‘Ethiopian Red-terror’ Trial before the District Court of The Hague: Critical Analysis of the *‘Context’* and *‘Nexus’* Elements of War Crimes.

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Abstract

The main objective of this paper is to examine the existence of the ‘nexus’ element in the war crime conviction of Mr. E. Alemu in the ‘red terror’ war crime trial before the Hague district court (Hague Court). For an offence to be qualified as a war crime there must be a ‘sufficient nexus’ between it and an armed conflict. The nexus requirement is mainly used to distinguish war crimes from other international crimes or ordinary crimes committed on occasion of an armed conflict. The study concludes that the Hague court employed an overly broad interpretation in determining both the context element (armed conflict) and the ‘nexus’ element in the ‘red-terror’ war crime trial which resulted in diverging interpretations of the same material acts and context by the Hague Court and the Federal High Court of Ethiopia (FHC). This approach undermines legal certainty and the very purpose of the requirement of nexus.

Keywords War crime, Sufficient nexus, Armed conflict, Red-terror, Urban violence

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1. Introduction

Following the 1974 revolution[1], in the struggle for ownership and leadership of the revolution, Ethiopia experienced unprecedented political unrest, activism and violence particularly among urban intellectuals.[2] Political unrest ultimately led to the military *Derg* regime taking power. Its revolutionary violence included summary execution, unlawful detention, enforced disappearances and torture aimed at eliminating opposition political groups in the capital and across major cities of the country, widely remembered as the 'Ethiopian Red-terror'.[3]

On 15 December 2017 the district court of The Hague in the Netherlands (hereinafter; The Hague Court) rendered a war crime verdict against Mr. E. Alemu, a former Ethiopian higher government official.[4] Alemu, who administered the province of Gojjam during the revolutionary *Derg* regime[5], faced trial before The Hague court for his involvement in the red-terror crimes committed in Gojjam during the period from 1 February 1978 up and until 31 December 1981. The Dutch public prosecutor before the international crimes chamber charged the accused for four indictments of war crimes based on the evidences retrieved from a file documented in his earlier trial in Ethiopia and victims' testimony living abroad.[6] The trial was concluded by a war crime conviction for pronouncing and imposing arbitrary detention in cruel and degrading circumstances, torture and killing of protected persons which resulted in a sentence of life imprisonment.

Since 1994, on the other hand, *Derg* former higher government officials including president M. Haile-Mariam have been prosecuted by the office of the Special Prosecutor (SPO)[7] before the

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[1] Economic and political grievances led to mass uprisings against the rule of Emperor Haile Selassie I. The uprising led to the overthrow of Ethiopia's last monarchy.

[2] J. Weibel, 'Let the Red Terror Intensify': Political Violence, Governance and Society in Urban Ethiopia, 1976-78, *International Journal of African Historical Studies* 48 (1) (2015), p.15

[3] G. Tareke, The Red-terror in Ethiopia, *Journal of Developing Societies* 24 (2) (2008), pp.183-206.

[4] District Court of The Hague, *Prosecutor v. Eshetu Alemu*, Judgment, 15 December 2017 (ECLI:NL:RBDHA:2017:14782).

[5] *Derg*, which literally means council, was established in June 1974 by representatives of various security sectors of the country before the dethroning of Emperor Haile-Selassie I. In September 1974, the council dethroned the imperial regime and established a Provisional Military Administrative Council (PMAC) and ruled the country from 1974-91.

[6] *Alemu*, *supra* note 4, para.2: Count 1: Deprivation of freedom and inhuman treatment, Count 2: Torture , Count 3: murder of 75 prisoners and Count 4: Deprivation of freedom and inhuman treatment during the period from August 1978 to December 1981.

[7] The office was established by the transitional government in 1992 immediately after the fall of the *Derg* regime with a special mandate to prosecute higher officials of the regime. *See* Proclamation No. 40/92, 1992.

Federal High Court of Ethiopia (FHC) in what is often referred to as the 'Red-Terror Trial'. M. Haile-Mariam and several high profile officials were found guilty of genocide and crimes against humanity for ordering the killing and persecution of 'political groups'.[8] Alemu, one of the co-accused in Mengistu case, was tried in absentia and found guilty of the crime of genocide against 'political groups' under the 1957 penal code of Ethiopia.[9] At the time of this conviction he was already living and working in Amsterdam, the Netherlands.

This paper focuses on the war crimes conviction of Mr. E. Alemu by The Hague Court (hereinafter; red-terror war crime trial). War crimes are 'serious violations of the laws and customs of war' under the GCs, and States have a duty to prosecute international crimes which amount to 'grave breaches' under the GCs. In order for an act to constitute a war crime, there must (1) be an armed conflict, (2) a 'sufficient nexus' or 'link' between the criminal act and the armed conflict, geographical, personal or other reasonable link, and (3) the offence must be of a serious nature.[10] Accordingly, this paper appraises the law regulating armed conflict (section 2) and applies it to the situation of revolutionary Ethiopia, examining whether there was an armed conflict during the period relevant to the indictments and the status of the groups (implicated in the case) in the conflict (Section 3); and whether the alleged war crime offences committed by the accused are linked to such armed conflict (Section 4). This section also appraises the diverging interpretations of the same act and context by the Hague court and FHC.

2. Criteria for Existence of Armed Conflict

The four Geneva Conventions (GCs) of 1949 and Additional Protocols (APs) of 1977 were basically adopted to protect victims of armed conflicts. The conventions and protocols provide detailed rules regulating means and methods of war to realize the very purpose of international humanitarian law, i.e., protection of protected persons and objects during hostilities.

[8] Federal High Court, *SPO v. Colonel Mengistu et.al*., File No.1/87, Trial Judgment, 12 December 2006. Under Ethiopian law, the definition of genocide extends to the destruction of *'political groups'* in addition to national, ethnic, racial and religious groups. *See also* M. Tessema, Prosecution of Politicide in Ethiopia: The Red Terror Trials, T.M.A Asser Press (2018), pp.171-214.
[9] Federal High Court, *SPO v. E. Alemu*, File No.921/89, Trial Judgment, 8 May 2000.
[10] ICTY, *Prosecutor v. Blaskic*, Trial Judgment, 3 March 2000, Case No.IT-95-14-T, para.69; ICTY, *Prosecutor v. Limaj et al.*, Trial Judgment, 30 November 2005, Case No.IT-03-66-T, para.83

Disregarding these rules may amount to a war crime (grave breaches of the GCs) and entail individual criminal responsibility under international criminal law.[11]

Ascertaining the existence of an armed conflict, parties to the conflict and nature of the conflict are necessary conditions to decide on the fate of persons suspected of violating the rules of war. Even though the existence and definition of armed conflict has significant legal consequences, the GCs and ICC statute fail to provide a precise definition of what constitutes an armed conflict. The case law of the *ad hoc* criminal tribunals has contributed to defining and understanding the meaning of armed conflict. The ICTY in the *Tadic case* set out a comprehensive definition:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State. ... International humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[12]

Generally, only two types of armed conflict are recognized: international armed conflict (IAC), fought between two or more states as per Common Art.2 of GCs or as wars of colonial domination, alien occupation and racist regime according to Art. 1(4) of Additional Protocol (AP) I; and non-international armed conflict (NIAC), fought between a state and non-state armed groups as per Common Art.3 of the four GCs and Art.1 AP II.

Determining the existence of armed conflict as well as characterizing the type of armed conflict and its recognition is not always an easy task, particularly when the conflict is of an intra-State nature.[13] Most of the time governments, in whose territory the conflict is ongoing, are not willing to recognize the situation as 'armed conflict' for legal and political reasons even if the conflict is very intense.[14] Still, states agreed to insert a single provision (Common Art. 3) into each of the four GCs to provide minimum standards of humane treatment for persons not or no longer

[11] Cf. The Four Geneva Conventions of 1949 Articles 50, 51, 130 and 147 respectively.
[12] ICTY, *Prosecutor v. Tadic*, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-A, para.70
[13] Y. Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press (2004), p.14
[14] L. Moir, The Law of Internal Armed Conflict, Cambridge University Press (2002), pp.3-21.

participating in a conflict 'not of an international character'.[15] The norm renders armed non-state actors, subject to certain conditions, parties to a conflict with a number of key duties and responsibilities. The following sub-section analyses the criteria for the existence of NIAC as per Common Art.3 of GCs.

2.1. Non-international Armed Conflict (NIAC)

There are two scenarios of NIAC based on the requirements of Common Art.3 GCs and AP II. During the period specified in the indictments Ethiopia was party to the 1949 GCs, but not to the APs. Therefore, characterization of the situation is based on the requirements of Common Art.3 GCs, relevant cases and customary international law.

Armed conflicts not of an international character are conflicts that take place in the territory of a State when there is a protracted conflict between the government and organized armed groups, or between armed groups themselves.[16] However, common article 3 does not explicitly require non-state armed groups to fulfill certain conditions to become a party to NIAC. The trial chamber in *Tadic* ruled that:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.[17]

International jurisprudence emphasized on the 'intensity of the conflict' and the 'degree of organization' of the parties to the conflict as a basic criterion for the existence of a 'protracted NIAC'. In practice, the fact assessment of the protracted nature of the violence refers to the level of intensity and duration of the conflict.[18] Several indicative factors have been used in case law to determine intensity. The ICTY takes into account the following factors:

[15] ICRC, Commentary on the First Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Cambridge University Press 2016, Art.3
[16] ICC Statute, 17 July 1998, ISBN No.92-9227-227-6, Art.8 (2) (f); *Tadic, Supra* note 12, para.70
[17] ICTY, *Prosecutor v. Tadic*, Trial Judgment, 7 May 1997, IT-94–1-T, para.562
[18] ICC, *Prosecutor v. Bemba Gombo*, Trial Judgement, 21 March 2016, ICC-01/05-01/08, paras.139-40

> […] the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by the shelling or fighting; the quantity of troops and units deployed; existence and change of frontlines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; closure of roads. [19]

The level of intensity may also, as stated by the ICC, be derived from objective standards such as ability to mobilize and distribute weapons, duration and strength of military operation, control over territory and consideration of the situation by international organizations, like UNSC.[20]

An armed group also required to exhibit a sufficient degree of military organization to conduct hostilities on behalf of the party to the conflict.[21] In most cases, the organizational adequacy of a group is reflected in its ability to conduct a sustained and intense military operation and capacity to negotiate. To assess whether certain armed entities exhibit the required level of organization, a series of indicative factors are employed by the *ad hoc* tribunals and the ICC, including existence of headquarters, presence of a command structure, ability to plan, coordinate and carry out sustained military operations, ability to speak with one voice and negotiate agreements with State or non-state entities and ability to implement the basic obligations of Common Art.3.[22] Once the requirements are satisfied armed non-state actors become party to the conflict and automatically assume a duty to comply with the rules stated under common Art.3 GCs. International custom and jurisprudence consider serious violations of common Art.3 and 'other serious violations of the laws and customs of war' in NIAC as a war crime.[23] Therefore, a court charged with a war crime charge in NIAC needs to examine the actual situation in line with the requirements of threshold of 'intensity' and 'organization'.

Under IHL, not every act of violence amounts to an armed conflict. In order to claim the existence of an armed conflict, particularly NIAC, during a certain period of time, examination

[19] ICTY, *Prosecutor v. Boskoski & Tarculovski*, Trial Judgment, 10 July 2008, IT-04-82-T, para.177
[20] ICC, *Prosecutor v. Thomas Lubanga*, Trial Judgment, 14 March 2012, ICC-01/04-01/06-2842, para.538
[21] ICC Statute, *supra* note 16, Art. 8 (2) (f)
[22] *See Limaj et al*, *supra* note 10, paras.85-90; *Lubanga*, *supra* note 20, para.537
[23] *Tadic*, *supra* note 12, para.98

of the specific circumstances of the case like the nature, scope and purpose of the conflict is required. Since no state other than Ethiopia is mentioned in the case under investigation, the focus if discussion is limited to a NIAC. The following section will make use of these indicative factors to examine whether the violence in Ethiopia satisfied the requirements of 'intensity' and 'organization'.

3. The Situation in Ethiopia during the Period Relevant to the Indictments

3.1. Overview of the situation*: 'Secessionists'* and *'Anti-revolutionists'*

Several political groups opposing the military *Derg* government, notably the EPLF[24], TPLF[25], OLF[26], EDU[27] and EPRP/MESION[28], emerged in Ethiopia in the 1970s. From the outset, the ethno-nationalist organizations (EPLF, TPLF & OLF) used force to achieve secession/independence of the people they represent.[29] EDU and EPRP, on the other side, were civilian political organizations opposing the military government and sought for the establishment of a civilian government. There was a clear difference among the opposition groups in terms of organizational structure and the political goal they sought to achieve.[30] Relatively, EPLF and TPLF were well organized in leadership and militarily and determined to achieve their respective goals militarily.[31] EPRP and EDU, on the other hand, due to

[24] EPLF (Eritrean People's Liberation Front) was established in 1977 by splinter groups from ELF (Eritrean Liberation Front) emerged in 1960. EPLF fought the *Derg* government and secured Eritrea's independence in 1991.
[25] TPLF (Tigray people's Liberation Front) is founded in 1975 that fought the *Derg* from the provinces of Tigray & Gondar for liberation of Tigray people, achieved a military victory in 1991. Later the idea of secession was replaced by self-determination.
[26] OLF (Oromo Liberation Front) was established in the 1970s and struggled for the independence of Oromia.
[27] EDU (Ethiopian Democratic Union) was not a regional independence movement but a movement which grew out of the monarchial regime ousted by the revolution in 1974.
[28] EPRP (Ethiopian People Revolutionary Party) and MESION (all Ethiopian Socialist Movement) were the two most prominent civilian political organizations of the early revolutionary era in urban Ethiopia, founded by students before the 1974 revolution. Initially they were united in their opposition to military rule and their demands for the establishment of 'provisional people's government'. Later, mainly triggered by the various reforms taken by the *Derg* government in its early period of power, MESION suspended its political opposition and allied itself with the military government. This stirred tension and violent confrontation between the two opposition groups on the one hand and between EPRP and the *Derg* government on the other hand.
[29] G. Tareke, The Ethiopian Revolution: War in the Horn of Africa, Yale University Press (2009), pp.59-65, 84-9
[30] *Id.*, pp.65-75, 86-8, 98-110
[31] R. Reid, Frontiers of Violence in North East Africa: Genealogies of Violence since 1800, Oxford University Press (2011), pp. 190-208.

organizational problems and division among their leadership, failed to achieve their goal of a revolutionary change in Ethiopia. They were later quashed by the *Derg's* brutal measure due to their violent opposition and driven from their rural hideout by TPLF fighters for reasons of political disagreement.[32] Although all political forces opposed the *Derg* regime, they were irreconcilable political groups in their approach toward the regime. Thus, the military government branded EPRP & EDU as 'anti-revolutionists'; whereas OLF, EPLF and TPLF as 'secessionists'.

Since 1976, EPRP strongly defied the legitimacy of the revolutionary military government in underground using the influential newspaper *Democracia*.[33] They demanded for the immediate removal of the *Derg* and the establishment of a 'provisional people's government'. The *Derg* considered the demand a heavy challenge in its effort to institutionalize military rule, denouncing EPRP as 'anarchist' and 'anti-revolutionist'.[34] Frustrated by the governments' uncompromising stance, EPRPs' opposition changed to a strategy of 'urban violence' and terror aimed at assassination of government officials and allies.[35] In 1977 the *Derg*, under M. Haile-Mariam's chairmanship, prepared to violently liquidate oppositions which marked a decisive turning point for the Ethiopian 'red-terror'.[36] Haile-Mariam, in his public statement, vowed that 'only those who are opposed to imperialism, feudalism and bureaucratic capitalism and who are genuine revolutionaries and patriots will have a place in socialist Ethiopia'.[37] According to observers, EPRPs' stance on 'people's government' and 'urban violence' constituted the final rapture and set the stage for the 'red-terror'.[38] The violence continued and intensified from both EPRP and the *Derg*. In response to 'urban violence' by EPRP, the *Derg* across the country stared to take the so called 'revolutionary measures'[39] against 'anti-revolutionaries'. For instance, the comprehensive house-to-house 'search campaign' of March 1977 in the capital and provincial

[32] *Ibid*; Tareke, *supra* note 29, pp.85-9
[33] M. Chege, The Revolution Betrayed: Ethiopia, 1974-9, *Journal of Modern African Studies* 17 (3) (1979), p.369
[34] J. Wiebel, The Ethiopian Red Terror, in Oxford research encyclopedia of African history, Oxford University Press (2017), p.18
[35] T. Haile-Mariam, A history of Nationalism in Ethiopia: 1941-2010, PhD Thesis on file at AAU (2013), p.217
[36] G. Tareke, The History of the Ethiopian Revolution and the Red Terror, in A. Mahoney (ed.), Documenting the Red Terror: Bearing Witness to Ethiopia's Lost Generation, Ottawa/ERTDRC North America Inc. (2012), pp.41-57.
[37] Weibel, *supra* note 34, p.18
[38] B. Zewde, The History of the Red Terror: Contexts and Consequences, in K. Tronvoll, C. Schaefer and G. Aneme (eds.), The Ethiopian Red Terror Trials: Transitional Justice Challenged, Boydell & Brewer (2009), pp.17-32.
[39] The 'revolutionary measure' literarily means summary execution of anti-revolutionist with a higher rank and suspected of a serious crime. Others, with lower rank, were subjected to arbitrary detention, torture and inhuman treatment based on the level of their participation in 'urban violence'. *See* Wiebel, *supra* note 2, p.19

cities took the lives of several prominent EPRP members.[40] The campaign targeted at hidden weapons, opposition activism and propaganda materials. At *kebele* label, 'revolution defense squads' were also established and charged to extend the 'revolutionary measures' to household level.[41] There was also a 'mass confession' and 'self-denunciation' strategy by the regime against alleged EPRP members in the government apparatus in order to break them and repress their counter-revolutionary activities by presumption of guilt.[42] Almost all urban life was affected by the period's violence which is labeled as a period of 'sustained state sponsored terror' characterized by a grave violation of human rights.[43]

3.2. Reflections on the *'Intensity'* and *'Organization'* Test

In the red-terror war crime trial, the court heavily relied on the jurisprudence of the *ad hoc* International Criminal Tribunals (ICTY, ICTR) and ICC to flesh out the requirement of what constitutes a war crime of a non-international character taking place in the territory of one country, namely a high level of organization of the parties involved in the conflict as well a high level of intensity during the carrying out of hostilities. The court was of the view that both requirements were met in Ethiopia and decided, in its judgment, that the alleged criminal acts of the accused were closely related to armed conflict.[44] The court provided three justifications for this ruling: there was a '*protracted NIAC'* between government forces and EPLF, TPLF, OLF, EDU and EPRP during the period relevant to the indictments; EPRP was '*sufficiently organized'* and involved in the conflict; and there was '*mutual cooperation'* between EPRP and other armed groups that fought the *Derg* regime. The court identified members or sympathizers of EPRP as victims. Other groups like MESION and EDU, though they too were heavily affected by the violence, were not acknowledged as victims. Given the involvement of several actors in the conflict during the specified period, the status of EPRP vis-a-vis other armed groups must be assessed based on factual circumstances and indicative factors of 'intensity' and 'organization'.

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[40] *Ibid.*
[41] 'Revolution defense squads' were civilians recruited from among various sectors, charged with carrying out police duties at *kebele* (smallest administrative unit). *See* Wiebel, *supra* note 2, p.20
[42] Weibel, *supra* note 34, p.20.
[43] G. Aneme, Apology and Trial: The Case of the Red Terror Trial in Ethiopia, *African Human Rights Law Journal* 6 (1) (2006), pp.66-7.
[44] Alemu, *supra* note 4, paras.7 & 14

I. ‘Secessionists’ – EPLF, TPLF, and OLF

Starting from the late 1970s the *Derg* government was involved in separate armed skirmishes with several secessionists forces. Resistance to central authority, in the form of wars of liberation, grew wider and intensified on various fronts.[45] Although fighting separately, the secessionists had joint purposes and fought within the context of sufficient intensity and level of organization, becoming victorious in 1991. Particularly EPLF and TPLF engaged in full-fledged conventional armed conflict with government forces. They controlled the majority of the territory of the respective provinces, mobilized resources, blocked or besieged towns and had large numbers of military personnel and logistics[46]. The *Derg*’*s* response in areas occupied by the liberation fronts was uncompromising. As a result, a significant number of refugees were forced to flee the fighting provinces. Therefore, arguably, there was ‘protracted armed violence’ with the required intensity for the purposes of common article 3 NIAC between government forces and secessionists.

During the period relevant to the indictments, EPLF, TPLF & OLF had command leaders, consultative bodies, political programs and command-units to plan and conduct a sustained military operation in an organized manner.[47] The government had deployed a large number of troops in the provinces of Eritrea and Tigray in an effort to abate the threat of EPLF and TPLF insurgents.[48] There was also a special government force in Asmara (Eritrea), trained and equipped for counter insurgency operations.[49] For instance, among several operations aimed to eliminate EPLF and TPLF insurgents, ‘*Operation Red Star’* (1981) was settled in favor of the secessionists and the government suffered heavy causalities.[50] EPLF also reported significant numbers of casualties and prisoners. This indicates that the ‘secessionist’ among opposition groups reached the level of organization required to a NIAC.

II. ‘Anti-revolutionists’ - EPRP

[45] Reid, *supra* note 31, pp.183-88.
[46] *Id.*, pp.192-99; Tareke, *supra* note 29, pp.63-75, 91-8
[47] Tareke, *supra* note 29, pp.177-81.
[48] *Id.*, p.46
[49] *Id.*, p.118
[50] *Id.*, pp.178-80, 218-9, 225-39

EPRP initiated a campaign of 'urban violence' and terror in September 1976, involving bombings of any symbols of the government and assassinations of public officials and supporters (mainly MESON) in the capital and provincial cities.[51] The campaign was labeled 'white-terror'. During the ensuing government-orchestrated 'red-terror' campaign 'revolution defense squads' systematically chased, arrested and killed suspected EPRP members and sympathizers in several cities including Debre-Markos where the alleged crimes were committed. The question is whether violent opposition and its forceful suppression by the government satisfy the requirements of 'intensity' and 'organization' to make EPRP a party to the conflict.

The Hague court concluded that there was 'a protracted and intensive armed violence between *Derg* and EPRP'.[52] The courts' assessment relied on acts of violence and terror by 'urban armed wings' (in the words of the court) against government officials and supporters. However, the requirement of intensity demands 'protracted' violence that goes beyond sporadic acts of violence or terror as a relevant factor.[53] Considering the involvement of several actors, the court should have examined the activities of EPRP separately and in line with the various indicative factors used to ascertain threshold of intensity; particularly EPRP's ability to plan and carryout military operations for a prolonged period of time, places of military confrontations or front lines, duration of the conflict, existence of command structure and units, the type of weapons they used, number of causalities and destructions caused by the fighting. Of course there were insurrections and attacks mainly in towns, but were indiscriminate, short-lived, sudden, unorganized and carried out clandestinely. The killing squads' strategy of 'urban violence' underscores the group's inability to conduct sustained military operations and points instead to criminal acts. The violence falls short of the requirements of protracted violence and thus be treated as instances of internal disturbance and terror. The Hague courts' assessment of facts and conclusion that the violence between *Derg* and EPRP/EPRA fulfilled the requirements of threshold of intensity for common art.3 NIAC is therefore inaccurate.

The Hague court also considered the existence of cooperation between EPRP and other armed group against *Derg* as a fulfilling factor for the organizational and intensity requirement. The court concluded that 'there was a more than incidental cooperation between EPLF on one side

[51] Haile-Mariam, *supra* note 35, p.217
[52] Alemu, *supra* note 4, para.7.5
[53] ICC, *Prosecutor v. Bemba Gombo*, Trial Judgment, 21 March 2016, ICC-01/05-01/08, paras.139-40

and EPRP on the other side'.[54] The ruling was entirely based on the material assistance given by EPLF to other groups including EPRP. A party claiming belligerent status must demonstrate sufficient organization that enables them to carry out sustained and concerted military operations. To claim a more than incidental cooperation and belligerency status, the groups should demonstrate a common plan or goal, common responsible command, a clear relationship of dependence and allegiance between them. Material assistance is not determinative for the existence of more that incidental military cooperation. The court didn't establish the existence of indicative factors beyond reasonable doubt. Therefore, the cooperation among the groups was incidental and temporary. Further, the mere fact that all oposition groups cooperated against the same enemy (*Derg*) doesn't automatically assure any one of these groups (EPRP in this case) fulfilling the 'organizational' test. The level of organization of the group and its ability to engage in military activities must be assed in line with indicative factors separately. In the absence of a certain degree of military organization, it is very unlikely to engage in an intensive military confrontation with a state force. EPRP, emasculated due to mass detention and assassination campaigns, became unable to conduct political activities, let alone military operations. Unlike the secessionist fronts, there is no account of EPRP's military chain of command and hierarchy, ability to procure and distribute weapons and involvement in an intensive coordinated military confrontation with government forces. The party didn't possess the degree of organization required for NIAC under Article 8(2) (f) of the ICC Statute and case law.

Therefore, during the red terror trial, the existence of armed conflict, distinct from unorganized and short-lived insurrections, was not established beyond reasonable doubt with respect to EPRP/EPRA.

4. Probing the 'Nexus' Element in the 'Red-Terror' War Crime Trial.

4.1. General Remarks

[54] Alemu, *supra* note 4, para. 7.5.2.

Under international law States have a duty to prosecute international crimes which amount to 'grave breaches' under the GCs.[55] War crimes are 'serious violations of the laws and customs of war' under the four GCs.[56] There is no similar treaty recognition of 'grave breaches' in Common Art.3 NIACs. International custom and jurisprudence, however, consider serious violations of that norm and 'other serious violations of the laws and customs of war' in NIAC as a war crime.[57] Later, serious violation of common art.3 and 'other serious violations of the laws and customs of war' in NIAC are incorporated in the Rome statute.[58] Accordingly, in order to constitute war crimes either under the GCs or international custom; first, there must be an armed conflict; second, there must be a 'sufficient nexus' between criminal acts and the armed conflict, such as a geographical, personal or other reasonable link; and third, the offence must be of a serious nature.[59] Whereas the existence of armed conflict prompts the application of IHL; the nexus requirement is used to differentiate war crimes from other international crimes[60] and ordinary crimes not committed in connection with the armed conflict[61]. This means not every serious crime committed during armed conflict can be regarded as a violation of IHL. Such offences may amount to crime against humanity or genocide depending on the context and intention of the perpetrators.[62] During a war crime trial, ascertaining the existence of an armed conflict (context element) and the relationship between criminal act and conflict (nexus element) is thus the court's prime concern.

Mr. Alemu had been a senior official in the Derg with responsibility for the province of Gojjam between the period 1 February 1978 and 31 December 1981. He was accused of war crimes before The Hague court for crimes of murder of civilians, torture and inhuman treatment and arbitrary deprivation of freedom of prisoners alleged to be members of EPRP at Debre-Markos prison center in his time as governor of the province.[63] As discussed above, a series of protracted

[55] Cf. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31, Art.49
[56] *Id.*, Art.50.
[57] Tadic, *supra* note 12, para.98
[58] ICC Statute, *supra* note 16, Art.8 (2) (c) (e)
[59] ICC, *Prosecutor v. Katanga and Chuhi*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07, paras.378-84
[60] H. Wilt, War Crimes and the Requirement of a Nexus with an Armed conflict, *Journal of International Criminal Justice* 10 (5) (2012), p.1116.
[61] ICTY, *Prosecutor v. Kunarac et al.*, Appeals Judgment, 12 June 2002, IT-96-23 & IT-96-23/1-A, para.58
[62] H. Wilt, *supra* note 60, p.1116.
[63] Alemu, *supra* note 4, para.2

NIACs occurred mainly in Ethiopia's northern part from 1978 onwards between secessionists and the *Derg*. This happened at the time, but not in the area of Debre-Markos where the alleged crimes were committed by the accused. So, the issue is whether the underlying crimes with which the accused charged were closely related to the armed conflict.

A sufficient nexus exists when the prohibited conduct is committed during armed conflict and at the place of combat between the parties to the conflict such as 'in the course of fighting or the take-over of a town during an armed conflict'.[64] War crimes may also be committed in an area remote from the actual hostilities or where no fighting is taking place provided that the criminal act has a reasonable connection to the armed conflict and is committed in furtherance of the purposes of the conflict.[65] The ICC also expressly requires that the criminal act must be committed 'in the context of and was associated with the armed conflict'.[66] If such link is lacking, the violation does not constitute a war crime.

For the purpose of criminal prosecution, emphasizing on the relevance of the nexus requirement is not adequate without a means to prove its existence beyond reasonable doubt. The ICTY provided an objective criterion to determine the existence of 'sufficient nexus', holding in the *Kunarac* case that:

> In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrators official duties[67].

While determining the nexus requirement, the conclusion that the victim and the perpetrator should have a certain status under IHL may be helpful but not a determinative factor. First, combatant or civilian status doesn't determine the existence of 'sufficient nexus' unless a 'functional relationship' between the respective criminal acts and the armed conflict is

[64] ICTY, *Prosecutor v. Delalic et al.,* Trial Judgment, 16 Nov.1998, No.IT-96-21-T, para.193.
[65] ICTY, *Prosecutor v. Kunarac et al.,* Trial Judgment, 22 February 2001, IT-96-23-T&IT-96-23/1-T, para.568
[66] Katanga and Chui, *supra* note 59, para.379
[67] Kunarac *et al*, *supra* note 61, para.59.

established[68]; second, war crimes can be committed by civilians too, given the required nexus[69]; and third, perpetrators' conduct, regardless of his/her status, must 'contribute for the ultimate goal of a military campaign'. In this vein, Ambos and Cassese criticized the *status criterion* as being 'insufficient' to hold the perpetrator responsible for war crimes by itself.[70] Entirely relying on the status criteria developed in the *Kunarac* case may result in unwanted outcomes. For instance, a criminal act committed in the occasion of armed conflict for personal reasons or purposes unrelated to the conflict may easily qualify as a war crime. It is too unreasonable to choose a factor among others, such as *status criterion*, that simply fit to one's own conception of war crime. This approach undermines the delimitating function of the nexus requirement and lead to a divergent conclusion of the same fact and context.[71] Therefore, for a court entertaining a war crime case, it is essential to evaluate the alleged offences against all other indicative factors and factual situations of the case at hand. In particular the political situation of the country during the period, motive of perpetrators and context in which the crimes were committed.

4.2. Reflections on the Court's analysis of the 'Nexus' Element in the 'Red-terror' War Crime Trial

The Hague Court, while determining the existence of 'sufficient nexus' in the Red Terror war crime trial, entirely relied on the *status criterion* without considering other relevant factors, such as the requirements of a "functional relationship" between the conduct and the armed conflict and the act(s) in question being committed "under the guise of the armed conflict".[72] This neglects the circumstances of the crimes committed.

The Red Terror crimes took place in the province of Gojjam, not occupied by secessionists and far from the actual hostilities. But could the acts still have been sufficiently related to the NIAC? That would be the case if the acts were committed in furtherance of or under the guise of the armed conflict. It is the criminal acts, not the criminal, that need to be linked to the purposes and objective of the armed conflict. The main purpose of the government's campaign during the period relevant to the indictment was to destroy the secessionists in the north militarily; whereas

[68] K. Ambos, Treatise on International Criminal Law: The Crimes and Sentencing (Vol. II), Oxford University Press (2014), p.142
[69] ICTR, *Prosecutor v. Akayesu*, Trial Judgment, 2 Sep.1998, No.ICTR-96-4-T, para.633
[70] Ambos, *supra* note 68, p.140; A. Cassese, The Nexus Requirement for War Crimes, *Journal of International Criminal Justice* 10 (5) (2012), p.1397.
[71] Wilt, *supra* note 60, pp.1126-28.
[72] Kunarac *et al.*, *supra* note 65, para.568.

Alemu's criminal acts in Debre-Markos were part of a nationwide government measure to suppress EPRP's 'White Terror' using 'revolutionary defence guards'. *Derg* approached EPRP differently from the secessionists. They were officially declared 'enemies of the revolution', not enemies of the state. As such, there was no involvement of the military in the liquidation campaign. The motive and purpose of the Red Terror crimes was a systematic repression of urban political opposition and activism, not in pursuit of achieving any military goal. Instead, though successful in eliminating EPRP, it intensified the war with secessionist and lead to the collapse of the regime.[73] Therefore, the criminal acts of the accused had no relevant connection with the circumstances which established the existence of armed conflict and didn't contribute to attain the ultimate goal of the military campaign at the time. In this regard, the Hague Court didn't profoundly examine the existence of a functional relationship between the criminal acts of the accused and the armed conflict as well as its overall contribution to military goals. By doing so, the court deviated from the practices of the *ad hoc* criminal tribunals and ICC.

The accused, during his time as a governor, though a member of the *Derg* Council, never participated in and was not part of the military operations established to fight the secessionists in the north or anywhere else. This fact cast a reasonable doubt on the existence of 'sufficient nexus' and the perpetrator's status as a combatant.[74] For the existence of 'sufficient nexus', there must be concrete evidence in order to show that how and in what capacity the accused was involved in the war effort and how his criminal acts were linked to the conflict. As Wilt has demonstrated, in order to establish a 'sufficient nexus' between the criminal acts and the armed conflict, "the accused must be part of, or be closely related to, the military power apparatus that has been established to fight an international or internal enemy" and "have access, and be able, to employ the methods and means of warfare"[75]. Nonetheless, The Hague Court labeled the accused as a 'combatant' without ascertaining his involvement in the conflict in any capacity and concluded his criminal acts were closely related to the armed conflict.[76] Contrary to findings of The Hague Court, the Federal High Court of Ethiopia retreated to conclude that the Red Terror crimes were committed in defence of the State and in the context of the armed conflict.[77] The

[73] J. Wiebel, *supra* note 34, p.16.
[74] Ambos, *supra* note 68, pp.143-4.
[75] Wilt, *supra* note 60, p.1127
[76] Alemu, *supra* note 4, para.14.
[77] *Colonel Mengistu et al., supra* note 8, p. 9. The defendants claimed that the Red Terror crimes were legitimate actions committed in defense of the sovereignty of the State.

court rejected the claim of 'defence of the State' as being disproportionate and found them guilty of the crime of genocide against political groups. In fact, the accusations before the Federal High Court of Ethiopia were different though the underlying offences are quite similar with the indictments before the District Court of The Hague. However, the absence of war crime accusations in the 'Red Terror trials' doesn't necessarily mean the Red Terror crimes had no relevant relation with the armed conflict. Nonetheless, the accused's mere membership to the *Derg* Council, without any military involvement, does not suffice to establish that his criminal acts were committed in the context of the armed conflict. This overbroad interpretation of the '*status criteria'* by the District Court, while determining the nexus, leads to diverging findings of the same material element and context with the Federal High Court of Ethiopia.

Lastly, unlike other international crimes, the commission of war crimes is entirely shaped by or dependent upon the environment of the armed conflict.[78] A sufficient nexus may exist when the situation of armed conflict is exploited by the perpetrator or his ability to commit the crimes is influenced by a situation created by the conflict.[79] However, in the case at hand, the respective crimes could have also been committed in the absence of armed conflict in the same way. The Red Terror campaign was started earlier than the counterinsurgency warfare in the north. In 1976, the 'revolutionary defence squad' had already began the campaign of eliminating 'anti-revolutionaries'. For instance, in 1976, hundreds of young EPRP members, participated or planning to participate in a May-day demonstration were arrested and executed.[80] The victims were either gunned down during peaceful demonstrations or tortured to death in prison camps in the capital and provincial cities including Debre-Markos. In this light, the District Court should have treasured the context in which the crimes were committed by considering the fact that the armed conflict with the secessionists followed and overlapped the Red Terror carnage. Further, though might have its own impact, the armed conflicts in the north didn't create any legal vacuum for the commission of the alleged crimes. In fact, on the part of the government, there was unwillingness, not inability, to protect citizens from wanton abuse of human rights. The capacity to ensure the life and bodily integrity of its citizens was not diminished as a result of the armed conflict. Therefore, the mass detentions, torture and execution measures in Debre-Markos were not occasioned or influenced by the armed conflict. The crimes in question were committed

[78] Kunarac *et al*., *supra* note 61, para. 58.
[79] Katanga and Chui, *supra* note 59, para. 380
[80] Zewde, *supra* note 38, p. 28.

systematically as a persecution policy through the *Derg* governments' sophisticated security apparatus which amounts to a serious violation of human rights, but not a war crime.

5. Conclusion

During the period relevant to the indictments, a prolonged NIAC existed between regime forces and 'secessionists'. However, contrary to the findings of The Hague Court, EPRP did not fulfil the minimum degrees of 'intensity of violence' and 'organization' required for a Common Article 3 NIAC. The criminal acts committed by the accused against members of EPRP (victims) had no relation to the armed conflict and thus didn't satisfy the existence of 'sufficient nexus' required in war crime. The alleged crimes were committed not in the context of and in association with, but merely *during* an armed conflict between the *Derg* government and the secessionists. The mere fact that the horrendous crimes were committed by a government official during the occasions of an armed conflict does not render them war crimes.

The alleged offences committed by the accused took place in the context of the infamous Red Terror campaign to counter the white-terror aimed at assassination of government officials and supporters. The revolutionary measures taken by the regime across provincial cities clearly show that the arbitrary arrest, torture and summarily execution of the victims were conducted as a persecutory policy and in a well-organized manner to eliminate political contestants. The measures were not simply carried out by an unaccountable local actor, but rather institutionally recognized and centrally authorized through the *Dergs'* sophisticated security apparatus. The patterns of violence and the reluctance of the state to secure the life and bodily integrity of its own citizen amounts to a serious violation of human rights and thus best qualify as either a crime against humanity or genocide as depicted by the FHC.

Basically, the existence of nexus between armed conflict and conduct is used to distinguish war crime from other international crimes committed during armed conflict, but unrelated to the conflict. Prosecutions dealing with war crimes, thus, must prove the existence of the nexus element beyond reasonable doubt on the basis of determinative factors developed by case law. In light of the requirements introduced by the *Kunarac* appeals judgement, The Hague Court's reliance on the *status criterion* alone resulted in an overly broad interpretation of the nexus

element in the Red Terror war crime trial. The mere fact that the victims are protected persons and the perpetrator is a combatant doesn't suffice to claim the existence of sufficient link. In addition to *status criteria*, analysis of other indicative factors is essential to establish a substantial ground to believe that the offences committed took place in the context of and were associated with the protracted armed conflict in Ethiopia. The Hague Court didn't demonstrate a sufficient link or nexus between the alleged offences and the armed conflict in order to justify the labelling of the conduct as war crime beyond reasonable doubt.

While the approach taken by the ICTY in the *Kunarac* judgement leaves room for different outcomes, a fundamentally divergent interpretation of the same fact and context, as exemplified by The Hague Court and Federal High court, is undesirable and affects the principle of legal certainty in criminal law. The divergent interpretation of the same criminal act and context impends the uniformity of war crime jurisprudence on the one hand and undermines the very purpose of the requirement of nexus in war crime prosecution, i.e., delimiting war crime from other international crimes and/or ordinary crimes on the other hand. To ensure a proper distinction between war crimes from other international crimes the District Court should have dealt the nexus requirement in concrete terms and employed a more restrictive approach – it should certainly do so in comparable cases in the future.