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Remedies for Human Rights Violations: A Reform Proposal for Addressing Victims of Criminal Proceedings in Ethiopia

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REMEDIES FOR HUMAN RIGHTS VIOLATIONS: A
REFORM PROPOSAL FOR ADDRESSING
VICTIMS OF CRIMINAL PROCEEDINGS IN
ETHIOPIA

*Abdi Jibril Ali**

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I. INTRODUCTION

Criminal proceedings are instruments of protecting human rights but are also a locus of human rights violations. For victims of all human rights violations, states have the obligation to provide remedies and reparation, including “restitution, compensation, satisfaction, and guarantees of non-repetition.”¹ These forms of reparation are applicable to victims of criminal proceedings—individuals, who are arrested, accused, prosecuted, convicted and/or sentenced for committing a crime in a proceeding that does not comply with applicable human rights.

Ethiopia is a state party to several human rights treaties that guarantee rights of arrested/accused persons. However, arrested/accused persons, particularly those belonging to opposition political parties, have been victims of human rights violations occurring during criminal proceedings; but they do not obtain remedy. In April 2018, political changes occurred in the country, providing an opportunity to reform the existing legal and institutional frameworks to provide remedy and reparation for the victims. In this paper, I first identify human rights most affected during criminal proceedings. I then briefly describe forms of reparation in international human rights law and examine their recognition in Ethiopian laws,

¹ * Head, Addis Ababa University School of Law.

DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 16 (3d ed. 2015).

identifying challenges faced in the implementation of the law, mainly due to the culture of impunity in the country. Finally, I suggest a reform proposal.

II. HUMAN RIGHTS IN CRIMINAL PROCEEDINGS

Criminal proceedings directly or indirectly affect all human rights. The most affected rights relate to physical integrity, dignity, and property of individuals. These rights include the right to life, the right to liberty and security, the prohibition of torture, and the right to privacy. In exceptionally serious cases, a criminal punishment may result in the deprivation of the right to life. In most cases, criminal punishments deprive the convicts of their rights to liberty and/or property. Other rights can be affected due to loss of life, liberty or property. Human rights, including rights most affected during criminal proceedings, are guaranteed in international human rights treaties ratified by Ethiopia and recognized in the Constitution of the Federal Democratic Republic of Ethiopia.²

The right to liberty is most affected by the processes and consequences of criminal proceedings. Arbitrary arrest or detention is a violation of the right to liberty. The Constitution and international human rights treaties contain provisions that have the purpose of providing additional protection to individuals' right to liberty, including speedy trial, habeas corpus, and bail.³ The Constitution contains detailed provisions on the right to a fair trial, including the rights to be presumed innocent, be represented by a legal counsel, be informed about the charge, present one's defense and appeal against one's conviction and sentence.⁴ The compliance with these provisions provides protection to the life, liberty and property of accused persons. The Constitution bans torture.⁵ The right to protection against torture is absolute and non-derogable, meaning the right cannot be limited or suspended during public emergencies.⁶ However, a violation of this right may occur during criminal proceedings. The right to privacy may be violated when the investigation involves search and seizure.

Apart from exceptional cases, criminal proceedings do not affect the right to life, the supreme right. "[T]he effective protection of [the right to life] is the prerequisite for the enjoyment of all other human rights."⁷ The

² See CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION NO. 1/1995 Aug. 21, 1995, ch. 3, art. 9(4), ch. 3, art. 13(2).

³ *Id.* ch. 3, arts. 19(4), 19(6), 20(1).

⁴ *Id.* ch. 3, art. 20(2-6).

⁵ See *Id.* ch. 3, art. 18(1) ("Everyone has the right to protection against cruel, inhuman or degrading treatment or punishment.").

⁶ *Id.* ch. 11, art. 93(4)(c).

⁷ Human Rights Committee General Comment No. 36 on Article 6: right to life, U.N. Doc. CCPR/C/GC/36, ¶ 2 (Sept. 3, 2019).

right to life is non-derogable, but is not absolute in Ethiopia and other states retaining capital punishment.⁸ However, the execution of death penalty imposed in violation of the right to a fair trial is a violation of the right to life.⁹

III. REMEDIES AND REPARATION FOR HUMAN RIGHTS VIOLATIONS

The recognition of human rights in national constitutions and international human rights treaties entails state obligation to provide remedy in cases of violations. The United Nations General Assembly provided directions to the states on remedies and reparation in its resolutions, including the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles)¹⁰ and Responsibility of States for Internationally Wrongful Acts.¹¹ The Basic Principles identify forms of remedies and reparation: “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”¹² The same forms of remedies and reparation have also been identified in the practice of the African Commission on Human and Peoples’ Rights (African Commission).¹³ The African Court on Human and Peoples’ Rights (African Court) includes the cost of litigation in its reparation orders.¹⁴ I briefly discuss these forms of remedies and reparation below.

A. Restitution

Restitution refers to the re-establishment of “the situation which existed before the wrongful act was committed.”¹⁵ Restitution restores the victims to the original situations that existed before the violation and includes

⁸ *Id.* at ¶¶ 2, 10; CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA PROCLAMATION 1/1995 Aug. 21, 1995, ch. 3, art. 15.

⁹ Errol Johnson v. Jamaica, Human Rights Committee, Commc’ns No. 588/1994, ¶ 8.9, U.N. Doc. CCPR/C/56/D/588/1994 (1996).

¹⁰ G.A. Res. 60/147 (Dec. 16, 2005).

¹¹ G.A. Res. 56/83 (Dec. 12, 2001).

¹² G.A. Res. 60/147, *supra* note 10, ¶ 18.

¹³ African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], *General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, ¶ 10 (2017) [hereinafter General Comment 4].

¹⁴ Beneficiaries of Late Norbert Zongo v. Burkina Faso, No. 013/2011, Judgment on Reparations, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 87, 94 (June 5, 2015), <https://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Application%20No%20013-2011%20-%20Beneficiaries%20of%20late%20Norbert%20%20Zongo-Ruling%20on%20Reparation.PDF>.

¹⁵ G.A. Res. 56/83, *supra* note 11, at 8.

“restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”¹⁶ In criminal proceedings, restitution may include the reopening of a defense case.¹⁷ Restitution is the preferred form of reparation for violations of human rights.¹⁸ However, it is not always possible to restore the situation that would have existed but for the violation. An example is loss of life. In such case, restitution is not a possible form of reparation because it is impossible to restore human life. If restitution is not possible or if it does not constitute full reparation, the victims should be provided with other forms of reparation including compensation.

B. Compensation

Compensation is a form of reparation for the injury caused by human rights violation and provided for any economically assessable damage such as “physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; [and] costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”¹⁹

Moral or non-material damage includes “pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium.”²⁰ Moral damages are determined based on equity because it is not easy to quantify physical, psychological and emotional sufferings. In a case against Ethiopia, for example, the African Commission underlined that “monetary compensation for non-material damage is at large and is determined as a matter of impression, taking into account all the relevant circumstances of the case as opposed to a mathematical formula.”²¹ Compensation covers reimbursement of expenses incurred to obtain redress. States should provide adequate compensation “for legal aid or specialised

¹⁶ G.A. Res. 60/147, *supra* note 10, ¶ 19.

¹⁷ William v. Tanzania, No. 016/2016, Judgment, Afr. Ct. H.P.R., ¶ 105 (Sept. 21, 2018), <https://en.african-court.org/images/Cases/Judgment/016%20-%202016%20-%20Judgement%20in%20the%20Matter%20of%20Diocles%20WILLIAM%20Versus%20United%20Republic%20of%20Tanzania%20Delivered%20on%2021%20September%202018%20-%20Optimized.pdf>.

¹⁸ SHELTON, *supra* note 1, at 298.

¹⁹ G.A. Res. 60/147, *supra* note 10, ¶ 20.

²⁰ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int’l L. Comm’n 102, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

²¹ Equality Now and Ethiopian Women Lawyers Association v. Ethiopia, Communication 341/2007, Afr. Comm’n H.P.R., ¶ 158 (2015).

assistance, and other costs associated with bringing a claim for redress.”²² This includes the reimbursement of lawyers’ fees.²³

C. Satisfaction

Satisfaction is a form of reparation usually ordered when the injury caused to the victims “cannot be made good by restitution or compensation” and consists of “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”²⁴ Investigation and prosecution are forms of satisfaction.²⁵ Satisfaction also includes the judgment declaring violations of rights and the publication of such judgment by respondent states.

D. Guarantees of non-repetition

Guarantees of non-repetition is a form of reparation requiring cessation of existing violations and putting in place mechanisms of preventing future violations.²⁶ A state responsible for human rights violations has an obligation to cease the violation and “to offer appropriate assurances and guarantees of non-repetition.”²⁷ In cases of torture, for example, states need to take measures such as establishment of independent mechanisms of investigation, training public officials, strengthening judicial independence, reforming laws and ensuring the fairness and impartiality of judicial proceedings.²⁸ When a specific law contravenes human rights, states should amend or repeal that law to guarantee non-repetition.

IV. REMEDIES FOR VIOLATIONS OCCURRING IN CRIMINAL PROCEEDINGS

Violations of human rights entail criminal and/or civil liability under ordinary civil and criminal laws of Ethiopia. In the following subsections, I briefly explore criminal and civil remedies and the challenges faced in the practical application of the remedies.

²² General Comment 4, *supra* note 13, ¶ 39.

²³ Beneficiaries of Late Norbert Zongo v. Burkina Faso, No. 013/2011, Judgment on Reparations, Afr. Ct. H.P.R., ¶ 87 (June 5, 2015), <https://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Application%20No%2013-2011%20-%20Beneficiaries%20of%20late%20Norbert%20Zongo-Ruling%20on%20Reparation.PDF>.

²⁴ G.A. Res. 56/83, *supra* note 11, at 9.

²⁵ Shumba v. Zimbabwe, Communication 288/2004, Afr. Comm’n H.P.R., ¶ 194 (2012), https://www.achpr.org/public/Document/file/English/288_04_gabriel_shumba_v_zimbabwe.pdf.

²⁶ See SHELTON, *supra* note 1, 397–98.

²⁷ G.A. Res. 56/83, *supra* note 11, at 7.

²⁸ General Comment 4, *supra* note 13, ¶ 46.

E. Violations of human rights as a crime

The Criminal Code of the Federal Democratic Republic of Ethiopia (Criminal Code) criminalizes acts violating human rights, including rights violated during criminal proceedings.²⁹ The deprivation of liberty is a crime.³⁰ It is a crime for police persons (and other public servants) in charge of the custody of a person to commit or permit the commission of torture, cruel, inhuman or degrading treatment or punishment.³¹ The violation of the right to privacy of a person by searching and seizing the person's property is a crime punishable with rigorous imprisonment not exceeding seven years.³² It is the obligation of the state, particularly the Attorney General, to prosecute public servants, who commit crimes and violate human rights.³³

The Criminal Code states that the victims of crime are entitled to compensation.³⁴ Article 101 of the Criminal Code requires the trial court to order the criminal "to make good the damage or to make restitution or to pay damages by way of compensation."³⁵ This provision applies to all victims, including victims of criminal proceedings, where the perpetrators of the crime are public servants such as police officers. The Criminal Code indicates the procedures for claiming reparations. It stipulates that victims of crimes can join their civil claim for compensation with a criminal suit.³⁶ When the victim of crime claims compensation, she or he specifies the amount of the claim and provides additional evidence, including witnesses, without paying court fees.³⁷ The acquittal of the accused does not extinguish the claim for compensation—rather, it changes the nature of the suit, from a criminal suit to a civil suit.³⁸

F. Human rights violations as a tort

A breach of law is a tort under the Civil Code of Ethiopia.³⁹ Human rights are guaranteed in international treaties, which are part of the law of

²⁹ THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA NO. 414/2004 [CRIMINAL CODE] arts. 422–424 (Eth.).

³⁰ CRIMINAL CODE art. 423 (Eth.).

³¹ CRIMINAL CODE art. 424(Eth.).

³² CRIMINAL CODE art. 422(Eth.).

³³ FEDERAL ATTORNEY GENERAL ESTABLISHMENT PROCLAMATION No. 943/2016 art. 6 (Eth.).

³⁴ CRIMINAL CODE art. 101(Eth.).

³⁵ *Id.*

³⁶ *Id.*

³⁷ THE CRIMINAL PROCEDURE CODE PROCLAMATION 1961 [CRIMINAL PROCEDURE CODE] art. 154(1) (Eth.).

³⁸ CRIMINAL PROCEDURE CODE art. 158 (Eth.).

³⁹ CIVIL CODE PROCLAMATION NO. 165/1960 [CIVIL CODE] art. 2035 (Eth.).

Ethiopia, and in domestic laws including in the Constitution.⁴⁰ Thus, a violation of human rights is a breach of law, constituting tort under the Civil Code. For example, a police officer's failure to bring an arrested person before a court of law within 48 hours of the time of arrest is a breach of Article 19(3) of the Constitution, constituting a constitutional tort.⁴¹ In particular, the Civil Code establishes that physical assault,⁴² deprivation of liberty,⁴³ trespass⁴⁴ and assault on property⁴⁵ are torts. When the torts are committed during criminal proceedings, "the victim may claim compensation from the State" as the offenders are usually public servants.⁴⁶

The Civil Code contains all forms of reparation recognized in international law and applied by human rights courts and quasi-judicial organs. A form of reparation is compensation for material damage.⁴⁷ The Civil Code also lays down rules applicable to the determination of compensation for moral injury.⁴⁸ Another form of reparation is restitution, which is provided in the Civil Code as a remedy for the breach of the right to property.⁴⁹ The courts have the power to make injunctions and other orders, which can be considered satisfaction or guarantees of non-repetition.⁵⁰

G. Practical challenges

The Ethiopian laws and procedures lay down rules applicable to remedies and reparation of human rights violations, including different forms of reparation such as restitution, compensation, injunctions and other orders. However, the forms of reparation provided by the law are hardly implemented in practice. The main barrier is the culture of impunity. It appears that the old Ethiopian adage, "the king can never be sued," extends to every official whose power concerns the arrest, detention, custody,

⁴⁰ Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995, Aug. 21, 1995, art. 9(4).

⁴¹ Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995, Aug. 21, 1995, art. 19(3).

⁴² CIVIL CODE art. 2038 (Eth.).

⁴³ CIVIL CODE art. 2040 (Eth.).

⁴⁴ CIVIL CODE art. 2053 (Eth.).

⁴⁵ CIVIL CODE art. 2054 (Eth.).

⁴⁶ CIVIL CODE art. 2126 (2) (Eth.).

⁴⁷ CIVIL CODE arts. 2090-2104 (Eth.).

⁴⁸ CIVIL CODE arts. 2105-2117 (Eth.).

⁴⁹ CIVIL CODE art. 2126(2) (Eth.).

⁵⁰ CIVIL CODE arts. 2120-2122 (Eth.).

investigation or trial of a criminal suspect.⁵¹ It is a matter of common knowledge among Ethiopians that individuals released from prison or detention prefer to enjoy their new liberty rather than suing a state official.⁵² Judges do not allow joinder of criminal cases with civil suits for reparation.⁵³ The Prosecution does not provide remedies for victims of criminal proceedings. In sum, victims have no recourse even when the fault of state or public servants is clear; for example, in the cases of wrongful convictions, the practice is to pardon wrongly convicted individuals instead of nullifying the conviction and compensating the victims.⁵⁴

As is the case in normal periods, victims of criminal proceedings do not obtain remedy and reparation during transitional periods. Following the transition in 1991, when the Ethiopian Peoples' Revolutionary Democratic Fronts (EPRDF) overthrew the communist military regime (*Derg*), the Office of Special Prosecutor was established to investigate and prosecute crimes committed by abusing one's power.⁵⁵ The Court identified close to 13,000 victims, but none were compensated as the prosecution was not accompanied by any reparation scheme.⁵⁶ It seems that international forums are the only recourse for victims. For example, in a case against Ethiopia involving the prosecution of the *Derg* officials, the African Commission found violations of the right to be presumed innocent and the right to speedy trial of the accused persons and ordered Ethiopia to pay compensation.⁵⁷

The 2018 reform, which includes the transformation of the EPRDF into the Prosperity Party, established a reconciliation commission.⁵⁸ One of the tasks of the Commission is to investigate causes of human rights violations in Ethiopia, but it lacks the power to identify victims and determine reparation for their injury. A part of the 2018 reform is a law that grants amnesty to political crimes, but expressly excludes restitution of property

⁵¹ Discussions of Working Group on Criminal Justice, Legal and Justice Affairs Advisory Council, Attorney General of Ethiopia at the meeting held on 4 January 2020, Momona Hotel, Addis Ababa (notes on file with the author).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Interview with Zeleke Delalo Beriso, Head of Pardon Board Office, Attorney General of Ethiopia, in Addis Ababa, (Dec. 25, 2019) (notes on file with the author).

⁵⁵ ETHIOPIA: PROCLAMATION ESTABLISHING THE OFFICE OF THE SPECIAL PROSECUTOR PROCLAMATION No. 22/1992 art. 6 (Eth.).

⁵⁶ MARSHET TADESSE TESSEMA, PROSECUTION OF POLITICIDE IN ETHIOPIA: THE RED TERROR TRIALS 175-76 (Asser Press 2018).

⁵⁷ Gabre-Selassie *ex rel.* Former Dergue Officials v. Ethiopia, Communication 301/05, Judgement, 56 (African Commission, Oct. 12, 2013).

⁵⁸ RECONCILIATION COMMISSION ESTABLISHMENT PROCLAMATION No. 1102/2018 (Eth.).

even if such property was confiscated in relation to crimes affected by the Amnesty Law.⁵⁹

V. A REFORM PROPOSAL

A range of reforms can be proposed to provide remedies and reparation for victims of criminal proceedings. The reform agenda can be achieved by taking legislative, institutional, financial, and educational measures. As noted above, Ethiopia has the legislative framework for claiming remedies and reparations, but the implementation of the law is lacking. Thus, a new law should lay down guidelines applicable to remedies and reparations for victims. The new law may establish institutions responsible for holding public servants accountable and supporting victims of human rights violations. The new law may create an environment conducive for the establishment and operation of non-governmental organizations, which support victims' effort to claim reparations.

The reform proposal should include institutional measures. An ideal institutional reform is the establishment of an independent public institution with the power to enforce the new law on reparation for victims, including the power to prosecute public servants and the mandate to claim compensation on behalf of the victims. However, the establishment of new institutions is burdensome in terms of human, financial and material resources. A more pragmatic approach is to consider assigning additional responsibility to existing institutions. For example, a department responsible for the prosecution of crimes committed during the criminal proceeding can be established within the Attorney General and tasked with the additional responsibility of claiming reparation on behalf of the victims. Another example is the assignment of additional responsibilities to national human rights institutions, the Ethiopian Institution of the Ombudsman and the Ethiopian Human Rights Commission, to investigate and determine reparation for the victims.

The adoption of financial measures is an essential part of the reform. The establishment of new institutions or the assignment of additional tasks to the existing institution would not be successful without adequate financial resources to employ necessary staff and acquire office spaces, equipment, and other materials. An annual budget can be allocated from the state coffer to provide reparation for the victims. Moreover, a fund can also be established to support the work of non-governmental organizations, which support victims in obtaining reparation. The sources of such a fund can be

⁵⁹ AMNESTY PROCLAMATION NO. 1096/2018 (Eth.).

voluntary contributions and donations from individuals, private organizations, and international donors.

Educational measures should be part of the reform. The culture of impunity in the country contributes to the violation of human rights in criminal proceedings and the lack of reparation for the victims. Educational measures aimed at creating awareness and changing the attitudes of the public are instrumental in eradicating the culture of impunity, fostering an environment favorable to the enjoyment of human rights, and creating a generation of accountable public servants. The Ethiopian Human Rights Commission should be the main institution implementing the educational measures in collaboration with other state organs and non-governmental organizations. It is not necessary to establish another institution since the Commission has the mandate to promote human rights.⁶⁰ In sum, it is necessary to prepare a reform package containing legislative, institutional, financial, and educational measures addressing victims of criminal proceedings.

⁶⁰ HUMAN RIGHTS COMMISSION ESTABLISHMENT PROCLAMATION NO. 210/2000 (Eth.).