

Dealing with a difficult past

Time to revitalise the Ethiopian Reconciliation Commission?

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Ethiopia is undergoing a complex political transition, which has revealed the dire need for reconciliation. The Ethiopian Reconciliation Commission was established to tackle past injustices, violations and recurring conflicts. Two years old, it still grapples with major challenges. Ways to revitalise the Commission should be considered. Its current mandate should be more specific, its institutional setup and member composition revisited, and its powers, capabilities and independence enhanced.

Key findings

- ▶ The establishment of the Ethiopian Reconciliation Commission (ERC) has generated great expectations about the longstanding need for reconciliation.
- ▶ Notable progress has been made in translating the Commission's good intentions into reality. This includes commissioners' appointments, institutional setup, attempts to clarify its mandate and powers, and engagements with the public and political actors to create awareness of its work.
- ▶ The implementation of some substantive aspects of the Commission's work has been hampered by a lack of clarity on its material and temporal mandates, its current setup, the Commission's composition and working modalities of its members, and the absence of a conducive political and security environment.
- ▶ Revitalising the ERC requires revisiting its founding proclamation and strengthening the Commission's set-up.

Recommendations

- ▶ The Ethiopian government should consider different options for revitalising the Commission if reconciliation is to be achieved. The ERC may need to be strengthened to become leaner and more technically competent in the fields of peace, justice and reconciliation.
- ▶ Revitalising the Commission's set-up should follow a transparent and consultative process. Members' competence should be a primary requirement while not ignoring regional and gender representation, and wider societal acceptance.
- ▶ The process of revisiting the founding proclamation could empower the Commission to focus on specified gross human rights violations and identify root causes of recurring violent conflicts. Among other things, key operating terms need to be clearly defined, notably gross human rights violations, unbalanced societal relations and reconciliation.
- ▶ The Commission's work should be strategically linked with other transitional justice mechanisms, primarily ongoing criminal prosecutions, conditional amnesties and pardons offered since 2018.
- ▶ In addition to promoting synergy and reducing overlaps with other government entities, the Commission needs to be empowered and its independence enhanced to promote healing and reconciliation through a clear mandate to recommend reparation. It has to be enabled to incentivise cooperation from perpetrators and ensure that its recommendations are implemented.
- ▶ Efforts to facilitate a conducive political environment for reconciliation should also be made. This includes demonstrating political commitment to a genuine and inclusive national dialogue that could enable reconciliation as a way to achieve national consensus. A platform of this nature can help create consensus on a plan for reconciliation and transitional justice and make recommendations in a structured and inclusive way.

Introduction

One of the most striking consequences of Ethiopia's current political transition is the unveiling of the urgent and unequivocal need for reconciliation. Throughout the country's long political history, divergent narratives of violence and injustices abound with contested impacts on cultural identities, modes of local governance, livelihoods and the rights of citizens and communities. Grievances emanating from such historical issues continue to dominate current political discourses and dispensations, contributing to the existing political polarisation, perpetuation of political violence and low state of national cohesion.¹ Thus, the need to come to terms with the past and reduce the burden of history is particularly pressing now.

The Ethiopian Reconciliation Commission (ERC) was established on 5 February 2019 by Proclamation No 1102/2018 to respond to this imperative. It serves as the country's 'preferred transitional justice mechanism' to transcend the perennial challenge of tackling past history of injustices and violations.²

The ERC's establishment less than a year after Ethiopia's current political transition started signals the intention to facilitate the unfolding socio-economic and political transition 'by creating a peaceful and just political environment'.³ The ERC is a promising instrument to close a longstanding chapter of violence, injustices and grievances, and pursue a quest for healing and sustainable peace.

Not surprisingly, the Commission's establishment has generated a lot of optimism. Expectations that the Commission will deliver the much-needed 'reconciliation dividend' further spiked when communal and political conflicts became frequent after its establishment.

Over the past two years, efforts were made to clarify and consolidate the ERC's institutional and legal frameworks, and to implement some key activities, as discussed in the next section. However the ERC is yet to start implementing some substantive reconciliation activities related to the broader mandate of reconciliation. These include engagements geared towards truth seeking such as statement taking and organising public hearings, identifying root causes of and resolving conflicts, and conducting reconciliation events. The time taken to

start these key activities has been lengthy compared to commissions in other countries which took only a couple of months.⁴

Such delays curb the gathering momentum for reconciliation and risk letting a potential 'reconciliation moment' slip away. At the very least, the delay has eaten away crucial time from the Commission's substantive engagements, such as statement taking, conducting public hearings and undertaking reconciliation events.

The ERC requested the Institute for Security Studies (ISS) to conduct in-depth research on factors constraining its timely and effective mandate implementation. The research aimed to enhance empirical understanding of the Commission's functioning and identified various conceptual, normative and institutional factors that continue to hamper the Commission from effectively discharging its mandate.

A courageous leap of faith is essential to revitalise the Commission and its institutional basis

The research took place between June and November 2020 and was based on in-depth interviews. Those interviewed were Chairperson and Deputy Chairperson of the Commission, some Commission members, stakeholders such as experts at the Ministry of Peace (MoP), attorney-general's office (AGO) and Ethiopian Human Rights Commission (EHRC), and international experts on transitional justice. The research also benefitted from content analysis of key ERC legal and institutional documents and insights on international experience drawn from a systematic desktop review of the experiences of similar commissions.⁵

This report synthesises key findings of the research.⁶ These are that the Ethiopian government should revamp its approaches to reconciliation and rethink the mindset informing the Commission's functioning, rather than simply 'working with what exists'. A courageous leap of faith is essential to revitalise the current Commission and rethink the legal and institutional underpinnings. Major changes are needed to create better clarity on ERC's material and temporal mandates, restructure the Commission setup, enhance

its powers and capability and address the country's lack of political negotiated outcomes.

Making inroads into a complex reconciliation space

The ERC's objective is 'maintain[ing] peace, justice, national unity and consensus and also reconciliation among Ethiopian peoples'.⁷ Over the past two years, it has started some crucial policy processes and start-up activities.

After nomination by the prime minister, the House of Peoples' Representatives (HoPR) appointed 41 commissioners, all serving on a voluntary and part-time basis. The commissioners shared experience from Kenya's Truth, Justice and Reconciliation Commission, which helped to reshape their understanding of key provisions of the founding proclamation and offered insights on the institutional setup.

The internal organisation was restructured in mid-2020 to better fit the different mandate areas included in the founding proclamation. This involves discovering the truth of past gross human rights violations and ensuring justice and non-recurrence; resolving social and political conflicts; and contributing to national consensus, unity and dialogue. Currently, the ERC has five standing committees⁸ charged with specific tasks.

The Commission is currently set to work on seven conflicts, both social and political

The executive committee comprises 13 members: the chair and deputy chairpersons of the ERC, the chair and deputy-chair of each standing committee, and the executive director of the secretariat (non-voting). The secretariat manages the day-to-day activities of the Commission. Among other things, it shepherded the preparation of the Commission's strategic plan for 2020 to 2022 and the recruitment of professional experts.

Despite the abovementioned institutional developments, major uncertainties hinder the Commission's implementation of its substantive work and mandate

areas. These include:⁹ What issues would count as gross human rights violations? What start and end dates should the ERC carve out for its work? Should the ERC be involved in resolving escalating current political conflicts in the country or focus on past conflicts? The uncertainties regarding the mandate emanate mainly from the lack of details in the founding proclamation.

The Commission made several attempts to address these challenges, such as internal discussion and consultation with key stakeholders, including with the prime minister. It also drafted a regulation to operationalise its mandates. However, the lack of clarity, mainly on material and temporal jurisdiction, lingers.

There is no publicly available information on consultation leading to the establishment of the ERC, including drafting and promulgation of the founding proclamation, and nomination and appointment of commissioners.¹⁰ To compensate for these limitations and ensure wider public engagement, the Commission conducted a series of consultations and engagements. These included consultations with regions, traditional and religious reconciliation actors, leaders of some opposition political parties and youth representatives.

Notwithstanding the above challenges, the Commission executed some substantial activities. Among others, it facilitated dialogues, for example by supporting the Addis Ababa youth initiative to provide COVID-19 related support to their counterparts in the Oromia region. Youth from the two regions jointly travelled to Hawassa and provided similar support. The initiative aimed to incrementally expand and include youth from other regions.

In collaboration with TIKVAH, a social media platform run by youth on Telegram, the Commission engaged youth through a writing contest dubbed 'I too have a Reconciliation Idea'. The competition helped to identify traditional reconciliation mechanisms in their respective areas. As part of this process, close to 1 000 youth submitted their writing. The exercise helped to connect with youth and capture their views on reconciliation practices in their respective localities.

The ERC has also raised awareness about the Commission's mandate and the need for peace and reconciliation through public forums and regular media

briefings. As part of its engagement with the wider public, the Commission interacted with some members of the media and CSOs working on peace, human rights and reconciliation.

More importantly, the ERC held consultations to help finalise the reconciliation process with communities from Sidama and Wolayta that was already underway by local elders. The ERC also had discussions with regional stakeholders to contribute to resolving outstanding issues and challenges arising from demands for the formation of new regional states in the Southern Nations, Nationalities, and Peoples' Region.¹¹

To kick start implementation of its substantive mandate related to the resolution of violent conflicts, the Commission identified criteria to select conflicts for resolution. It is currently set to work on seven conflicts, both social and political.¹² A statement form has been prepared in readiness to collect statements on gross human rights violations across the country.

To be effective, the ERC should have a focused mandate centred on gross human rights violations and recurrent violent conflicts

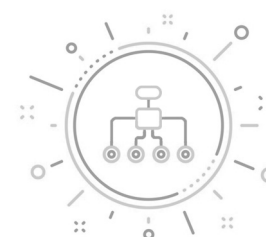
These and related engagements highlighted above are critical components of a commission's work. However, there has been a delay in other key activities related to uncovering truth about gross human rights violations, addressing root causes of conflicts and conducting reconciliation initiatives. This delay stems from the serious limitations the ERC received at birth. As will be highlighted in the following four sections, operational changes and fixes will not suffice. There is an urgent need to attend to these severely constraining factors by revitalising the ERC and amending its current proclamation.

Material and temporal mandate: need for strategic clarity

Specifying the ERC's broad mandate areas

The ERC is overburdened as it has broad material mandate areas – gross human rights violations, social and political conflicts, and national consensus and unity – and an undefined temporal mandate. Both of these are unique to the ERC. Virtually all similar commissions had a near-exclusive focus on (particular) gross human rights violations, with a specific temporal mandate. The loosely-defined mandate makes an already difficult job nearly impossible.

To be effective, the ERC has to have a focused mandate area, primarily centred on gross human rights violations and recurrent violent conflicts. Should a commission be explicitly empowered to systematically investigate the root causes of conflict (as in Sierra Leone and, to an extent, Liberia), it was limited to examining aspects in a civil war that gave rise to grave human rights violations.



OPERATIONAL CHANGES
AND FIXES TO THE ERC
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Working with undefined material mandate

The necessity of a clear and specific mandate cannot be overemphasised. This invariably is a strategic and political decision often included in the establishment proclamation. Similar commissions in other countries focused primarily on civil and political rights, while in recent years increasing attention is being accorded to socio-economic rights and sexual violence. Thus, a specified mandate is now the norm, often having a holistic view of human rights.

The ERC's draft regulation and its statement form include the major acts it considers gross human rights violations. A holistic conception of human rights is adopted, as violations of socio-economic and cultural rights, and sexual and gender rights are also included.¹³ In keeping with international experience, neither document provides an exhaustive list of acts, but keeps the door ajar. The draft regulation clearly states the centrality of 'political motives' for a certain act to be considered by the ERC.

The regulation setting out ERC's material mandate hasn't been approved and is not yet legally binding

While this is a step in the right direction, much remains to be done. For one, the draft regulation has not been approved and is not yet legally binding. The ERC has a list of the acts, not a clear operational definition of what each act should constitute to pass the 'gross' criteria. The AGO's response to the draft regulation makes the importance of such an operationalisation important and suggests some criteria.¹⁴

Furthermore, the ERC's operations should be clarified in proper legal lexicon, including a sound definition of what constitutes gross human rights violations. For example, how would it differentiate between gender-based and sexual violence? Which acts of gender-based violence will be considered 'gross violations'? Similarly, would land alienations for development count as violations, in both urban and rural (highland and lowland) areas? How would it define violations to cultural rights? After how many days/weeks would arbitrary detention pass the 'gross' threshold?

If a proper conceptualisation and definition of key issues and concepts is not adopted, the ERC's operations will be overburdened by too many cases and avoidable legal and political complications. A clear exposition on the above-mentioned issues from the outset – preferably by the establishment law – would have been ideal, and should still be rectified.

Defining the material mandate parameters

A commission's material mandate intends to identify patterns, not to comprehensively canvass isolated and individual cases.¹⁵ The assumptions are that some severe violations will be more frequent in the selected time period and that reconciliation will be impossible without focusing on these.

Although the material mandate should be as specific as possible (i.e. avoiding over-ambition), the potential downside is excluding some politically motivated grave crimes. This would potentially leave some victims of the excluded acts invisible and their demand for justice unmet.¹⁶ An oft-repeated example of a major omission is the non-inclusion of economic crimes and everyday apartheid policy by South Africa's Truth and Reconciliation Commission, although these acts degraded black South Africans' dignity.¹⁷ Chile's torture survivors were excluded by the first commission (which focused exclusively on those who died during torture) and were investigated only by a second a decade after the first had closed.¹⁸

Working with undefined temporal mandate

The ERC's hands are also tied by an undefined temporal mandate in the start and end dates for the cases it considers. The founding proclamation leaves this crucial point untouched. While comprehensiveness is commendable, the urgent need for efficiency given the scarce time, human and financial resources requires particular attention to the recent historical period, which heavily affects the current state of politics and stability.

The current draft regulation suggests 12 September 1974 as a start date for gross human rights violations-related works, with the possibility to go beyond this date as necessary for conflict resolution-related works. This provision allows enough scope to examine conflicts rooted in historical state-making processes, while not constraining the ease of evidence generation for

investigation of gross human rights violations.¹⁹ This approach, at the very least, allows individuals and communities to air their grievances, no matter how recent or old.

The ERC's founding proclamation is also silent on an end date to its work. By definition, commissions work on the past and the end date of their temporal jurisdiction is usually the date a peace agreement is signed or the date the commission is established. The persistence of violent social and political conflicts in the aftermath of its establishment exposed the ERC to pressures to resolve contemporary conflicts.²⁰

Most truth and reconciliation commissions, by their very nature, are born out of political processes and essentially focus on the past

The government also expects the ERC to proffer its good-offices functions or *shimgelina* for contemporary issues.²¹ Some commissioners see this as necessary to live up to societal expectations,²² while others see it as a challenge and distraction that interferes with the Commission's focus on the past.²³

Currently, the Commission is readying to collect statements, with the possibility of excluding claims before and/or after a certain date if the collected statements outweigh its capacity.²⁴ However, working with such undefined temporal scope carries practical risks and repercussions.

Parameters for determining temporal mandate

Past experience shows that the start and end dates of commissions are selected to coincide with a period in the country's history when large-scale gross violations occurred. Ghana, Kenya and Morocco, for example, picked their independence days as start dates. Argentina, Colombia, Mozambique, Peru and Sierra Leone chose the start of civil war or authoritarian regime as start dates of their commissions.

The selection of start dates was less straightforward in other cases. In South Africa, the start date was set at 1 March 1960, although the National Party, which implemented apartheid policies, came to power in 1948. March 1960 was selected as it captures the Sharpeville massacre, which was a turning point towards violence by both the apartheid regime and the resistance (i.e. the African National Congress established a military wing in December 1961).²⁵ Mauritius is an exceptional case, as its start date was pushed to 1638 when the islands were colonised and slavery was introduced.²⁶

A commission's end date is less contested. The very establishment of a commission pre-assumes the cessation of hostilities and agreement of political rivals and government to not go back to old violent and repressive tactics. Thus, in effect, the date a peace or political agreement is signed or

12 September
1974

SUGGESTED START DATE FOR
WORK ON GROSS HUMAN
RIGHTS VIOLATIONS

an agreement is reached to establish the commission itself counts as an official end date.

If violations and violence relapsed after this date, some commissions were allowed to go beyond the agreed end date. In South Africa, the first end date for the TRC was 6 December 1993, the date the interim constitution was signed. This was later extended by a few months to 10 May 1994 (the inauguration date of former president Nelson Mandela) to consider cases of pre-election violence by right-wing political groups.²⁷

In Sierra Leone, the initial agreed end date was 7 July 1999, the signing of the Lomé Peace Accord. Following the relapse of conflict and delayed start of its work, the commission pushed the end date of its work to January 2002.²⁸ Thus, extension of the end date is necessary if it is to meet a commission's primary aim. The start dates of commissions do not need to be rigidly fixed.²⁹

Based on the above, the ERC would need to operate within clearly defined start and end dates. However, the possibility of going beyond these dates should be open for the Commission to determine on a case-by-case basis. This would be inevitable, especially to identify root causes of gross violations. It would also be ideal to have all its work within one period.

In its composition and functioning, the ERC represents a major departure from international trends

The table on page 9 shows different options for start and end dates, each presenting opportunities and challenges. The determination of start and end dates essentially is related to the expected material scope of the ERC and important historical dates.

It is important not to go too far into the past otherwise generating evidence and the absence of living individuals and groups to be reconciled become challenging. Particular historical milestones must be considered after which political violence and gross violations increased, and became severe and systematic. Current political dynamics must be assessed to determine the importance of considering cases after a certain period for achieving effective reconciliation and a peaceful

future. Promoting reconciliation must be the goal, not resolving all the country's historical baggage.

The Commission: setup, composition and operations

The setup and functioning of commissions are among the most critical 'barrage of methodological, operational and political problems' confronting these mechanisms.³⁰ Selection of commissioners and functioning of commissions are often highly dependent on circumstances and country contexts. Nonetheless, certain considerations and issues are quite similar, such as the consultative process in setting up the commission, well-defined selection criteria of commissioners, and moderate number and balanced composition of commission in expertise and representation.³¹ A critical appraisal of the ERC based on these parameters clearly shows the major departure from international trend and the urgent need for revitalising its setup.

Diverse composition vs requisite expertise and background

The broad spectrum of the commissioners' background (social, political, generational, professional etc.) suggests that an aspiration for wider societal or cross-sectional representation was a major consideration in their selection. The Commission is currently composed of renowned public figures, religious leaders, intellectuals, sport personalities, artists, politicians and activists etc. The majority of its members also excel in their own fields. The above two factors indicate a recognition of the importance of traditional dispute resolution mechanisms as well as the personality and gravitas of some of the eminent personalities included in the ERC.

On one hand, striving for such a representative Commission that depicts 'the true face of Ethiopia' is justifiable to instil public legitimacy for reconciliation. The rationale behind this assumption partly stems from current heightened ethnic nationalism in the country and the associated trend of ensuring ethnic representation in major endeavours. At the same time, commensurate attention was not given to inclusion of individuals with certain technical competencies to fulfil the ERC's immensely complex reconciliation mandates. Key ERC tasks cover peace, human rights, justice and

Table 1: Brief assessment of possible start and end dates for the Commission’s temporal mandate

No.	Start date	Pros	Cons
1	28 May 1991	Ease of generating evidence for the Commission’s work Enables capturing of violations widely claimed to have been perpetrated by the now-defunct Ethiopian Peoples’ Republic Democratic Front (EPRDF) regime	Likely to be interpreted as biased/’witch-hunt’ against the Tigray People’s Liberation Front (TPLF)/EPRDF, a task out of line with the reconciliation mandate Less likely to capture historically rooted causes and violations
2	12 September 1974	Relative ease of generating evidence for the Commission’s work Possible to promote reconciliation by addressing violent acts by the Derg and the EPRDF	Ignoring the need to establish truth and reconciliation based on violations during the imperial era Failure to account for violence pre-1974, primarily in the failed coup, the violence associated with students movement and the lead-up to the 1974 revolution
3	5 May 1941	While largely a continuation of imperial government policies of the past, there is a major break towards modernisation and centralisation of state bureaucracy Helps address needs for reconciliation related to grievances rooted in state-making processes, particularly as it relates to land and identity	Obtaining strong evidence in older violations might be a challenge
4	Mid-19 th century	Helps capture and address (counter)claims and grievances centred on state-making processes and related violence	Challenges to bring forth hard evidence to some (counter)claims Although historically important to current politics, historical events and processes pre-dating this might not be included (especially of the 16 th century wars and population movements)
No.	End date	Pros	Cons
1	2 April 2018	Prime Minister Abiy Ahmed is sworn in and political reforms begin	Institutional reforms have not yet kicked-off, while conflicts and rights violations continue
2	5 February 2019	In line with standard international practice, establishment of the ERC could be taken as an end-date	Full mandate implementation lag by two years, while conflicts and rights violations continue
3	Date when ERC proclamation is revised/ changed	Helps to account for conflicts and violations in the post-2018 period	Likely to expose the ERC to increased political contestation and pressure from current political elite

reconciliation, which are specialised fields that require special knowledge, skill and professional backgrounds.

Commissions in other contexts have paid more premium to knowledge and experience in specific areas – i.e. by including members with solid backgrounds in human rights, law, conflict resolution, conflict management, forensic audit, investigation, psycho-sociology, anthropology, social relations, religion or gender issues.³²

Too many commissioners?

The ERC has 41 commissioners.³³ The experience of other commissions³⁴ shows that membership ranged from as few as one (Zimbabwe) to 27 (Germany, in the case of the commission established following downfall of dictatorship in East Germany and to examine its impact on German unity). While there is no magic formula to determine the number of commissioners, having a large number inevitably presents two sets of inter-related challenges.

The inclusion of politicians has raised concerns about the ERC's independence and impartiality

The first refers to constraint on ease, efficiency and timeliness of decision making. An increase in membership brings an increase in divergences, cutting the chances of creating a 'cohesive corporate entity', thereby negatively affecting strategic decision making. This is especially concerning if one 'works with the end in mind', as difficulty to maintain cohesion will risk creating minority voices in approving final reports.

This likelihood is higher as the ERC has to make decisions by majority vote if it fails to reach consensus, following the terms of Article 7(3 and 4) of its proclamation. This will undermine the creation of an authoritative truth of the past to serve as a basis for healing and reconciliation.

In addition, the large size of the Commission – coupled with commissioners' diverse backgrounds and blurred conception of the ERC's mandates – reduces the likelihood of a cohesive understanding on key issues and concepts. A case in point is the initial contestations among commissioners, where some took their role as identical to that of traditional *shimgelina*.³⁵ Here, the

research's primary lesson is that 'small is more efficient,' while recognising that commissions tend to be larger when their material and temporal mandate is broad.

Gender and regional representation

While the current setup may have aspired to wider societal inclusion, there is still very limited representation of women and youth as well as some regions. The inclusion of more women commissioners would facilitate a safe space for female victims of sexual and other violations to openly tell their truth.

In South Africa, eight of the 17 commissioners were women, which allowed for convening 'women only hearings.'³⁶ In Kenya, aware of feminist critics of such processes, an attempt was made to mainstream gender in the commission's work. Moreover, there was a special gender unit that worked with non-governmental organisations, in addition to women-only audience, teams and statement takers. Gender activists were allowed to testify too.³⁷

In contrast, there is an evident under-representation of women in the ERC, currently standing at a mere five (about 12%). In addition, the absence of a commissioner from Gambella was raised as an issue in one of the ERC's regional visits,³⁸ despite the apparent attempt to be widely representative.

Modality of engagement

The work of commissions entails intensive engagement with a definite deadline for completion, even if this is extendable.³⁹ During this period, commissioners are usually engaged full time and paying commissioners is the norm.⁴⁰ In contrast, ERC commissioners serve part-time and work on a voluntary basis. Moreover, not all commissioners are actively engaged in the ERC's work. This approach is not commensurate with the complex task at hand. Of major concern is the already-busy schedules of most commissioners, including the chair and deputy-chair. Consequently, this approach adversely impacts on execution capacity and commitment of commissioners.⁴¹ This will be exacerbated in the future when public hearings start and commissioners have to travel extensively.

Politicians as commissioners

The inclusion of active and retired politicians, however few, has raised concerns about the ERC's independence

and impartiality. The Commission attempted to ‘minimise the damage’ by including articles in its draft regulation and code of conduct requiring that commissioners not attend cases where they or their family are victims/perpetrators.⁴² This ‘fix’ is inadequate to fully address the foundational issue of concerns over impartiality and independence. A participatory and consultative process to select commissioners would also have ensured better public trust in the independence of the Commission.

Setting up the Commission

Some commissioners interviewed for the research mentioned that they knew about their ‘appointment’ after it was made. And they heard the information not first-hand from the government, but initially from mainstream or social media or their contacts. Most commissioners were not consulted, neither were public consultations conducted in their selection. This starkly contrasts with the experience of similar commissions in other countries.⁴³ Public consultation is especially important considering the need to generate greater support and trust in a commission’s work in midst of highly polarised political transition.⁴⁴

Enhancing the ERC’s legal powers and capabilities

Discovering the truth

A commission’s powers, social acceptance and resources (financial and human) determine the extent of cooperation from victims and perpetrators. Cooperation enhances the likelihood of generation of authoritative truth, which is crucial for reconciliation. Particularly, the legal mandate and powers of a commission need to be strong and clear. The stronger the powers (i.e. subpoena, search and seizure, and witness protection), the greater the possibility of establishing the truth more concretely.⁴⁵

At just 12% of commissioners, women are drastically under-represented in the ERC, as are youth and representatives from some regions

Obviously, limited financial and human resources will erode the success of a commission’s work. In addition to investigating the claims made by victims and witnesses, commissions should be empowered to subpoena pertinent individuals and documents, search and seize documents and provide witness-protection powers. While the ERC appears to be sufficiently empowered, a hair-splitting legalistic debate exists about whether it is bestowed with ‘examination’ powers (assumed to be lower than ‘investigation’), which undermines its work. Since the ERC is yet to start some of its substantive activities, such as statement taking, conducting public hearings and undertaking reconciliation events, it is difficult to assess the extent of support from the police, AGO and other key government institutions and the ERC’s powers vis-a-vis these institutions.

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NUMBER OF
COMMISSIONERS IN THE ERC

Recommending reparations

Reconciliation will not be promoted by focusing only on discovering the truth (and producing big reports) and prosecution of alleged perpetrators. That is why, in contexts of transitional justice, victim-centred reparative justice is promoted, alongside the promotion of forgiveness. Virtually all customary institutions do the same. Reparation is necessary for healing and reconciliation to begin.⁴⁶ Accordingly, the ERC needs to be explicitly empowered to recommend a range of reparative measures.

Various informants stated that the government is wary of the financial implications of compensation, even though the founding proclamation does not have a specific provision either allowing or prohibiting reparative measures. Although concerns about hefty financial repercussions are understandable, reparation is much broader than financial compensation. Reparation could also be symbolic, as historical memorialisation goes further to becoming part of the national healing and reconciliation process by contributing to a new social narrative.

The ERC needs to be explicitly empowered to recommend a range of reparative measures

It will be important to consider different forms of reparative interventions in Ethiopia's case too. Restoration – bringing back to original position – could be attempted for socio-economic violations (e.g. land alienations without proper compensation, marginalisation). Rehabilitation should be considered for physical and mental health issues (e.g. free healthcare, skill training). Financial reparation is also important in violations of civil and political rights and bodily integrity, as are symbolic reparations (e.g. public acknowledgement, national day, monuments). Considering the general poverty in the country, the burden of financial reparations should be kept within the state's capacity.

Incentivising perpetrators' cooperation

Confessions by alleged perpetrators advance reconciliation. Public acknowledgment of victims'

injuries fosters healing. Confessions also help reduce polarised acrimony over the truth and reach an agreeable shared truth about the past. In the current wording of the ERC's proclamation, the Commission has little to offer cooperating perpetrators.

Having the powers to name perpetrators and recommend prosecution or conditional amnesty within the limits of the Ethiopian Constitution will be strategically important to garner perpetrators' cooperation. Moreover, doubts about the independence of a commission will reduce participation, especially from alleged perpetrators. The right balance should be struck between the need for retributive justice and reconciliation, without allowing a culture of impunity.

Ensuring recommendations are implemented

Commissions generally suffer from governments' lack of, or delayed, implementation of their recommendations, due primarily to legal professionals' concerns over evidence, ebbing of political will and very high reparation costs.

Various factors ensure better implementation of recommendations. Granting commissions the power to make legally binding recommendations is one.⁴⁷ Others are empowering national human rights institutions (Liberia),⁴⁸ establishing institutions implementing recommendations (Kenya) or a reparation commission specifically set up to implement recommended reparations to beneficiaries. Commissions can be empowered to release their reports to the legislature and the public (rather than submitting it to the executive). A commission's work can have broader public and civil society organisation (CSO) support, which helps in enhancing implementation of recommendation.⁴⁹

It will be important for the ERC to better synchronise its work with permanent public institutions and CSOs that could carry forward implementing recommendations to ultimately deepen reconciliation. Perhaps it would be also useful to include a recommendation in the final report of the Commission suggesting specific mechanisms for implementing remedial actions.

Defining the ERC's powers vis-à-vis other institutions and transitional justice mechanisms

The ERC continues to operate in a complex transitional political field with multiple stakeholders creating the demand for an integrated approach and smooth working relationship. The executive branch, as the main interlocutor of the stakeholders, is expected to provide strategic guidance on how the different mechanisms could operate more synergistically.

Although the ERC appears to be one of Ethiopia's preferred transitional justice mechanisms, its work has to be integrated with other ongoing processes such as criminal prosecutions, amnesties, and acknowledgement of and apology to past violations. Currently, the ERC's proceedings are not sufficiently linked to other mechanisms.

In addition, a more synergetic relationship and reduced overlaps are crucial with three stakeholders in particular, as a main determinant of the ERC's future mandate implementation. The MoP shares some mandates with the ERC in promoting national consensus, and identifying and resolving root causes of conflicts. The ERC's mandate of identifying root causes of gross human rights violations provides for interfacing with and complementing the work of the EHRC. At the same time, possible overlaps between the two commissions may arise as a product of the ERC's open-ended temporal mandate.

The ERC's current powers to investigate/examine cases and protect witnesses, as well as possible extension of the ERC's powers to recommending conditional amnesty and prosecution, will overlap with that of the AGO. This will emanate mainly from the inherent overlaps and contradictions of the thrust of the two entities, as the violations and issues the ERC examines primarily stem from crimes the AGO is empowered to investigate.

Functioning in a difficult political environment

Commissions are generally described as politically complicated mechanisms.⁵⁰ Their inherent politically complex nature emanates from how they come to exist. An equally decisive complexity also exists in how the commissions would operate.

This is recognised by the African Union Transitional Justice Policy, which stated that the work of such commissions is 'first and foremost a political rather than a technical process'.⁵¹ This illustrates that a commission's setup and work will be influenced by political compromises and considerations.⁵²

Political considerations generally guide decisions on: the choice of commissioners; temporal and material jurisdiction; powers to investigate, seek truth and recommend amnesty to perpetrators; social and political context of the commission; and government commitment to implementing recommendations.

The ERC operates in a difficult political and security environment that severely constrains its efforts

In most cases, the political context under which the new political dispensation came into being determines a commission's entire proceedings. The context could be one of reform within an existing regime (Morocco) or end of (military) dictatorship and start of democracy (South Africa and many Latin American commissions, including those of Argentina, Chile and Peru). It could be entrenchment of democracy and pressure from civil society as well as opposition/political groups (Ghana, Mauritius) or peace agreement that led to ceasefire (Liberia, Sierra Leone and Mozambique).

These contexts signify the start of a new chapter in a country's political history: the new political dispensation is not yet born and the old has not yet withered away. The resulting uncertainty is emblematic of a very polarised political landscape, defined by the terms of the agreement entered between the leaders of the old and the new political ideals. Such uncertainties will affect the legitimacy and impartiality of commissions.

The ERC's case is more complicated than other commissions, primarily as it was not born of an elite pact among major protagonists. It also continues to operate in a difficult political and security environment that severely constrains its efforts. The results of such deficient political context are two-fold.

A political context that derails the ERC from its core task

The absence of a negotiated political agreement among elites is one of the main reasons for the flare-up of deadly conflicts in various parts of the country. When this happens, members of the public, activists and politicians sometimes drag and ‘name and shame’ the ERC into taking action to resolve unfolding crises. This has distracted the Commission from focusing on its main mandate of identifying and contributing to resolving the systemic causes of conflicts.⁵³

Although ideally supposed to consolidate a pact already made by major political actors, the ERC is often called on to create it and be actively engaged in resolving current crises. This makes the ERC unique, given the conventional focus of such commissions on past issues.

Unlike other countries’ commissions, the ERC is called on to broker political agreements and be actively engaged in resolving current crises

However, because the roots of some contemporary communal conflicts are deeply political and found in the disagreement among the higher political elite, any efforts by the ERC to resolve the conflicts are futile.⁵⁴ As some politicians informed commissioners, some of the issues the ERC intends to address are not matters for ‘reconciliation’ (*shimgelina*). Rather the issues are solvable only through political struggle or law enforcement by regional and federal authorities, thereby showing a degree of reluctance to the ERC’s efforts.⁵⁵

Limited political agreement on the means and ends of the ERC

The establishment of the ERC overlooked wider consultations with key political actors, including some of the regional political elite in the incumbent party. Neither were there discussions and negotiations with pertinent opposition nor ruling party officials on key aspects of setup, mandates, powers and functioning of the ERC. This has translated into a lack of political buy-in from key political actors and their constituencies.

The ERC is mainly an expression of the good intentions of the prime minister and his administration. However, it has not yet garnered broad explicit and solid support from some opposition political groups.

Some observers construed the ERC’s major focus on past gross human rights violations as an attempt at retribution against officials of the previous regime.⁵⁶ The inclusion of some prominent opposition political figures emboldened such interpretations of the ERC being perceived as the executive’s weapon. Despite these concerns, the ERC’s regional consultations demonstrated a level of commitment to and support for ERC work from all regional governments and political parties, some stating that the Commission must be judged by what it does.⁵⁷



ERC NEEDS THE POLITICAL
OPPOSITION’S SUPPORT

Conclusion and recommendations

The ERC's establishment symbolises an attempt to 'take the bull by the horns' and start the much-needed reconciliation of Ethiopia's diverse social and political groupings with each other and with the country's complex past. The opportunity offered by the post-2018 transition, however, is losing momentum before substantive reconciliation efforts have begun.

This report set out the major reasons why the ERC has struggled to achieve its core objective of contributing to sustainable peace, justice, national unity and reconciliation. Although reconciling such a complex political community as Ethiopia is a daunting political and bureaucratic undertaking, major technical and political considerations were overlooked during the ERC's establishment. These range from its broad and loosely-defined material mandate and undefined temporal mandate, as well as the number and composition of the commissioners.

The ERC's ability to achieve reconciliation is limited, due, *inter alia*, to the absence of explicit powers to recommend reparations, conditional amnesty, prosecution and ways to ensure implementation of findings.

The political and security situation that gave rise to the ERC was not suitable either. In final analysis, the good intentions of establishing the Commission must be buttressed by deep technical considerations and genuine political dialogue rather than just the urge to pursue a complex reconciliation process.

The opportunity offered by the post-2018 transition is losing momentum before real reconciliation begins

The window of opportunity for Ethiopia to close the centuries-long chapter of historical grievances and gross human rights violations of recent decades is narrowing. A major change of course is mandatory, with due consideration to addressing limitations in its design and strategic outlook.

Working 'against the grain' and bold measures of renewal are better than compromising on many fronts. It would be a great disservice to settle for 'what is possible'

rather than what is desirable in meeting the reconciliation and sustainable peace goals of the ERC's proclamation and public expectations.

A revitalisation of the ERC is needed, by, among others, revisiting its proclamation, providing clear mandates and stronger powers with more details and clear legal language as well as strengthening the Commission's set-up and working modalities. As the need for genuine reconciliation remains high, it is imperative that the Commission is revitalised so that it can meet the promises of the transition. This will primarily hinge on the political will and determination of policymakers beyond the Commission. As such, major changes are urgently required in the following areas:

Specific material and temporal mandates

- The government needs to initiate a political and legal process to revitalise the ERC with a mandate focusing on specified gross human rights violation-related work and identifying root causes of recurring violent conflicts. The ultimate focus would be providing policy options towards reconciliation. This would alleviate the serious limitations of the ERC's currently overburdened and vaguely worded mandate areas – identifying the cause, nature and extent of gross human rights violations; identifying root causes and resolving social and political conflicts, and promoting national consensus and unity.
- The ERC, AGO and HoPR, through wide consultation, have to lead the specification of the material and temporal mandates of the Commission to promote reconciliation.
- The material and temporal mandates, and all aspects of the Commission, need to be defined in clear and detailed legal terms.
- The most important parameters in specifying gross human rights violations mandates include pattern and systematic nature of violations (not isolated cases), underpinning political motive, and severity of civil and political rights violations. Socio-economic and cultural rights violations should not be ignored, nor should sexual and gender-based violence.
- Parameters to identify violent conflicts to fall under the Commission's conflict-related work include recurrence and severity of impacts, implications for broader peace and stability, and regional representation.

- The temporal mandate of the Commission needs to be specified, with clear start and end dates, and the possibility of including cases outside this period on a case-by-case basis.
- One start date and one end date would be ideal for all work of the Commission. The start date should not be too far into the past to avoid the challenges of generating evidence. Relevance to current political dynamics should also influence the start date, which must be strategically selected and made at the highest levels after consultation.

To incentivise perpetrators' participation, the ERC needs powers to name perpetrators and recommend conditional amnesty and prosecutions

- Commissions are essentially empowered to investigate violations of the past and often operate with clear end dates. A future date when a revised or new proclamation is passed could serve as the end date.

Setup and composition of the Commission, its commissioners and the secretariat

- Strengthening the Commission's set-up should be the key priority of HoPR and the prime minister if the goal of reconciliation is to be achieved.
- The government needs to revitalise the ERC so that it becomes leaner and more technically competent in specific areas of expertise required for fulfilling the Commission's reconciliation mandate.
- Different options could be considered for changing the existing set-up of the Commission to redress challenges primarily emanating from its current working modality and composition. As a first option, strengthening the Commission is needed by revising the current proclamation and vetting of existing commissioners, as well as adding new nominations through a public consultative process. This should be done by a representative panel, with the possibility of keeping the majority of the current Commissioners serving as advisory board members. The second option is to re-establish the Commission with a new/revised proclamation that addresses some of the other recommendations of this research (such as specific material and temporal mandate, clear division of labour with other stakeholders, fewer Commissioners, due consideration to knowledge and relevant experience in specific areas of peace, justice and reconciliation in selecting Commissioners and harmonised working relations between the Commission and its secretariat, etc.).
- Wider consultation is essential with victims, civil society, political parties and academia, as is drawing lessons from the experience of other countries in selection of commissioners.
- Technical competency and experience in specific areas of peace, justice and reconciliation should be considered when revisiting the existing set-up



ERC'S WORK NEEDS SPECIFIC
START AND END DATES

of the Commission, as much as the current emphasis on cross-societal representation. Gender representation should also be given greater attention.

- In addition, the current working arrangement of commissioners should be changed so that they serve the ERC on a full-time basis with clear terms and conditions and security of tenure.
- The government should consider setting up a technical advisory group of international and local experts to inform and guide the Commission.
- Lessons could be drawn from recent measures of HoPR to enhance the work of the EHRC, including enhancing its independence and approving full-time commissioners.
- The reporting line between the Commission and its secretariat needs to be revisited considering the different options for optimal mandate implementation. The process of revising the proclamation should clearly codify the relationship between the Commission and Secretariat.
- It is also essential to avert a dual institutional setup and fast-track existing administrative processes (including procurement and recruitment). A strong and technically equipped secretariat is essential to buttress the work of the Commission.

Enhancing the ERC's powers and capabilities

- The Commission should have strong powers to discover the authoritative truth. Its current powers to subpoena, do search and seizure and protect witnesses are a strong basis, however, they need to be supported by human and financial resources and political support. A strong research portfolio is necessarily not only to discover the root causes of recurrent violent conflicts but to provide the context for gross human rights violations.
- For successful reconciliation, the Commission needs powers to incentivise perpetrators to engage and confess. The powers to recommend conditional amnesty within the bounds of the constitution could serve as a carrot, while the power to name perpetrators in the final report and recommend prosecution could be the stick.
- The ERC's work needs to be victim-centred and interventions are needed to help redress and repair the harm suffered. Thus, the ERC should be explicitly

empowered to provide various recommendations on reparation.

- The recommendations of commissions are either not implemented or implementation is significantly delayed. Considering this general trend, the ERC should be empowered to recommend measures to ensure timely and proper implementation.
- The enhanced powers of the Commission should be carved out by capitalising on synergies and reducing overlaps with other institutions, primarily the MoP, AGO and EHRC.
- A high-level federal council, preferably chaired by the prime minister's office, is essential to give strategic direction to the Commission's work. Members could be from HoPR, House of Federation, MoP, AGO, the Boundary and Identity Affairs Commission, regional presidents and EHRC.
- The government also needs to integrate the activities of the ERC with other transitional justice processes, including conditional amnesty granted in 2018, ongoing criminal cases and public acknowledgement and apology.

Redressing implications of wider political agreements

- Strengthening the Commission should go side by side with efforts by the government to facilitate a conducive political environment for reconciliation in the country. These include demonstrating a political commitment to a genuine and inclusive national dialogue that could address reconciliation issues as a way to achieve national consensus.
- Such a platform helps create consensus on plans for a broader reconciliation and transitional justice scheme (e.g. by helping define material and temporal mandate) and make recommendations in a structured, inclusive way.
- The ERC has to reposition itself as a key player in such strategic political conversation to ensure that reconciliation features on the national dialogue agenda.
- Moreover, the Commission should enhance its engagement to earn public trust and support, by proving its independence and adopting consultative processes, including working with key political actors and CSOs.

Notes

- 1 D Yohannes and MK Dessu, National dialogues in the Horn of Africa: Lessons for Ethiopia's political transition, *East Africa Report No. 32*, Institute for Security Studies. June 2020.
- 2 Ethiopian Reconciliation Commission (ERC), Strategic Plan 2020–2022, Final draft, June 2020.
- 3 ERC, Strategic Plan, 5.
- 4 For example, three months in Sierra Leone and Kenya; five months in the case of South Africa according to Hayner, 2011.
- 5 The country cases were Argentina, Colombia, Ghana, Kenya, Liberia, Mauritius, Morocco, Mozambique, Peru, Rwanda, Sierra Leone, South Africa and Zimbabwe.
- 6 D Yohannes and F Gebresenbet, Exploring key issues and debates in reconciliation in Ethiopia and insights from international experiences, Commissioned research conducted by the Institute for Security Studies for the Ethiopian Reconciliation Commission, 2021.
- 7 See Article 5 of the proclamation.
- 8 One on each of the mandate areas (gross human rights violations affairs, conflict resolution, and national consensus and unity), capacity building and public relations.
- 9 These are highlighted in the Attorney-General's Office written response to the draft regulation, and in interviews with some commissioners and other key stakeholders.
- 10 This was highlighted in many interviews where commissioners indicated that they found out their selection from the mainstream or social media.
- 11 This refers to efforts to release of those arrested in relation to demands for formation of Wolayata regional state. Written communication from a member of the ERC Executive Committee (ERC EC 8), April 2021 and phone interview with a member of the ERC Executive Committee (ERC EC 7), Addis Ababa, April 2021.
- 12 Interview with a member of the ERC Executive Committee (ERC EC 7), Addis Ababa, September 2020.
- 13 The draft regulation lists the gross violations as those included in Article 28 of the constitution (i.e. crimes against humanity, including genocide, summary executions, forcible disappearances and torture), inhumane treatment, arbitrary detention, sexual and gender-based violence, massacre and large-scale dislocation, alienation of land, grand economic corruption, violation of socio-economic rights (marginalisation), and gross violation of group rights.
- 14 In addition to the type of violation covered by the draft regulation, some suggested criteria are how the act was committed, number of victims, expansiveness, pattern, planning and government role. In general, systematic nature and extent of impact will be very important.
- 15 This is also a key component of the definition of commissions, as defined by Hayner (2011: 11) are 'set up to investigate a pattern of abuses over a period of time, rather than a specific event'.
- 16 KR Richards and RA Wilson, Truth and reconciliation commissions: Anthropological perspectives, in H Callan (ed) *International Encyclopedia of Anthropology*, Hoboken: Wiley-Blackwell, 2017.
- 17 P Hayner, *Unspeakable truths: Transitional justice and the challenge of truth commissions*, Routledge: New York and London (second edition).
- 18 P Hayner, *Unspeakable truths*.
- 19 Interview with a member of the ERC Executive Committee (ERC EC 7), Addis Ababa, September 2020.
- 20 Interview with various members of the Executive Committee and commissioners, Addis Ababa, June–September 2020.
- 21 Interview with a member of the ERC Executive Committee (ERC EC 7), Addis Ababa, September 2020.
- 22 Ibid.
- 23 Interview with ERC Commissioner (ERC 5), Addis Ababa, September 2020; Interview with members of the ERC Executive Committee (ERC EC 3 and 4), Addis Ababa, June 2020.
- 24 Interview with a member of the ERC Executive Committee (ERC EC 7), Addis Ababa, September 2020.
- 25 LS Graybill, Pursuit of truth and reconciliation in South Africa. *Africa Today*, 45(1) 1998, 103–133.
- 26 P Hayner, *Unspeakable truths*.
- 27 LS Graybill, Pursuit of truth and reconciliation.
- 28 P Hayner, *Unspeakable truths*, 58.
- 29 In Liberia, there was the possibility of considering violations before the start date, be it individually or patterns. C De Ycaza, A Search for Truth: A Critical Analysis of the Liberian Truth and Reconciliation Commission, *Human Rights Review*, 14(3), 2013, 189–212.
- 30 P Hayner, *Unspeakable truths*, 210.
- 31 P Hayner, *Unspeakable truths*.
- 32 See for example the Act establishing Kenya's Truth, Justice and Reconciliation Commission (TJRC).
- 33 Actively participating members are only about 36 out of 41.
- 34 For a succinct comparison see chart 4 in P Hayner (2011: page 268–273).
- 35 Interview with a member of the ERC Executive Committee (ERC EC 2), Addis Ababa, June 2020.
- 36 S Slyomovics, The argument from silence: Morocco's truth commission and women political prisoners, *Journal of Middle East Women's Studies*, 1(3), 2005, 73–95.
- 37 RC Slye, Putting the J in the TRC: Kenya's Truth Justice and Reconciliation Commission, In Mia Swart and Karin van Marle (eds), *The limits of transition: the South African Truth and Reconciliation Commission 20 years on*, Brill: Leiden, 2017, 282–307.
- 38 Interview with a member of the ERC Executive Committee (ERC EC 2), Addis Ababa, June 2020.
- 39 P Hayner, *Unspeakable truths*, 215.
- 40 E González, *Drafting a truth commission mandate: A practical tool*, ICTJ: New York.
- 41 Interview with a member of the ERC Executive Committee (ERC EC 7), Addis Ababa, September 2020.
- 42 Ibid.
- 43 P Hayner, *Unspeakable truths*, 210.
- 44 P Hayner, *Unspeakable truths*, 213.
- 45 See chart 7 in P Hayner, *Unspeakable truths*.
- 46 African Union, Transitional Justice Policy, 12; Richards and Wilson, Truth and reconciliation commissions.
- 47 Very few commissions are given such powers and it is not generally advisable (P Hayner 2011, 193).
- 48 The Liberian TRC recommended 'the establishment of a national palava hut forum under the aegis of the Independent Human Rights Commission is a useful tool for peace building, healing and national reconciliation at both the national and district levels', Final Report of

- the Truth and Reconciliation Commission of Liberia (TRC), Volume I: Findings and Determinations, 76, https://reliefweb.int/sites/reliefweb.int/files/resources/3B6FC3916E4E18C6492575EF00259DB6-Full_Report_1.pdf.
- 49 P Hayner, 2011, 192–194.
- 50 P Hayner, *Unspeakable truths*, 210.
- 51 African Union, *Transitional Justice Policy*, adopted in February 2019, 5.
- 52 *Ibid.*
- 53 Interview with a member of the ERC Executive Committee (ERC EC 6), September 2020, Addis Ababa.
- 54 Interview with ERC Commissioner (ERC 5), Addis Ababa, September 2020.
- 55 Interview with a member of the ERC Executive Committee (ERC EC 3), Addis Ababa, June 2020.
- 56 During the visit to Tigray, it was stressed that the ERC should show its independence in practice, should not be manipulated by the executive and should have a constitutional basis, interview with a member of the ERC Executive Committee (ERC EC 2), Addis Ababa, June 2020, Addis Ababa. This perception appears to have existed within the ERC itself, especially in earlier months of its life, interview with ERC Commissioner (ERC 5), Addis Ababa, September 2020.
- 57 Interview with a member of the ERC Executive Committee (ERC EC 3), Addis Ababa, June 2020.

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