Most of these perpetrators have also flagrantly violated established rules of international humanitarian law.

In most cases, perpetrators have acted as principals or accessories either by perpetrating, ordering, encouraging, aiding, participating, abetting or taking a consenting part in, and were connected with, plans and enterprises involving the commission of international crimes which subjected hundreds of thousands of Eritreans and non-Eritreans to murders, brutalities, cruelties, tortures, atrocities, and other inhuman acts. It was argued that all such perpetrators have acted with a common design and conspiracy, with plans and enterprises to commit international crimes in many instances against the Eritrean people but at other times also against the peoples of neighbouring countries and the international community at large.

It is estimated that a vast number of people could have participated in the perpetration of international crimes in Eritrea. However, those most responsible for the atrocities are a number of government officials who sit at the highest echelon of government and ruling party structures. Having identified the most responsible perpetrators in Chapter 5, it becomes relevant to examine the mechanisms by which these individuals can be held accountable for their acts. As asserted by John Dugard, there are two major ways to deal with systematic and large scale violations of international law in a given country. This can be done either through prosecutorial mechanisms implemented by national or international courts; or via alternative accountability mechanisms implemented by

TRCs.[12] These two major options of transitional justice are the building blocks of the future Eritrean model of transitional justice.

7.4 International criminal justice

In relation to the international crimes perpetrated in Eritrea, there are two important possibilities in terms of prosecution. The most responsible perpetrators identified in this study can be prosecuted either before foreign municipal courts which can exercise the principle of universal jurisdiction, or before the ICC.[13]

As was pointed out earlier, in international law, states can claim jurisdiction over persons whose alleged crimes are considered crimes of universal concern. This entitlement works under the principle of universal jurisdiction and states can accordingly act against any offender regardless of the nationality of the offender or victim and irrespective of where the offence was committed. The underlying justifications behind this principle and how it works have been discussed in greater detail in Chapter 5 section 5.5. However, as noted in section 5.7, there are certain challenges to the exercise of universal jurisdiction by foreign municipal courts. The ruling of the ICJ in the *Arrest Warrant*[14] clearly demonstrates that there are certain immunities attached to incumbent high-ranking government officials, such as the head of state, diplomatic agents and senior members of cabinet. Such immunities will continue to trump the possibility of prosecution for international crimes in foreign municipal courts.[15] In relation to Eritrea, the scenario is the same as far as the possibility of prosecuting incumbent high-ranking officials in

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12 John Dugard 'Possible conflicts of jurisdiction with truth commissions' in Antonio Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary* vol 1 (2002) 693. See also William A Schabas 'Introduction' in William A Shabas and Shane Darcy *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (2004) 1-2.

13 Compare this with the possibilities proposed by Max du Plessis and Andreas Coutsoudis 'Serious human rights violations in Zimbabwe: Of international crimes, immunities, and the possibility of prosecutions' 21 (2005) *South African Journal on Human Rights* 355-356.

14 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* ICJ Reports (2002) 3, paras 51-55. See also the latest obstacles with regard to the proposals of prosecuting Zimbabwean incumbent high-ranking officials in foreign municipal courts as discussed by Du Plessis and Coustoudis (n 13 above) 350-357.

15 Antonio Cassese *International Criminal Law* (2003) 271.

foreign municipal courts is concerned.[16] There is, however, another possibility: prosecution before the ICC.

The ICC provides the most important means of prosecution of individuals responsible for serious human rights abuses that attract universal concern. According to article 13 of the ICC Statute, there are three jurisdictional trigger mechanisms for a case to be tried by the ICC.[17] A case can be referred to the Prosecutor of the ICC by a state party to the ICC Statute; it may be referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter; the Prosecutor can also commence investigation on her/his own initiative (*proprio motu*). In all cases, the jurisdictional trigger mechanism is subject to the principle of complementarity, as discussed below.[18]

7.4.1 Initiation by a state or by the ICC Prosecutor

One of the core principles in the ICC Statute is the principle of complementarity,[19] according to which the prosecution of international crimes is primarily the responsibility of national courts. The ICC prosecutes international crimes only when national courts fail to accomplish this task owing to unwillingness or inability. Apart from this, two other fundamental elements must also be fulfilled before the ICC can prosecute an offender. The crime must have been committed in a state which is a party[20] to the ICC Statute, or the person who has committed the offence must be a national of a state party to the ICC Statute.[21] The possibility of prosecution of offences committed in a non-signatory state or by a citizen of such a state is unfortunately circumscribed by narrow parameters. This

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16 It should be noted that those individuals who do not enjoy immunity may be prosecuted in foreign municipal courts provided that they are to be found in the territory of other states. Possibly, army generals and ruling party officers may not be entitled to immunity.

17 Kriangsak Kittichaisaree *International Criminal Law* (2001) 281.

18 Ibid.

19 See 10th Preambular Paragraph, articles 1, 15, 17, 18, and 19 of the ICC Statute. Werle and Jessberger refer to this as a 'decentralised criminal justice' system characterised by 'conservative jurisdictional constraint.' Gerhard Werle and Florian Jessberger 'International criminal justice coming home: The new German Code of Crimes against International Law' 13 (2002) *Criminal Law Forum* 193. See also Neels Swanepoel 'Universal jurisdiction as a procedural tool to institute prosecution for international core crimes' 32(1) (2007) *Journal for Juridical Science* 136.

20 With regard to the two competing views on the status of the ICC Statute in Eritrea (whether Eritrea is a party to it), see the discussion in Chapter 3 section 3.5.

21 Article 12 of the ICC Statute.

was evident from the reply of the ICC Prosecutor which was given in response to a communication lodged with the ICC by a rights group known as Rights for Eritrean Citizens.[22] The group requested the ICC Prosecutor to initiate a prosecution against Eritrean government officials in 2003. In response, the Office of the Prosecutor wrote:

> A fundamental feature of the Rome Statute (articles 12 and 13) is that the Court may only exercise jurisdiction over international crimes if (i) its jurisdiction has been accepted by the State on the territory of which the crime was committed, (ii) its jurisdiction has been accepted by the State of which the accused person is a national, or (iii) the situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter.
>
> Based on the information currently available, it appears that none of these preconditions are satisfied with respect to the conduct described. Accordingly, as the allegations appear to fall outside the jurisdiction of the Court, the Prosecutor has confirmed that there is not a basis at this time to proceed with further analysis. The information you have submitted will be maintained in our archives, and the decision not to proceed may be reconsidered if new facts or evidence provide a reasonable basis to believe that the allegations fall within the jurisdiction of the Court. The decision may also be reviewed if there is acceptance of jurisdiction by the relevant States or a referral from [the] Security Council.[23]

The above limitations are applicable only as regards the two options of jurisdictional trigger mechanisms: initiation of the investigation by a state party or by the Prosecutor. Under the circumstances, it appears that the most viable option for the prosecution of Eritrean government officials is via Security Council referral.

7.4.2 Security Council referral

That Eritrean courts are unwilling or unable to prosecute the violations discussed in this study is verifiable by a consistent body of information.[24] Due to lack of confidence in the justice system and the inherent erosion of the rule of law, no one in Eritrea dares to challenge government officials in a court of law.[25] There exists no readily available

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22 See Rights for Eritrean Citizens 'Marketing justice,' available at http://news.asmarino.com/Information/2003/5/RIGHTS_for_ERITREAN_CITIZENS_30.asp (accessed 24 October 2004); Rights for Eritrean Citizens 'Reply to the ICC Prosecutor,' available at http://news.asmarino.com/Information/2004/07/RIGHTS_for_ERITREAN_CITIZENS_14.asp (accessed 24 October 2004).

23 Letter from the Office of the Prosecutor of the ICC to Rights for Eritrean Citizens, 18 June 2004, OTP–CR–265/03, also available at http://news.asmarino.com/Information/2004/07/Images/icc2.gif.'

24 See, for example, Mekonnen (n 3 above) 46-49; *ACHPR-EMDHR Communication.*

25 *ACHPR-EMDHR Communication.*

domestic remedy to rectify human rights violations in Eritrea. Since the two jurisdictional trigger mechanisms of the ICC Statute are now regarded as non-binding on Eritrea, the most practical option is prosecution via Security Council referral. In any event, Eritrean government officials can be prosecuted if the ICC Prosecutor decides to initiate a prosecution upon instructions to be given by the Security Council.

Security Council referral is always possible even when the ICC Statute is not ratified by a given state. This can be done regardless of where the offence took place and by whom it was committed.[26] For this to happen, the UN Security Council must believe that a situation in a given country amounts to a threat to international peace. The Security Council did this for the first time by Resolution 1593 (2005) of 31 March 2005, when the situation in the Darfur region of Sudan was regarded as a threat to international peace and regional security. The factors relevant to classify the Eritrean situation as a threat to international peace and regional stability are all in place.

Apart from grave human rights violations (crimes against humanity), humanitarian law violations (war crimes and the crime of aggression) of a much graver nature have also been perpetrated in Eritrea in different contexts: in the context of the 1998-2000 border conflict with Ethiopia and perhaps also in the context of the 1996 Eritrea-Yemen conflict, as well as in the context of Eritrea's violations of several Security Council Resolutions which imposed stringent sanctions against Somalia and Sudan. Violations of international humanitarian law have also been committed in the context of low level internal armed conflicts. There is a reliable body of information, including periodic reports by UN panels of experts[27] and monitoring groups,[28] reasonably indicating the direct involvement

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26 Phillip Kirsch and Darryl Robinson 'Trigger mechanisms' in Antonio Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary* vol I (2002) 634. Kontorovich opines that the exercise of universal jurisdiction by the ICC on the basis of Security Council referral should be considered as a 'delegated' rather than pure exercise of universal jurisdiction. Eugene Kontorovich 'The piracy analogy: Modern universal jurisdiction's hollow foundation' 45(1) (2004) *Harvard International Law Journal* 201.

27 See, for example, *Final Report of the Panel of Experts, Submitted in accordance with Resolution 1591 (2005)*, UN Doc S/2006/65, 30 January 2006 (hereinafter '*Report of the Panel of Experts on Sudan*').

28 See, for example, *Report of the Monitoring Group on Somalia, Submitted to the Security Council in Accordance with Security Council Resolution 1724 (2006)*, UN Doc S/2007/436, 18 July 2007.

of Eritrean government officials in two of the most catastrophic humanitarian crises of our time, namely the civil wars in the Darfur region of Sudan and Somalia. Eritrean government officials have persistently violated Security Council resolutions and norms of customary international law with the adverse effect of turning the entire Horn of Africa into a major spot of armed conflict and a devastating humanitarian crisis. Apart from arming, training, financing and supporting armed groups in Ethiopia, Somalia and Sudan, government officials have recently offered sanctuary to a notorious militant designated by the UN Security Council as associated with Al-Qaida, Usama Bin Laden and the Taliban (in other words a designated 'terrorist').[29] The designated individual, Sheikh Hassan Dahir Aweys, officially attended a Somali National Conference hosted by Eritrea in September 2007 where he gave a press release from Asmara, defying Security Council Resolution 1267 (1999).[30]

As a result of continued belligerent manipulations, Eritrean government officials have maintained a threatening influence in all conflicts in the Horn of Africa. This has given them a 'potential authority to decide matters of peace and war on a land mass of 1.7 million square miles and a population of nearly 127 million.' Population-wise, this is the eleventh largest in the world.[31] This region has suffered continuously from massive human rights and humanitarian law violations, poor governance and severe economic deprivation. In terms of human development indicators, the Horn of Africa 'ranks near the bottom in the world – and indeed below the rest of Africa.'[32] Certainly, Eritrean government officials are amongst the most responsible actors in destabilising the whole

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29 Security Council Resolution 1267 (1999), 1333 (2000), para 8(c) and 1390(2002), para 2(a).

30 *Shabait.com News*, 'Sheik Hassan Dahir Aweys dismisses Washington's accusation as baseless,' 11 September 2007. See also *Consolidated List of Targeted Individuals and Entities Associated with Al-Qaida, Usama Bin Laden and the Taliban*, compiled by the Al-Qaida and Taliban Sanctions Committee, available at http://www.un.org/sc/committees/1267/pdf/pdflist.pdf, updated on 17 October 2007.

31 Saleh AA Younis, 'The reckoning: Another Eritrean crossroad,' available at http://www.awate.com/portal/content/view/4595/16/ (accessed 23 August 2007).

32 Experts depict the Horn of Africa as 'a rough neighbourhood' which has, since 1990, been ravaged by at least one conflict in each of the forms of inter-state conventional war, guerrilla-style liberation struggle, coups or revolutions. See James Swan 'US policy in the Horn of Africa,' paper delivered at the 4th International Conference on Ethiopian Development Studies, Western Michigan University, Kalamazoo, Michigan, 4 August 2007. Mr Swan is the Deputy Assistant Secretary for African Affairs at the US Department of State.

region. This is in addition to the massive human rights violations perpetrated against the Eritrean people inside the country.

The frustration and dismay emanating from such threats must be accompanied by international indignation and a firm resolve to react seriously to such inhumanity. Clearly, ICC prosecution through Security Council referral is a most important recourse to do justice not only to the suffering of the Eritrean population but also to the people of the Horn of Africa at large. The deterrent factor in Security Council referral is peculiarly relevant to the current crisis in the Horn of Africa, which if left unattended might lead to another catastrophe.[33] In this regard, the international community is expected to act urgently lest it is condemned to repeat the mistakes of the past.

There may be, however, one unavoidable limitation to ICC prosecutions. According to the general view, even if an investigation is initiated upon Security Council referral, the ICC can only prosecute those crimes perpetrated in Eritrea after 1 July 2002, the date when the ICC Statute entered into force.[34] The unfortunate consequence of the purported temporal jurisdiction of the ICC is that all atrocities perpetrated before 1 July 2002 could be effectively excluded from the domain of the ICC. Due to the protracted political instability, the national judicial system in Eritrea has totally collapsed as far as the prosecution of international crimes is concerned. With the apparent limitations on the possibility of prosecution of incumbent high-ranking officials in foreign municipal courts and if the temporal jurisdictional limitations of the ICC holds true, there is a possibility that international crimes perpetrated in Eritrea before 1 July 2002 will remain unpunished.

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[33] Compare this with the responsibility of the international community as phrased in the *The Responsibility to Protect*: *Report of the International Commission on Intervention and State Sovereignty (ICISS)*, December 2001: the responsibility of the international community to intervene in a given situation of humanitarian crisis or massive human rights violations, even without the consent and blessing of a given state under whose territory the problem arises. This can be done if it is reasonably proved or believed that such a state is unable or unwilling to reverse the situation. The situation in Eritrea pertinently fits into the kind of scenario foreseen by the above report. See also generally *In Larger Freedom: Towards Development, Security and Human Rights for All,* Report of the UN Secretary-General UN Doc A/59/2005.

[34] Article 11(1) of the ICC Statute.

Nonetheless, following the argument developed by the UN Human Rights Committee, in *Carballal v Uruguay*,[35] a jurisdictional nexus can always be established by the ICC in situations where human rights violations constitute a continuous act of perpetration. In this regard, the conclusion reached in Chapter 4 with regard to the applicability of the ICCPR and the African Charter in Eritrea shall apply *mutatis mutandis* to the applicability of the ICC Statute.[36]

It can also be argued that some international crimes which fall under the jurisdiction of the ICC were defined as such long before the coming into effect of the ICC Statute. This means that those crimes were already well recognised by the international community as core international crimes. A good example in this regard is torture, which according to article 1(1) of the Convention against Torture, was defined as an international crime in 1984. In *Delalic and others*,[37] in *Furundzija*[38] and in *Kunarac and others*,[39] the ICTY restated that the elements set out in the definition of torture are now generally considered to be customary in nature. They were thus defined as binding on all states of the world as customary international law. This promising development of international criminal law may help in refining the jurisdiction of the ICC when the latter is called to decide on issues related to its temporal jurisdiction.

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35 ICCPR, UN Doc A/36/40, decision of 27 March 1981) 125, para 13.

36 See the discussion in Chapter 4 section 4.14. Similarly, in so far as a violation starts before the coming into force of the ICC Statute and such a violation continues after the entry into force of the ICC Statute in Eritrea and has the effect of constituting an international crime, it can fall under the jurisdiction of the ICC. With regard to the specific crime of enforced disappearance, Carsten Stahn comments that this violation is a typical international crime with a characteristic feature of perpetuity. This is so because enforced disappearance endures as long as the fate and the whereabouts of the disappeared remain concealed. The continued nature of the crime is subject to the revelation of concealed facts and as such this may extend over a long period of time making the crime subject to the jurisdiction of any court which assumes jurisdiction after the commission of the crime. See Carsten Stahn 'Complementarity, amnesties and alternative forms of justice: Some interpretative guidelines for the International Criminal Court' 3 (2005) *Journal of International Criminal Justice* 706.

37 *Delalic and others* ('*Celebici* case'), ICTY Trial Chamber, judgment of 16 November 1998, paras 455-474.

38 *Furundzija*, ICTY Trial Chamber II, judgment of 10 December 1998, para 257.

39 Paras 483-497.

However, there are some valid concerns[40] that Security Council referral may be too politicised in that any initiative dependent on such referral can fail if Eritrean government officials undertake to serve the interest of the superpowers, especially the US.[41] Given the current irreparable and soured US-Eritrea relationship, this is less likely to happen in the near future – at least as long as the current Eritrean government officials remain in power. The current Eritrean leaders have irrefutably placed themselves out of US favour. In so far as Eritrea is concerned, US political interests will hardly be an obstacle in utilising the ICC as a legal tool. Although the US government is widely criticised for its hostile[42] approach towards the ICC, it has not blocked ICC prosecutions against Sudanese suspects, mainly because the proposed prosecutions also serve the interests of the US. The same is true about Eritrea.

Another counter-balancing concern is that as a friend of the Eritrean government and a country not interested on human rights protection, China may use its veto power in the Security Council to shield Eritrean government officials from ICC prosecution.[43] However, China has not done this in the case of Sudan. One of the probable reasons is that China may not have wanted to frustrate the interests of the US who strongly recommended robust sanctions against Sudanese officials. Compared to Eritrea, China has greater economic and political interests in Sudan and this implies that China being an obstacle in the Eritrean scenario is also less likely. In addition, as a result of growing economic reform, China has already become one of the largest economic partners of the US, with a trade exchange of tens of billions of US dollars per annum between the two

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40 Simon M Weldehaimanot 'Summoning PIA to the ICC,' available at http://www.awate.com/portal/content/view/4655/5/ (accessed on 6 November 2007)

41 See William A Schabas 'United States hostility to the International Criminal Court: It's all about the Security Council' 15 (2004) *European Journal of International Law* 701; W Chadwick Austin and Antony Barone Kolenc 'Who is afraid of the big bad wolf? The International Criminal Court as a weapon of asymmetric warfare' 39 (2006) *Vanderbilt Journal of Transnational Law* 291; Salvatore Zappala 'Are some peacekeepers better than others? UN Security Council Resolution 1497 (2003) and the ICC' 1 (2003) *Journal of International Criminal Justice* 671.

42 Mohamed M El Zeidy 'The United States dropped the atomic bomb of article 16 of the ICC Statute: Security Council power of deferrals and Resolution 1422' 35 (2002) *Vanderbilt Journal of Transnational Law* 1400; Leila Nadya Sadat 'Summer in Rome, spring in The Hague, winter in Washington? US policy towards the International Criminal Court' 21 (2003) *Wisconsin International Law Journal* 557.

43 Weldehaimanot (n 40 above).

countries.[44] In spite of the disparity in the political ideology of China and the US, which has considerably narrowed in recent years, China's economic and political interests in Eritrea are too insignificant compared to China's interests in the US. However, all such concerns reflect on the political, rather than legal, nature of the jurisdictional trigger mechanism for Security Council referral. Yet, with its deterrent effect on the unruliness of Eritrean government officials, Security Council referral could be the most effective option to combat impunity in Eritrea.

On the other hand, the democratic dispensations of the world should also consider the possibility of prosecuting the most responsible perpetrators whenever the prospect to do so materialises. As discussed in Chapter 5 section 5.12, the possibility of prosecuting individuals who are currently abroad for various reasons is much easier than that of others who still enjoy political power inside the country. The case of Mr Nazgi Kiflu, the former chief of national security, is good example in this regard.[45] According to recent developments, it was revealed that Mr Kiflu is now living in the UK as an 'ordinary' person, a fact that presupposes any diplomatic immunities attached to him previously may no longer apply to his current status. This can serve as a good test case laying the foundations for further prosecutorial actions that could be taken against other government officials in different jurisdictions.

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44 According to 2005 estimates, China was the world's second-largest energy consumer after the US and the third-largest merchandise trading nation in the world. Official US statistics indicate that 'American exports to China have more than doubled since China joined the World Trade Organization (WTO) in 2001.' Only in 2005, total exports from America to China were US$41.8 billion, up 20% over 2004. In 2005, China was the fourth largest market for US farm exports (after Canada, Japan, and Mexico). Similarly, between 2001 and 2005, US imports from China have increased from US$102 billion to US$243.5 billion. See US Department of State, Bureau of East Asian and Pacific Affairs 'Fact sheet: Economic relations between the United States and China,' available at http://www.state.gov/p/eap/rls/64718.htm (accessed 18 April 2006).

45 HRC-E 'Naizgi Kiflu is returning to Eritrea from London,' available at http://cs.asmarino.com/?itemid=936 (accessed 1 May 2008). In this regard, RSF says: 'The fact that one of the regime's barons and a key figure in its repressive system is living in Europe despite his continuing political activities raises questions for democratic governments that are supposed to protect the political refugees to whom [they grant] asylum.' RSF then adds: 'The British authorities should ask themselves what this [senior official] of one of the world's most brutal dictatorships is doing leading a comfortable life in London. There are lessons to be learned from this, and explanations need to be given to the British public and to the Eritreans who were the victims of the despotic regime imposed by Isaias and his close associates, of whom Naizgi is one of the most important.' See RSF 'Naizgi Kiflu, the dictatorship's *éminence grise*,' available at http://www.rsf.org/article.php3?id_article=27109 (accessed 21 May 2008).

7.4.3 The role of national or mixed criminal tribunals

In the Eritrean situation, mixed criminal tribunals such as those of East Timor, Kosovo and Sierra Leone may be regarded as viable options for the prosecution of international crimes which fall outside the jurisdiction of the ICC. Cassese particularly suggests that this option is best suited with crimes perpetrated in authoritarian states whose political structure continues to shield perpetrators with impunity.[46] Mixed tribunals, like national courts, normally function within the same country where the international crimes were perpetrated. For practical reasons, the feasibility of such tribunals would come into play only after the demise of the current dictatorship in Eritrea. Experience in some countries has shown that mixed criminal tribunals can be established either as part of a comprehensive peace plan or a post-conflict transitional strategy, none of which is currently visible in Eritrea.[47]

The prosecution of the most responsible perpetrators by national courts (subject to regime change) is yet another option. However, prosecution by national courts after regime change most of the time leads to what is widely referred to as victor's justice or a purely retributive model of transitional justice, particularly if the regime change transpires after a full military victory. In addition, this holds true in the light of the fact that in the last

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46 Cassese (n 15 above) 456-457. See also Robert Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 61; Hansjorg Stohmeyer 'Collapse and reconstruction of judicial system: The United Nations Missions in Kosovo and East Timor' 95 (2001) *American Journal of International Law* 46. However, the establishment of a mixed tribunal should be seen against the growing reluctance of the UN in this regard. As stated by Bassiouni, the international community was at some stage said to have reached a point of 'tribunal fatigue.' See M Cherif Bassiouni 'From Versailles to Rwanda in 75 years: The need to establish a permanent international criminal court' 10 (1997) *Harvard Human Rights Journal* 10. This reluctance was also reflected in the report of the UNSG on the rule of law and transitional justice in conflict and post-conflict societies, in which it was said: 'While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no *ad hoc*, temporary or external measures can ever replace a functioning national justice system.' *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (3 August 2004), para 34.

47 For a critical reflection on the relationship between peace processes and the defining terms of transitional justice in such contexts, see generally Andrea Armstrong and Gloria Ntegeye 'The devil is in the details: The challenges of transitional justice in recent African peace agreements' 6(1) (2006) *African Human Rights Law Journal* 1-25. The authors critically examine the role of peace processes in transitional justice paradigms as experienced in four African countries: Burundi, DRC, Liberia and Sierra Leone.

few years the capacity of Eritrean national courts and the rule of law have been severely undermined by the current government. Any national strategy in this regard will, therefore, face insurmountable legal and institutional challenges. This option can only be considered as a viable alternative subject to financial and institutional support from the international community – a support which can only be guaranteed in the event of regime change in Eritrea. However, as will be seen later, if the current Eritrean government leaders agree to a peaceful and genuine political transition, prosecution may not necessarily be considered the primary option.

Finally, any prosecutorial initiatives (whether with domestic or international assistance) that have to be implemented in Eritrea should always comply with the guiding parameters developed by the UN specialised agency on human rights, the OHCHR. The guiding considerations are:

> 1. Initiatives should be underpinned by a clear political commitment to accountability that understands the complex goals involved.
> 2. Initiatives should have a clear strategy that addresses the challenges of a large universe of cases, many suspects, limited resources and competing demands.
> 3. Initiatives should be endowed with the necessary capacity and technical ability to investigate and prosecute the crimes in question, understanding their complexity and the need for specialised approaches.
> 4. Initiatives should pay particular attention to victims, ensuring (as far as possible) their meaningful participation, and ensure adequate protection of witnesses.
> 5. Initiatives should be executed with a clear understanding of the relevant law and an appreciation of trial management skills, as well as a strong commitment to due process.[48]

In spite of the prosecutorial options discussed above, the perpetration of international crimes has never ceased in Eritrea. Impunity has become the order of the day. The pervasive nature of human rights and humanitarian law violations in Eritrea calls for the adoption of interim punitive measures by the international community. The following are some of the most important measures of this kind.

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[48] OHCHR *Rule-of-law Tools for Post-Conflict States: Prosecution Initiatives* (2006) 1.

7.4.4 Other interim measures

In the mean time, the international community could adopt interim measures or sanctions by imposing travel bans and freezing of assets of those who bear a wide responsibility for the human rights and humanitarian law violations in Eritrea. The list of individuals compiled by Awate Team could serve as a good starting point in this regard. For such purposes, pertinent lessons are to be gleaned from UN Security Council Resolutions 1267 (1999), 1333 (2000), and 1390 (2002) in which the Security Council has requested all states to freeze the funds of certain individuals and entities believed to have links with Usama Bin Lanen, Al Qaida and the Taliban. States were also requested to impose travel bans against individuals designated by the Security Council in the above resolutions. Similarly, the Security Council imposed comparable sanctions against individuals believed to be most responsible in the Darfur crisis.[49] The underlying assumption for all such measures is that the individuals designated by the resolutions are believed to be responsible for promoting or carrying out acts amounting to threats to peace.

The perpetrators identified by Awate Team, especially the state president and his close aides, pose no less a threat to international peace and regional security than some of the individuals designated by the aforementioned resolutions of the Security Council. Sanctions against individuals can also be imposed by regional bodies such as the EU.[50] This has been done recently in the case of Zimbabwe. Noting that President Robert Mugabe and his high-ranking officials bear the widest responsibility for the human rights violations in Zimbabwe, the Council of the EU imposed stringent sanctions against twenty high-ranking Zimbabwean officials. The sanctions include a travel ban to the EU and the freezing of personal assets of the individuals.[51] Cassese considers these measures

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49 Security Council Resolution 1591 (2005). See also *List of Individuals Subject to the Measures Imposed by Paragraph 3 of Security Council Resolution 1591 (2005)*, compiled by the Sudan Sanctions Committee, available at http://www.un.org/sc/committees/1591/pdf/Sudan_list.pdf (accessed 19 September 2007).

50 In this regard see, for example, the recommendation of RFS 'which called on the EU to ban Eritrean government members and senior military officers from entering EU territory until the Eritrean government ends repression.' RFS (n 45 above).

51 See, for example, Council Common Position of 18 February 2002 Concerning Restrictive Measures against Zimbabwe (2002/145/CFSP), in *Official Journal of the European Communities*, 22 February 2002, L50/1. Zimbabwe also faces sanctions from the US government. See *VOA*

as best interim tools of international criminal justice through which international institutionalised response to human rights violations has considerably shifted from 'collective responsibility' towards the more realistic modern concept of 'individual responsibility.'[52]

With regard to steps that have to be adopted by the Eritrean government, this study proposes that recommendations similar to those suggested by the Darfur Commission are also applicable in the context of Eritrea.[53] In the first place, the Eritrean government must facilitate, through a broad consultative process, a peaceful political transition to a democratic system of governance. Furthermore, the government must halt the current pervasive impunity for the perpetration of human rights violations; strengthen the independence and impartiality of the judiciary, and empower courts to address human rights violations; allow full and unimpeded access to the international community and UN and AU human rights bodies to monitor the situation in Eritrea; and ensure the protection of all the victims and witnesses of human rights violations. In addressing the pressing needs of victims, the establishment of a compensation commission or a TRC designed to grant reparations to victims of human rights violations should also be given equal weight. The latter consideration links the debate with the relevance of a TRC as an alternative mechanism of accountability.

7.5 Conditional amnesty accompanied by TRCs

As discussed in the Chapter 5, there are several shortcomings of criminal accountability as an option for a given transition. It is the assessment of such drawbacks which necessitates the consideration of other forms of accountability. In this regard, amnesty as administered by TRCs assumes a prominent position. With regard to crimes such as

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'Sanctions against Zimbabwe regime,' available at http://www.voanews.com/uspolicy/archive/2005-11/2005-11-23-voa3.cfm?CFID=299922738&CFTOKEN=93620866 (accessed 27 November 2005). Similarly, the IMF has also 'maintained its suspension of financial and technical assistance to Zimbabwe, saying the government had failed to clear its arrears and address a worsening economic and social crisis.' See *Reuters* 'IMF reaffirms sanctions against Zimbabwe,' 27 February 2007.

52 Cassese (n 23 above) 447-448.

53 *Report of the Darfur Commission,* para 650.

genocide and war crimes, amnesty may be considered inconceivable. Similarly, unconditional amnesty for crimes of any kind is no longer permissible. There is, however, some room to allow 'prosecutions to proceed where they will not impede peace but at the same time [to permit] societies to "trade" amnesty for peace where there is no alternative.'[54] In such situations, TRCs become indispensable. These institutions can serve a functional middle ground to ensure that justice is not entirely sacrificed to the cause of peace.

UN organs, international actors, activists and others have demonstrated a growing interest in TRCs over the past few years, thus providing for newer, creative, and perceptive guidelines on the creation of TRCs. The adoption of seminal UN documents and reference manuals, such as the OHCHR rule-of-law tools for post-conflict states[55] and the reports of the UNSG,[56] has resulted in an unprecedented international recognition of TRCs. This can be described as a promising beginning for the internationalisation of TRCs. As such, any truth-seeking and truth-telling effort without coordinated assistance from, and cooperation with, the relevant agencies of the UN as well as other prominent international actors, may not bear any fruitful results in any future Eritrean TRC. In light of the above, this study recognises the need for effective harmonisation of efforts among stakeholders. This must be studied in conjunction with the following fundamental policy considerations for transitional justice in Eritrea.

The discussion in Chapter 6 revealed that any truth-seeking efforts must be crafted to fit the particular national circumstances of a given country.[57] In the new global order where interest in TRCs is growing considerably, the many and varied dimensions of previous TRCs, as well as their potential contributions and possible risks, must be studied and

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54 Stahn (n 36 above) 719.

55 OHCHR (n 56 above).

56 *In Larger Freedom* (n 33 above) paras 137-139; *Report of the UNSG* (n 46 above), para 26.

57 Ellen Lutz 'Transitional Justice: Lessons Learned and the Road Ahead' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds) *Transitional Justice in the Twentieth Century: Beyond Truth Versus Justice* (2006) 333-334; Abraham F Lowenthal 'Foreword' to Guillermo O'Donnell *et al Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1986) ix and x; Du Toit (n 11 above) 122; Jeremy Sarkin *Carrots and Sticks: The TRC and the South African Amnesty Process* (2004) 1; Christian Tomuschat 'Clarification Commission in Guatemala' 20 (2001) *Human Rights Quarterly* 239-240.

recognised thoroughly. As there is no universal model applicable to all situations, creativity and sensitivity to Eritrean national needs are the most crucial factors that have to be noted when proposing alternative options for Eritrea. One of the major normative justifications of TRCs is their contribution to restorative justice. Understandably, a TRC in the Eritrean context may not prove successful without due consideration of restorative justice, which is a major component of the Eritrean indigenous legal tradition. In order to address the transitional justice needs of Eritrea, the normative justification of TRCs (their moral foundation) should be linked up with the indigenous foundations of restorative justice in Eritrea. In this regard, the standards of any TRC are expected to be harmonised with Eritrean indigenous institutions and traditions of conflict resolution. The mechanisms by which this can be implemented will be discussed in the section that deals with the most important features of a future Eritrean TRC. This will preceded by a discussion of the foundations of restorative justice under Eritrean customary laws in the next section.

7.6 Restorative justice in Eritrea

The discussion of restorative justice in Eritrea should be informed by the observation of Gilman, who holds that as a distinct response to crime, restorative justice has its roots in community origins and its theoretical foundation is deeply rooted in many ancient cultures.[58] This resonates with the observation of Beyers Naudé, who also describes restorative justice as a criminal justice model dominant in major world legal systems and indigenous legal traditions.[59] In many societies, the normative foundations of restorative

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[58] Eric Gilman 'What is restorative justice?,' available at http://www.sfu.ca/cfrj/fulltext/gilman.pdf (accessed 2 April 2008). Similarly, the CRJ holds that 'restorative justice is an old idea with a new name' and 'its roots can be found in [communal] healing traditions and the non-retaliatory responses to violence endorsed by many faith communities' as well as in social, theological and philosophical movements. Accordingly, restorative justice strives 'to embody the values and principles that are akin to and informed by holistic peace and justice-making processes in many … communities.' See CRJ 'Introduction to restorative justice,' available at http://www.sfu.ca/crj/popular.html#intro (accessed 2 April 2008).

[59] Naudé mentions in this regard ancient Greek, Roman and Arab civilisations as well as indigenous communities in Australia, Canada, New Zealand and South Africa as some of the leading sources of the restorative criminal justice model. He argues that restorative justice was re-discovered by Western countries in the mid 1970s and by the end of the 1990s most of such countries had legalised restorative justice programmes. He defines restorative justice as 'a victim-centred response to crime that provides opportunities for those most directly affected by crime - the

have become guiding principles on how a community and its justice system understand every aspect of their response to crime or violence. In this sense, restorative justice can also be described as a form of 'community justice focused on restitution through informal processes of mediation and arbitration, with both victims and offenders playing central roles.'[60] Findlay and Henham also recognise restorative justice as fundamentally communitarian and the production of peace and harmony alongside the identification of guilt. In the context of international criminal justice, the authors identify the global community as a communitarian foundation.[61]

The most important source of law relevant to restorative justice in Eritrea is indigenous or customary law. Indigenous law is not formally recognised as an official source of law in Eritrea. In this regard, Yohannes Gebremedhin notes that due to variations along ethnic and regional lines, uniform application of customary law is also practically impossible in Eritrea.[62] However, through informal incorporation, customary law plays a prominent role in the modern legal system of Eritrea. In most of the individual localities that form modern Eritrea, there are peculiar indigenous norms and institutions of customary law governing several aspects of social life. Historical accounts indicate that written records of Eritrean customary laws are older than three centuries.[63] The basis of law in much of

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victim, the offender, their families, and representatives of the community - to be directly involved in responding to the harm caused by the crime.' See Beyers Naudé 'An international perspective of restorative justice practices and research outcomes' 31(1) 2006 *Journal for Juridical Science* 101. See also CRJ 'Restorative justice: Summary,' available at http://www.sfu.ca/cfrj/fulltext/summary.pdf (accessed 2 April 2008), which mentions as an example the traditional practices of Canadian aboriginal communities in which victims, offenders, their families and friends and other members of the community gather together to resolve conflicts in a way that restores harmony to those who were affected by wrongdoing. It is further argued that: 'Rather than privileging the law, professionals and the state, restorative resolutions engage those who are harmed, wrongdoers and their affected communities in search of solutions that promote repair, reconciliation and the rebuilding of relationships.'

60 CRJ (n 58 above).

61 Mark Findlay and Ralph Henham *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (2005) 276-277.

62 Library of Congress 'Legal research guide on Eritrea,' available at http://www.loc.gov/law/help/eritrea.html (accessed 29 April 2008).

63 Citing Ludolf's *Historia Aethiopica* (1681), Yohannes Gebremedhin notes that the inhabitants of the highland region of Hamasien elected their own leaders three centuries back and applied their own indigenous laws 'like a small republic.' He also notes that most of the customary laws of Eritrea were reduced to writing long before the arrival of the Europeans. He then continues as follows: 'In the highlands of Eritrea a number of customary laws evolved dating back to the early fifteenth century. According to Ostini, the oldest customary laws are the laws of *Adkeme Mlgha'e*

rural Eritrea, which constitutes 80% of the total population, remains customary law. Eritrean customary laws are greatly influenced by deeply rooted communal values and as such restorative justice is a central element in that system. Although there are some fundamental features of restorative justice common to all Eritrean customary laws, the readily available literature focuses mainly on customary laws of the highland communities.[64] The legal literature on the customary laws of the lowlands is one of the subjects on which there has hitherto been a dearth of knowledge and academic writing.

A unique feature of the Eritrean customary laws of the highland communities, as recognised by Gebremedhin, is that the laws are made up of purposefully formulated rules and standards that determine the reciprocal expectations of conduct in varied circumstances of social interaction. Since these laws are made and amended by *elected* tribal elders and men of wisdom, the general characterisation of customary law by some writers as 'any recurring mode of interaction between individuals and groups'[65] is not fitting to Eritrean customary laws. The laws regulate a wide-range of social interaction, 'including criminal offences, blood money, torts, marriage, land and public holidays (saint days).'[66] Particularly, the procedural rules applicable in customary dispute resolution mechanisms were described by an American scholar, who served as an attorney general in Eritrea, as 'interesting parallels to Roman Law, early Anglo-Saxon, Germanic and the Common Law.'[67]

(ስርዓት ኣድከመ ምልጋእ), the edicts of *Habsullus* (ስርዓት ሃብስሉስ) and the law of Mehem Mahaza (ስርዓት ሜዓ መሓዛ). Other accounts date the law of *Adkeme Mlgha'e* and other customary laws such as the law of *Loggo Chiwa* (ሎጎ ጭዋ) and the law of *Adghena Tegheleba* (ኣድግና ተገለባ) to earlier times.' Yohannes Gebremedhin *The Challenges of a Society in Transition: Legal Development in Eritrea* (2004) 33-34. See also Yohannes Berhane *Delicts and Torts: An Introduction to the Sources of the Law of Civil Wrongs in Contemporary Ethiopia* (1969) 15; ብዘርኣያቆብ እስቲፋኖስን ካልኦትን እተሰናደወ ሕግን ስርዓትን ናይ መራት ዓደቦ (Zerayacob Estifanos *et al Indigenous Customs and Laws of the Forefathers*) (1990).

64 In these communities, customary laws are made or amended by a village council formed by representatives of the people, who are 'elected elders from neighbouring villages, bound by common heritage [and] convened … under the shade of a sycamore tree found in a secluded common area.' The body of representatives or village council is known as *Baito* (ባይቶ); it is analogous to a modern day assembly or parliament. See Gebremedhin (n 63 above) 33.

65 Gebremedhin (n 71above) 36 ascribes this kind of general characterisation to Roberto Mangabiera Unger *Law in Modern Society: Toward a Social Criticism of Social Theory* (1976) 49.

66 Gebremedhin (n 71 above) 37.

67 Franklin Russell 'Eritrean customary law' 3(2) (1958) *Journal of African Law* 103. Russell was Attorney General of Eritrea between 1955 and 1956. He mentions *Deputy Advocate-General v Fitirauri Hadgu Ghilhabr*, judgment written by Justice GN Debbas (date unknown), as one of the

The inhabitants of the highland, the Tigrinya-speaking population, are mainly settled agriculturalists who are organised in village communities that consist of a number of kinship units known as *endas* (እንዳ·ት·). The village[68] is the principal social and political unit of the Eritrean highland rural society. Communality is a major building block in the centuries old social structure and indigenous dispute resolution mechanisms of highland Eritrea.[69] Every village has two prominent institutions involved in administrative and judicial functions. Local administration is customarily administered by an elected council of elders, called *shimagle* (ሽማግለ).[70] Judicial matters or dispute resolution functions are administered by a *chiqa* (ቐ·ቃ), the equivalent of a magistrate in modern judiciaries, and some *nebaros* (ነባሮ), a body of village elders and wise men. Although the role of the *nebaros* is only advisory to that of the *chiqa*, notes Gebremedhin, it is very unusual for a *chiqa* or a judge to decide against the opinion of the *nebaros*, who are a group of God-fearing elders and are highly regarded in the community.[71] A pertinent concept from modern legal thought comparable to the *nebaros* would be a trial jury, which represents a

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earlier court cases decided by the Federal High Court of Eritrea in which some aspects of Eritrean customary laws were put to test. The case is also known as 'The Goat Case' as it involved the unlawful seizure and sale of some goats by officials of the government of the day. The case was possibly decided in the 1950s.

68 A standard Eritrean village in the highlands has some 800 inhabitants. According to a 1996 decree, a greater part of the Eritrean highland has been integrated under a single province, named Zoba Debub, meaning Debub (Southern) Region. This geographical area virtually combines the three former major provinces of highland Eritrea: Akele Guzai, Hamasien and Seraye. It covers an area of 11 124.8 square kilometres and is divided into twelve sub-zobas (sub-regions). There are 886 villages in Zoba Debub, with a total population of 779 060 and 195 140 households. From the above, it appears that the average number of inhabitants of a given village is 879. See FAO 'Baseline study on livelihood systems in Eritrea,' July 2004, available at http://www.fivims.net/documents/pdf/Livelihood%20Systems%20Debub%20-final-.pdf, 4-5. At 17, the study estimates that 85% of the population of Zoba Debub are agriculturalists and 13% are agro pastoralists. The livelihood system in the highland of Eritrea depends on rain fed traditional agriculture combined with livestock rearing.

69 Compare this with the customary law of *bhere-Bilen* in which community affairs are also administered by a council of elders composed of heads of various extended families. The customary law of this population is called *Fet'ha Megareh* (ፍት·ሓ መጋርሕ). See Michael Gaber *The Blin of Bogos* (1993) 30-31; G Ken N Trevaskis *Eritrea: A Colony in Transition 1941-1952* (1962)15; John S Trimingham *Islam in Ethiopia* (1952) 166; Steven H Longrigg *A Short History of Eritrea* (1945) 65.

70 *Shimagle* means elder. *Shimagles* (elders) are also called *shimagle adi* (ሽማግለ ዓዲ), literally meaning village elders.

71 Compare this with article 43 of the customary law of *Adkeme Mlgha'e* and article 95 of the customary law of *Loggo Chiwa.*

group of sworn lay people convened to assist a court of law on factual and legal findings.[72]

The roles of *chiqa* and *shimagle* are, however, complementary in the sense that in any social conflict it is the council of elders or the *shimagle* who would first attempt to resolve any dispute through mediation and conciliation. Institutional mediation monitored by the *shimagle* is the primary and consistent reaction to any form of social conflict. Gebremedhin defines the role of the *shimagle* in dispute resolution as a proactive persuasive role aimed at achieving 'reasonable compromise that was normally achieved through lengthy conciliatory processes and negotiations.'[73] Implicit in these procedures is the theory of restorative justice which strives to achieve a consensus that satisfies both disputants. It is only when conciliation and mediation of the *shimagle* fail that customary laws provide for formalised dispute resolution mechanisms led by a *chiqa,* who is normally advised by some *nebaros.*

In typical Eritrean highland legal tradition, one way by which restorative justice manifests itself is the case of homicide. In such cases, the customary laws focus on the victim of the crime. Restitution and reconciliation are important factors as they are considered crucial in restoring the harm done to a victim. Regularly, a transgression involving homicide is resolved by the payment of blood money, called *gar nebsi* (**ጋር ነብሲ**), by the wrongdoer to the family or relatives of the deceased.[74] *Gar nebsi* can be paid in the form of money, cattle or other items, or a combination of all. In such cases,

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72 On the American concept of trial jury, see generally Akhil Reed Amar *The Bill of Rights* (1998) 81-118.

73 Gebremedhin (n 63 above) 39.

74 Russell (n 67 above) 103. The following Tigrinya proverbs are good examples of restorative justice theories. **ዕርቂ ደም መድረቒ፡ ባእሲ ደም መተርከሲ** (Reconciliation cures a wound, while retribution fuels a dispute). **ይበድሉኻ ኣይትበድሎም፡ ይቕተሉኻ ኣይትቕተሎም** (It is better to be wronged by others than to do wrong to others). **ዕሩቕ ኣይምድር፡ ቆራይ ኣይስድር** (As a lame cannot walk, a reconciled cannot also squabble). The latter proverb has, however, apparent bias against people with a disability. Another pertinent proverb relevant for transitional justice is: **ናይ ጎቦ ንፋስ ይውሰዶ፡ ናይ ሩባ ውሕጅ ይውሰዶ** (That which is on the mountain should be gone with the wind and that which is in the riverbed should be washed away by the waters). For a comprehensive work on Tigrinya popular proverbs, which are apparent reflections of the Eritrean highland customary laws, see **ሊቀ መዘምራን (መ. ገ.) ሞገስ ዑቕበጊዮርጊስ ናይ ኣቦታት ጥንታዊ ምሳሌ 2ይ ሕታም** (Liqe Mezemran Moges Ouqbegiorgis *Ancient Proverbs of the Forefathers* 2ed, 1969). It is imperative that other equivalent traditional concepts from other Eritrean languages and customary laws should also be explored purposefully.

the kinship of the wrongdoer takes collective responsibility and restores the harm done to the victim accordingly. Intermarriage between family members or relatives of the wronged and the wrongdoer is also an important and common practice in dispute resolution mechanisms involving homicide. Although a rare practice, the family or relatives of the deceased may at times unilaterally resort to a vengeful retaliatory act which includes the killing of any close member of the wrongdoer's family or relatives.

Nonetheless, imprisonment is not seen as an option. In fact, there are no clearly defined rules in the Eritrean customary laws prescribing imprisonment or criminal punishment as a punitive method, even in the case of serious offences such as murder. There are some vague references in Chapters 8 and 9 of the customary law of *Loggo Chiwa* about punitive measures that could be taken by a king in the case of murder.[75] However, these are not sufficient enough to be regarded as providing for criminal punishment in the modern sense of the concept. These indigenous practices[76] were oppressed during colonialism and replaced by a European worldview of a retributive justice which is largely offender focused.[77]

Conceptions of restorative justice are also common in the customary laws of other Eritrean ethnic groups in which local administrative matters and dispute resolution functions are similarly handled either by clan leaders or elders. In all nine ethnic groups,

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75 Examples of other provisions dealing with murder are Chapter 13 of the customary law of *Hgi Engan'a Sr'at Atsmi Harmaz* (**ሕጊ እንጋንኣ ስርዓት ዓጽሚ ሓርማዝ**) and Chapter 20 of the customary of law of *Adghena Tegheleba*.

76 Compare this with the customary law of the Thembu people in Eastern Cape, South Africa, as discussed by David Kgosimore 'Restorative justice as alternative way of dealing with crime' 15(2) 2002 *Acta Criminologica* 71. The author argues that Thembu people 'attain justice through practicing a philosophy of healing and reconciliation by placing the victim, the offender and the community at the heart of the justice.' See also Naudé (n 59 above) 103; Ntanda Nsereko 'Victims of Crimes and Their Rights' in Tibamanya Mwene Mushanga (ed) *Criminology in Africa* (1992) 21.

77 Eritrea inherited all of its codes of laws from Ethiopia in 1991, with minor amendments. The Ethiopian Penal Code of 1957, which is drafted by the Swiss jurist, Professor Jean Graven, is one good example. The Ethiopian Codes of Criminal Procedure and Civil Procedure are also drafted by the same jurist, while the 1960 Ethiopian Civil Code is drafted by the French jurist, Professor René David. See Franklin Russell 'The new Ethiopian Penal Code' 10(3) (1961) *American Journal of Comparative Law* 265-266. All of the above codes together with the Ethiopian Commercial Code and Maritime Code were adopted by Eritrea in 1991 as transitional codes and are still operational, albeit ineffectively as far as the protection of human rights is concerned.

restorative justice is a deeply rooted social capital, except that in the case of the Kunama and the Nara ethnic groups there is an additional unique characteristic feature. Unlike other ethnic groups, the Kunama and Nara are matrilineally organised societies, a characteristic which was described by foreign writers as egalitarian and democratic.[78] In the Eritrean lowlands, Muslim communities are predominant and as a result customary laws are heavily influenced by Islamic law, which also has its own concrete foundations of restorative justice.[79]

A very important aspect regarding Eritrean customary law is its role in the post-independence era. As is true with the total crisis of legal development in Eritrea, there is no promising record in the advancement of customary laws during the post-independence era. The government persistently pays lip service to such noble causes, for example, by establishing inefficient community courts which are purportedly intended to promote 'out-of-court dispute resolution.' Established in 2004, the community courts are theoretically designed to promote alternative dispute resolution mechanisms via reconciliation or mediation-arbitration, as is done in most Eritrean customary law institutions. The Eritrean Ministry of Justice mentions this development as a positive contribution in the advancement of indigenous dispute resolution mechanisms.[80]

Theoretically, the initiative is commendable. However, with the complete emasculation of judicial independence and the erosion of the rule of law, the role of the community courts in dispute resolution has not been effective. Their role in human rights protection is non-existent, as is the case with the ordinary courts. According to David Bozzini, the community courts 'lay in between the realms of law and norms, neither deeply founded in customary law, nor closely linked with national law and its reforms.' Their contribution is constrained by the government's socialist-oriented form of self-control, which manifests itself in the form of ideology, bureaucracy and informal agents of the

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78 Carlo Conti Rosini *I Principi de Diritto consuetudinario dell'Eritrea* (1916) 742 and Alberto Polera *I Baria e I Cunama* (1913) 98, as cited in Gebremedhin (n 71 above) 43.

79 For a discussion of gender rights in the context of the customary laws of the nine Eritrean ethnic groups, see generally Daniel R Mekonen 'The abolition of female circumcision in Eritrea: Inadequacies of new legislation' 7(2) (2007) *African Human Rights Law Journal* 389-411.

80 See for example, Shaebia.org 'Community courts: Helping citizens settle disputes out of courts,' available at http://www.shaebia.org/artman/publish/article_4206.html (accessed 1 May 2008).

state. This has caused, argues Bozzini, 'a blurring of the old distinction between customary and state law.'[81]

One point is, however, clearly evident. Eritrean customary laws and traditional courts, which date back to the pre-colonial era and are still effective (to some degree) in the rural areas, have played an important role in the dispensation of justice among citizens. The heritage of indigenous legal tradition in Eritrea is not yet fully appreciated and explored. It is a potential national reservoir of wisdom that should be properly utilised in combating human rights abuses and fulfilling the transitional justice needs of the Eritrean society. In view of the above considerations, any future model of transitional justice in Eritrea is expected not only to give proper weight to aspects of restorative justice, which are deeply rooted in all Eritrean customary laws, but also tap from the wisdom of customary laws.

The foregoing reveals an enduring relationship between restorative justice aspects of Eritrean customary laws on the one hand, and the moral foundation and normative justification of TRCs on the other. It explains that the indispensability of a TRC for the success of a *holistic transitional justice approach* in Eritrea is beyond contention. It is now appropriate to identify the fundamental features of such a TRC in which the restorative aspects of Eritrean customary laws are expected to play a central part. How this could be done will be explored especially in relation to the public hearings of the proposed TRC.

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[81] David Bozzini 'Troubled judicial itineraries: The in-between out-of-court cases in Eritrea,' AEGIS European Conference on African Studies, African Studies Centre, Leiden, 11-14 July 2007, also available at http://ecas2007.aegis-eu.org/ViewAbstract.aspx?PaperID=98. The assessment of Bozzini on the inefficiency of the community courts, which is based on material gathered during fieldwork carried out in Eritrea between 2004 and 2006, can be taken as most authoritative.

7.7 Basic features of the forthcoming Eritrean TRC[82]

In terms of the needs of a deeply divided society, restorative justice as implemented by TRCs can achieve broader objectives of societal healing and social reconstruction. In this regard, a TRC is an intermediate solution for the achievement of peace and justice in a transitional society emerging from deep division and mistrust. Its role in reconciliation and national healing makes it a most appropriate institution for a *holistic approach* to transitional justice which gives full meaning to social reconstruction at the end of massive violations.[83] Without ignoring the possibility of prosecution of the most responsible perpetrators, those who are tentatively identified in Chapter 5 of this study, the exigencies of restorative justice may warrant that the establishment of a TRC[84] would be an inevitable enterprise for Eritrea. In this regard, the prosecution of the most responsible perpetrators should be understood as a possibility that should be implemented in the absence of a genuine political commitment on the part of the perpetrators to a peaceful political transition in Eritrea. This is the case currently. If it appears that the leaders have genuinely committed themselves to a peaceful transition anytime in the near future and this is warranted by the transitional needs of the Eritrean society, the prosecutorial proposal should be subject to reconsideration.[85]

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82 In addition to the discussions in Chapter 6 and the authorities which are frequently cited therein, the following paragraphs reply heavily on the lessons offered by the recent experience of Kenya, especially the Kenyan Bill on TRC and the consensus document developed by Kenyan National Dialogue on Reconciliation. For details, see email message circulated by David M Malombe in the listserv of ATJRN, 13 March 2008 and 31 March 2008.

83 Priscilla B Hayner *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2001) 12-13.

84 In spite of the widely recognised usefulness of TRCs, there are some challenges to dispute their relevance. See, for example, Charles Villa-Vicencio 'Truth Commissions' in Charles Villa-Vicencio and Erik Doxtader (eds) *Pieces of the Puzzle: Key Words on Reconciliation and Transitional Justice* (2004) 90. However, it should be noted that a TRC which establishes thorough mechanisms of truth-telling, parallel mechanisms of accountability as well as minimum requirements for the granting of amnesty hardly suffers from criticism. Such is the understanding established by the *In Larger Freedom* (n 33 above), paras 137-139; OHCRH (n 56 above) 26. Parallel mechanisms that should accompany TRCs have been identified by the OHCHR *Rule-of-law Tools for Post-Conflict States: Truth Commissions* (2006) 27-29 as: prosecutions, reparations, vetting and institutional reform. The components are most of the time dealt with in the recommendations of TRCs as appearing in their final reports. In the Eritrean context, these considerations will be revisited in section 7.6.8 below.

85 This is what scholars such as Stahn describe as trading amnesty for peace where there is no alternative; Stahn (note 36 above) 719. John Dugard also argues: 'Where, however, a state opts to undergo the type of screening process involved in the South African model, it is difficult for foreign and international courts simply to ignore these amnesties.' John Dugard 'Dealing with

The establishment of an independent and functional TRC, which is based on international standards and best practices, would enable Eritrea to draw a distinction between permissible and impermissible amnesties. The international recognition[86] of such alternative forums of accountability would also help achieve a settlement between the international demand for prosecution of international crimes and the national appeal for a political compromise. In recent years, attempts have been underway to prepare global guidelines[87] for the operation of TRCs. Such parameters are believed to provide assistance in determining the minimum requirements for an acceptable future TRC in Eritrea. On the basis of these guidelines and the experience of TRCs from different parts of the world, Dugard suggests that the following minimum requirements be met by any future TRC:[88]

1. The Commission should be established by the legislature or executive of a democratically elected regime;
2. The Commission should be a representative and independent body;
3. The Commission should have a broad mandate to enable it to make a thorough investigation. It should not, for example, be restricted to deaths and disappearances (as with Chile) but should be permitted instead to investigate all forms of gross human rights violations;
4. The Commission should hold public hearings at which victims of human rights abuses are permitted to testify;
5. The perpetrators of gross human rights violations should be named, provided adequate opportunity is given to them to challenge their accusers before the Commission;
6. The Commission should be required to submit a comprehensive report and recommendations within a reasonable time;
7. The Commission should be empowered to recommend reparations for victims of gross human rights violations; and
8. Amnesty should be denied to perpetrators of gross human rights abuses who refuse to cooperate with the Commission or who refuse to make a full disclosure of their crimes.

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crimes of a past regime: Is amnesty still an option?' 12(4) (1999) *Leiden Journal of International Law* 1015. See also *In Larger Freedom* (n 33 above), paras 137-139; *Report of the UNSG* (n 46 above), para 26.

86 One such recognition is incontrovertibly manifested by the OHCHR (n 84 above) 27 which explicitly supports the establishment of TRCs as a major option of transitional justice.

87 See *The Study of Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights*, reported by Special Rapporteur Louis Joinet, UN Doc E/CN4/Sub2/1985/16; Neil J Kritz 'Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights' 59 (1996) *Law and Contemporary Problems* 127; Priscilla B Hayner 'International guidelines for the creation and operation of truth commissions: A preliminary proposal' (59) 1996a *Law and Contemporary Problems* 173; Stephan Landman 'Alternative responses to serious human rights abuses: Of prosecution and truth commissions' 59 (1996) *Law and Contemporary Problems* 81.

88 Dugard 1999 (note 85 above) 1012. Some of features of these salient guiding principles were later to be endorsed by the OHCHR (n 84 above) 27-29

These minimum requirements, together with international best practices developed by UN[89] and other international organisations[90] can serve as a good starting point for any TRC that should be contemplated in Eritrea. For purposes of the current discussion, the most important features of the forthcoming Eritrean TRC will be explored under the following sub-headings.

7.7.1 Establishment

The process of establishment of a TRC and the selection of its commissioners are commonly regarded as a symbolic political exercise in the history of TRCs.[91] Experts on the study of TRCs note that a wide and inclusive process of consultation together with a careful design and consideration of available options are the most known trademarks of a successful TRC.[92] To repeat what has been reiterated earlier, the foundation for such a process is patently missing in the current political reality in Eritrea. Nonetheless, pending the development of a favourable political atmosphere in Eritrea, appropriate forums for provisional deliberation can be created by all opposition and civil society groups in exile. This could facilitate the most inclusive form of deliberation under the circumstances on the establishment of a TRC in Eritrea. In this regard, a provisional leading role should be assumed by the umbrella organisation of Eritrean opposition groups, the EDA. Given that any political association, organisation or party is not allowed to operate inside the country, there is no relevant and competent national institution inside the country genuinely representing the entire Eritrean society. As a result, the EDA appears to be the most appropriate political grouping to galvanise deliberation on the establishment of TRC in Eritrea. Furthermore, the lapse of legitimacy of the current government bestows the EDA with a most important interim legitimacy to deliberate on this issue, pending the instalment of a transitional, representative and democratic government in Eritrea.

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89 OHCHR (n 84 above) 27-29.

90 See, for example, AI *Truth, Justice and Reparation: Establishing an Effective Truth Commission* (AI Index: POL 30/009/2007).

91 Dorothy Shea *The South African Truth Commission: The Politics of Reconciliation* (2000) 24.

92 Priscilla B Hayner 'Commissioning the truth: Further research questions' 17(1) (1996) *Third World Quarterly* 22; Du Toit (n 11 above) 122-123; Alex Boraine *A Country Unmasked* (2000) 385; Ritu G Teitel *Transitional Justice* (2002) 4; Martha Minow *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998) 13; OHCHR (n 84 above) 7.

In this regard, the latest successful congress of the EDA can be taken as an encouraging political development for the initiation of deliberations on the establishment of TRCs. The successful EDA congress, which for the first time invited representatives of civil society organisations (albeit in an observer capacity), has been praised by many Eritreans as a positive development towards the facilitation of a peaceful political transition in Eritrea. This success must be utilised for purposes of deliberation on a TRC. Indeed, the EDA has demonstrated a paradigm shift in its strategy towards ending authoritarianism in Eritrea. In spite of its staunch and outright rejection of the Eritrean government (a position the EDA maintained for long), the umbrella group has for the first time called openly on the Eritrean government to engage in a national dialogue of peaceful political transition.[93]

Although the Eritrean government has not yet heeded this call, the initiative taken by the EDA is promising. As far as the objectives of transitional justice are concerned, this is indeed one of the milestone political developments in the history of Eritrean opposition groups. With regard to the role that should be played by other actors, the EDA resolved:

> In order to avert the dangers threatening the unity of the people and sovereignty of the country, the EDA congress called on all Eritrean [political forces] to organise their potentials. Recognising such a need, the EDA congress renewed its commitment on the need for a national convention in which all Eritrean political forces, intellectuals, civil society and other organisations should come together and discuss the challenges posed by the legacies of the dictatorial regime and enhance the unity of Eritrean people.[94]

The forum national convention envisaged by the EDA must create the relevant platform for deliberations on a TRC in which all stakeholders should be given equal access and opportunity to add their inputs. In this regard, pertinent lessons could be learned from the Kenyan National Dialogue on Reconciliation and the Kenyan TRC Bill in which the

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93 EDA Congress Resolutions (n 6 above).

94 Ibid. In this regard, a previous proposal on a national convention developed by the Kassel Liaison Committee in March 2006 should be revitalised in order to serve the transitional justice needs of Eritrea. The Kassel Liaison Committee is a group of individuals and experts convened by some opposition groups and concerned individuals, some of whom are now members of the EDA. Its objective was the preparation of a source document on a national convention which is defined by the Committee as a meeting to be 'convened by political, civic, economic, intellectual and other social groups to identify and discuss current and fundamental issues and reach at a consensus.' Kassel Liaison Committee *National Convention for the Unity and Salvation of Eritrea* (March 2006) 6.

parameters of the proposed Kenyan TRC have been refined.[95] However, any deliberation on a future TRC by the EDA or other political or non-political forces can only be taken as a preparatory initiative, the proper endorsement of which can only be conferred when such preparations are finally formalised by a duly constituted representative body comprising all segments of Eritrean society. Ideally, the TRC should be launched by an act of a democratically elected transitional parliament or a duly constituted democratic and representative transitional executive body.

For purposes of civil society participation, the Network of Eritrean Civil Society in Europe (NECS-E) as well the Eritrean Solidarity for Justice and Human Rights (ESJHR), a network of civil society organisations in North America, are two of the most important civil society organisations, which have to add their inputs on the deliberations of a future TRC. There are some political and civil society organisations which are not included in the above grouping. It is imperative that mechanisms for the effective participation of such other groups should also be provided. Other stakeholders that should be included in the consultation process are victims, human rights defenders, women, children, and persons belonging to minorities and vulnerable groups. Prominent Eritrean websites[96] and their publishers could be utilised in this respect. The process should also avail itself of the expertise of some prominent Eritrean and non-Eritrean personalities who have extensively written on the needs of a negotiated peaceful political transition in Eritrea.

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95 ATJRN (n 82 above). However, it should be noted that AI has already expressed a number of serious reservations on the Kenyan Bill based on the following factors. 'Amnesty International is seriously concerned about several aspects of the Bill, which do not comply with international law, standards and best practices. These include: The provisions allowing the Commission to recommend amnesty for gross human rights violations such as torture, enforced disappearance and extrajudicial executions; Other provisions creating obstacles to prosecutions of gross human rights violations; The procedure for nominating Kenyan Commissioners, which does not ensure their independence, impartiality and competence; The lack of provisions for the establishment of a comprehensive, long term and effective protection programme for victims and witnesses; The lack of provisions authorising the Commission to recommend a broad range of reparations for victims; The lack of full consultation with civil society organisations, victims, human rights defenders, women, children, and persons belonging to minorities and vulnerable groups on the establishment, mandate and powers of the Commission.' See AI 'Concerns about the Truth, Justice and Reconciliation Commission Bill,' 21 May 2008 (AFR 32/009/2008). For best international practices and lessons, see also AI (n 98 above).

96 Two examples in this regard are: www.asmarino.com and www.awate.com.

7.7.2 Composition

Regarding the appointment of commissioners, the selection process should encourage public participation and deliberations, including public nominations. Broad public trust and ownership can be ensured by a consultative selection and appointment process of commissioners. Submissions of comments from political organisations and interested parties should be given proper weight. Due consideration must be given to maintain a proper balance between different groups whose interests might be affected by the work of the commission.[97] The establishment of a selection panel composed of imminent national and international personalities, civil society and political organisations that should assist in the selection process is crucial in this regard.

Due consideration should also be given to historical political divisions, such as the EPLF/ELF ideological divide of the liberation struggle era. Although these divisions have diminished over time due to the establishment of political organisations merging both ideological backgrounds,[98] accommodating both organisational sentiments should be an important consideration in the establishment of a future TRC in Eritrea. The group of individuals or experts that should be involved in the establishment and operation of an Eritrean TRC, as well as in defining its parameters, should have a balanced political background, reflecting the Eritrean history of political divisions. Ethnic and religious balance is also a factor in the Eritrean case. Nine of the ethnic groups and the two major religions (Christianity and Islam) should be equally represented in the TRC.

The proposed TRC shall consist of persons of high moral integrity who are well regarded by the Eritrean population. The TRC should by no means be seen to represent a specific political, religious or ethnic or other group at the exclusion of others. In terms of qualifications, members of the commission shall have sufficient knowledge and experience relating to law, human rights and humanitarian law, investigation techniques and forensic science, psychology, sociology, anthropology and social relations, conflict

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97 Shea (n 91 above) 25.

98 An example in this regard is the Eritrean National Salvation front which includes prominent ex-freedom fighters from both the EPLF and the ELF.

management, religion and gender issues. In addition to this, the TRC may also establish committees, sub-committees and special units as it considers necessary for the better performance of its functions.

To address the experiences of women, children and other vulnerable groups, opportunities should be created for such vulnerable groups to relate their experiences suitably. To add an indigenous context to the TRC, the commission should create mechanisms whereby elders and traditional leaders representing major Eritrean customary laws must be involved in the healing and reconciliation process. The role of traditional leaders and experts of customary laws should be properly appreciated in the context of the restorative role of TRCs. By incorporating the indigenous context as a major component of the TRC, the institution can encourage the input of customary laws in the process of healing and transformation. The role of such actors can be accommodated via involvement in the committees, sub-committees or special units that should be established by the TRC as support groups to its main activities.

7.7.3 Overall mandate

The most important objective of the forthcoming Eritrean TRC should be the advancement of truth, justice, peace, reconciliation and national unity of the Eritrean people via the establishment of a *common truth* on the most contentious aspects of the Eritrean history. While it is unrealistic to expect the TRC to cover all atrocities perpetrated in Eritrea, it is generally expected to establish as complete a picture as possible about major historical incidents and gross human rights violations, particularly the most controversial and atrocious aspects of the Eritrean history.

Although this study primarily focused on the human rights and humanitarian law violations perpetrated after 1991, it would be an affront to the cause of justice if any future Eritrean TRC would have to avoid investigation into the perpetration of injustices of the pre-independence era; and most importantly those perpetrated by Eritreans against Eritreans, namely by the two major liberation fronts: the ELF and the EPLF. As was done

in the 1974 Ugandan TRC,[99] the proposed Eritrean TRC should by no means purport to conceal international crimes of past leaders or future aspirants who wish to assume senior government position in the post-PFDJ era without clearing the decks on their past. The latter consideration is true particularly with regard to certain elements in the opposition groups whose political background is as controversial as that of the current Eritrean government leaders. The fact that none of them has so far had to account for their past misdeeds should not be overlooked under the guise of their current 'struggle' against tyranny.

7.7.4 Specific mandate

In respect of its specific investigative mandate, the following considerations are important. Selecting the most important or representative cases for in-depth study, the TRC can summarise others by outlining only the patterns of abuse. The major incidents to be investigated by the TRC shall include but not be limited the following notorious injustices and gross human rights violations.

From the pre-independence era, the TRC is expected to thoroughly investigate incidents such as the *menkae*, the *yemin*, the *falul*, the *sryet addis* and other incidents as well as the controversial Kangnew Station Scandal, as a result of which several innocent citizens have been assassinated to ensure secrecy.[100] From the post-independence era, the TRC should examine major incidents of gross human rights violations which shall include the following: the Adi Abeito, the Dembelas Qohain, the Dirfo, the Mai Maihabar, the Qarora and the Wia massacres, the deaths at Ira-Iro Prison and other atrocities. Other incidents that should be investigated include the summary and arbitrary prison terms and other methods of punishment imposed on real or perceived enemy collaborators, such as former officials of the *Derg* regime; Eritrea's involvement in major border conflicts

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99 Hayner (n 83 above) 24, 50-51.

100 The Kagnew Station Scandal involves a political intrigue of the current Eritrean president that took place in the 1970s. It allegedly involves a secret meeting with Ethiopian government representatives and CIA agents based at that time in the American military base, Kangew Station, in Asmara. All individuals who have direct knowledge about this secret meeting are allegedly assassinated at different times. See Woldeyesus Ammar 'Revisiting the Kagnew Station incident,' available at http://www.awate.com/artman/publish/article_3123.shtml (accessed 8 March 2004).

(especially the conflicts with Ethiopia and Yemen), the involvement of the Eritrean government in the destabilisation of the Horn of Africa region as well as in the conflicts of the Great Lakes region, together with the human rights and humanitarian law violations perpetrated in relation to these conflicts, and others.

A most important historical account that should be clarified by the forthcoming TRC is the cause and development of the controversial Eritrean Civil War of the 1970s-1980s. In this regard, there are two competing interpretations: one that is promoted by the EFL and another that is propagated by the EPLF. The interpretations apparently serve the political interests of the two fronts and it is in this regard that the TRC should play an impartial role by telling the Eritrean people the correct version of history. By purifying the argument and narrowing 'the range of permissible lies,' the TRC should function like an honest historian.[101]

Most importantly, the TRC must be able to adopt a precise definition of violations of international law that are to be the subject of investigation. As a recent experience, the proposed Kenyan model of TRC, as defined by the Kenyan TRC Bill, offers instructive guidance in this regard. The Bill mandates the proposed TRC to investigate gross human rights violations which are defined as follows:

> (a) violations of fundamental human rights, including but not limited to acts of torture, killing, abduction and severe ill-treatment of any person;
> (b) imprisonment or other severe deprivation of physical liberty;
> (c) rape or any other form of sexual violence;
> (d) enforced disappearance of persons;
> (e) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender or other grounds universally recognized as impermissible under international law;
> (f) any attempt, conspiracy, incitement, instigation, command, or procurement to commit an act referred to in paragraph (a) and (c)[102]

As in the South African experience,[103] the Kenyan Bill provides that in order for a gross human rights violation to fall under the mandate of the TRC, it should be perpetrated in

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101 Michael Ignatieff 'Articles of faith' 25(5) 1996 *Index on Censorship* 113; Michael Ignatieff 'Elusive goal of war trials' March 1997 *Harpers Magazine* 16; Aryeh Neier, interview by Priscilla Hayner on 31 July 1996, as quoted in Hayner 2001 (n 91 above) 26.

102 Part I of the Kenyan TRC Bill; ATJRN (n 82 above).

103 See section 1(1)(*ix*)(a-*b*) of the Promotion of National Unity and Reconciliation Act, 34 of 1995.

the context of a political objective. In a preparatory document developed prior to the formulation of the TRC Bill, the Kenyan National Dialogue on Reconciliation stated that the mandate of the proposed TRC should also include investigations into violations committed by the state, groups, or individuals, as well as community displacements, settlements, and evictions, major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land,[104] especially as these relate to conflict or violence, and other historical injustices shall also be investigated.[105] These defining elements should also be emulated as fundamental features of the forthcoming Eritrean TRC.

7.7.5 Cut-off time

Most Eritreans agree that the most horrendous atrocities by Eritreans against Eritreans took place during the armed struggle. Regarding the period that should form the subject of investigation, the TRC should cover a period of time that includes major incidents of atrocities starting from the liberation struggle era. Although the objectives of this study were narrowly defined in Chapter 1 section 1.3 as focusing on human rights and humanitarian law violations perpetrated in the post-independence era, this was only meant to clarify the scope of international crimes examined in this study. In defining the parameters of the future TRC, such a restricted timeframe may not be helpful. Indeed, in order to understand the nature, root causes, or context that led to certain violations, violence or crimes, the forthcoming TRC must of necessity also look at antecedents to such atrocities.

The Eritrean struggle for independence was pioneered by the ELM in the late 1950s. However, the armed struggle for liberation was launched on 1 September 1961 by the liberation struggle hero Hamid Idris Awate, who fired the first bullet, passionately remembered by Eritreans as the liberating bullet. It is generally understood that the

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104 In this regard, the controversial land policy of the EPLF implemented by the 1994 Land Proclamation and the resulting malpractices should be investigated by the forthcoming TRC. It is widely agreed that the land policy of the EPLF has caused several social evils in different parts of the country and is regarded as one of the ill conceived policies of the EPLF.

105 ATJRN (n 82 above).

perpetration of atrocities by Eritreans against Eritreans escalated during the armed struggle. The timeframe of the proposed TRC should ideally start from 1 September 1960. To propose a timeframe that extends beyond this milestone would overstretch the capacities of the TRC in so far as the securing of witnesses and evidence is concerned.[106] The cut-off date from the other end should be the date when the current authoritarianism comes to an end, or in the event of continued atrocities after the demise of the PFDJ, it shall extend up to such time when violations are effectively halted.

The perpetration of crimes by foreign forces against Eritreans should not be included in the mandate of the TRC, as this may overburden the TRC. Perpetrations committed by Eritreans against Eritreans in collaboration with foreign elements (during and after the liberation struggle) should, however, be part of the investigation.

7.7.6 Public hearings

Public hearings are important ingredients in the operation of TRCs as they are meant to advance national or community healing and reconciliation.[107] The Eritrean TRC should, therefore, provide for public acknowledgment of harms on which the trust of survivors in the new democratic order is to be built. This is the best way of enabling victims to understand that their society as a whole acknowledges what has happened to them.[108] In this regard, public hearings are meant to provide victims, perpetrators and the general public with a platform for non-retributive truth telling that charts a new moral vision and seeks to create a value-based society for all Eritreans. At the same time, public hearings acknowledge the need for a public forum for repentant perpetrators or participants in atrocities where they should come clean on their actions as a way of bringing reconciliation. If need be, the TRC can also hold its proceedings in closed sessions but

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106 Erich Brahm 'Truth commissions,' available at http://www.beyondintractability.org/essay/truth_commissions/ (accessed 15 January 2007).

107 Minow (n 100 above) 71-72; Joanna R Quinn and Mark Freeman 'Lessons learned: Practical lessons gleaned from inside the Truth Commissions of Guatemala and South Africa' 25 (2003) *Human Rights Quarterly* 1145-1146; OHCHR (n 56 above) 31; Thomas Buergenthal 'United Nations Truth Commission for El Salvador' 27 (1994) *Vanderbilt Journal of Transnational Law* 292 and 321.

108 Minow (n 92 above) 71-72.

this should be done only in rare cases and when the need is justified by compelling considerations of the transitional period.

To encourage victims and witnesses to speak out publicly, the provision of effective protection programmes for victims and witnesses is imperative. The importance of this factor should be evaluated in the light of the widespread sense of fear and terror the current authoritarian rule has effectively instilled in the Eritrean society, even in the Eritrean Diaspora communities. Fear and suspicion has already become part of daily life in Eritrea.

7.7.7 Conditions for amnesty

Perhaps the most important power that the Eritrean TRC will exercise is that of the granting of amnesty. There is a global consensus on the abhorrence of blanket amnesty. This will not form part of the forthcoming Eritrean model. The contention is on how to administer conditional amnesty. Amnesty should be granted only when it is accompanied by full disclosure of facts and genuine repentance on the part of perpetrators. A dilemma may arise here as to whether amnesty should be granted to the most responsible violators and to categories of transgressions recognised as core international crimes. As stated earlier, the approach adopted by Stahn and Dugard should inform this dilemma. Amnesty should be granted when it is the only alternative for a peaceful transition.[109] As argued by Dugard, if such an amnesty is accompanied by the type of screening process involved in the South African model, it would be difficult to pursue prosecution when perpetrators have genuinely demonstrated repentance, disclosed the full truth and committed themselves to a peaceful democratic order.[110] To qualify for amnesty, the crime should have a clear political motive. Amnesty should be formally applied for by perpetrators and should be subject to approval by the TRC. The TRC should have powers to deny amnesty if it reasonably believes that a perpetrator has not disclosed the whole truth or has not demonstrated genuine repentance or the act or omission has no link with a political motive. Obviously, individuals whose application for amnesty is not approved by the

[109] Stahn (note 36 above) 719.
[110] Dugard (n 85above) 1015.

TRC should be prosecuted, especially if they are suspected of commission of serious international crimes (such as crimes against humanity or war crimes).

As stated by Jeremy Sarkin in relation to the South African experience, perpetrators should feel compelled to contribute to the truth-telling process. By failing to fully participate in the truth-telling they should never be allowed to make a mockery of the amnesty granting process. A pertinent cure in this regard is that alongside the TRC activities the criminal justice system should also be reinvigorated to make sure that those who did not qualify for amnesty are prosecuted immediately. In the words of Sarkin, there must be sufficient 'stick' to coax potential applicants into the amnesty process.[111]

7.7.8 Publication of a report

At the end of its work, the Eritrean TRC should publish a comprehensive report on its findings. By publishing an accurate record of past abuses, TRCs help prevent the recurrence of repressive rule in the future. It is highly recommended that the final report of the Eritrean TRC should be written at least in English and the two *de facto* official languages of Eritrea namely, Arabic and Tigrinya. The report is also to be distributed as widely as possible. To facilitate this, the report must be translated into the rest of the eight Eritrean languages, at least in the form of main findings and recommendations.

Apart from unearthing the truth, a TRC's report is expected to contribute to justice and accountability by recommending various transformative measures. A major component in the TRC's report shall be a recommendation for a comprehensive reparations programme. The TRC's contribution to accountability is to be measured by the extent of reparative measures it adopts in its final report. Reconciliation may not be achieved by merely airing the full truth, if the harm done to victims is not repaired meaningfully. The most important aspect of recommendations on reparations should focus on repairing the socio-economic imbalances created by the current authoritarianism.

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[111] Sarkin (n 57 above) 5-20, 44, 53, 127 and 194.

Recommendations of the TRC should also include proposals aimed at vetting, institutional reform and prosecution. The OHCHR recommends that one of the major tasks of a TRC is to recommend the reform of 'dysfunctional and inequitable institutions that created fear' and which 'need to turn into efficient and fair institutions that enjoy civic trust.'[112] The police, the prosecution, the judiciary, the army, the economy and the educational system are some of the most visible institutions that require robust recommendations of institutional reform. The TRC should also recommend the establishment of institutions that should monitor the impact of reform efforts as well as the observance of the rule of law and human rights in the post-authoritarian era.[113] Particularly relevant in this regard is the establishment of democracy fostering institutions, such as a human rights commission, a public protector, a gender commission and so forth.

Following a successful completion of the TRC's task, prosecutions can follow based on its report. As one of the central elements of an integrated transitional justice strategy, prosecution plays a pivotal role in moving a society beyond impunity and a legacy of human rights abuse.[114] In this regard, the report must include proposals for the prosecution of perpetrators who did not apply for amnesty or whose application for amnesty is rejected. The report should also include the name of perpetrators provided that individuals are given ample opportunity to challenge allegations before the publication of the report.

7.7.9 Independence and impartiality

To allow for independence and a fair and balanced inquiry, the TRC should at all times maintain its autonomy. In particular, it shall operate free from political or other influence. In order to freely determine its own specific working methodologies and work plan, including investigation and reporting, independence and impartiality are crucial factors.

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112 OHCHR (n 84 above) 3; see in particular the section dealing with vetting and institutional reform. The document notes that 'reforming institutions contributes to achieving a central objective of an effective and legitimate transitional justice policy: the prevention of future human rights abuses.'

113 OHCHR *Rule-of-law Tools for Post-Conflict States: Mapping the Justice Sector* (2006) 1.

114 OHCHR (n 56 above) 1.

Although the financial support and funding of the TRC is primarily to be covered by the forthcoming transitional government or the government of national unity, this factor should not make the TRC vulnerable to political interference from any group assuming power during the transition. To ensure this, the TRC should be given sufficient powers to determine its own budget as well as to administer its own activities independently. This should include powers to appoint or hire experts as need be.

7.7.10 Other powers

International standards and best practices require that a TRC shall be given powers of investigation, including the right to summon persons to appear before the TRC, visit sites, search premises and individuals, provided that certain procedural requirements of fairness are fulfilled. Sufficient punitive measures shall be developed to monitor individuals or organisations that refuse to cooperate with the TRC. Without such powers, the mandate of the TRC to receive statements from victims, witnesses, communities or interest groups would be hardly achievable. In this regard, a genuine commitment is expected from the forthcoming government in providing relevant information and institutional support, including the provision of safety and security mechanisms that enable the TRC to function effectively and independently. It is natural in this regard to expect the full cooperation of international organisations such as the UN, the EU, the AU, the ICTJ and others. Donors, foundations, or other independent sources are also expected to contribute to the financial and institutional support of the TRC.

7.7.11 Operational period

The period of operation of the proposed TRC should also be clearly defined in its mandate and structure. In terms of the complicated history of human rights violations in Eritrea, the TRC could take a minimum of two and a maxim of three years to accomplish its task successfully. A short period of time may not allow the TRC to establish as complete a picture as possible about the past. On the other hand, a protracted operational period can cause the TRC to lose momentum.

7.7.12 Indigenous legal tradition[115]

The incorporation of the indigenous legal tradition in a future TRC is of vital importance. TRCs are at times regarded as Western implants. They emphasise formal mechanisms of truth-telling and acknowledgement which are widely recognised as embodiments of Western legal tradition. By applying standards which are alien to the local context, the proposed Eritrean TRC should not distance itself from the norms and values of the Eritrean society. It is expected to comply with the objectives and specificities of the national situation. The relationship between memory, healing and reconciliation as seen against the therapeutic and conciliatory role of the TRC, as well as its contribution towards accountability and a culture of human rights, should be promoted against the background of established societal values and knowledge systems of the Eritrean society. In this regard, alternative, informal and traditional mechanisms of healing, truth-telling, acknowledgement and reconciliation, which are deeply rooted in all Eritrean customary laws, may play a more restorative role.

In reference to a TRC imposed as a foreign implantation, Quinn asserts that such kind of process represents a 'top-down' exclusive prescription; while a locally contextualised model of transitional justice represents a 'bottom-up' inclusive process. The former approach does not involve local ownership; hence it fails. The latter approach emanates from a common understanding of the symbols, ceremonies, and institutions widely recognised in affected communities. As a result of express commitment of the affected community, it successfully heals the wounds of the society.[116]

The forthcoming TRC would become effective if it is built upon established and indigenous practices of healing and social coexistence. Like most African societies, communality and interdependence among members of the community are central elements in the Eritrean society. Practically, it is in the public hearings of the TRC that

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115 This section relies heavily on Joanna R Quinn 'Social reconstruction in Uganda: The role of customary mechanisms in transitional justice' (2007) *Human Rights Review* 389-402; Rosalind Shaw 'Memory frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone' 1 (2007) *International Journal of Transitional Justice* 183-207.

116 Quinn 2005 (n 115 above) 389 and 402.

aspects of indigenous restorative justice should assume a prominent role. Public hearings are the main activities of the TRC in which a healing and reconciliation process effectively takes place. This process should be informed by knowledge and practices of indigenous communities constitutive of their meaning and belief systems, values, as well as the substantive dimension of their practices and customs which have survived for centuries. This advances the TRC's incorporation as a local agency rather than as an institution alien to the local context. Although the details and technicalities with regard to this particular proposal are to be spelt out through further research and inquiry, some tentative observations can be offered at this stage.

In order to promote the role of restorative justice in the public hearings of the TRC, procedures should be developed to allow the inclusion of indigenous healing mechanisms practiced by the different ethnic groups. In many rural communities, there are certain rituals and informal ceremonies of healing and cleansing that are practiced routinely in the context of reconciliation and dispute resolution mechanisms. A pertinent example of an indigenous healing and reconciliation ritual can be seen from the following provision of the customary law of *Adkeme Mlgha'e*:

> One who kills shall stand and submit himself in front of the family of the deceased, and shall say 'finish me,' holding a knife, wearing unworthy garments and with a rope on his neck. Afterwards, seven elders and priests with their cross shall ask for forgiveness. Firstly, his soul shall be forgiven, and then shall follow reconciliation. Guarantors shall secure the reconciliation. When reconciliation is done, the wrongdoer shall pay blood money. The blood money shall be paid on an agreed date. If the blood money is to be paid in the form of land, the elders shall oversee the implementation. If the family of the wrongdoer and the wronged are not related, they shall then give each other a boy and a girl. Those who shall give a girl are the family of the wrongdoer.[117]

The TRC clearly cannot implement some of the specific and now archaic remedies referred to in the above mentioned customary law. However, as much as possible from

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[117] The customary law of *Adkeme Mlgha'e*, 51-52. The original Tigrinya text reads as follows: '**ነፍሲ ዝቐተለ ወሮ ተገዲዑ ገመድ ኣብ ክሳዱ ጌሩ ካራ ኣንጠልጢሉ፡ እኔኹ ሓለፍኩ ኢለ፡ ኣብ ቅድሚ ስድራ እቲ ዝሞተ ደው ይበል። ብድሕሪ'ዚ 7 ሽማግለን ካህናትን ምስ መስቀሎምን ንምሕረት ይለምኑ። ቅድም ብነፍሲ ይመሓር፡ ድሕሪኡ ድማ ዕርቂ የቐሙ ዋሕሳት ዕርቂ ውን ይትከሉ። ዕርቂ ምስ ቆመ ጋር ነፍሲ፡ ፈርማን ቅርሽን ይኽፈል። ጋር ነፍሲ ብቆጸራ መ ዓልቲ እዩ ዝኽፈል። እቶም ዝኽፈሉ ድማ ከም ቆጸራኦም ይኽፈሉ። ብመሬት እንተኾነ ዝኽፈል እቲ ጋር ነፍሲ እቶም 7 ሽማግለ እዮም ዘወሃህብዎም። እቶም እተቓተሉ ሰባት ንኖት እንተኾይኖም ኣብ ርእሲ ጋር ነፍሲ ንልን ወድን እዮም ዝወሃቡ። ንል ክህቡ ዝግብኦም ግን ቀተልቲ እዮም።**' Compare this with the Ugandan traditional healing mechanisms of *mato oput*, *nyouo tong gweno* and *gomo tong* as discussed by Quinn (n 115 above) 398.

the process and rituals needs to be incorporated into the TRC hearings, in order to give symbolic effect to the underlying notion of restorative justice. If this indigenous context has to play a catalyst role, the public hearings of the proposed TRC should be designed in such a way that traditional leaders, elders and experts of customary laws should be allowed to take part in the public hearings. To allow this, public hearings should be organised at the local level, including villages and smaller communities, where deeply rooted indigenous healing and cleansing mechanisms can be utilised effectively.

In the Eritrean highland community, for example, the role of the prominent traditional village institutions such as the *baito*, the council of elders (*shimagle*), the *chiqa* and the *nebaros* should be explored purposefully. If need be, the community courts established in 2004 can be transformed in so far as they promote the transitional justice needs of the Eritrean society. On the other hand, a council of traditional leaders and elders representing all Eritrean ethnic groups and customary laws can also be established as an independent organ with an advisory role to the TRC; or some traditional leaders can be nominated to serve in any of the subcommittees of the TRC on a representative basis. This should help in introducing innovative indigenous approaches that enable the entire Eritrean society to heal its wounds via its long held traditions of dispute resolution and healing mechanisms.

The above guidelines together with international best practices developed by the UN and other international organisations can serve as a good starting point for any TRC project that should be contemplated in Eritrea. The current understanding is that a state which follows the above guidelines[118] will have its amnesty recognised by foreign courts and the international community at large. The latest global guidelines for the establishment of

[118] The best example in this regard is South Africa in which the political process that led to the formation of the TRC is internationally recognised as participatory. See Sarkin (n 65 above) 32-34; Lyn S Graybill *Truth and Reconciliation in South Africa: Miracle or Model?* xii and 59; Desmond Tutu *No Future without Forgiveness* (1999) 9; Boraine (n 92 above) 382; Minow (n 92 above) 52 and further; David Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998) 2.

TRCs developed by the UN[119] in 2006 also conform to the proposals initially developed by leading international law publicists such as Dugard and Hayner.

The following observations are important to sum up the foregoing discussion. As stated earlier, a negotiated political transition or an enabling political environment is a core factor for the establishment and operation of a TRC. This is patently absent from the current political reality in Eritrea. Theoretically, the possibility of a peaceful political transition cannot be entirely ruled out in the case of Eritrea. Practically, however, the requisite political commitment is not a top priority to the Eritrean government. As far as Eritrean government officials have not made themselves amenable for a peaceful political transition, the prosecutorial options proposed in the preceding sections are more important than a TRC for Eritrea, especially with regard to the most responsible perpetrators. However, it should be noted that even when the most responsible perpetrators are prosecuted, the role of a TRC for societal healing and social reconstruction is always indispensable.

7.8 Conclusion

As a result of a continued history of injustice, Eritrea is still suffering from atrocious crimes perpetrated by one of the most violent regimes in Africa. Only in the post-independence era, the atrocities perpetrated by the Eritrean government have caused too much suffering to the Eritrean people. Although it is still not too late to reverse the sad course of events in the country, Eritrean government leaders seem to have opted to learn this the hard way.

International crimes of universal concern have been perpetrated in Eritrea with impunity and in fact as part of a widespread, systematic and preconceived government plan or policy. The violations discussed in this study sufficiently meet the threshold of international crimes (crimes against humanity, war crimes and others) as defined by the relevant body of international law. In the light of the government's non-conciliatory and

[119] OHCHR (n 84 above).

non-repentant political culture, international criminal law is one viable legal regime under which accountability mechanisms can be considered. However, the latent shortcomings of prosecutions as a response to massive human rights violations, the exigencies of restorative justice, societal healing and transformation necessitate consideration of complementary, alternative and acceptable forms of accountability for Eritrea.

It can be generally argued that both prosecution and amnesty have their merits. While conditional amnesty accompanied by an extrajudicial commission of enquiry, namely a TRC, seeks to satisfy the right to know and understand the past, prosecution emphasises the right to justice and society's demand for retribution. The one aims at reconciliation and restoration, and the other at retribution. On the one hand, there are increasing demands in terms of international opinion that prosecution and justice should be pursued strictly in dealing with the crimes of a past regime, especially for those regarded as international crimes. On the other hand, domestic opinion may give priority to other societal concerns. In fact, if conditional amnesty administered by TRCs is the only viable option for a peaceful political transition, it can acceptably be taken as a major model of transitional justice.

The role of a TRC is indispensably relevant for Eritrea. It should be crafted to fit the particular national circumstances of the country. In this regard, creativity and sensitivity to Eritrean national needs are the most crucial factors that have to be noted when defining the parameters of the proposed TRC. One of the most important considerations in the formation of a future Eritrean TRC is wide and inclusive process of consultation among all stakeholders. However, the current malpractices of the Eritrean government will continue to inform the type of choices that have to be adopted in Eritrea.

In spite of the continuous calls for a peaceful political transition, the Eritrean government has remained intransigent. In this regard, if transition transpires as a result of a violent conflict, the applicability of conditional amnesty for the current leaders is less likely. However, even in the event of a full military victory, due to other relevant factors, such as the needs of societal healing, a TRC will be an indispensable component of the

forthcoming Eritrean model of transitional justice. Nonetheless, without the requisite enabling political circumstances any proposal for the establishment of a TRC in Eritrea may remain a distant dream. When the right political milieu transpires, the proposed TRC should be established based on the international standards and best practices discussed in this chapter.

In the meantime, however, Eritrean opposition groups, civil society organisations, prominent personalities and other stakeholders should formally begin meticulous deliberation on the establishment of a TRC that can possibly take place during the post-PFDJ era. Such deliberations are expected to refine the parameters and guiding principles of the forthcoming TRC which have to be formally endorsed by a duly constituted representative body. It is hoped that the tentative guidelines developed in this chapter will serve as a starting point for further planning and implementation. In this regard, the EDA is considered the most appropriate political forum to initiate, lead and organise deliberations on such an important national project. However, the EDA is also equally expected to create a favourable atmosphere for all stakeholders who should be given equal opportunity to add their inputs in the process. Prominent among such stakeholders are the two networks of Eritrean civil organisations in Europe and North America namely, the NECS-E and the ESJHR.

SUMMARY OF MAIN FINDINGS AND RECOMMENDATIONS

Outline

Summary of main findings

The brief post-independence history of Eritrea has seen serious violations of human rights and humanitarian law which amount to international crimes. The factual and legal analysis of the major incidents and events that took place between 24 May 1991 and 30 May 2008 reveals that crimes against humanity, war crimes and crimes of aggression have been perpetrated in Eritrea in an alarming manner, affecting hundreds of thousands of people. In most cases, human rights violations have been perpetrated under a clear and premeditated government plan of persecution and repression. Although some of the incidents discussed in this study appear to be sporadic events occurring only in a specified time and with a specific objective, most of the violations portray a clear, coherent, systematic and widespread government policy of repression. From all accounts analysed in this study, the author finds that the vast majority of crimes have been carried out as a premeditated government policy of killing, maiming, torturing and persecuting individuals or groups who are believed or perceived to have a different political conviction or religious tendency. Accordingly, the most common grounds of persecution in Eritrea are political and religious factors.

There is a reliable body of evidence indicating that the crimes of persecution and torture on the basis of political or religious views have been perpetrated in Eritrea in a widespread and systematic manner; hence constituting crimes against humanity as defined by the relevant provisions of international law. There are also violations

perpetrated in the context of the 1996 Eritrea-Yemen border conflict, the 1998-2000 Eritrea-Ethiopia border conflict, as well as other incidents in the course of internal and international armed conflicts. These cases portray categories of crimes perpetrated with a political motive of a cross-country nature. It was concluded that a certain group of high-ranking government officials can be tentatively identified as the most responsible perpetrators and accordingly they bear individual criminal responsibility for serious violations of international law since 1991.

It is estimated that only the number of victims of arbitrary detention since Eritrea's independence in 1991 may exceed 20 000. As a result of avoidable international conflicts Eritrea has sustained the loss of more than 19 000 soldiers, the disablement of tens of thousands, as well as the displacement and deportation of more than 700 000 citizens. The human anguish Eritrea has suffered since 1991, as a result of the belligerence and intransigence of the current leaders, is exceedingly high.

The unabated perpetration of international crimes represents a hideous blot on the pages of post-independence Eritrean history. Together with the regional instability prevailing in the Horn of Africa, the crisis constitutes a threat to international peace and security. The situation merits intervention by the international community. It is, therefore, strongly recommended that the situation in Eritrea should be immediately referred by the Security Council to the ICC pursuant to article 13(b) of the ICC Statute. In the meantime, the international community should adopt interim punitive measures aimed at alleviating the suffering of the Eritrean people, as well as those of other peoples in the Horn of Africa. With all its potential and having the requisite political commitment, Eritrea can competently recover from the current crisis. At the same time, however, Eritrea represents a bleak picture of a failed state in the making. The role of the international community is indispensable in this regard as it is expected to act urgently lest it condemns itself to repeat the same mistakes of the past.

Although immense damage has been done in Eritrea by the current government, it is not too late to reverse the course of events. If the Eritrean government officials make

themselves amenable to a negotiated and peaceful political transition, conditional amnesty administered by a democratically constituted TRC should be taken as an acceptable transitional justice option. In this regard, any TRC that could be established in Eritrea is expected to comply with international standards and best practices.

Recommendations

This study makes the following essential recommendations for combating impunity, ensuring accountability and enhancing a peaceful political transition to democracy in Eritrea.

Recommendations with regard to the Eritrean government

First and foremost, the Eritrean government must be amenable to a peaceful political transition in the country. Respect for human rights and fundamental freedoms of all Eritreans must be restored immediately. A halt must be called to the abusive and indefinite NMSP and the extension of the same abusive purported development programme, the WYDC. All political prisoners detained in Eritrea – some for several years – must be released immediately without preconditions or should be brought before an impartial and independent court of law where they can challenge any accusations against them and ask for appropriate remedies. The government must compensate the wrongs the victims have suffered. Investigations must be conducted with regard to all abuses perpetrated since 1991 or before with a view to facilitating a smooth political transition to democracy, uncovering the misdeeds of the past in full, and establishing as complete a picture as possible about the history of injustice. In order to halt future violations, the independence and impartiality of the judiciary must be strengthened and courts should be endowed with adequate powers to adjudicate on human rights violations. The required assistance in this regard must be sought from the international community which can be implemented via training of judges, prosecutors and lawyers with particular emphasis on human rights law, humanitarian law and international criminal law.

Academic institutions, especially the University of Asmara, which is the only university in the country, must be reinstituted to embolden the cultivation of qualified professionals with the requisite legal education and other disciplines relevant for transitional justice. International human rights monitoring groups such as AI, HRW, UN, EU and AU treaty bodies, and others must be given unimpeded access to monitor the situation of human rights in Eritrea. The Eritrean government must ensure the protection of all victims and possible witnesses of human rights violations. The Eritrean government must encourage the creation of a TRC via a broad, consultative and democratic process which shall include all stakeholders such as victims, civil society groups, Eritrean Diaspora communities, exiled politicians, intellectuals, religious leaders and others. Any initiative for the establishment of a TRC should comply with international standards and best practices developed by the OHCHR and other renowned international law publicists. Amnesty that can be offered to the leaders should by no means serve to indemnify perpetrators.

Recommendations with regard to the international community

All the crimes documented in this and other studies meet the threshold of international crimes as established by the ICC Statute. In light of the gravity of the crimes perpetrated by the Eritrean government and the failure of the latter to combat impunity, the international community is duty bound to intervene by referring the matter to the ICC Prosecutor via Security Council referral. All other democratic countries of the world should also cooperate in prosecuting incumbent government officials who are not protected by the doctrine of sovereign immunity. The recommendations designed to break the cycle of impunity would hardly be attainable without the effective exercise of universal jurisdiction by democratic countries of the world. Meanwhile, the international community is also expected to implement interim punitive measures such as travel bans and asset freezes against targeted individuals deemed most responsible for the perpetration of international crimes and destabilisation of international peace and order.

In the event that the international community proposes to encourage long-term plans of domestic prosecution by Eritrean courts, it must be noted that in its current state the Eritrean judiciary is less than likely to meet minimal international standards of fair trial and justice. As a result, greater financial and institutional support should be extended from the international community. However, with the international dimension of some of the crimes perpetrated by the most responsible suspects, it is recommended that prosecutorial initiatives have an international character. If need be, an acceptable formula should be found to have foreign judges and prosecutors participating in all stages of proceedings. The involvement of the international community in the national prosecutions can be implemented, if need be, by the establishment of mixed or special tribunals. Alternatively, crimes perpetrated against Eritreans may be prosecuted inside Eritrea and crimes perpetrated against nationals of other countries may also be prosecuted by an international or mixed tribunal. A most important consideration is that any prosecutorial proposal, whether domestic or international, must be compliant with international fair trial principles.

With regard to the stalemate on the Eritrea-Ethiopia border conflict, it is imperative that the international community should impose punitive measures on the party who is frustrating the implementation of the peace plan, including the resumption of political dialogue between the leaders of the two governments. Ethiopia's refusal to cooperate in the demarcation of the common border is an abhorrent violation of the country's international obligation. Equally, Eritrea's rejection of whatsoever type of political dialogue and unwillingness to facilitate normalisation as well as refusal to cooperate with peacekeeping forces is grossly unacceptable. This sends a message that the simple delimitation and demarcation of the border will not bring a lasting solution in the region. The international community must pressure and encourage the parties to engage in a comprehensive peace plan which will seek solutions to the causes of the war and not only to its consequences. The international community, via the UN Security Council, may also utilise its Chapter VII powers against any party which fails to abide by international law. Only then can there be a lasting peace in the region. The use of force by either of the two parties should be condemned in the strongest of terms.

With the exceedingly vast number of low- and middle-level perpetrators, a comprehensive prosecutorial plan to punish each and every perpetrator, regardless of the degree of guilt, is practically impossible in Eritrea. To complement all other accountability efforts, the establishment of a TRC, via a democratic and participatory process, is highly recommendable. The international community should strongly encourage this. Recognising the unacceptability of blanket amnesty for any crime, this study recommends that conditional amnesty administered by a TRC should be considered as a major component of transitional justice. This should be encouraged especially if the current leaders genuinely commit themselves to a peaceful political transition without compromising the requirements of an all-inclusive national reconciliation and the demands of accountability.

A balanced assessment of the competing needs and interests of the Eritrean society (having an intricate and protracted history of political violence) and that of the international community must be duly reconciled and recognition must be afforded to conditional amnesty which is the result of a meticulous balancing of such needs and interests. Admission of guilt accompanied by a genuine and remorseful repentance and contrition is highly regarded in the Eritrean customary law systems. If a genuine repentance and contrition can be proven incontrovertibly on the part of perpetrators, due consideration should be given to its contribution for a smooth and successful transition. This must be accompanied by comprehensive mechanisms of redress, reparations and restorative justice. In this regard, the role of indigenous legal tradition in the proposed transitional justice initiative must be appreciated properly. Such societal needs must be strongly supported by the international community. It is less likely for Eritrea to transit into a new democratic era without consideration of these factors.

Recommendations with regard to other actors

The attainment of the above goals is primarily a responsibility that should be met by Eritrean political forces, the government and all opposition groups in exile. Given the closed political culture of the Eritrean government, exiled political forces, Eritrean

Diaspora intellectuals and activists are expected to play a prominent role in this regard. To give effect to the above recommendations, urgent action and planning is required from such stakeholders. It is highly recommended that a consortium of legal academics, professionals, experts and activists shall be established as a matter of urgency to assess transitional justice options for Eritrea. In this regard, the resolutions adopted at the latest successful congress of the EDA must be supported by all stakeholders, including the international community.

The proposed consortium of experts must evaluate existing evidence and documentation on the nature of the international crimes committed by Eritrean government officials. It must collect empirical data, testimonies and other relevant information with a view to establishing a reliable body of evidence and reference material for further prosecutorial proposals. The consortium must also, using acceptable standards such as those developed by the Darfur Commission, identify most responsible suspects regarding the perpetration of international crimes in Eritrea and access the feasibility of prosecution of such suspects in foreign municipal courts or before the ICC. It should also facilitate and lead national dialogue and deliberation on issues of reconciliation as relevant to transitional justice with a clear objective of laying the requisite foundation for a future TRC. It must bring together all Eritreans in the Diaspora which constitute a great proportion of the total Eritrean population, not only in terms of absolute numbers, but most importantly in terms of their contribution to the national economy and government expenditure. The consortium must also be mandated to propose other national strategies relevant for a peaceful political transition. In all aspects, the composition of such a consortium must be as representative as possible in terms of the social stratification of Eritrean society, geographic factors of the Eritrean Diaspora communities, political orientation and other relevant factors.

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Srat Adkeme Mlgha'e (ስርዓት ኣድከመ ምልጋእ)

Srat Adghena Tegheleba (ስርዓት ኣድግና ተገለባ)

Srat Habsullus (ስርዓት ሃብስሉስ)

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