

How to Strategize a Transitional Justice Policy in Ethiopia?

This working document provides guidance for defining a transitional justice policy in Ethiopia. It is based on ICTJ's understanding of the challenges the country faces, as well as on lessons learned from 20 years of working on the subject in more than 50 countries. It includes a brief explanation of how to understand transitional justice, beyond a mere set of mechanisms to be imported from abroad. It provides a short reflection of timing and sequencing, stressing the need for consultation and buy-in from all stakeholders. It concludes with some examples that offer lessons that could be relevant to the current discussions taking place in the country. By sharing these suggestions, ICTJ hopes to contribute to the debate that the country needs to hold, taking into account the interests of all sectors, including political actors, the different groups that form the Ethiopian society, and those often excluded from policy debates, such as victims, women and youth.

Transitional Justice as a Comprehensive Form of Justice

Ethiopia is facing a very complex crisis that is having considerable humanitarian costs. The current conflict in the north, armed violence and human rights violations in different regions and of different nature pose unprecedented challenges. These situations, even if diverse in their scope, parties involved, and direct causes, are not disconnected from previous periods of oppression, armed conflict, and human rights violations. Defining a path towards sustainable peace requires examining both: the current conflicts and the legacies from previous periods. In the search for answers, references to transitional justice are often made. However, there is a risk that the concept of transitional justice could be misinterpreted or even manipulated, given the different understandings by key stakeholders involved. In fact, transitional justice is often equated to amnesties, overemphasizing a dialogue and reconciliation aspect that can derive from misrepresentation or manipulation of other experiences, particularly from the Amnesty Committee of the South African Truth and Reconciliation Commission (the only truth commission that has included a specific mechanism for granting amnesty to those offering full disclosure of violations committed). Other forms of misrepresentation or manipulation are confusing transitional justice with victors' justice, even modeled on experiences like the Nuremberg and Tokyo Trials. In either case, the concept is distorted to mean the opposite of what transitional justice is. Transitional justice does not mean impunity, neither weaponizing the criminal justice system to persecute those in the opposition or those who were politically or militarily defeated.

On the contrary, transitional justice offers a comprehensive approach for addressing the causes and consequences of massive human rights violations from a human rights and a prevention-and-sustainable-peace perspective. These could be understood as the foundational elements of transitional justice: examining the past to address the causes and consequences of massive human rights violations; affirming human rights as inalienable rights of all people; and finding solutions for addressing causes and consequences that take into consideration the prevention of repetition, ending the cycles of violence,

and sustainable and long-term peace. There are different ways for understanding transitional justice. The UN Secretary General defined it as:

“the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof” (S/2004/616, para 8).

This is not only a UN agenda, but it has strong roots in African experiences. That is why the African Union has understood it as:

“the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation. Transitional justice is meant to assist societies with legacies of violent conflicts and systemic or gross violations of human and peoples’ rights in their effort to achieve transition to the future of justice, equality and dignity. Going beyond retribution and drawing on traditional justice approaches emphasizing conciliation, community participation and restitution, the conception of TJ advanced in this policy seeks to address African concerns on violent conflicts and impunity through a holistic policy that considers the particular context and cultural nuances of affected societies, as well as the gender, generational, ethnocultural, socio-economic and development dimensions of both peace and justice” (AU TJ Policy 2019:4).

The UN Special Rapporteur on the Right to truth, justice, reparations and guarantees of non-recurrence has contributed to the conceptual but also practical understanding of transitional justice by insisting on how the efforts of investigating the truth of violations, acknowledging the experiences and conditions of victims, holding those criminally responsible accountable, providing reparations to victims, and adopting measures to end cycles of conflict and reform institutions to guarantee non repetition are not matters for picking and choosing, or they are not to be implemented alternatively, but that they complement each other.

The Special Rapporteur takes the four components of the mandate, truth, justice, reparations and guarantees of non-recurrence as a set of measures that are related to, and can reinforce, one another, when implemented to redress the legacies of massive human rights violations and abuses. Redressing the legacies of abuse means primarily giving force to those human rights norms that were systematically or grossly violated [...]. The four measures can be conceptualized as assisting in the pursuit of two mediate goals, i.e., providing recognition to victims and fostering trust, and two final goals, i.e., contributing to reconciliation and strengthening the rule of law (A/HRC/21/46, 2012, para 21).

These definitions serve to guide countries when implementing policies for addressing past violations. They are based on international legal obligations¹ and often capture national constitutional obligations under countries' bill of rights, particularly the obligation to provide effective remedies to victims of serious crimes and human rights violations. As such, transitional justice is not an alternative for complying with legal obligations. Instead, it offers ways to fulfill them in situations of conflict or post conflict. It does not offer a magic solution to the difficult problems that Ethiopia faces. What it offers is to embrace the complex dilemmas between peace and justice, between security and rights, between examining the past and focusing on the future, and between local identities and common understanding of shared dignity and universal undeniable rights.

A number of core elements of transitional justice underscore its relevance to Ethiopia:

- 1) Addressing massive violations requires identifying responses that are adequate to the scale and nature of violations committed by organized structures for political purposes, either by the Federal Government, regional forces, ethnic militias, or other actors;
- 2) Confronting the different dimensions of such violations and violent phenomena (institutional, political, social, economic, cultural) requires a comprehensive and coordinated response;
- 3) Crafting justice measures in such complex context requires acknowledging and assessing the contributions and roles of a range of stakeholders, including victims, women, children and youth, those constituencies and political actors that supported armed groups or security forces responsible for violations, those demobilizing, those providing different forms of support or funds, civil society, and state and international institutions (but paying special attention to those with less power, those marginalized, or vulnerable, making sure that their voices are heard); and
- 4) Achieving a fundamental objective of transitional justice requires designing responses that help prevent the recurrence of injustice, interrupt cycles of violence, and contribute to sustainable peace and development. It necessarily needs to be based on strict adherence to international human rights law and international humanitarian law, when applicable.

This understanding of prevention is different from the one derived from a simplistic interpretation of transitional justice as either based only on criminal justice or on a transaction between justice and amnesty. Over its 30 years of evolution, transitional justice has been understood in some contexts in a reductionistic and mechanistic way as a toolbox that can guarantee nonrepetition or reconciliation.²

¹ The obligation of states to provide effective remedies, appropriate investigations, and reparations to victims derive, among others from the International Covenant on Civil and Political Rights, arts 2.3 and 14; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 14; the African Convention on Human and Peoples Rights, art. 7; the 2007 African Commission on Human and Peoples Rights General Comment No. 4; the UN 2005 Principles to Combat impunity (E/CN.4/2005/102) and UN 2005 Basic Principles and Guidelines on the Right to remedy and reparations (E/CN.4/147/60). The three conventions cited has been signed and ratified by Ethiopia.

² See, for example, Roger Duthie, ICTJ, "Transitional Justice and Prevention: Summary Findings from Five Country Case Studies" (2021), www.ictj.org/publication/transitional-justice-and-prevention-summary-findings-five-country-case-studies; Working Group on Transitional Justice and SDG16+, "On Solid Ground: Building Sustainable Peace and Development After Massive Human Rights Violations" (2019), www.ictj.org/publication/solid-ground-building-sustainable-peace-and-development-after-massive-human-rights; and Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006).

The types of interventions that constitute a transitional justice approach include those that promote accountability, truth, reparation, rehabilitation, reintegration, memorialization, and reform; and they can be implemented at the Federal, regional or community level. This requires addressing the consequences of the violations committed during the conflict and previous periods of oppression, exclusion, political repression and armed conflict. That conclusion is grounded not only in a basic notion of justice, which demands responding to victims, but also in a sound prevention approach, which seeks to avoid the repetition of new cycles of violence.

The whole effort needs to be directed to long term peace. Transitional justice should not be imposed by a powerful group on the rest of the population, as the last 60 years of Ethiopian history have showed repeatedly that such imposition fuels cycles of violence and oppression of one group towards others. When defining prosecutions, or sentencing those convicted; when examining violations committed, or rebuilding towns and the economy, there is a need to think not just about the short-term benefits, but also to the long-term common good. As one peacebuilder has put it:

The quality of our life is dependent on the quality of life of others. It recognizes that the well-being of our grandchildren is directly tied to the well-being of our enemy's grandchildren.³

It is not mercy, neither weakness, nor strategic retreat. It is just accepting that we rely on each other and that we need to learn how to leave with each other. That requires that all of us feel safe and have opportunities for a better future.

For this purpose, the effort needs to be geared towards strengthening the rule of law and guaranteeing human rights. One of the end goals of transitional justice is to foster civic trust among the different sectors of society. This means the ability to be certain that democratic institutions can be effective guarantors of political participation and human rights. That institutions comply with a human rights-based legal system, and that the political system guarantees that dissent can have expression and find acceptable solutions without having to resort to violence or repression

Developing a transitional justice policy for Ethiopia might require a participatory process where the four fundamental questions mentioned above are asked and responses are crafted with inclusive participation and towards strengthening the rule of law and creating conditions for sustainable peace. However, responses to these questions are not easy. Addressing them requires confronting the multiple dilemmas they pose.

Timing and sequencing

Discussing these questions can be overwhelming. There is so much to try to cover that it is difficult to know where to start. Clarity about them may only emerge after some time. More importantly, there is no way to control complex political processes that involve several actors, so questions need to be redefined and asked several times.

One first step could be to immediately guarantee conditions of livelihood to all those displaced or those suffering from the worse violations. This is not just a moral and political imperative for the government. It can also be an important trust building measure. A government with the willingness and ability to

³ John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (Oxford University Press 2005), 35.

provide assistance to all victims, of any side, affirms its capacity and legitimacy to govern and strengthen its credibility as a government that claims to represent all Ethiopians.

Providing humanitarian assistance to victims should not be confused with reparations, as reparations need to be accompanied by acknowledgement of responsibility. However, if humanitarian assistance is distributed fairly, no matter the ethnic group or side in the conflict, it can demonstrate commitment to justice and reduce mistrust and fear. Freeing all those imprisoned for their ideas or for participating in peaceful protests or dissent is another first step, as it is freeing combatants once hostilities have ceased, unless there is evidence of their criminal participation in crimes against humanity or war crimes.

These initial gestures are important, as they create conditions favorable for trust and reduce fear to participate in the political debate. However, they are not transitional justice per se. The next step is defining a vision and a policy of transitional justice that represent the interests of the whole country, not just of those in government or in parliament. This requires consultations that could be done in partnership with civil society organizations, reaching all regions and communities, making sure that women voices and those of other vulnerable groups are included. Some useful questions for these consultations could be:

- What is the truth that needs to be investigated and clarified, and that needs to be known and acknowledged by the rest of society? What are the grievances that different peoples across the country suffered?
- What are the crimes and types of violence committed against individual or groups that still cause immense suffering on those affected?
- Which crimes need to be investigated and how to make sure that investigations and trials are fair and impartial, and not based on the political affiliation of the victim or the suspect? What should be the role of punishment and what the role of leniency?
- What Ethiopian practices can be useful and could be adapted to hold community, regional or national dialogues about past injustices? What can your community contribute to establish the truth about past injustices and provide avenues for redress?

In a country as vast, complex and composed of different ethnicities and communities that speak different languages consultations may be complex. Defining a common strategy may require building up consensus, first at the regional level (could also be at kebele, woreda or zonal levels) through regional conferences of community representatives, and later, national conferences. Parallel conferences reserved just for women to reflect their vision might be encouraged, and those ideas may need to be integrated into the national vision and policy.

In sum, even if transitional justice is often assumed to examine the past, it is mostly focused on defining the future. The main questions are how to address the past in ways that could help guarantee a future of peace and dignity for all. And what to do now to start that process. Past, present and future are brought together, based on a shared vision of the future, and the concrete steps to advance towards it. Doing this cannot rely only on well-defined policies. The way those policies are defined and implemented matters as much as their substance. The process for defining them and their level of support and legitimacy matters too.

Some examples of how the context shapes transitional justice

To be effective, transitional justice needs to have the buy-in of the various political and social actors and be adapted to the particular circumstances of the country. Dealing with violations committed during an internal armed conflict, or by a previous oppressive regime, or one that has partially changed requires a tailored approach. Ethiopia is a unique scenario. To be effective, transitional justice policies cannot be just imported from outside but require careful adaptation. Additionally, Ethiopian history may offer the most useful set of lessons for the future of the country in light of the cycles of repression, political dialogue, detention of political dissidents and their release, armed conflict and negotiations that the country has experienced. Understanding what worked and what did not and why; what helped bring long-term peace, or how the notion of justice was manipulated by those victorious, providing a temporary upper hand and turning into new sources of grievances and violence in a new cycle. There are high chances that the obstacles and failures of the past could be repeated, as institutions tend to carry a high dose of inertia, even if authorities change.

This does not diminish the importance of examining comparative experiences that could be used and adapted to the particular conditions of the country. Some of those lessons are:

1) Clarifying and acknowledging violations committed: truth seeking

Once identified in a participatory way what is the truth that needs to be investigated, clarified, and acknowledged, a number of countries have established special commissions to investigate them, listen to the victims, and conduct dialogues, public and private. This has helped to recognize victims, their suffering but also their agency, give them voice, and advance the acknowledgement of responsibility for the violations committed. This usually requires:

- a) Defining a mandate and powers for the commission that covers a period that can allow to include the grievances that different communities and sectors have. This can help the commission shed light on the two main issues it needs to bring clarity: (1) the violations committed and their consequences, and (2) the causes of conflict and of the political use of armed violence and repression.
 - i) In the case of Sierra Leone, the Truth and Reconciliation Commission defined a period to be examined starting in 1991, when the internal armed conflict started. But in its report, the commission included a longer analysis of the political tensions since early colonization in the XIX century that helped explain some of the political tensions that contributed to the conflict.
 - ii) In the case of Kenya, the Truth Justice and Reconciliation Commission had to examine several waves of political repression and abuses by different administrations, and not only one particular conflict, even if its creation was immediately motivated by the 2007-2008 post electoral violence. It defined a period starting with the country's independence, in 1963, until the peace agreement signed to end the post electoral violence. The commission also examined some roots of conflict that preceded independence. Similarly, the Truth and Dignity Commission of Tunisia created after the fall of President Ben Ali had a mandate that extended beyond his long regime. The mandate considered abuses committed since the country's independence in 1956.

b) Establishing a commission of wide representation and credibility. Credibility and legitimacy are the most important assets of a commission and the most important factor for their success. Their main power relies in their moral authority. This requires that its members are trusted by all the different stakeholders and sectors of society.

- i) The law creating the Commission for the Clarification of Truth, Coexistence, and Non-Repetition of Colombia established a selection process based on an independent selection committee. The committee included representatives to be selected by the Secretary-General of the United Nations, the Supreme Court, the International Center for Transitional Justice, the Permanent Commission of State Universities, and the European Court of Human Rights. These committee defined a selection process that provided guarantees of transparency, independence, and of fulfilling the job's requirements. The selection process was based on open applications by different political and social actors, assessment of the candidates and selection 11 commissioners who comply with the moral character required and that were able to form a diverse and cohesive team that included gender parity.
- ii) Other commissions were based on less participatory and transparent processes and chose larger or smaller numbers of commissioners. It is critical to balance different factors in choosing the right number of commissioners, as larger groups can provide more diversity, but smaller ones (such as commissions including seven members), can help guarantee that they work as a team, and not in separate silos. After all, the credibility is the result of the added value of all the commissioners and the diversity and moral authority that all of them provide. Diversity can be tricky, as a commission is far from being a mini-parliament. Commissioners need to feel independent from the government, but also from any particular group. They cannot "represent" a group, as if having to consult a particular group about the position to adopt in their work, or having to report to a particular group, but they should provide the commission with the diversity that the commission needs to be credible to all groups. That is why it is essential to have a significant representation of women, so they could provide the commission with a sensible eye to examine the conflict from the perspective of women.

2) Defining forms for addressing the consequences of human rights violations

The large scale of the violations committed, their political nature, and the devastating consequences they have on the life of those who suffered directly require establishing policies that are capable to address them with the required effectiveness and accessibility. Even if courts are usually the regular mechanisms for obtaining reparations for harm, they are insufficient to guarantee the accessibility and large scope that reparations for victims require. If the goal is to provide forms of reparation to all victims of the most serious violations, the response needs to be adapted to the particular challenge of making sure that all those entitled to reparations could be able to access them. In several countries, reparations policies have been defined or recommended by truth commissions, but only a few have effectively implemented them. However, reparations do not need to follow truth commissions. Some countries have defined reparations policies based on extensive

consultations and the establishment of independent implementation bodies. For reparations to increase public trust, it is critical to make a promise that the country will be willing and capable to fulfill. For defining and implementing reparations, it is usually required:

- a) To identify serious violations that requires being officially acknowledged and provide some measures of reparation. This has been done by consultations processes as well as by truth commissions. However, it is not a prerequisite of reparations to have a truth commission.
- b) To identify the current consequences of violations that could had been committed years or decades ago. Given the nature of the violations, involving loss of life or serious violations of personal integrity causing severe harm, such as sexual violence or torture, it is not possible to restitute victims to the previous situation. In Chile, reparations included the provision of health care and psychosocial support to families of victims for life, scholarships for children, and life pensions, understanding that nothing could be effectively considered adequate to “compensate the harm”. Instead, reparations aimed at providing better conditions for the future, while acknowledging the wrongs committed. Those services and pensions were also easier to budget over the long term, as not all the costs were concentrated in one fiscal year. However, Chile has a well-functioning pension system and health care system, making those services effective.
- c) In context of ongoing conflict, countries like Colombia implemented a series of assistance policies, two decades before the peace agreement was negotiated. Demands for expanding those policies led to recognize them as reparations, not mere assistance, and to officially acknowledge the existence of than armed conflict. Only more than 15 years since the first humanitarian assistance policies started reparations for victims of all sides, including violations committed by the armed forces, were acknowledged as deserving reparations. The peace negotiations started soon after.
- d) To include both symbolic and material forms of reparations, individual and collective. Reparations need to have meaning, not only consist of a series of material measures. In Colombia reparations include forms of acknowledgement, individual recognition, ceremonies of apologies by the state and on occasion by the groups responsible for the violations, as well as a combination of individual payments, health care and psychosocial support, and collective reparations plans defined with the participation of the affected community.
- e) To implement an effective registration process of all victims of the types of violations selected. Registration needs to be simple and accessible, without requiring excessive certificates or high standards of evidence. Many victims are afraid to speak, traumatized, or fear discrimination, reprisals or stigma, particularly those who suffered sexual violence. Chile, Sierra Leone and Peru implemented a simplified registration process, considering the testimonies of elders, local authorities and victims’ groups when documents were not available, providing confidentiality, and reaching different regions and remote localities through building trust and consulting local authorities. This was possible because the registration body had resources, was independent from the government, and was perceived as credible by all sectors, and was especially sensitive to the particular needs of women, addressing the obstacles that they faced to trust and be registered.

- f) To set up an implementation agency that has the funds, the political power, and the capacity needed. Colombia created a special unit inside the government, linked with the presidency and supported by a committee of the relevant ministers to help guarantee policy implementation and coordination. It has dedicated a large budget over more than 10 years, and implementation has continued despite changes in government and in the political coalition in power.

3) Providing justice but not vengeance

The nature of the violations committed require criminal investigations as they constitute serious crimes that cannot be just forgotten. The legacies of those crimes will keep resurging over the years, either by victims seeking revenge, or by criminal organizations being tempted to advance their political goals through criminal activities, since they were not held accountable, neither were dismantled. However, criminal justice needs to be balanced, including violations committed by different groups and even those in power. Additionally, criminal justice should focus in guaranteeing non repetition, and not seeking mere punishment. This requires focusing the efforts on those most responsible, those who govern criminal structures, and those who in the field chose to commit egregious crimes and will commit them again. Other with lower responsibility could contribute by providing evidence, disarming, showing repentance to victims. This requires a careful balance between an effective but strategically focused criminal investigation effort, with a system for leniency, pardon or amnesties that could distinguish between different levels of responsibility.

- a) In Colombia, criminal investigations have focused on those of higher responsibility, examining cases beyond the individual crimes, but based on the identification of patterns of violations that helps identify the responsibility of criminal organizations and structures, including their political allies. This has helped dismantle those groups, while providing a sense of justice to victims.
- b) In Colombia also, the transitional justice system was the result of a negotiated peace between the FARC guerrilla and the government. At the negotiation table, the guerrilla leaders accepted to be examined by an independent judiciary and acknowledged responsibility for the violations committed. They also committed to collaborate with the peace process. The special judicial framework created for this effect admitted the value of such collaboration and required those recognizing their criminal responsibility to approach victims to provide reparations and acknowledgement of their wrong. Those complying with all these requirements, received sanctions that were negotiated with victims. These sanctions allowed them to play a role as legitimate political actors engaging legally with democratic institutions. Similarly, military commanders and officers that acknowledged and collaborated with the peace process followed a similar sanction regime based on leniency.

A serious warning should be made regarding criminal justice: it is recommended not to prioritize it if conditions of independence and capacity cannot guarantee that justice will be balanced, and there are risks of using investigations and the courts as a way for authorities to impose punishment against those opposing them. Criminal justice can make a contribution to peace only under

conditions of impartiality and balanced justice. If not, it may help perpetuate cycles of resentment and violence.

4) Learning lessons and instituting reforms to interrupt cycles of violence

Accountability by itself does not guarantee non repetition. Other political factors need to be taken into account for defining an effective policy, including: (i) the presence of arms and the perceived need of groups to hold on to them as their only guarantee for safety and political influence; (ii) the existence of uncontrolled militias that are not clearly accountable to state institutions and civilian-democratic authorities; (iii) the engrained practices among security forces to use torture and excessive violence; (iv) laws that authorize abuses and shield authorities from judicial review and accountability for their decisions. Particularly, laws that criminalize dissent overusing notions like counter terrorism, crimes against the state, or that criminalize criticizing authorities; (v) insufficient independence and capacity of the judiciary to hold authorities accountable and affirm the rule of law; and (vi) mistrust and fear among communities; and other multiple factors that explain the repetition of cycles of violence. Guaranteeing non repetition is the most difficult aspect of a transitional justice policy, which requires a consistent and long-term effort on multiple fronts, political power, and a vision that needs to be perceived as independent from any faction. Usually, truth commission can help identify the factors that caused or contributed to violations, and their recommendations can lead to relevant political reforms to be implemented in short, medium, and long terms. Human rights commissions, consultations, or national dialogue process can also help identify political reforms that could help non repetition.

- a) The Kenya Truth, Justice and Reconciliation Commission provided a comprehensive and authoritative set of recommendations. However, Parliament refused to even acknowledge the report, and efforts to implement them have been spotted. A police vetting process was implemented in ways that shielded those most responsible for violations, and police abuse remains rampant in the country. Deeper political changes also remain unaddressed, despite a new and well drafted constitution.
- b) Peru's Commission for Truth and Reconciliation found that a factor behind the 20 year armed conflict and subsequent state repression and massive violations suffered between 1980 and 2000 were the profound disparities that affected the indigenous communities living on the highlands and the Amazon basin. The Commission's recommendations led to the implementation of some decentralization policies, as well as improved access to education and health care on the affected regions, but deeper reforms, distribution of power, and engrained racism against indigenous people remain unaddressed.

None of these experiences are exempted from errors and shortcomings. They can offer only partial lessons and even more partial success stories. However, they show that some ways of responding to the violations committed can be more effective if they have the support and the trust of wide sectors of society, and if they are not perceived as a power grab or as vengeance by any particular group. This is why defining a transitional justice policy in Ethiopia requires considering these and other experiences, but also careful adaptation to the reality and conditions of the country. It should be perceived by all sectors as an opportunity for a more peaceful future, even if imperfect.

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