RESPONDING TO PAST HUMAN RIGHTS ABUSES THROUGH AMNESTY, RECONCILIATION AND PROSECUTION: ANALYZING THE CASE OF ETHIOPIA SINCE 2018

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October 16, 2019

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Thesis submitted in partial fulfillment of the requirements for the degree of master of laws (LLM) at the school of law, Jimma University.

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Abstract

Transitions provide an opportunity for countries to renew or replace the functionality of the system that has been affected by conflicts of human rights violations by an authoritarian government; it serves as a foundation for a new societal identity that departs from the past. One of such mechanisms to effect renewal or replacement of the system is responding to the human rights abuses that have happened in the past. Such a response to violations of human rights can be implemented through different initiatives such as prosecution, amnesty, reconciliation or reparations that are generally considered as pillars to transitional justice mechanisms.

While responding to past human right abuses, there are many interests that have to be taken with care and principled application of the rules under international law such as victims' right to remedy or reparation, societal right to the truth, states duty to prosecute core human rights violations and societal interest to achieve peace and stability. International law dictates that states should prosecute core violations of human rights such as genocide and torture, and employ other restorative transitional justice mechanisms to respond to other human rights violations of the past by taking the specific context of the country and other practical situations into consideration by employing an inclusive process that can lead to an attainment of peace and democracy. It's clear that Ethiopia has been in implementing varies transitional justice mechanisms to respond to past human rights violations, and the lack of transitional road map coupled with unclarity in the choices and priorities of those mechanisms and also the obvious mischief of some actions already taken brings the legitimacy of the process under international law into question. This paper analyses the compatibility of the actions taken by the Ethiopian government, most specifically, prosecution, amnesty and reconciliation as a response to past human rights abuses in light of international law. And it points out some problems in the process such as lack of proper investigation, lack of inclusion of victims and the society at large on the transitional justice road map, incomprehensive application of different transitional justice mechanisms, establishment of a defective truth and reconciliation commission and other related problems. The research also provides a way forward that can be used to fix some of the problems and help the progress of ongoing transitional justice initiatives.

CHAPTER ONE

INTRODUCTION

1.1. Background

Transitions are bridges between the past and the future, and the means that societies employ to construct the bridge will determine what they can pass through it. Waves of transitions have been witnessed, which according to Huntington are classified as the first (1820-1926), second (1945-1962) and third (1974-1990) waves of transition in different parts of the world such as Europe, Asia, Latin America and also Africa, and they have laid a foundation for the whole concept.[1] The modern transitional justice has emerged during the second wave of transition as an issue of how to deal with past atrocities.[2] And after that, International and domestic developments have been seen in light of implementing transitional justice mechanisms. At the international level-where there was direct involvement of the international community, the choice of transitional justice mechanism was inclined towards the retributive model as was reflected in the criminal prosecution of perpetrators in international tribunals such as the international criminal tribunal for Yugoslavia (ICTY), the special court for Sierra Leone (SCSL) and the international criminal tribunal for Rwanda (ICTR). At the domestic level-where there was no direct involvement of the international community, diversified and complex transitional justice approaches have been seen since late 20th century. Some countries have applied the retributive model and involve in prosecutions. German, after the destruction of Berlin wall and the 1991 Ethiopian transition can be cited as an example.[3] Some other countries such as Latin

[1] R. L. Siegel, 'Transitional Justice: A Decade of Debate and Experience' (1998) 20 *Human Rights Quarterly* 431, 432; S. P. Huntington, 'democracy's third wave' (1991) 2(2) *journal of democracy* 12-34, 12

[2] We can find acts of amnesty and prosecution as a means of redressing the past happening as early as ancient Athens when they do amnesty to the Athenian tyrants after their defeat, and then the Westphalia peace treaty of 1648 which has provided for an amnesty clause up until the 19th century, though mechanisms of redressing the past as a form of a legal regulation at the international arena has started to emerge after the second world war with the making of laws and establishing institutions. See, C. binder, *introduction to the concept of transitional justice* 9-29, 11; see also, n1.

[3] German has prosecuted persons responsible for killing fugitives at the wall as a gross human rights violation after the fall of the wall. Ethiopia after the downfall of the dictatorial military regime in May, 1991 has established a transitional government that established a special prosecution office for the prosecution of former officials as well as members of the military and security forces as a main means of transitional process. See, R. D. Shiferaw, 'national prosecution and transitional justice: the case of Ethiopia', (DPhil thesis, University of Warwick 2014); R. Tietel, 'transitional jurisprudence: the role of law in political transformation' (1997) 106 (7) *the Yale law journal* 2009-2080, 2022

Americans and South Africa choose to adopt the restorative model and met past abuses with amnesties.[4]

Conforming to the Vienna Convention on the Law of Treaties,[5]the United Nations (UN) Framework for Rule of Law states that, providing support and encouraging compliance with international norms and standards when designing and implementing transitional justice process and mechanisms should be the first guiding principle of transitional justice.[6] Taking the political and unique country context into consideration is also another principle of transitional justice.[7] As a pillar to transitional justice system, international human rights law, humanitarian and international criminal law provides rights and duties such as the right to justice,[8] the right to truth,[9] the right to reparations[10] and states duty to guarantee non-recurrence of violation or duty of prevention[11] together with declarations, principles, reports and guidelines to transitional justice mechanisms.[12]

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[4] Latin American countries such as Argentina and Chile met past abuses of the dictators of the 1970s and 1980s with amnesty. South Africa has established a truth and reconciliation commission in 1995 with a view to grant individuals a conditional amnesty made in return for the disclosure of crimes committed. See, Binder, (n 2) 12

[5] Nations engage in a process of discourse at the international level and accede to treaties when they are persuaded to comply with the dynamic created by the treaty regime, states should follow the rules because they have agreed to their application and not just for the resultant actions such as sanctions. See, Vienna Convention on the law of treaties.

[6] United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict societies', (2004) S/2004/616, 5; United Nations guidance note of the secretary general, 'united nations approach to transitional justice' (2010) 3.

[7]United Nations guidance note of the secretary general, (n 6) 4

[8] See, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976, article 2 (ICCPR); Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, UN General Assembly in resolution 39/46 of 10 December 1984, articles 4, 5, 7 and 12 (CAT); International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), adopted 20 December 2006, articles 3, 6, 7 and 11 (Convention for the Protection of All Persons from Enforced Disappearance)

[9] See, ICCPR, article 2; Convention for the Protection of All Persons from Enforced Disappearance, article 24

[10] Universal Declaration of Human Rights, UN General Assembly resolution 217 A (III) of 10 December 1948, article 8 (UDHR); ICCPR, article 2; International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly in resolution 2106 A (xx) of 21 December 1965, article 6 (ICRD); CAT, article 6; Convention for the Protection of All Persons from Enforced Disappearance, article 24; Convention on the Rights of the Child, UN General Assembly in resolution 44/25 of 20 November 1989,article 39 (CRC).

[11] See, ICCPR, article 2; CAT, article 2; Convention for the Protection of All Persons from Enforced Disappearance, article 23

[12]The rule of law and transitional justice in conflict and post-conflict societies (n 6); United Nations commission on human rights, 'updated set of principles for the protection and promotion of human rights through action to combat impunity', [2005] E/CN.4/2005/102/Add.1;Office of the united nations high commissioner for human rights, 'Rule-of-law tools for post conflict states: reparation programs' [2006] HR/PUB/06/1; Office of the united nations high commissioner for human rights, 'Rule-of-law tools for post conflict states: prosecution initiatives' [2006] HR/PUB/06/4; Office of the united nations high commissioner for human rights, 'Rule-of-law tools for post conflict states: truth commissions' [2006] HR/PUB/06/1; Office of the united nations high commissioner for human rights, 'Rule-of-law tools for post conflict states: vetting' [2006] HR/PUB/06/5; Office of the united nations high

Ethiopia has landed on a state of transition with the coming to power of Prime MinisterAbiy Ahmed on April, 2018.[13] This transition has brought to the position of leadership a member of a coalition of the existing regime itself, ensuing the process to be characterized by manyas one of a hybrid transition.[14] Even though the government has not established a transitional government, the fact of state of transition has been reflected through series of changes that has been undergoing in the recent past.As part of the transition process, the government has undertaken various steps aimed at reforming the internal and external affairs of the country. The reform measures included releasing prisoners,[15] decriminalizing different organizations exiled abroad,[16] re-making the gender balance in its cabinet members and other top official positions, [17] proclaiming amnesty,[18] prosecution of some old members of the regime[19]and, making a peace

commissioner for human rights, 'Rule-of-law tools for post conflict states: amnesty' [2009] HR/PUB/09/1;United Nations guidance note of the secretary general (n6); Report of the United Nations Secretary-General on 'The rule of law and transitional justice in conflict and post-conflict societies' [2011] S/2011/634; African union transitional justice policy, adopted on February, 2019 (AUTJP).

[13] Ethiopia had previously undergone a transitional period in 1991 when the dictatorial military regime was overthrown and the transitional government of Ethiopia established. The main transitional justice mechanism employed at the time, in order to deal with past human rights violations, was a criminal prosecution before national courts. The transitional justice mechanism exercised at that time were and still are being criticized for failing to bring to justice to all persons that have involved in the past abuse, and the failure of the retributive method adopted to accommodate other transitional justice interests such as reconciliation, truth telling and reparation in the process as a transitional justice mechanism. See, Shiferaw (n 3)166-178

[14]There are different sorts of transitions as mentioned in various literatures. Most classifications are made based on different dimensions such as: who initiated the transaction? How strong and polarized were the different groups? What is the transitions' strategy? Or, for how long does the transition last? The most common classifications stated in famous literatures are: one, elite dominated compromises also called transformation, transaction, *reforma-pactada*, and other related labels by different scholars; two, elites in opposition lead transition also called Impositions, replacement, breakdown, rapture, or collapse; three, elites in power and in opposition co-operate in leading the transition also called trans placement or extrication. The Ethiopian transition was forced by the mass but it is an elite dominated compromise and it characterizes as a hybrid one. see, C. Q. Schneider, 'Some Notes on How to Study the Impact of Transition Modes on the Consolidation of Democracy', 6; See also, T. L. Karl, 'Dilemmas of Democratization in Latin America' (1990) 23 *Comparative Politics* 1-21, 8-9. Many have also considered the current Ethiopian transition as a hybrid one. See, for example, M. Miftah, 'op-ed: Ethiopia in transition is facing critical challenges' (Addis standard, 5 November 2018) https://addisstandard.comaccessed 05 March 2019; S. A Deresso, 'op-ed: pursuing transitional justice and reconciliation in Ethiopia's hybrid transition' (Addis standard, 5 November 2018) https://addisstandard.com accessed 05 march 2019

[15] Just in June, 2018 around 300 political prisoners were released to "widen the political space." See, https://ethsat.com/2018/06/ethiopia-release-300-political-prisoners/

[16] Organizations such as OLF and Ginbot 7 have returned to the country from exile on a call made by the government as per the decision of parliament in June, 2018. See, <https://www.aa.com.tr/en/africa/ethiopia-welcomes-return-of-exiled-opposition-leader/1250507><https://www.aa.com.tr/en/africa/exiled-dissidents-return-to-ethiopia-in-search-of-peace/1154251> accessed on April 20, 2019

[17] See, https://www.washingtonpost.com/world/africa/ethiopias-reformist-leader-inaugurates-new-cabinet-half-of-the-ministers-women/2018/10/16/b5002e7a-d127-11e8-b2d2-f397227b43f0_story.html?utm_term=.352da5505dee accesses on April 20, 2019

[18] The Ethiopian parliament has passed an amnesty bill into a law In its 32nd regular sessionhttp://addisstandard.com/news-ethiopian-parliament-passes-amnesty-bill-law/

deal with Eritrea (for which he was awarded a Nobel peace prize).[20]However, whether these series of changes put the country in a state of transition was unclear perhaps because the process has not entertained a regime change,[21] or suspension of the constitution,[22] or the establishment of a transitional government like those of classical transitional types.[23] The absence of a clearly communicated transitional road map has created confusion regarding the nature and plans of the process. Nevertheless, the process has elements that are considered to be indicative of the occurrence of transitions, which happens when authoritarian governments are forced to yield power to the ones that operate within the set of rules such as free speech, right to association and guarantees of basic civil liberties which could be reflected through actions of releasing prisoners, decriminalizing organizations exiled abroad or amendment of legislations.[24] The situation also shows typical characteristics of state of transition such as the need to address crucial question in

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[19] See, https://www.ethiopia-insight.com/2018/11/15/abiy-attacks-impunity-as-metec-and-niss-officials-held-for-graft-and-torture/

[20] The Prime Minister has made a peace deal by accepting the decision regarding the delimitation of the border between Eritrea and Ethiopia by the United Nations in 2006. The Nobel peace prize was awarded for the Prime Ministers' additional effort in brokering peace in neighboring countries and also the reforms made in his first 100 days such as lifting the countries state of emergency, granting amnesty for thousands of political prisoners and dismissing military and civilian leaders who were suspected of corruption. See, full text of the 2019 Nobel Peace Prize citation: https://www.reuters.com/article/us-nobel-peace-fulltext/full-text-of-the-2019-nobel-peace-prize-citation-idUSKBN1WQ15N?mod=related&channelName=worldNews

[21] A regime change by itself does not guarantee a state of transition when mechanisms of responding to the past are not put in place, when mechanisms to respond to the past and transit to a democratic future are set in place, absence of an actual regime change will not also be a reason to claim an absence of transition. The same political regime might put mechanisms in place to convert to a democratic regime and we call it a state in transition. For some, a regime change by itself might be an abstract in that, a regime is not constitutive of people but an ideology and once the old regime has put a meaningful reform process in place, it spells the death of the old regime. See, F. D. Ni Aolain and C. Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) *Human Rights Quarterly* 172-213, 182

[22]Transitions that have been happening globally and also the Ethiopian past transitions show a transition from autocracy to democracy or at least a basic structural change of a state that comes with the change of the regime. And those changes demand the suspension of the constitution at the first stage of the transitional process. But the objectives of transitions also necessitate a transition from 'conflicted democracies to democracy'- a type of transition which does not necessarily require a change in the structure of the state or other important changes that demand amendment of the constitution, thereby rendering suspension of constitutions as a dependent feature of states in transition and not a compelling requirement for every transition.

[23] Many countries in transition have established a transitional government to lead the transitional process, either through nationally elected members or through the mandate of international organizations such as the United Nations. Examples in this case are: the transition of Timor-Leste during the 1995 was led by the UN transitional administration for east Timor (UNTAET), the transition in Ethiopia during the 1991 was led by the transitional government of Ethiopia (TGE) which lasted in 1995 and the transition in Liberia during 2003 has established a transitional government. P. B. Hayner, *unspeakable truths: transitional justice and the challenge of truth commissions*, (2nd edition, routlegde 2011) 39&65; Shiferaw, (n 3) 25-26

[24]See, Haggard, Stephan and Robert R. Kaufman, The Political Economy of Democratic Transitions (Princeton University Press 1995) as cited on S. Guo and G. A. Stradiotto, *Democratic Transitions: Modes and Outcomes* (1st edition, Rutledge 2014] 3

rather urgent period of time, the rapid flourishment of political actors and the need for communication among them and also having an elite centered process of transition.[25]

Yet still, the confusion goes as long as the fact of transition is not established within the types of transitions, in a way that can transgress the conceptual cacophony. According to Karl and Schmitt, transitions could be of three types based on the mechanisms that are used to have it to occur. 1st, transition from above (transformation, transaction, reform); 2nd, transition from below (replacement, breakdown, rapture) and; 3rd, transition when the opposition and the regime itself play a role in the process (Trans placement, extrication). Transitions from above happens when the ruling (the incumbent) themselves negotiate a democratic opening which could be referred to as a reform or otherwise based on the nature of the conversion. Transitions from below happen when a movement, push or any other process that has initiated from below has resulted in a democratic opening which could be referred to as a revolution or otherwise based on its nature. Those both parties can also come together to effect a transition.[26]

This study establishes the Ethiopian situation since April, 2018 as a reformative transition for the following reasons: first, the Ethiopian situation fits in the characteristics and indicators for a pre-transitional state and a state in reformative transition from a conflicted democracy to democracy. When an observation is made on the characteristics or markers for a conflicted democracy, they show a strong division in the body politic either based on race, ethnic or other ideologies such as to result in political violence.[27] They also experience derogation of human rights in the form of either de jure or de facto emergencies.[28] When they enter the state of transition, compromise (marginal or substantive) will be made from the events giving rise to the transitional process and the state will also acknowledge its human rights abuses and accept the need for some kind of changein the political order(though there might be some localized resistance form elite actors).[29] Ethiopia has an ethnic based federalism which has occasioned the political stage to be dominated by a single ethnic group and this has become a cause for violence which in turn resulted into successive declarations of a state of emergency.[30]And such process

[25] See, H. A. Welsh, 'Political Transition Processes in Central and Eastern Europe' (1994)*Comparative Politics* 379, 382
[26] K. T. Lynn and P. C. Schmitter, 'modes of transition in Latin America, southern and eastern Europe' (1991) 43(2) *international social science journal* 269-284, 272ff
[27] Ni Aolain and Campbell, (n 21) 176
[28] Ibid, 177
[29] Ibid, 180
[30] Amnesty international, 'commentary on the Ethiopian state of emergency' 1-2

was also met by many reformative activities that are meant to change past activities and such activities have emerged from the act of the government in acknowledgment of past human right abuses.[31] Second, the government has also indicated time and time again that the country is in a reform process.

1.2. Statement of the problem

There are many interests that have to be seen with care in exercising transitional justice mechanisms. Before dealing with the legality of transitional justice mechanisms, it is imperative that the applicable international laws during transition be identified because the rules and principles applied during transitions are peculiar and they need to be reconciled with international laws by taking the context of every transition into consideration.[32] Rules or principles of transitional justice established through jurisprudence and rule making by relevant organizations state that:[33] The process of reconciliation should not be an unprincipled embrace of a political evil,[34] a pursuit of justice should not be so relentless so as to turn into revenge,[35] the need to effect reconciliation and move societies forward should uphold victims' rights to justice,[36] truth telling has to be proper in a way that responds to the demand for justice and reconciliation[37] and so on. International laws also laid down rules which, although not specific to transitions, may be affected by states' decision to prioritize one mechanism over the other. Such laws relate to the right to justice of victims and the general public.[38] In this case the idea of doing justice might mean political justice (when the executive organ of the government alone gives a final decision), it could mean an administrative justice (when the government effects lustration or

[31] See, text to n 15-20
[32] Even though international laws have their own enforcement mechanisms based on objective standards, there is no one-size-fits-all application of international laws during transitions because every transition demands implementation of different actions based on its type and also the context in which the transition is undergoing. But this doesn't mean there is a room for violation of basic rules such as a duty of the government to prosecute violations of human rights or the rights of victims to know the truth. See, United Nations guidance note of the secretary general, (n 6) 3-5
[33] See, text to n 12
[34] How we approach the process of reconciliation should not be a way that only intends to do away with the past but also a means to address issues of both victims and perpetrators properly in a way that let the perpetrator to own his guilt and the victim to be compensated. See, promotion of national unity and reconciliation act 34 of 1995, article 3
[35] OHCHR, 'Rule-of-law tools for post conflict states: prosecution initiatives' (n 12) s 1(a) Para 4
[36] AUTJP, (n 12) s 2 Para 63
[37]OHCHR, 'Rule-of-law tools for post conflict states: truth commissions' (n 12) s 1(d)
[38] Text to n 8

purging of former officials and considers it justice done) or, it could be legal justice (when legal proceedings are used).[39]

Besides, under international law, states' have an obligation to extradite or prosecute persons suspected of committing certain types of crimes[40] and, this rule impliedly includes a duty to investigate the nature of a crime before resorting to other transitional justice mechanisms. States are under obligation to respect the right to access to justice of individuals and also an obligation to provide reparation for victims of past human rights violations.[41]

A look at the transitional justice mechanisms under implementation in Ethiopia shows a lack of comprehensiveness or a clear transitional road map. The initiatives taken are not complementary in a sense that one mechanism supports another and also not made through public consensus.[42] Due to such intended or unintended characteristics, many problems have transpired and call for a thorough examination of the situation in light of laws governing transitional justice. Some of the problems that can be mentioned are: first, the choice of transitional justice mechanisms implemented by the government is not clear and foreseeable, and that might potentially make the process complicated and problematic.[43]Lacking a clear road map in the countries' transitional journey might create confusion and even feeling of exclusion from decision making process from the partof the society who has been a victim of abuses in the past and who also has to be consulted and included in the process.[44]

Second, the articulation of past violations is problematic in that it does not have a neutral body to its effect and it's questionable whether the process has entertained a proper truth telling and thereby proper investigation and prosecution.[45] Implementation of transitional justice

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[39] Shiferaw, (n 3) 91-93
[40] Text to n 8&11
[41] Text to n 10
[42] It's a rule of transitional justice that initiatives during transition should be comprehensive and also inclusive of the participation and demands of every members of society, the Ethiopian transition, however, does not seem to be mindful of such rules as the process does not entertain the participation of victims and other members of society following from proper identification of the violations of the past and their victims. For example, decision to adopt amnesty law or proclamation to establish a reconciliation commission was made by parliament which is representative of the society but not individual victims whose interest has to be considered during transitions. See. AUTJP, (n 12) s 1 Para 33
[43] Because of the absence of a clear and publicly communicated transitional justice strategy as to who to prosecute or amnesty: who to remove from public positions or what issues will be subject to reconciliation based on a clear investigation of human rights violation of the past by an independent organ, actions taken by the government come as a surprise and also seem to be conflicting with each other.
[44] Text to n 42
[45]Here, I do not intend to make a judgment as to the responsibility of someone and thereby argue for imposition of punishment upon that individual, nor, do I intend to base my arguments based on individual cases but the process.

mechanisms should be made in a comprehensive manner which requires a proper and logical orderliness of initiatives so that one complements another and not contradicts it.[46]Such logical symmetry of actions can be sought by putting most determinant factors first.For example, investigation of abuses of the past can be given priority so that there will be knowledge of what happened in the past and also it can become be a baseline for further decisions. In Ethiopia, however, amnesty has been offered before the investigation on past human rights abuses under the general attorney has been put to completion and, it is questionable whether the amnesty has not violated states obligation to prosecute core human right violations such as torture and crimes against humanity.

Third, the procedures taken by the government to start prosecution are not fairly clear and that brings about claims that the government has adopted a retributive justice on some selected old members of the regime that does not cover all violations.[47]Andhow justified are these so called selective prosecutions under international law and how the process has satisfied the need for justice is also questionable. These problems raise the question as to whether Ethiopian transitional justice process has effectively addressed the objectives of transitional justice and practiced within the bound of international law.

Fourth, a reconciliation commission as opposed to a truth and reconciliation commission has been established and it is not clear whether that has been done based on a need assessment resulting from investigation of past abuses and identification of target groups for the work of the commission- whether there is a demand for reconciliation between members of the society themselves or between the government and the society has not been identified. The element of truth in the works of the commission has also been given a contradictory value both in the naming of the commission and also in its establishing document and its questionable how the work of reconciliation is to be made without the commission having a clear and logical mandate to carry out its work and, it's also questionable how the commission is going to deal with human rights violations that demand prosecution and also the rights of victims to know the truth and get remedy.

Yet still, historical accounts and recent allegations provide for an evidence of past human rights violations and this by default leaves certain persons as a perpetrator of such violations and others as victims, therefore, how the process has answered or respond to such articulations has to be examined.

[46]United Nations guidance note of the secretary general (n6) s A(7,8)

[47] A. K. Abebe, 'what Ethiopia needs is an independent prosecution' Al Jazeera (16 August, 2019) https://www.google.com/amp/s/www.aljazeera.com/amp/indepth/opinion/ethiopia-independent-prosecution-100717140328127.html accessed 10 October, 2019.

Therefore, it is relevant to assess the situation in Ethiopia in light of established rules that lay down the rights of victims and the society at large and also the obligation of the government to prosecute human right violations; to do so, It is important to examine method or process of effecting justice in light of international law; it is important to examine the scope or limits of non-prosecutorial mechanisms in light of a states' duty to prosecute and also individual's right to an access to justice and reparation; it is also important to see the process of reconciliation in light of other interests.

1.3. Research questions

The study attempts to answer the following basic research questions

1. Are the transitional justice measures taken in Ethiopia compatible with a states' duty to prosecute under international law?
2. How does the amnesty process uphold the rights of victims to the truth and remedy?
3. Does the reconciliation initiative go along with the relevant trend under international law and states practices?

1.4. Objective of the study

The general objective of my research is to analyze the mechanisms currently adopted to respond to past human rights abuses in Ethiopia, in light of applicable international law.

The specific objectives of my research are:

- To exhaustively analyze the mechanisms taken to respond to past human rights abuses in light of the states' obligation to prosecute under international law.
- To examine the legality of the amnesty law in light of international rules providing for states' duty and the rights of victims' and the society.
- To examine whether the reconciliation employed in Ethiopia go along with the objectives of transitional justice and appreciated practices.

1.5. Methodology

The paper intends to make a comprehensive doctrinal analysis by focusing on the selection and implementation of transitional justice mechanisms as the main analytical approach.[48] A qualitative approach will be employed as the case requires analyzing a given

[48] The application of international law in case of transitions is unclear as there are no one size fits all rules to transitions and the rules differ based on context, and collecting and analyzing a body of law to apply to a given situation is important to set what the law is in a particular area and how it apples because the law is reasoned and not

situation in light of laws governing transitional justice and best practices (even though a comparative study is not the main objective of this paper, practice of some appreciated transitional justice systems will be mentioned to justify and elaborate on the pros and cons of a given transitional justice mechanism, of course by carefully looking into their context). Analysis of the relevant literature in areas of transitional justice mechanisms most specifically on amnesties, prosecution and reconciliation will be made. A highly thorough engagement in an analytical study of relevant national and international laws that will be applicable in the Ethiopian context will be made specially in relation to issues of prosecution and amnesty whereas a discussion on issues of reconciliation will highly depend on experiences of other countries that have already implemented the same initiative, still having the rules under international law as a decisive factor in every decision made with regard to initiative of reconciliation.

Research will be conducted by using primary and secondary sources of information such as international human rights instruments, UN documents, national laws, cases, scholarly literatures, disaggregated public opinions, and report by governmental bodies such as the reconciliation commission or international organizations if any,[49] and make discussions and arguments on the mechanisms responding to past human rights abuses in Ethiopia, by using the protection of human rights and rule of law as a limit or standard of judgment.[50]

Primary and Secondary data collection methods

In the collection of the required information from the primary and secondary sources, the following methods will be employed.

- Legal analysis: of international and national laws and rules to gather information about the stand of the law in a specific situation
- Literature review: used to collect information from secondary sources on conceptual or theoretical matters

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objectively found. This in turn requires the process of selecting and weighing authorities based on their hierarchy and understanding the social context and doing interpretation. For this reason, the research will follow a qualitative doctrinal method. See, I. Dobinson and F. Johns, 'qualitative legal research' in M. McConville and W. H. Chui (eds), *research methods for law* (Edinburgh University Press 2007) 22.

[49] As the law is there to found from a reasoning applied to the sources to be found, it is imperative that a look at the relevant legislations and also literatures in this area be made.

[50] Transitional justice mechanisms are peculiar in that, the end goal is set to reach to democracy, protection of human rights or rules of law. When rules are reasoned to apply to a transitional situation, it has to be made in light of the main objectives which are the protection of human rights and rule of law.

- Case study: selected brief case studies of individual persons prosecuted in response to past HRs violations

1.6. Scope of the study

Theoretically the concept of transitional justice and the diverse mechanisms of dealing with past human right abuses are employed for the purposes of examining the Ethiopian model. Focus will be made on the already adopted mechanisms of transitional justice, I.e. amnesty, reconciliation and prosecution as these are the most controversial transitional mechanisms affecting other mechanisms such as reparation. Conceptually, the research will be limited to assessing the means, methods and process of responding to past human rights abuses which have occurred from 1991 up until April 2018.

1.7. Literature review

Recent transitions, including the political transition in Ethiopia, probably for their lack of contingency and radical change, have failed to attract a number of writers that could make an analysis of their situation in light of current developments under international law. The existing literature on the current Ethiopian transitional justice process are heavily dependent on one's political opinion with very few of them making a limited legal analysis. A web research made by this particular study shows the absence of any academic research or scholarly articles on the matter of responses taken in Ethiopian current transition to respond to past human rights abuses. A paper written by Betru Dibaba focuses on the general reform undergoing in Ethiopia since April, 2018 where he also touches upon the general concept of the frameworks of dealing with the past.[51]The other written works found are opinions of individuals in the form of op-ed,Some of the writers that shared their opinions include Selomom Ayele Deresso,[52] Awol Allo[53] and Mukerem Miftah[54]; mostly reflecting on the unjust-*ified* compromise of human rights offenders need for prosecution over other interests at the beginning of the transition; the unpredictability of

[51] B. Dibaba, 'rocks of hope: interrogating Prime Minister Abiy Ahmed's reform within the boomerang model of human rights' (Abyssinia law, 09 January, 2019) https://www.abyssinialaw.com/blog-posts/item/1845-rocks-of-hope-interrogating-pm-dr-abiy-ahmed-s-reform accessed on October 27, 2019.
[52] See, S. A Deresso, 'op:ed: persuing transitional justice and reconciliation in Ethiopia's hybrid transition' transition' (addis standdard, 5 November 2018) https://addisstandard.com
[53] See, A. K. Allo, 'navigating Ethiopia's journey towards reconciliation and justice' (Al Jazeera, august 2019) https://www.aljazeera.com/indepth/opinion/navigating-ethiopa-journey-reconciliation-justice-181119135649004.html .
[54] See, Mukerem Miftah, 'op:ed: ethiopia in transition is facing critical challenges'(addis standdard, 5 November 2018) https://addisstandard.com .

the political situation that comes with lack of transitional road map, and the choice of transitional justice mechanisms by the government as lacking balance in the beginning of its transitional journey was all mentioned as a problem.[55]

Many writers, most specifically, Solomon Deresso and Awol Allo, try to shade light on the many issues that needs focus in Ethiopian transition by making a reference to the new African transitional justice policy. This particular research tries to go beyond what has been done in case of Ethiopian current transition by looking at the issue in light of international law, African transitional justice policy and also experience of other transitional states so that a full-fledged analysis can be made on the responses to past human right violations with a view of not only identifying problems but also suggesting solutions.

1.8. Significance

Efforts by many scholars to analyze transitional justice mechanisms in many countries have flourished since the late 20th century after the Second World War.[56] Most of the studies conducted do not address the effect of transitional justice process on human rights or, the limits that international law should lay on the means of employing transitional justice mechanisms. Most studies remain descriptive of the process of transitional justice in many countries or explanation of the philosophical and theoretical framework of transitional justice. Even though research works have undeniable contribution to making of policies and strategies in implementation of transitional justice mechanisms, the scholarly discourse in this areas are very few and lack a legal perspective.

A discourse on the implementation of transitional justice mechanisms as a growing field of international law should include a discussion as to which transitional justice mechanism or set of mechanisms improves the protection of human rights and transition to democracy depending on the context of a particular transition. It should also dare to discuss how the process has respected rights and duties laid down by international law or how a state exercised its discretion at times of transition within the limit of the law. Shaping the rules of transitional justice by giving meaning and purpose to every transitional justice mechanism within the bound of international law is important. It is also important to examine the current Ethiopian transitional justice process in light of the relevant rules of transitional justice and international law, in order

[55] See, id.
[56] A. Dukalskis, 'interactions in transitions: how truth commissions and trials complement or constrain each other' (2011) 13(3) *international studies review* 432-451, 432

to check the validity of the process and, recommend changes, if any. This is where my research becomes relevant.

1.9. Structure of the study

This study contains five chapters, including this introductory chapter. The second, third and fourth chapters will be dedicated to providing the legal frameworks regulating the situations of amnesty, prosecution, reconciliation and other related matters such as victims right to justice and reparation during transition. Discussion on the cases of Ethiopia with regard to actions taken to respond to past human right abuses, most specifically amnesties, prosecution and reconciliation will be made by focusing on activities that can be meaningfully translated into a legal action which has to be made within the limit of the law.

In chapter one, discussion on issues of prosecution at times of transitions will be made. In doing so, an introduction of the situation in Ethiopia after April, 2018 as a case of transition will be made, then a discussion on the applicable the legal frameworks for dealing with the case of prosecutions will be made by looking deep into the exigencies under international human rights and criminal law and national laws together with rules and principles of transitional justice. Discussion of the current situation in Ethiopia will also be discussed with reference to the legal analysis made. On a similar basis, chapter two and three will provide analysis of the law in cases of amnesty and reconciliation and provide the situation in Ethiopia relevant to the legal analysis. Chapter five will finally provide a comprehensive conclusion based on the analysis made in previous chapters.

Objective wise, the whole discussion can be dissected into two parts: the first part analyses the existing laws governing transitional justice and the second part examines the Ethiopian situation in light of those identified applicable laws. The first set of discussion is about finding out the legal framework for effecting amnesties, prosecution and reconciliation. This discussion is round up with two major gaps in transitional justice, which are: first, scholars and policy makers do not yet come up clear cut evidence that supports the claim that transitional justice actually brings about improvement in the protection of human rights. There are some considerations taken in effecting international laws during transitions because of the special purpose attached to it and which have to be compromised with the objectives of international law, in cases where the objectives of both do not align. Being not able to prove the need to set aside international laws to achieve the purpose of transitions will make it difficult to justify the

derogation that has to be made to international law, if any. Having no evidence on the absence of correlation of effecting transitional justice to improvement of human rights will also make it difficult to prove otherwise. An endeavor to find out the legal framework applicable during transitions will also impliedly take those considerations in order to set the stand of the law with its proper exposes de motifs. When we settle this issue the second gap arises, which inquires how transitional justice should be implemented to result in future improvement of human rights? How justified are we to compromise the application of international laws that protect the rights of victims to justice and reparation with the purpose of transitions to building about a future with an advanced democracy and human rights protection?. Having a clear idea in those theoretical gaps is inherent in discussion of all chapters because confusion in such theoretical matters affects the proper application of the law. Chapter two, three and four will discuss the status of application of international law in matters of amnesty, prosecution and reconciliation by referring to international and national laws applicable in such matters and, by taking into consideration the wording and purpose of the law together with the rules and purpose of transitions as reflected in policies and rules of transitional justice. Good practices of other appreciated transitions will also be inferred to strengthen arguments. Examining the application of those laws in Ethiopian transition will also be made in those chapters waiting for a general conclusion in chapter five.

CHAPTER TWO

PROSECUTION IN ETHIOPIAN TRANSITION

2.1. Introduction

There are several accountability mechanisms that can be carried out on persons responsible for past human rights abuses that can fall within the broad classification of justice, truth and redress.[57] Such measures could be an international prosecution, national truth and reconciliation commissions, national prosecutions, national lustration mechanisms, national civil remedies and international mechanisms for victim compensation.[58] Prosecution have been one of the oldest mechanisms of implementation of transitional justice that has been effected in most

[57] C. Bassiouni, 'searching for peace and achieving justice: the need for accountability' in Cherif Bassiouni (ed), *law and contemporary problems*Vol. 59 (1996) 18-22

[58]N. J. Kritz, 'coming to terms with atrocities: a review of accountability mechanisms for mass violations of human rights' in Cherif Bassiouni (ed), *law and contemporary problems* Vol. 59(1996).

transitions such as the Nuremberg trials after the Second World War and the ICTR after the genocide in Rwanda.[59]Prosecutions during transitions have been found to be important to reach to the end goals of transitions, such us protection of human rights and respect for the rule of law for many reasons. One of the obvious reasons for meting a past abuse with prosecution is for the purpose of deterrence.[60]Effecting prosecutions can be a major signal for future prospects of democracy. Prosecution not only punishes past offenders but also deters others from committing of any of such offenses because it is likely that they will face punishment too. Prosecuting those who have committed a violation of human rights in the past sends a message that, those who abuse the rights of others will be held accountable, and this approach shows the disapproval on the part of the government for such abuses and its stand to ensure the rule of law.[61] Ruti G. Teitel explains this effect of prosecution as follows.

> The leading arguments for punishment in periods of political flux is consequentialist and forward looking: It is contended that, in societies with evil legacies moving out of repressive rule, successor trials play a significant foundational role in laying the basis of a new liberal order.[62]

Cherif Bassiouni argues such deterrence effect of prosecutions will result in reduction of future harms occurring by way of international crimes such as genocide, crimes against humanity, war crimes, and torture.[63] On the other hand, It is argued that replacing prosecution with other mechanisms of transitional justice such as truth telling or a simple act of impunity (when the government respond to past human right abuses through other mechanisms or when the need to respond to past human rights violation was simply out of concern), is a necessary evil which is indispensable for achieving the end results of transitions.[64] There might be specific

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[59] Such wider prosecution initiatives together with the establishment of the international criminal court have helped the transitional justice system to tilt towards the retributive model even though amnesties still continue to be implemented during transitions. M. Freeman, '*necessary evils: amnesties and the search for justice'* (2009) 2-4, as cited on A. Fallon, 'amnesty rather than restraining accountability, is a constituent part of the accountability process'https://www.academia.edu/6991495/Amnesty_rather_than_restraining_accountability_is_a_constituent_part_of_the_accountablity_process accessed on 18 October, 2019; R. G. Teitel, 'transitional justice genealogy' (2003) 16 *Harvard human rights law journal* 70-94, 71

[60] D. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', (1991)*Yale law journal* 2539, 2542.

[61] OHCHR, 'Rule-of-law tools for post conflict states: prosecution initiatives' (n 12) s 1(a) Para 5

[62] R. G. Teitel, transitional justice (2000) 46-51, as quoted on Shiferaw, (n 3) 95

[63] C. Bassiouni, 'introduction' in C. Bassiouni (ed), *law and contemporary problems,* vol. 59(1996) 1

[64] Fallon argues that a newly reinstated democracy is a frail construct so a country seeking to achieve the end results of transitions such as a stable social order should avoid or at least tolerate retribution towards past abuses. See, Fallon, (n 59) 6

particularity or situation in a given country in transition which hinders effecting prosecution or, if prosecution is made, it is expected that it will result in demise of democracy rather than its flourishment.[65]A state may use a limited flexibility in implementing transitional justice measures for reasons of, the need to adjust policies to the country context and considerations of achieving the end goals of transitions.[66] But how they use such flexibility in choosing to apply the different means of accountability is something that needs a legal, moral and ethical guidance and, the dominant opinion in this case is that, whatever level of flexibility that a state uses, impunity for core human rights violations should be removed from the tool box of political negotiators, because impunity for such grave violations implies betrayal of human solidarity to the victims, to whom we owe a duty of justice, remembrance and compensation and, it sets a legacy of resentment which will always call for vengeance and long for redress.[67]

Taxonomy of compromises exists with regard to prosecution both in law and practice.[68] A state may pursue accountability only for some subset of individuals, or lustration may be effected on those who collaborated on human right violations for purpose of accountability and political reform, or plea bargains or sentence reduction may be utilized based on the context of the country in transition.[69] Such contexts might differ based on the type of transition depending on the political situation that the country has been before the transition, the group of people who have initiated the transition, or the status of different groups who are on opposite ends of the transitional process. In this case there are international laws governing the issue of prosecution and we also have transitional justice policies and principles that any transition should take into account.

In this chapter, discussion of the relevant laws governing the issues of prosecution will be made together with rules and principles of transitional justice specific to the case of Ethiopia. The first part of discussion will be dedicated to analyzing as to what extent states are under

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[65] Such specific circumstances in transitional states could be: the number of perpetrators, the status of local judicial systems, or the financial capacity of the state to effect prosecutions and these factors will affect the peaceful transition and negatively contribute to the process. See, Shiferaw, (n 3)105

[66]United Nations guidance note of the secretary general, (n 6) s A(2)

[67]United Nations guidance note of the secretary general, (n 6) s A(2); AUTJP (n 12) s 2, Para 86; The rule of law and transitional justice in conflict and post-conflict societies, (n 6) s IX, Para A(67); W. A. Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) *U.C. Davis journal of international law & policy*145, 161; C. Bassiouni, 'international crimes: jus cogens and obligatio erga omnes' in Cherif Bassiouni (ed), *law and contemporary problems* vol. 59(1996) 68

[68] M. H. Morris, 'international guidelines against impunity: facilitating accountability' in C. Bassiouni (ed), *law and contemporary problems* vol. 59(1996) 32

[69] AUTJP, (n 12) s 2, Para 83-88; see also, Id

international obligation to prosecute or extradite persons suspected of committing international crimes. To do so, it's imperative to discuss the duty to prosecute as regulated under major international conventions such as the genocide, Geneva and torture convention and also the status under international customary law. The second part will discuss the transition process in Ethiopia since April, 2018 in relevance to the duty to prosecute or extradite and other obligations that follow because of such duty. Decisions made during transition that has relevance to the duty to prosecute under international law could a decision on the part of the government to investigate crimes that have happened in the past and make a prosecutorial decision in line with the duty stipulated under national and international law. And how such process has been handled by the government will be at the core of such discussion in light of international law. However, the decision to investigate and prosecute during transition is mostly affected by special situations that happen during transitions and also the goal of transition itself and how such special circumstances have affected the duty to prosecute and opened a door for the implementation of other transitional justice mechanisms will be discussed in the last part of this chapter.

2.2. Duty to investigate and prosecute

2.2.1. Under international law

International law provides a formula for the world community, which if agreed upon, will work to nurture and maintain a public order of human dignity under the dynamics of developments, that comprises the human context as a whole and when states accede to such laws, they have agreed to bound by them and act accordingly. One of such dynamics could be the fact of the world being in transition, which is creating a new path of development in a world order within the bound of human context. In following such developments, there might be new rules or new lines of interpretation to the existing international law, which are made to shape the existing situation in a world order, yet still functioning within the basic essence of human dignity on which the world order has been built on.

International law lays a duty on the state to protect and, ensure the protection of rights of individuals.[70]State has a duty to use any means at its disposal to ensure the protection of human

[70] ICCPR, (n 8) article 2;Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms, General Assembly resolution 53/144, article 2.

rights and also avoid recurrence of violations by punishing perpetrators.[71]The right to remedy of individuals also lays a duty on the government to investigate and prosecute violations.[72]According to legal literatures, thoseobligations become more important in cases of grave violations such as genocide, crimes against humanity, war crimes, piracy, slavery and slave related practices and torture. Cherif bassiouni classified those as a *jus cogens* norms by laying on the basis of their international pronouncement, on the languages used on the preambles applicable to the crimes, on the large number of states that have ratified conventions dealing with these crimes and related conventions, and based on the international investigation and prosecution of those crimes.[73] These *jus cogens* crimes are especially relevant in cases of prosecuting abuses of the past because of their specialty that comes with their character of creating an obligation to prosecute such as, the non-applicability of statutes of limitation and granting of immunity and also the universal jurisdiction over perpetrators of such crimes.[74]

Sources of an obligation to prosecute are found in major international human rights instruments such as the Geneva conventions and the genocide convention. One of the pioneer conventions providing for the rule of duty to prosecute is the convention on the Prevention and Punishment of the Crime of Genocide.[75] The convention provides for an obligation to prosecute persons responsible for acts of genocide as defined in the convention.[76]This duty entails on the

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[71] The American court of human rights has interpreted the duty to ensure to mean, duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. And this duty to ensure the protection of rights is enshrined in most human rights conventions. The same line of interpretation was also forwarded by the human rights committee. See, Velasquez Rodriguez Case, inter American court of human rights. 35, OAS/ser. L/V/III. 19, doc. 13, app. VI (1988).

[72] The right to remedy of individuals was first introduced under the universal declaration of human rights. During the preparation of the declaration, delegates from Latin American countries proposed the inclusion of such provision to give due emphasis on this issue separate from habeas corpus and public trial rights. The right extends duty on the government to remedy violations by creating a favorable condition and act on the matter when violations happen by state organs and also non-state actors. The same interest was taken during the negotiations of article 2(3) of the ICCPR. The Philippine representative proposed for the inclusion of explicit word commanding states duty to prosecute but later the committee agreed to state that through interpretation and the human Rights Committee has interpreted the obligation to provide a remedy to include an obligation to investigate and prosecute. See, D. Weissbrodt and M. Hallendorff, 'Travaux Préparatoires of the Fair Trial Provisions--Articles 8 to 11--Of the Universal Declaration of Human Rights' [1999] *Human Rights Quarterly*, 1062, 1090-1096; N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) *California Law Review*, 451, 475-476. See also, Vienna convention on the law of treaties of 23 May 1969, article 32

[73] See, Bassiouni, international crimes (n 67) 68.

[74] Ibid, 63

[75] Convention on the prevention and punishment of the crime of genocide, UN General Assembly resolution 260 A (III) of 9 December 1948 (Genocide convention)

[76] See, Ibid, article 4. The convention defines an act of genocide in its article 2 as: genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as

part of the government an obligation to investigate any act such as the existence of torture or starvation or any other act which could lead to the commission of genocide. A universal jurisdiction over crimes of genocide have evolved into a customary international law after prosecutions at the ICTY, ICTR and also establishment of ICC and, such character of crime of genocide was also confirmed in the case of the international court of justice (ICJ) which noted that the genocide convention has put a duty to prosecute crimes of genocide not limited by territory.[77]

The Geneva conventions[78] are also the earliest instruments in providing for a duty to prosecute for grave breaches of the convention.The convention states the duty of contracting parties to search for persons who have allegedly committed or ordered to be committed grave breaches of the conventions and bring those persons to their own national courts or extradite them to another country.[79]Those greave breaches to the convention include torture, willful killing and unlawful detention of a civilian.[80]And the duty to prosecute in this case applies both in circumstances of an international armed conflict and also a non-international armed conflict because what matters for the applicability of the duty is the nature of the crime and not the circumstance that it has happened and the duty to prosecute war crimes in cases of non-international armed conflict has become a norm of an international customary law.[81]

A relatively recent convention in providing for the principle aut dedere aut judicare is the convention against torture and other cruel, inhuman, or degrading treatment or punishment.[82] The convention defines an act of torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person

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such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group.

[77] International court of justice, application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina Vs. Yugoslavia) preliminary objections, 1996, Para 31

[78]Geneva convention for the amelioration of the condition of the wounded and sick in armed forces in the field (Geneva convention i) of 12 August 1949; Geneva convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea (Geneva convention ii) of 12 August 1949; Geneva convention relative to the treatment of prisoners of war (Geneva convention iii) of 12 August 1949; Geneva convention relative to the protection of civilian persons in time of war (Geneva convention iv) of 12 August 1949

[79]Geneva convention iv, article 146

[80] See, Geneva convention I, article 50; Geneva convention ii, article 51; Geneva convention iii, article 130; Geneva convention iv, article 147

[81] ICRC, customary international humanitarian law (Cambridge university press, 2005) 603

[82] CAT

information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[83]

There is a duty to prosecute or extradite persons who have allegedly committed torture or makes a preparation or complicity or any participation in the act.[84] Unlike the case in the genocide and the Geneva conventions, some commentators argue that the torture convention does not provide for an absolute obligation to prosecute or extradite.[85]Their argument lies on the fact that the above conventions provide for an absolute prosecution of such acts by stating that 'states shall prosecute', but in the case of the torture convention, it provides states shall 'submit the case to competent authorities for the purpose of prosecution' and this does not require a necessary prosecution by those authorities. But this seems a bit of an overlook because the provision, as it is a recent one than the others, was formulated to reflect the development in standards of due process of law which is also a recent development. The provision in the torture convention was formulated to be consistent with rights such as the right to be presumed innocent and, its articulation shows a rather due process method and not any reflection of suggesting impunity.

The Rome statute[86] also provides for the prosecution of core human rights violations. The statute on its preamble emphasizes the need to punish the most serious crimes of concern to the international community as a whole. The most serious crimes of concern include genocide, war crime, crimes against humanity and aggression.[87]Skepticism surrounding the works of the ICC also leads to arguments indicating that the court does not have a legally binding duty to prosecute.[88] Arguments are based on the fact that the prosecutor does not initiate proceedings

[83] Ibid, article 1
[84] Ibid, article 7
[85] See, Orentlicher, (n 60) 2604
[86] Rome statute of the international criminal court of 17 July 1998 (Rome statute)
[87] Ibid, article 5
[88] See, I. Hassan and B. Olugbuo, 'The Justice versus Reconciliation Dichotomy in the Struggle Against Gross Human Rights Violations: The Nigerian Experience' (2015) 40(2) *Africa Development*, 123-142, 127

when the investigation is believed it would not serve the 'interest of justice'.[89]In this case, the interest of justice when viewed in a broader sense might lead to alternative methods of providing justice such as reparation or even at times provision of amnesty.[90]Nevertheless, a look at the preamble and articles 17 and 20 of the statute reveals other conceptions of justice such as reconciliation process decided by national legislative body should not be a bar to prosecution because it does not qualify as a decision made by a competent judicial organ by balancing the interests.[91] This conception of barring prosecution for the interest of justice is also integrated under the Ethiopian criminal system where proceedings will not be instituted when the public prosecutor is instructed not to prosecute in the public interest.[92] The ICC was initiated to continue on the path of Nuremberg and ICTY and other ad hoc tribunals and respond to grave violations of human rights as a permanent institution and an interpretation to article 53 of the statute should be made in light of its overall objective.

An obligation to prosecute those core human right violations has also made part of international customary law either through consistent practice of states or deriving from legislation of such duty.[93]Based on such understanding, much legislation made before and after the above stated major conventions has affirmed the jus cogens character of those grave human right violations and the surrounding obligations. There are conventions and resolutions providing for the non-applicability of statutory limitations for grave violations of human rights and prohibition of granting asylum for persons with respect to whom there is a serious reason to believe that they have committed such crimes.[94]Inspite of such resolutions and declarations

[89]Rome statute of the international criminal court article 53 states: In deciding whether to initiate an investigation, the Prosecutor shall consider whether… Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

[90] K. Ambos, 'the legal framework of transitional justice' in K. Ambos et al (eds) *building a future on peace and justice: studies on transitional justice, peace and development* (Springer 2009) as cited on, Hassan and Olugbuo, (n 88) 127.

[91] Rome statute, article 17, 20, preamble

[92] Criminal procedure code of Ethiopia, 1961, Proc. No. 165 of 1961, article 40 cum. 42

[93] See, text to n 71.

[94]See, for example, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, of 26 November 1968 (Convention on the Non-Applicability of Statutory Limitations)-the convention states that statutory limitation shall not apply to crimes against humanity, irrespective of the date of their commission; Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 of 1973 (G.A. Res. 3074 of 1973)-the resolution states the commission of crimes against humanity should be subject to investigation and prosecution; Vienna declaration and program of action, World Conference on Human Rights, June 1993 (Vienna declaration and program of action)-states should not make legislations that result in impunity of persons who have committed grave violations of human rights;Declaration on Territorial Asylum, GA Resolution 2312 (XXII) of 14 December 1967

providing for an obligation to prosecute major violations, a contradictory state practice has been revealed after the third wave of democratizations through acts of amnesty granted for persons who have been suspected of committing major human right violations, by justifying such act on their need for reconciliation and transition to democracy and stability.[95] Preventing such contradictory practices of states by filling the gap between international laws and rules of transitional justice would be the work of international organs and also the global community as a whole.

2.2.2. under national law

At the national level, the duty to prosecute or extradite rule for the core human rights violations is provided under the FDRE constitution in its article 28.[96]Crimes such as genocide, summary executions, forcible disappearances or torture are listed as crimes that the state has the duty to prosecute and, crimes to which no pardon or amnesty applies or a period of limitation starts to count. The constitution considers core human right violations such as genocide and torture as a crime against humanity or '*be sew lij lay yetefetsemu wenjeloch'* in its literal sense and not as an independent crime in itself. The constitution makes a reference to international and national laws for definition of those crimes and, the wording of the provision or its construction doesn't seem to indicate that the provision is defining a crime against humanity as a distinct crime. The intention of the law seems to regulate the duty to prosecute of core human rights violations that it referred to as crimes against humanity, which might also include the crime against humanity in itself as a distinct violation of international law as the crimes listed under the provision are not exhaustive ones. The problem in this case is, unlike genocide or other core human rights violations, the crimes against humanity by itself, as a distinct crime doesn't have a specified convention to which Ethiopia is a party and it was not either defined under Ethiopian laws before the promulgation of the constitution. In this case, the definition of crimes against humanity can be found from customary international law so that courts apply the rule in cases that come before them.

(GA Resolution 2312 (XXII) of 14 December 1967)-states shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against humanity.

[95] The amnesty law data base compiled by Louise Mallinder from 1945 to 2005 shows there have been about 420 amnesty laws introduced by governments during this period, of which 60 of them offered during the third wave of transition. See, Amnesty Law Database, <t http://incore.incore.ulst.ac.uk/Amnesty/about.html.>

[96] Constitution of the federal democratic republic of Ethiopia, proclamation no. 1/1995, august, 1995, article 28 (the FDRE constitution)

2.3. Prosecution in Ethiopia since 2018

Prosecution can be over excessively implemented in vast number of perpetrators, it could be strategically implemented while opening a door for a coherent application of other transitional justice mechanism, and it could also be totally neglected or improperly applied in a way that opens a door for unjustified impunity. There are numerous problems occurring in relation to an effective implementation of prosecution of perpetrators of past violations. The problems might transpire in relation to the existing state apparatus or problems resulting from long standing societal and political situation in the country in transition or from the political status of those who have involved in atrocities in the past.[97] In cases where past violations were state-sponsored violations and that regime is still in power, response to those past atrocities will be met by amnesties of pardons or even left without any response at all.[98] In some cases the form of transition itself might result in choice of impunity in case, for example, when the new government tries to reform the country while the old members of the regime are still in power or when the old government itself decides to reform the system, such governments might maintain impunity as the best mechanism to transit to democracy and achieve reconciliation.

In Ethiopia, the new prime minister has admitted acts of state terrorism and torture in his speech at parliament[99] but there was not clear and communicated strategy about how to go about such past violations of the state. The attorney general announced an investigation on crimes of torture and corruption after a documentary made by state owned television, and after that charges have been made on corruption, torture and unlawful use of power yet without mapping of the whole violations that have happened in the past by a qualified investigative body and also a clearly communicated prosecutorial strategy.[100]Cases have been instituted on members working on security sector such as high officials of the national intelligence and security service

[97]Morris, (n 67) 31

[98] Ibid

[99] Prime Minister Abiy Ahmed addresses the Ethiopian house of people's representatives (HPR) on June 18, 2018 and publicly admitted state terrorism and torture committed by government officials. See, <https://www.youtube.com/watch?v=wJnC2aX4jP8&t=8079s> accessed on July, 2019.

[100] The attorney general in a press release made on 12 November, 2018 stated that there were brutal acts of torture and rape committed at seven detention centers in Addis Ababa operated by national information and security service (NISS) and also acts of corruption by Metals and engineering corporation (MetEC) and announced the accusation of 36 individual s for human rights violations and 27 individuals for corruption. The attorney general indicated accusations are being made after five months of investigation and finding out there have been international crimes to which Ethiopia has a duty to prosecute. See, All things Ethiopia, 'attorney general to charge former national intelligence and security service (NISS) officials for shocking crimes' <http://www.allthingsethiopia.com/ethiopia-breaking-news/4437/>

(NISS),[101] officials of prison administration[102] and police officers.[103] The main charges instituted against those persons are based on unlawful use of power so the prosecutor presents its accusations based on the 2004 criminal code for crimes that have happened before 2015 and the corruption crimes proclamation number 881/2015.

In transitions from a conflicted democracy to democracy, the new government running the reform of transformation will have to respond to past violations which have been perpetrated by government apparatus of a democratic setting which requires employing a qualified personnel to investigate all past violations.[104] In doing so, lack of qualified persons or qualified judicial system that can attend to complicated system crimes might create a problem. In this case a choice can be made to focus on restorative justice systems and focus on proper reconciliation and reparation still respecting international norms and having a clear strategy towards heinous human rights violations so that the international community can react to it.[105]This can open a chance for the international criminal law system to react to violations that the state is unable to react to. The government should also avoid an act of pre-prosecution amnesty because governments or institutions cannot forgive, rather they can pardon and act in mercy for crimes committed against the public after the perpetrator has been convicted.[106] Forgiveness in not a legal action, it's a change of heart towards the wrongdoer and it arises from the victimized person, so, the power to forgive or forget in cases of grave violations is not that of the government but the victims and such forgiveness or reconciliation process should start with a proper telling of the whole

[101] In the case file- Getachew Assefa Vs. public prosecutor, charges are instituted based on acts of illegal detention and investigation of individuals and establishing of illegal detention centers in areas such as Jimma, Addis Ababa and Hawassa. The prosecution also allege that in those detention centers, there were acts of torture on those individual victims but the charges seem to be instituted solely on abuses of power as per article 407(1,2) of the criminal code and article 9(1,2,3) of proclamation number 881/2015. See, Getachew Assefa *et al*, case file number 198/2011

[102] In the case file- Gebremariam Weldey Abreha et al Vs. public prosecutor, charges are instituted on high officials working at prison adminstartions for acts such as homicide and torture committed during the arsenal of Kilinto rehabiliatation center and the time after that incident. Charges are instituted based on article 9(3) of proclamation number 881/2015. See, officer Gebremariam Weldey Abreha *et al* Vs. public prosecutor, case file number 175/2011

[103] In the case file- Commander Alemayehu Hailu et al Vs. the public prosecutor, case is instituted on police officers involving as investigations team leaders and investigators at the federal police and Showa Robit rehabilitation center. Charges are made for crimes committed between 2010-2019 for their acts of coercion on inmates that have been subject to imprisonment on accusations related to the decision of Ginbot 7 and OLF groups as a terrorist group and other individuals related to the so called Islamic extremist movement and also arson occurred at Kilinto rehabilitation center.

[104] Ni Aolain and Campbell, (n 21) 184.

[105]Kritz, (n 57) 147

[106] C. Bassiouni, 'searching for peace and achieving justice: the need for accountability' (n 58).

truth.[107]There can be a room for reconciliation and reparation after a meaningful investigation and prosecution of core human right violations.[108]

One of the characteristics of conflicted democracies transitions to democracy is all about strengthening substantive or procedural democracy or the need to bring about rule of law as opposed to transitions from war to peace that focus on building the state and constructing a democratic structure through reconciliation.[109] Before April, 2018 Ethiopia has shown a democratic structure but lacking a fair operation of the rule of law or even having a repressive operation,[110] so transition in this case should be towards a liberal democracy by implementing proper transitional justice mechanisms. Therefore, a proper investigation and prosecution should be given priority to bring about rule of law, yet this was not the case in Ethiopia as other transitional justice mechanisms such as amnesty was given priority and utmost emphasis.[111]The other characteristics of conflicted democracies is reflected by the enormous damage on the trust that citizens have on the rule of law which is developed when citizens assume they have a democratic state and want to have an answer to their questions to the government but they get failed and downed time and time again.[112] In cases of transitions from an authoritarian state, an institutional reform and democratic construction might be the end goal that would result in the assumed protection of rule of law and human rights. But transitions from conflicted democracy have liberalization of democracy as their end goal and this can be reflected through mechanisms that strengthen the rule of law and, in this case there should be little incentive for reconstruction of state structure or institutional reform and greater interest in building trust in the rule of law.[113] In Ethiopia however, a great deal of emphasis was paid to institutional reform and vetting process which is reflected in continuous removal of people from leadership positions and

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[107] Id

[108] OHCHR, 'Rule-of-law tools for post conflict states: prosecution initiatives' (n 12) s A(b).

[109]Ni Aolain and Campbell, (n 21) 184.

[110] The Ethiopian constitution adopted in 1995 provide for independent organs of state to carry out activities and also provide for basic human rights of individuals which in practice have been violated. See, The FDRE Constitution, Ch. 2 article 1-12, Ch. 3; see also, Human Rights Watch, 'world report 2018: Ethiopia' <https://www.hrw.org/world-report/2018/country-chapters/ethiopia> accessed on 10 July, 2019.

[111] See, text to n 97-98 according to the Attorney General, investigations of past human rights abuses have been going on for five months up until November 2018 but amnesty have been already adopted before the completion of the investigation and the explanation made by the Prime Minister was that the law only provides for pardon which can help to release prisoners until full evidence is found on their case, yet the proclamation adopted by the parliament offers amnesty for those who have already been prosecuted and those that are not. See, proclamation on the procedure and implementation of amnesty, HPR proclamation number 1096/2010 (Amnesty proclamation)

[112]Ni Aolain and Campbell, (n 21) 188.

[113] Id.

appointment of other leaders. Such vetting processes would not be without merit in any transitional process but it should have been an act collateral to the investigation and prosecution process, especially in case of Ethiopian transition, so as to avoid claims of unwarranted selection of individuals for vetting and prosecutions and claims of attack on ethnic group rather than on individual based on their culpability.[114]

Generally, when we see the case of doing justice through efforts of prosecution in Ethiopia, the first question would be whether the prosecutorial efforts have followed on proper investigations of the crimes in the past because it is not logical to analyze if a certain response was just when the action leading to that response is not properly identified. Conducting a proper investigation requires mapping out of past violations through the involvement of many stakeholders and also communicating the prosecutorial strategy to the public in line with the duty to prosecute in case of core human rights violations. In Ethiopia, any communications about the investigations being carried out was made through a press release of the prosecutor general mentioning an investigation made by police on pre-reformation EPRDF led security, intelligence and police units and mentioned acts of torture that has been committed in and out of prison.

The second question that has to be analyzed is whether the prosecutorial strategy is in line with the duty to prosecute core crimes under international law and also complementary to other transitional justice mechanisms. In this case, The accusations made so far in Ethiopia based on gross human rights violations of the past does not differentiate between persons with greatest responsibility or masterminds and others who have been direct participant in human rights violations as evidenced from the accusations made on persons that have involved in acts of torture committed on prison inmates, that are both masterminds who have participated in facilitating and ordering acts such as Getachew Assefa and others who have participated on torturous acts such as commander Alemayehu Hailu. The prosecutions that are currently going n are also mainly involved on charges of corruption so it is not clear how the prosecution strategy is implemented leaving a room for other transitional justice mechanisms such as truth telling and reparation.

2.3. Prosecution and transitional justice

Conceptions of justice associated with periods of political change are inherently modified to the changing situations and specific contexts, whereas laws that are meant to set the justice

[114]Kritz, (n 57) 128.

agenda by governing our everyday lives are made to be applicable for today and also for the future to come. There is no one size-fits-all rules to governing transitional justice and a growing and changing normative shifts has become one of the characteristics of transitional justice.[115] Yet still, law continues to govern our everyday lives and applies during transitions by bridging the gap between the two extremes of continuance and change; between adherence to established convention and radical transformation.[116]This has created a dichotomy between the laws made by the human rights machinery of international organizations and the rules, principles and policies set out to apply during transitions by organs engaged with peacemaking activities.

The process of transitions involve making a balance between various interests such as the need to respond to past human rights abuses, the need to consolidate the new government and also the need to achieve reconciliation.[117] The Nuremberg trial has paved the way for intervention of the law in countries effort to come to terms with the past and, it has laid the foundation for the works on transitional justice policy at the United Nations. Following on this classic example, most transitions have focused on retributive justice in their effort to respond to past human right violations. But the implementation of prosecution on crimes of the past has become inconsistent practice through time as some transitions implement other mechanisms such as truth telling and reconciliation process. To regulate such judicial and non-judicial mechanisms of redressing the past, rules and principles of transitional justice has started to take control, with a view to providing guidance for the application of the various mechanisms towards a common destination. In 2004, the UN Security Council has made a report on the rule of law and transitional justice in conflict and post-conflict societies with a viewto ensure a common basis in international norms and standards.[118] Recognizing the importance of prosecution in bringing about justice, the report also calls for the application of other mechanisms that are less expensive and also has a potential to contribute to sustainable national capacities in the administration of justice.[119]The Office of the United Nations High Commissioner for Human Rights has also made

[115]United Nations guidance note of the secretary general, (n 6) s A(3).
[116] Ruti G. Teitel, Transitional Justice, as cited on A. Panepinto, *Transitional Justice:International Criminal Law and Beyond* (2014) 9.
[117] K. Jorstad, 'transitional justice: customary African practices' (2015) *African Legal Theory, Law and Development*, 3, 8.
[118] The report states "We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations and help fill the rule of law vacuum evident in so many post-conflict societies. See, The rule of law and transitional justice in conflict and post-conflict societies*'*, (n 6), 1.
[119] Id, 2.

rule of law tools for post-conflict states.[120] In 2010, the UN secretary general has made a guidance note to the United Nations approach to transitional justice.[121] The note provides for guiding principles in the approach to transitional justice process and mechanisms. Recently, the African union has also adopted a transitional justice policy[122] to provide a continental guideline for AU member states to develop their own context specific transitional justice model. The African commission on human and people's rights has also published a study on transitional justice and human and peoples' rights in Africa,[123] to elaborate on the charter based approach to transitional justice process and also to elucidate the role of the commission in transitional justice process.

Assessment of national needs and capacities before making any intervention is emphasized both at the UN and AU transitional justice policies.[124] Any state should consider its own specific circumstance and apply transitional justice mechanisms that fit the specific country context rather than importing pre-packed set of solutions from other jurisdictions. Due attention must be paid to political situation in the country as transitional justice mechanisms are usually designed in a fragile transitional environment. Still, consideration of the political context should not lead to a consideration as to whether to pursue accountability or not but it should lead to a consideration of how and when should accountability be perused.[125]A state should also consider involving the public in the transitional justice process and involve a public debate to come up with an agreed upon vision and approach to transitional justice.[126] And such national ownership

[120] OHCHR, 'rule-of-law tools for post conflict states: amnesties' (n 12); OHCHR, 'rule-of-law tools for post conflict states: prosecution initiatives' (n 12); OHCHR, 'rule-of-law tools for post conflict states: truth commissions' (n 12); OHCHR, 'rule-of-law tools for post conflict states: vetting: an operational framework' (n 12).
[121]United Nations guidance note of the secretary general, (n 6).
[122] AUTJP, (n 12).
[123]African Commission on Human and Peoples' Rights, 'study on transitional justice and human and peoples' rights in Africa' (2019).
[124] See, The rule of law and transitional justice in conflict and post-conflict societies', (n 6) Para VI; AUTJP, (n 12), 1.
[125] As stated in instruments governing transitional justice, taking the countries context is important to adopt a specific TJ mechanism that takes into consideration the nature of the violations occasioned and the conditions of the countries legal system. But this should never result in consideration of whether to pursue accountability or not, some countries focus on the consolidation of power and forget about preserving the rule of law when they could have reinforced the two. Taking the context of national situations such as the views of national stakeholders is important but so it the context of international legal obligations. Any agreement reached and TJ model adopted based on the country's political context should have a room for accountability and other measures. See, AUTJP, (n 12), 6, Para 36; United Nations guidance note of the secretary general, (n 6) 4; The rule of law and transitional justice in conflict and post-conflict societies' (n 6) 7, Para VIII
[126] It's stated that a meaningful public participation should involve national legal professionals, Government, women, minorities, affected groups and civil society.Without public awareness and education campaigns, and public

of transitional justice process should be respected and supported by the international community while remaining faithful to established norms and standards.[127]The works of UN in advancing transitional justice, as an international human rights monitoring organ is based on the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law.[128] In complying with these international obligations, any transitional justice mechanism should seek to ensure undertaking of investigations and prosecutions for grave human right violations.[129] The UN supports nationally agreed upon transitional justice mechanisms still having a firm stand to never endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights.[130]

Prosecutorial initiatives should also be considerate of the political context in the country. For instance, a country in transition might experience high levels of ordinary crime and also grave violations of human rights in the past and, an overly ambitious prosecution plan might cause a backlash.[131] In this case, a demand for prosecution may be targeted on a small number of persons, for instance, on persons who have allegedly committed grave human right violations and, those who ordered and carried out the worst offenses, leaving out the ones that involve in minimal offenses.[132] In doing so, states should have a clear reflection of their intentions about prosecuting major human right offenses so that triggers are set for the international community to resort to handling such matters. Having a clear reflection of intentions on prosecutions also sends a message that specific individuals who have committed grave violations of human rights will be

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consultation initiatives, public understanding of and support for national reform efforts will not be secured.The design and implementation of TJ should be led and driven by national stakeholders involving all sides of the conflict and all sections of society. Victims and other members of society affected by violence have as a matter of principle the right to justice and to truth in their own country, based on mechanisms and processes in whose design they take an active part. See, AUTJP, (n 12), 6; the rule of law and transitional justice in conflict and post-conflict societies' (n 6)7 Para VII.

[127] AUTJP, (n 12) s 1 (b) Para 28-32, 40.

[128]United Nations guidance note of the secretary general, (n 6) s A (1) Para 1.

[129] See, United Nations guidance note of the secretary general,(n 6) 4; the rule of law and transitional justice in conflict and post-conflict societies' (n 6) 4ParaIV.

[130] Ibid.

[131] OHCHR, 'rule-of-law tools for post-conflict states: Prosecution initiatives' (n 12) 5.

[132] Kritzbreaks down classifications of perpetrators into: (1) the leaders who gave the orders to commit war crimes and those who actually carried out the worst offenses (inevitably the smallest category numerically); (2) those who perpetrated abuses not rising to the first category; and (3) those whose offenses were minimal. And argue that based on the huge pool of potential defendants and the limited capacity of national or international prosecution efforts to handle them, actual trials may be limited to those in categories (1) and part of (2)(for example those who have committed murder in genocide but without having the intention to it) see, Kritz, (n 57)134

held accountable and only individuals and not an entire ethnic group has committed an atrocity for which they are to be held accountable. This is especially important in countries divided based on ethnic lines and committed violations based on such division, a clearly communicated and investigated prosecution based on the gravity of individual responsibility will help avoid a culture of collective guilt and retribution or resentment that often produces further cycles of violence.[133]

In order to decide on the question of who to prosecute, based on the nature and gravity of past violations and also the number of people involved in it, it's important to follow on steps of transparent prosecutorial strategy. The two essential steps that have to be taken in this case are a mapping exercise and an outreach to communicate the purpose of prosecutorial policies and strategies.[134]At the mapping stage, information of a prima facie standard about the kinds of crimes that have occurred in the past, who the victims are and also the likely identity of perpetrators will be identified.[135] In this case, it's important to use appropriate journalistic and civic society sources to establish an adequate basis for setting out of larger trends of violations in that country.[136] The other step is to send a clear message to the public about the prosecutorial strategy and doing this is important to avoid confusions about the relevance of the strategy by explaining and justifying the strategy based on relevant considerations.[137] In this case the strategy might be to prosecute those who have believed to have committed grave violations of human rights or those with greatest degree of culpability but this should not mean those who have carried out the orders of the high level perpetrators or those who participated in a lesser degree of violations would go free.[138] Prosecutorial initiatives should also communicate their

[133] Id, 128
[134] OHCHR, 'rule-of-law tools for post conflict states: prosecution initiatives' (n 12) 6
[135] Such mapping exercise has a threefold benefits such as: 1) it makes the process more objective by basing strategic decisions on preliminary indications of actual events, rather than on pure suppositions. 2) As a result of the former, it establishes the essential discipline of "rational hypotheses" in complex investigations, i.e., proceeding on the basis of presumptions which are supported by the facts and gradually building on those to construct further "hypotheses" and, 3) It allows those directing the process to make more realistic estimates of the necessary resources. It's emphasized that in order to conduct an objective mapping exercise that will bring about such benefits; it has to be conducted by qualified team and need not be prolonged. See, ibid
[136] Id.
[137] See, Ibid, 9.
[138] Focusing on those who have the greatest degree of responsibility will align with the purpose of prosecution but prosecuting those who perpetrated heinous crimes and not those who have formulated policies and strategies leading to that crime will have its repercussion. If those who triggered or run the torture chambers are prosecuted while those who gave ambitious or unwritten orders to 'take care of' putative political or social opponents are let free, both the credibility of the process and the hopes of non-repetition suffer. When it is not practical to prosecute both trigger pullers and those who have planned and ordered the atrocities, then, the prevailing view in this case if to prosecute

strategy in dealing with such persons in transitional justice mechanisms other than prosecution.[139]

Investigating system crimes such as genocide and crimes against humanity may be complicated because in most times, people or entities that have planned or ordered such system crimes might remain politically powerful. This might probably be the case in pactedtransitions or transitions with reform because in this case persons who used to run an authoritarian government or a conflicted democracy makes a pact or unilaterally decides to reform or transform the system while staying in power. In this case prosecutorial initiatives should set up an investigative team that can look deeply into the system in order to understand how and why some crimes have committed at the time because mostly such crimes are committed pursuant to a policy.[140] Therefore, in any case, when a state is going through transitions based on regime change or, through agreement between the authoritarian state and the opposition or, by the decision of the authoritarian state itself, there should be a clear mapping of past violations and, strategies of transitional justice mechanisms communicated to the public and in line with the duty of aut dedere aut judicare in cases of core human rights violations. After a proper prosecution on core human rights violations have been made, resort can also be made on other transitional justice mechanisms such as reconciliation and amnesty which will be discussed in the next chapters.

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those who planned the atrocities because those persons are more morally culpable and also aligns with the nature of system crimes see, Ibid, 7-9 See also, N. Roht-Arriaza 'Sources in international treaties of an obligation to investigate, prosecute, and provide redress' in N Roht-Arriaza (ed) *Impunity and human rights in international lawand practice* (1995) 287 as quoted on G. A. Aneme, 'Apology and trials: The case of the Red Terror trials in Ethiopia' (2006) 6 *African human rights law journal*, 64-84, 73

[139] Non-criminal sanctions can be made to be put on those people who have not been made subject to prosecution. Countries like Czech Republic, Lithuania and the post-communist Germany have effected administrative purges on those persons, most specifically, those who have allegedly collaborated in past abuses. Such vetting's can work to build the confidence of the community to trust the system again, for instance to feel secure in the protection of police that used to torture and gang-rape the same community. See, Kritz, (n 57), 139

[140] Id, 11-13

CHAPTER THREE

AMNESTY UNDER ETHIOPIAN TRANSITION

3.1. Introduction

Even though there are laws that call upon states to conduct trials in cases of major human rights violations,[141] there is still a continuous trend in many countries of a failure to prosecute or sometimes rendering of an official amnesty. Most notable in this case are, amnesties made in South Africa,[142] El Salvador,[143] Haiti,[144] Argentina,[145] Uruguay,[146] Algeria,[147] Chile[148] and

[141] See, text to n 71 in Ch. 2.

[142] After 40 years of sever human rights violations of the black population in south Africa, the apartheid government entered to negotiations with the African national congress (ANC) to conduct a democratic election in the country on the condition that members of the former government and security forces will not be tried, arrested or sentenced for their acts under the apartheid policy. In 1995 the South African parliament passed a legislation which created the truth and reconciliation commission that is mandated to investigate the abuses of the past regime and grant amnesties to people who comply with the rules of the reconciliation act which includes telling the whole truth. See, D. Mazjub, 'peace or justice? Amnesties and the international criminal court' (2002) 3 *Melbourne journal of international law* 1-33, 15

[143] On 27, April 1991, an agreement was reached in El Salvador to establish a truth commission which will investigate acts of violence that has occurred during 1980s and 1991. After the commissions' report in 1993, an amnesty law was passed by the assembly to grant immunity for persons mentioned on the report. See, C. Uribe, 'do amnesties preclude justice?', (2012) 21 *international law review*, 297-359, 307

[144] After almost three decade of dictatorship and subsequent military coups, an agreement was reached in 1993 where the first democratically elected president will come to power in exchange for full amnesty. The amnesty law was applicable for violations referred as 'political infractions'. Later in 1995 a national commission on truth and justice was established to establish the truth about the most serious human rights violations and it allows individuals to seek for legal action. See, L. Mallinder, 'global comparison of amnesty laws' the international institute of higher studies in criminal sciences, 58, http://ssrn.com/abstract=1586831 accessed 8 march, 2019

[145] After years of political violence, frequent amnesty laws and the 'dirty war' in which about 9,000-15,000 people had been murdered or disappeared, 30,000 imprisoned and 500,000 exiled, the military junta prepared a blanket amnesty law upon transfer of power to civilian politicians which was passed in 1983 just before the elections. After election, the new government, who have gained support for his promise to exclude prosecution has changed things and repeal the amnesty law and establish a national commission on disappearance of persons and proclaim prosecution on the same year. A new president after 1989 introduced an amnesty law but it was later repealed for reasons of being unconstitutional. See, id, 39-47

[146] In Uruguay, the transition began at the initiation of the military junta itself which also negotiates its withdrawal. Civil society was not as such organized and united at the time to come up with a clear transitional road map. Amnesty was introduced in March 1985, and a second one in 1986 which prevented penal sanction with respect to crimes that occurred until March 1985 including torture and disappearance. See, id, 60-64

[147] Following the cancellation of the 1992 parliamentary elections in Algeria, a conflict between the Algerian security forces and militant group's brock out, resulting in death of 100,000 lives. On 10, January 2000, president bouteflika of Algeria issued a decree granting amnesty to persons belonging to organization which decided to put an end to conflicts. The decree granted blanket amnesty for crimes regardless of their nature.

[148] Chile has a democratic transition in 1990 on which the newly elected president has pledged to repeal an amnesty law previously made by Augusto Pinochet to amnesty officials of the regime itself. The new government instead established the truth and reconciliation commission. Later in 1999, the Chilean Supreme Court ruled an act of amnesty for crime of disappearance is not allowed and that sets for a move towards annulment of amnesty law. See, Mallinder, 'global comparison of amnesty laws' (n 140), 47-50.

Cambodia[149]. In many of thosetransitional countries, amnesty was employed as an exchange for truth as a means of reckoning with the past and transitioning to stability and democracy. The newly installed regimes in those countries employ an act of amnesty for reasons of lack of resources to effect trials or to effect peace negotiations in a rather fast pace and such acts have been practiced by states as an expression of their sovereigntyand intervention of the international community was rather lenient. [150] However, over the past few decades, international organizations have rose in number resulting in development in the enforcement of international human rights and criminal law. Fruits of such developments include the establishment of the international criminal court and the adoption by the UN and other international organizations such as the AU of different resolutions concerning the establishment of ad hoc tribunals and regulation of transitional justice mechanisms.[151] Such developments have been received by the international community with different understandings and arguments usually led by the philosophical conflicts deriving from the law itself. Example of issues leading to different arguments is the applicability of amnesty in transitional societies. Some argue that, when effecting prosecution becomes a potential reason for renewed violence, when the military retains a substantial power after violence or, when prosecution becomes unrealistic, a state may resort to amnesty while others argue that effecting amnesty encourages vigilante justice, it dehumanizes victims and it demolishes any faith in the rule of law.[152] Yet both sides recognize the need forpeace and transition to democracy, they argue, such end results can be achieved through their respective approaches.

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[149] After having a UN facilitated transition in 1991, the new government sought to negotiate with the former Khmer Rouge regime and adopted an amnesty law in 1994 which applies to guerrilla fighters of the previous regime with the exception of the main leaders and it was implemented for non-exhaustive list of crimes until it gets banned by the parliament in 2004. On the same year the parliament ratified a law on the establishment of extraordinary chambers for the prosecutions of crimes occurred in the past regime. See, Ibid, 69-73

[150] Morris, (n 67) 31

[151] Since their establishment, international organizations such as the UN and AU have been instrumental in standard setting of universally recognized human rights and such standards are monitored and supervised through different internal institutions such as the human tights council. Though enforcement mechanisms are generally weak because of state sovereignty functioning as an 'Achilles heel' to the system, we have also noticed un refutable contribution of such international setting through condemnation of the international community of wrongful acts and also direct involvement of such organizations at times such as implementation of transitional justice. Examples in this case could be the role of UN in the establishment of ad hoc tribunals for Rwanda, Yugoslavia and Sierra Leone and also other mechanisms of dealing with the past such as truth and reconciliation commission in El Salvador. For further understanding of the enforcement mechanism of international human right laws, see, S. Joseph and J. Kyriakakis, 'the United Nations and human rights' in Sarah Joseph and Adam McBeth (eds) *research handbook on international human rights law* (1st edn, Edward Elgar 2010)

[152] For a detailed discussion on both sides, see, Shiferaw, (n 3) 93-110

Looking at how volatile transitions can be, it's difficult to come up with such hard and fast rules governing amnesties and the issue calls for consideration of different internal and external contexts which have been shaping the development of amnesties through time. In this chapter, a discussion of the status of amnesty under international law vis-à-vis other cardinal considerations such as the right to truth and remedy of victims and the society at large will be made. Such analysis will then be applied to the situation in Ethiopian current transition and how the method of amnesty as a means of transitional justice has been implemented.

3.2. Understanding the legal framework

Even though the use of amnesty as the natural price to be paid to facilitate a transition to democracy is no longer accepted by the international community, for which crimes of past regimes and in what circumstances and what kind of amnesty should exceptionally be acceptable is still a matter of debate.[153] With the rise of new transitional justice implementing institutions such as the truth and reconciliation commission, the question of which kind of amnesty to apply during transitions has now become clearer in favor of prohibiting a blanket amnesty. The issues remains, on what conditions should a conditional amnesty be applied? Basing our arguments on the duty laid onto states international law, we can conclude that there is a duty to prevent, investigate and punish but whether prosecution is the only exclusive means of punishment is not made clear under customary international law. Yet still, some international human rights instruments have made it clear that in cases of grave violations of human rights such as torture, a state cannot grant amnesty in any form so the question of legality of amnesty for such grave violations has become out of question except for some confusion in international law coupled with states practice, which seem to allow amnesty for such crimes in some circumstances during transitions to democracy.[154] Prohibition of amnesty in cases of other gross violations of human rights finds its justification on the duty of states to punish perpetrators of individual human rights that can be found for example in the ICCPR and also the various rights of victims and the society

[153] Hassan and Olugbuo, (n 87) 135.

[154] See, text to n 71 in Ch. 2 many conventions regulate on the duty to prosecute such violations of gross human rights but the conflict has been seen in both state practice and also how international organizations handle the matter. For example many countries in transition has employed amnesty for past human rights violations and in 1998, the UN secretary general Kofi Annan, on their visit to South Africa publicly supported the establishment of TRC and Amnesty process as a means of coming to terms with apartheid. The UN also assisted in the conclusion of Guatemalan peace accord in 1996 which provides for amnesty, leaving the determination of the scope of amnesty for the people. But such confusion has cleared out at least in law after 2004 with the publication of a report by the secretary general stating non endorsement of agreements by UN representatives that provide amnesty for war crimes, crimes against humanity and gross violations of human rights. See, Uribe, (n 139), 306-309

at largewhich could be put in jeopardy if a resort to amnesty is made. In the next subsections, an elaborate discussion on those matters will be made.

3.2.1. Amnesty and international crimes

A country may produce an unprecedented number of human suffering and rights violations by its own government and such country may also experience a time in history where they attempt to respond to the past, where they attempt to hinder their future of that violent repetition. Such an attempt to deal with the past and transform to a democratic future lays a great deal of its concern on massive violations of human rights, which have happened as part of the policy of the government itself, effected through any person or by public officials themselves. The development under the international arena of the various mechanisms of responding to the past such as trials, truth commissions or institutional reforms also reflect a societal determination to show revulsion against past violations and secure non-repetition through institutional reform with a hope to set a genuine and enforceable rule of law and a hope to curb such violations in the future. Such moral determination of the international community has been reflected in a legal consensus to prosecute international crimes in their agreements set at international legal instruments. Albeit their promises to live up to their international commitments, individual states observance to such internationally set rules has shown significant zigzags as collaboration of the international community to put to effect those international rules experience its own problems.

After WWII, developments under international law crystalizes on the staes duty to prosecute under international law, on the widely accepted *jus cogens* crimes such as genocide, war crimes, crimes against humanity and tortures as has been explained above.[155]International law also provides for a duty to prosecute other gross violations of human rights such as enforced disappearance, extra-judicial executions and slavery.[156]Such as duty to prosecute, not only is based on the gravity and systematic nature of the violations but also on concerns of victims remedy and other corollary interests which will be discussed below.

3.2.2. Amnesties and the right to know

Just as many other issues of concern such as, when to prosecute or amnesty, the issue of telling the truth is also at the core of transitional justice initiatives that aim to properly deal with the past and secure a consolidated democracy ahead. Truth seeking initiatives have an individual

[155] Text to n 71 in Ch. 2.
[156] See, United Nations guidance note of the secretary general,(n 6) 4

and collective advantage. Knowing the truth will help an individual victim to find closure by learning about who does what and why. It also has a collective societal advantage in that it leads to public understanding of what happens in the past from first-hand information and that in turn prevents any manipulation of what happened in the past. Knowing the truth is important in itself and it can also be a means to other ends, for example, imposing an appropriate sanction follows a certainty about who violated rights and how, reparation works follow proper identification of victims and the harms they have suffered, Reconciliation process follows perpetrators admission to their wrongdoings and public apology, public deliberation of how to proceed with violations of the past follows proper truth telling that is made accessible to the public.Truth telling is important for the victim and the general public and even sometimes to the perpetrators of violations but it cannot replace to account for what the perpetrators did and guarantee non-repetition because it is not clear how knowledge can be translated into deterrence. Any transitional justice initiative should consider the rights of victims to know the truth but not as an end by itself but as an end and also a means to other further actions that respond to the past.

The Geneva conventions regulate on the right to know the truth in circumstances where there are victims of an armed conflict and families would be unaware as to the fate of their relatives.[157] The right to know the truth is also recognized in cases of enforced disappearances where the victims have the right to know the truth regarding the circumstances of the enforced disappearance and also the progress of investigation and other information including the identification of perpetrators of the acts that gave rise to such violations.[158] The preservation of archives and other evidences concerning gross violations of human rights and memorialization works are also considered as part of the right to truth as they facilitate knowledge of such violations.[159] The right implies not just the pursuit of knowledge but rather the pursuit of knowledge of the truth, and this facilitates other transitional justice initiatives that depend on the truth of what happened and it also takes its part from other initiatives that seek to investigate the truth such as prosecution efforts.

[157] Protocol additional to the Geneva convention of 12 august 1949, and relating to the protection of victims of international armed conflicts (protocol 1), adopted on 8 June, 1977, article 32
[158] Convention for the protection of all persons from enforced disappearance, article 24
[159] Resolution adopted by the general assembly on 18 December 2013, right to truth, A/68/456/Add.2, (resolution on the right to the truth), preamble

3.2.3. Amnesty and victims' right to remedy

Victims have a right to remedy which could be a criminal, civil, administrative or disciplinary nature. And this right covers all injuries suffered by victims and it includes measures of restitution, compensation, rehabilitation and satisfaction as provided by international law.[160] According to article 8 of UDHR, everyone is granted with the right to remedy. Article 2 of ICCPR also builds on this right by stating everyone's right to effective remedy. Specific conventions such as the convention on the right of the child, the convention against racial discrimination, and the convention against torture also provides such right to effective remedy in case of violation of the rights dealt with in those special conventions. In cases of transitions, amnesty granted for the purpose of preserving peace may violate the right to remedy of individual victims. One of the compelling arguments for need of trials during transitions also depends on the interest of victims, but there can also be cases whereby the interest of the victim could be satisfied through amnesty procedures, especially in cases of conditional amnesty.[161] Collective or sweeping amnesties do not open a room for identification of perpetrators and conducting proper investigation and thereby do not lead to providing reparation and rehabilitation to victims.

Where amnesty laws preventsubsequent civil liability as is explicitly stated under the amnesty proclamation or implicitly found in case where civil liabilities are dependent on prior criminal convictions, the government should shift to administrative reparation programs to provide remedies to victims.[162] To appropriately apply those choices according to national and international laws by taking victims centered procedures requires proper investigation of crimes of the past and the victims to those crimes.

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[160] UN commission on human rights, 'updated set of principles for the protection and promotion of human rights through action to combat impunity', E/CN.4/2005/102/Add.1, 8 February 2005 (updated set of principles for the protection and promotion of human rights through action to combat impunity)

[161] Victims right to remedy is usually protected when prosecutions are conducted based on proper investigation so that there will be compensation in a sense of retribution or it opens a room for the victim to address her/his quest to compensation by opening up civil claims which would not have happened if a blanket amnesty was given to perpetrators. Some authors argue that having a victim centered transitional justice requires providing remedy that the victim needs which sometimes will not be satisfied with mere prosecution. See, B. C. Olugbuo and G. M. Wachira, 'enhancing the protection of the rights of victims of international crimes: a model for East Africa' (2011) 11 *African human rights law journal* 608-638, 609

[162] The Belfast guidelines on amnesty and accountability, transitional justice institute, university of Ulster, p 21

3.3. Amnesty in Ethiopian transition

The use of amnesty has long been as a means or technique for ending civil wars or a violent past or to enable a peaceful transition from authoritarian government to a democratic one.[163] Yet from time to time the objective for granting amnesty has changed to be mostly applicable as a means to stop bloodshed or as a component of a package for reaching settlement in a divided state in a particular country where the international community has failed to intervene to stop the violation and it has benefited government officials, rebels and other regime opponents.[164] But the lawfulness of these amnesties has been questioned recently and significant international law developments have been made in this matter.

In Ethiopia, an amnesty law[165] has been proclaimed during the transition which is brought about by the coming into power of the new Prime Minister DR Abiy Ahmed. According to the preamble, the law is proclaimed to respond to the need to facilitate provision of amnesty to those who violated the law in order to respond to occasional social, political and economic problems. The proclamation provides amnesty for those accused exhaustive list of crimes[166] such as crimes of outrage against the constitution or the constitutional order; obstruction of the exercise of constitutional powers; armed rising or civil war; attack on the political or territorial integrity of the state; impairment of the defensive power of the state; treason; collaboration with the enemy; espionage; material preparation of subversive acts; provocation and preparation; desertation; inciting the public through false rumors; violation of the prohibitions under the proclamation number 652/2001, proclamation number 01/2009 and proclamation number 2/2010 doing away with its exclusionary provision which excludes the crimes of extrajudicial killing, genocide, enforced disappearance, and torture from the scope of application of the law.[167] Provision of amnesty as per the proclamation has the effect of discontinuing or barring any accusations against the beneficiary, discontinuing punishment in case when it's already imposed and also erasing any record of the act of crime.[168] The proclamation also imposes a duty to reconciliate

[163] M. H. Arsanjani, 'the international criminal court and national amnesty laws'(1999) 93 *proceedings of the annual meeting (American society of international law)* 65-68, 65
[164] ibid
[165] Amnesty proclamation
[166] See, Ibid, article 5.
[167] See, Ibid, article 3.
[168] Ibid, article 7

through traditional arbitration mechanisms if there is anyone who wishes to revenge upon a crime which has been subject to amnesty under the proclamation.[169]

Amnesty established under the proclamation has the effect of prospectively barring criminal prosecution or retroactively nullifying legal liability previously established against certain individuals in respect of specified criminal conduct committed before the amnesty's adoption. The amnesty proclamation does not regulate on the conditions to be attached upon those individuals who have been suspected, accused or convicted of certain crimes. The proclamation states, those who wish to be beneficiary of amnesty should declare their intensions to go back to the society and lead a peaceful life.[170]The provision can be considered as a self-explanatory condition in that if those beneficiaries fail to live up to their declarations then the amnesty will be removed,Inthis case for example it applies to dissident fighters that are accused of certain crimes but then they will be beneficiary to the amnesty law on the condition that they become and continue to be civilian citizen. This line of interpretation can also be problematic in a way that if amnesty is removed and that results in the resumption of the prior status of those persons then this decision will give validation to the accusations made in the first place even though the alternative will leave the proclamation as providing amnesty with no conditions attached. The amnesty provided under the proclamation also has the effect of dismissing only established criminal accusations and not civil ones and this might serve as a protection for the victims of their right to remedy in some conditions.

3.4. Amnesty and transitional justice

Even though there are developments under international law prohibiting amnesty in many circumstances, its role during transitions as a tool to reach to respect for human rights and rule of law is not so small to not to take note of. Recent rules and transitional justice policies also discuss amnesty as a tool for transitional justice by taking issues such as the particular context of the country in question and the nature of the crimes occurred.[171] We can look into the lawfulness of an amnesty in light of individual cases on the basis of two questions that are incorporated in many international and regional transitional justice rules and principles. The first question is concerned with what crimes were the subject of amnesty? Or does an (a proposed) amnesty fully and clearly exclude all categories of conduct that should be subject to effective investigation and

[169] id
[170] id
[171] See, OHCHR, 'rule-of-law tools for post conflict states: amnesties'; AUTJP, 20-22.

thereby prosecution?[172]Some amnesty laws provide exclusions of acts not subject to amnesty law but not in a comprehensive manner and that leads to a gap whereby the law will be applicable to other crimes that are under international law and UN policy should be subject to prosecution.[173]

According to the UN rule of law tools for post-conflict states, an amnesty granted for genocide, crimes against humanity, war crimes, torture, enforced disappearance and other gross violations of human rights including extrajudicial killing, summary or arbitrary executions and slavery is against international law and cannot lawfully be implemented for any justification whatsoever.[174] The second question is that where amnesty is granted for other acts, does it compromise either individual victims or societies right to know the truth or victims right to remedy? The updated set of principles for the protection and promotion of human rights through action to combat impunity provides for the inalienable right to the truth of victims and the society at large.[175] It is also stated under the UN human rights committee general comment number 31 that states duty to provide remedy is not discharged without proper reparation to individuals whose covenant rights have been violated.[176]And states should provide programs that offer remedies to broad categories of victims without leaving the burden on individual victim's to vindicate their rights judicially.[177]

Acts of amnesty has usually failed to bring about the assumed results of peace and stability in many transitional states in situations where there are ongoing violations and an act of amnesty to those violators is perceived as a weakness on the part of the government or any other responsible person and leads to further preparation on the part of those individuals suspected of committing gross violations to continue on that path and distract the transitional process.[178] It

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[172] OHCHR, 'rule-of-law tools for post conflict states: amnesties', 29.

[173] For example the amnesty law adopted in Guatemala has excluded from its scope crimes that should be prosecuted under international law by stating the exclusions as 'crimes imprescriptible under Guatemalan law or treaties under which Guatemala is a party' but there were crimes such as war crimes and crimes against humanity which were neither regulated under national law not their respective treaties were not signed by Guatemala. See, *ley de reconciliacion nacional*, decree 145-96, article 8

[174] OHCHR, 'rule-of-law tools for post conflict states: amnesties', 40-41

[175]Report of the independent expert to update the set of principles to combat impunity, Dianne Oerentlicher (2005) UN Doc. E/CN.4/2005/102/Add.1, principle 2

[176] General comment no. 31 [80] on the nature of the general obligation imposed on state parties to the covenant [2004] CCPR/C/21/Rev.1/Add.13 (General comment no. 31) Para. 16

[177] OHCHR, 'rule-of-law tools for post conflict states: reparation programs', chapter 1

[178] Many transitional states try to justify the presence of amnesty for reasons of bringing about peace and stability in the country and build a foundation of democracy rather than destroying the little hope they have for democracy and the resultant protection of human rights and rule of law but the direct relation of amnesty with a resulting peace has failed to reflect itself in many transitions. For example in post-Marcos Philipinnes, the regime avoids accountability to avoid instability but the president- Corazon Acquino had faced seven coup attempts in her five year presidency

also fails to bring about the desired results of peace when amnesty initiatives are not properly complemented by other transitional justice initiatives such as prosecution and reconciliation, and then transgressors fail to avail themselves of the condition of amnesty due to fear of unanticipated repercussions such as trials.

CHAPTER FOUR

RECONCILIATION

4.1. Introduction

Transitional justice is made up of many significant pillars such as prosecutions, reparation and lustration [179] programs. Though transitions from authoritarian system to democracy require prosecution of those who have committed violation of rights in the past, a balance must be struck between retribution and justice with reconciliation of the society. Transitional justice measures aim at achieving justice in the aftermath of transitions by responding to violations from the past and prevention of same occurrence from happening in the future, and this process highly depends on the level of reconciliation made between different members of society during the transition.

In Ethiopia, soon after the accession into power of the new prime minister, the center of discussion has largely been focused on reconciliation between societies. Kimberly Theidon has made a distinction between national and individual reconciliation.[180] National reconciliation is achieved when the societal and political process functions and develops without reverting to previous patterns or framework of violation, whereas individual reconciliation is achieved when individual human beings conduct their lives in a similar manner as prior to the violations

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and thus instability was not avoided. Even when we see the most regulated and exemplary case of amnesty in south Africa, the concept of reconciliation was Africanized and persuaded through the concept of Ubuntu and the call for restoration and reconciliation over victimization or vengeance was accepted during the time because of the force of high caliber and respect behind the persons leading the efforts such as Nelson Mandela and Dasmond Tutu. The innate societal need for justice and accountability has however found its way out of the concept of Ubuntu as the dissatisfaction of many South Africans reveals itself in the most violent way in the absence of those individuals.

[179] Lustration programs are also termed as 'vetting' or 'purge' and it indicates removing of person from a public office.

[180] See, K. Theidon,'justice in transition: the micro politics of reconciliation in post war Peru', (2006) 50(3) *the journal of conflict resolution.*, 454

occurred, without fear or hate.[181] These two forms of reconciliation can be aspired for and implemented at the same time or one can be implemented without the other. When national reconciliation alone is given focus, it might come at the expense of individual reconciliation and the implication in this case is that political reconciliation may be promoted without healing of individual traumas through different processes. Different transitional methods may uphold different strategies of going about the reconciliation process. Mostly truth and reconciliation commissions become choices by the government leading the transition process for using it to achieve avoiding things that the commission could help to avoid such as resumption of violence or democratic reversals and less for what the commission itself has promised to deliver such as truth, healing and reconciliation specially when the situations in the past has not been clearly investigated and what the nature of those violations lend themselves into has not been well considered.[182] Sometimes they can also be deemed important for the benefits that truth recovery could bring about to the victim in light of sharing their stories and making it easier for them to deal with the past and also restore their dignity.

Further consideration in this case is the issue of justice as a pre-condition to reconciliation. Broader understanding of justice as it includes the right to truth and reparation is not only considered as compatible but also a pre-condition to reconciliation process as Reta puts it.[183] This chapter analyzes the different aspects of reconciliation process in Ethiopia in light of international law and other soft rules and principle of transitional justice.

4.2. The justice vs. reconciliation dichotomy

As we try to strike a balance between transitional justice initiatives such as prosecutions, amnesty and reconciliation; it's also important to settle the issue of when to apply one mechanism and how. It's important to reconcile reconcilable initiatives and prioritize based on law for those of irreconcilable ones. One of the uncertainties that remain in such cases is regarding the relationships between justice and reconciliation. Reta tries to understand the issue of justice in its multiple layers and types and argues that a freestanding retributive justice employed in the form of criminal prosecutions may not help in promoting reconciliation; rather,

[181] E. Mobbek, 'transitional justice in post-conflict societies- approaches to reconciliation'. [Online] available on http://www.bmlv.pv.at/pdfpool/publikationen/10_wg12_psm_100.pdf , at 261. As quoted on Shiferaw, (n 3)132
[182] G. Wachira, et al, 'the uncertain promise of TRCs in Africa's transitional justice' (2014) Nairobi peace initiative-Africa and the west African network for peace building
[183] Shiferaw, (n 3)134

the measure of retributive justice should be considered with and implemented alongside other transitional justice process.[184] As it is explained somewhere in this paper, the implementation of transitional justice mechanisms might differ according to context of the state in transition and also the type of transition that the state is experiencing but it's still important to understand that employing both retributive and restorative justice mechanisms is vital in any transitional society even though the priority of one to another and their degree of implementation varies.[185]

Reconciliation is usually premised on acknowledgment of violation, truth telling and repentance on the part of perpetrators and readiness to forgive on the part of the victim or the society. Such truth telling process during transitions responds to a demand for justice for the victims and society and such process in return will facilitate national reconciliation because divided societies only reestablish their relationship if they know the truth of what happened in the past.[186]

Justice, as it related to the question of what happens in case of violations can have many aspects.it could be retributive justice, interactional justice or restorative justice.[187] Retributive justice can be understood to mean a form of justice that is achieved when a person is punished for his/her misdeeds, usually in a form of criminal prosecutions whereas restorative justice can be understood to be a form of justice which addresses violations by trying to restore situations between the victim and the offender by repairing the harm done. The other informal way of justice is the interpersonal or interactional justice where cultural institutions, conventions, moral rules and moral sanctions are used to achieve justice. Those all forms of justice will be material in reaching to reconciliation process if they are applied selectively by respecting rules that dictate prosecution for some forms of violations and using other modalities as the case may be so that justice is served and reconciliation can be set to operate. As Jermaine puts it, "justice is the link that holds together truth with the possibility of reconciliation".[188]

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[184] ibid

[185] Effective transitional justice programs employ an appropriately conceived combination of all possible transitional justice initiatives falling in the range of judicial and non-judicial processes and measures of responding to the past. See, United nations guidance note of the secretary general, (n 6) 6

[186] Y. Naqfi, 'the right to truth under international law: fact or fiction' 88 (862) *international review of the red cross*, 247

[187] Shiferaw, (n 3) 262

[188] J. O. McCalpin, 'written into amnesia? The truth and reconciliation commission of Grenada', (2013) 62(3/4) *social and economic studies* 113-140, 123

Understanding the need to account for international crimes, there might also be situations in cases where there is a disparity in the living standards and societal participation among the society which is deliberately made to exist between individuals through policies and practices and such structural violence on the basic rights of individuals leads the grassroots population to develop anger and engage in violence and in this case the theory of conflict transformation argues that in order to bring about peace, such ongoing cultures of violence should be recognized and legally addressed.[189] Even though the violation doesn't constitute the gravity of international crimes, it might set to function as a means of conflict between the government and citizens and also between citizens themselves which needs accounting for such intentional acts so that the works of reconciliation can be put in place.

In Ethiopia, the government leading the reform process seems to have a different notion of justice that upholds forgiveness and amnesty as the ultimate and noble way of doing justice to the victim, perpetrators and also everyone involved in it. The prime minister explains the concept of justice in the following manner:

> The law can only give recognition of citizens' rights but no by itself guarantee respect for those rights. No other country in the world has guaranteed respect for rights laid down by law, not even America. The law can only open a door for exercising your rights. The law can also be used by those who have power in order to kill, torture and harm others. The aim of providing amnesty is to secure the peace and security of individuals which is also the objective of any law. The law seeks to prevent the lowest moral actions of human beings and love (through which amnesty is given) preserves the highest moral, thereby subsuming what the law has intended to achieve. This renders any judgment provided as per the law irrelevant. The end goal of amnesty is justice- not in the meaning of something to be granted by a court of law, but in its other various facets and aspects such as purring oneself with acts of amnesty and forgiveness which can lead to justice in its noble sense and not to vengeance. We can only achieve justice and prevent feeling of pain and the urge for vengeance through forgiveness.[190]

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[189] Theory of conflict transformation, like the study of transitional justice comes into the fore after the end of cold war. It deals with issues such as ending of violence and improving relationship between previously conflicting parties whereas a study on transitional justice mechanisms such as trial, truth and reconciliation commission and amnesties deal with the legality of the process. Theory of conflict transformation seems to focus on the end result. Still, how transitional justice initiatives affects conflict transformation is under studied.

[190]Prime Minister Abiy Ahmed during an interview held on Sheger 102 radio. [Translation by the author, The Amharic version of the speech reads: ህግበሁለትመንገድነውጥቅምላይሊውልየሚችለው; በተገቢውመንገድስተገበርስነ-ሥርዓትንሰላምንአብሮመኖርንይፈጥራልተገቢባልሆነመንገድሲተገበርደካሞችንይጎዳልጭቆናንይፈጥራል።ህግለሰዎችየመብትሪ ኮግንሽንይሰጣልእንጂመብትአይሰጥም::

4.3. Reconciliation in Ethiopian transition

In countries where authoritarian systems have been replaced with a democratic one but significant continuities with the past system remain, a reconciliation process becomes a focus of transitional justice process if those polarized societies are to start to work together towards a democratic future. In Ethiopia, an initiative to work on national reconciliation was taken by the new Prime Minister Dr. Abiy Ahmed after his accession to power in April, 2018. To this effect, a proclamation [191] for the establishment of a reconciliation commission was adopted by the parliament in 2019.Issues that has to be analyzed in this case are, whether the initiative as a response to past human rights violations was relevant to the case of Ethiopia and also legal under international law and also the lessons that can be drawn from other countries experience.

4.3.1. The relevance and legality of the commission

The preamble of the proclamation states the need for the establishment of the commission and also the need for reconciliation between societies.[192] The proclamation bases the necessity to establish the reconciliation commission based on the need to rehabilitate the various disagreements that are developed among the peoples of Ethiopia for many years because of social and political conflicts based on truth and justice. The establishment of the commission is also based on the need to identify major/core human rights violations so as to lead to reconciliation and respect for basic human rights that are enshrined under the constitution and other international human rights instruments that Ethiopia has acceded to even though no time frame of violations was set.[193] The value of truth telling by those who have been victims and also

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ህግአለማለትሪኮገናይዝድየሆኑራይትአሉማለትነውእንጂተከበሩማለትአይደለም።በዓለምላይየተፃፉመብቶችበሙሉሪኮገናይዝድ ከመደረግአልፈውወደተግባርየገቡባቸውሀገራትበጣምውስንናቸው።አሜሪካንጨምሮበተጻፈውልክየሰዎችመብትአይከበርምአሁ ንጥያቄውህጉንራሱንበህጋዊመንገድተጠቅመንበታልወይአልተጠቀምንበትምህግተብሎማሰርይቻላል;
ህግተብሎመጉዳትይቻላል; ህግተብሎአሸባሪማለትይቻላል;
የህግምሆነየይቅርታዓላማየህዝቡንደንነትናጥቅምማስከበርነው።አሁንህግስንልይቅርታስንልፍቅርስንልአንዱንጠቅመንሌላውንለ መጉዳትአይደለም።አሊቲሜትሊየህዝቡን፣ማህበረብንሰላምለማምጣትነው።ሌላውየፍቅርየመጨረሻውግቡህግነው።ህግማለት ዝቅተኛውንሞራልመከላከልማለትነው።ፍቅርከፍተኛውንሞራልነው።ፍቅርካለፀብየለም።ላይየከፍታውሞራልካለበዝቅታውሞራ ልመዳኘትአያስፈልግምእናየፍቅርየመጨረሻውግቡህግመሆኑንመገንዘብአስፈላጊነው።ሁለተኛየቅርታመጨረሻግቡደግሞፍትህነ ው።ፍትህፍርድቤትሂደንስለተፈረደየሚገኝነገርአይደለም።ፍትህእንኳንቢመጣርትዕአይኖርም።]

[191] Reconciliation commission establishment proclamation, HPR proclamation no. 1102/2018

[192] Ibid, preamble

[193] One of the characteristics and goals of truth and reconciliation commissions is to investigate a pattern of abuse over a set period of time, so, terms of reference has to be made on the establishment document as to the time frame and also the type of violations that the commission will deal with. See, report on the international conference of transitional justice mechanisms held in Bujumbura, Burundi in August 2011, *American friends service committee*, 11

acceptance of the violations and seeking for forgiveness to the victims by perpetrators and reconciliation between the societies is also stated on the preamble as something that is needed to bring about a sustainable peace in the country.[194]

According to George Wachira,[195] reconciliation becomes important when citizens have been involved in abuses against each other and not in situations where there were violations of human rights by the state and its agents because where the state persecutes or fails to protect its citizens from human rights violations, the state has failed in its pledge to protect citizens and the social contract is Brocken. So then the state has no moral justification to demand the obedience of its citizens until the state re-establishes the social contract by making amends and guarantee respect for human rights. And to do so, the state has to hold accountable both individual leaders who mastermind violations and the institutions they represent for state sanctioned crimes and not trying to reconciliate because reconciliation is a means of covenanting relationship between citizens and not a means to fix social contract between state and the citizens.[196] For example, the Rwandan genocide in 1994 was not simply instigated by top leadership but also resonates with horizontal people-to-people engagement which calls for reconciliation but of course also demands prosecution for those who had cultivated, conspired and designed the violations from above.

In case of Ethiopia, the idea of amnesty and forgiveness has taken precedence before any action that sets to analyze the whole situation and human rights violations that have happened in the past so that its clear to decide as to whether to engage heavily on works of accountability and restore the social contract or rather work on reconciliation to fix societal relations. Even when reconciliation initiative has found out to be relevant, the Ethiopian political context requires that the initiative to be politically and financially independent from organs of government. This affects the operation and legitimacy of the commission because any investigation that the commission is making on the government can face financial constraints, making the commission dependent on the will of the government in its activities. The form of transition that is happening in Ethiopia- an old regime reforming itself, is a unique country context that requires the involvement of independent institutions in investigation of the truth of the violations that have happened in the past and leading transitional justice mechanisms such as reconciliation efforts,

[194] Id
[195] Wachira, et al, (n 175) 18-19
[196] M. Fischer, transitional justice and reconciliation: theory and practice, 405-430, 416

but in case of Ethiopia all activities were under the direct leadership of the government which is not a proper strategy considering the countries context.

Reconciliation is defined under the proclamation as a means of establishing values of forgiveness for the past, lasting love, solidarity and mutual understanding by identifying reasons of conflict, animosity that are occurred due to conflicts, misapprehension, developed disagreement and revenge.[197] The definition is more of a description of what the term could be used for than a clear designation of what it stands to represent therefore a need to understand what kind of conflict does it intend to solve is left in vein. The proclamation in its article 5states that working to bring about peace, justice, national unity and reconciliation as the main aim of the commission.[198] However, the relationship between those objectives; how one leads to another or how those objectives are going to be delivered by the commission was not clearly set. the issues or violations that are subject to reconciliation were not also made clear even though the proclamation provides for protection of witnesses and whistle-blowers from any form prosecution based on such confession or information provided.[199]

Documents establishing truth and reconciliation commissions regulate on the fate of past abuses that have been discovered through the process of the works of the commission. In what situations is amnesty given, and for which crimes is a resort to accountability to be made? For example the 2003 comprehensive peace agreement of Liberia establishing truth and reconciliation commission states that the commission can recommend amnesty upon application of individuals and disclosing their wrongs and expressing remorse though amnesty will not apply for violations of international humanitarian law and for crimes against humanity.[200] Some documents also further regulate on crimes not subject to amnesty making a demarcation on who is to be held responsible among the wide range of perpetrators. For example, the truth and reconciliation commission establishing document of Sierra Leone ascribes liability only to those who bear greatest responsibility.[201] The commission of inquiry established by the 2008 national reconciliation accord of Kenya also set up to bring to justice those persons bearing greatest

[197]Reconciliation commission establishment proclamation, HPR proclamation no. 1102/2018, article 2(3)
[198] Ibid, article 5
[199] Ibid, article 18
[200] An act to establish the truth and reconciliation commission (TRC) 0f Liberia, June 22, 2005, article 26(d,g)
[201] Peace agreement between the government of Sierra Leone and the revolutionary united front of Sierra Leone, 12 July 1999,

responsibility for international crimes, particularly on crimes against humanity relating to the 2007 post-election violence.

Many truth and reconciliation commission reports are followed by prosecution or reparations as per their recommendations urging the state to carry out trials based on the evidence and the names of perpetrators that they have provided. In some cases of course, such recommendations have been ignored or only slowly acted upon.[202] Prosecution requires a political will but should it follow after the work of truth commission or should prosecutions be implemented as a truth inquiring strategy that also helps other initiatives is a question that needs careful consideration. Truth gained from trials may provide a high level certainty on facts based on the standard of proof for criminal cases but the truth that is unveiled in the process is too specific to the charges made and other importantinformation's that might help in understanding the violations that have happened in the past may have been excluded. In transitional states where there is a strong willingness to prosecute perpetrators, engaging in truth findings before starting prosecutorial efforts is more feasible step to undertake proper trials based on the whole truth. In Ethiopia, however, truth finding has been presented very controversially and it's difficult to understand the link between truth and reconciliation and also other transitional justice initiatives. Therefore it's ambiguous whether it's a truth and reconciliation commission or a reconciliation commission; an issue which will be addressed below.

4.3.2. Reconciliation commission or truth and reconciliation commission

Many truth commissions have been built around an assumption or priority of advancing reconciliation, reconciliation commissions by the same token aspire to lay their activities based

[202] For example in Liberia the truth and reconciliation commission in its final report evidenced the acts of corruption and nepotism of Ellen Johnson Sirleaf and recommended prosecution and debarment from office but such recommendation was not implemented and Sirleaf has even become a Nobel prize winner and also won national election on the same year which shows the rejection of the works of the truth and reconciliation commission by Liberia and also the world at large. In Uganda, the truth commission that had operated from 1986 to 1995 forwarded cases to police investigation unit directly recommending prosecution though very few of those cases have ever made it to court. In Chad, the truth commission report recommended that perpetrators be removed from office and prosecuted but it resulted in little response from the government who have already incorporated those perpetrators into its government apparatus. The rejection of recommendations of the truth and reconciliation commission in such countries reflects the fact that some transitional states might resort to the establishment of such commissions before some favorable conditions such as lack of bitterness over the past in public sphere so that the truth can be talked about and be civilly absorbed by the public; existence of relationship of antagonist groups of the past based on their current interest to transition to democracy and not violations of the past so that truth telling will not be used to create tensions between the communities; and most of all existence of agreed upon and firm political willingness and cohesion that will allow meaningful implementation of the recommendations of truth commission and not as an instrument to cover the fact that the state does not want to respond to the past violations.

on truth telling which they themselves have to facilitate and investigate. In case of Ethiopia, the work of reconciliation based on truth telling is recognized under the proclamation establishing the commission but whether they are going to depend on the judicial truth or the truth investigated and told through the national media or their own versions of truth which they will have to investigate is not clear even though the wordings seem to suggest depending on the last alternative.

Members of the reconciliation commission are in most cases given separate duties within the mandate of the commission itself which in Ethiopian case is, finding the truth, facilitate reconciliation, bringing about justice and providing recommendation to a future way forward. The proclamation establishing the reconciliation commission has not clearly set on what other corollary activities is the work of reconciliation to be made except for mentioning the need to find out the truth. The explanatory note to the reconciliation commission establishment proclamation states, establishment of a truth commission will only lead to unnecessary arguments because there is no member of society who doesn't claim to be a victim of rights violation, so, we need to proclaim national reconciliation and forgiveness without a need to find out the truth.[203] The commission will be constituent of individuals with high caliber and who have much recognition, reputation and respect in their societies and who will function based on guidelines such as: understanding of the issue through consultations with stakeholders and the society at the first phase, investigating the cause of conflict, facilitating a platform where people who feel like violated will come together and discuss, providing a strategy or framework that can help for tolerance and respect between members of society if they happen to find out that the problems were caused by lack of tolerance between religious and ethnic groups, undertaking of symbolic reconciliation and finding best practices that can apply to the Ethiopian context. Yet, in all of these endeavors, the main purpose is not to find out the truth but to understand how people feel.[204] This seems contradictory to what the proclamation has set as an objective, and also the

[203] There are many questions of relevance that has to be answered when forgiveness is reflected upon on the public sphere, such as, how does act of forgiveness relate to the notion of justice? What conditions should be fulfilled from the part of the wrongdoer and what actions follow after the fact? How will collective responsibility be handled where a group of people are responsible and at times when an act affects a group of people and one reconciliates whereas the other doesn't? And, how the rights of different groups will be protected has to be set out before or during an effort to reconciliate which the Ethiopian reconciliation commission did not answer. See, N. Doorn, 'forgiveness and reconciliation in transitional justice practices' (2008) 15 (3) *ethical perspectives* 381-398, 382

[204] See, the explanatory note to the Ethiopian reconciliation commission establishment proclamation

function of the reconciliation commission which is finding the truth and facilitating for justice and respect for human rights which will be unimaginable without investigation of the truth.[205]

There are many corollary activities such as truth seeking, reparation or compensation to victims and the society at large, and provisions of amnesty for some perpetrators of human rights based on the crimes perpetrated and reconciliation made between the victims. The proclamation is termed as a proclamation to establish a reconciliation commission as opposed to a truth and reconciliation commission which is the case in many other transitional states that strive to reconciliate based on truth. Yet still, the common designation of truth and reconciliation commissions lies less on their official name and more on the circumstance and objectives of their formation so the Ethiopian reconciliation can be considered as a truth and reconciliation commission.[206] For example out of the 21 truth commissions established around the world, only five of them have the word 'truth commission' in the naming of their establishing documents and they were still operating as a commission in charge of finding out the truth as per the objectives and circumstances of their establishment.[207] The proclamation seems to facilitate individual reconciliation between the perpetrators and the victim through the process of the victim telling the truth about the violations and the perpetrator disclosing and confessing their actions.[208] But it's not clear as to what results would those individual reconciliations bring about to a decision as to whether to prosecute or amnesty those violations because the commission does not have an explicitly stated mandate to grant amnesty or order prosecution for matters not regulated by the amnesty proclamation.[209]

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[205] According to Donald W. Shriver Jr. if the history of what happened in the past is malleable at the behest of the powerful, if moral suppositions about finding out the truth are arbitrary, if human suffering is not accessible to moral judgment at the moment or post facto and, if facts of history cannot be attributed in some tangible way to human agency, then both judicial institutions and truth commissions are philosophically illegitimate. If there is a legitimate prosecution and reconciliation commission then there has to be a tangible truth. See, D. W. Shriver Jr., 'truth commissions and judicial trials: complementary or antagonistic servants of public justice?' (2001) 16(1) *journal of law and religion* 1-33, 4

[206] The proclamation states an act of investigating the truth as one of the activities and when we see the circumstance of the case, the transitional process in Ethiopia is based on forgiving and not forgetting as can be inferred from the many documentaries about past violations conducted by the national television acting as a form of investigation of violations in the past and making it known to the public.

[207] Hayner lists a total of 21 truth commissions and out of those only Chile, Ecuador, Haiti, Sierra Leone and South Africa have the name as a truth and reconciliation commission. See, Hayner, 'unspeakable truths' (n 23) 291

[208] Reconciliation commission establishment proclamation, HPR proclamation no. 1102/2018, preamble For subsequent discussions, the terms "reconciliation commission' or 'truth and reconciliation commission' will be used to refer to the Ethiopian commission under deliberation because even though the naming doesn't include the word 'truth' it exists as one of its objective and it remains as a truth and reconciliation commission of Ethiopia

[209] The proclamation on its article 18 provides guarantee for non-prosecution for confessions or any information provided to the commission but whether this applies to any form of violation including those not subject to amnesty

4.4. Truth and reconciliation and transitional justice

Truth and reconciliation commissions (TRC) in many post-conflict, post-accord and post-authoritarian have seen to become a "microwave-ready" answers to past human right abuses in a country without any meaningful consultation with the society specially victims and survivors.[210] With the possible exception of Manau Mutua task force in Kenya in 2003, truth and reconciliation commissions have been imposed from the political leaders into the society, often with little prior engagement or consultation.[211] In most cases such commissions are established through presidential decree and very rarely through parliamentary negotiated process.This has resulted in lack of popular support and feeling of national ownership, and anti-commission sentiments from the general population in many countries. Considering such unfavorable circumstances, the UN document on rule of law for truth commissions has set the issue of 'national choice' as its number one principle.[212] The document stands on the basic understanding that truth commissions are not appropriate for every transition, and such decision to establish a commission should be based on broad national consultation and decision. And such commissions should be set up in a way that their functions can go in tandem with other initiatives of transitional justice.[213] Such considerations can also help solve problems of functional overlap or inconsistency in their applications which will result in the works of one transitional justice initiative to be incompatible with another or even become superfluous.

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as stated by the constitution and the proclamation itself and other violations not subject to amnesty based on international laws. The commission is established with a mandate to bring about reconciliation, peace and cohesion and also to identify the nature, cause and dimension of the repeated gross violations of human rights so as to ensure respect for human rights and promote reconciliation. This implies the commission is tasked with a duty to find out human right violations such as torture, extra-judicial killings, sexual and gender based violence and enforced disappearance which demands prosecution according to international law. But the proclamation also provides protection for witness, testimony and whistle-blowing so anyone in relation to such gross violation of human rights approaching to the commission to testify will end up having protection from prosecution which defies the mandate of the commission itself to ensure respect for human rights.

[210] According to George Wchira, Prisca Kamungi and Kalie Sillah, because TRCs have become a ready-made answer to problems of transitional countries without consideration of their particular relevance, their ephemeral and bureaucratic nature fails to match the intricacies that they are presumed to address. The commissions simply get set up and if the commission makes the opponents of the government leading the transition as chiefly responsible then it resonates with the interest of the government(not the interest of transitional society in general) but if the leadership in power is implicated I the past violations and become responsible for parts of the past that needs to be dealt with then there is no guarantee that any radical recommendation will be implemented and therefore their true purpose can be usually twisted to serve other purposes. See, Wachira, et al, (n 175) 219

[211] Ibid, 229

[212] OHCHR, 'rule-of-law tools for post conflict states: truth commissions' (n 12)

[213] ibid

Truth seeking and reconciliation is a mammoth and complicated task, and it even gets even more difficult when the activities and the general function are not mindful of the needs and interests of the country in transition. Questions such as how the commission will evaluate and respond to the many accounts from victims and others; whether the procedures will be done in public or be confidential; whether to instigate all past violations or specific crimes will be answered differently in different transitions.[214] Such contexts could be for example, the transitional type that the country is in, the strength and position of those individuals who are responsible for violations in the past, the interest and involvement of international community, the national political and social culture and so on.[215] According to the UN document on rule of law, every truth commission will be expected to be unique, responding to the national context and special opportunities present in its mandate as well as the specific operational aspects.[216] And those initiatives taken considering the countries context should be made to go along with the overarching peace building framework and also reinforce the broader justice and rule of law reforms.[217] Lack of integration between the different judicial and non-judicial transitional justice initiatives will reduce the effectiveness of such initiatives for example, in south Africa, its claimed that the number of freedom fighters applying for amnesty outnumbered the number of apartheid forces because of lack of mechanism that will put every perpetrator on the corner and this creates a distortion of history and disenchantment with the process among many south Africans.[218]

TRCs that are generally considered to be successful show commonality in their independence and funding opportunities. For example the TRC in El Salvador established in 1991 which has served as a point of reference and also the origin of the idea for peace negotiators, was administered by UN and funded through contributions of UN member states and it has full operational independence in its activities.[219] Its independence was not just declared but guaranteed through procedures such as the appointment of commissioners (which was made by the UN secretary general) and method of data collection and investigation. TRCs that are not as such considered to be successful also had failure in operational and financial independence as the

[214]Wachira, et al, (n 175) 5
[215] ibid
[216] OHCHR, 'rule-of-law tools for post conflict states: truth commissions' (n 12), 5-6
[217] United Nations guidance note of the secretary general, (n 6) 6
[218] Wachira, et al, (n 175), 195
[219]Hayner, 'unspeakable truths' (n 23) 50

cause for it. For example the TRC in Sierra Leone was declared to be an independent institution in its establishing document without setting up mechanisms to guarantee the same so later the problem has been sought to be solved by putting the commission under the management of the UN office of the high commissioner for human rights that could help in fundraising and administrative support but later this was not considered as the most advantageous administrative structure as the office has failed to avoid functional overlap of the commission with that of the special court for Sierra Leone established in 2002 and was also unable to secure the necessary fund to run the commissions' activities.[220]And the recommendations of the commissions were only partially implemented. The truth, justice and reconciliation commission (TJRC) in Kenya also has its commission members selected by the president after a nomination made by a panel of prominent African personalities and the appointment of a person who have held senior political position under the president Moi was however very criticized. And it was after those events that the UN has specifically provided that TRCs should work with clear operational independence and be free from political interference,[221] and this can be guaranteed when the commission is free of a direct influence or control by the government. It's also stated that such commissions must rely on significant international support (monetary or otherwise) if they are to fulfill their mandates successfully. The UN makes such rule based on the understanding that the cost of series TRCs can easily exceed five to ten million dollars and no one country can single handedly meet such financial need by using its national resources.[222]

TRCs can be a significant turnaround in a countries history of rights violation if the commission has correctly record violations of the past by merely focusing on the rights that have been violated and not whose rights. Rights based investigations can help to understand and recognize human rights that have been equally granted to everyone by national and international laws and also rightly spot out when there are violations on every victim from every part of the

[220] The 9.9 million dollar that has been budgeted for the TRC at the beginning was scaled back to 3.7 million dollar and even then this lower amount was not forthcoming. After the establishment of TRC, a need to establish a criminal tribunal-special court for Sierra Leone was sought and a significant amount of international support has to shift to prosecutorial initiative which was not part of the initial plan to respond to past human right violations by the government. This financial deficit leads to an abrupt closure of the commission on 3 December, 2004 without having to respond to the 7,706 statements recorded from victims, perpetrators and witnesses.

[221] According to the UN document on rule of law, the legitimacy and public confidence that are essential for a successful truth commission process depends on the commissions ability to function without any form of political interference in its activities including its research and investigations, budgetary decision making and its report and recommendations. See, OHCHR- 'rule-of-law tools for post conflict states: truth commissions' (n 12), 6

[222] Ibid

society including women and children so that response can be made towards the satisfaction of every victim without any discrimination and transition can be made to a future where everyone's right is recognized and respected.[223] The terms of reference in the TRC document should guide the commission to give special attention to members of the society to which the violation of their rights is thought to be underreported or misunderstood.[224] The sum of those small activities is what makes the whole and every activity should be given the attention it deserves. The following chapter will summarize how those parts of the whole have been taken into consideration in the efforts of responding to the past human rights violations in Ethiopia and also suggest a way forward on the gaps.

CHAPTER FIVE

CONCLUSION AND WAY FORWARD

5.1. Conclusion

By way of applying the above analysis to the case of Ethiopia, this chapter will answer the basic research questions that have to do with respect for international law and consideration of context. At this point, it's worth analyzing and concluding on some aspects of transitional justice that are related to the researches' point of inquiry such as how the issue of justice is dealt in Ethiopia in light of the responses made to past human rights violations, how the Ethiopian transitional justice process accommodates international law and also rules and guiding principles of transitional justice that apply in post-conflict and post-authoritarian states and also how the context of Ethiopian transition has shaped the decision on the implementation of transitional justice mechanisms which will all be discussed below.

5.1.1. The duty to prosecute under Ethiopian transition

One of the issues that have been discussed above is whether the transitional justice process accommodates the duty to prosecute under international law. And in this case, it's possible to conclude that the effort to prosecute past human rights abuses in Ethiopia fails to

[223] For example, gender inequality is one of the most pervasive forms of societal inequality so transitional justice initiatives should include a gender and women rights perspective and also be inclusive of women so that they can get to determine their priorities for transitional justice initiatives and that helps to secure that women rights violations, abuses, oppression or maltreatment is not perpetuated into the future. See, United Nations guidance note of the secretary general, (n 6) 5

[224] Id, 10

accommodate the rules and principles found in international law and guidelines of implementing transitional justice for three main reasons. First, an independent body that can investigate the violations that happened in the past and map out the whole violation that has occurred in its different types and the gravity of commission was not established. Second, a clear strategy of prosecution was not communicated to the public as to whether only jus cogens crimes are being prosecuted or all violations in the past are, except for a time when the attorney general mentioned in a press release that the act of torture committed is a crime against humanity according to article 7 of the Rome statute and it will be prosecuted. Third, the steps taken in an effort to conduct prosecution does not align with other initiatives such as reconciliation so it creates confusion as to why some prosecutions precede reconciliation or whether the crimes are not subject to prosecution.

5.1.2. Amnesty and the rights of victims and society

Amnesty, as discussed above, has to be implemented with respect to international law that provides for states obligation to prosecute core human rights violations, the right of victims and the society to know the truth, the rights of victims to remedy and also applied in coherence to other transitional justice initiatives. In this case it is possible to conclude, drawing from the above discussion that, the amnesty provided in Ethiopian transition fails to accommodate those interests for the following reasons. First, provision of amnesty without proper investigation of the nature of violations in the past and its perpetrators affects victims whose rights have been left without proper redress and also the beneficiaries themselves who have to observe a condition that might reflect upon the actual commission of crime in the first place. Second, amnesty provided without consultation to other transitional justice initiatives such as prosecution and reconciliation affects the fairness of the process thereby providing an advantage point for one when the same is not done for another. Third, whether provision of amnesty would bring about the assumed results of peace and security over a result that can be achieved through prosecution was not analyzed based on the context of the country and also consultation with the victim and society.

5.1.3. Truth and justice under the Ethiopian reconciliation commission

Reconciliation can be used as one tool of transitional justice to bring polarized societies together by effecting justice and reconciliation based on truth. It can also be one mechanism in the tool

box of political negotiators that is meant to avoid states duty to prosecute and repair harms done to victims under international law.The Ethiopian reconciliation commission lacks many features that would make the commission become an effective transitional justice mechanism. The first problem with regard to the reconciliation commission is its ambiguous presentation of the need to search for the truth in the function of the commission which will which will also affect implementation of other activities. The other problem with regard to the commission is its lack of functional and financial independence as is reflected in the appointment of members to the commission and approval of its budget. Lack of comprehensive application of the reconciliation initiative with other transitional justice mechanisms is also another problem which creates conflict and discrepancy between one transitional justice mechanism to another. The other problem with regard to the commission is that, it doesn't have terms of reference as to the effects of the woks of the commission and also follow up procedures to effect its recommendation which diminishes the value of the commission itself.

5.1.4. Consideration of context

The problems in Ethiopian transitional justice system that have been identified above also reflect upon the lack of contextual application of transitional justice initiatives in Ethiopia by remaining faithful to the duties laid down under international law. One of the political contexts that have to be considered in case of Ethiopia is the fact of transition from a conflicted democracy to a new political order which demands high attention and focus on bringing about the spirit of rule of law through involving the international community in the investigation and prosecution of core crimes under international law. Yet, the Ethiopian transition carried out investigation by the national police apparatus which is also one area of investigation in past human right violations. The other contextual reality that has failed to be accommodated in Ethiopian transition is the need to regain peoples trust in democratic institutions by involving the grassroots in the decision process which was not the case in Ethiopia. The other decisive context in Ethiopia is the fact of transition led by the same regime which requires the transition process to be led by an independent institution which was also a problem in Ethiopian transitional process as reflected from the top-down decision making process on the transitional justice mechanisms and also high involvement of the government in transitional institutions such as the reconciliation commission.

5.2. Way forward

As the responses to past human rights violations can be many and the results of their implementation keep unfolding through time, more researches need to be made that evaluates both the framework and efficacy of those mechanisms through time and provide recommendations. This research, as short and limited as it may be, has based on the analysis and conclusions made above presents few actions as a way forward to help fill the gaps that are identified.

5.2.1. Consideration of context

There might be iconic pubic leaderships or states transitioning to a consolidated democracy that others might want to follow up on. But the fact is that there are different factors that shape a countries transitional possibility and constraint, and possibility of its consolidation or even backsliding. And countries in transition should be willing to be guided by such contexts in their transitional journey. Transitional choices will be affected by the nature and intensity of the human rights violation in the past and the nature of transition that the country is currently undergoing. Consideration of context helps countries to understand what kinds of initiatives they really want to implement in order to effectively respond to the past and transit to a democratic future rather than carrying out activities that doesn't target the needs and interests of society. In order to achieve this, focus can be made on the following:

A. type of transition: the Ethiopian current transition is a transition from conflicted democracy to a new political order and this demands focusing on the rule of law and fixing societal mistrust on democratic institutions or the government which could be realized by building national consensus on the responses to a clearly mapped out and publicly communicated past violations and facilitating public participation in decision making.
B. Nature of violations in the past: understanding the nature of violations in the past can help shape the implementation of any type of response to such violations. Do the violations in the past constitute gross human rights violations that initiate the duty to prosecute under international law? Who were the victims of past violations and who perpetrated them? Answering such questions help in the decision making of transitional process such as the possibility of national prosecution on perpetrators of international

crimes, whether there is a need for societal reconciliation or not, which initiative to give priority to and so on. This of course requires employing heavy research supported by criminal investigations.

5.2.2. Setting the justice balance

The concept of justice is controversial and it could have different meaning in different places. Whatever meaning it carries, in transitional societies that try to repair the social contract should be given a chance to decide what is just for them in every particular situation under the general notion of justice towards core crimes that affect the conscience of the international community. Considering the fact that effort of prosecution and amnesty on those who have been suspected of committing crimes is already taken, some future steps can be made to make the pursuit of justice fair and effective. The actions can be the following:

A. Set a clear prosecutorial strategy: there are prosecutorial initiatives going on based on human rights violations of the past and it includes individuals who have the greatest responsibility in ordering and facilitating the commission of crimes and others who have participated in execution of crimes. When other initiatives such as TRC are conducted or produce result, then the same strategy should be followed to avoid selective prosecution even if prosecuting every perpetrator could be inappropriate considering the context of the country or actions of indemnifications be made on those perpetrators who committed crimes that are not subject to prosecution.
B. Respect the rule of law: one lesson that can be taken from countries that have gone through transitions is that, dealing with the past is not a romantic or utopian ideal and neither can we make it so at some point in a time. Realistic imposition of the rule of law can help to build a state on a firm foundation, set a level of standard to which human right and dignity is respected and the violation of those standards is duly punished. Law is the foundation of society and there is no alternative to it.

5.2.3. Re-visit the reconciliation commission

Meaningful political and institutional reforms are dependent on the will of the political leadership to set up an actually effective system. Well thought through and effectively implemented transitional justice initiatives will help not only to bring about national consensus and collaboration but also call for an engagement of the international community which can help

in providing a push for action. But being able to actually do become the catalyst for action is not a result that ipso facto follows merely from its work but also the composition and realistic responsibilities given to the TRC during its establishment. In order to realize such effectiveness and acceptance, the Ethiopian reconciliation commission can take the following measures:

A. Guarantee its independence: the chair and other members of the commission and its office should stand apart from other governmental or non-governmental posts because of the intense public and political pressure under which the commission functions. Yet, the Ethiopian reconciliation commission gives the commissions' accountability; determination of number of commissioners; recommendation of the chair person, deputy chairperson and other members of the commission and appointment of head of the office of the commission all to the prime minister. Even though the commission has already been established and members get selected, there is still a chance to re-visit the selection of members from various views, backgrounds, skills, and genders through NGOs, universities and other national and international civic society organizations.

B. Set clear expectations: the Ethiopian reconciliation commission includes truth telling, remorse and justice in its designation but nothing in the design and structure of the commission and its members signaled that those objectives will be carried out and expectations will be met. Careful consideration must be given to the relationship between its investigation of probably massive crimes and those of separate criminal procedures and other initiatives. The Ethiopian TRC has a mandate to make recommendations in light of the principles of promoting lasting peace and prevent occurrence of conflict in the future but such mandate has to be executed having in mind important rules of international law such as states duty to prosecute gross human rights violations, the rights of victims to remedy and so on which can also clearly set the road to achieving such objectives so that a conflict with an idea of achieving justice through forgiveness can be disentangled.

C. Regulate on post-TRC follow up mechanisms: provision on the founding legislation of the TRC for a follow up mechanism after its work is necessary. For example an obligation can be given to the attorney general or the constitutional affairs or any other organ to provide explanation to the house of people's representative about any failure or

delay in the implementation of the recommendations of the commission like the case of TRC in Kenya.

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