



## THE FACADE OF JUSTICE: TRANSITIONLESS TRANSITIONAL JUSTICE OF ETHIOPIA

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### Cite this article:

Henok Abebe (2024), The Facade of Justice: Transitionless Transitional Justice of Ethiopia. African Journal of Law, Political Research and Administration 7(1), 102-116. DOI: 10.52589/AJLPRA-0DCSPFTR.

### Manuscript History

Received: 24 May 2024

Accepted: 18 June 2024

Published: 1 July 2024

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**ABSTRACT:** *The Ethiopian government has committed to a transitional justice process to address gross human rights violations through investigation, prosecution, truth-finding and revelation, reconciliation, conditional amnesty, reparation, and institutional reforms. Despite these efforts and international support, this mechanism will unlikely resolve Ethiopia's political and security issues. The government's lack of intent to cease ongoing conflicts and its continued human rights violations hinder effective participation in implementing the transitional justice process. Furthermore, the involvement of non-state and foreign actors, which are beyond the state's authority, in gross human rights violations undermines accountability. Victims and witnesses in conflict zones face significant barriers to participation due to the government's limited reach and fear of retribution. Gross human rights violations by the government and the Ethiopian National Defense Force raise doubts about the accountability of civil and military leaders through a government-controlled transitional justice mechanism. To address these challenges, the current government should relinquish power to a transitional government to mitigate undue influence on the justice process, cease hostilities, and hold officials accountable. If the government resists establishing a transitional government, a hybrid court with foreign judges and prosecutors should handle high-profile cases, while domestic courts, with strict measures to ensure impartiality and independence, should address other cases.*

**KEYWORDS:** *Transitional Justice, Transition, Hybrid Court, Transitional Government, Policy.*



## INTRODUCTION

*They killed 42 people in one place. There was only one adult male among them; the rest were women and children. We found their bodies piled up in one place. Among those dead were newborns. Among those 42, 22 of them are my children and grandchildren. One of my daughters died with her five children, the other one with four, the other with five, the other with two children, one newly-wed daughter and one boy.*<sup>1</sup>

This harrowing testimony from a victim who lost multiple generations of her family encapsulates the grim reality faced by Ethiopians, who suffer heinous crimes at the hands of both government and non-state actors. In response, Ethiopia has initiated a transitional justice process to address these gross human rights violations through prosecution, truth-finding and revelation, reconciliation, conditional amnesty, reparation, and institutional reform.<sup>2</sup> This process is essential for addressing past atrocities and fostering a peaceful and stable future for society. Transitional justice is anticipated to lead to transformative justice, enabling peace, democracy, the rule of law, justice, freedom, and economic growth.

International and continental intergovernmental institutions, such as the United Nations and the African Union, have developed policy documents and guidelines to support states' efforts to address their disturbing past.<sup>3</sup> Nelson Mandela once stated that 'as all countries recover from the trauma and wounds of the past, they have had to devise mechanisms not only for handling past human rights violations but also to ensure that the dignity of victims, survivors and relatives is restored.'<sup>4</sup>

The transitional justice mechanism addressing past violations emerges from three philosophical approaches.<sup>5</sup> The first is retribution, which focuses on investigation, prosecution, and sentencing. The second is restoration, which 'attempts to bring healing and understanding to communities through non-judicial or quasi-judicial mechanisms such as truth commissions and traditional arbitration systems.'<sup>6</sup> The third approach is reparation, involving apology and restitution.<sup>7</sup> Additionally, the UN emphasizes the guarantee of non-recurrence, encompassing institutional reform, vetting officials, and impacting societal, cultural, and individual relations and behaviors.<sup>8</sup> As former Secretary-General Kofi Annan emphasized, whether transitional justice mechanisms are retrospective or prospective, a singular focus on individual institutions or excluding civil society and victims is ineffective. Instead, a comprehensive approach that considers all interdependent institutions, addresses the needs of key groups and ensures complementarity between transitional justice mechanisms is necessary.

<sup>1</sup> Amnesty International, Ethiopia: *Authorities must investigate massacre of ethnic Amhara in Tole* (2022).

<sup>2</sup> Federal Democratic Republic of Ethiopia, *Transitional Justice Policy* (2024).

<sup>3</sup> African Union, *Transitional Justice Policy* (2019); United Nations, *Transitional Justice a Strategic Tool For People, Prevention and Peace (Guidance Note of the Secretary General)* (2023); Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence as cited in Pablo de Greiff, eds., *Justice and Reparations*, in *The Handbook of Reparations* (Oxford University Press, 2006).

<sup>4</sup> As cited by Joanna R. Quinn, 'Chicken and Egg? Sequencing in Transitional Justice: The Case of Uganda', *International Journal of Peace Studies* 14.2 (Autumn/Winter 2009), p. 1.

<sup>5</sup> Joanna R. Quinn, 'Whither the 'Transition' from Transitional Justice?' *Interdisciplinary Journal of Human Rights Law* 8(1) (2014-2015), p.1.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> United Nations, *supra* n 3.



## Transitional Justice

Transitional justice encompasses a range of formal, traditional, and non-formal policy measures and institutional mechanisms that societies adopt through an inclusive consultative process. Its purpose is to address past violations, divisions, and inequalities, thereby fostering conditions conducive to security, democratic governance, and socio-economic transformation.<sup>9</sup> Transitional justice aims to assist societies burdened by histories of violent conflicts and severe human rights violations in their transition toward a future characterized by justice, equality, and dignity.<sup>10</sup>

According to the African Union Transitional Policy, a transition does not refer to a specific period. Instead, it describes the journey of societies burdened by violent conflicts and severe human rights violations toward achieving sustainable peace, justice, and democratic governance.<sup>11</sup> Societal transitions can involve moving from conflict to peace or authoritarian regimes to legitimate governments. The transitional context can vary significantly: states may be considered post-transition, where crimes ceased long before the transition (e.g., Spain) or were committed until the transition (e.g., East Timor). Conversely, pre-transition nations experience ongoing crimes during the transition period (e.g., Uganda and currently Ethiopia).<sup>12</sup>

The concept of justice in transitional justice involves judicial and non-judicial measures to ensure perpetrators' accountability and provide redress to victims. Beyond addressing past wrongs, justice also encompasses establishing fair institutional, social, and economic systems that promote governance and inclusive development.<sup>13</sup>

## Experience of Ethiopia in Transitional Justice

Ethiopia has undergone a few transitional periods under different regimes in the last fifty years. The first transition was from monarchical rule to a military dictatorship, followed by a transition from a military dictatorship to the Transitional Government of Ethiopia, eventually giving way to the authoritarian rule of the Ethiopian People's Revolutionary Democratic Front (EPRDF). The transition from the EPRDF to the incumbent Prosperity Party can be considered a third transition, potentially paving the way for a new phase of transitional justice.

The Dergue, which came to power in 1974 by overthrowing Ethiopia's centuries-old monarchical rule, rebranded itself as the Provisional Military Government of Ethiopia. It ruled without a constitution until 1987, when the People's Democratic Republic of Ethiopia's constitution was adopted, signaling its intention to move beyond provisional status. Despite its name, the Dergue never functioned as a transitional government. The Dergue established a military court to adjudicate cases of 'administrative and judicial misfeasance and unlawful enrichment' by former officials.<sup>14</sup> It also formed an Inquiry Commission to investigate alleged crimes committed by previous government officials. Initially, it appeared that the Dergue would pursue lawful investigations and prosecutions. Even most officials 'voluntarily

<sup>9</sup> African Union, *supra* n 3 at Para. 19.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, Para 20

<sup>12</sup> Drazan Dukic, 'Transitional justice and the international criminal court-in "the interest of justice"?' *International Review of the Red Cross* 89/867 (2007): 692-693.

<sup>13</sup> African Union, *supra* n 3 at Para. 17.

<sup>14</sup> A Proclamation to Provide for the Establishment of a Provisional Military Government of Ethiopia, Proclamation No. 1/1974, Article 9.



submitted on the same day with a strong conviction that they would be acquitted after a fair trial.<sup>15</sup> However, before the Inquiry Commission completed its work, Mengistu Hailemariam ordered the execution of senior officials of the monarchical regime, effectively ending the commission in 1977 and burying the concept of transitional justice.<sup>16</sup>

On May 28, 1991, EPRDF, dominated by the Tigray People's Liberation Front, ousted Mengistu Hailemariam's regime and entered Addis Ababa. The Transitional Government of Ethiopia established the Special Public Prosecutor's Office in 1992 to investigate and prosecute officials of the Dergue and the Workers' Party of Ethiopia.<sup>17</sup> The office aimed to fulfill a historical obligation to record and educate the public about the brutal offenses and embezzlement committed against the Ethiopian people to prevent the recurrence of such governance.<sup>18</sup> The focus of the trials was on high-ranking officials of the Workers' Party of Ethiopia and members of the security and armed forces suspected of committing offenses, as well as representatives of urban dwellers' associations, peasant associations, and others associated with these crimes.<sup>19</sup> In 1994, the Special Public Prosecutor's Office filed charges against 73 Dergue officials. The trial even extended beyond the time of the Transitional Government and in 1997, the Prosecutor's Offices filed charges against 5198 civil and military officials of the Dergu by grouping them as the policymakers (deliberated and designed), the field commanders (instrumental for implementing the plan by transmitting orders), and material offenders (involved in the act of commission).<sup>20</sup>

However, no special court or chamber was established, and the specific crimes to be investigated and tried were not detailed in the establishing proclamation. The transitional justice process was heavily trial-focused, neglecting other elements such as truth-finding, amnesty, reconciliation, lustration, and reparation.<sup>21</sup> The trials were criticized for focusing exclusively on Dergue officials, neglecting other opposition members, violating defendants' rights, and lacking public engagement.<sup>22</sup>

Despite these efforts, both transitional periods failed to establish a successful transitional justice mechanism that held human rights violators accountable and transformed society. The trials of the Dergue officials, despite their shortcomings, were an improvement over the summary executions carried out by the Dergue itself, as they aimed "to engrave the rule of law

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<sup>15</sup> Aberra Jembere, *Agony in the Grand Palace: 1974 - 1982* (Shama Books, in Amharic, 1999) as cited by p.394 Simeneh Assefa, 'Conspicuous Absence of Independent Judiciary and 'Apolitical' Courts in Modern Ethiopia' 15/2 *Mizan Law Review* (2021); p. 394.

<sup>16</sup> Dawit WoldeGiorgis, *What a life!* (Simonstown, South Africa 2021), 46.

<sup>17</sup> A Proclamation to Provide the Establishment of the Special Public Prosecutor's Office, Proclamation No 22/1992 of Ethiopia.

<sup>18</sup> *Ibid*, Preamble.

<sup>19</sup> *Ibid*.

<sup>20</sup> Trial Observation and Information Project, *Consolidated Summary and reports from observations made in 1996, 1997, 1998 and 1999, compiled and distributed by NIHR's project 'Ethiopia's Red Terror trials: Africa's first war tribunal'* 1(2000).

<sup>21</sup> Girmachew Eneme, 'Apology and Trials: the case of the Red Terror Trials in Ethiopia,' *African Human Rights Law Journal* 6/1 (2006): p.67. 33 top Dergue officials have requested to get a chance to apologize the public for what they did while in office; however, their attempt was not successful due to the heavy emphasis that the government gave to prosecution.

<sup>22</sup> For major problems of the proceeding, see *Ibid*. and Alebachew Birhanu Enyew, 'Transitional Justice and the Creation of a Human Rights Culture in Ethiopia' (Master Thesis, University of Oslo, 2008)



into the social fabric of Ethiopian society.”<sup>23</sup> However, the post-trial era, and even during the trial period, saw Ethiopia mired in even more gross human rights violations. This indicates that neither the populace nor the officials learned from the past, and the transitional justice pursued by the EPRDF did not guarantee the non-recurrence of heinous crimes.

### **Ethiopia's Transitional Justice Policy**

The incumbent government of Ethiopia recognizes the necessity of a transitional justice and national dialogue process to address the nation's past and present challenges. Consequently, it has approved a transitional justice policy<sup>24</sup> and established a National Dialogue Commission.<sup>25</sup> The transitional justice policy acknowledges that gross human rights violations<sup>26</sup>, including genocide, crimes against humanity, war crimes, extrajudicial killings, enforced disappearances, rape, and ethnic cleansing, have been committed in Ethiopia. The policy sets forth the goals of maintaining accountability and the rule of law to serve justice, quell enmity, and halt ongoing conflicts and human rights violations. The policy outlines principles and directions regarding legal, operational, and structural requirements for its implementation. It ensures that the process adheres to continental and international principles of transitional justice, aiming to be sustainable, transparent, accountable, and just.

The policy seeks to balance retributive justice with restorative or reconciliatory justice. It stipulates that investigations and prosecutions will focus exclusively on gross human rights violations, in alignment with the Ethiopian constitution and international agreements to which Ethiopia is a party. Due to time and resource constraints, the policy prioritizes prosecuting perpetrators with significant involvement in these crimes<sup>27</sup>, while other forms of transitional justice mechanisms<sup>28</sup> will address the accountability of secondary perpetrators. Trials are expected to have a deterrent effect, reinforcing the rule of law and emphasizing individual accountability, thus reducing the potential for future ethnic violence. A trial has a deterrent effect by showing that everyone will be individually accountable for their crimes; it strengthens the rule of law and ‘emphasizes the guilt of particular individuals and thereby diffuses the potential for future cycles of violence between ethnic groups.’<sup>29</sup>

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<sup>23</sup> Yakob Hailemariam, ‘The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and The Ethiopian High Court’ (1999), *Hastings Comparative and International Law Review* 22/4 (1999): p. 743

<sup>24</sup> Federal Democratic Republic of Ethiopia supra 2.

<sup>25</sup> Proclamation No.1265/2021 The Ethiopian National Dialogue Commission Establishment Proclamation.

<sup>26</sup> The policy has listed instances of gross human rights violations. Accordingly, widespread, systemic crimes that includes genocide, war crimes, crimes against humanity, extrajudicial killings, forced disappearances, inhuman treatment, rape and sexual violence, forced displacement, crimes committed against children and disabled individuals, persecution based on ethnicity, political opinion, or religion, or any other gross human rights violations specified in international agreements that Ethiopia has signed or defined as such by international criminal law.

<sup>27</sup> According to the policy document, a person is deemed to be a perpetrator with a high degree of participation in the commission of a crime if he/she plans, leads, organizes, or orders the commission of gross human rights violations. Alternatively, if despite holding higher responsibility, he/she fails to execute their duties and this failure leads to the commission of the crime, or if they directly commit the crime upon their own initiative or play a pivotal role in its commission in any other manner.

<sup>28</sup> These mechanisms include truth finding and revelation and reconciliation, preconditioned amnesty, reparation (the mechanisms are coterminous and should be applied holistically).

<sup>29</sup> Jack Snyder and Leslie Vinjamuri, ‘Trials and Errors: Principle and Pragmatism,’ in *Strategies of International Justice, International Security* 28/ 3 (Winter, 2003/2004): p. 17.



The policy is subject to temporal jurisdiction limitations (*jurisdiction ratione temporis*). For criminal responsibility, the adoption year of the Constitution of the Federal Democratic Republic of Ethiopia (1995) is stipulated as the benchmark; gross human rights violations committed after this year will be subject to investigation and prosecution. For truth-finding, reconciliation, amnesty, and reparation, the time frame is essentially unbounded, and extendable based on the practicality of gathering information and evidence. However, the policy does not explicitly address whether ongoing gross human rights violations by the incumbent government and other warring parties will be included.

It is becoming a trend that transitional justice should not focus only on past crimes but should also include present crimes.<sup>30</sup> We can not really separate society's past, present, and future, as these timelines are intertwined in terms of the impact they bring about on the stability and peace of society. Justice cannot be achieved, and peace cannot be secured unless current perpetrators of egregious crimes are held accountable. Moreover, in states enduring perpetual conflict, distinguishing between past and present crimes, perpetrators, and victims can be challenging. One of the main imperatives of transitional justice is peacebuilding; unaddressed gross human rights violations act as a time bomb, potentially triggering future conflicts. Hence, the transitional justice process in Ethiopia is expected (and it is a must) to address present gross human rights violations committed by the Ethiopian government, non-state actors, and foreign forces.

However, the implementation of transitional justice does not guarantee the resolution of a state's problems. Countries must avoid exacerbating issues, widening societal cleavages, or reinforcing denial and impunity. To achieve this, apart from a trial, the transitional policy should emphasize amnesty, reparation, reconciliation, and institutional reform, which are essential for protecting human rights, maintaining security, and building the future. As scholars suggest, 'the various measures should be externally coherent, meaning that they should be conceived of and implemented not as discrete and independent initiatives but rather as parts of an integrated policy.'<sup>31</sup> This holistic approach ensures that the transitional justice process comprehensively addresses past and present crimes, fostering a more stable and peaceful society.

### **Transitional Justice in the Absence of Transition**

In the foreword to the 2019 African Union Transitional Justice Policy, Moussa Daki Mshamat emphasized that the policy aims to address reconciliation *following* violence and mass atrocities.<sup>32</sup> The African Union defines transitional justice as a mechanism nations use to address *past* human rights abuses. The policy describes a transition as 'the journey of societies with legacies of violent conflicts, systemic or gross violations of human and peoples' rights towards a state of sustainable peace, justice, and democratic order.'<sup>33</sup> Similarly, the United Nations defines transitional justice as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, to ensure

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<sup>30</sup> Jeremy Sarkin, 'Refocusing Transitional Justice to focus Not Only on the past, But also to Concentrate on Ongoing Conflicts and Enduring Human Rights Crisis', *Journal of International Humanitarian Legal Studies* 7(2016): 294-329.

<sup>31</sup> Greiff, *supra* n 3 at para.27.

<sup>32</sup> African Union, *supra* n 3.

<sup>33</sup> *Ibid.*, para 20.



accountability, serve justice, and achieve reconciliation.’<sup>34</sup> This backward-looking view of transitional justice assumes that abuses are in the past and that society, while relatively peaceful, seeks to address its grim history to move forward toward a secure future. However, based on prevailing practices, scholars argue that transitional mechanisms can be implemented during the transition, as well as pre- and post-transition stages.<sup>35</sup>

In Ethiopia, despite past crimes committed by previous regimes, the country is still experiencing ongoing violent conflicts and gross human rights violations. These are not merely past legacies but current realities that society is grappling with. Elham Atashi posits that some form of a grace period is necessary, stating that, ‘without some form of transition, transitional justice mechanisms are unlikely to gain legitimacy and move society toward reconciliation.’<sup>36</sup> This does not imply that countries should wait for conflicts to cease or their intensity to significantly reduce before conducting transitional justice. Instead, transitional justice should be a mechanism to stop conflicts and prevent future atrocities.<sup>37</sup> Ongoing conflicts can overshadow the success of transitional justice, making the cessation of hostilities a prerequisite for a meaningful process.<sup>38</sup>

The Ethiopian transitional justice policy stipulates that all gross human rights violations committed since 1995 will be addressed through various mechanisms. This includes violations resulting from ongoing wars, aligning with the current trend of transitional justice addressing both past and current crimes.<sup>39</sup> However, as seen in Colombia, Uganda, Syria, and Afghanistan, conducting transitional justice amid ongoing conflicts can hinder achieving its objectives.<sup>40</sup> Joanna, in her article, highlighted how ongoing conflicts derailed Uganda’s efforts to address human rights violations, noting that ‘the cessation of hostilities, accompanied by some sort of tangible guarantee, potentially in the form of a peace agreement, or some other mechanism, is at the very least a prerequisite for good-faith efforts at negotiation with an aim to social transformation.’<sup>41</sup>

Currently, Ethiopia is in a pre-transitional state, with no clear transition from one regime to another, nor a definitive move from war to peace. Transitional justice can be used manipulatively or democratically.<sup>42</sup> It may be employed to manipulate the international community, evade accountability, legitimize impunity, and disregard victims' rights. Conversely, transitional justice can be designed to balance peace and justice, hold perpetrators accountable through judicial or traditional mechanisms, uphold victims' rights, and transform society by ensuring non-recurrence, conducting institutional reforms, and fostering socio-economic changes.

<sup>34</sup> United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Postconflict Societies: Report of the Secretary-General* (2004), para 8.

<sup>35</sup> For instance see Quinn, supra n 5.

<sup>36</sup> Elham Atashi, ‘Afghanistan: Transitional Justice in the Midest of War’, *National Papers* 41/6 (2013): p. 1056.

<sup>37</sup> Sarkin, supra n 31 at 309.

<sup>38</sup> Quinn, supra n 5 at 3; Maria Alexandra Van Nievelt, ‘Transitional Justice in Ongoing Conflict: Colombia’s Integrative Approach to Peace and Justice’, *Cornell International Affairs Review* IX (2016): p. 105.

<sup>39</sup> Sarkin, supra n 31 at 294-329.

<sup>40</sup> Nelson Camilo Sanchez and Rodrigo Uprimny Yepes, ‘Transitional Justice without Transition? The Colombian Experience in the Implementation of Transition Measures’, *Inter American Institute of Human Rights* (2011).

<sup>41</sup> Quinn, supra n 5 at 9.

<sup>42</sup> Nievelt, supra n 39 at 15.



Unless the Ethiopian government intends to use the policy manipulatively, and despite the possibility of conducting transitional justice in a pre-transition period, practical expediency requires some form of transition that fosters a peaceful environment. This is essential to effectively undertake various mechanisms nationwide, investigating and prosecuting crimes committed by all parties and implementing institutional reforms. This transition should begin with ceasing conflicts involving the Ethiopian government and other belligerent parties. It is not practicable to conduct a transitional justice process while the state remains mired in conflict and the government continues to commit crimes ranging from war crimes to crimes against humanity.

### **Implications of Concurrent Commitment of War Crimes and Transitional Justice**

Although the policy aims to gain domestic and international legitimacy and states that the immunity rights of primary perpetrators will be suspended, it is practically impossible to hold those in high political and military offices accountable in a transitional justice process which they heavily control.<sup>43</sup> Elham discusses that in Afghanistan, perpetrators' control of power complicates accountability and justice, hindering the transitional justice process. This control positions them advantageously and received pardon for the sake of peace, which is an affront to justice, perpetuates a culture of impunity, and reinstates denial.<sup>44</sup>

During the Transitional Government of Ethiopia, the regime was criticized for focusing solely on past crimes while neglecting the human rights violations of its time.<sup>45</sup> Transitional justice aims to address gross human rights violations and transform society into a peaceful and secure future. It includes a peace component envisioning the end of ongoing wars and the removal of further threats.<sup>46</sup> For transitional justice to be effective, serve justice, and hold those responsible for mass atrocities accountable, there needs to be a process of negotiation or mediation to end conflicts. Including all stakeholders in the transitional process renders legitimacy to the process and the new political and legal dispensation set out afterward.

However, in Ethiopia, the government appears to pursue transitional justice without engaging all warring factions. While it has signed a cessation of hostilities agreement with the Tigray People's Liberation Front and started but failed peace talks with the Oromo Liberation Front, no talks have been held with the Fano groups fighting for the Amhara people's rights and interests. Active violence during the transitional justice process undermines its goals, peacebuilding, reconciliation, justice, victim reparations, and truth-finding.<sup>47</sup> Transitional justice in ongoing conflict risks politicizing justice, making it vulnerable to political manipulation.<sup>48</sup> Some fear that calling for accountability of those in power 'does nothing but strengthen their resolve to avoid facing justice, destroying as much evidence as possible.'<sup>49</sup>

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<sup>43</sup> Atashi, *supra* n 37.

<sup>44</sup> *Ibid.*

<sup>45</sup> Amnesty International, *Ethiopia: Accountability past and present: Human rights in transition*, AFR 25/006/1995, (April 1995),

<sup>46</sup> Africa Union, *supra* n 2, at 43-44.

<sup>47</sup> Rosario Figari Layus, Juliette Vargas Trujillo, 'The 'Domino Effect' of Ongoing Violence on Transitional Justice: The Case of Colombia's Special Jurisdiction for Peace', *International Journal of Transitional Justice* 17/3 (2023): 435-452.

<sup>48</sup> Nievelt, *supra* n 39 at 119.

<sup>49</sup> Ghuna Bidiwi, 'Should we call for Criminal Accountability During Ongoing Conflicts?', *Journal of International Criminal Justice* 21/4 (2023): 733.





Transitional justice during ongoing conflict may lead to further victimization due to retaliation from either those in power or those opposing state authority who have not disarmed to participate in the process. 'A successful transitional justice scheme must uphold non-repetition guarantees by preventing the perpetrators of crimes from maintaining the victim-victimizer power dynamic.'<sup>50</sup>

'Vetting state officials maintaining positions of authority and enforcing criminal justice in a way that reaffirms the importance of norms that grant equality to all, hence leveling the playing field between citizens and authorities,' is indispensable for achieving the goals of transitional justice.<sup>51</sup> If conflicts persist, it hampers the participation of victims, witnesses, and the general public, and complicates exerting authority over non-state perpetrators. Regarding public participation, the United Nations stipulates that 'the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out.'<sup>52</sup> If the government, which is actively committing crimes, controls the transitional justice process, it may use it to suppress opposition groups.<sup>53</sup> During active conflict and even in post-conflict states, securing the safety of judges, prosecutors, investigators, and enforcers can be challenging.<sup>54</sup>

### *Nemo judex in causa sua*

*Nemo judex in causa sua* is a well-established legal principle that asserts that no one should judge a case in which they have an interest. When a state is implicated in gross human rights violations, it loses its legitimacy to hold perpetrators accountable.<sup>55</sup> This situation necessitates the establishment of a transitional government or an international (or hybrid) tribunal. The Ethiopian government has been implicated in gross human rights violations in regions such as Tigray, Amhara, Oromia, and others.<sup>56</sup> The proposed transitional justice mechanism should address these violations. However, the Ethiopian court system is widely perceived as lacking impartiality and independence. The executive branch has often disregarded court rules and judgments regarding political prisoners. Suspects and political prisoners frequently express a lack of trust in the court system and do not expect justice from it as the investigation and prosecution of high profile crimes are usually buried by the government. These realities, coupled with the government's role in perpetrating mass atrocities in various parts of the country, underscore the necessity of establishing a judicial system beyond the regime's influence. Without such a system, accountability will not extend to the government, and justice will not be served to the victims.

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<sup>50</sup> Nievelt, supra n 39 at 117.

<sup>51</sup> Sarkin, supra n 31 at 318.

<sup>52</sup> United Nations, supra n 35 at para 16. *See also* Sarkin, supra n 31 at 16.

<sup>53</sup> Sarkin, supra n 31 at 320.

<sup>54</sup> Jennifer Widner, 'Courts and Democracy in Postconflict Transition: A social scientist's perspective on the African Case', *American Journal of International Law* 95/1(2001) as cited by Snyder and Vinjamuri, supra n 30 at 27. In Rwanda, when it was in a seemingly transitional state, judges, prosecutors and magistrates used to fear retaliation if they participate in the genocide trial and between 1994-1997 over three hundred survivors who were set to testify murdered.

<sup>55</sup> Bidiwi, supra n 50 at 734.

<sup>56</sup> For instance Amnesty International, *Ethiopia: Military Executes Dozens in Amhara Region*(2024), The Guardian, *Ethiopian troops accused of mass killings of civilians in Amhara region* (2023), Al Jazeera, 'Collective punishment': *Ethiopia drone strikes target civilians in Amhara*(2023).



Transitional justice mechanisms must consider the political context, as justice actors and institutions are influenced by politics.<sup>57</sup> Even from the outset, it is the political necessity of ending conflicts that often drives the adoption of transitional justice.<sup>58</sup> However, adopting transitional justice for ‘political convenience and expedience’<sup>59</sup> undermines the goals of achieving justice, addressing grievances, and transitioning to peace. The Ethiopian government's attempt to serve as a judge in its own case is a form of political convenience and a means to evade accountability.

### **Transitional Justice Institutions: Court and Prosecution Office**

Courts in Ethiopia are often perceived as extensions of the executive branch, exhibiting a lack of judicial independence and impartiality, particularly in cases involving the government or political issues.<sup>60</sup> The national transitional justice policy acknowledges the need for institutional reforms within the judiciary, recognizing that judicial institutions have historically been complicit in human rights abuses. To prevent the recurrence of such abuses, comprehensive reforms are deemed necessary. Given that the policy document itself acknowledges the judiciary's past failures and identifies them as a focus for reform, it raises the question of how these institutions can be expected to advance the cause of transitional justice and render justice effectively. This situation presents an inherent contradiction.

The Ethiopian transitional justice policy envisions a separate chamber within the current court system. The professional group that drafted the policy proposed establishing a discrete court system (a special court); however, their proposal was rejected in favor of establishing a new chamber under the Federal High Court.<sup>61</sup> The policy outlines the establishment of a special chamber within the Appellate and Cassation Bench of the Federal Supreme Court. Foreign nationals will be allowed to advise and train but not serve as judges. Judges are expected to possess knowledge and experience in criminal law, international criminal law, international human rights law, and international humanitarian law, and they should not have participated in or be suspected of human rights violations. The special chamber will have first-instance jurisdiction, and its jurisdiction will not be delegated to others except for regional special courts accountable to the Federal Supreme Court. Although non-Ethiopian soldiers have been implicated in human rights violations, the domestic court can extend its universal jurisdiction

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<sup>57</sup> Par Engstrom, ‘Transitional Justice and Ongoing Conflict’, SSRN Electronic Journal(2011): 15. [https://www.researchgate.net/publication/228142666\\_Transitional\\_Justice\\_and\\_Ongoing\\_Conflict](https://www.researchgate.net/publication/228142666_Transitional_Justice_and_Ongoing_Conflict) (accessed 23 May 2024).

<sup>58</sup> Sanchez and yepes, supra n 41.

<sup>59</sup> Sarkin, supra n 31.

<sup>60</sup> Lemlem Dejenu Mulugeta, ‘Judicial Independence in Ethiopia and Its Challenge Vis-à-Vis the United Nations Basic Principle on Independence of Judiciary’, *Journal of Political Science and International Relations* 6/4(2023): 111-119.

<sup>61</sup> For Fairness: Special Court of Special Chamber in the Existing Court System? [https://www.youtube.com/watch?v=UxdLEcZ1dhA&ab\\_channel=ShegerFM102.1Radio](https://www.youtube.com/watch?v=UxdLEcZ1dhA&ab_channel=ShegerFM102.1Radio) Marshet Tadesee, who led the professional group that drafted the national transitional justice policy told to Shager Radio that their proposal of establishing a separate special court has rejected by the government in favor of establishing a special chamber under the Federal High Court.



to entertain these cases.<sup>62</sup> However, the legitimacy and enforcement of such judgments will remain problematic.

The policy also aims to establish a free, independent, and impartial prosecution office separate from the current Ministry of Justice. Although it allows professionals from other countries to participate in consulting and training investigators and prosecutors, the policy does not permit the participation of foreigners as investigators or prosecutors. The enlistment and nomination of the leadership of the special prosecution office must be inclusive, diverse, and participatory, focusing on ethics, experience, professionalism, impartiality, and other criteria set out by law. However, the issues of independence and impartiality will continue to hover over the prosecution office, especially in a country like Ethiopia, where the incumbent government is committing crimes, sometimes along ethnic lines, and a peace pact does not stop hostilities. This concern is one of the reasons the UN established a hybrid prosecution office in countries like Sierra Leone. The UN Secretary-General has stated, ‘the appointment of an international prosecutor will guarantee that the prosecutor is, and is seen to be, independent, objective and impartial.’<sup>63</sup>

States have the responsibility to investigate and prosecute human rights violations, while the international community holds complementary jurisdiction. Giving primacy to domestic courts is often preferred because states guard their sovereignty jealously, and domestic trials are more practical, less expensive, and have a greater societal impact. They allow for the participation of witnesses and victims, use local languages to reach a wider audience, and ultimately aim to influence societal behavior, deter further crimes, provide relief to victims, and restore confidence in domestic institutions responsible for upholding the rule of law and serving justice.<sup>64</sup> However, as evidenced in other sub-Saharan countries, weak institutions may lead to the failure to achieve the goals of transitional justice and continued impunity.<sup>65</sup>

Countries and leaders often express a desire for accountability to enhance their international legitimacy and respectability.<sup>66</sup> However, they frequently lack the willingness to invest in meaningful processes due to insufficient economic resources, lack of political will, and inadequate infrastructure to support reform. These obstacles often result in accountability processes whose authenticity is questionable, particularly when those involved in designing and implementing these strategies are themselves culpable. In Ethiopia, several challenges impede the achievement of justice. The government intends to employ the very people and institutions who failed to prosecute or convict war crimes, genocide, and crimes against humanity over the past years. The courts are widely perceived as extensions of the executive branch, especially in politically sensitive cases, undermining their independence and impartiality. Additionally, ongoing human rights violations and state-sponsored crimes pose significant obstacles to establishing a fair legal system. The government should not be allowed

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<sup>62</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Article 11.

<sup>63</sup> United Nations, *Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (Oct. 4, 2000), p.9

<sup>64</sup> International Center of Transitional Justice, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (2016) <https://www.ictj.org/publication/handbook-complementarity-introduction-role-national-courts-and-icc-prosecuting> (accessed 20 May, 2024)

<sup>65</sup> Lydiah Bosire, ‘Under Delivered: Transitional Justice in Sub-Saharan Africa’, International Center for Transitional Justice (2004): p 30

<sup>66</sup> Ibid.



to evade international scrutiny by creating domestic institutions that ignore international or hybrid courts, thereby creating an accountability gap. This situation is further compounded by a substantial lack of public trust in the judicial system, as the government, which should be held accountable, is frequently seen as committing crimes itself. This distrust erodes confidence in the justice system's ability to deliver impartial justice, especially in cases involving political issues. If the government insists on utilizing domestic courts and prosecution offices, it must relinquish power and arrange for a transitional government that can handle the transitional period and respect the transitional justice institutions, such as the Special Chamber and the Special Prosecution Office, as envisaged by the policy.

### **Transitional Period – The Need for a Transitional Government**

A transitional government is a provisional entity that exercises public power governed by interim legal regulations, such as transitional charters, typically during post-conflict or political unrest periods.<sup>67</sup> The mandate of a transitional government is limited to executing the transition, including transitional justice, negotiation, and reconciliation, administering the country by restoring security, and facilitating the 're-constitutionalization' of the state.<sup>68</sup>

The establishment of a transitional government is imperative for Ethiopia to effectively implement transitional justice. For conflicts to cease, those fighting the government must perceive the transitional justice process as fair and unbiased. This fairness is achievable only if the government holds no more power than the other stakeholders. Given the current government's implication in mass atrocities, it must face justice; true justice can only be achieved if it is not controlled by the perpetrators.<sup>69</sup>

As demonstrated in the past few years when no single military or civil leader faces justice, the Ethiopian legal system's courts and prosecution offices lack the independence necessary to investigate, prosecute, and sentence high-ranking officials. This lack of autonomy hinders the impartial administration of justice. Witnesses and victims, fearing retaliation if the perpetrators remain in power, are unlikely to fully and freely participate in the justice process. Politically, the government has lost legitimacy and is facing resistance in the politically significant regions of Amhara, Oromia, and Tigray. Its inability to protect citizens from atrocities committed by third parties further erodes its legitimacy.

Effective societal transformation requires the inclusive and equal participation of all stakeholders. Historical transitions in Ethiopia, such as those from the monarchy to the Dergue and from the Dergue to the EPRDF, were controlled by the prevailing power holders and failed to incorporate diverse views, leading to repeated cycles of exclusion and conflict. Similarly, the transition from the EPRDF to the Prosperity Party illustrates the pitfalls of a transition managed solely by those in power. The current situation, where the incumbent government

<sup>67</sup> Emmanuel De Groof and Micha Wiebusch, 'The Features of Transitional Governance in International Law and Transitional Governance' (2020): 6-18, DOI:10.4324/9780429057786-2

<sup>68</sup> Ibid.

<sup>69</sup> For instance the Ethiopian Human Rights Commission forced to quit the investigation of the killing of politician Bate Urgessa after the government realized that the government forces will going to be implicated for the crime. This is one instance why the transitional justice process controlled by the very entity that should face justice will not be successful. EthioExplorer, 'Commission 'forced to quit' investigation in Meki into Bate's Assassination after Gathering Witness Testimonies Implicating Security Forces' (2024).

<https://www.ethioexplorer.com/commission-forced-to-quit-investigation-in-meki-into-bates-assassination-after-gathering-witness-testimonies-implicating-security-forces/> (accessed 23 May 2024).



seeks to unilaterally steer the nation, is met with resistance from other groups calling for inclusion and participation.

To prevent those in power from dominating the transitional justice process and the broader transformative mechanisms, it is essential that they transfer power and participate equally with other stakeholders. A transitional government is practically expedient for achieving the goals of transitional justice in Ethiopia. The ongoing conflicts and the government's involvement in atrocities necessitate the cessation of hostilities. However, the government lacks the legitimacy to investigate, prosecute, and adjudicate cases in which it is implicated. Addressing victims' rights to justice, combating impunity, and ensuring all perpetrators are held accountable require that those in power who committed atrocities face justice. Therefore, the current government should relinquish its power to a new transitional government and commit to facing justice through the transitional justice process. Those not involved in the atrocities can participate in the broader national reconciliation and justice process, which should proceed in tandem with the transitional justice efforts. However, if the government, as expected, is adamant about not relinquishing power and arranging a transitional period that includes the establishment of a transitional government, transitional justice process, and national negotiation and reconciliation process, it should revise its plan of relying solely on domestic courts and open the gate for a hybrid court.

### Hybrid Court

A hybrid court can be characterized by its origins, mandate, or composition.<sup>70</sup> It may be established through both domestic and international efforts, have jurisdiction to adjudicate cases using both domestic and international laws, or include judges from both domestic and international jurisdictions on its bench. Countries and the international community often turn to either international or hybrid tribunals to address the weaknesses of impartial and independent institutions—particularly courts and prosecution offices—that may be weak, compromised, or nonexistent due to conflict. Hybrid tribunals have the advantage of dispensing justice locally while adhering to international standards and maintaining global oversight. However, international tribunals often alienate the justice process from the affected society, diminishing their potential impact on domestic attitudes. International courts, distant from the affected society, may conflict with the concept of sovereignty. Conversely, domestic courts may fail to deliver justice due to undue influence from the executive branch and local politics. In such cases, hybrid courts can be a viable solution. Hybrid courts ‘may offer enhanced sociological legitimacy, further capacity-building efforts, and promote deeper norm-penetration.’<sup>71</sup>

To achieve sociological legitimacy, hybrid courts need to include local judges. However, given that human rights violations often have ethnic dimensions, the inclusion of local judges might introduce ethnic biases and local political issues into the judicial process. Experts argue that ‘sociological legitimacy is not gained by the presence of corrupt or inadequate judges who happen to have a connection to the community. Merit remains the overriding concern.’<sup>72</sup>

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<sup>70</sup> Elizabeth M. Bruch, ‘Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens’, *International Law Journal* (2010): 6 as cited by Harry Hobbs, ‘Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy,’ *Chicago Journal of International Law*. <https://cjl.uchicago.edu/print-archive/hybrid-tribunals-and-composition-court-search-sociological-legitimacy> (accessed May 21 2024).

<sup>71</sup> Hobbs, *supra* n 71.

<sup>72</sup> *Ibid*.



Hybrid courts have been established in various regions, including Kosovo, East Timor, Sierra Leone, and the Central African Republic. Although the International Criminal Tribunal for Rwanda was an international court, it incorporated domestic professionals and laypeople through the *Gacaca* system. This system alleviated the burden on the international court, involved the local community, and fostered a sense of responsibility. Ultimately, it is believed to have enhanced the sociological legitimacy of the process and outcomes, facilitated norm penetration, influenced behavior, and played a significant role in post-conflict Rwanda.

In Ethiopia, one of the challenges to establishing a hybrid court is the language barrier. Finding international judges who speak the local language may be difficult. 'If the hybrid court is to adequately reflect the communities within its jurisdiction, it must be capable of being understood by those communities.'<sup>73</sup> Operating in a non-local language can undermine sociological legitimacy and increase costs due to the need for translation services. Moreover, conducting proceedings in a foreign language can weaken the psychological connection between the community and the judicial process, potentially leading to public indifference and undermining transitional justice efforts.

Hybrid courts could adjudicate federal government officials, national military leaders, top regional civil and security officials, high-ranking non-state actors, and cases involving foreign actors. Other cases may be entertained by domestic courts. To ensure accountability, it might be helpful to assign no more than two out of three judges or prosecutors on a single bench from the same ethnic group where the court is established. Although court proceedings should be conducted in a local language, Amharic, as the *lingua franca*, can facilitate communication between prosecutors, judges from different ethnic groups, and the local community. Interpretation services should be provided for individuals who do not speak Amharic.

## CONCLUSION

The Ethiopian government's commitment to initiating a transitional justice process to address gross human rights violations and transition the nation into a peaceful democracy is commendable. Despite efforts and support from international partners, the current transitional justice mechanism is unlikely to resolve Ethiopia's political and security challenges. This is primarily because the nation continues to experience conflicts in various regions, and the government has sought to proceed with transitional justice without first achieving a cessation of hostilities or a ceasefire, while itself continuing to commit gross human rights violations. The ongoing conflicts hinder the participation of entities fighting against the government in the transitional justice process. Since these groups and foreign actors are alleged to have perpetrated gross human rights violations, they are unlikely to be held accountable by the current system since they are beyond the reach of the state's authority.

To address these challenges, it is imperative to establish a conducive environment for effective transitional justice. This includes a transitional period leading to the cessation of hostilities, ensuring the free participation of victims and witnesses, and holding perpetrators accountable. The formation of a transitional government is essential to ensure the accountability of current

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<sup>73</sup> Ibid.



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civil and political leaders. Furthermore, a participatory, inclusive, and comprehensive national reconciliation and negotiation process should be conducted, leading to a new constitutional and political dispensation and transformative justice. This would alleviate the undue influence on domestic judges and prosecutors stemming from the current power imbalance. However, if the government is unwilling to leave office, addressing issues of impartiality and independence in the courts is crucial to garner the confidence of the people and the international community. In such a scenario, the transitional policy should prioritize the establishment of a hybrid court. This court would involve the participation of foreign national judges and prosecutors in high-profile cases implicating federal and state high civil and security officials, leaders of non-state actors, and non-Ethiopians accused of gross human rights violations. Other cases can be handled by domestic courts but with a stringent focus on maintaining impartiality, independence, and the trust of society.