Considerations for Designing a Transitional Justice Policy Framework for Ethiopia

Executive Summary

A transitional justice policy framework for Ethiopia requires legitimacy and ownership from diverse sectors of society to be able to address multiple conflicts. It needs to be based on consultation, guarantees for the rights of the different communities and stakeholders, and provide certainty and clear expectations on what they could deliver. The particularity of Ethiopia is that a transitional justice policy has to be able to address different forms of political violence, interethnic violence, and political repression, under common principles. But it also requires urgent actions to give concrete signals of the willingness and leadership of the Federal Government in a multipronged effort. It should be aimed at: (1) examining past violations; (2) holding those responsible accountable, without distinction of their official position or the side they supported who committed serious crimes ; (3) listening and respecting victims; (4) learning lessons from the violations committed and acknowledge wrongdoing; (5) responding to the needs and demands of victims; and (6) implementing measures to end cycles of violence, foster institutional reforms, and guarantee non repetition.

The questions presented during the December 2022 consultations led by the Ministry of Justice are important starting points. Responding to each of them may require expanding the scope of what was presented as possible alternatives. Each question and dilemma presented requires defining what could be useful and effective to the unique context of Ethiopia. Doing this demands appraising comparative experiences while engaging in a creative process to define unique Ethiopian solutions. ICTJ offers some considerations that could be useful for continuing the discussion, based on each of the questions raised. The essence of the framework, though, may rely on the coherence and ability to coordinate the different efforts, as none of them alone can solve the complex legacies and wounds that affect the country.

1. Criminal accountability

The first question that a criminal accountability system for addressing massive political violence needs to respond to is how criminal justice can help peacebuilding. The answer to this question will guide all other questions on what, who, and how to investigate, and on how to define a balance between punishment and leniency.

A basic condition for a policy on criminal accountability that can contribute to peacebuilding and to ending cycles of violence is to be based on a balanced and independent justice effort. Criminal justice cannot be an instrument of those in position of power or in government. Any form of using criminal justice for reasserting power, acquire dominance against political rivals, or imposing victors' justice would not contribute to the overall objective of guaranteeing sustainable peace. Rather, criminal justice should be based on the rule of law. All those responsible for serious crimes are to be held accountable, even if they were supporters of the existing government or hold important offices. This demands that those investigating, prosecuting, and judging, are independent and operate under strict conditions of due process of law. This may require establishing new systems that are shielded from political influence, potentially with the involvement of international actors that could join national ones, to perform the investigative, prosecutorial, or judging roles.

Defining how to conduct investigations in a context of a large number of serious crimes is another challenge. This involves having a clear policy for the selection of cases and the ability to prosecute and judge those most responsible. Directing investigations towards identifying systematic crimes can make better use of prosecutorial capacity and can serve as an unbiased criterion for prioritization and selection. This can be done through identifying common characteristics of crimes committed in large scale at some moment and place. Those common characteristics can serve as patterns to attribute the crimes to those most responsible. This requires investigative teams and strategies that are different from ordinary prosecutions.

Accountability for massive crimes and political violence, though, cannot rely only on punitive responses. Alternative and conditional mechanisms for those offering collaboration, willing to acknowledge responsibility, provide recognition and reparations to victims, or for those who bear little responsibility should be built into the system. Only under these circumstances it is possible to discuss amnesties, which are among many alternatives for leniency. It is a common mistake to try to define amnesties without having a clear definition of the purpose and the approach of the whole accountability effort, as amnesties are just one tool under criminal justice. Participation of victims and transparency are essential for these processes to have the needed legitimacy.

2. Truth seeking

An effective truth-seeking effort requires a dedicated body lead by a group of trusted women and men, that are respected by all sectors but who do not respond or follow instructions from those sectors. The selection of members of a truth commission is perhaps the most important aspect for guaranteeing a truth-seeking process that could help bring narratives of conflict and suffering of different sectors together. The goal should not be just writing a report, but a process of engagement and listening where the whole country is involved. This requires a commission to have the resources and powers not only to conduct investigations, but to listen to thousands of victims, to give them voice so their stories are known by all sectors of society, and to help reach common narratives and learn lessons to avoid repetition of crimes. The stories of victims should inspire the country to listen with compassion and increase its commitment for respecting and defending the dignity and inalienable rights of all, no matter their ethnicity or political position.

3. Reparations

It is urgent to respond to the consequences that different iterations of violence still have on victims. This requires a decisive policy of reconstruction of infrastructure, services, and local economies; provision of basic social and economic rights to all the communities affected by displacement or marginalization; and a specific policy for the reparation of victims of the most serious crimes. Distinguishing between reconstruction, guaranteeing social and economic rights, and reparations for serious violations of human rights can help guide an effective policy that could respond to the needs and the rights of those affected, and particularly of direct victims. Reconstruction and the provision of services should be based on the needs of affected communities. Reparations should be focused on responding to the consequences of the violations committed, specially targeting those affected by the most serious violations. Responding to them, though, requires special mechanisms that could guarantee accessibility and effectiveness for victims of those violations. General mechanisms and norms regulating the right to reparation, based on individual rights to seek remedies from courts, are often insufficient when trying to address large number of victims who can provide little evidence, have no resources, or have fear or be too traumatized to seek the courts. A participatory definition of reparations policies, which include material and symbolic elements, and affirm the dignity and agency of victims, could be more effective.

4. Other elements and immediate steps

The policy framework should also outline reforms that are needed. Truth-seeking efforts can help guide those reforms, as they can identify the institutional shortcomings that contributed to abuses. Additionally, the dismissal of compromised civil servants or members of security services could be among the non-punitive sanctions that an accountability system could apply to guarantee non repetition. Similarly, traditional mechanisms could be used or adapted to contribute to accountability, truth seeking or reparations, based on their degree of legitimacy for addressing certain situations and their ability to integrate gender considerations and respond to the rights of women.

Nevertheless, a framework cannot be just a high-level policy, but needs to be accompanied or even preceded by concrete measures that affirm the rule of law and the commitment to equanimity and peace. This requires immediate policies to free political prisoners; try those responsible of serious crimes with strict adherence to due process of law and transparency; reduce the use of counterterrorism and other extraordinary legislation; strictly enforce prohibition of torture and monitoring mechanisms; and forcefully guarantee the rights to free association and expression. These measures, that can be implemented immediately, could provide credibility and trust that the framework will be effectively implemented.

Introduction

Ethiopia is embarking on a nation-building process of unprecedented nature in response to the political turmoil, and uncertainly the country has experienced in the past several decades. The initiative complements the notions of unity and equality, two fundamental principles that the country's Constitution promotes. In doing so, the country is anchoring the process in the respect of the human dignity, diversity, and inalienable rights for all Ethiopians.

One essential element for defining not just how to balance unity and diversity, but to complement them with respect for human rights, is to deal with past atrocities committed during different episodes of political violence. After repeated cycles of violence, political repression, interethnic violence, politics of exclusion, and imposition of one vision, identity, and ideology over a diverse and rich country, it is critical to examine the causes and the consequences of such violence and oppression. The diverse experiences of transitional justice accumulated in other countries, endorsed by the African Union, and partially implemented in Ethiopia itself, offer some guidelines for developing a truly Ethiopian process.

In the case of ~~One challenges that~~ Ethiopia, ~~faces~~ developing such process ~~is that it~~ requires addressing multiple conflicts, as well as historical and current grievances. The diverse and multiple grievances ~~require~~ demand designing a process that should encompass different efforts, some of which are national, to be led by the national government with the participation of multiple actors; others that refer to center-periphery conflicts (between the Federal Government and one or more region), which require considering those regions and affected communities as equal partners in developing policies for addressing them; and others that are inter-regional or intercommunity, which may have their own particularities.

Responding to the causes and consequences of the multiple conflicts demands legitimacy and ownership from the different communities and segments of a fractured society. This makes the consultation process that the Ministry of Justice has embarked on an essential element for policy design. As the aim of examining the past is to contribute to ending cycles of violence and set up conditions for sustainable peace in the country, there is no other viable option than to consult different people in designing and implementing a general framework. These consultations will enable the different communities in Ethiopia to fully engage in the design and implement each mechanism that would need to be set up for dealing with the different conflicts. Nevertheless, consultation, outreach, participation, and transparency are not needed just at the early design of the general framework, but through the whole process of establishing institutions, approving laws and regulations, selecting members of the institutions, operation of those bodies, and follow up. A transitional justice system requires the buy-in and the involvement of different communities, and particularly of victims. Each of the mechanisms to be created needs to develop their own outreach efforts for their creation and throughout their work.

The following draft ideas are an attempt to contribute to the work being done by the Ministry of Justice to define a policy of these characteristics. They are based on the presentations and discussions organized by the Ministry on December 8 and 9, 2022. They are not definitive ideas, as the consultation is just starting, they are aimed at continuing the discussion initiated by the Ministry.

The present draft contains two main sections. The first one refers to considerations to be taken into account in defining a framework for a transitional justice policy for a country affected by multiple conflicts. It examines other policy frameworks and propose factors that a framework for the particular

challenges Ethiopia faces need to consider. The second one offers ideas for the different dilemmas that such a framework faces, based on the questions presented during the December 2022 consultation sessions. The conclusion contains possible immediate steps that could help guarantee security, trust, and legitimacy conditions to defining and implementing the framework and the different efforts it should include.

A Transitional Justice Policy Framework for Multiple Conflicts

Defining a transitional justice framework for Ethiopia requires three conditions or steps : (1) defining a general policy that guarantees the rights of the different communities and stakeholders and is based on strong legitimacy; (2) including all the elements required to address multiple types of conflict and in the right degree of detail to provide certainty, predictability and trust to all sectors; and translating [what?] the policy into a legal instrument that could guarantee effectiveness and implementation.

The particular nature of a transitional justice framework for Ethiopia is that is does not refer to a single conflict or period of oppression. The framework needs to respond to the recent conflict in the North, but also to incidents of political and interethnic violence in different regions and at different moments; to oppressive regimes of the last decades; of guerrilla movements and counter guerrilla policies; and to persistent tendencies to solve political differences through violence or through repression at the federal and regional levels. Under these conditions, the framework needs to be broad enough to develop different policies at the federal level. It also needs to include the ability to support initiatives that some regional governments could define that are aligned with the overall objectives of accountability and sustainable peace. It should contain a set of principles that can guide different efforts, as well as some concrete instruments and mechanisms to start with a broad process led by the Federal government, all based on consultation.

The transitional justice effort requires multiple elements and institutions that are coherent and coordinated. Truth seeking, criminal justice, reparations, and guarantees of non-repetition are not alternatives to choose, but all of them together can be able to respond to the consequences and legacies of different conflicts and violations committed. Those elements need to be led by independent bodies of trusted people, not controlled by any government. Coordination should not be a government function, but should be left to the independent bodies, under the notion that none of them has hierarchy over the others. Similarly, coordination between a national body, like a truth commission, and other mechanisms established by a regional government, should not be controlled by any government, but be led by the bodies themselves.

Generally, frameworks are often contained in peace agreements, in constitutional texts or in laws, or in governmental resolutions issued by the executive. The legal nature of a framework depends on what is needed in a particular context for having the legitimacy and the legal authority required for its implementation. When the transitional justice process in a country requires making exceptions to general legal obligations, it may involve a constitutional amendment or provision. Examples of this are the Colombian 2012 amendment that authorized the creation of transitional justice instruments, or the provisions in the South African Interim Constitution of a short section on National Unity and Reconciliation. Those provisions allowed for the creation of the institutions and legal provisions contained later in the peace agreement between the Colombian Government and the FARC guerrilla, as

well as the South African Truth and Reconciliation Commission, respectively. In the case of Ethiopia, the need for a particular constitutional provision should be ascertained with constitutional experts, but some of the alternatives offered below could help determine whether exceptional constitutional provisions may be needed to develop a transitional justice policy in Ethiopia.

In each context, a transitional justice framework may take different forms based on legal requirements. Nevertheless, complying with legal requirements does not guarantee broader legitimacy. Constitutional amendments and laws require legislative approval. Hence, legislative bodies that are truly representative can provide a dose of legitimacy. Peace agreements, on the other hand, can guarantee the buy-in of the warring factions, but they do not necessarily include other relevant stakeholders. Government resolutions could be preceded by multiple forms of consultation. The relevance of legitimacy for a transitional justice framework requires going beyond strict legal exigencies or consideration about power-brokers. If the final goal of transitional justice is to end cycles of violence, set up conditions for inclusive governance and coexistence, and guarantee sustainable peace, defining the framework requires extraordinary efforts to involve a wide range of social and political actors, women and men, people from different regions, ethnicities and languages, people from different social class and political views, the diaspora, activists and human rights defenders, and victims of human rights violations. Even if the concept note developed by the Ministry makes ample references to consultations, their importance cannot be overemphasized. Consultations should be undertaken not only at the design stage, but during the whole process of implementation. This is not just a principled position. The effectiveness of the framework to create conditions for sustainable peace requires a high dose of representativeness, legitimacy, and participation of multiple actors in its definition, implementation, and monitoring.

Frameworks could be “thinner” or “thicker”, depending on their level of detail. They could lay out general foundations for institutions and legal provisions to be defined later or they could provide detailed description of those institutions. The Lomé Peace Agreement of Sierra Leone established the creation of a series of national reconciliation and consolidation of peace structures, including a truth and reconciliation commission, but without providing details about its mandate, powers or members. The government later passed the TRC Act, which provided that detail. On the other hand, the peace agreement of El Salvador included a detailed description of a truth commission. None of these agreements, though, provided comprehensive and detailed descriptions and regulation for the creation of institutions truth, justice, reparations, the search of the missing, and guarantees of non-repetition, as the ones included in the Colombian peace agreement with FARC. For example, one key component of the transitional justice approach in Sierra Leone was the Special Court, which was not part of the original framework but the result of a later agreement between the government and the UN. Even comprehensive frameworks can fall short and need additional efforts and institutions. Another example of a comprehensive transitional justice framework is the Organic Law on Establishing and Organizing Transitional Justice, passed by the Tunisian Constitutional Assembly after a long process of consultation. Nevertheless, the Organic Law required enabling regulations, operational provisions and more detailed definitions for each of the mechanisms created. Even a thicker and detailed framework would need additional definitions and regulations.

In a context like Ethiopia, where there is a need for certainty and urgency, a thick framework that defines different institutions and how they all contribute to a common goal seems to be the most appropriate. Such a framework could provide the coherence that the different institutions and

mechanisms require. The Tunisian Law and the Colombian peace agreement could serve as general guidelines, as both define in detail a set of institutions that constitute a transitional justice policy. They are very different though, and respond to the particularities of the situations they were designed to address. The Tunisian Law established several institutions, defining their powers, mandate, and appointment of members. The Colombian Peace Agreement, despite its length and detail, required specific laws to create the different institutions and legal provisions for a comprehensive system of transitional justice, as the agreement in itself was not a law. The comprehensive system of truth, justice, reparations, and non-repetition defined in the peace agreement was later defined in a constitutional amendment and each institution was regulated in detail by subsequent laws. Either option should be considered for Ethiopia, depending on constitutional and legal provisions required for the creation of the system, as long as coherence among the different institutions is guaranteed.

Dilemmas in defining the transitional justice policy framework

The presentations made by the Minister and by those providing advice on this policy contain most of the issues that a policy needs to include. The concept note also contains them. Additionally, the references to the African Union policy serve as a useful anchor guidance. There is no need to detail each of the elements mentioned.

The list of policy options presented to debate is useful for a preliminary discussion. They could be complemented by some of the issues identified by consultations conducted by different bodies, like the ones recently organized by the EHRC and the OHCRHR. Many other issues should be considered in the next stages of the consultations and design process, as the framework requires more detail. The definition on how a gender approach and differentiated approaches to include the needs and particularities of vulnerable groups needs to be more developed. The search for the missing and addressing the uncertainty that being missing produces on family members is another topic to be examined. Finally, the policy framework requires addressing not only the consequences of violations committed, but also the causes and factors that contributed to those violations or that are at the root of political or interethnic violence, political repression, and of cycles of violence and exclusion. The grievances many communities mention when asked include conflicts over land or resources, social and political exclusion, cultural or language exclusion or discrimination, lack of trust in security, justice or governance institutions, poor representation in political structures, and fear of institutions that are supposed to provide security. A truth commission could help identify these issues more deeply, but some of them may require more prompt responses to be defined with the affected communities. The questions and options presented during the consultation, while important, are not the only ones that need to be part of the policy framework, even if finding common ground on them could be a starting point for defining some salient issues.

1. Accountability

Accountability is often assumed to be equivalent to formal justice. Nevertheless, there are plenty of experiences of process for holding accountable those responsible for difference offenses that combine formal and informal justice, like the Gaçaca system in Rwanda or the community reconciliation process implemented in Timor-Leste, where crimes resolved at the community level were referred to the special prosecutor and the decisions were granted legal recognition. Restorative justice mechanisms that

require communities, victims and perpetrators to be involved in ensuring accountability have been also applied in Bangsamoro, in The Philippines and Colombia, to name two examples. When defining a system for accountability it may be good to include what could be the role of traditional systems, its relationship with the formal system, and the provisions that it may require to fulfill to guarantee equanimity and a gender approach.

Before defining the categories of offenders, types of crimes or institutional arrangement, as well as amnesties, as mentioned during the consultation, it is important to define the purpose of criminal accountability in the transitional justice policy. Defining its goal is what can help respond to technical questions on this issue.

The presentation mentioned that the transitional justice process was aimed at state building and sustainability, including democratization, lasting peace, guaranteeing human rights and the rule of law. Another goal mentioned was expeditiousness, as the process needs to achieve results with relative promptness. Other considerations involve legitimacy, which requires strict independence by all, prosecutors, investigators, and judges, and particularly, conditions for guaranteeing impartial and balanced justice. Frequently, in contexts of massive and organized crime, by militias or by state institutions, explicit references to dismantling criminal structures are often added. In contexts of intercommunity violence, reintegration of certain offenders are also stated goals. These goals are consistent with other experiences of transitional justice, as well as with the lessons derived from the Derg regime trials, a clear example of how victor's justice and prosecuting all crimes can result in perpetuating the cycle of violence, repression, and counter-repression.

The criminal justice policy should respond to the goals mentioned above in a way that can effectively address the number and nature of the crimes. Guaranteeing impartiality, expeditiousness, and dismantling criminal structures in situations of massive and politically motivated crimes requires for investigations and prosecutions to target serious crimes committed by any side of the conflict. Additionally, prosecution needs to focus on all those who are key players in an official or unofficial criminal structure, like a military unit, a death-squad, militia/civil defense force or a network of authorities, involving civilian and military or police, that designed and implemented a policy of repression or that involved violations of international human rights law or international humanitarian law. These approaches are not just the result of limited capacity to deal with a large number of crimes. They respond to the pressing need for effectiveness, for producing results in a reasonable time, and for making sure that those results could contribute to peace, guaranteeing non recurrence, and strengthening the rule of law.

Once defined which conducts and whom to target, it is essential to define how to do it. Selection or prioritization of cases among equally serious crimes should not be a random or a partisan decision, but one governed by a well-though strategy geared towards guaranteeing effectiveness in dismantling criminal networks, and strictly following the evidence. The strategy should be focused on identifying those who played a critical or decisive role in the execution not of a single crime, but of a criminal action plan or operation that consisted of a series of crimes that constitute serious violations of internal law or international humanitarian law. International criminal tribunals and national courts from Guatemala and Colombia have used the identification of patterns of crimes to characterize what some of them had called a macro-criminal phenomenon. A series of crimes, linked by similar *modus operandi*, committed at certain time and place, may point to similarities that are not the mere product of coincidence.

Instead, they follow a pattern of actions that reveals common orders, command, and even the institutional culture of the respective unit or militia, or the military doctrine followed by an army or police force. Location and time can help identify the specific unit and its command structure. But the key is not just to pursue commanders, presuming their criminal responsibility, but linking different crimes that reveal a pattern and as result can be attributable to those who made key decisions on how those crimes were executed, sometime involving also operational officers of the field level, like majors, captains, lieutenants or non-commissioned officers. Based on plans, circulars, and manuals it is possible to demonstrate the responsibility of others having high responsibility, or even of some non-military actors, like civilians who participated in defining the criminal plan or civil authorities.

In addition, there is a risk that aiming only at those most responsible could feel that the experiences of many victims are not recognized and there is no justice for them. Since the patterns are based on the organization of information from concrete crimes, prosecutions may require evidence of those single crimes and involve the testimony of witnesses and survivors. Based on that evidence, investigators and prosecutors could be able to build up the case towards those with higher responsibility, providing clarity about how some particular crimes were committed, by whom, and how they are linked to other crimes who were part of the broader pattern. Those crimes could be investigated not just to determine their direct perpetrators, but also to connect them to similar ones to identify possible patterns.

An approach like this one requires prosecutors and investigators to operate differently from regular prosecutors. It requires teams of investigators and specialists of different disciplines that collaborate in bringing together the different elements that characterize the patterns. It also requires integrated databases to organize the information regarding multiple crimes to help identify common features among them. They cannot see their role serving the interests of the government, but serving the interest of justice, which means taking victims' rights seriously. The importance of capable and independent investigators cannot be stressed more, as often all the attention is given to the independence of judges; independence of prosecutors is only sometimes considered; and unbiassed and independent police officers, investigators, and forensic experts is often omitted.

When discussing the institutional arrangement for the prosecutorial and investigative body, the essential questions are about independence and capacity. Existing institutions could be an option but only if they offer conditions of independence, resources, and specialization for implementing investigative strategies like the ones described above. If existing prosecutors and investigators lack sufficient independence, separate institutional frameworks may be needed, which may require constitutional or legal provisions. Nevertheless, a diagnosis of what could be needed demands an independent assessment that considers how to overcome those limitations. The assessment of independence and capacity should not be just a normative exercise, but one that involves intangible factors, like organizational culture, forms of temporary secondment that don't shield from future retaliation, etc. Despite the content of norms, training or instructions, inertia plays an important role on how institutions behave and how independent they could be.

Institutional options can vary greatly, as long as they guarantee the conditions outlined above. However, they are often presented as rigid options, either as entirely separate national institutions, such as the International Crimes Division of High Court of Uganda, or with different degree of international participation, such as the Special Court of Sierra Leone or the Special Criminal Court in Central African Republic. An experience often overlooked that offers a more nuanced type of a hybrid system is the

International Commission against Impunity of Guatemala (CICIG). This was the result of an agreement between the UN and the Government of Guatemala that created an independent international commission as advisor to the Office of the Prosecutor and the judiciary. The commission, headed by an international judge or prosecutor, not only provided training and technical assistance to the judiciary and prosecutor, but also had its own investigators. CICIG could develop its own investigations and work on them jointly with the Office of the Prosecutor. Decisions about prosecutions remained at the Office of the Prosecutor, while CICIG could act as joint prosecutor in the case. This strengthened national capacities while maintaining national ownership. Other options that could strengthen independence are hybrid models, like a special prosecutor and chamber jointly composed by Ethiopian and foreign staff, including experienced judges, prosecutors, and investigators.

In terms of legal reforms, an important consideration about the principle of legality is needed. Legal reforms that establish new crimes or redefine existing ones could have little effect for prosecuting conducts committed before the reform. However, lack of adequate descriptions of crimes against humanity or other crimes not specifically included under Ethiopian laws should not limit the ability to try them. Many countries have prosecuted crimes using their existing criminal laws even if they do not capture the specificity of the conduct. Before recognizing the continuous nature of enforced disappearances, Chilean courts prosecuted them as kidnapping or illegal detention, adding concurring offenses like murder, illegal burial, torture, or failure to report a crime or to register a detention. Antiquated and even inadequate definitions in criminal codes are not an unsurmountable obstacle to prosecute those crimes while respecting the principle of *nullum crimen sine lege* and *nulla poena sine lege*, enshrined in article 22 of the Constitution, and the Ethiopian Penal Code contains a catalogue of criminal conducts that is very ample and updated.

The principle of legality is not an obstacle for attributing criminal responsibility to those who directed or ordered the action without taking immediate part in its material commission. Doctrines like command responsibility, perpetration by means or joint criminal enterprise can be used even without having to ratify and fully domesticate article 28 of the Rome Statute. A court could interpret article 2.4 of the Ethiopian criminal code in a way that incorporates those doctrines or the reasoning used by international criminal codes. A reform that explicitly includes a definition of command responsibility based on the Rome Statute could provide more certainty, but criminal participation could be established just using existing norms under the Criminal Code, adequately interpreted under the circumstances and the nature of the unit or criminal network involved in the commission of macro-criminal phenomena.

Perhaps the area where a reform is of the essence to provide certainty and ensure independence is to guarantee that these crimes are tried by civilian and not military courts. Even if committed by military units or during armed conflict by warrying factions, crimes like torture, rape, summary executions, or similar ones cannot be understood as military crimes. Military jurisdiction does not offer the conditions of independence and legitimacy that are required for dealing with the past. Other relevant reforms could involve witness and victims' support and protection, mechanisms for victims' participation, and incentives for collaboration, including alternative sanctions. Legal reforms may be needed also for implementing an adequate outreach program for the definition of the policy and later for its implementation, public information, as well as establishing transparency measures needed for providing legitimacy to the policy and the trials. These measures can be particularly relevant when there is a legacy of biased justice and deficit in trusting the justice system among certain communities.

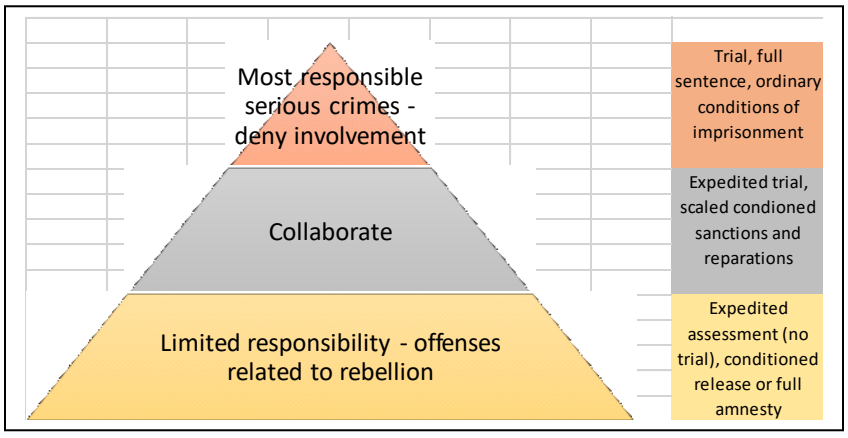
Some aspects of these measures may require constitutional provisions. Norms establishing a special court system, hybrid international and national ones, or judicial systems based on adaptations of traditional systems with special jurisdiction may need to be defined at the constitutional level. Similarly, creating special prosecutors that do not depend on the Attorney General may also need exceptional constitutional provisions. Others may require simple legislation.

Alternative outcomes to criminal justice: Incentives, leniency, and amnesties

Even if in the consultation the question about amnesty was presented a separate one from criminal justice, we strongly recommend treating it as part of the criminal justice component. Amnesties are just an instrument of criminal law, so their definition depends on the overall criminal law strategy and the goals defined for it. Moreover, amnesties are not the only instrument for providing alternative forms of exit for criminal accountability. Others include special conditions for serving time (special jails, confinement in not enclosed facilities, like a region or location, domestic confinement); reduced sentences; community services, including services to affected communities in reconstruction projects, or clearing mines and unexploded devices; release under certain conditions; participation in community reconciliation initiatives or traditional justice processes; civil or administrative sanctions, such as dismissal from civil service or from security bodies and prohibition to join them in the future; and amnesties of certain crimes. According to article 6.5 of II Protocol of the Geneva Conventions, in situations of internal armed conflicts, it is even advisable and highly encouraged to provide general amnesties for political offenses, related to the rebellion or insurrection, or for crimes like treason, use of uniforms or prohibited arms, and even conducts that could be equivalent to take prisoners of enemy combatants or law enforcement officers, under reasonable conditions of imprisonment. Amnesties are also essential to deal with all those who have been imprisoned for political reasons or for reasons related to armed conflict. Notably, such amnesty could not cover great breaches on international humanitarian law or serious violations of international human rights law, in accordance with article 28 of the Ethiopian Constitution and as affirmed by Ethiopian courts in the *Mengistu and Others* case.

All these measures should be considered as alternatives to be granted by prosecutors and courts in exchange for collaboration, including the expression of repentance, or assisting in the location of the whereabouts of the missing. They require expedited decisions, which may prevent the system from getting congested, but they are still judicial decisions.

The following graphic explains in a simplified way the suggested approach. It distinguishes defendants based on their degree of determinant responsibility, the seriousness of the crime, and their level of collaboration. The accused of serious crimes, who played a key role in planning, ordering or committing them, and who refuse to collaborate are to be tried and receive a full sentence



to be served in an ordinary facility. A second broad category are those accused of serious crimes who choose to collaborate. They should go through expedited trials to determine the veracity of their acknowledgment of responsibility and receive alternative sanctions based on the nature of the crime and conditioned to provide different forms of reparations and redress. The broadest category corresponds to those who did not have a determining responsibility on the commission of crimes; who are only responsible of offenses associated to the rebellion; or are accused only of political crimes. They should be released under certain conditions or amnestied without further conditions for crimes of political nature. The pyramid shows that the portions of defendants to be tried could be limited to those most responsible for the most serious crimes and who refuse to collaborate. However, other mechanisms target other defendants. Traditional justice mechanisms could be used for defendants who had collaborated (middle level of the pyramid), so they could be confronted by victims, acknowledge wrongs, and provide forms of reparations. They could also be applied to some of those in the lower level of the pyramid. This could foster a perception among victims and affected communities that justice was done.

Any of these alternatives can be controversial. Nevertheless, if they are decided by truly capable and independent investigators, prosecutors, and judges, in full compliance with the rule of law and due process of law, and with strict adherence to basic principles of fairness and a balance justice, they could contribute to achieving the goals of the transitional justice policy. On the contrary, if criminal justice is perceived as biased, too harsh on one side and too soft on the other one, or omitting some suspects that are deemed politically powerful, the result invariably would contribute to the strengthening of resentment and grievances, and the possible resurgence of political violence.

2. Truth Seeking

A process of truth seeking defining shared narratives, establishing political responsibilities regarding different iterations of political violence, providing voices to victims, acknowledging wrongs, and learning lessons from those wrongs might be what Ethiopia needs the most in a crucial effort of nation building and peacebuilding. The history of conflicting narratives; of imposition of ethnic, language or religious identity, and the subsequent violent affirmation of a particular identity; and the unresolved tension between unity and diversity require a shared examination. The National Dialogue Commission can be of help to promote dialogue, but a truth-seeking effort may still be needed to deal with the legacies of the violent conflicts and political repression. Criminal justice could establish criminal responsibility, but would not be able to establish political responsibilities or deep grievances that communities have. Reparations could address some of the consequences but would not offer lessons in understanding what made possible that such degree of cruelty was inflicted on victims. A truth-seeking effort is needed to complement what the other mechanisms cannot deliver: examine the root causes and historical legacies that contributed to the different conflicts; identify political responsibilities; provide a general narrative from victims and other actors beyond what could be established by courts; reach the whole society in examining the consequences of the violence suffered by others; and help learn lessons that could be useful for prevent re-occurrence.

Moreover, even a criminal justice system and prosecutorial strategies like the ones outlined above would have limited capacity to listen to all victims and acknowledge the injustices they had suffered. A truth-seeking effort is not just a space to recognize different narratives, but also an opportunity to listen

to victims and give them a voice. The narrative needs to be based on the voices of victims, and the acknowledgement of wrongs needs to speak to the offenses experienced by victims, as described by themselves. This can help the whole society, and not just those directly liable, to be confronted with their responsibility. However, a truth commission is not a court, neither is the best place to grant leniency to those accused of crimes or to grant amnesties. The South African TRC has been the only one of more than forty commissions that had a special mechanism for granting amnesties. The coordination and the firewalls between a truth-seeking and a criminal justice mechanisms should be carefully delineated, to guarantee that the truth commission doesn't become an avenue for impunity. Criminal justice incentives for collaboration should be administered by the special prosecutor and the courts.

Understanding this challenge can help define the contours of a truth-seeking process that is appropriate to Ethiopia. Truth commissions in other countries have dealt with an internal armed conflict or with human rights violations committed by an autocratic regime. The Truth, Justice and Reconciliation Commission of Kenya dealt with a complex and extended period, since the country independence, as those defining its mandate realized that abuses and violence were not the feature of only one regime. Furthermore, the Commission was capable of examining some root causes, going beyond independence and including legacies from colonial times. 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 begun. However, it included in its report a longer analysis of the political tensions since early colonization in the XIX century that helped explained some of the political tensions that contributed to the conflict. In fact, truth-seeking efforts cannot have a strict limit on the period to be examined, as identifying causes and contributing factors to political violence requires looking at their multiple roots. At the consultation session of December 8, 2022 there were opinions about starting with the Derg regime while others suggested going further back. Addressing contested narratives about national identity and unity under one ethnic group demands revising certain aspects of the imperial period.

What could be more important is the selection of the members of the commission and its powers. Questions about the legitimacy and effectiveness of recent commissions in Ethiopia demonstrate the need for a more inclusive process. Credibility and legitimacy are the most important assets of a commission and the most important factor for their success. Their main power relies on their moral authority. This requires that its members are trusted by all the different stakeholders and sectors of society. Experiences from Colombia and from the Yoorrook Justice Commission of the State of Victoria, in Australia, can serve to model a selection process of people who could be trusted by all sectors, instead of merely representing different but particular interests. Selection through participatory and transparent processes, based on open submissions, and done by a credible selection committee could offer more chances to choose people that could speak with moral authority and be listened by all peoples in Ethiopia. There is a need to balance different factors to guarantee diversity, representativeness, and legitimacy, but that doesn't mean that members should be chosen or nominated by each community and that they respond to a particular constituency. All members should feel that they are answerable to the whole nation. A commission of fewer members may be more conducive to team work, finding common solutions and narratives to offer them to the country. Autonomy needs to be guaranteed through transparent selections, security of tenure of the commissioners, capacity to implement their mandate without being subjected to pressure or intimidation, and to a secured and sufficient budget.

In terms of powers and functions, the commission needs to have the capacity to listen to a large number of people, particularly victims, to communicate their stories to the rest of the country, and to give voice to those often silenced. This may require not only a database, but a staff and collaborators who could listen and record testimonies in ways that are welcoming and – to some extent – reparatory for those reliving painful stories. It will also require working with civil society to gain the trust of survivors and providing psychosocial support and immediate assistance to deal with urgent needs. Public hearings, outreach and the use of multiple media (radio, tv, but also social media, in different languages, aiming at different generations and degrees of technological access of a diverse people as Ethiopia is). One particular challenge would be how victims of certain groups that speak a particular language could be listened and respected by those of other ethnic groups and who do not speak their language. The commission should need to obtain information, documents and testimonies of people who could be reluctant to collaborate. Powers of subpoena are needed when general mandates for collaboration are not responded.

The commission should also investigate thoroughly political and repressive events, matching them with the narratives of victims, considering multiple sources and points of views. This may require not only investigators, but access to information usually guarded as secret or confidential. Commissioners and qualified staff may require special clearances and mechanisms for guaranteeing access, while protecting what really deserves to be kept confidential, considering that state secrecy should be the exception in a democratic nation.

A final aspect is guaranteeing that the legacies of the commission are continued. The work of a commission cannot be limited to the production of a final report. Instead, it is a process of listening and acknowledging that cannot be limited to a written document and a list of recommendations that often remain unimplemented. The mandate and powers of the commission should allow it to organize hearings and activities to foster dialogue between conflicting narratives; find effective representations of the suffering and lessons to be learn; develop forms of memorialization of events that are inclusive; make recommendations that have sufficient buy-in to be promptly implemented; and have a clear and well-organized implementation and follow up body.

The commission should be able to make recommendations for legal or policy reforms based on its findings. One of the most powerful aspects of a truth commission is its ability to identify factors that contributed or enabled the use of political violence, political repression by authorities, or interethnic violence. Violence is used as a political tool frequently out of fear from serious threats or out of frustration when there are no other avenues to protect or advance the rights of one's community. It is often the result of lack of adequate mechanisms for advancing political interests or to participate in government according to the constitution and laws. Other contributing factors are the lack of adequate protection and legal remedies: the absence of independent courts, the lack of effective and independent human rights commissions, or the existence of police forces that are abusive . Other factors that often favor political violence or repressive policies are Insufficient institutional check and balances, lack of independence of the press, restrictions to free speech, and limitations on the exercise of the right to free association. Identifying how these or other factors contributed to human rights violations can help define reforms that are needed to provide security and legitimate avenues for advancing the rights of all members of society.

3. Reparations

This topic is often left to the end. Partly it is because of the significant gap that exists in what is perceived to be deserved as reparations and what is actually possible to deliver. However, when victims are asked, it is often their first priority, as lack of minimal conditions for subsistence and the impact of the crimes suffered are a daily source of deprivation, suffering, and anxiety.

In a broader sense, reparations involve addressing the needs of all those affected by violence, oppression and marginalization. When people are asked about reparations, they often state immediate needs that include the provision of basic services and conditions for survival. In a stricter legal sense, responding to basic needs is not necessarily reparations, but is urgently needed and can be a precondition for reparations. The provision of basic services for those living in marginalized or destroyed communities and guaranteeing the return or resettlement in sustainable conditions of those displaced by conflict are general obligations of the State. They do not necessarily derive from its responsibility over human rights violations. They are based on social and economic rights of the people; on humanitarian obligations under national and international law; and under the obligation to provide basic conditions of security and the protection of the law. Guaranteeing living conditions of people displaced and their right to return or resettle with dignity are prerequisites for a transitional justice policy and for reparations. Basic infrastructure and services, such as functioning schools and health care centers, are not only a basic right, but also would be needed for victims to receive rehabilitation or educational forms of reparations. Guaranteeing basic rights is also a trust-building measure for a government that claims legitimacy and for trusting its commitment to address past abuses. The credibility of the whole transitional justice process relies in it. Moreover, fulfilling those obligations should be done immediately, without needing for the approval of a transitional justice framework, as long as these policies are designed and implemented with the participation of those affected.

In terms of reparations for human rights violations committed, the implementation gap referred above is often filled with unrealistic expectations over donors contributing or of assets expected to be recovered. Experiences of donor contributions and of recovering assets rarely reach those expectations. Another obstacle for reparations is the concern about how expensive it could be, when the government also needs to invest in reconstruction, guaranteeing social rights, and setting up several justice and truth mechanisms. Part of the problem is thinking that the same standards and parameters applicable to individual losses can be applied to massive ones. The experience of the Eritrea-Ethiopia Claims Commission shows the limitations of this approach, as little of what the commission recommended was implemented, and victims, after having their rights stated, were left with nothing. This complex topic deserves further exploration, but some general principles could help guide the discussion. This could include: (1) Determining the most serious violations that require receiving some form of individual reparation; (2) Identifying, through participatory consultations, the general consequences that those violations have on victims and survivors today; (3) Determining what could be of value to victims of those worse violations to address the consequences and the obstacles they experience to live a normal life, considering the differentiated impacts and obstacles that specially affect women, children or the elderly. This often includes not only monetary payments, as on lifelong pensions, but also psychosocial and medical care, education and skills training for children and for direct survivors, restitution of civil rights and “a good name”, and symbolic forms of reparation; (4) Registering victims of those violations in a way that is accessible, especially considering those who are in no condition to remember, speak, or provide details or evidence of such traumatic events, or who have reasons to distrust or fear speaking

out. Fear of stigmatization, by those who suffered sexual violence, is often acute when there is insufficient understanding of the pervasiveness of those violations.

The whole process should be based on participation, consultations and gaining the trust of victims, as well as providing a consistent message of inclusion and explicit acknowledgement that reparations are a right derived from State wrongdoing. This should translate into forms of symbolic reparations to be defined with the participation of victims. Simultaneously, addressing harms affecting entire communities may require forms of collective reparations, in addition to individual ones; a policy for the reconstruction of infrastructure; the return or resettlement of those displaced; and the improvement of social services to marginalized areas of the country. Participation is not just a recommendation for good policy, but can have a value in itself, as the recognition of political agency and ability to propose policies to respond to own needs is an essential component of human dignity. It is precisely human dignity what was first denied to those who were targeted by killings, sexual violence, torture or repression, so the whole reparation policy should reinforce the dignity and agency of victims.

Nevertheless, as in other countries, any form of material reparation would be empty of meaning if not supported by prosecutions and public acknowledgement of wrongs. Material reparations can easily be confused with exchanging blood from money, or with mere handouts that have no ability to respond to the serious injustices that victims have suffered by the violations and by all the subsequent years of dismissive neglect.

These considerations can help address some of the questions posted during the consultation session. The legal framework for reparations based on tort law and judicial adjudication of individual claims based on a detailed assessment of the harm suffered by each victim is clearly not applicable, as most victims would not have access to courts, lawyers or evidence that could allow them to successfully litigate. Accessibility should be the highest priority for a reparations policy to guarantee fairness and that could be reached by those victims who had experienced the highest degree of suffering and trauma. Moreover, the State cannot provide the funds to pay all compensation it is ordered if all victims could overcome those obstacles and obtain court decisions on their favor. A more effective policy should be one where the State takes the initiative as result of acknowledging its responsibility, based on a system like the one presented above. The determination of the funding should be based on the nature of the measures, as a fund cannot cover permanent costs, like pensions, scholarships, or psychosocial or medical expenses. Effective reparations policies have been established by law, in ways that its costs are yearly appropriated through the national budget as permanent costs, due to obligations of the State established in a reparations law. In terms of institutional frameworks, experiences of registering victims through independent bodies, like the one used in Peru, Colombia, and Sri Lanka, and with less efficacy in Côte d'Ivoire, could make easier for victims to trust. In a diverse country like Ethiopia, such a body may need establishing alliances with local entities, as the reparations Council of Peru did. Those alliances, a careful and respectful deployment over all the regions of the country, and flexible registration criteria helped it for register more than 200,000 victims and direct relatives, and almost 6,000 communities affected by violence and massacres, overcome obstacles like mistrust, or lacking identity documents or evidence of the violations suffered. Needless is to say that an independent state commission established under the Paris Principles for national human rights institutions, like the Ethiopian Human Rights Commission, cannot be an implementing body. That would interfere with their nature as a human rights monitoring institution.

4. Other policy components

A final section tries to respond to issues mentioned in the consultation on institutional reforms, temporal scope, and the use of traditional mechanisms, even if they were mentioned in the previous section. In addition, certain preconditions for implementing the framework are mentioned, as essential policies for trust building and legitimacy.

Regarding institutional reforms, and particularly legal reforms, some of them could be part of a negotiated political arrangement. Nevertheless, an examination of lessons from the past, by a truth commission, could offer deeper analysis of institutional failures that contributed to political violence. They could also help recognize institutional incapacity or unwillingness to prevent or act promptly protecting of victims, like the lack of judicial independence; security services that are unaccountable; police forces that rely exclusively on the orders of political authorities, dismissing their legal obligations as law enforcement bodies; existence of political militias; lack of independence or capacity by human rights protection institutions; or failures for guaranteeing an independent press or civil society that could have raised their voices for the protection of victims.

Considerations about vetting may require further exploration. In the aftermath of an extremely abusive regime vetting seems to be needed to restore public trust. That could be the case of the Somali region after the Abdi Illey regime. Nevertheless, that seems to be a regional process where Federal authorities might better not get involved. There may be other institutions where a vetting process may be required, but regularly, changes in command, doctrine, discipline mechanisms, and oversight could be more effective, as often the main responsibility for abuses committed by certain institutions are among the upper ranks. Often, the main factor for changing the culture of an institution is the commitment of its leadership, at the top and medium levels. Dismissal and prohibition to rejoin civil service or security services as part of the alternative sanctions of the criminal justice system can offer similar benefits than a vetting process that is coordinated with the general accountability one.

In regards to temporal scope for the transitional justice policy, each mechanism could have different ones. Age of defendants and witnesses, lack of evidence, and other obstacles due to the passage of time could make it advisable to set up a shorter period for criminal investigations, like 1995, as suggested during the consultation session. The truth-seeking process could have a longer one, with the natural possibility of examining factors that have origins further back, as needed. In terms of material reparations, the examination of the consequences of past violations in the present may help avoid having to examine violations committed more than one or two generations before. It is reasonable to consider the consequences that a person who lost her parents as a child several decades ago could suffer today, but perhaps not beyond that point. As for property losses, the passage of time, but also the immensity of the suffering caused for those affected by a personal loss, may recommend not to include them through reparations, but perhaps through a system of mediation, traditional conflict resolution (with gender corrections) or land distribution. On symbolic reparations, those limits of time might be counterproductive, and it may be advisable to go as far back on time is needed.

Traditional mechanisms could play important roles in each of the systems described above. In Timor-Leste, traditional mechanisms were used in some cases of lesser criminal offenses, and the results were notified to the prosecutor for the dismissal of charges, once the defendant had complied with the

conditions imposed, including reparations to the victims. Any role to be assigned to traditional mechanisms may require considering the comments made during the consultation about guaranteeing gender sensitivity and the rights of women, as well as determining special and eventually joint mechanisms in cases of interethnic violence.

Finally, it is worth mentioning that the first step required for designing and implementing a transitional justice policy is the cessation of violations, guaranteeing security and safety, affirming the rule of law, and safeguarding the right to demand, participate and express opinions. The recent advisory note produced by the EHRC and OHCHR could not stress more the importance and urgency of this precondition. This may involve strict enforcement of prohibitions for political imprisonment and torture; end of any form of administrative detention; drastic reduction of pretrial detention for any case that does not involve a serious risks of defendants scaping justice; restrictions on the use of exceptions laws, like those referred to counter terrorism or sedition; absolute cessation of any interference on decisions by prosecutors or by courts; cessation of any form of censure or limitations to freedom of expression; and cessation of messages and statements that could increase fear, insecurity, or hate among communities or groups usually perceived as opposing the government, including political rivals, critics, journalists or others. It also includes implementing policies on releasing anybody detained without charges or active investigations leading to trials; engaging in political dialogue to reduce tensions and find peaceful solutions to ongoing conflicts; and other initiatives to guarantee the reduction of violence. Guaranteeing security, safety, and the protection of rights are a first step to be able to affirm the arrival of a new epoch based on the respect and guarantee of the rights of all Ethiopians. They are essential to provide legitimacy and credibility to the whole transition and the transitional justice policy.

Conclusions and Possible Initial Steps

Defining a transitional justice framework demands decisive leadership. However, such leadership needs to be based on dialogue, participation, openness, ability to respond to the interests and rights of every segment of society, and strict observance of human rights and due process of law. It also requires adopting instruments that are usually not part of regular policy tools, but that are adapted to the nature and challenges of massive human rights violations and political violence. Comparative experiences can serve to inspire a creative process that has to be based on the unique needs and conditions of Ethiopia. They can contribute to a participatory process that responds to a unique context. In a country like Ethiopia, where the transition is not about restoration to a previous democracy, but part of a national building process based on democracy and pluralism, the context is particularly unique, which would demand additional doses of creativity and legitimacy.

The challenge cannot be more historical. That is why it needs to be based in dialogue, negotiation, and generosity. It should start with guaranteeing certain preconditions for assuring each sector that their right to participate will be protected. The process should be able to approach victims and create conditions of trust, so they can express their needs and demands without fear. And it should establish special institutions and mechanisms that could deal with the unique types of violence the country has suffered over different cycles of violence and their still pervasive legacies.

Some initial measures could be implemented while the policy is being defined. In addition to the preconditions mentioned above regarding civil and political rights, as well as those referring to social,

economic, and cultural rights of communities affected by conflict and those affected by displacement, there are some measures that could be immediately implemented. They could communicate the strict adherence to the rule of law, even more than official statements or political promises can. Possible examples are: Prosecuting and trying high profile detainees for human rights violations who have been in preventive or administrative detention for years, like Abdi Illey or others like him, under strict conditions of independence and due process of law, including special measures for transparent national and international observers; engaging in political dialogue with rivals and opposition parties to end intercommunity violence, with the same decisive impulse and leadership demonstrated for reaching the cessation of hostility agreement in Pretoria; consulting the National Dialogue Commission for other steps the government should take to ease tensions and bring all national groups to the table; acknowledging wrongdoing in recent episodes of violence; and other immediate trust-building measures defined in consultation with different actors. These measures could all be strong signals to provide the credibility that this process requires.

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