Dealing with the Legacies of Repressive Past: Transitional Justice in 'Transitional' Ethiopia

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Setting the Context

In recent past, lengthy conflicts that wreaked havoc and caused incalculable human causalities in several African countries came to an end. Likewise, deeply entrenched undemocratic and repressive modes of rule have given way to relatively democratic civilian governments. Regrettably, the African continent is still saddled with conflicts and atrocities, and authoritarian regimes are the rule rather than the exception. In many countries such as the youngest Africa nation, South Sudan; Somalia, Democratic Republic of Congo and Ethiopia horrific conflicts are causing an incalculable number of human casualties.

Most often, the displaced authoritarian regime and the conflict are characterized with gross human rights violations, tattered social fabric, social discontent and societies divided along different lines. Hence, following a transition from authoritarian regime to a relatively democratic one or from conflict to stability, the newly installed government is often faced with the herculean tasks and formidable challenges of how to confront the repressive past in order to build the future yet without upsetting the fledgling democracy and fragile peace.

Numerous countries across the globe were confronted with this formidable challenge and many others particularly in Africa are still grappling with this arduous task. It has become a burgeoning practice that addressing past gross human rights violations by charting appropriate transitional justice mechanisms is necessary in order to, *inter alia*, re-humanize the victims, replace impunity with accountability and restore rule of law, and to promote reconciliation by uncovering the comprehensive truth. However, as transition is an extraordinary and chaotic period that requires *sui generis* mechanisms, the questions of how to address and effectively come to terms with the evils of the past is a complex and daunting one yet necessary.

In recent past, Ethiopia has also experienced series of regime changes and faced the challenges of confronting the legacies of past gross human rights violations. The newly installed governments have put in place different mechanisms, albeit incomplete and inadequate, as a means to come to terms with alleged violations of predecessor regimes. Nonetheless, Ethiopia's history is still rife with unsettled and unprocessed egregious human rights violations and historical grievance. Since April 2018, Ethiopia is again in transitional process and grappling with transitional justice issues that often arise during such 'transitional period'. Thus, this article takes stock of the transitional justice mechanism/s that Ethiopian put in place or should have put in place with special emphasis on prosecution and the Ethiopian Reconciliation Commission

The article is divided into four parts to address major issues surrounding Ethiopia's attempt to come to terms with the legacies of widespread and systematic human rights violations of the past. The first part briefly introduces readers to the general notion of transitional justice and mechanisms. The part that follows dwells on transitional justice in Ethiopia. To do so, this part takes stock of the major transitional justice mechanisms that the post-*Derg* regime and the incumbent Abiy government have put in place to deal with repressive past *in seriatim*. The third part briefly deals with the interface between the mechanisms' put in place and on how to address their symbiosis. The last part of the article puts forth lessons that can be drawn for the current transitional process and plausible means which help rectify the blind spots of the ongoing transitional justice mechanisms and thereby restore the mechanisms.

I. General Account of Transitional Justice

After a transition,[1] be it from a dictatorial regime or disastrous civil war, the embryonic democracy and newly installed government or regime is

[1] As aptly observed by O'Donnel and Schmitter: Transition in this sense implies 'an interval between one political regime and another. Transitions are delimited, on the one side, by the launching of the process of dissolution of an authoritarian regime

often faced with the complex challenges of: what to do to atrocious and repressive past. Transition is an extraordinary period that requires *sui generis* mechanisms, as the conventional approaches and conception of justice associated with ordinary period are ill suited for such context of extraordinary condition and political flux. During this period '[l]aw is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective.'[2]

Transitional justice[3] is a notion associated with such context and helps to tackle the thorny issues and dilemmas intrinsic to transition. Put differently, transitional justice is a field that studies how societies emerging from authoritarian rule or protracted war can deal with the legacies of repressive past. Teitel defines the concept as 'conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes'.[4] For the UN, transitional justice 'comprises the full range of processes and mechanisms associated with a society's attempts to come

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and, on the other, by the installation of some form of democracy, the return of some form of authoritarian rule, or the emergence of a revolutionary alternative. The typical sign that the transition has begun comes when these authoritarian incumbents, for whatever reason, begin to modify their own rules in the direction of providing more secure guarantees for the rights of individuals and groups.' See O'Donnell G, and Schmitter Ph (eds.) *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1986), p. 6. See also the AU Transitional Justice Policy (2019), p. 4. Available at https://au.int/en/documents/20190425/ transitional-justice-policy last accessed June 2020; and Teitel RG *Transitional Justice* (2000), pp. 5-6.

2 Teitel (2000), p. 6.

3 There is no consensus on the labelling or nomenclature of this subject either. Many refer to it differently. The labels or descriptive phrases range from 'Post-conflict justice', 'post-transition justice', 'post authoritarian (or totalitarian) justice', 'retributive justice' to 'justice after transition'. The author of this paper prefers to use 'transitional justice' as this is relatively less misnomers and descriptive of the subject matter.

4 Teitel RG 'Transitional Justice Genealogy' (2003) *Harv. Hum. Rts. J.* 16, p. 69. See also, Kritz NJ *Transitional Justice: How Emerging Democracy Reckon With Former Regimes* (1995). Cf Roht-Arriaza N 'The New Landscape of Transitional Justice' in Roht Arriaz N, Mariezcurrena J (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice (*2006), pp. 1-2.

to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.'[5]

Albeit it is daunting to define a slippery notion like transitional justice due to its multidimensional and multidisciplinary nature as well contextual feature, it is possible to dissect the main issues or questions that it seeks to address. Succinctly, transitional justice deals with the following major dilemmas, questions and formidable challenges that transitioning states/societies face: What to do to a repressive past? Is settling past accounts necessary? Is dealing with the legacies of repressive past an option to displace without risk? Can confronting repressive past run the risk of awakening the ghost of the past? Or is it inescapable yet daunting task for a newly installed government or regime to face to fast the atrocious (and/or contested) past? What are the available choices and mechanisms to confront past gross human rights violations?

Admittedly, these are complex questions, as some call them 'immensely difficult' dilemmas,[6] for which there are no off-the-shelf and conclusive answers. However, turning a blind eye to a repressive past and trying to 'brush the past under the rug' in order to avoid grappling with the complex and difficult challenges of confronting past gross human rights violations, cannot lead to the much needed 'healing of wounds', reconciliation and democratization process.[7]

There is a growing consensus that ignoring past gross human rights violations and attempting to close the chapter of an oppressive past by saying let bygones be bygones is not anymore a viable option to start a

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[5] Report of the UN Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004), p. 4. See also the AU Transitional Justice Policy (2019), p. 4. AU in its transitional justice policy succinctly recognizes transitional justice as one of the crucial ideals for 'drive towards the Africa-We-Want'. See AU Transitional Justice Policy (2019), p. iv.

[6] O'Donnell and Schmitter (1986), p. 30.

[7] As Lutz argues 'unmet transitional justice goals will cast a long shadow across the political landscape that will not go away until they are realized.' See Lutz, E 'Transitional Justice: Lessons Learned and the Road Ahead' in Roht Arriaz and Mariezcurrena (eds) (2006), p. 327.

journey on the road to a democratic future.[8] In other words, confronting the violent conflict, repressions and other mass atrocities of the past is necessary, in fact it is the 'least worst strategy' compared to ignoring the past which is 'the worst of all bad solutions'.[9] Because unaddressed atrocities and a sense of injustice would not only haunt a nation but also remain as embers that could ignite similar conflicts in the future. It is undeniable that in some transitions, sequencing mechanisms and prioritization peace over justice is necessary so as not to provoke the ire of the defunct but powerful wrongdoers who might have the potential to destabilize the fragile democracy and foment violence.[10]

The question then is what choices are available to the newly installed government to reckon with the legacies of repressive past? Also, which or which combination of the mechanisms should be charted as a means to look back at the past and forward to the future? The following subsections shed light first on the models of transition followed by the major transitional mechanisms that help confront a repressive past.

i. Models of Transition

Based on the foregoing discussion, transitional justice is a notion associated with periods of (political) transition. Hence, it is judicious to briefly highlight the main models that bring about transition, change of regime or government or end of war. Huntington makes tripartite

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8 See Kritz (1995); Roht-Arriaza (2006), pp. 3-14 in Roht Arriaz and Mariezcurrena (eds) (2006).

9 O'Donnel and Schmitter stated that: 'By refusing to confront and to purge itself of its worst fears and resentments, such a society would be burying not just its past but the very ethical values it needs to make its future livable. Thus, we would argue that, despite the enormous risks it poses, the "least worst" strategy in such extreme cases is to muster the political and personal courage to impose judgment upon those accused of gross violations of human rights under the previous regime.' See, O'Donnell and Schmitter (eds.) (1986), p. 30.

10 AU Transitional Justice Framework (2015), pp. 13-14; Stan and Nedelsky (2013), pp. 58-59.

classifications of transition, namely replacement, transplacement and transformation.[11]

Replacement, as the designation indicates, is a model of transition in which the change of regime resulted from complete defeat or collapse of the old regime and then ultimately replaced by the opposition group. This type of transition often occur through a protracted revolutionary struggle or civil war which consequently results the opposition gaining strength and the government losing strength until the government collapses or is overthrown.[12] Unlike in other types of transition, in the case of replacement the oppositions are the ones who take the lead to bring about change or transition. The prototypical cases of this transition include Rwanda's 1994 transition and Ethiopia's transition from *Derg* to Ethiopia's People Revolutionary Democratic Front (EPRDF). In such cases of transition, the level of criminal accountability for past gross violations is substantial as the defunct officials are often powerless hence could not cause serious threat to the peace and stability of a country.

Transformation on the other is a type of transition in which 'those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system.'[13] Of course, it is not to say that the opposition and /or citizens in general do not have any role in the realization of such transition. Instead, in such model of transition, the incumbent government is stronger than the opposition. Thus, such changes are regime initiated reforms. In contrast, in the case of transplacement, the transition is a result of the joint action of both the government, on the one hand, and the oppositions and

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[11] For the various cases of these transitions, see, Sriram, CL *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (2004), pp. 40 *et seq*. For more discussion on other models of transition see also, Share, D 'Transactions to Democracy and Transition through Transaction', *Comparative Political Studies*, 19/4 (1987), pp. 525–548. On the models of transition, phases and paces of transition, see generally, O'Dnnell and Schmitter (1986).

[12] Huntington S *The Third Wave: Democratization in the Late Twentieth Century* (1991), p. 142.

[13] Huntington (1991), p. 124.

citizens, on the other. In transplacement, unlike in the cases of replacement and transformation, 'the eyeball-to eyeball confrontation in the central square of the capital between massed protesters and serried ranks of police revealed each side's strengths and weaknesses.'[14] In such case, there is often a stalemate and is hard to foretell a definitive winner. To use the words of Huntington, 'the political process leading to transplacement was thus often marked by a seesawing back and forth of strikes, protests, and demonstrations, on the one hand, and repression, jailings, police violence, states of siege, and martial law, on the other.'[15] Due to this, the regime would be forced to concede change—liberalization of the political space and democratization process. In the case of transition that resulted from transplacement, the level of criminal accountability is slightly higher than transformation where accountability is minimal as in the latter case the reformers tend to be protective of the erstwhile officials.

To conclude, the nature of transition is one of the various factors that may inform the type, timing and sequencing as well as postponing of some of the transitional justice measures, especially prosecution in case of negotiated transition (or transplacement). However, whatever nature a given transition takes, it does not warrant an attempt to move forward without reckoning with the past egregious human rights violations. The newly installed government has to confront the repressive past by using appropriate transitional justice mechanisms. The question then boils down to what are the transitional justice mechanisms that are available to confront the repressive past.

ii. General Overview of Transitional Justice Mechanisms

This part briefly dwells on the various transitional justice mechanisms with special emphasis on criminal accountability and truth commission. Transitional justice mechanisms include wide-array of measures that help

[14] Ibid, p. 154.
[15] Ibid, p. 153.

to come to terms with the legacies of past widespread and /or systematic (state sponsored) human rights violations. As defined in the UN Policy Framework, transitional justice mechanisms are '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.'[16] The possible road map that transitioning states chart to confront past gross human rights violations can also be broadly defined to include anything that they adopt to come to terms with legacies of past violations and abuses.[17] The above definition of the UN narrowly defines, rightly so, the universe of transitional justice mechanisms.[18]

Accordingly, the most prominent transitional justice mechanisms include criminal prosecution (or accountability), truth commission, conditional amnesty, vetting, reparation, and memorialization. Although each of these mechanisms have their respective purposes, the general shared goals of the mechanisms range from establishing accountability, truth seeking, establishing authoritative historical record, acknowledgement of the violations, promoting healing of wounds and reconciliation, and preventing recurrence of similar violations.[19]

It bears mentioning that from the diverse ranges of transitional justice mechanisms, there is 'no-one-size-fits-all' mechanism or miracle solutions for the question of how to deal with the past.[20] Besides, one mechanism is neither a substitute for the other nor sufficient by itself to address past wrongs. In other words, the wide-array of transitional justice mechanisms

16 Report of the UN Secretary-General, p. 4.

17 'At its broadest, it involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict.' See Roht-Arriaza in Roht Arriaz and Mariezcurrena (eds), p. 2

18 As noted by Roht Arriaza 'broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless.' Roht-Arriaz in Roht Arriaz and Mariezcurrena (eds) , p. 2.

19 AU Transitional Justice Policy (2019), p. 6, paras, 35 and 36.

20 Ibid.

should be viewed as adjunct and mutually reinforcing than as dichotomous and mutually exclusive. [21]

Based on factors, such as, the nature of the transition, the scale and intensity of past gross human rights violations, and resource, it is necessary to tailor the transitional justice mechanisms to prevailing context and situation of a transitioning state. Also, use of comprehensive transitional justice mechanisms is desirable where broader outcomes are desired.

Besides, it is worth mentioning that for the transitional justice process and mechanisms in general to be effective and successful, among other factors, there should be meaningful participation of different stakeholders starting from the decision to initiate transitional justice process to designing, opting for and implementing a specific or all ranges of transitional justice mechanisms. Also, whatever combination is charted must be in implemented in compliance and conformity with international legal norms and obligations.[22]

a. Criminal Prosecution as a Transitional Justice Mechanism

Prosecution as a criminal accountability mechanism is judicial measures which traditionally represent justice only whereas the others transitional justice mechanisms are non-judicial mechanisms which represent peace. To reiterate, the periods that precedes a transition from authoritarian regime to democracy or conflict to stability is often characterized with egregious human rights violations in the forms of extra judicial killings, torture, enforced disappearance, arbitrary arrest, abuse of power,

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[21] Ibid, p. 7, para, 38. See also, The Report of the UN Secretary-General (2004), p. 9; Hayner, PB *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2 ed. (2011), pp. 8, 26. While commenting on the Sierra Leone experience, Schabas aptly noted that: 'The Sierra Leone experience may help us understand that post-conflict justice requires a complex mix of complementary therapies, rather than a unique choice of one approach from a list of essentially incompatible alternatives.' See Schabas, WA 'The Sierra Leone Truth and Reconciliation Commission' in Roht Arriaz and Mariezcurrena (2006), pp. 21-22.

[22] United Nations Approach to Transitional Justice Processes and Mechanisms (2010), p. 2.

corruption and many others. Simply put, during these periods, impunity and rule by iron fist were the order of the day which enabled state sponsored crimes. Thus, following transition, among other things, replacing impunity with accountability and re-establishing rule of law through the instrumentality of criminal prosecution is not only necessary but also a duty of transitioning states.

A case for adopting criminal prosecution as a transitional justice mechanism transcends the conventional theories of punishment—it advances other purposes peculiar to period of political change. Transitional criminal prosecution is 'generally justified by forward-looking consequentialist purposes relating to the establishment of the rule of law and to the consolidation of democracy.'[23] In simple terms, transitional criminal prosecution aims to replace impunity for rationalized state sponsored violence with accountability and thereby reinforce normative change and reconstruct rule of law.

Moreover, in most cases, the gross human rights violations perpetrated under the authoritarian rule or during conflict fulfill the necessary elements of crimes under international law such as genocide, crimes against humanity and /or war crimes for which states have a duty to investigate and prosecute alleged perpetrators or extradite.[24] Thus, in such cases, transitioning states have a duty to chart criminal prosecution

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23 Teitel (2000), p. 30.

24 Scholars have suggested that there are at least 70 treaties that impose obligation to prosecute or extradite on states. The major multilateral treaties that impose *aut dedere aut judicare* obligation are Genocide Convention, Torture Convention, and Geneva Conventions. For detailed discussion on the sources of aut dedere aut judicare, see *Bassiouni MC, Wise MW Aut Dedere, Aut Judicare: The Duty to Extradite or Prosecute in International Law (1995) Martinus Nijhoff Publishers, London; Kelly, M "Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare into Customary Law and Refusal to Extradite Based on the Death Penalty", 20 Arizona Journal of International and Comparative Law, 2003, pp. 491-532 Mitchell, C, Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in international Law (2009) Graduate Institute: Geneva.*

as a means to reckon with such core crimes, at least for those who bear greatest responsibility.[25]

Admittedly, in some transitional contexts, adopting criminal prosecution as a means to deal with the crimes of defunct officials might threaten the fragile peace and foment violence. In such cases, relentless pursuit for prosecution can only exacerbate the already fragile peace and be an obstacle for the transition, hence postponing, not abandoning altogether, criminal prosecution is necessary.[26]

Transitional criminal prosecution can be carried out before courts of territorial state, third state (at least on the basis of universal jurisdiction), international courts, internationalized and/or hybrid courts.[27] The prosecutions can be carried out on the basis of domestic law or other applicable laws.

It is worth to note that criminal accountability alone cannot help to adequately deal with repressive past and come to terms with the evils of past. In other words, 'a piecemeal approach to the rule of law and transitional justice will not bring satisfactory results in a war-torn or atrocity-scarred nation.'[28] Thus, depending on the context and peculiarities of the transitional state, transitional criminal accountability should be complemented with other mechanisms—where transitional justice mechanisms are required, embracing comprehensive and complementary mechanism is imperative. The reason being, criminal prosecution as a form of retributive justice is ill fitted to achieve the goals of the other restorative transitional justice mechanisms. It is hardly

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25 However, extensive or large scale prosecution of 'all offenders for all crimes' is impractical especially when there are numerous, which is often the case in many transitional states, perpetrators of past human rights violations. Hence, it is imperative to prioritize the perpetrators and the crimes to be investigated and prosecuted on the basis of clear strategy.

26 The cases of Argentina and Chile are classical instances of the need to sequence mechanisms.

27 For more on this, see Marshet Tadesse Tessema *Prosecution of Politicide in Ethiopia: The Red Terror Trials* (2018), p. 138.

28 The Report of the UN Secretary-General (2004), p. 9.

possible to establish comprehensive historical record of past gross human rights violations by using criminal prosecutions. Thus, as the context of transitioning societies often demand, complementing criminal prosecutions by other responses to legacies of past abuse is crucial.

b. Truth Commission: Truth Seeking and Telling Mechanism

After the first the widely known Argentinean truth commission of 1983,[29] truth commissions have become one of the standard ways of coming to terms with the past gross human rights violations.[30] In Africa, Uganda in 1986 and Chad in 1991 are forerunner countries in establishing truth commissions albeit their Commissions are the least successful and popular compared to the 1995 Truth and Reconciliation Commission of South Africa.[31]

Over 40 truth commissions have been established by several countries though in different designations and for different purposes.[32] As rightly noted:

> Given the variation between these many inquiries, it is not always clear which bodies should be considered within the group for comparison. There is still no single, broadly accepted definition of what constitutes a truth commission. Thus, published lists and databases of truth commissions differ, with some researchers liberally including a broad range of inquiries, and others insisting on

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29 The Commission was referred to as: 'The National Commission on the Disappeared'.

30 Wiebelhaus-Brahm, E *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (2010), p. 3.

31 Subsequently, several African countries such as Nigeria, Sierra Leone, Ghana, the DRC, Morocco, Liberia, Togo, Kenya and Côte d'Ivoire have established truth commissions. Recently, the Gambia and Ethiopia have established truth commissions as means to address their repressive past.

32 The commissions on the disappeared" in Argentina, Uganda, and Sri Lanka; "truth and justice commissions" in Ecuador, Haiti, Mauritius, Paraguay, and Togo; a "truth, justice, and reconciliation commission" in Kenya; a "historical clarification commission" in Guatemala; and, of course, "truth and reconciliation commissions" in South Africa, Chile, Peru, and other countries. See Hayner (2011), p. 12.

a more rigorous and narrow definition and thus a smaller number of commissions.[33]

From the above, it is clear that there is no uniformity in the naming of truth commissions; in consequence on the list of these bodies and on which ones should be categorized as truth commissions. In fact, Hayner and the United States Institute of Peace database of truth commissions, erroneously categorized the Ethiopian Special Public Prosecution Office of 1992 as a truth commission.[34]

Be that as it may, truth commissions are defined as 'official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years.'[35] From this it is clear that truth commissions are victim-centred bodies unlike criminal prosecution which primarily focuses on the perpetrators. Also, the subject matter jurisdiction of such truth-seeking and telling bodies is not to establish individual criminal responsibility rather to seek official, authoritative and compressive truth of what had happened.

As parameters to differentiate a truth commission from a court, administrative tribunal, human rights commissions and other similar bodies with adjudicatory power, Hayner identified the following four defining characteristics or attributes of truth commissions: 1) They focus on past, rather than ongoing, events; 2) they consider pattern, causes and consequences of conflict in general terms as opposed to specific or particular events ; 3) they are ad hoc in nature and conclude with general

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[33] Hayner (2010), p. 10. Freeman also noted that: 'Despite the apparent popularity of truth commissions, their nature often remains obscure to lawmakers and laypersons alike.' See *Freeman M Truth Commissions and Procedural Fairness* (2006), p. 3.

[34] Hayner, PB 'Fifteen Truth Commissions-1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly, pp. 634-635; and the United States Institute of Peace digital collection of truth commissions available at http://www.usip.org publications/truth-commission-digital-collection. Accessed June 2020.*

[35] The Report of the UN Secretary-General (2004), p. 17.

findings; and 4) they operate under authority be it national or international auspices.[36]

As the names of truth commissions that have been established so far vary, so do their mandates,[37] duration (life span), the time-period that they cover, and composition.[38] For instances, in terms of their nature (or composition) truth commissions can be national,[39] mixed[40] or international truth commissions;[41] the organ that establishes them also varies, in some countries the executive organ, in others the legislative established truth commissions.[42] In relation to the organ that establishes truth commission, there is no one size fits all best model. As aptly noted by Freeman '[n]one of these means of establishing a truth commission is inherently preferable to the others. In one context the executive branch may be seen as more credible than the legislative branch; in other cases, the reverse may be true.'[43]

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[36] *Hayner, PB Unspeakable Truth: Confronting State Terror and Atrocity (2001)*, p. 14. Cf, Hayner's revised definition in the second edition of the same book, Hayner (2011), pp. 11-12. Also for more defining attributes of truth commissions, see Freeman (2006), pp. 14-17.

[37] Some truth commissions were vested with the mandates to grant amnesty, to list names of perpetrators or name names, power to order search and seizure, and / or to subpoena. See the detailed table on the mandates and other features of diverse truth commissions in Freeman (2006), p. 317. See also the United States Institute of Peace digital collection of truth commissions available at http://www.usip.org/publications/truth-commission-digital-collection. Accessed June 2020; and the Institute for Justice and Reconciliation, Truth Commissions: Comparative study available at http://www.ijr org.za/trc-database-themes.php. Accessed June 2020.

[38] For more on the various features of different truth commissions see Freeman (2006), p. 27.

[39] There are several national truth commissions which have been established since the first Truth Commission of Idi Amin of Uganda in 1974. See Freeman 2006, p. 317; the United States Institute of Peace digital collection of truth commissions available at http://www.usip.org/publications/truth-commission-digital-collection. Accessed 16 June 2016; and Institute for Justice and Reconciliation, Truth Commissions: Comparative study available at http://www.ijr.org.za/trc-database-themes.php. Accessed June 2020 The most prominent prototypes of national truth commissions are the Truth and Reconciliation Commission of South Africa; the National Commission on the Disappeared of Argentina, and the National Commission for Truth and Reconciliation, see Hayner 2011, pp. 28 *et seq.*

[40] Guatemalan Historical Clarification Commission is the archetype of mixed truth commission, see Tomuschat 2001, pp. 233-258, Hayner 2002, pp. 45-49

[41] For example Commission on the Truth for El Salvador, see Buergenthal 1994, p. 497.

[42] Freeman 2006, p. 27.

[43] Freeman (2006), p. 27.

Although dozens of truth commission have been established only few of them are (considered) effective. Several factors determine the success or failure of truth commissions, 'some of which are determined by the body that establishes the truth commission or by the truth commission itself; other factors remain outside of a commission's control.'[44] The major factors that determine the success or failure of a truth commission include its establishment process, the scope of its mandate, legal powers, independence, period of operation, and period under investigation.

The establishment process of a truth commission should not be a top-down, nor should it be an outcome of external imposition, rather it has to be the result of decision of the concerned nation itself which need to talk into account the views of victims and the society at large. Truth commission is 'best formed through consultative processes that incorporate public views on their mandates and on commissioner selection.'[45] The establishment of a truth commission and selection of its commissioners which is preceded by public consultation and consultative selection process would not only help to ensure the credibility, legitimacy and the acceptance of its findings but also determines its effectiveness.

The other important factor that contributes to the effectiveness of a truth commission is the scope and clarity of its mandates.[46] The enabling law of a truth commission should clearly define the types of gross human rights violations that fall under the subject matter jurisdiction of a commission. Conducting public consultation would play a significant role to determine the needs and priority of victims on what should be investigated and uncovered by a truth commission. Simply, '[a] mandate too broad in scope may overwhelm a truth commission; an overly limited or unrepresentative mandate may undermine the commission's legitimacy

44 AU Transitional Justice Framework (2015), p. 14.
45 Report of the UN Secretary-General (2004), p. 17
46 Mandates also referred to as 'charters' or 'terms of reference', see Freeman, (2006), p. 27.

and fail to respond to the needs of victims and their relatives.'[47] Also, in view of the indivisibility nature of human rights, socio-economic violations should not be excluded from the mandates of truth commission.

Truth commission should be equipped with all the necessary powers that enable it to effectively carry its mandates. These include the powers to search premises and seize evidence, access to archives, subpoena, grant (or recommend) conditional amnesty, name perpetrators, grant/recommend reparation and recommend reforms. The enabling law of a truth commission should also state the consequences of failure to coordinate with, or obstructing the works of a commission. The establishing law should also provide for not only ways to implement the recommendations of a commission but also follow-up mechanisms that ensure full implementation of recommendations. In addition to these factors, meaningful independence, sufficient support from civil societies (as well as other partners), enabling political context and host of other factors determine the effectiveness of a truth commission.

Although the goals of most truth commissions and factors that determine their effectiveness are similar, there is no 'one-size-fits all' truth commission model. As stated in the UN Rule of Law tools for Post-Conflict states

> it should be expected that every truth commission will be unique, responding to the national context and special opportunities present. While many technical and operational best practices from other commissions' experiences may usefully be incorporated, no one set truth commission model should be imported from elsewhere.[48]

[47] AU Transitional Justice Framework (2015), p. 15. For more on this and other necessary benchmarks for the success of a given truth commission, see AU Transitional justice Policy (2019), p. 53.

[48] Report of the UN Secretary-General (2004), p. 4.

Even though transitioning states are not expected to invent 'new truth commission' out of nothing, in establishing a truth commission each state needs to adapt commission that fits its prevailing situation, context, national needs and political climate.

In summary of this part of the article, it is a trite that each transitioning society has its own peculiar contexts, needs, opportunities and challenges. In fact, 'there is little that unites any single transitional context to another; the differences are greater than the similarities'.[49] But one factor that makes most transition societies similar, if not unites them, is the legacy of widespread and systematic human rights violations albeit they may differ on the type, scale and extent of the violations.

So many transitioning societies and government are confronted with the daunting task of how to come to terms with their past in order to clear their way for the future. Of course, transitional justice issues are not the only challenging agenda on the plate of transitioning societies. Transitioning societies face host of other equally challenging non-transitional justice societal and political matters such as security issues, invigorating the shattered economy, providing basic services, and /or resettling displaced persons. Balancing those challenging demands and properly addressing the repressive past by charting appropriate transitional justice measures is herculean but necessary. Thus, transitioning states need to confront the legacies of their repressive past by adopting holistic, not piecemeal, and complementary transitional justice mechanisms. Moreover, the synergy of the various transitional justice mechanisms should be properly regulated.

II. Transitional Justice in Ethiopia: Criminal Prosecution and the Reconciliation Commission in Focus

In recent past, Ethiopia has seen different forms of transitions which include from imperial regime to *Derg in 1974,* from *Derg* to EPRDF in

[49] Freeman (2006), p. 5.

1991 and most recently, in 2018, from EPRDF to Prosperity Party (PP). Ethiopia and Ethiopians missed the opportunities to come to terms with their repressive past and thereby democratize the country not once but at least twice. Arguably, the most apposite time to kick-start the onset of democracy in Ethiopia was the post-Derg transition. After a little less than three decades, Ethiopia and Ethiopians are again on a transitional path which is undoubtedly an opportune time like no other to set the democratization process of the country on the right path. I only hope, of course not hope against hope, that this window of opportunity will not be squandered and go to waste as another addition to the list of missed opportunities in the democratization process of Ethiopia.

One of the factors that positively contribute to a democratization process of transitioning state like Ethiopia is the use of comprehensive and integrated transitional justice mechanisms. With the view to draw lessons for the on-going transitional process, this part first briefly examines the transitional justice mechanisms (mainly criminal prosecution) that were put in place as a means to come to terms with the 17 years legacy of *Derg* regime. Then, this part takes stock of the transitional justice mechanisms namely criminal prosecution and truth commission that the Ethiopian government charted following the country's transition from EPRDF-led government to PP.

i. Post-*Derg* Transitional Justice Mechanism: Reckoning with *Derg* Crimes

Following the replacement of the imperial regime by the totalitarian regime of Mengistu, no official criminal accountability mechanism was charted for addressing crimes of the defunct regime. Instead, instant justice or mass of summary executions followed. In fact, until 1991, almost all successor regimes in Ethiopia settled their scores with their predecessor officials by resorting to summary justice.

After the complete military defeat of *Derg* in 1991, the Transitional Government of Ethiopia adopted criminal accountability as the main transitional justice mechanism to reckon with the repressive past of the *Derg* regime. The Special Public Prosecutor's Office (SPPO) was established in 1992 to investigate and prosecute *Derg* crimes.[50] No special court was established albeit necessary; instead the cases were entertained before the newly established ordinary courts.

The Transitional Government resorted to massive criminal prosecutions as an accountability mechanism. Other promising transitional justice mechanisms such as a Truth and Reconciliation were not brought into play. In other words, the government adopted incomplete, inadequate and narrow transitional justice mechanism.

In general, although the criminal prosecutions of *Derg* officials as a transitional mechanism left some contributions as their legacy, they suffer from the following limitations which the current prosecutions should consider with a view not to repeat them:[51] a) Selectivity: The post-*Derg* criminal prosecutions were solely against *Derg* officials. Crimes allegedly perpetrated by other civilian and armed groups were excluded from the mandate of the SPPO. This makes criminal prosecutions of *Derg* officials a prototype of victors' justice. However, this does not mean that the *Derg* officials are as such victims of the criminal accountability process and should have been spared. Rather, such narrow conception of perpetrators should have been avoided and crimes allegedly perpetrated by opponents of the *Derg* regime should have been investigated and prosecuted as well. b) Massive prosecutions of all perpetrators: Instead of large-scale prosecutions of all level of perpetrators (or all offenders and all crimes

[50] Proclamation 22 of 1992. For more on the SPPO, see Marshet (2018), pp. 148 *et seq*; *Vaughan S 'The Role of the Special Prosecutor's Office' in: Tronvoll K, Schaefer Ch, Aneme GA (eds) The Ethiopian Red Terror Trials: Transitional Justice Challenged (2009), pp. 51 et seq.*

[51] For detailed discussion on the pitfalls of Red Terror trials, see Marshet (2018), pp. 240 *et seq*; *Tronvoll K, Schaefer Ch, Aneme GA (eds) The Ethiopian Red Terror Trials: Transitional Justice Challenged (2009).*

approach), the focus should have been in prosecuting only the most heinous crimes and in respect of the most responsible perpetrators. Other complementary transitional justice mechanism (example truth and reconciliation) should have been used to deal with the less serious crimes and lower level perpetrators. c) Protracted trials: The investigation and prosecution of *Derg* officials took unreasonably long time to wind up which in turn jeopardized fair trials rights of the individuals involved and the legitimacy of the whole process; d) Offenders oriented approach: In the post-Derg criminal prosecutions, there were minimal engagement and participation of victims of egregious human rights violations.

In a nutshell, the post-*Derg* transitional justice mechanism (or criminal prosecution) was incomplete, delayed, selective and inadequate. It, therefore, left several issues unaddressed and unsettled, which arguably contributed to the poor human rights record during the periods of the successor regime—EPRDF that followed. In the presence of such limitations, transitional justice mechanisms would not have salutary effects and contributions for the process of moving forward from bleak past.

ii. The Current Transitional Process and the Mechanisms Charted to Confront the Repressive Past

Currently, Ethiopia is in transitional process, although the nature of this transition is not as clear as Ethiopia's transition from *Derg* to EPRDF. The nature of Ethiopia's transition, from Prime Minister Haile-Mariam Desalegn's EPRDF to Prime Minister Abiy Ahmed's EPRDF/PP is what Huntington refers to as transplacement.[52] The waves of anti-government protests and resistances in Oromia and Amhara Regional States and in other parts of the country; which resulted in the deterioration of the power of the governing coalition, forced the latter to concede change and start the democratization process. As a result, the ruling coalition was forced to make changes of the top leadership by replacing the staunch

[52] *Supra*, p. 7.

standpatter. Hence, the type of Ethiopia's current transition is transplacement, not transformation, which is a result of a combined action of the reformist within the EPRDF and anti-government protests.

Admittedly, the line between transformation and transplacement as types of transition is fuzzy, hence for some the type of Ethiopia's current transition can be transformation or reform. Whatever type of transition it may take, Ethiopia is in transition and transitional process.

Since April 2018 Prime Minister Abiy and his administration have adopted several transitional justice mechanisms which range from Official Apology, Amnesty,[53] establishment of the Ethiopian Reconciliation Commission (ERC), criminal prosecutions to legal[54] and institutional reforms as mechanisms to come to terms with the past.[55] The part that follows briefly highlights and analyzes some of the blind spots of the ongoing criminal prosecutions as well as the establishment process of the Reconciliation Commission and its enabling law in seriatim.

a. Criminal Prosecutions

There are several on-going criminal prosecutions at the Federal and Regional levels against some suspects of past gross human rights violations and /or corruption crimes.[56] Neither special court, nor special

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53 The law-making organ passed Amnesty law on 28 June 2018, which applies for individuals suspected of, charged with, convicted, or sentenced for political crimes such as treason and acts of terrorism. See Proclamation 1098 of 2018.

54 The Federal Attorney General of Ethiopia established the Legal and Justice Affairs Advisory Council (LJAAC) in 2018. LJAAC is mandated to assist and advice the government to make the much-needed legal and institutional reforms of the system that enabled past gross human rights violations. As a result of the fruitful works of LJAAC and its diverse working groups, several laws which enabled the perpetration of gross human rights violations have been abrogated and replaced by relatively progressive laws. For more on this, see Muradu Abdo 'Ethiopia's Ongoing Criminal Justice Reform: Modus Operandi, Methodology and Observations' *Mizan Law Review* Vol 14, pp. 341-356.

55 To the best of this author's knowledge, although some institutional reforms like that of the Human Rights Commission and the National Electoral Board have been progressing fairly well, the same cannot be said for the security and judicial sectors.

56 These include cases against some of the former officials, intelligence officers, and prison officials. To mention few, cases against *Getachew Assefa* et al (26 former National Intelligence and Security Service officials, 4 *in absentia, are charged with*

prosecution office has been established; instead, the investigation and prosecutions of the suspects are carried out by the existing justice machinery, without undergoing meaningful revamp.

One of the challenges in using criminal prosecutions as transitional justice mechanism is lack of independent and impartial justice machinery in the wake of transition from authoritarian rule. In a situation where the transitional state inherited a judiciary and other justice sectors which were used as instruments of repression or were at least complicit in the perpetration of past gross human rights violations, adequate and proper institutional reform should precede criminal prosecutions. Or else, it is advisable to bypass existing justice machinery and carry out criminal prosecutions before specially constituted court.

In Ethiopia's current transition, the justice sectors particularly the judiciary is yet to undergo meaningful, adequate and proper reform including vetting process of judges. In fact, it takes time to make such meaningful reform in the criminal justice system, or in any other sector for that matter. Thus, the Ethiopian government should have established special court to investigate and prosecute those who bear greatest responsibility for perpetration of past gross human rights violations. Had Ethiopia's government established such special court it would help to lessen issues of partiality and selectivity that arise in relation to the ongoing trials. Henceforward, to restore the credibility of the process and to minimize plausible danger of partisan justice, selectivity and issues of

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various crimes); Commander Alemayehu et al (9 accused from federal and Addis Abeba Police); Abdi Muhamud Omer et al (Cr. File No. 231812, some 43 accused charged for various crimes). Also, former prison officials (nine accused from Makelawi and eight accused from Qilinto) are charged with various crimes. The case against Bereket Simon and Tadesse Tenkeshu before Amhara Regional Supreme Court; and the case against the former higher officials of Metals and Engineering Corporation are also among the high profile cases for past crimes. Some of these cases have reached or about to reach their logical conclusion. Also, it is worth to mention that the Federal Attorney General has recently dropped charges against some 63 individuals including from some of the aforementioned cases.

legitimacy in relation to the on-going criminal prosecutions, it is desirable to at least fast track the reform process of the judiciary.

Due to the scale of past violations and large number of perpetrators involved, it is hardly possible to investigate all the crimes perpetrated by all the offenders. Even if it was possible to do so, conducting massive criminal accountability is not a viable option for successful transitional process. Thus, it is necessary to adopt prosecutorial strategy to clearly address the criteria or basis to select and prioritize the crimes and /or offenders to be investigated and prosecuted. Accordingly, criminal accountability should focus on gross human rights violations (or serious crimes or crimes under international law) perpetrated by (former) high ranking and middle level officials.

In relation to some of the on-going criminal prosecutions, one can discern that albeit most of the conducts for which the individuals are charged with squarely meet the contextual elements of crimes against humanity (and torture); the charge is for less serious crimes such as abuse of power. What is clear from this is that akin to Ethiopia's transition from *Derg* to EPRDF, the current transition also faced the challenge of inadequate legal framework on crimes against humanity and/or torture.[57] There are two plausible options to overcome this problem:[58] First, using ordinary crimes approach to prosecute crimes against humanity: Most of the individual acts of crimes against humanity such as killing, and arbitrary arrest are criminalized under the FDRE Criminal Code. Hence, crimes against humanity can be prosecuted as these ordinary crimes, as the Ethiopian government has done albeit this is not a good approach for many reasons. The second option is using customary international law as a legal basis to prosecute crimes against humanity in same characterization and

[57] The Ethiopian law criminalized torture in a narrow sense. *Cf* Art. 424 of the Criminal Code with Art. 1 Convention against Torture and Art. 8 (2) (f) of Rome Statute. For more on the status of crimes against humanity in Ethiopia, see Marshet (2018), pp. 103 et seq.

[58] For general discussion on the plausible approaches, see Marshet (2018), p. 106.

label. Crimes against humanity is one of the *jus cogens* crimes that impose *erga omnus* obligation, hence absence of domestic legal framework is not necessarily a bar against prosecuting such crimes which attained the status of customary international law. Thus states can rectify the blind spot in their domestic criminal law either by direct application of customary international law or by enacting a law on crimes against humanity that confers retroactive jurisdiction on courts to investigate and prosecute these crimes as such. Doing so would not fly against principle of legality as the law-makers are not creating new crimes rather simply conferring retroactive jurisdiction on courts.[59] Using the second approach is preferable as it enable states to invoke the various features of core crimes, not to mention the moral condemnation associated with such core crimes. However, most states are reluctant to use customary international law as a legal basis to prosecute core crimes; the same is true in Ethiopia. Thus, it is advisable to repair this blind spot in Ethiopia's criminal law by enacting a law that adequately and comprehensively criminalizes crimes against humanity as such.

b. The Restorative Justice Route: The Ethiopian Reconciliation Commission

Ethiopia's government established a national 'Reconciliation Commission' which became effective on 25 December 2018.[60] The Reconciliation Commission is the first of its kind in Ethiopia, hence a new restorative justice path for the country. It has been over two years since the Commission was established, but it has not yet started its core functions such as statement taking and hearing rather still grappling with other works.

Although such body is one of the much-need and a long overdue mechanisms for Ethiopia to move forward from its bleak past, for it to be effective, the major factors that determine the success of truth

[59] Art. 15 (2) ICCPR.
[60] Reconciliation Commission Establishment Proclamation 1102 of 2018.

commissions in general have to be present. These include the establishment process, scope of the mandate, composition, temporal jurisdiction, period of operation and political context.[61]

1) **Establishment Process: Defective**

As discussed in preceding part of this article,[62] the establishment process of truth commissions in general should be preceded by public consultation. The establishment of the Ethiopian Reconciliation commission (ERC) was rushed, if not done meteorically. To the best knowledge of the author of this paper, no proper public consultation and dialogue was conducted prior to the establishment of the Commission. Although this birth defect is not a serious irredeemable problem, had public consultation been conducted that not only would have increased the legitimacy and credibility of the Commission but also would have helped the lawmakers to have a clear picture on the needs of victims and types of violations that need priority and focus. To mitigate the impact of this defective establishment process, the Commission should design a clear strategy that helps to actively engage different stakeholders specially the victims of past gross human rights violations and civil societies.

2) **Composition of the Commission: Commissioners**

As highlighted somewhere in this article, for a truth commission to be effective, one of the determining factors is its composition. Truth commission should be composed of recognized, competent and independent personalities from all relevant social groups and sectors. In other words truth commission, other institutions as well for that matter, is as good as its commissioners. The selection of the members should be in a consultative and representative process. Therefore, prior to the

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61 *Supra*, p. 14.
62 *Supra*, p. 15.

appointment of members of a truth commission, public consultation in the selection process should be conducted.

On this matter, the Ethiopian law states that the Chairperson, vice Chairperson and other members of the Commission shall be appointed by the House of Peoples Representatives upon the recommendation of the Prime Minister.[63] The law says nothing concerning the direct participation of the public and other stakeholders in the appointment of the commissioners. This adversely affects the legitimacy and credibility of the process and consequently works of the Commission. Therefore, it is submitted that prior to making recommendation of the commissioners to the law-making organ, the law should have imposed obligation on the Prime Minister to conduct public consultative selection process before choosing the commissioners. The reason being, the consultative process would make the victims and other members of civil societies to feel local ownership of the mechanism and thereby boost the credibility of the resulting outcome.

Moreover, unlike the experience of countries like South Africa,[64] and Sierra Leone,[65] the Ethiopian law does not determine the number of commissioners.[66] Rather, it empowers the government to determine the number of the members of the Commission.[67] In this regard, it would have been better had the Ethiopian law clearly stated the minimum and maximum number of the Commissioners; or at least the maximum number of the commissioners. Regardless, the law-making organ

63 Art. 4(2), Proclamation 1102 of 2018.

64 Art. 7 (1) of the Act that established the South Africa's Truth and Reconciliation Commission stated: 'The Commission shall consist of not fewer than 11 and not more than 17 commissioners, as may be determined by the President in consultation with the Cabinet.'

65 'The Commission shall consist of seven members', See Art 2 (3), the Truth and Reconciliation Commission Act 2000.

66 Art. 4, Proclamation 1102 of 2018.

67 The proclamation states that: 'Number of members of the commission shall be determined by the government'. Ibid, Art. 4(1). The definitional article of same proclamation defines government as a federal or regional government. From this wording of the law, it is not clear which specific organ of government is empowered to determine the number of commissioners.

stupefyingly appointed 41, oodles by any standard,[68] Ethiopians as commissioners, His Eminence Cardinal Berhane Yesus Sourafel and Mrs Yeteneberesh Nigusse as Chairperson and Deputy Chairperson, respectively.[69] The commissioners work on part time basis as volunteers which pose a serious challenge for a herculean task like that of ERC's mandate. Thus there is a need to revisit not just the composition of the ERC but also the commissioners' modality of work.

The other serious blind spot of the enabling law of the ERC in relation to its composition is the fact that it does not provide for conditions to be appointed as commissioners.[70] The law should have provided for eligibility conditions for appointment as a commissioner and factor/s that make a person ineligible for the position.[71] The other equally important point is conditions for the removal (and/ or replacement) of the commissioners which are not addressed under the enabling law of ERC. Issues such as who has the power to remove (and /or replace) a commissioner and on what ground/s remain the lacunae of the law as well, albeit this can easily be resolved by looking at the practice.[72]

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[68] Of the truth commissions established thus far, the ERC is the one with the highest number of commissioners. To the best of this author's knowledge, there has not been any truth commission with more than 30 commissioners. Having manageable size of commissioners is advantageous for many reasons.

[69] It is not clear why the Prime Minister decided to recommend 41 individuals as commissioners of the ERC, nor is it clear why the law-makers simply endorsed what was presented to it. It seems that representation was used as a predominant criterion in selecting the commissioners, instead of meritocracy. It is unclear whether this mysterious 41 number is meant as a minimum or maximum. Some Commissioners have distanced or disassociated themselves from the ERC. Also, Commissioner Laureate Dr. Tibebe Yemane Berhane and Commissioner Sultane Hanferie Almira passed away on 20 February 2021. The Vice Commissioners, Yetneberesh Nigussie resigned from the ERC and at the time of writing she has not been replaced.

[70] The enabling law of the ERC does not regulate the nationality of the members of the Commission either. Truth commission can be national, mixed or international based on its composition. The Ethiopian law, however, is silent whether foreign national/s can be elected as commissioners or not. All the current commissioners are Ethiopian nationals.

[71] This resulted in the appointment of some controversial figures as members of the Commission.

[72] In fact, the law-making organ appointed five Commissioners namely Dr Ezera Abate Yemam, Mr Debelash Yadetie Teferra, Mrs Fatum Hatie Hafi, Garde Kulemie Mohamed Dol and Reverend Dereje Jemberu Kassa on 25 June 2020 to replace those

3) The Institutional Set-up of the Commission

The ERC's founding law does not layout the institutional set up of the Commission.[73] Thus, to carry out the functions of the ERC, the commissioners structured themselves into General Assembly,[74] Executive Committee[75] and five standing committee, namely the Gross Human Rights Violations Affairs Standing Committee, Conflict Resolution Standing Committee, National Dialogue and Consensus Standing Committee, Capacity Building Standing Committee, and Public Relations and Awareness Raising Standing Committee.[76] The ERC also has Secretariat office. The Secretariat (or the office to use the wording of the law) is established by the enabling law of the ERC as separate and distinct institution with its own legal personality, albeit the office is responsible to run the day-to-day and administrative activities of the ERC.[77] Also, the Chief Executive Director (or head) of the office is appointed by the Prime Minister, not by the Commission.[78] This sort of created two institutions in one; both of them are made accountable to the Prime Minister.

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who were not present due to different reasons. From this, it is clear that the parliament is the one who has the power to replace the commissioners for whatever reasons. But what is still not clear is the period within which the replacement should be done and how the ERC should proceed in the interim.

73 The law clearly stated that the head office of the ERC is Addis Ababa and it may establish branch offices at the regions. See Article 10 (3) of Proclamation 1102 of 2018. The ERC shares the spacious and beautiful building adjacent to American Embassy in Addis Ababa with the Administrative Boundaries and Identity Issues Commission. The ERC decided to establish branch offices in Awassa, Asella, Diredewa, Jimma, Gambella, Nekemte, Arbaminch, Mekele, Bahirdar, Desse, Asossa and Jigjiga. The plan is to establish the branch offices within the public universities located on these cities.

74 The General Assembly is composed of all the commissioners.

75 This consist of 13 individuals namely the Chairperson of the ERC, Deputy Chair Person of the ERC, the chairperson and vice chairperson of each standing Committee as well as the Chief Executive Director of the Secretariat (non-voting). This Committee holds its regular meeting every two weeks. In other words, it is this set up of the ERC that operates as per Article 7 of the Proclamation.

76 From these standing Committee, it is clear that the ERC considers conflict resolution as one of its mandate. It is uncommon for a commission like the ERC to embark on the daunting work of addressing on-going conflict.

77 See Arts. 3(3), 4(3) and 10 of Proclamation 1102 of 2018.

78 There is a discrepancy between the Amharic and English versions of Article 10 (1) of the Proclamation. The Amharic version states that the Head of the Office is appointed by the Prime Minister whereas the English version gives the power to the

4) Mandates: Subject Matter Jurisdiction

The enabling law of a truth commission should explicitly specify the types of past gross human rights violations that fall within the subject matter jurisdiction of a commission.[79]

The law of ERC provides the mandates of the Commission under its Article 6. This provision reads like mishmash—the problem starts with its structure. This provision of the law provides both mandates and legal powers of the Commission. For example, while the other sub-provisions are about the mandate of the Commission, Article 6(1) (5) (6) & (7) are legal powers of the Commission. As these two matters are essentially different, they should have been regulated in distinct provisions of the law.

Be the above as it may, the Ethiopian law is not express enough as to the subject matter jurisdiction of the Commission.[80] The provision that purports to address the mandate of the ERC is neither here nor there; the preamble is relatively expressive.[81] From the reading of Article 6, it is plausible to argue that the ERC is also mandated to conduct national dialogue and resolution of on-going conflict. In fact, as can be discerned from the national dialogue and conflict resolution standing committees, this is also the position of the Commission. The law should have plainly spelt out the subject matter jurisdiction of the ERC. It is necessary to revisit the law and specifically regulate the subject matter jurisdiction of the ERC. Based on the very nature of such commission, it is inconceivable

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Chairperson of the ERC. For obvious reason, the Amharic version prevails. In practice as well all the three Heads that served the office are appointed by the Prime Minister. As a result, the head is also accountable to the Prime Minister. Thus far the office has had three executive directors; the first two resigned from the position one after the other.

79 *Supra*, p. 16.

80 From the five standing committees established by the ERC, it is possible to deduce that the Commission considers national dialogue and conflict resolution as matters that fall within its mandate.

81 The preamble reads that 'it is necessary to identify and ascertain the nature, Cause and dimension of the repeated gross violation of human rights …', Preamble , para 2, of Proclamation 1102 of 2018.

to mandate it with national dialogue function[82] and prevention of ongoing conflicts. Such a commission is a means to reckon with the past for the betterment of the present and future. It is submitted that the main mandates of the ERC should be to investigate and establish historical record of the pattern, causes, nature, extent, and consequences of past gross human rights violations in Ethiopia. The investigation should not be limited to gross-violations of civil and political rights; instead, in view of the indivisibility nature of human rights, it should also include gross violations of socio-economic rights. The law should also illustratively define the constituent elements of gross human rights violations. In relation to this, the law should also provide a guideline for the contents of the final report of the Commission on the gross human rights violations. Also, as the law is silent on the implementation of the recommendations and follow-up mechanism/s to ensure proper implementation; it is necessary to clearly address this under the law.

5) Temporal Jurisdiction: Period under Investigation

It is important to determine the time frame within which a commission should confine its operation. The enabling law of the ERC does not mention period of coverage of the works of the Commission. In other words, it does not limit the mandate of the Commission in terms of time-period from when up to which period it should investigate past gross human rights violations. The law should have clearly addressed this by first conducting public consultation as regards the period to be covered by the ERC. Therefore, in consultation with different stakeholders, the lawmakers should clearly specify the time-period that fall in the ambit of the ERC's temporal jurisdiction. The draft regulation stated the cut-off period of the ERC's temporal jurisdiction as 1974, still without proper

[82] Ideally, such a commission is midwifed through national dialogue process, not the other way round. Undeniably, the ERC can play a facilitation role in a national dialogue with the view to make the ideals of confronting the past to promote reconciliation one of the agenda of such initiatives.

public consultation.[83] Over and above this, even if public consultation will be conducted at a later stage, trying to solve decisive matter like this by a subsidiary law would be problematic in many ways.

6) Period of Operation: Life Span of the Commission

Truth commission is an ad hoc body by its very nature, hence, the period for which a commission operates should be determined by the law that establishes it. The law that established the ERC under Article 14 provides that the tenure of the Commission be for three years with the possibility of extension for additional time. Given the time period to be investigated is not determined by the enabling law, it is not clear how the lawmakers determined the period of operation. The other point is, it is not clear as to when this three-year period starts to run. Does it include time for preparatory work such as appointment of commissioners and staffing? Although members of the Commission were appointed on 16 May 2019, the ERC, is yet to officially start its statement taking, truth seeking and telling exercise.

7) Legal Powers

Truth commission should be vested with necessary powers that enable it to effectively carry out its mandates.[84] On the basis of Article 6 (1) (5) (6) (7) and Article 15 of the law, the ERC has the legal powers to search and seizer, and access to archives. From the reading of the Ethiopian law, the Commission has the power to order the presence of anyone; however, it is not clear whether the Commission has the power to issue summon itself. The law should have plainly entrusted this power to the ERC. Also,

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[83] The ERC has made an attempt to address this problem by a regulation but, (fortunately) the draft regulation could not pass the first legislative process for different reasons. It is uncertain how the ERC will address the blind spots in the enabling law. In addition, in its strategic plan, the ERC, 'decided to look into the social and political conflicts and gross violations of human rights experienced across the country as of 12 September 1974. Notwithstanding the period specified herein, the Commission may, on an application by any person or groups of persons on justifiable grounds, pursue the objective set out in the Proclamation in respect of any other period preceding 1974.' See The Ethiopian Reconciliation Commission Strategic Plan 2020-2022 (2020), p. 2. It is not clear on what basis the ERC chose the stated year as a cut off for its temporal jurisdiction.

[84] *Supra*, p. 16.

the law does not clearly state the consequences of failure to cooperate with or obstructing the works of the Commission.

One of the crucial legal empowers for the ERC to unravel comprehensive truth about the past is the power to trade-off amnesty for full disclosure. Some truth commissions were given the power to grant (or recommend) a conditional amnesty, i.e. depending on the nature and gravity of the crimes and the extent to which the suspects have cooperated in the discovery of the truth and the compensation of the victims.[85] Under the enabling law of the ERC, there is no mention of conditional amnesty. There is a need to trade-off amnesty for full disclosure of the details of commission of crimes. Therefore, the law should have given the power to grant conditional amnesty to the ERC and should have provided conditions such as individual application, nature and gravity of the crime, degree of participation, and full disclosure for granting amnesty.

The other issue that the law does not address is whether the Commission has the power to name names of perpetrators. The Commission should be empowered to name identified perpetrators of egregious human rights violations. Besides, the Commission should have been empowered to recommend reparation, mainly collective reparation to identified victims.

III. Integrating and Synchronizing the Mechanisms: Managing their Symbiosis and Synergy

The wide-ranges of transitional justice mechanisms are not a substitute to one another, nor mutually exclusive, instead, they are complementary. The crucial roles of criminal accountability or reparation cannot be achieved by truth commission alone and vice versa. For instance, it is only by way of criminal accountability that one can establish individual

[85] The South African Truth and Reconciliation Commission was entrusted with the power to grant conditional amnesty; see Art. 19 of Promotion of National Unity and Reconciliation Act 34 of 1995. The Gambian Truth, Reconciliation and Reparation Commission was given the power to recommend granting of conditional amnesty. See Art. 19 of Truth, Reconciliation and Reparation Act 2017.

criminal responsibility—individualization of guilt. Transition from repressive past to a society based on a culture of rule of law and reconciliation requires a comprehensive or synergy of transitional justice mechanisms. Although the leadership of Prime Minister Abiy put in place relatively diverse mechanisms simultaneously, the various measures are operating disconnectedly.

Under the ERC's law, the relationship of the Commission with the finalized, ongoing and future criminal accountability for past gross human rights violations is not regulated. Can a court and the Commission share evidence? Can the Commission recommend prosecution of identified perpetrators? Can the Commission look at matters which have already been entertained before courts of law?

The law states that no one will be prosecuted on the basis of testimony he gave before the Commission.[86] However, this does not inhibit investigation and prosecution of a person on the basis of other possible evidence. In other words, since the Commission is not given the power to grant conditional amnesty, perpetrators of crimes who gave testimony before the Commission can be prosecuted if there is other evidence that serve as a proof. Thus, these and other issues as regards the relationship of the ERC and criminal accountability mechanism need to be plainly regulated.

Also, the indigenous restorative justice mechanisms in Ethiopia are not integrated in the design and implementation of the ongoing formal transitional justice mechanisms adopted by the government. The mechanisms put in place specifically the ERC should be synchronized with the indigenous restorative justice mechanisms.[87] Undoubtedly, the

[86] Art. 18(1), Proclamation 1102 of 2018.

[87] There are diverse indigenous dispute resolution mechanisms throughout Ethiopia, which include *Jaarsummaa*, *Songo* Serra and *Shimgilinna*; for more on these, see Pankhurst, A and Assefa (eds), G Grass-Roots Justice in Ethiopia : The Contribution of Customary Dispute Resolution (2008) Centre Français d'Études Éthiopiennes: Addis Ababa

various indigenous dispute resolution mechanisms in Ethiopia have a lot to offer in coming to terms with past gross human rights violations. In fact, these mechanisms are considered as informal transitional justice mechanisms that play vital complementary roles to formal transitional justice mechanisms in addressing past human rights violations.

There are diverse indigenous restorative justice mechanisms throughout Ethiopia. These mechanisms offer several useful and positive contributions in truth seeking, healing of wounds, promoting reconciliation and redressing past gross human rights violations. However, they are not synchronized with the various transitional justice mechanisms, particularly the Reconciliation Commission, charted by the government. It is necessary to utilize the useful roles of these mechanisms in truth finding and reconciliation process. Admittedly, it is necessary to first conduct a balanced assessment of these mechanisms in order to identify their potentials, specific roles and compatibility with international standards.

IV. The Way Forward: Restoring the Mechanisms

Although the nature of Ethiopia's current transition is not as clear as Ethiopia's transition from *Derg* to EPRDF, since April 2018, Ethiopia is again on transitional process. To set the democratization process on the right path, the current government should not repeat the incompleteness, selectivity and inadequacy of Ethiopia's transition from *Derg* to EPRDF. The government should build a bridge that would help the country to quickly move forward from its bleak past by charting comprehensive and integrated transitional justice mechanism that help to uncover the truth and bring closure, ensure justice and unify all Ethiopians. Based on the foregoing discussions the author puts forward the following: First, it is commendable that the current leadership took the initiative to adopt

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Adebo, T and Tsadik, H(eds) *Making Peace in Ethiopia: Nine Cases of Traditional Mechanisms for Conflict Resolution* (2016) Peace and Development Centre: Addis Ababa.

broader transitional justice mechanisms including the establishment of the ERC. Nonetheless, these mechanisms should not operate disjointedly. There is a need for a clear strategy that should integrate these mechanisms and regulates the symbiosis as well as possible tension of the mechanisms that are put in place; secondly, it is necessary to adopt prosecutorial strategy to clearly address the criteria or basis to select and prioritize the crimes and /or offenders to be investigated and prosecuted for past gross human rights violations. Accordingly, criminal accountability should focus on serious crimes perpetrated by former high ranking officials. To carry out the accountability process in compliance with international standards and norms, fast-tracking the much-needed meaningful reform of the judicial sector is pivotal. Also, just like the Red Terror Trials, (some of) the on-going criminal prosecutions for the past gross human rights violations have faced challenges of inadequate legal framework that criminalizes crimes against humanity under Ethiopian law. This forced the prosecutorial organ to resort to ordinary crimes approach as opposed to crime under international law—crimes against humanity. Thus, it is necessary to repair this defect in the Ethiopia's criminal law by way of criminalizing crimes against humanity in the same label and characterization as under international criminal law; thirdly, it is necessary to restore the ERC by rectifying the serious defects in its enabling law. Some of the serious flaws in the enabling law such as issues of period under investigation, its subject matter jurisdiction and types of past gross human rights violations, power to grant conditional amnesty and power to recommend reparation need to be addressed by way of (at least) amending the law, not by subsidiary laws. Ideally, the ERC's composition and serious blind spots of the founding law be addressed by way of reestablishment, as the problems are too many to be revitalized by way of amendment. In addition, for the ERC to have salutary effects, it must be used in combination to other transitional justice mechanisms. In more specific terms, criminal accountability for the upper echelon and the most responsible perpetrators of past gross human rights violations

should be carried out; and conditional amnesty as a trade-off to full-disclosure of past egregious human rights violations by middle and low-level perpetrators need to be recognized. Also, identifying the indigenous restorative justice mechanisms in Ethiopia which offer useful and positive contributions for promoting reconciliation and integrating them within the ERC is imperative.

Finally, to ensure full implementation of the recommendations of the Commission and maximum dissemination of the report/s, it is necessary to device implementation and follow-up mechanisms as well as comprehensive dissemination strategies.