

**Ethiopia**  
**Policy Options for Transitional Justice**

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Draft

## **INTRODUCTION**

Transitional justice has contributed to sustainable peace, reconciliation and justice in many countries' attempts to transition from civil war, conflict and/or authoritarian rule to kick start democratization process and post-conflict re-organization of political systems.

The United Nations<sup>1</sup> has supported efforts of countries and communities to move from situations of widespread human rights violations through transitional justice processes that comprised accountability, justice and reconciliation. At a regional level, the African Union Transitional Justice Policy (AUTJP), adopted in Addis Ababa in 2019, reiterates the importance of transitional justice measures (both formal and non-formal) adopted through inclusive consultative process in addressing past violations, divisions and inequalities; and consequently in creating conducive environment for democratization, socio-economic development, and security.<sup>2</sup>

The origins of transitional justice could be traced to the early decades of the twentieth century. There is ample evidence of transitional justice practice in many countries of Latin America and Africa. The experiences enabled the identification of a range of activities and processes that are used to implement transitional justice and consolidate democracies in transitioning states.

Ethiopia has attempted to apply certain components of transitional justice on different occasions. However, the absence of a holistic transitional justice framework rendered its efforts ineffective, incoherent, and largely fragmented. In this light, it is held that in order to consolidate democracy and ensure sustainable peace, it is imperative for the country to develop a comprehensive transitional justice policy in reading with its current realities and socio-political context, and by drawing on lessons learnt at national and international levels.

This document on 'Policy Options for Transitional Justice in Ethiopia' is developed based on findings of a study conducted by experts and is aimed at soliciting inputs from relevant stakeholders. The document comprises three main parts. The first part looks into the history of transitional justice in Ethiopia and its relevance to the current situation. The second part presents an analysis of alternative policy options on a wide-range of mechanisms for the pursuit of transitional justice in Ethiopia. The last part examines and proposes a range of institutional arrangements to implement transitional justice mechanisms in Ethiopia.

### **PART 1**

#### **HISTORY AND THE NEED FOR TRANSITIONAL JUSTICE IN ETHIOPIA**

##### **1.1. International experience on transitional justice**

This document on Policy Options for Transitional Justice in Ethiopia is developed based on findings of a study conducted by experts and is aimed at soliciting inputs from relevant stakeholders.

Transitional justice is a process that seeks to build a system of sustainable peace, reconciliation, stability and rule of law by breaking with a past culture of atrocities and injustices. It prevents democratic regression

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<sup>1</sup> United Nations Approach to Transitional Justice: Guidance Note of the Secretary-General. 2010.

<sup>2</sup> The AU Transitional Justice Policy Framework. 2019.

and the resurgence of authoritarianism in newly democratized states. Dealing effectively with past violations using transitional justice mechanisms contributes to the advancement of rule of law and sustainable peace.

Several countries had applied different models of transitional justice in the past. The practice includes prosecuting suspected offenders before international courts, mixed courts or national courts; truth-seeking through truth commissions ; institutional and legal reforms, amnesties, memorial for victims, and reparation programs. There are multiple experiences in which these mechanisms were applied concurrently or independently.

Experience has also shown that focusing only on criminal accountability process has its drawbacks. First, processes that emphasize punishing offenders would not achieve lasting peace and reconciliation simply because they sideline the truth-seeking, healing, reconciliation and reparation elements. Trials concentrate on perpetrators and may exacerbate conflicts if they are applied by disregarding other imperative constituents of transitional justice. Second, most prosecutions focus on a few perpetrators since it usually proves unrealistic to prosecute and punish all offenders because of the volume of cases and large number of offenders involved. Prosecutions also represent a narrower approach to systematic violence; they may not fully unravel and address the underlying reasons of past atrocities. In some measure, criminal trials also impede healing processes as they enable participation and public access *only* in respect of limited number of victims.

To remedy such shortfalls and foster sustainable peace, different approaches and mechanisms have been operationalized across jurisdictions. These approaches have been widely used to ensure accountability, establish truth, heal the wounds of victims and survivors, promote reconciliation and reparation, and engage in institutional building. The mechanisms are not mutually exclusive; rather, they complement each other.

The application of transitional justice approach needs to be aligned with the specific context of the country in transition. Each transitional justice mechanism has its own strength and drawbacks. A reading of the relevant experience in countries that operationalized one or another form of transitional justice mechanism demonstrates that countries had capitalized on the strength of select approaches. The prevalence of a widespread prior practice has facilitated the design and application of comprehensive and experience-based transitional justice approaches across jurisdictions.

## **1.2. Ethiopia and transitional justice process**

Despite its experience in socio-political transitions in its modern history, Ethiopia has neither designed nor implemented comprehensive and integrated transitional justice mechanisms to systematically deal with the past and craft a better future. In the context of recent transitions, no comprehensive processes had been deployed that assessed and provided an independent, accurate and authoritative account of the types, nature, causes, patterns and consequences of violent pasts.

When the Dergue ascended to power by overthrowing the imperial regime, the government detained renown personages, feudal lords, ministers, and other officials who were suspected of committing injustice and corruption, and were also allegedly responsible for the tragic Wollo famine. The government

established a Commission of Inquiry to investigate the allegations. However, before the commission completed its investigation, the Dergue executed sixty officials without following legal or judicial procedures. The Dergue ruled Ethiopia for over seventeen years. It did not implement any transitional justice mechanism during its tenure. Hence, in 1974, the transition from imperial autocracy to a military rule was pursued without any meaningful exercise of transitional justice process.

When the Ethiopian People's Revolutionary Democratic Front (EPRDF) assumed power in 1991, it engaged in the prosecution of several officials of the Dergue regime who were alleged to have committed crimes, including genocide. Accountable to the Prime Minister, the Special Prosecutor Office (SPO) was established by Proclamation 22/1992 and accorded an investigation and prosecution mandate; it was able to deploy over 400 staffers to realize its objectives. During its tenure, the SPO investigated select crimes committed by Dergue officials and prosecuted the wrongdoers by using national courts and procedures. Former civilian and military officials - including the country's former president Colonel Mengistu Hailemariam, were convicted and sentenced for crimes perpetrated against civilians during the seventeen years of the Dergue's reign.

The EPRDF government also erected museums, memorial centers and monuments in different parts of the country to honor victims of violence persecuted by the Dergue regime. A closer analysis of the transitional justice process implemented during this period (mainly focusing on prosecutions) demonstrates at least three limitations.

**First**, the process ignored other critical components of transitional justice and hence failed to deliver national reconciliation. It brought large volumes of criminal cases before courts - disregarding the use of complementary mechanisms including truth-seeking, reconciliation, and reparation.

**Second**, the process engaged in selective prosecutions; it was characterized as victors' justice because the prosecutions had only focused on Dergue officials, and ignored crimes committed by civilians and other armed groups. The trials were also criticized for failing to guarantee fair trial procedures.

**Third**, the process entailed limited victims' participation, and as such failed to deliver redress to victims; the latter's involvement was mainly limited to giving testimony. The joinder of criminal and civil matters was also missing.

Following political reforms unveiled in 2018, the government undertook specific measures to address past injustices, grievances, and serious human rights violations. The measures had aimed at creating a conducive environment for democratic consolidation: they included the issuance of official apology, establishment of the Reconciliation Commission, the formation of Identity and Boundary Commission, the enactment of progressive legislations, and the pursuit of institutional reforms that support transitional justice.

Yet, the purposes of transitional justice were not fully met; key limitations included failure to anchor and coordinate the process on a holistic framework, and ineffectiveness of the individual measures implemented. In particular, the following challenges were observed.

## **Prosecution**

**While** a handful of government officials are prosecuted on charges of corruption crimes and human rights violations:

- the charges were limited in scope; they did not encompass all grave human rights violations committed by the EPRDF-led government;
- the trials were selective;
- judicial procedures were not up to the task; they have not yet recovered from the long years of lack of independence and institutional autonomy;
- the adjudication process was beset by delays; many cases have yet to be disposed of;
- the prosecution process has not been pursued in a manner that delivers redress to victims; it creates a sense of denial of justice - hence would not contribute to reconciliation and amnesty;
- critical challenges linked to the justice sector: the process relied on police officers, prosecutors and judges of a regime that was responsible for the abuses and was pursued without requiring such personnel to go through lustrations and vetting.

### **Amnesty:**

Proclamation No.1089/2018 (to Provide for the Procedure of Granting and Implementing Amnesty) was promulgated to remedy the gaps in the provision of amnesty. A subsequent legislation, Amnesty Proclamation No.1096/2018 was enacted to holistically regulate the grant of amnesty - with the objectives of bringing peace and stability, creating national harmony, enhancing reconciliation, and broadening the political space. The intended beneficiaries of this scheme are persons who took part in the commission of crimes during the period of political instability and those who had engaged in political crimes. However, the amnesty process features the following key limitations.

- in sharp contrast to a widely accepted recommendation applied in transitional justice settings, the amnesty decree offered a blanket reprieve - the only precondition being submitting an application within six months;
- the amnesty process failed to consider victims' voices and encompass compensation for and apology to victims as one of its potential outcomes;
- the process did not meet the objectives of repentance; many of the eligible perpetrators who had been released on the basis of amnesty procedures returned to prison by committing other crimes of comparable gravity;
- public confidence in the capacity of the government to enforce laws was questioned; beneficiaries of the amnesty system were expected to obtain a certificate from federal and regional bureaus; however, there was no adequate follow up in its implementation, and hence, persons without certificates joined communities - negatively affecting the credibility of the process.

### **Institutional framework:**

The Reconciliation Commission was established by Proclamation No.1102/2018; it was accorded a mandate to assess, identify and acknowledge gross human rights violations, injustices, grievances and failures. Its objectives were to build a sustainable peace and democratic system based on reconciliation

and justice. However, the Commission's three-years operational term expired in February 2022; while the Commission had undertaken various preparatory works, it failed to deliver on any of its plans or mandated objectives. Key reasons that led to the Commission's failure include the following.

- the Commission's establishment was not preceded by any meaningful public participation and consultative process; the public as well as key experts were not consulted on the draft legislation;
- the Commission's legitimacy was negatively affected because of the absence of direct public participation in the nomination, selection and appointment of the commissioners ;
- the powers and functions of the Commission were vague, and in parts impossible to implement; most importantly, the Commission's relationship with other mechanisms was not clearly articulated - with some of its powers overlapping with the powers of other transitional justice mechanisms ;
- the Commission was vested with huge powers than it could possibly implement;
- the Commission was mandated to lead the national dialogue process; in principle, reconciliation bodies are highly recommended not to take on national dialogue agenda and dispute resolution functions as part of their major responsibility;
- some of the Commission's commissioners were politically active, or perceived to be partisan, or criminal offenders, or victims; and
- the commissioners were not full-time employees of the Commission; besides, the number of the commissioners was inessentially large (41) - which exceeds the average size of most truth commissions (not more than 25);

Apart from the creation of new institutions, the government also implemented targeted institutional reforms - mainly focusing on prison administration, and military and security apparatus. Yet, several persons who remained loyal to the previous administration continued to hold positions of influence and worked both openly and clandestinely to undermine democratic consolidation.

In conclusion, while it is noted that various efforts have been exerted to implement certain components of transitional justice, the processes have only brought about some results. The efforts, including those which were implemented since the initiation of large-scale reforms in 2018, are neither complete, adequate, effective, nor comprehensive. This continued to impede the possible use of a transitional justice mechanism as a way of breaking with a repressive past. As the country fails to address the root causes of past violations and injustices, the prevalence of conflict, civil war and human rights violations continues.

### **1.3. Why transitional justice in Ethiopia?**

Ethiopia needs to deal with its past and organize its future based on the pillars of justice, equality, human rights and inclusiveness. Attempts so far in implementing transitional justice have not met their objectives. Therefore, it is imperative to design a comprehensive, human rights-based, and victim-centered transitional justice policy framework that draws on the experience of other jurisdictions and considers Ethiopia's socio-political context. The following sections offer a succinct summary of key justifications for promoting a holistic transitional justice agenda in Ethiopia.

#### **a) the national context demands a comprehensive transitional justice approach**

In the past, several reports have been published indicating the commission of widespread and systematic human rights violations in Ethiopia. Despite the aggressive reforms in the post-2018 period, mass killings, forced displacements and destruction of properties persisted as serious predicaments of the political order. Injustice, human rights violations, misguided interpretations of the past, inadequate response to problems encountered, and the absence of a comprehensive and meaningful reconciliation process have been cited as some of the main reasons for the perpetuation of the vicious cycle in Ethiopia.

In the Ethiopian national context, the multiplicity of offenders and victims involved, recurrence of injustice, horizontal nature of violence, and limited capacity and legitimacy of governance institutions makes it impossible to render justice, grant amnesty, or espouse meaningful reconciliation by deploying the existing justice sector infrastructure. In this light, implementing comprehensive and integrated transitional justice process that is based on the national context, is designed as forward looking, and holistically addresses past situations is extremely paramount to solve the country's serious predicament.

**b) in effective transitional justice process plays a positive role in state-building and its sustainability**

Rebuilding social cohesion based on the ideals of truth, justice, peace and reconciliation is essential to pull Ethiopia off the recurring conflict and violations cycle. There is hardly a time in Ethiopia's history where a genuine reconciliation process had been implemented. Successive governments and regimes have either underrated or denied the very existence of conflicts meriting special consideration within the framework of such process. The political appetite for initiating comprehensive reconciliation processes was literally nonexistent - which in turn meant that no proper mechanisms existed to address massive human rights violations and grievances.

Engaging in holistic deliberations on past injustices and grievances is a painful but imperative procedure in any state-building. Where no such mechanism is designed, different interpretations of past injustices will provoke antagonism and communal divisions. Therefore, transitional justice mechanisms should be applied to bring divided communities closer, restore relationships, build trust, fulfill the demands of justice, and bring a comprehensive reconciliation. This is essential to acknowledge or recognize all major sufferings endured by victims and survivors, restore human dignity, and facilitate unity and state-building.

**c) democratization and lasting peace are not possible in the absence of effective transitional justice**

Embedding democratization and rule of law is the main preoccupation of the post-2018 administration. However, a transition to democracy centering on reconciliation, peace and justice is not achievable without addressing past injustices and gross human rights violations and finding and acknowledging the truth. The core undertakings of any transitional justice mechanism are - addressing grievances and sense of injustice, effective transformation to democracy, and establishing lasting peace through which solutions are availed to recurring injustice and violation.

The implementation of transitional justice in Ethiopia thwarts regress to authoritarianism, contributes to the consolidation of democracy, and facilitates the move to a stable and affluent society based on equality, justice, reconciliation and respect for human rights and freedom.

**d) implementation of transitional justice lays a foundation for ensuring human rights and rule of law**

One of the rationales for the recurrence of conflicts that lead to large-scale human rights violations is the absence of a system that is informed by overarching principles and persistently penalizes persons who trigger or contribute to the conflict. The victims of conflicts and violations are mainly Ethiopian citizens who have little or no involvement in the making of events that lead to violations. Governments, who are bestowed with the primary responsibility to protect all persons within the national jurisdiction - as well as segments of the elite - have been part of the problem. There is no effective system that prevents, mitigates, and remedies violations and abuse; the challenges exacerbate in conflict settings. Those who initiated, perpetrated or contributed to serious violations remain unpunished because of accountability gaps resulting from the absence of an appropriate system and motivation. Besides, the system of accountability implemented to address recurrent conflicts is beset by issues of low-level legitimacy and credibility; the investigation and prosecution process has not been victim-centered and participatory.

A comprehensive and integrated transitional justice process plays crucial role in establishing a sustainable human rights protection system and rule of law by ensuring amnesty, accountability, establishing truth, promoting reconciliation, and providing reparation, by rolling out a specific accountability mechanism, and giving adequate focus to violations.

## **PART 2**

### **POLICY ALTERNATIVES FOR TRANSITIONAL JUSTICE**

#### **2.1. Introduction**

Transitional justice is a comprehensive process that involves prosecution, reconciliation, conditional amnesty, truth-seeking, reparation, and institutional reforms. Its effectiveness is enhanced when these mechanisms are applied in a manner that fits the particularities of a country. In any given setting, the historical, socio-economic, and political realities of a country and the nature of the transition that is sought - determine the models and mechanisms of transitional justice.

In the preceding sections, it was shown why Ethiopia, as a country seeking democratic transition, needs to deploy a transitional justice mechanism. However, to ensure an effective process, a serious analysis and decision must be taken in respect of the modalities and approaches of transitional justice that should be operationalized in Ethiopia. Making the process effective requires answering the question '*which mechanisms are best suited to what matters?*' What are the best-suited means or institutional arrangement for each transitional justice mechanism? The following sections examine policy directions and modalities of transitional justice that are deemed appropriate to Ethiopia's context and; furthermore offer specific alternatives for the public and policymakers to choose from.

#### **2.2. Prosecution**

##### **2.2.1. General**

Designing and rolling out prosecution procedures with a view to punishing wrongdoers is one of the various mechanisms implemented in transitional justice. International human rights law obliges countries to prosecute criminal acts as part of their duty to institute a national human rights protection system. This is particularly true for grave breaches of human rights laws (for example Geneva Conventions, Genocide

Convention, and the Convention against Torture). The AUTJP, too, obliges countries to prosecute certain categories of crimes.

In addition to the expression of commitment for human rights obligations, a country's prosecution system could be instrumental in ensuring access to justice and preventing collective attribution of responsibility - by focusing on individualization of punishment. Further, it helps to promote rule of law and accountability, deter future violations, and facilitate reconciliation, peace and democratization by establishing the truth.

The government of Ethiopia has a duty to conduct an effective investigation into all human rights violations and prosecute alleged perpetrators before independent courts. With regard to some of the most serious crimes, the FDRE Constitution has already established prosecution as the preferred pathway for dispensing justice - over and above all other forms of transitional justice.<sup>3</sup> A similar approach is also dictated by international human rights and humanitarian instruments ratified by Ethiopia. It follows that the government is invested with little discretion in terms choosing other forms of transitional justice mechanisms but to prosecute individuals involved in the commission of such offences.

## **2.2.2. Prosecution: The subject matters of criminal proceeding**

Within the framework of transitional justice mechanisms, gross human rights violations are the subject of prosecution. However, there must be a delimitation of the scope - identifying the types of crimes encompassed under prosecution. In this regard, the following options are worth considering.

### **Option 1: a prosecution process that seeks to punish only gross human rights violations (genocide, war crimes, crimes against humanity, other grave crimes).**

Prosecution is not the only mechanism to dispense justice in transitional justice setting. In other word, not all human rights violations are settled through prosecution. Hence, focus should be placed on gross crimes so deemed under international and national criminal laws. Such crimes typically refer to crimes against humanity, genocide, war crimes, extra-judicial killings, torture, and other serious crimes.

#### **Strengths**

- this option provides an opportunity to apply other components of transitional justice mechanism as prosecution proceedings only focus on the most serious crimes;
- avails greater opportunity for speedy trial since the mechanism handles only certain categories of crimes;
- eases challenges associated with 'selection processes' as it focuses on prosecuting 'gross' or 'grave' breaches of international and national laws;
- reinforces international acceptance of the process and the buildup of evidence to ensure specific accountability;

#### **Risks**

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<sup>3</sup> Article 28(1) states that the commission of 'crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture, shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ'.

- most crimes are complex and have international dimension, and hence pose greater challenge in relation to investigation procedures and gathering of pertinent evidence;
- the mechanism targets only certain types of crimes; it does not acknowledge the full extent of sufferings encountered by victims, and therefore may lead to misguided interpretation of critical episodes in history;

### **Option 2: a process that prosecutes all human rights violations**

Finding evidence to prove all gross human rights violations and international crimes is a difficult undertaking. More so, establishing the standard of proof required in seeking conviction is very demanding. For this and other reasons, a process concentrating on gross breaches will most probably result in the dissatisfaction of victims. Consequently, prosecution proceedings should work on crimes falling below the threshold indicated under option 1; the criminal accountability process should comprehensively cover cases of extra-judicial killings, body injuries and serious inhuman treatments, rape and other forms of sexual violence, arbitrary arrest and detention, enforced disappearance, forced displacement, attacks based on race, ethnicity, religion or other status, and similar violations.

#### **Strengths**

- facilitates broader accountability as it punishes more offences and offenders;
- broadly responds to victims' demands for justice;
- avoids hierarchy of crimes and improves crime prevention by promoting deterrence;

#### **Risks**

- overwhelms the criminal justice system since several matters become the subject of the process;
- overshadows the grave nature of some of the crimes as the process does not feature exclusive focus;
- increases the workload of courts and stretches limited resources which in turn lead to a shallow handling of cases;
- delays the dispensation of justice because of breadth of the scope; this in turn results in reduced public optimism towards the process;

### **2.2.3. Prosecution: The range of suspected offenders covered**

The prosecution process should not fall to the trap of victor's justice. Rather, it must bring within its fold all government officials and officers, members of armed groups, as well as individuals who had committed human rights violations.

Conventionally, transitional justice entails that not all offenders will be the subject to prosecution proceedings. While several persons who had taken part in criminal acts will be prosecuted, complementary mechanisms --including amnesty and truth finding are also triggered to address violations committed by others. The key question is, then, whether the process should dwell on the prosecution of persons with higher criminal culpability or should instead charge all suspected offenders.

**Option 1: prosecution should target the most responsible-- offenders who gave orders, planned and coordinated actions/inactions that resulted in serious human rights violations, including persons holding high positions whose inaction led to the breaches.**

While most responsible offenders may as well be covered by other mechanisms, the latter procedure should only be invoked to mitigate criminal sentences - once convictions are pronounced. On the other hand, non-principal offenders must be excluded from prosecution processes where it is demonstrated that they have not engaged in the commission of serious crimes and have repented their participation. A determination must be made in advance in respect of persons falling under both categories - as principal offenders and second-degree offenders.

**Strengths**

- eases the burden on staff and institutions that carry out investigation and prosecution works;
- affords space for other mechanisms to be triggered in respect of non-principal offenders;
- enables limited state resources to focus and prosecute the most serious crimes;
- ensures accountability-based transition by prosecuting all principal offenders;

**Risks**

- as offenders are subjected to different fates based on level of participation, the process would likely lead to grievance and resentments from victims and public;
- undermines the notion of deterrence since some of the offenders will not be held criminally responsible;
- opens room for discrimination and improper administrative maneuver at the stage of identifying offenders eligible for prosecution;

**Option 2: prosecution of all persons involved in gross human rights violations in any capacity.**

Rolling out this procedure entails a comprehensive investigation and filing of charges against all persons who participated in breaches at all stages and in any capacity. However, this counters the very essence of deploying a transitional justice mechanism which, by default, involves the application of pardon and amnesty, the imposition of alternative penalties, and mitigation of sentences in respect of persons who repented or apologized for wrongdoings.

**Strengths**

- reduces grievances from victims and the public as the process includes all offenders;
- better addresses victims' demands for justice;

**Risks**

- diminishes focus on other critical mechanisms of transitional justice;
- risks overwhelming the transitional justice process because of a large number of suspected offenders involved;

- presents practical and technical-level challenges in terms of bringing all delinquents to justice; and when attempted, the process will certainly be hasty and result in inconsistent decisions;

## **2.3. Institutions: who leads investigation, prosecution and judicial processes?**

### **2.3.1. General**

A highly pertinent issue in criminal accountability processes pursued within the framework of transitional justice pertains to the question of who leads the critical activities. The police and security apparatus, prosecution institutions, and courts of law that had been operational at the time of the commission of the crimes cannot be allowed to remain central pillars of the transitional justice process without undertaking an actual or perceived institutional reform.

### **2.3.2. Courts of law**

In many transitioning democracies, the prosecution of human rights breaches is beset by weak judicial systems; this is mainly because courts had yet to recover from years of lack of independence, institutional autonomy and political partisanship. Individual judges are also impacted by bias and prejudice. For this reason, there were multiple instances where atrocity-level crimes had been prosecuted before the International Criminal Court, or, depending on the context of countries, through ad hoc international tribunals (as in the case of Yugoslavia and Rwanda), or using hybrid courts (as in the case of Sierra Leone, East Timor and Cambodia).

Other jurisdictions had used domestic institutions and indigenous knowledge to address past atrocities. For example, while lawyers were not involved, the Gacaca community courts had been at the heart of Rwanda's justice and reconciliation process to heal the country from wounds of genocide.

Ethiopia is not a state party to the Rome Statute of the International Criminal Court. Moreover, other options availed by the international system are neither desirable nor feasible. The only rational alternative is to promote the adjudication of the crimes using domestic courts - with a caveat attached in terms of institutional reform; this includes the assignment of judges for this specific process, the establishment of a dedicated bench or court and the provision of training to judges and their assistants.

### **2.3.3. Investigation and prosecution agencies**

In terms of the role played by investigation and prosecution agencies, two options are widely presented.

#### **Option 1: composing a special team within police and prosecution institutions responsible for leading investigation and prosecution functions under a transitional justice framework.**

This option requires the establishment of special teams within the existing institutional structures to lead and coordinate all investigation and prosecution functions. The process also entails the design and provision of specific training to individual members of the teams - in meeting with international standards.

#### **Strengths**

- saves huge resource because it uses existing institutional structures;
- facilitates institutional capacity building through accretion of experience;

## **Risks**

- the use of existing institutions without actual or perceived reforms raises legitimacy and public trust concerns;
- the process may be challenged and produce sub-optimal investigation results as the lead investigators would be looking into crimes committed by fellow colleagues or a system of which they were a part;
- issues related to institutional accountability may not be sufficiently addressed since this model ventures to investigate institutions that have been at the center of the systemic crimes alleged to have been committed by multiple actors and institutional agencies;
- the process will be beset by low level reporting as most victims will fear re-victimization and do not wish to relive bad memories by going to such institutions;

## **Option 2: establishing a special prosecutions office that coordinates investigation and prosecution functions.**

Under this model, all prosecution proceedings will be led by a special prosecution office exclusively established for this purpose. The office will have its own investigators and prosecutors.

## **Strengths**

- avails opportunity for the creation of a new institution having better legitimacy and independence;
- ensures a speedy process since both the investigation and prosecution tasks would fall under the same institution;
- creates opportunity for increased support because of the additional focus on such institution;
- incentivizes victims and the public to support the institution;
- heightens ownership in and accountability of the process;

## **Risks**

- establishing new institutional platform along with equipment/infrastructure requires time;
- the process may be challenged by difficulties of finding capable and experienced staff from the job market;
- the process presents a limited contribution to capacity building of existing institutions;
- the process generates additional strain on limited resources of the state;

### **2.3.4. Legislative reforms: crimes against humanity**

Ethiopia's criminal law does not incorporate crimes against humanity per se. This is a major gap in any prosecution procedure which is carried out within the framework of transitional justice. It is therefore important that the substantive element of 'crimes against humanity' is incorporated into the Ethiopian criminal law. Such measure ensures a harmonized and fair criminal process.

Evidently, the principle of non-retroactivity will be raised to thwart the incorporation and use of a new clause on 'crimes against humanity' in the penal law. However, the crime is already defined under customary

international law which applies within the jurisdiction of any state. Further, Article 15(2) of the International Convention on Civil and Political Rights - a covenant to which Ethiopia is a party - draws an exception to the non-retroactivity principle in respect of acts which are already defined as crime against humanity through state practice (amounting to customary international law). Ethiopia's federal constitution has also established the principle that human rights provisions of the constitution should be interpreted in line with international human rights instruments adopted by the country.

Hence, while bearing in mind that the invocation of customary international law norms may be attended by technical challenges ensuing in the context of sentencing, it is possible to initiate prosecution proceedings and seek convictions in respect of crimes against humanity committed by any person.

## 2.4. Truth-Seeking

### 2.4.1. General

Truth finding is one of the core elements of transitional justice processes. It is a non-judicial inquiry that focuses on finding what human rights wrongs had occurred and determining the facts (extent of grievance sustained); it furthermore entails proper acknowledgment of the wrongdoing. It is predicated on the principle that victims, families of victims, and the public in general have the right to the truth. A process that leads to acknowledgement of violations and injustices fulfills the victims' demand for justice, and the inclusion of such facts in historical record lays the groundwork for national reconciliation.

Truth finding is particularly effective when it is designed and applied concurrently with other elements of transitional justice (such as reparations, trials, amnesty, and institutional reforms). Truth commissions may not have prosecutorial jurisdiction, but they are generally invested with a mandate to recommend prosecutions and submit their archives to prosecutors. This approach is what Ethiopia's transitional justice framework should aim for.

### 2.4.2. Key elements of truth finding

**Victims-centered approach:** victims' participation in truth finding is a key consideration in any such process. Victims and other harmed persons should be given the opportunity to narrate their stories. Several truth commissions are not only mandated to protect survivors and victims, they can also deliver essential services - including psycho-social and medical supports. In some cases, they assume a mandate to seek durable solutions in respect of persons forcibly displaced from their homes.

**Participation of suspected offenders:** offenders' participation in the process is essential for a broader understanding of what had happened. To appreciate the full picture, it is imperative to go beyond the victims' testimonies and then connect the dots. In truth finding, the testimony of suspected offenders is particularly essential in situations where the victims are not found. Participation of offenders in the process may give insight into the planning, coordination, and objectives of the crimes committed, and the modus operandi of the regime. It can also be used as means of learning the whereabouts of disappeared persons or locating buried bodies.

**Documentation of violations:** documentation helps to bring awareness about the violations, guarantees non-recurrence, and counters the denial of violations in the future. For this reason, truth commissions often

collect larger volume of evidence - including witness testimonies, documentary evidence and video footages.

**Publicizing the truth:** a truth finding process does not stop at documentation; it includes publicizing the truth and acknowledging the sufferings of victims.

### 2.4.3. Institutions: who leads truth-finding?

A truth finding process comprises of statement taking from victims and offenders and facilitating public hearings. Institutional arrangements to enforce this procedure can take any one of the following forms.

**Option 1: truth and reconciliation commission:** establishing truth commissions to lead truth finding initiatives is a very common practice. The experience in many jurisdictions demonstrates that such commissions can be established for a limited duration (usually 1-3 years) by a proclamation (South Africa), executive decree (most commissions in Latin America and Morocco), or through judicial pronouncement (Canada). In Ethiopia, endorsement by a parliamentary act contributes to enhanced legitimacy, political support and institutional strength of the commission. However, such legislative track must be preceded by broader consultations with CSOs, political parties, communities, and other stakeholders. Engagement in wider consultative undertakings is critical to strengthen the credibility, independence, and effectiveness of a commission.

#### Strengths

- ensures effectiveness since truth finding aims at granting of amnesty and reconciliation on the basis of the truth established;
- has greater legitimacy because of the institution's independence, impartiality and inclusive nature of the process;
- is akin to a more professional work-line as the mandated institution will likely attract experts serving as staffs;
- such institutional platform is fit for the objective of a transitional justice process; it involves amnesty, the participation of victims and offenders, receiving of complaints, organizing forums, and the discovering, documenting and publicizing of truth;
- contributes to victims' healing as it is widely dependent on testimonies; it also leads to victims' recognition as persons after continued social stigmatization and skepticism;

#### Risks

- such initiative requires availing huge state resources;
- in Ethiopia, a similar commission has been tested and failed;

**Option 2: Ethiopian Human Rights Commission or National Dialogue Commission:** this policy option requires carrying out legal reforms to add specific mandates to these institutions.

#### Strengths

- it saves resources since existing institutions will be leveraged;

- facilitates institutional capacity building along one track of activity;

## **Risks**

- effectiveness of the process will be undermined because the institutions are already invested with huge mandates and responsibilities;
- the institutions will be challenged by incapacity to implement a complex and inclusive truth finding process;

## **2.5. Reconciliation**

### **2.5.1. General**

One of the objectives of any transitional justice process is to achieve reconciliation. Reconciliation entails bringing together communities divided by widespread human rights violations, war, conflict, injustice-induced social fractures, hate and fear - and enabling them to embark on the path of rebuilding a shared future. When applied in transitional justice mechanisms, reconciliation is conceived both a means and an end. As a means, it is a deep, long term, indirect and dynamic process which contributes to ensuring justice and consensus.

The specific role of a reconciliation process depends on contexts. In countries like Ethiopia where the legacies of massive past human rights abuses stand high, community leaders and/or individuals seriously affected by violations should assume a major role in the process.

Reconciliation does not imply impunity. As such, it is applied in conjunction with other mechanisms: truth, amnesty, reparation, peacebuilding, and justice. A reconciliation process should involve the acknowledgement of wrongdoing and repentance by offenders, the victims' acceptance of the apologies, and living in harmony and under legitimately endorsed decisions.

### **2.5.2. Types of reconciliation in transitional justice**

Reconciliation takes various forms. In the Ethiopian context, it may be important to consider the following in any future enterprise on transitional justice that embeds reconciliation as one of its core pillars.

**Intra-personal or Self-reconciliation:** if offenders are to engage in any meaningful reconciliation with others, they must first reconcile with oneself. Victim rehabilitation programs should be designed and implemented in a manner that avail physical and psychological supports.

**Inter-personal/Individual reconciliation:** this focuses on the relationship between victims and the principal and/or secondary offenders; it includes the acknowledgement of injustice, a sense of being reformed and the grant of apology.

**Social and political reconciliation:** the process entails reconciliation among divided ethnic, social, religious, political, or other groups by acknowledging sufferings; it focuses on the objective of establishing a shared future based on respect, and mainly relies on religious and traditional dispute resolution mechanisms.

**Institutional reconciliation:** this process focuses on holding institutions accountable and requires the implementation of institutional reform. The primary targets are institutions which have the responsibility to respect, protect and fulfil human rights and play critical role in transitional justice. Such intervention helps to restore public confidence in the institutions.

### 2.5.3. Institutions: who leads the reconciliation process?

Reconciliation is an integral part of a larger process that also consists of prosecution, truth finding and amnesty. As such, the reconciliation process can be pursued through the agency of one of the following institutional mechanisms.

**Option 1: truth and reconciliation commission:** best practice demonstrates that reconciliation is ideally led by an institution established for purposes of carrying out a holistic transitional justice agenda. In the Ethiopian setting, an independent and impartial truth and reconciliation commission can be established to undertake such task.

#### Strengths

- ensures better effectiveness since reconciliation constitutes one of the core pillars of a transitional justice process;
- is afforded more legitimacy because of such institution's independence and impartiality, and its bent on a participatory process;
- is likely to be a professional pursuit as the institution will attract expert-level staffs;

#### Risks

- the establishment of new institution requires a huge state resource;
- a similar commission was tested in the past and had failed;

**Option 2: National Dialogue Commission:** recourse to such option requires a legislative amendment to specifically add a mandate to the institution.

#### Strengths

- it saves state resources;
- benefits from greater legitimacy as the institution is established to be independent and impartial;

#### Risks

- the process will likely be ineffective given that the Commission is already over-burdened with mandates and responsibilities;
- requires legislative amendment which likely takes time to carry out;
- granting such mandate raises concerns of incompatibility with internationally accepted models;
- this model may suffer from potential gaps in coordinating with other mechanisms;

**Option 3: pursuing a comprehensive and coordinated transitional justice measure:** ensuring accountability, truth-finding, acknowledgement of wrongdoing, reparations, and institutional reform

measures are all important for comprehensive reconciliation process. Hence, it can be concluded that all elements of transitional justice process contribute to reconciliation. In this light, all approaches and measures can be organized, coordinated and mandated to contribute to such process.

### **Strengths**

- this model has a higher probability of success since it operationalizes all core elements of transitional justice;
- helps to improve complementarity among transitional justice elements;

### **Risks**

- will be challenged by the absence of institutions and systems to coordinate all these elements;

## **2.6. Amnesty**

### **2.6.1. General**

Amnesty is one of the variety of mechanisms applied in transitional justice processes. Its role in peace building, prevention of violence, and communal healing is well recognized. However, amnesty serves the foretated objectives only when it is used properly. The grant of unconditional amnesty leads to a miscarriage of justice, perpetuates impunity, reinforce victims' sense of defenselessness, and can be a precursor for future violations. International and regional human rights instruments state that amnesty extended to persons involved in the commission of gross human rights violations constitutes a breach of human rights obligation.

In Ethiopia, no sweeping amnesty could be dispensed in respect of persons who took part in past atrocities. The country's ability to issue amnesty within any framework of transitional justice is circumscribed by Article 28 of the FDRE Constitution which already established that there are certain crimes that are not amenable to amnesty or pardon.

Nevertheless, it is imperative that in Ethiopia amnesty is incorporated as aspect of the transitional justice mechanism and is granted subject to the fulfillment of certain conditions - within the frontiers established under the constitution and international law. The transitional justice framework should clearly define the conditions and procedures that apply in this respect. Mandated institutions should implement this process in a transparent and impartial way.

### **2.6.2. Considerations and pre-requisites in granting amnesty**

Experience shows that the following factors are considered while granting amnesty.

**Participation, nature and gravity of crime:** a person's participation in a crime is one consideration in granting amnesty; amnesty should not lead to establishing impunity for gross human rights violations.

**Participation of offenders:** amnesty requires closer collaboration with offenders; wrongdoers must participate in the whole cycle of transitional justice - a condition which is established for any such persons to benefit from amnesty.

**Finding truth:** amnesty plays a key role in the search for truth. Offenders eligible for amnesty should support the transitional justice mechanism by providing details of the commission of crimes (preparation, planning, objective, circumstances, etc.).

**Repentance and apology:** in addition to the provision of remedies, in transitional justice settings, the public and victims also demand assurance of non-recurrence. Offenders should not only repent, and they must also offer apology to victims.

**Collaboration:** offenders should collaborate with justice institutions, participate in rehabilitation works and traditional justice processes, restitute property they appropriated, contribute to reparations, etc.

### 2.6.3. Institutions: who grants amnesty?

In addition to the nature and structure of the amnesty process, institutional legitimacy and trust are also key factors. The following are some of the institutional options a country may consider.

**Option 1: establishment of truth and reconciliation commission:** this involves the constitution of an independent and impartial body that leads the search for justice and truth. This model has worked well in several countries.

#### Strengths

- effectively meets the truth and reconciliation objectives of amnesty;
- has potential to build a strong institution by bringing experts together;
- ensures the application of a trusted process as such institutions will be organized as independent, impartial and inclusive platforms;
- encourages offenders to participate in the transitional justice process;
- is more akin to conditions relevant in amnesty (setting up conditions, listening to victims' voices, and enforcement of conditions);

#### Risks

- the model imposes additional strain on limited resource of the state;
- the model has been tested and failed;

**Option 2: using existing amnesty legal and institutional framework:** this procedure refers to a process pursued by the Ministry of Justice and the Amnesty Board based on public interest objectives described under Proclamation No.1089/2018. The Ministry of Justice identifies persons illegible for amnesty and sends the list to the Amnesty Board. The Board sends its recommendations to the Prime Minister who passes a final decision.

#### Strengths

- uses already existing institutions, and hence, saves national resource;
- facilitates institutional building along the existing tracks;

#### Risks

- it does not follow the spirit of transitional justice, and therefore is prone to fail;
- does not fit the transitional justice conception in the sense that it does not entail an inclusive handling of very complex cases;
- is challenged by concerns of trust and legitimacy;
- discourages offenders from participation in the process;

#### **2.6.4. Circumstances under which amnesty is granted under the law**

Ethiopia's federal constitution forbids the grant of pardon or amnesty to 'crimes against humanity such as genocide, extra-judicial killing, enforced disappearance and torture' (Art.28). This list covers crimes which normally form the subject of transitional justice mechanism; hence, caution must be taken not to design or implement measures that are incompatible with the constitution.

As discussed above, there are also restrictions imposed under international laws - particularly in relation to the grant of unconditional amnesty to persons suspected of international crime. However, such restrictions apply in 'normal circumstances' - and not to a context that necessitates the espousal of transitional justice mechanisms. In this light, it is submitted that a state's duty to prosecute human rights breaches cannot be understood as implying a prohibition on the part of states to design specific mechanisms that address lasting national issues, help in abating crimes, or provide assurance of non-recurrence. The African Transitional Justice Policy clearly states that what is prohibited is the grant of unconditional amnesty that restricts the victims' right to truth and justice.

It follows that the design and implementation of amnesty process that is constricted by specific conditions, facilitates truth finding and ensures reparations - is deemed compatible with the federal constitution and international law. The federal constitution should be interpreted in such a way as to ensure coherence with this spirit of international law and Africa's continental framework. To this end, though, a constitutional interpretation should be sought, or alternatively, the subject should be set as one of the key agenda items in any future constitutional amendment initiative

### **2.7. Reparations**

#### **2.7.1. General**

The deployment of a reparations process generally entails the application of effective and proportional monetary and/or non-monetary compensations, means of restoration, and/or reinstatement. The main objective of this mechanism is to support the healing process and reform the behavior of victims and offenders.

To date, mechanisms that have been applied in Ethiopia have not considered reparation as one their objectives; this fact had led to denial of justice. In the context of any legitimate transitional justice mechanism, designing a holistic policy, resource mobilization and allocations scheme, and applying options to avail to victims adequate, effective and speedy reparation - are deemed very important constituent of the overall model for dispensing justice.

### 2.7.2. Forms of reparations availed in transitional justice setting

**Reinstatement:** this procedure encompasses the return of displaced people to their homes, reinstating persons to their work, compensating for lost job opportunities, or the restitution of property. These interventions mainly require that the government fulfills its obligation, but the process may also entail setting aside for additional resources to fully comply with the objectives.

**Compensation:** includes rendering a proportional benefit - monetary or in kind - to victims of human rights violations. It may take the form of reconstruction, availing employment opportunities, or effecting payment of pensions and money. While a government should allocate budget to this end, offenders and those who had profited from the injustices or violations committed should contribute to the program.

**Satisfaction:** this is mainly achieved, among others, through truth finding, acknowledgment of sufferings, the issuance of public apology, conduct of proper burial of deceased, contributing to memorial programs, and the grant of a non-material compensation.

**Rehabilitation:** includes the provision of basic services such as medical, psychological and relatable services through the employ of a victim-centered support scheme;

**Communal compensation:** includes returning communal land, and the reconstruction of health, education, security, justice and other public services, infrastructure and systems that are essential for the day-to-day life of communities.

**Memorials:** this is achieved, among others, by holding events, building statutes or symbols, renaming public buildings, and by revising art, traditional symbols, national symbols and public holidays, and/or by amending history books and curricula.

### 2.7.3. Key activities to build reparations system

**Legal framework for reparation:** the establishment of a reparations program focusing on victims of gross human rights violations must be anchored on a clear legislation. The legal framework should provide specifics regarding the nature and content of reparation, conditions for redress, definition of victims, and other related matters.

**Identifying victim beneficiaries of compensation:** establishing a mechanism for identifying individual beneficiaries of a reparations program is very crucial. Since it will prove impossible to design a system that compensates all victims, for purposes of transitional justice a scheme must be devised that guides the conduct of inquiries and identification of victims.

**Wrongdoers' contribution to reparation system:** in addition to participation in truth finding and offering of apologies, the policy must designate a mechanism which requires offenders to contribute to the reparations scheme, as appropriate by paying compensation, repairing damages, and/or donating to reparation programs.

**Establishing victims' fund:** establishing such endowment to mobilize, collect and allocate resources is important to institute a uniform and adequate scheme for pursuing a rehabilitation and compensation program that meets international human rights standards. This is particularly true for developing countries

like Ethiopia where resource poses a constraint to implement large-scale reparation schemes. Hence, a fund must be established by the mandated institution that is given oversight powers under the law.

#### **2.7.4. Institutions: who leads/coordinates reparations program?**

In terms of institutional arrangement, the experiences are varied; the following options can be considered to address the key questions of who leads the process, and how and by whom should compensation be paid.

**Option 1: truth and reconciliation commission:** the experience in many countries show that truth, reconciliation, and reparation commissions are mandated to lead and coordinate the process, identify the beneficiaries, establish the means of compensation, and recommend on joint redress methods. The same can be applied in Ethiopia as well.

##### **Strengths**

- assures greater effectiveness of the process; independence of the institution facilitates opportunity to lead a huge and complex reparation scheme;
- guarantees effectiveness because other responsibilities of the commission will help answer some of the questions in the reparation process;
- is extended better legitimacy because of the institution's independence and impartiality and its bent on participatory processes;

##### **Risks**

- establishment of such institution demands huge state resource;
- a similar commission was tested in the past and had failed;
- would likely be challenged by incapacity of the commission to effectively deal with reparations issues which require unique competence and capacity;

**Option 2: accommodate *individual* reparation processes through a joinder of compensation and criminal proceedings; entertain *communal* compensation issues through the National Dialogue Commission or Ethiopian Human Rights Commission:**

If and where such is found to be feasible, its implementation will require the amendment of existing legislations to invest additional powers in the institutions.

##### **Strengths**

- this model saves resources as it uses existing institutional platforms;
- facilitates institutional capacity building;
- better ensures individual accountability by obliging individual offenders to pay for compensation;

##### **Risks**

- the model can be beset by lack of capacity of such institutions to enforce a reparation scheme which is complex and demands the deployment of inclusive approach;

- will be hampered by difficulty of implementing this alternative in conjunction with other mechanisms of transitional justice;
- may prove ineffective given that it had been difficult to enforce the right to compensation even in ordinary settings;
- may turn out to be a futile move in light of the over-burdened mandate and extended responsibilities of the institutions concerned;
- may potentially be plagued by discriminatory practices as not all matters pass through judicial or administrative scrutiny;

## 2.8. Institutional reform

### 2.8.1. General

In any process of transitional justice mechanism, the participation of officials and officers of the institutions who are believed to have committed or had condoned gross human rights violations will likely pose a hurdle. Hence, a clear strategy must be designed to guide the vetting of personnel and all institutional reforms. As appropriate, such strategy should enable the identification, investigation, termination of contracts, and/or transfer of suspected officials and officers to other establishments. This approach promotes a sustainable institutional reform by fostering the legitimacy, trustworthiness, and functions of institutions.

In the Ethiopian context, many institutions of concern to a transitional justice initiative continue to function without substantial changes in the structure or composition of their personnel. Genuine institutional reforms should be pursued to enhance the chances of success of the transitional justice mechanism by embarking on the first critical step - which is moving officials and officers who had committed or participated in the commission of gross human rights violations from their positions.

### 2.8.2. Components of transitional justice-linked institutional reforms

**Identification and investigation:** this phase in institutional reform involves the identification of institutions and work processes relevant to transitional justice. Personnel of such institutions who had committed or ordered the commission of gross human rights violations should be investigated. In order to prevent arbitrariness of the investigation and identification process, the task should be carried out in compliance with specific standards set by justice and human rights frameworks.

**Terminate employment or position:** further, the contract of personnel who are said to have committed, caused or contributed to the perpetration of gross human rights violations should be terminated, or such officials should be removed from the offices they hold. In addition to discouraging impunity, this serves as one means of redressing victims.

### 2.8.3. Institutions: who leads institutional reform?

The process of identification, investigation and termination of employment relations requires a great deal of caution. It should avoid any injustice that may result from improper application, prevent gaps that affect

government functions, and avert any violence that might result from it. This can be ensured through the use of two options.

**Option 1: establish a new institution that leads the process:** this undertaking can take the form of a commission, a committee, or specialized office with clear procedures.

### **Strengths**

- benefits from greater legitimacy as it will be led by independent and impartial body;
- has a better chance of thwarting unwarranted interferences (from politics, ethnic, and interest groups);
- facilitates coherence with other mechanisms of transitional justice;

### **Risks**

- requires huge state resources;
- may suffer from lack of political stature required to ensure the effectiveness of the identification and investigation process;

**Option 2: establish ad-hoc units:** this model entails the establishment of specific units within institutions of concern that are invested with the power of identification, investigation and terminating employments - based on clear and priorly established procedures.

### **Strengths**

- saves resources as it uses existing structures;
- facilitates institutional capacity-building;
- benefits from institutional ownership, embedded political stature, and better responds to risks that arise in the process;

### **Risks**

- limits the opportunity to have independent and impartial process; suffers from legitimacy deficiency;
- might be challenged by lack of capacity and interest to implement the process in compliance with internationally accepted standards;
- is exposed to risk of making decisions based on political grounds; there is a danger of giving focus to overcoming gaps/avoiding conflict than conducting proper investigation and termination of employment relations;

## **2.9. Other critical matters requiring decisions**

Apart from the policy options presented above, the following are identified as critical matters that require clearer direction and decision in the context of Ethiopia's endeavor to design and implement a transitional justice mechanism.

### **2.9.1. Temporal scope of the process**

The temporal scope of the transitional justice process should be determined at the outset. The starting point should not stretch far too back as to make the finding of evidence and witnesses a difficult undertaking. This does not, however, imply that a recent time frame should be selected which ignores serious human rights violations of the past - since such approach will then hamper the overall objective and effectiveness of transitional justice. The point is that in any setting, the temporal scope of the process must be determined carefully, and in Ethiopia, this should be pursued based on particularities of the national setting.

The cut-off point of the transitional justice process must encompass the time when the policy is adopted and comes to full force. In Ethiopia, this recommendation makes greater sense - considering that elements of transitional justice mechanism experimented since the 2018 reforms have not been effective. Further, the prevalence of gross and widespread human rights violations, conflicts and civil war justifies extending the temporal scope of the upcoming transitional justice process to include all recent events that occur at the time of the coming into force of the policy instrument.

Broadly, three options can be considered regarding the starting time of a transitional justice process in Ethiopia. Throughout the epochs, Ethiopia has witnessed multiple and widespread violations that demand the deployment of a transitional justice mechanism. Public and intellectual opinion is diverse regarding the ideal temporal scope of transitional justice; some propose for the time frame to stretch back to the reign of Emperor Menelik II, others argue the point of departure should be the imperial regime of Emperor Hailesilassie, while others advocate the 1974 timeline.

One option is to just select one of such periods as a starting point for initiating a transitional justice process in Ethiopia and investigate the merits based on broader objectives which the process intends to fulfill and other pragmatic considerations.

#### **Temporal scope covering the pre-1991 period**

##### **Strengths**

- allows broader scope for settlement of historical grievances and human rights violations through pardon, reconciliation and other mechanisms, and helps to break with the past;

##### **Risks**

- expanded timeline poses serious challenges to trace victims and witnesses;
- broader scope may suffer from possibilities of false/doctored interpretations of the past;
- will be challenged by inability to reach common understanding on the interpretation of multiple and complex incidences and trajectories of the past;

- greatly detracts focus from current issues - negatively impacting the effectiveness of the process;
- will likely take longer time to implement the process;

In order to take the best of the transitional justice mechanism, injustices and human rights violations of the far-past are better settled through the schemes of the National Dialogue Commission - than by using a transitional justice process.

**Temporal scope covering the post-1991 period:** a second consideration can be for the transitional justice mechanism to cover incidences that unfolded since the EPRDF's ascent to power on 28 May 1991. This may be an appropriate timeline considering that this historical juncture heralded a 'new political chapter' in Ethiopia - with the adoption of the Transitional Government Charter and the incorporation of more progressive human rights norms.

### **Strengths**

- the option presents a fairly manageable period;
- enables to strongly address large-scale human rights violations *in continuum* whose root causes can be traced to this particular period;
- benefits from ease of tracking and finding information and evidence;
- has the advantage of completing a high-impact process within shorter period of time;

### **Risks**

- a narrower timeline could trigger grievances related to perception of deliberate attempt to engage in selective justice;
- may pose practical challenges as this option covers the transitional government period where there was neither peace and security nor a clear constitutional duty;

**Temporal scope covering the post-1995 period:** this starting-period for initiating transitional justice in Ethiopia may be considered appropriate given that the timeline represents a landmark in the constitutional history of the country; the federal constitution was adopted, and a specific stipulation put forth which established the obligation to respect, protect and fulfil human rights (Article 9).

### **Strengths**

- this option offers a strong legal formulation as a basis of the process;
- provides a stronger basis for pursuing accountability matters; the constitution clearly defines the powers and duties of institutions and officials;
- affords a much easier opportunity for collection of information and evidence;
- benefits from possibility of completion in short period of time;

### **Risks**

- is exposed to grievances which may emanate from popular perception that the option espouses selective justice;

- may suffer from issues of legitimacy as it distinguishes between two timelines (before and after the adoption of a constitution) while the same EPRDF-led government had remained in power;

**Temporal scope covering the post-2018 period:** April 2018 may be considered as one of the options in setting an appropriate timeline; this period represents a major shift in the political order. The EPRDF-led government was reorganized, a new reform-oriented leadership ascended to power, acknowledged past violations, issued a public apology for the gross human rights violations, and promised to undertake and deepen reform and the democratization process.

### **Strengths**

- facilitates speedy transitional justice as it covers a narrower temporal scope;
- affords an easier opportunity to trace incidents and collect information/evidence;

### **Risks**

- triggers a sense of injustice on the part of victims of past violations;
- can be ineffective as it will not consider the continuity of the pattern in relation to most human rights violations today;
- does not look into, and will not address the historical context/basis of the problems;
- is exposed to grievances emanating from popular perception that the option espouses selective justice;

### **Temporal scope covering the post-1995 period ‘for prosecution’ purposes and ‘any prior period’ when the collection of information and evidence is conceivable:**

The year 1995 marks the end of the Transitional Government’s power, the enactment of the federal constitution, and a holistic and much clearer designation of the government’s responsibility to respect, protect and fulfil human rights. This makes 1995 a preferred starting point for initiating a transitional justice process. In respect of the prosecutorial component of transitional justice, it is already recognized that all crimes, except for serious international law crimes, have a statute of limitation (25 years maximum period of limitation under domestic law).

In this light, one option for consideration in Ethiopia’s context can be to strictly confine all prosecution measures to the post-1995 timeline, while using information and evidence from any prior period for purposes of establishing truth, promoting reconciliation, and pursuing other components of the transitional justice process.

### **Strengths**

- provides a stronger legal basis for pursuing criminal accountability (prosecution); the constitution clearly defines the powers and duties of institutions and officials;
- affords an easier opportunity to trace incidents and collect information/evidence;
- enables the settlement of some of the issues linked to pre-1995 period through complementary components of transitional justice;

## Risks

- triggers a sense of injustice on the part of victims; the option can be perceived discriminatory since it presents a time-bound distinction for the application of prosecution measures and other components of transitional justice;
- a narrower timeline can trigger grievances related to perception of deliberate attempt to engage in selective justice;
- may be challenged by legitimacy issues as it distinguishes between a pre and post adoption of the federal constitution while both periods were presided by the same regime;

### 2.9.2. The role of sub-national administrations in transitional justice

In countries that adopt a federal governance model, the federal government is entrusted with responsibility to design and implement a transitional justice policy. This derives from the obvious reasoning that any meaningful transitional justice initiative is implemented nationally and covers all parts of a country's territories.

In Ethiopia, the federal government is the most appropriate tier to initiate, coordinate and lead the process. The federal constitution also assigns the central government the power to issue policies pertaining to several realms. The approach also holds ground when looked at a technical level; for example, criminal matters that relate to gross human rights violations fall under the investigative and prosecutorial jurisdiction of the federal government.

The experience of several countries supports this approach. The underlying justification is that transitional justice is mostly applied in divided and diverse societies; any fragmentation of central power can risk that the process is hijacked or used to further social divisions. In this light, the most pragmatic predisposition has been to assign the responsibility to a central government.

This is not to imply that local governance structures will not assume a role; it only indicates that their functions and responsibilities should be specified and regulated through a well-articulated study and executed based on the ideals of federalism. Their engagement should be pursued within a framework led by the federal government and institutional arrangements that enable effective communication and coordination between the two tiers. This alone will guarantee an effective implementation of the process.

In practice, the participation of regional governance actors in a center-led national mechanism is important for various reasons. First, violations and offenders who are the subject of the transitional justice process may be residing in regions. Second, some of the violations may have been committed in regional contexts. In specifics, regional governance structures can play critical role in facilitating public participation, extending support to the process, ensuring that violations committed in regional context are adequately covered by the process, identifying traditional systems that may play role in the process, and in mobilizing regional officers, civil societies and other entities to contribute to the process.

### 2.9.3. The role of traditional justice systems

The concept of traditional justice systems generically refers to processes pursued based on tradition, belief and custom of communities functioning outside of (or in parallel) with the formal justice system. They

include processes that are carried out to establish truth, adjudicate on various subject matters, issue compensation, and prevent and resolve disputes.

Traditional justice systems can play important role in transitional justice processes. There is experience of traditional systems complementing formal processes in the searches for truth, amnesty and reconciliation procedures. However, traditional justice systems also raise concerns related to women's participation, adherence to human rights, and political and other forms of independence.

In Ethiopia's unique setting, the extremely diverse ethnic and religious composition of its communities implies that it will prove extremely difficult to find a traditional justice system that can be implemented nationally. Therefore, while their involvement is crucial and this must be recognized, their engagement should be predicated on proper assessment and identification of roles in localized contexts. This is achieved by recognizing their status and establishing pertinent subject matters and geographic areas which require their involvement. The pursuit of such model eases the burden which formal transitional justice institutions shoulder; it also helps to ensure effectiveness of the transitional justice process by contributing to sustainable peace, reconciliation, and amnesty.

## **PART 3**

### **OPTIONS FOR TRANSITIONAL JUSTICE INSTITUTIONAL ARRANGEMENTS**

#### **3.1. Principles guiding transitional justice process**

A transitional justice process is essentially a national process; it should be conceptualized, promoted and led by domestic institutions and stakeholders. Only such method will ultimately guarantee a sustainable foundation for rule of law and institutional building in a country. Moreover, its adherence to and recognition of the principle of sovereignty makes the pursuit of any such process a matter of national dignity.

Any institutional arrangement instituted to carry out the transitional justice agenda must be legitimate, independent, impartial, inclusive, effective and speedy. It should ensure public participation and be founded on clarity of mandates and allocation of resources. Further, the institutional scheme should facilitate communication among different mechanisms and approaches of transitional justice to create a comprehensive and effective process.

One of the key issues that needs to be addressed in the context of any determination of institutional arrangement for transitional justice is whether it will be possible to carry out an effective process using the existing institutions and structures. The following section analyzes three broad options that can be considered in Ethiopia.

#### **3.2. Options for organizational coordination (TBD)**

##### **Option 1: transitional justice through existing institutions and structures**

This option employs infrastructure availed by the police, prosecution, judiciary, and other currently operating institutions to implement transitional justice - usually by topping up new roles in such institutions. However, the institutions cannot shoulder and effectively implement a transitional justice process without going through some overhaul; hence, institutional reforms are usually espoused to transform their current

state and make them fit for newly attached roles. Where this option is adopted, the reforms will comprise two core components, namely, institutional reorganization and personnel vetting.

Institutional reform: 'existing' institutions will comply with the complex tasks and calls of transitional justice only if they are reorganized in such a way as to ensure their independence and accountability. Units tasked with criminal investigation and prosecution mandates and judicial benches looking at pertinent cases should be invested with a special independence and accountability framework. Conventionally, this requirement entails carrying out legal and institutional reforms which will lead to the establishment of a clear legal framework, structure and processes that ensure the delivery of an impactful transitional justice mechanism.

Inquiry/investigation of involved personnel: a second dimension of the reform is concerned with a system of personnel vetting. It will be inappropriate to engage personnel who had taken active part in human rights violations or created an enabling environment for violations. More specifically, a holistic personnel-linked reform (vetting process) should be designed and implemented to exclude those who are eligible for exclusion and identify staff who can be trusted to lead the process.

### **Strengths**

- the option to carry out transitional justice mechanism through the use existing infrastructure saves state resources;
- facilitates institutional capacity-building;

### **Risks**

- the process can be challenged by issues of trust and legitimacy since it deploys institutions which may have not, or are perceived to have not implemented serious institutional reforms;
- institutions may lack the requisite capacity, and the process may be deprived the focus it merits; the institutions are already encumbered by workloads emanating from inherent mandates;
- the option entails exerting great effort to coordinate the activities of multiple institutions;

### **Option 2: transitional justice process by establishing a new commission**

This option proposes the establishment of a national truth and reconciliation commission that leads the implementation of different components of transitional justice mechanism and coordinates the pertinent institutions. A stand-alone institution is established by legislation with clearly defined powers and responsibilities that are relevant to the pursuit of transitional justice - taking lessons from best practice and the experience of the now defunct Reconciliation Commission.

This model is widely applied in other jurisdictions to lead a transitional justice process. Under different nomenclature and slightly different objectives and responsibilities, transitional justice related commissions have been established in Argentina, Chile, El Salvador, South African Republic, Guatemala, Peru, Timor-Leste, Morocco and Kenya. The African Transitional Justice Framework also asserts that truth commissions are essential for African transitional justice.

With this model, the major critique is linked to the failed experience of the previous commission - which appeared to have left a negative impression in public and intellectual opinion. However, it should also be noted that the real problem with the previous commission - which induced its ineffectiveness - had mainly related to the establishing legislation and the structure it envisioned.

### **Strengths**

- benefits from a higher degree of international acceptance as it is founded on best practice and widespread practice;
- is a plausible option to receive more legitimacy and ensure impartiality;
- will likely possess better capacity because of the high political focus on transitional justice (will be attended by allocation of resource);
- ensures better ownership and accountability as the structure enables a process that considers the complexities of transitional justice and ensures participatory process;

### **Risks**

- the option avails limited contribution to sustainable institutional capacity building;
- deploying this option requires huge state resources and preparatory time;
- the option may be looked at reluctantly by the GoE because of the failed experience in the past;

### **Option 3: transitional justice through existing institutions, but with enhanced coordination capacity or via a coordination platform**

A seamless coordination and complementarity among all institutional stakeholders are key to effective transitional justice process. The institutional model notwithstanding, the truth remains that transitional justice-linked functions and responsibilities are cross-cutting, and often involve more than one institution. For instance, the establishment of a stand-alone commission or the pursuit of transitional justice mechanism by leveraging the facilities of existing institutions does not obviate the need for a strong government agency leading the investigation and prosecution proceedings. Effective coordination is more imperative in the latter scenario.

When coordination lacks, fragmented efforts will likely stand out - weakening effectiveness of the whole process. Therefore, a transitional justice policy is expected to set clear direction on how best the coordination of individual functions and mechanisms is facilitated. Such policy should indicate a structure that enables communication among relevant institutions. Ideally, this can be pursued by establishing a **national transitional justice coordination board or council**.

**The national transitional justice coordination board or council** shall own the transitional justice process and follow up the implementation of specific activities by institutions.

**The board/council can draw its members** from institutions that in one form or another are involved in implementation, supervision or support of the transitional justice process. Between 3-5 additional individual representatives may be selected in an independent and impartial process. Representatives will serve in the process on a full-time basis.

Public office representatives can be drawn from the House of Peoples' Representatives, the federal judiciary, the Ministry of Justice, the Federal Police Commission, the Ethiopian Human Rights Commission, and the National Dialogue Commission.

Individual members shall be nominated from and by the public in an independent and impartial selection process (as in the case of the establishment of new commissions); they should also hold chairperson and secretariat positions of the board/council. Such individuals should be known for and be perceived to be trustworthy, of good character, and possess a sense of ownership of transitional justice. A mechanism should also be devised to put in a representative of victims and survivors.

**Secretariat of the national transitional justice coordination board/council:** the board's secretariat is tasked with the coordination and implementation of routine activities that do not fall within the mandate of individual institutions. In particular, the secretariat shall develop working procedures, policies, directives and other instruments as are relevant to the effective implementation of the transitional justice process. As appropriate, the secretariat should have complete oversight over processes and an obligation to ensure the implementation of such processes either by itself or through the engagement of pertinent institutions.

#### **Strengths:**

- this model addresses the risks attendant in pursuing option 1 and option 2: it overcomes lack of support resulting from political fatigue relating to the establishment of commissions, and modestly saves national resources;
- it benefits from a degree of effectiveness and legitimacy as it enables the participation of experts in the process;
- the model responds to risks attached to lack of institutional ownership because it strongly leverages the coordination mechanism to drag-in institutions; it also permits institutions to implement their respective roles with a strong transitional justice lens;
- ensures sustainable institutional capacity building since it blends new structures and existing institutions;

#### **Risks**

- the option is rare and may be challenged because of limited international experience;
- the appointment of new members and establishment of a secretariat may itself suffer from political fatigue and issues pertaining to allocation of resources;

## **4. CONCLUSION**

Today, transitional justice mechanism is regarded as one of the most effective means availed to societies transitioning from a conflict setting and authoritarian rule to democratic consolidation. Over the years, countries and communities have benefitted from the process - and a great deal of knowledge and experience has accumulated at national and international levels.

There are compelling imperatives that justify the design and implementation of transitional justice process in Ethiopia. The national context demands such process. Transitional justice is essential to accelerate

state-building and ensure its continuity. Both democratization and sustainable peace cannot be realized without an effective transitional justice. Not least, transitional justice is deemed critical for meaningful protection of human rights and respect to the principle of rule of law.

Previous initiatives in Ethiopia pertaining to transitional justice had not focused on truth finding, reconciliation, redress, and the creation of national consensus; they were neither comprehensive nor effective. Ethiopia must learn from its experience and espouse an effective transitional justice mechanism that is in reading with the national contexts and opportunities - and complies with best practice and international standards.

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