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COMPENSATORY REMEDIES FOR BREACH OF THE RIGHT TO
PHYSICAL LIBERTY IN ETHIOPIA: AN APPRAISAL OF THE
LEGAL AND INSTITUTIONAL FRAMEWORK

BY
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A THESIS SUBMITTED TO THE SCHOOL OF GRADUATE STUDIES OF ADDIS ABABA UNIVERSITY SCHOOL OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTERS OF LAW (LL.M) IN HUMAN RIGHTS LAW

MAY 2014

DECLARATION

I, Teferi Firissa Shula, hereby declare that this thesis is my own original work and has never been presented in any other institution. I also declare that where sources are used, they are duly acknowledged.

With Regards!

Signature: _____

Date: _____

I, Abera Degefa, have read this thesis and approved it for examination.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACT	Australian Capital Territory
ACtHPR	African Court of Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCI	Council of Constitutional Inquiry
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRC	Ethiopian Human Rights Commission
FDRE	Federal Democratic Republic of Ethiopia
HoF	House of Federation
HPR	House of Peoples' Representatives
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NHRIs	National Human Rights Institutions
UDHR	Universal Declaration of Human Rights
UHRC	Ugandan Human Rights Commission
UK	United Kingdom
UN	United Nations
US/USA	United States/United States of America
VCLT	Vienna Convention on the Law of Treaties
UPR	Universal Periodic Review

ABSTRACT

The FDRE Constitution and the Constitutions of National Regional States in Ethiopia guarantee the fundamental rights and freedoms of individuals including the right to physical liberty. Besides, Ethiopia has so far ratified a number of international human rights treaties that enshrine a similar guarantee. These primary constitutional or treaty-based rights mostly serve as a check on the government in the exercise of power. In so doing, they foster protection against violations by the state agents. But human beings and the institutions run by them are not error-proof. As a result, it is inevitable for breach of the right to physical liberty, particularly of arbitrary arrest or detention, and wrongful conviction to occur in connection with the criminal justice system. This makes it necessary to have an avenue for a legal remedy by suit or action at law whenever that right is infringed. It is equally necessary have strong institutions capable of awarding remedy (compensation) when demanded by victims. However, the situation in the current Ethiopian legal system does not offer much prospect. This study thus assesses the existing right-remedy gap in the domestic law of Ethiopia as well as the domestic application of the relevant provisions of the ICCPR with respect to particular breaches of the right to liberty, i.e., arbitrary arrest or detention, and wrongful conviction. Accordingly, the study demonstrates that the absence and/or inadequacy of remedies provision in the domestic laws of Ethiopia, the jurisdictional dilemma between the regular courts and the HoF coupled with the requirement of publication in the Negarit Gazeta of ratified human rights treaties overshadow the prospect of success in pursuing a compensatory remedy for breach of the right to physical liberty by the victim, and thus leaves a lot to be desired.

Key words: Remedy, compensation, physical liberty, arbitrary, detention, arrest, wrongful conviction, human rights, constitution.

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CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

In the aftermath of the Second World War, the issue of human rights had gained prominence. The War created an opportunity for the international community to express sorrows about the atrocities that had claimed the lives of millions of innocent peoples. Expression of regret about what had happened was, however, not enough. Being well aware of this, the international community placed much more emphasis on establishing a world free of similar scourge of war. This, amongst others, prompted the international community (particularly the victors) to devise a way of preventing such appalling events in the future. The United Nations Charter¹ (hereinafter referred to as the UN Charter) thus marked a crucial step toward the recognition of dignity worth human. The purposes of the UN included, in Article 1(3) of the UN Charter, the promotion and encouragement of human rights and fundamental freedoms. Under Articles 55 and 56, Member States are committed to ‘joint and separate action’ to create ‘conditions of stability and well-being’ across the world, including the promotion of ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’.

The Universal Declaration of Human Rights (hereinafter referred to as the UDHR) (1948)² is the first comprehensive international human rights instrument that enshrines plethora of rights. Subsequently, the twin international covenants, the International Covenant on Civil and Political Rights (hereinafter the ICCPR)³ and the International Covenant on Economic, Social and Cultural Rights (hereinafter the ICESCR)⁴, were adopted in 1966 and came into force in 1976. These human rights instruments recognize rights of individuals and impose obligations on

¹ Charter of the United Nations, 1 UNTS XVI, 24 October 1945.

² Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly Resolution 21 7 A (111) of 10 December 1948.

³ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXZ) of 16 December 1966, Entry into force: 23 March 1976.

⁴ International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966, Entry into force: 3 January 1976.

ratifying States. By ratifying international human rights treaties, States promise to implement them in their respective domestic jurisdictions.

As far as possible, each State party to a human rights treaty is expected to safeguard the treaty-based primary rights of individuals against violations. However, human actions and human institutions are not error-proof. Because no human being and/or human institution can be perfect, violation of human rights is inevitable. This is particularly true in the criminal justice system. In the course of crime investigations, there is the likelihood that innocent persons may be deprived of their right to physical liberty. Arbitrary arrest or detention and wrongful convictions are the most common deprivation of physical liberty in the criminal justice system. Serious as the problem is, it calls for the legislative and other measures to be taken so as to guarantee the right to compensation for victims of violation of this fundamental right. With a view to counterbalance such human ills, some human rights instruments contain a remedial provision as a secondary right emanating from the violation of the treaty-based primary rights. Indeed, it is generally true that where there is a right, there is a remedy. The mere existence of a right is meaningless without the ensuing remedy in the event of violation of the same right. The right to a remedy in case of violation of human rights thus forms part of customary rule of international law.

So far, Ethiopia has acceded to/ratified a significant number of international human rights treaties. Of the bulk of these treaties, the most important instrument for the purpose of this research is the International Covenant on Civil and Political Rights (the ICCPR).⁵ Ethiopia acceded to the ICCPR on 11 June 1993 without any reservation.⁶ The ICCPR purports not only to safeguard the treaty-based primary right to physical liberty the protection of which States have undertaken to ensure at home, but also provides individuals with the secondary right to compensation in the event of breach of their primary rights as a result of States' failure to discharge their obligations to respect and protect the Covenant rights.

As of 11 June, 1993, the Covenant is binding on Ethiopia and any violation of the rights enshrined in the Covenant would necessarily give rise to breach of an international obligation to which the country is obliged to account.⁷ A year after acceding to the ICCPR, Ethiopia has

⁵ Supra note 3.

⁶ The ratification history of the ICCPR is available at: <http://www.treaties.un.org/.../viewdetails.aspx?...>

⁷ It must be noted that Ethiopia has not ratified the First Optional Protocol to the ICCPR which provides for individual complaint procedure. Hence, State Reporting is the major monitoring mechanism of compliance.

managed to adopt a new Constitution (the Federal Democratic Republic of Ethiopian Constitution, hereinafter the FDRE Constitution), which is the first of its kind in the country's constitutional history in providing for a comprehensive catalogue of human rights.⁸ Having come into existence after ratification of the ICCPR, the FDRE Constitution has fairly fetched its normative content from the Covenant and other international instruments (both binding and non-binding).⁹ Generally, the human rights laws of Ethiopia thus consist of ratified international human rights instruments, the FDRE Constitution, the Constitutions of the nine National Regional States and national and regional laws that are passed by national and regional legislatures.¹⁰

These laws protect individuals against violations of their human rights. Of the fundamental rights and freedoms that have been entrenched in the above constitutions and ratified international human rights instruments is the right to physical liberty. With regard to violation of this right, the ICCPR moves one more step forward and aims to specifically regulate the remedy State parties are bound to grant. In particular, it expressly provides for an enforceable right to compensation for breach of the right to liberty in Articles 9(5) and 14(6) for unlawful arrest or detention, and wrongful convictions respectively. Because Ethiopia has acceded to the Covenant, it now forms an integral part of the law of the land by virtue of Article 9(4) of the Constitution. Unfortunately, however, the FDRE Constitution and the Constitutions of the Regional States do not contain provisions akin to the above two provisions of the Covenant. Even worse, Ethiopia has not enacted domestic legislation for the implementation of human rights including the right to compensation in case of breaches of the *right to liberty*. The Law of Extra-contractual liabilities (Title XIII of the 1960 Civil Code of Ethiopia) which has been in force for more than half-a-century does not adequately address this matter.

⁸ The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 1st Year, No.1, 21st August, 1995(hereinafter cited as the FDRE Constitution or the Constitution).

⁹ Provisions of international human rights instruments such as the Universal Declaration of Human Rights (the UDHR), the ICCPR, the International Covenant of Economic, Social and Cultural Rights (the ICESCR), etc have found their way into Chapter 3 of the FDRE Constitution.

¹⁰ Getachew Assefa, The Protection of Fundamental Rights and Freedoms in Ethiopian Federalism, in Proceedings of The First National Conference on Federalism, Conflict and Peace Building, 2003 [hereinafter Assefa], P.254. See also, the FDRE Constitution, Article 9(4) and Chapter 3, The Constitutions of the National Regional States in constituting the Ethiopian federalism.

Generally, the Ethiopian human rights law as it currently stands leaves some confusion in the area of compensation for victims of breach of human rights in general and the right to physical liberty in particular. It may be that in spite of a sometimes apparent breach of the right to physical liberty, it is uncommon to see human rights litigation in Ethiopia. Victims who are deprived of their physical liberty are not seen seeking compensation before domestic courts. This is particularly shocking when seen from the vantage point of the alternative forums of international human rights litigation. As of the time of writing this thesis, the only international human rights institution which is competent to consider individual complaints against Ethiopia is the African Commission on Human and Peoples' Rights (hereinafter the African Commission). Though something is better than nothing, this in itself does not as such merit blessing. The obvious reason is that the recommendations of the Commission are not of themselves legally binding on the States concerned.¹¹ In effect, the domestic forum becomes the best, if not the only; place where compensatory remedy for breach of the right under consideration can be hoped for. This makes it so crucial to conduct a research and investigate into the legal and institutional frameworks of compensatory remedies and shed some light on the uncertainty that has circumscribed it. In so doing, the research also endeavors to find a way for compensatory remedies that victims of breach of the right to physical liberty may pursue.

1.2 Literature Review

The writer has made all possible efforts to find domestic literatures on the subject matter of the study, but to no avail. Yet there are a few works that have only indirect bearing on the matter. These sources generally address the human rights guarantees of the FDRE Constitution, the role of the judiciary in the enforcement of human rights guarantees of the FDRE Constitution, the domestic application of ratified human rights treaties and their place in the Ethiopian legal system. The literatures do not consider the legal and institutional frameworks on a particular right. They rather focus on the enforcement of constitutional and/or treaty based rights in general. None of them specifically touch upon a matter of 'compensatory remedy' for breach of the right to physical liberty.

¹¹ While the recommendations of the African Commission are not automatically binding on the states concerned, it may become binding on them if a final recommendation of the Commission is included in the Commission's Annual Activity Report.

This study, on the other hand, focuses on breach of a particular right: the right to physical liberty, and aims to assess if the right to compensation is well founded given the existing Ethiopian laws and if the institutional framework set in place is as strong as to grant the remedy when sought. The study thus seeks to bridge the literature gap on the above specific right by drawing a lesson from foreign literatures. In so doing, the highlight of the scanty domestic literatures having indirect bearings on the issue in hand has been presented in this section while the discussion of foreign literatures is moved forward and addressed in Chapter 2.

To begin with, the right to physical liberty forms part of human rights recognized in the FDRE Constitution and other human rights treaties ratified by Ethiopia. Discussing one of the inherent nature of human rights, Tsegaye Regassa addresses that human rights impose limits on the exercise of power by governments, which he calls, they ‘discipline power’.¹² Even so, he argues that the limitations human rights exert on the government in the exercise of public power cannot be felt practically unless it is coupled with the establishment of a strong judiciary.

Similar to Tsegaye, Assefa Fiseha asserts that it is the judiciary that would be trusted to “ensure that the political branches operate within the limits provided by the law and when violation occurs, the courts provide remedies to the victim.”¹³ When the political branches (the legislative and the executive) fail to comply with their obligations therein, “right holders’ hope ultimately rest on the role played by the judiciary”.¹⁴ According to him, the question still remains if the Ethiopian courts are duly committed to respecting the boundaries of their role so that human rights effectively ‘discipline power’.

Other scholars such as Getachew Assefa¹⁵ and Ibrahim Idris¹⁶ particularly address the protection of fundamental rights and the controversies relating to the place of ratified human rights treaties in the FDRE Constitution. In particular, they deal with the requirement of publication in the *Negarit Gazeta* of ratified human rights treaties as a precondition for judicial application of the

¹² Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, *Mizan Law Review*, Vol.3 No.2, September 2009, [hereinafter Regassa], P.293.

¹³ Assefa Fiseha, *Some Reflections on the Role of the Judiciary in Ethiopia*, *Ethiopian Bar Review*, Vol. 3 No.2, December 2009,[hereinafter Fiseha], P.107.

¹⁴ *Id.*, P.123.

¹⁵ Assefa, *supra* note 10.

¹⁶ Ibrahim Idris, *The Place of International Human Rights Conventions in the 1994 FDRE Constitution*, *JEL*, Vol.20. 2000 [hereinafter Idris].

same. Further, Sisay Alemahu¹⁷ ascertains the justiciability of human rights in current Ethiopian context with all the existing limitations when it comes to judicial practice in the enforcement the rights.

1.3 Statement of the problem

Many modern countries of the world have devoted a significant part of their constitutions to the rights, norms and principles of international human rights law. The FDRE Constitution is a good example of such constitutions. One of the plethoras of the human rights that have been accorded a constitutional guarantee is the right to liberty. To this end, Article 17 of the Constitution strictly prohibits any form of deprivation of liberty except that which is to be carried out in accordance with duly established procedure. The same provision, in sub-article 2, affords an absolute prohibition against arbitrary arrest and unlawful detention. Modeled exactly on the Federal Constitution, the State Constitutions also extend similar protection to the above mentioned right. Sadly, however, both Constitutions are silent on the right to compensation in the event of breach of the right to liberty it guarantees. They do not contain a provision akin to Articles 9(5) and 14(6) of the ICCPR which respectively provide for the right to compensation for victims of unlawful arrest or detention, and wrongful conviction.

The law of extra-contractual liabilities which governs the relational duty mainly of private individuals does not also afford compensatory remedies to victims of breach of the right to liberty to the extent entailed by the right breached. Given the apparent gap in the above laws on the matter in issue, one may choose to look for a solution in ratified human rights treaties that constitute the source of Ethiopian human rights law. At the forefront come the ICCPR. As mentioned above, it explicitly guarantees the right to compensation for breach of the right to liberty. If so, the next question would be whether or not this Covenant right is invocable by the victims and capable of application by Ethiopian courts.

So, in the course of this study, the writer seeks to look at the following problems: (1) the existing gaps in the laws on compensatory remedies for breach of the right to physical liberty and the institutional pitfalls; (2) the problems in the requirement of publication of ratified human

¹⁷ Sisay Alemahu Yeshanew, The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia, Electronic copy available at: <http://ssrn.com/abstract=1530825> [hereinafter Yeshanew].

rights treaties for the domestic judicial application of the right to compensation in the ICCPR; and (3) the jurisdictional issues in the domestic application of ratified treaties in the current Ethiopian dual court system on the face of the laws enacted to regulate same.

1.4 Research Questions

Based on the problems stated above, the following are the major questions this study attempts to examine:

1. Do Ethiopian laws guarantee the right to compensation for victims of arbitrary arrest or detention, and wrongful conviction? To what extent?
2. Which institutions are responsible or/ and competent to entertain claims of compensation for breach of the right to physical liberty and grant the remedies?
3. What are the jurisdictional issues in enforcing the right to compensation under the ICCPR?

1.5 Objectives of the study

This research purports to:

- Examine the FDRE Constitution, States Constitutions (to some degree) and other laws, as appropriate, on the right to compensation for breach of the right to physical liberty and the institutional mechanism of addressing the matter from the vantage point of international human rights instruments, foreign laws and best practices thereof; and pin point where the real problems lie.
- Analyze the laws and scholarship in other jurisdictions on the subject matter of the study and draw lessons that would help the legislature/policy makers to place sufficient weight on the, psychological, moral, physical, social and economical impacts of arbitrary arrest or detention, and wrongful conviction; and reconsider the relevant existing laws and institutions.
- Assess the competence and jurisdiction of Ethiopian courts of law to award compensatory remedies for breach of the right to physical liberty

1.6 Research Methodology

This study first explores the normative framework of the right to liberty and the consequent right to remedies (compensatory remedies) for victims of arbitrary arrest or detention, and wrongful conviction in human rights instruments at the global and regional levels. In addition to legal (binding) documents (e.g., treaties), non-legal documents (e.g., Declarations and Principles) have been considered. Then, it goes on to examine the pertinent laws and institutions of other jurisdictions (U.S.A, U.K. Australia, India, Poland, Germany, Netherlands, South Africa and Uganda). The legal basis of compensatory remedies for breach of the right to physical liberty in these jurisdictions and the institutional mechanisms set in place to grant awards of compensation have been scrutinized.

The selection is based on the availability of laws and literature. Nonetheless, nature of their legal system in the domestic application of human rights treaties has been taken into account. That is, countries with legal systems that are dual, hybrid-monist, and monist approach to treaty enforcement are included. This is because the Ethiopian legal system is believed to fall at least in one of the three. And if the right to compensatory remedy for breach of the right to liberty is available in the country that follows the same approach as Ethiopia, the message is pretty clear. Leaving aside all possible logical flaws in deduction based on small sample such as this, and having regard to the optimistic view that ‘where there is a right, there is a remedy’, the right to compensation on the issue at hand can also apply in Ethiopia in a similar fashion.

Against this background, the researcher examines the provisions of the FDRE Constitution on the protection of the right to physical liberty and the theoretical and pragmatic ramifications of the silence of the Constitution on the right to compensation. A brief look has been made to the laws establishing institutions responsible for the promotion and ‘protection’ of human rights in Ethiopia with a view to point out the extent of their competence and the pitfalls thereof to award compensation for victims of violations of the right to physical liberty. Besides, some provisions of the Civil Code dealing with extra-contractual liabilities are closely considered to assess if there exists tort cause of action for breach of the right to physical liberty and to what extent it is consonant with relevant provisions of the ICCPR.

In sum, this research is of qualitative nature. As such it relies on both primary and secondary data. Primary data such as legal and non-legal documents at global, regional and national levels have been reviewed; some judges and public prosecutors as well as attorneys have been interviewed. As far as secondary data are concerned, literatures on the jurisprudence of international human rights law and selected jurisdictions as well as the scanty domestic literatures that have to do with the issue in hand have been reviewed. Throughout the study, particular emphasis has been placed on exploring, reviewing, examining and evaluating the challenges/drawbacks in the legal and institutional framework that pose uncertainty to the exercise of the right to compensatory remedy for breach of the right to physical liberty.

1.7 Significance of the study

In 1995, the FDRE Constitution has come into full force and effect heralding a new chapter in the country's constitutional history. The Constitution has given a significant place to human rights. About one third of the Constitution is devoted to the protection of human and democratic rights. Besides, the Constitution has given due recognition to international human rights instruments ratified by Ethiopia. Ethiopia has so far ratified a number of international human rights treaties including the ICCPR.

The human right to liberty has been given constitutional guarantee. Yet, unlike Articles 9(5) and 14(6) of the ICCPR which entitles victims of arbitrary arrest or detention, and wrongful conviction to enforceable right to compensation, neither the Constitution nor any subsidiary laws of Ethiopia grant such clear protection. Furthermore, the controversies relating to the requirement of promulgation of international treaties has given rise to a teething problem in the judicial enforcement of human rights treaties. Judges are not often seen directly applying international human rights treaties while resolving disputes. Equally controversial is the competence of courts to interpret the Constitution. The Constitution itself vests the House of Federation (HOF) with the power to interpret the Constitution. As a result, Ethiopian Courts are playing minimal role even in the indirect application of provisions of human rights treaties including those on the right to compensation in the ICCPR.

Yet, as in any other jurisdictions, Ethiopian justice system cannot be error-proof. Given the lack of scientific method of crime investigation, it is not uncommon in Ethiopia to see innocent

persons having been detained, charged, convicted and finally acquitted via appeal(s) or pardon. The absence of review of judgment in the current Ethiopian Criminal Procedure Code poses a terribly pressing problem to victims of breach of the right to liberty in the pursuit of compensatory remedies. Where a person is wrongfully convicted and the decision is final, the only mechanism for the exoneration of the person wrongfully convicted is by way of pardon. But the grant of pardon presupposes acceptance of guilty and regret on part of the wrongfully convicted. Due to this, it does not have the effect of expunging the criminal record of the exoneree. On the other hand, exoneration alone would merit a little for a person who has wrongfully served in prison some number of years. It is clear that after exoneration, individuals need assistance to address and repair the psychological, physical, social, and financial injury that they suffered as a direct result of their wrongful convictions and imprisonment. Particularly, the wrongfully imprisoned, who lose property, jobs, freedom, reputation, family, friends and more should be compensated to the extent it can redress them.

Therefore, this study attempts to discover the legal basis of compensatory remedies for breach of the right to physical liberty in Ethiopia by analyzing the pertinent laws (global, regional and domestic) and the institutional mechanism set in place to help the victims when requested. As compared to other areas of research that have been conducted in Ethiopia so far, the issue of compensation for breach of human rights has been neglected and has remained out of the academic circle as well. In a circumstance such as this, a ‘wake-up call’ is of paramount importance to give an impetus to future studies. Thus, this study aims at creating inspiration for further studies in this virgin area of research by laying a foundation for. In so doing, it seeks to raise the awareness of victims of breach of the right to physical liberty, to be assertive not only for breaches by private persons but also for actions of public officials violating the right in question. As an input the findings of this study are also intended assist the policy/law makers, judges, legal practitioners/lawyers, public prosecutors, and police officers. It is also believed to be of help for law students and law teachers as a reference material. Finally, based on the findings of the research, recommendations will be addressed to appropriate authorities.

1.8 Scope of the study

Though all human rights may be susceptible to violation and, hence, demand compensatory remedies, the writer believes that this research cannot capture them all without losing sight. This

has warranted the selection of a somehow specific human right, the right to physical liberty, and the ensuing right to compensation upon its violation. More specifically, this research is limited to the examination of compensatory remedies for *arbitrary arrest or detention*, and *wrongful conviction*. Here, two intertwined parameters have been taken into account in making the choice: (1) the corpus of international human rights law; and (2) the overall purpose of this study. First, from the corpus of international human rights instruments, the right to compensation for breach of the right to liberty has been explicitly accorded normative foundation more than any other human rights. But such an explicit guarantee is absent from the Ethiopian laws. Secondly, this research generally seeks to examine the prospects and challenges in pursuing compensatory remedies for breach of the right to physical liberty given the existing laws and institutions. The writer thus holds that it would be more reliable to make an attempt to seek a legal solution for breach of a right which has a relatively solid normative foundation at least internationally-albeit in a rather imprecise way domestically-than to try other rights with no notable normative basis at the risk of darkening the horizon.

1.9 Limitations of the study

In Ethiopia, the sources of human rights law are mostly the Federal Constitution and ratified human rights treaties. Human rights are often disputed as moral entitlements short of legal force. This holds despite the significant number of human rights treaties the international community has managed to have since the Second World War. This is partly so because historically the domestic forum is not as such feasible for human rights litigation. The factors for this are aptly attributable to legal and/or institutional framework set in place in each state. In effect domestic courts are not usually seized with cases of human rights violations in general and compensation for breach of the right to physical liberty in particular. The situation with the Ethiopian courts and other institutions is not an exception. Ethiopian courts rarely rely on the provisions of the Constitution and international human rights treaties in deciding cases put before them. Further, because victims are also not aware of the existence of the right to compensation, it is hardly possible to find cases where they have claimed compensation to get redressed. This made it impossible to substantiate the study with concrete cases of compensation claimed following breach of the right to physical liberty. The interview conducted with some judges, prosecutors and attorneys also reveal the absence of the practice in this area. As a result, the study is not

practice oriented. The absence of literature on the issue in point adds up to the above limitations. With a view to tackle the pitfalls in this respect and to make sense of the matter in the context of Ethiopia, the writer has made use of the body of literature at the international level and the jurisprudence of other jurisdictions.

1.10 Organization of the study

This research work will comprise four chapters each of which will in turn be divided into sections and sub-sections. The first chapter is an introductory one. It consists of back ground of the study, literature review, statements of problem, research questions, objectives of the study, research methodology, significance of the study, scope of the study and limitations of the study and organization of the study.

The second chapter is devoted to the examination of the legal framework for remedies in general and compensatory remedies in particular in human rights instruments, both global and regional. It then goes on to analyze the legal and institutional framework for the same subject matter in some jurisdictions focusing on their constitutions and human rights treaties as well as the institutional mechanism set in place to afford compensation in the event of breach of the primary right to liberty.

The third chapter addresses the legal framework for right to compensatory remedies for breach of the right to physical liberty in Ethiopia. First, acts that constitute breach of the right to liberty are considered in the Ethiopian context. Once it is established that breach of the right to liberty is inevitable, it subsequently seeks to analyze how far the existing laws help the victims to vindicate interests that have been injured.

The fourth chapter examines the institutional framework set in place to grant compensatory remedies upon breach of the right to physical liberty. Both federal and State courts as well as the Ethiopian human rights institutions are considered. Before winding up the discussions in the study a brief analysis is conducted with a view to draw lessons from the foregoing discussions.

The last chapter makes analysis of the work and concluding remarks; and forwards recommendations and suggestions on the basis of the findings of the study.

CHAPTER TWO

THE GLOBAL, REGIONAL AND NATIONAL JURISPRUDENCE ON THE RIGHT TO REMEDIES FOR BREACH OF THE RIGHT TO PHYSICAL LIBERTY

2.1 The notion of Right to Liberty

The ‘right to liberty’ contemplates individual liberty in its classic sense, that is, the ‘physical liberty’ of the person.¹⁸ Black’s Law Dictionary defines ‘liberty’ as “freedom from all restraints except such as are justly imposed by law”.¹⁹ From this definition, the aim of the right to liberty is to ensure that a person is not dispossessed of his or her liberty in an arbitrary manner. The converse of the definition means that a person may be divested of his or her liberty under clearly defined legal circumstances provided for in a just manner. For instance, a person’s right to liberty may be restricted if he or she is found guilty of a crime by a court of law.

The other side of the right to liberty is the ‘right to security’, which has come to be used to refer to the right to the protection of the law in the exercise of the right to liberty.²⁰ Hence, the two cannot be seen distinctly. It follows that peril to security would necessarily imperil the right to liberty. Nonetheless, the notion of security of person, as such, has wider field of application²¹ to the detail of which it is not the aim of this study to go. While this work is intended to deal with the possible redress, i.e., compensation, ensuing breach of the right to physical liberty, the right to security of person may be touched upon incidentally.

¹⁸ Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law As Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, 2007, P.120.

¹⁹ Henry Campbell Black, M. A., *Black’s Law Dictionary*, 6th ed., St. Paul Minn, West Publishing Co., 1990.

²⁰ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002. P. See also, Michael Arne, *The Handbook of Human Rights Law: An accessible approach to the issues and principles*, Kogan Page, London and Sterling, VA, 2004, P.202. Liberty and security of are considered: ‘Everyone has the right to liberty and security of person.’ ‘Liberty’ is open to several interpretations, one of which is the right to do whatever you like as long as it does not interfere with anyone else’s rights. ‘Security’ comes from a Latin root meaning ‘lack of worry’, or ‘lack of anxiety’. What it means is the right to stay at home and go about your business without let or hindrance – and without having to look over your shoulder all the time.

²¹ Human Rights and Arrest, Pre-trial Detention, available at: <http://www.ohchr.org/.../>. In the Human Rights Committee’s view, the right to security under Article 9(1) of the ICCPR applies outside the formal deprivation of liberty, i.e., it applies whether a person is arrested or otherwise detained or not.

2.2 The notion of Remedy

‘Remedy’ is defined as “the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated”.²² The basic right to remedies has a double meaning. It has substantive and procedural dimensions.²³ Procedurally, remedies involve access to justice in situations of alleged violations of a legal norm.²⁴ Substantive wise, it concerns measures taken to “make good the damages caused” or to wipe out the consequences of the wrong committed.²⁵ In French, the confusion in meaning of a ‘remedy’ is avoided making use of two distinct words: *recours* and *reparation*. The two words stand for the procedural and the substantive dimensions respectively.²⁶ Reparation, in turn, is made in the form of restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition.²⁷ Of these forms of reparation, this research draws on compensation. And throughout this work, the term ‘remedy’ is used to refer to the availability and form of the procedure as well as its outcome (the substantive dimension), as the case may be.

2.2.1 The Right to a Remedy in International Human Rights Instruments

The right to an effective remedy in the events of violations of human rights is expressly guaranteed by numerous widely ratified global and regional human rights instruments; the Universal Declaration of Human Rights (Article 8), the International Covenant on Civil and Political Rights (Article 2), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14), the Convention on the Rights of the Child

²² Black’s Law Dictionary, Supra note 19.

²³ Victims’ Right to a Remedy and Reparation: The New United Nations Principles and Guidelines, available at: <http://www.corteidh.or.cr/tablas/r26214.pdf>

²⁴ Antoine Buyse, Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law, available at: <http://www.igitur-archive.library.uu.nl/.../Restitution>, ..., accessed on 09/11/2013.

²⁵ Ibid. See also, Para 48, Comments of Françoise Hampson, The Administration of Justice and Human Rights, Report of the sessional working group on the administration of Justice; E/CN.4/Sub.2/2000/44, 15 August 2000.

²⁶ Ibid.

²⁷ 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 Violation of International Humanitarian Law, 2005, Principle 21.

(Article 39), the International Convention for the Protection of All Persons from Enforced Disappearance (Article 24), as well as in regional human rights treaties: the European Convention for the Protection of Human Rights and Fundamental (Article 13), the American Convention on Human Rights (Article 25), and the African Charter on Human and Peoples' Rights (Article 7). These are not the only instruments that contain the right to a remedy. Many more global and regional declarations, resolutions and principles have been adopted over the years in the course of the efforts being made for the promotion and protection of human rights.

2.2.2 The Aims and Purposes of Remedies

Manifest in the above human rights instruments providing for remedies is that human rights law, representing fundamental interests, develop not only a primary theory of what duties are owed, but a secondary theory of what duties exist when a primary duty is violated.²⁸ So much so that "it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated; a right without a remedy is a legal conundrum of a most grotesque kind".²⁹ The aim of remedies is to vindicate interests that have been injured. Strengthening this, Chief Justice Holt, as cited by Dinah Shelton, proclaimed that rights and remedies are reciprocal in that 'if the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy'.³⁰ Put differently, the primary function of remedial justice is to rectify the wrong done to a victim, that is, to 'correct injustice'.³¹ Besides, appropriate remedies can have a 'dissuasive effect' on those who would commit violations.³² As an extremely important part of rights jurisprudence, remedies are thus a significant aspect of ensuring the rule of law.³³ Against this background, the discussion of the substantive aspect of a remedy, often regarded as *reparation*, is in order.

²⁸ Dinah Shelton, *Remedies in International Human Rights Law*, Oxford, 1999 [hereinafter Shelton], P.38

²⁹ Lisa Tortell, *Monetary Remedies for Breach of Human Rights: A comparative Study*, Oxford and Portland, Oregon, 2006 [hereinafter Tortell], P. 1.

³⁰ Antoine, *supra* note 24 at 63.

³¹ Ibid.

³² Ibid.

³³ Id. P.14.

2.2.3 The Right to Reparation in the context of Human Rights

At the international level, the right to remedy and/or reparation found its legal basis in the Law of State Responsibility.³⁴ Basically, the Law of State Responsibility was intended to govern inter-State relations and designed to protect individuals only vis-à-vis certain conduct by States other than their own.³⁵ With this approach, the right to reparation was attributed to the State of the injured national to claim against the offending State at the inter-State level.³⁶ Pragmatically, the reparation was awarded solely to the State as the injured party and only then would normally the State turn over the award to the injured national where it is monetary compensation.³⁷

After World War II, this state-centric approach was dramatically transformed with the evolving extensive corpus of law designed to protect individuals from abuses of all governments, including their own.³⁸ In its Commentary, the International Law Commission (ILC) also points out that in the context of human rights, individuals are the “ultimate beneficiaries” and in that respect the holders of rights.³⁹ Beginning with the Universal Declaration of Human Rights which specifically proclaimed the inherent rights of individuals to dignity and respect, today many international instruments and national constitutions of many countries have made individuals their point of focus.

It goes without saying that the term ‘reparation’, similar to the term ‘remedy’, is of fluid meaning. There is no consensus in its meaning and application across the globe.⁴⁰ Its meaning and application vary according to the legal systems: between private parties, between States,

³⁴ See, supra note 20.

³⁵ Id. P. 26.

³⁶ A Source Book for Victims of Torture and other Violations of Human Rights and International Humanitarian Law, P.10, available at: <http://www.redress.org/.../SourceBook.pdf>, accessed on 11/11/2013.

³⁷ Ibid.

³⁸ Id. P. 11.

³⁹ James Crawford, The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries, available at: <http://www.assets.cambridge.org/.../9780521813532...> See also: UN General Assembly resolution 56/83 on the report of the Sixth Committee (A/56/589 and Corr.1), International Law Commission, Articles on State Responsibility, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. The International Law Commission embarked for more than fifty years in the drafting of principles on international responsibility of states for breaches of their international obligations. The so called Draft Articles on State Responsibility (Draft Articles) were finally adopted in 2001.

⁴⁰ See, supra note 36, P.7.

between the State and the individual(s) or between all of them.⁴¹ Be that as it may, this writer would like to rely on the definition of the term given in the Draft Principle on Reparation: ‘the range of measures that may be taken in response to an actual or threatened violation; embracing both the substance of relief as well as the procedure through which it may be obtained’.⁴² The International Covenant on Civil and Political Rights (ICCPR) stipulates in Article 2(3) that states have a duty to provide an effective remedy in case of a violation of the human rights protected in the Covenant and that individuals have a concomitant right. In line with this stipulation, the Human Rights Committee (HRC) has held that Covenant violations in general entail “appropriate compensation” and that reparation can involve “restitution, rehabilitation and measures of satisfaction”.⁴³ The discussions of these forms of reparation are in order.

2.2.3.1 Restitution

Restitution is a mode of reparation which aims at returning the injured party to the *status quo ante*, i.e., the situation that existed prior to the occurrence of the wrongful act.⁴⁴ It should, whenever possible, restore the victim to the original situation before the violation occurred. In some cases, its application depends on the primary obligation that has been breached. For instance, in the case of breach of the right to liberty, take the case of unlawful detention, the authority in charge of the custody of the victim may be required to put an end to the situation either as a matter of cessation or restitution.⁴⁵ In this particular case, the breach is of a continuing character and restitution is an appropriate remedy.⁴⁶ However, States may sometimes enact laws

⁴¹ Ibid.

⁴² Ibid. See also, Annex, E/CN. 4/2000/62. In 2005, after years of study by independent experts and governmental comments, the former Commission on Human Rights (CHR), now succeeded by the Human Rights Council (HRC), adopted a set of basic principles and guidelines on the right to remedy and reparation for victims of violations of international human rights law and international humanitarian law (Supra, note 9). The document was subsequently endorsed by the ECOSOC and adopted by the GA. It provides for different forms of reparation ranging from restitution, compensation, rehabilitation, to satisfaction and guarantees of non-repetition.

⁴³ Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, Para.16. See also, supra, note 44 at 136.

⁴⁴ Antoine, supra note 24, P.133. See also Definition by Black’s Law Dictionary, cited at #1 above: ‘An equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred’. Similarly, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 of the Committee against Torture, para.8 asserts ‘restitution’ as “a form of redress to re-establish the victim in his or her situation before the violation of the Convention was committed, taking into consideration the specificities of each case”.

⁴⁵ Nihal, supra note 20, P. 16.

⁴⁶ Ibid.

that contravene with their treaty obligations and subsequently abrogate the human rights of individuals guaranteed under the respective instrument. In such a case, “juridical restitution” which requires the modification (or revocation, annulment or amendment) of the law enacted in violation of a rule of international (human rights) law comes into play.⁴⁷ In the context of Ethiopia, Article 9(1) of the FDRE Constitution may be of help to discard a law passed in violation of human and democratic rights recognized under Chapter 3 of the same and, in effect, restore an individual or group of individuals to the constitutional guarantee that previously existed.⁴⁸

However, it is not always possible to undo the wrongs committed against victims. Matters such as times spent behind prison bars by a person arbitrarily arrested or detained, and wrongfully convicted; lives taken as a result of wrongful convictions, and the like cannot be re-established or restored. These and other pragmatic considerations necessitate the pursuit of other modes of reparation short of restitution to counterbalance the harm sustained. *Compensation* has thus been taken to cover damage that fall beyond the reach of restitution.

2.2.3.2 Compensation

The term ‘compensation’ is described as “indemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value that which is necessary to restore an injured party to his former position..., equivalent in money for a loss sustained”.⁴⁹ Compensations as a redress for human rights violation is submitted to stand a second-best response in the sense that it comes into play when full rectification by way of restitution is impossible.⁵⁰ In other words, compensation as a remedy can be seen to imply that money can replace the thing lost, or at least that money is the best alternative when no restitution is possible.⁵¹ As such, it corresponds to the financially assessable damage suffered by the injured party. As important as it is, awards of compensation encompass material losses and non-material

⁴⁷ Ibid.

⁴⁸ Indeed, the reading of Article 9(1) of the FDRE Constitution, “...shall be of no effect” seems to suggest *void ab initio* in which case no breach of right can happen. Nor is restitution called for to remedy it.

⁴⁹ Black’s Law Dictionary, at note 19.

⁵⁰ Supra, note 47, P. 215. See Principle 36.

⁵¹ Ibid. See also, supra note 6 at 138, the practice of both global and regional human rights mechanisms does not clearly single out restitution as the preferred forum of reparation. Both restitution and compensation work effectively when applied in appropriate cases.

or moral suffering.⁵² However, compensation itself may not yield full reparation. This is particularly true in the case of breach of the right to physical liberty where it is hardly possible to assess in monetary terms an exact (equal) value of the right violated. Such a fundamental right is not a commodity with a fixed market value. Nonetheless, “monetary compensation is intended to remedy the damage suffered by the injured party as a result of the breach, to the extent that money can do this.”⁵³ Therefore, the significance of compensation as a redress for the damage and as acknowledgment of the violated right should not be undermined.

The efficiency of compensation for the violation of human rights by the State can be analyzed from two different points of view: (1) for the victim, obtaining an amount of money, even a large one, cannot be expected to be an adequate compensation for the huge pain that may cause breaches of fundamental liberties; nevertheless, something may be better than nothing; (2) for the State, the economic analysis of law furnishes an ambiguous answer that the State will be incentivized to prevent the violation of human rights only if the cost of compensation for any violation is higher than the cost of prevention of such violations; but leaves one consideration that it is politically indecent for a State to be found liable for violation of human rights.⁵⁴ This in effect suggests that a better compensation for breach of human rights leads to better enforcement of the same.

In the pages that follow, discussion of the legal framework of the right to a compensatory remedy is preceded by a brief look at the other forms of reparation.

⁵² Supra, note 56, P.17. Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc) and non-material or moral (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium) suffering, the latter usually quantified on the basis of an equitable assessment.

⁵³ Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation, P. 38, available at: <http://www.redress.org/.../> ...P.35, Visited on 16/11/2013.

⁵⁴ Christophe Quezel-Ambrunaz, Compensation and Human Rights (From A French Perspective), NUJS Law Review 4 NUJS L. Rev. 189, 2011 (189-203), P.193. This is illustrated as follows: if jails are crowded due to the large number of detainees, it amounts to an infringement of the human dignity. According to the economic analysis of compensation, the State will deal with this situation only if the total amount of damages is higher than the cost of new jails. If not, it is more efficient for the State to pay compensation. By this approach, the higher the damages are, the better the enforcement of human rights is. From this assumption, it is clear that where there is no duty to compensate damage, respect for the rights is expected only at the mercy of the state. But the linkage between human rights and compensation suggests that a better compensation for breach of human rights may lead to better enforcement of human rights.

2.2.3.3 Other forms of Reparation

Rehabilitation, satisfaction and guarantee of non-repetition are also regarded as forms of reparation. To begin with, while the right to reparation (as a remedy) has a solid legal basis in all relevant treaties including the international bill of rights, rehabilitation as a form of reparation has only made its way into some treaty laws in the mid 1980's and so.⁵⁵ It involves “the process of restoring the individual's full health and reputation after the trauma of a serious attack on one's physical or mental integrity....”⁵⁶, as well as legal and social services.⁵⁷ It is a kind of non-monetary remedy developed at the international level with the criminalization of the act of torture and remedying the trauma thereof. Thus, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) comes at the forefront in indicating that ‘compensation shall include the necessary means for the fullest rehabilitation that is possible for a torture survivor’.⁵⁸ Rehabilitation, also true for other forms of reparation, is approached here from the perspectives of gross violations of international human rights law and serious violations of international humanitarian law. Yet, the same notion can be imported to the domestic forum to address breach of the right to physical liberty. Reintegration into the family or society of a person who is wrongfully deprived of his liberty and subjected to significant numbers of years in prison would demand rehabilitation measures to be taken.

Satisfaction comes into play when the injury caused by the wrongful act cannot be made good by restitution or compensation.⁵⁹ It covers a wide range of non-pecuniary reparative measures.⁶⁰ Accordingly, it may consist in an “acknowledgement of the breach, an expression of regret, a

⁵⁵ Rehabilitation as a form of Reparation under International Law, available at: <http://www.redress.org/.../> ..., accessed on 11/13/2013.

⁵⁶ Ibid. The term ‘rehabilitation’ also applies in penitentiaries to encompass the process of reforming the conduct of prisoners.

⁵⁷ Supra, note 47.

⁵⁸ Ibid. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT), Article 14. See also the Committee against Torture, General Comment No.3: Implementation of Article 14 by State Parties, 19 November 2012, UN Doc. CAT/C/GC/3, para.1 has this to say: All States parties are required to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” Para.6 of the same reiterates para.2 and moves on to list the five forms of reparation: restitution, compensation, *rehabilitation*, satisfaction and guarantee of non-repetition.

⁵⁹ David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge University Press, 2009 [hereinafter Sloss], P. 49.

⁶⁰ Supra, note 57, P. 38. See also, Principle 22 of the Basic Principles, cited at #27 above, also list what satisfaction may include.

formal apology, a declaratory judgment” or another appropriate modality depending on individual circumstance of the case as it happens.⁶¹ The declaration of wrongfulness of the act by a court, a tribunal or some other competent state body forms the most important part of satisfaction as reparation.⁶²

Last, guarantees of non-repetition are of limited relevance where as noted above, breach of the rights to liberty is inevitable. Nevertheless, the guarantees comprise broad structural measures of a policy nature such as institutional reforms aiming at, *inter alia*, strengthening judicial independence, the protection of human rights defenders, the promotion of human rights standards in public service, law enforcement, the media, industry and psychological and social services.⁶³ This is, indeed, the manifestation of positive obligation of a state to prevent violations. And it may amount to a form of redress.

Standing alone, any one of the above mode of reparation may not present full redress for the injury caused to a victim. However, the desired result of redress may well be enhanced when one mode of reparation complements the other. The next section will be devoted to the discussion of the right to compensation, the aim this thesis is for.

2.3 The Legal Framework of the Right to Compensation in Human Rights Instruments

Unlike treaty and customary obligations in international law, which are generally reciprocal or contractual in nature between treaty partners (the States), human rights obligations have ‘the purpose of guaranteeing the enjoyment of those rights and freedoms’ stipulated in the human rights treaties.⁶⁴ While States are the natural duty bearers, individuals are the beneficiaries of the rights and guarantees in the human rights instruments. It is with this aim in mind that a number of global and regional human rights treaties have evolved. This part is thus intended to address the legal framework for the right to compensation at the universal and regional levels with a view to facilitate the discussion that will subsequently come by showing the extent to which those

⁶¹ Ibid. Thus, any court or tribunal which has jurisdiction over a dispute has the authority to make a declaration of its findings, as a necessary part of the judicial process, and a declaration may sometimes act as another forms of reparation, or it may be the only remedy sought. In some instances, therefore, a finding of a violation could in itself be sufficient ‘just satisfaction’.

⁶² Ibid. See also, Malcolm N. Shaw QC, *International Law*, Fifth Edition, Oxford University Press, 2003, P.719.

⁶³ Supra, note 47, Principle 23.

⁶⁴ Shelton, supra note 28, P. 47.

norms may influence domestic legislations and States' obligations toward their citizens at the domestic level.

2.3.1 The Universal Declaration of Human Rights (UDHR)

As a declaration as it is, the UDHR is a soft law without binding force. No matter how, it is proclaimed to be 'a common standard of achievement for all peoples and nations'.⁶⁵ This has also been affirmed by a number of treaties that have subsequently come into existence. The preambles of these subsequent international human rights instruments make reference to the human rights ideals in the document.⁶⁶ Moreover, its principles/norms have been incorporated into the constitutions of more than 185 nations now in the United Nations (UN).⁶⁷ Arguably so too, the UDHR is believed to have achieved the status of customary international law because people regard it "as a common standard of achievement for all people and all nations."⁶⁸ Therefore, the UDHR is of significant importance in standard setting in the field of human rights.

When it comes to the issue under consideration, the right to liberty is guaranteed in two provisions of the UDHR: 'Everyone has the right to life, *liberty* and security of person', in Article 3 and 'No one shall be subjected to arbitrary arrest, detention or exile' in Article 9.⁶⁹ Further, the Declaration stipulates the right of everyone to an 'effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.⁷⁰ Even though this remedy may be construed as to include compensation, it does not, anyhow, make mention of the possible compensatory remedy in the event of violation by States of their primary obligation to respect and protect the right to personal liberty. These were rather subsequently transferred into Articles 9 of the ICCPR, which guarantees liberty and security of

⁶⁵ The UDHR, Eighth recital.

⁶⁶ See Preambles of the International Covenant on Civil and Political Rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and many other human rights treaties mention in their preambles the Universal Declaration of Human Rights as a source of authority and inspiration.

⁶⁷ A Short History of Human Rights, available at: <http://www1.umn.edu/humanrts/.../hereandnow...>, accessed on 10/11/2013.

⁶⁸ Ibid.

⁶⁹ Universal Declaration of Human Rights, adopted under General Assembly Resolution 217(III), U.N. GA OR, 3rd Session, 183rd Plenary Meeting (1948).

⁷⁰ Id., Article 8.

person and prohibits arbitrary deprivation thereof, and provide for an enforceable right to compensation in the event of breach of the right.

2.3.2 The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is one of the three instruments known together as the ‘International Bill of Rights’.⁷¹ The original intention of the international community was to transform the UDHR into a binding instrument. However, the ideological divide between the Western and the Eastern Blocs did not allow the transformation of the UDHR from a non-binding resolution into a legally binding agreement.⁷² As a result, the ICCPR was born twin with the ICESCR and came up with the categories of rights which, unlike the rights under the ICESCR, were thought to be implemented with some immediacy.⁷³ As of this year (i.e., April, 2014), the ICCPR had 74 signatories and 168 parties.⁷⁴ This is an indication that the Covenant is of a potentially worldwide application, occasionally referred to as one of the ‘UN’s universal instruments’.⁷⁵ Ethiopia is also a State party to the Covenant as from 11 June 1993.⁷⁶ On top of that, many of the Covenant rights have found their way into Chapter three of the FDRE Constitution. This overarching state of affairs makes it relevant to consider the instrument here.

One of the most fundamental rights that has been given due recognition under the ICCPR is the right to physical liberty. On the other hand, the general obligation to ensure to all individuals the rights recognized in the Covenant, established in Articles 2 and 3 of the same, requires that States Parties take all necessary steps to enable every person to enjoy those rights. Apart from this, the Covenant itself spells out some specific legal steps to be taken to ensure the enjoyment by individuals, the beneficiaries, of the respective rights. Where that fails, Article 9(5) of the Covenant requires that victims of unlawful arrest or detention “shall have an enforceable right to

⁷¹ Alex Conte, *Defining Civil and Political Rights: The Jurisprudence of the UN Human Rights Committee* (2nd ed.), Asgate, 2009 [hereinafter Conte], P.1. The other two instruments that constitute the International Bill of Rights are the Universal Declaration of Human Rights (the UDHR) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR).

⁷² Id., P.2.

⁷³ Ibid. Unlike the civil and political rights, the economic, social and cultural rights were believed to be implemented progressively and programmatically depending upon the resources available to each State.

⁷⁴ International Covenant on Civil and Political Rights-Wikipedia...available at: http://www.en.wikipedia.org/.../International_Covenant..., accessed on 20/11/2013.

⁷⁵ Supra, note 51 at 3.

⁷⁶ International Covenant on Civil and Political Rights-United..., available at: <http://www.treaties.un.org/.../viewdetails.aspx?...>, accessed on 20/11/2013.

compensation.” Similarly, Article 14(6) provides for the right to compensation “according to law” in certain cases of miscarriage of justice.⁷⁷ The State parties to the Covenant must thus foster conditions to enable persons who are unlawfully deprived of their liberty to gain access to an effective remedy including compensation. In its General Comment No.31, the Human Rights Committee has further elaborated that the obligation of States Parties under Article 2(3) of the Covenant is two-fold: i) affording effective protection of Covenant rights, and ii) ensuring individuals that they have accessible and effective remedies to vindicate those rights.⁷⁸ In this respect, the Committee is insightful of the role of domestic players. It attaches an important weight to ‘States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.’⁷⁹ Plainly, the Covenant also requires the State Parties to enact domestic legislation for this goal to be achieved.⁸⁰

In sum, the principle that unlawful infringement of human rights requires compensation is well established in international law. The rights to an effective remedies for victims of human rights violations in Article 2(3) in general and the right to an enforceable compensation for victims of unlawful arrest or detention in Article 9(5) as well as ‘wrongful conviction’ in Article 14(6) enshrined in the ICCPR affirm this position of international human rights law. Moreover, the Human Rights Committee is of the view that the right to a remedy guaranteed in the Covenant has been recognized as non-derogable.⁸¹ Following this line of argument would yield the conclusion that all State Parties to the ICCPR have the obligation to provide an effective remedy

⁷⁷ Anja Seibert-Fohr, Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para.2, available at: http://www.mpil.de/.../pdf1/mpunyb_seibert_..., P.455, accessed on 21/11/2013. See also, Articles 9(5) and 14(6) reproduced in Sections 3.3.2.3.2.1 and 3.3.2.3.2.2 of this work. Article 2(3) of the ICCPR is reproduced as follows:

Article 2(3)

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

⁷⁸ Supra, note 25, para.15.

⁷⁹ Ibid.

⁸⁰ The ICCPR, Article 2(2).

⁸¹ Supra, note 57, P.13. See also, CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, Adopted at the Seventy-second Session of the Human Rights Committee, on 31 August 2001 CCPR/C/21/Rev.1/Add.11, para.14.

to victims of human rights violations at all times and under all circumstances. And whenever those State Parties to the First Optional Protocol fail to do this at the domestic level, individuals are entitled to bring the matter to the attention of the Committee on Civil and Political Rights (CCPR).⁸² The duty to provide effective domestic remedy is binding on all State Parties to the Covenant, irrespective of whether or not they have ratified the Optional Protocol. In other words, all State Parties to the ICCPR are bound to provide domestic remedies for breach of Covenant rights. While the First Optional Protocol offers victims of breach of human rights one additional chance to seek justice from the Human Rights Committee, the obligation to afford domestic remedies is commonly shared by all parties to the ICCPR. Indeed, in ensuring compliance, the role of the other compliance monitoring mechanisms under the Covenant should not also be undermined.⁸³

2.3.3 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The European Convention on Human Rights is the first regional binding human rights instrument to follow the Universal Declaration of Human Rights. The drafters of the Convention are cognizant of the importance of a remedy as a corollary to the substantive rights provided in the Convention. Accordingly, it modeled its remedial provision on Article 8 of the UDHR. Imposing a general obligation, Article 1 of the Convention provides that the High Contracting Parties “shall secure to everyone within their jurisdictions the rights and freedoms defined in Section I of the Convention”.⁸⁴ Consequently, they are required to provide everyone whose rights and freedoms guaranteed by the Convention have been violated with “an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an

⁸² Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Article 1. See also, Conte, *infra* note 70, P.277: Neither the ICCPR nor its First Optional Protocol expressly provides the Human Rights Committee with the jurisdiction to award remedies. Nonetheless, where a State is found in breach of its obligations, it is normally required by the HRC to undertake remedial action, which may include: modifying its domestic law; commuting a criminal sentence and/or releasing a detained person;...; as well as prosecuting, trying and punishing the culprits; protecting a victim from threats and/or intimidation from members of security forces; or providing restitution or compensation to victims.

⁸³ One such supervisory mechanism under the ICCPR is State Reporting Procedure under Article 40.

⁸⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N. T.S. 221.

official capacity.”⁸⁵ [S]imilar to Article 2(3)(a) of the ICCPR, acting in an official capacity does not dispense the human rights violator of the duty to make the damage good. However, Article 13 of the European Convention has often been referred to as the most obscure provision in the Convention.⁸⁶ With a view to shade light on such doubt, the European Committee of Ministers reinforced Article 13 of the Convention with a recommendation adopted in 1984 that calls on all Council of Europe member states to provide remedies for ‘governmental wrongs’.⁸⁷ In particular, Principle V of the commentary indicates that ‘the victim must be compensated for all the damage resulting from the wrongful act which can be assessed in terms of money’.⁸⁸ Thus, it is submitted that Article 13 is linked to higher Convention protection, *inter alia*, the requirement of compensation for unlawful arrest in Article 5(5) of the Convention. Here, the European Convention on Human Rights, a seminal treaty in developing individual rights against nations, provides a remedy for wrongful conviction that is virtually identical to that provided by Article 14(6) of the ICCPR.

Moreover, Article 3 of Protocol No.7 to the European Convention guarantees the right to compensation of a person who has been convicted of a criminal offence which he/she did not commit.⁸⁹ Article 5(4) of the Convention also provides important judicial guarantees with regard to all deprivations of liberty.

2.3.4 The American Convention on Human Rights (ACHR)

To begin with, the American Declaration of the Rights and Duties of Man guarantees every person the right to resort to the courts to ensure respect for legal rights and to obtain protection from acts of authority that violate any fundamental constitutional rights.⁹⁰ Having come into force 30 years after the Declaration, the American Convention on Human Rights also strengthens

⁸⁵ Id., Article 13.

⁸⁶ Shelton, *supra* note 48, P. 22.

⁸⁷ Ibid.

⁸⁸ Id., P.23.

⁸⁹ Protocol No.7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22.XI.1984:

Article 3: Compensation for wrongful conviction

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

⁹⁰ American Declaration of the Rights and Duties of Man, 2 May 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), Article XVII.

the same guarantee by entitling everyone to effective recourse for protection against acts that violate the fundamental rights recognized by the constitution 'or laws of the state or by the Convention', even where the act is committed by persons acting in the course of their official duties.⁹¹ More specifically, Article 7(1) of the American Convention on Human Rights guarantees a person's right to "liberty" and "security". What is odd, unlike the two instruments previously discussed, the Convention lacks a specific provision for compensation in case of arbitrary detention. Article 10 of the Convention merely stipulates: "Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice."

2.3.5 The African Charter on Human and Peoples' Rights (ACHPR)

The African regional human rights system is the youngest of its European and American counterparts. As for the European and American Human Rights Conventions, the African Charter on Human and Peoples' Rights (hereinafter referred to as the African Charter or the Charter), also guarantees the right to liberty.⁹² Article 6 of the Charter has this to say:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

As it stands, the second sentence of this provision seems to regard any form of deprivation of liberty as legitimate insofar as it conforms to the domestic laws of the States Parties to the Charter. Thanks for the inclusion of the term "arbitrary" in the last sentence; one should not be tempted to be misled pursuing this seemingly self-defeating interpretation. The word "arbitrary" expands the protection under the provision beyond a mere requirement of lawfulness implicated in the second limb of the above provision. With respect to the interpretation of Article 9(5) of the ICCPR, it has been asserted that the word "arbitrary" in the provision imposes a higher international standard upon the content of domestic laws.⁹³ So, if the word "arbitrary" in the last

⁹¹ American Convention on Human Rights, 22 November 1969, in force 18 July 1969, OEA/ser.L/V/II.23, doc.21 rev.6(1979), Article 25.

⁹² African Charter on Human and Peoples Rights, Adopted in Nairobi June 27, 1981, Entered into Force October 21, 1986.

⁹³ Laurent Marcoux, Jr., Protection from Arbitrary Arrest and Detention Under International Law, Boston College International and Comparative Law Review, Vol.5/Issue 2, 1982, P.6-7, available at <http://www.lawdigitalcommons.bc.edu/.../viewcontent...>, accessed on 25/11/2013. See also, Ibid., P.366: After an exhaustive survey of laws and practices at the global, regional and national levels, the United Nations Committee on the

limb of Article 6 of the Charter simply means “unlawful”, then the prohibition in the same provision would not apply to any lawful governmental action, regardless of how oppressive the action, if it conformed with domestic law.⁹⁴ Such an approach would be discarded for it would essentially allow each state, through its own domestic law, to determine the scope of an individual’s right to freedom from arrest or detention.⁹⁵

As far as remedies are concerned, Article 7 of the Charter guarantees every individual the right to have his cause heard, including the ‘right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force’. This provision does not specifically provide for the right to compensation in the event of breach of the right to liberty. On the other hand, the Charter recognizes the ‘right to an adequate compensation’ in regard to the spoliation of resources of a dispossessed people’.⁹⁶ From this, if damage resulting from spoliation of resources is to be made good by way of compensation, there would be no reason why breach of the right to liberty under Article 6 of the Charter not be compensated. This assertion is in line with paragraph 8 of the preamble of the Charter which clearly states the notion of indivisibility, interdependence and interrelatedness of all human rights.

2.4 Survey of the Experiences in Some Jurisdictions

2.4.1 USA

The U.S. Constitution expressly states in Article VI that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”⁹⁷ On its face, the language of this provision seems to suggest that the U.S. is a purely monist legal system, all treaties having the legal force on its domestic plane.⁹⁸ However, it is practically a

Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile (United Nations Committee) concluded that “‘arbitrary’ is not synonymous with ‘illegal’ and ... the former signifies more than the latter. It seems clear that, while an illegal arrest or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary.” Accordingly, the Committee adopted the following definition of “arbitrary”: “Arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with the right to liberty and security of person.”

⁹⁴ Ibid. Application by analogy of the interpretation by the Committee of the word “arbitrary” under Article 9(1) of the ICCPR to a similar guarantee provided under Article 6 of the African Charter.

⁹⁵ Ibid.

⁹⁶ American Convention on Human Rights, Article 21.

⁹⁷ Sloss, *supra* note 59, P. 33. See also, United States Constitution, available at: <http://www.usconstitution.net/const.pdf>

⁹⁸ Ibid.

hybrid monist and judicial decisions bifurcates treaties as self-executing and non-self-executing.⁹⁹ Whereas the former are considered to automatically have legal force in the domestic legal system, the latter can have such a force only in the presence of implementing legislation.¹⁰⁰ Moreover, the U.S. courts distinguish between vertical and horizontal application of treaty-based claims. Although domestic courts have the authority to apply treaties directly in some cases, they rarely use their judicial power to remedy treaty violations committed by government actors.¹⁰¹ That is, U.S. courts grant remedies to individuals claiming against private actors and avoid holding government accountable for treaty violations.

Indeed, the United States was not happy at the outset with the way Article 9(5) of the ICCPR was framed. Thus, it resorted to acts that it believed would compromise the message the provision attempts to convey. For this, it proposed to the words “enforceable right to compensation” with a mere “right of action for compensation” but the proposal was rejected.¹⁰² Its reluctance to recognize the right to compensation was further reflected in the understanding it proffered for Articles 9(5) and 14(6) of the ICCPR.¹⁰³

Against all these odds, the statement the ex-President of the U.S.A, G.W. Bush once made merits considering:

Because one of the main sources of our national unity is our belief in equal justice, we need to make sure Americans of all races and backgrounds have confidence in the system that provides justice. In America, we must make doubly sure no person is held

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Id., P.8. Where government actors are brought before them as defendants, U.S. courts frequently avoid holding government actors accountable for treaty violations by adopting an interpretive methodology that favors the government’s interpretation of a treaty or by applying judicial avoidance doctrines to refrain from deciding the merits of a treaty-based claim.

¹⁰² Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, 1995, P.37.

¹⁰³ —, *Alone in the World: The United States’ Failure to Observe the International Human Right to Compensation for Wrongful Conviction*, *Emory International Law Review*, P. 1622, available at <http://www.law.emory.edu/.../Cost...>, accessed on 26/11/2013.

The U.S. understanding (reservations) of Articles 9(5) and 14(6) of the ICCPR reads: [T]he United States understands the right to compensation referred to in articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

*to account for a crime he or she did not commit, so we are dramatically expanding the use of DNA evidence to prevent wrongful conviction.*¹⁰⁴

Here again, even as the United States is at the forefront of using DNA technology to re-examine closed cases, U.S. policy and legislation to ensure the right to compensation for wrongful conviction is disputed to be among the poorest in the world.¹⁰⁵ For this reason, some contend that President Bush's promise to prevent wrongful conviction must be coupled with a commitment to provide adequate compensation to those who suffer this 'supreme injustice'.¹⁰⁶

2.4.2 United Kingdom (UK)

The United Kingdom is a dualist state in which legislative incorporation is a requirement for a treaty to have legal force within the domestic legal system.¹⁰⁷ In the absence of legislation incorporating treaties into domestic laws, domestic courts in the UK never apply treaties directly as law.¹⁰⁸ However, judicial activism has enabled the courts to routinely grant remedies to victims of violation of treaty-based rights either by applying a statute that was enacted to implement a treaty or by interpreting it to conform to treaty obligations codified in unincorporated treaty.¹⁰⁹

With regard to wrongful conviction, the United Kingdom is considered as a leading example for its direct incorporation and implementation of the right to compensation under Article 14(6) of the ICCPR into its domestic law.¹¹⁰ To this end, Section 133 of the U.K's Criminal Justice Act provides:

[W]hen a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a

¹⁰⁴ Supra, note 97, P.1617: President George W. Bush, State of the Union Address, Feb.2, 2005.

¹⁰⁵ Id., P.18.

¹⁰⁶ Ibid. See also, Undoing Time: A Proposal for Compensation for Wrongful Imprisonment of Innocent Individuals, Committee on Capital Punishment and Committee on Corrections, New York City Bar Association, October 2010, P.6, available at: <http://www.digitalcommons.law.wne.edu/.../vol34/.../> Save the question of adequacy, currently, in the United States, Statutes governing compensation for wrongfully imprisoned individuals have been enacted by 24 states, the District of Columbia, and the federal government.

¹⁰⁷ Sloss, supra note 59, P. 17.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Supra, note 118, P.1622. Incorporation into the domestic law of Article 14(6) of the ICCPR is believed to be the most direct and effective way of enforcing the right to compensation in the event of wrongful conviction or miscarriage of justice.

*miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result . . .*¹¹¹

In addition to providing an exoneree with the option to have his/her case reviewed/reversed, this above Section creates an enforceable right to compensation for the damage he/she sustained as a result of the wrongful conviction.¹¹² At times, some critics have voiced concern that “incorporating the right directly into domestic law would create a flood of application for compensation”.¹¹³ But such fears remained superfluous as the practice over two decades has proved no horde of unusual compensation claims in the UK.¹¹⁴

The other important point worth consideration is the application of the European Convention on Human Rights in UK’s domestic jurisdiction. Though the ECHR was ratified by the UK as early as in 1951, there had long been no domestic provision for the enforcement of the private rights created by the Convention contrary to Article 13 which expressly provides that there shall be “an effective remedy before national authority” for any violation of the ECHR.¹¹⁵ The then government’s refusal to give domestic effect to the rights of individuals guaranteed under the Convention was premised on the assumption that all rights were well protected by the existing common law and legislation, and if compensation was justified, this could always be given *ex gratia* (out of grace).¹¹⁶ The UK maintained this position for about half a century. But the loss by the UK of many cases before the European Court of Human Rights eventually led it, in 1998, to the incorporation of the ECHR into domestic law, including the provisions in Section 8 for courts to give remedies (including, where appropriate, compensation) for breach of the ECHR.¹¹⁷ The

¹¹¹ Ibid. See also, Section 133 of the U.K’s Criminal Justice Act (1988), available at: <http://www.logiclaw.co.uk/Acts/.../crimjust198...> accessed on 26/11/2013.

¹¹² Ibid.

¹¹³ Sloss, *supra* note 59.

¹¹⁴ Ibid.

¹¹⁵ Id., P. 486.

¹¹⁶ Ibid.

¹¹⁷ Ibid. See also, P.344-5, Section 8 of the Human Rights Act sets out a general power relating to any act or omission by a public authority in breach of an individual’s civil liberties, allowing a court to “grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”. The availability and nature of remedies under this provision takes the following features:

First, section 8(2) allows the courts to make an award of damages under the Act only if the court itself has the jurisdiction to award compensation as a remedy and restricts such awards to civil proceedings.

Secondly, by virtue of section 8(3), damages are to be awarded only where they are necessary to afford ‘just satisfaction’ to the victim, taking into account all of the circumstances of the case including the availability or granting of any other relief or remedy .

Act does not formally make the ECHR part of domestic law but requires courts and public bodies to apply existing and future legislation “so as far as possible” in a way “which is compatible with” rights under the ECHR.¹¹⁸ So, the Convention has since influenced UK’s Courts to heed a route of harmonization when it comes to the application of domestic law that have bearings on the rights guaranteed under the former.

2.4.3 India

India has the longest written constitution of any sovereign country in the world.¹¹⁹ The Constitution is the supreme law of India¹²⁰ and Article 21 of this Constitution provides that no one may be deprived of personal liberty except according to procedure ‘established by law’.¹²¹ Here, the constitutional guarantee against deprivation of liberty is very strict. This is evident in the use of the [s]trong word “established” which means “settled firmly” not wantonly, or whimsically.¹²² The Indian Constitution does not stop at the point of recognizing fundamental human rights. It moves on and guarantees the justiciability of fundamental rights.¹²³ Accordingly, the responsibility for the enforcement of the fundamental rights lies with the Supreme Court by virtue of Article 32 and with the High Court by virtue of Article 226. The Supreme Court of India heavily relies on the international human rights law in the interpretation of individual rights provisions of the Indian Constitution.¹²⁴ For example, it has invoked Article 9(5) of the ICCPR to support its holding that “surviving family members of individuals killed in police custody have a constitutional right to monetary compensation”.¹²⁵

Finally, section 8(4) directs British courts to take into account the principles applied by the European Court in the award of compensation under article 41 of the European Convention on Human Rights. Article 41 of the European Convention on “just satisfaction” states: If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

¹¹⁸ Id., P.487.

¹¹⁹ The Constitution of India-Wikipedia, the free encyclopedia, available at: http://www.en.wikipedia.org/.../Constitution_of_Indi... The Constitution of India consists of 448 articles in 22 parts, 12 schedules and 118 amendments.

¹²⁰ Ibid.

¹²¹ The Constitution of India, 1949, Article 21.

¹²² Ibid.

¹²³ Manoj Kumar Sinha, Role of the National Human Rights Commission of India in Protection of Human Rights[hereinafter Kumar], available at: <http://www.rwi.lu.se/pdf/seminar/manoj05.pdf>, P.1, accessed on 21/10/2013.

¹²⁴ Sloss, supra note 59, P.27.

¹²⁵ Ibid.

With a view to help in the promotion and protection of human rights guaranteed under national and international instruments, the Government of India established an independent National Human Rights Commission.¹²⁶ The Human Rights Commission is vested with broad powers and it is actively engaged, and enormously assisted by NGOs.¹²⁷ The jurisprudence of the Commission with regard to remedies is praiseworthy. So far, the practice of the Commission reveals that it has directed huge amount of compensation for breach of human rights of individuals entrenched in the national laws, including the Constitution, and international instruments.¹²⁸ Save this strong side, the Commission is not without limitation. As its institutional shortcoming, the Commission is endowed with only recommendatory power and its recommendations are not binding.¹²⁹ One may thus be tempted to question the power of the Commission to direct compensation as far-fetched one. But the fact on the ground is this: '[i]n most of the cases recommendations of the Commission have been complied with by the concerned government or authority, as is apparent from the prosecutions of several police officials, and the compensation awarded to victims in various cases.'¹³⁰ Therefore, the practice of Indian Human Rights Commission has much to lend to human rights commissions of other jurisdictions such as ours.

2.4.4 Australia

Australia is categorized as the only country among the western nations in not having bill of rights.¹³¹ By the same token, it does not have compensation statute in cases such as wrongful convictions, with the exception of the Australian Capital Territory (ACT).¹³² Moreover, Australia is a strict dualist state, and a treaty does not have legal force within its legal system save the case of incorporation by way of legislation.¹³³ The sum effect of the above two phenomenon imply that victims of breach of the right to physical liberty (the writer's point of concern) are placed in a disadvantaged position insofar as compensatory remedy is concerned. This is because wrongful

¹²⁶ Manoj, *supra* note 123. The Commission came into effect on 12 October 1993, by virtue of the Protection of Human Rights Act 1993.

¹²⁷ *Id.*, P.3. See also, Section 3 of the Protection of Human Rights Act of 1993.

¹²⁸ *Id.*, P.7.

¹²⁹ *Id.*, P.10.

¹³⁰ *Ibid.*

¹³¹ Conte, *supra* note 71, P.316.

¹³² *Ibid.*

¹³³ Sloss, *supra* note 59, P.17.

convictions obviously occur in Australia as they do in other jurisdictions whereas the consequent victims have no *statutory right* to compensation.¹³⁴ This has left the victims at the mercy of the State. As in other common law jurisdictions, one compensatory remedy available in Australia for wrongfully convicted individuals is thus *ex gratia*, “out of grace” payments.¹³⁵ Without compensation legislation, the recourse available to exonerees is thus to “apply for *ex gratia* awards, file a tort claim against liable parties, or propose an individualized compensation bill through parliament.”¹³⁶ Though *ex gratia* payment is commonly applied in Australia, state officials are reluctant to recognize it as a right. This is evident in the reasons they provide to award *ex gratia* payments. The reasons so provided fall into the following categories: ‘i) award without explanation; ii) award as gift to ease transition; iii) award to express regret; and iv) award to rectify injustice or correct mistakes of the state or state misconduct’.¹³⁷ From this, *ex gratia* payment is not brought into effect immediately. This problem is inherent in the fact that *ex gratia* payment is not recognized as a right that directly arises from the breach of the primary right to liberty.

2.4.5 Germany and the Netherlands

In both Germany and the Netherlands, domestic courts play an active role in treaty enforcement, and in effect, promote the State’s compliance with treaty obligations.¹³⁸ The courts do provide remedies for individual victims of breach of treaty-based primary rights.¹³⁹ The legal systems in the two jurisdictions generally exhibit the following three features:¹⁴⁰ (1) many treaties form part of the domestic legal system; (2) domestic courts recognize both the direct effect of treaties in the domestic law and the standing of individuals to invoke these treaties before domestic courts; and (3) courts often apply treaties indirectly to harmonize domestic law with the States’ international obligations.

¹³⁴ Conte, *supra* note 71, P.111.

¹³⁵ Rachel Dioso-Villa, Without Legal Obligation: Compensating the Wrongfully Convicted in Australia, P.1, available at: <http://www.albanylawreview.org/.../75.3>. ..., accessed on 28/09/2013.

¹³⁶ *Ibid.* See p. 2, *Ex gratia* payments are a viable option for most exonerees who do not have the resources or political influence to pursue private lawsuits or draft a personalized bill. However, without guidelines for decision-makers or transparency in the process of awarding and allocating funds, *ex gratia* awards are often criticized as inadequate and arbitrary.

¹³⁷ *Id.*, P.11.

¹³⁸ Sloss, *supra* note 59, P.7.

¹³⁹ *Ibid.*

¹⁴⁰ *Id.*, P.9.

Judicial practice in the above two jurisdictions is thus consistent with the principle that “private parties who are harmed by a violation of their treaty based primary rights are ordinarily entitled to a judicial remedy for the harm they suffer”.¹⁴¹ Courts of these jurisdictions play significant roles in enforcing the rights of individuals enshrined in the ECHR. Notably, they award compensation to individuals, as provided in Article 5(5) of the ECHR, where governments of the respective jurisdictions are found to have violated the right to liberty.¹⁴²

2.4.6 South Africa

South Africa has seen a new era of democratic order with the coming into force of the 1996 Constitution.¹⁴³ In a stark contrast to the prevailing attitude during the Apartheid South Africa, the Constitution has given important place to the fundamental rights of individuals. Some provisions of the Constitution are also devoted to paving the way to the application of international treaties in the domestic legal system of the country. To this effect, Section 231(4) of the Constitution provides: “Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”¹⁴⁴ This very provision conveys two different messages regarding the domestic effect of international treaties. Whereas the first clause suggests the South African legal system to be largely dualist one, the second clause provides for the automatic incorporation of some treaties, which are regarded as ‘self-executing’, into domestic law apart from legislative approval of the treaty itself.¹⁴⁵

The institutional framework set in place to enforce the rights of individuals under the constitution and international human rights instruments also attracts one’s attention. Similar to that of the

¹⁴¹ Id., P.13.

¹⁴² Ibid.

¹⁴³ Constitution of the Republic of South Africa, 1996. See also, http://www.en.wikipedia.org/.../Constitution_of_Sout... The Constitution was formerly numbered as “Act No. 108 of 1996”. Regarding this way of citing the constitution, many jurists ventured their objection that it equates the Constitution with other acts of parliament whereas the constitution was not. This suggestion of the jurists was put into effect and now the Constitution is referred to as cited above.

¹⁴⁴ Ibid. See also, David, supra note 58, P.25. Besides, see also See also, infra note 124, P.15: The provision in section 39(1)(b) that courts ‘must consider international law when interpreting the Bill of Rights’ is the most important provision on the influence of international law on domestic law in the South African Constitution.

¹⁴⁵ Sloss, supra note 59, P. 25. However, David Sloss himself has concluded that whether those treaties that are regarded as self-executing can apply automatically has not been tested in practice.

Indian Supreme Court, the South African Constitutional Court has relied heavily on international human rights norms in the interpretation of the Constitution. It has often resorted to such norms to support its holdings, *inter alia*, that the death penalty and corporal punishment are unconstitutional, and that the state may not imprison a person for failure to pay a debt.¹⁴⁶ Most importantly, the Constitutional Court has also read the right to compensation for unlawful imprisonment into Section 8 of the Constitution dealing with freedom and security of person “even though there is no provision in the Bill of Rights which provides for compensation for violations of its provisions”.¹⁴⁷ The Court added that “South Africa also bears an international obligation in this regard in terms of Article 9(5) of the ICCPR”.¹⁴⁸

2.4.7 Uganda

On 8th October 1995, Uganda promulgated a new Constitution which was the first in the country to have been prepared through the genuine consultation of the Ugandan peoples.¹⁴⁹ Because the constitution heralded the end of the era of dictatorship, the Ugandans consider it their symbol of pride.¹⁵⁰ As the history of dictatorship which was characterized by arbitrary arrest, detention without trial, torture and brutal repression with impunity on the part of security organ was in their fresh memory, the people had taken seriously both the substantive content of the Constitution and the institutional mechanism of monitoring compliance.¹⁵¹ Unlike many other constitutions, the Ugandan Constitution is not limited to the recognition of fundamental human

¹⁴⁶ Id., P.27.

¹⁴⁷ Magnus Killander (edr.), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, PULP, 2010, P.13. See also, *Zealand v Minister of Justice and Constitutional Development and Another* (CCT54/07) [2008]. This decision is available at: <http://www.saflii.org/za/cases/ZACC/2008/3.html> On 24 January 1997, Jonathan Zealand was charged in a regional South African court with murder, rape and assault (“the original charges”). The case was postponed several times, with Zealand remanded in custody. On 15 May 1997, Zealand escaped. Subsequently, he was arrested and charged with the original charges plus for his escape. On 28 September 1998, he was convicted and sentenced to 18 years of imprisonment. Following, he was moved into maximum security custody. On 23 August 1999, his conviction was set aside on appeal. But due to the negligence on part of the registrar to communicate with him at first and owing to various court orders, he was kept under maximum security as a convict until his withdrawal on 9 December 2004. With a view to redress this injustice, the South African Constitutional Court imported the right to compensation under Article 9(5) of the ICCPR into section 8 of the South African Constitution. ZACC 3 (11 March 2008).

¹⁴⁸ Ibid.

¹⁴⁹ Chris Maina Peter, *Human Rights Commissions in Africa – Lessons and challenges*, P.358, available at: http://www.kas.de/.../Human_Rights_Africa/11..., accessed on 02/12/2013. See also, *Constitution of the Republic of Uganda*, [As at 15th February 2006], 1995.

¹⁵⁰ Ibid

¹⁵¹ Ibid.

rights and freedoms. It in addition provides for the right to redress including compensation in the event of violation of human rights guaranteed under the Constitution. Article 23, which stands to guarantee personal liberty states: “A person unlawfully arrested, restricted or detained by any other person or authority shall be entitled to compensation from that other person or authority whether it is the State or an agency of the State or other person or authority.” Here, the identity or official position of the defendant is immaterial. The Constitution then goes on to guarantee the enforcement of this right by expressly empowering courts in Article 50(1) which reads: “Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation”.

To conclude, in this chapter, attempts have been made to generally show the legal framework of the right to a remedy in human rights instruments in general and the right to a compensatory remedy in particular. The influence these instruments exert on the domestic laws and institutions has been surveyed having regard to a few jurisdictions’ constitutional and treaty laws, and their court system as well as their human rights commissions, where appropriate. Particular attention has been paid to the enforcement of treaties in these jurisdictions and their constitutional guarantees of human rights and remedies available in the event of breach of the treaty-based or constitutional right to liberty. In so doing, the aim has been to discover how other jurisdictions have managed to solve old problems such as ours. It is also intended to facilitate the discussions in the chapter that follows.

CHAPTER THREE

THE LEGAL FRAMEWORK OF COMPENSATORY REMEDIES FOR BREACH OF THE RIGHT TO PHYSICAL LIBERTY IN ETHIOPIA

3.1 General Overview

As the outset, the title of this chapter presupposes the existence of the right to physical liberty the breach of which warrants award of compensatory remedies. In fact, it is true that ‘there is no legal remedy where there is no breach of a legal right’. This chapter therefore first addresses the legal guarantees of the right to physical liberty under the Ethiopian Constitution and some few ratified treaties. Then it goes on to assess specific cases of breach of the right to physical liberty in general as well as in the Ethiopian context. Subsequently, efforts are made to examine the possible legal avenues for an action for a compensatory remedy; and the law that forms the basis of the cause of action for breach of the right to physical liberty for which an award of compensation may be sought.

3.2 Breach of the Right to Physical Liberty

This section deals with some particular cases of breach of the right to physical liberty, namely: arbitrary arrest, arbitrary detention, pre-trial detention/ denial of bail and wrongful conviction.

3.2.1 Arbitrary Arrest

The protection against ‘arbitrary arrest’ under the FDRE Constitution is one of the fundamental human rights guarantees of the Constitution. To begin with, the use of the word ‘arbitrary’ itself offers more protection than the word ‘unlawful’ would otherwise do. So well, it is submitted that the ordinary meaning of “arbitrary” is not “unlawful.”¹⁵² The former is construed as broadly as to include, but not limited to, the latter. As such, Article 9(1) of the ICCPR which guarantees the right to liberty and security of person has been interpreted to emphasize the concern with protection from ‘arbitrary laws’ in addition to ‘unlawful acts’.¹⁵³ In the light of this interpretation, it seems appropriate to consider Article 17 of the FDRE Constitution vis-à-vis Article 9(1) of the Covenant

¹⁵² Laurent Marcoux, Jr., *Protection from Arbitrary Arrest and Detention Under International Law*, 5 B.C. Int'l & Comp. L. Rev. 345 (1982), <http://lawdigitalcommons.bc.edu/iclr/vol5/iss2/3>, P.359.

¹⁵³ Ibid.

Article 9(1) of the ICCPR

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 17 of the FDRE Constitution

(1) No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law.

(2) No person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him.

The first sentence of Article 9(1) of the ICCPR, stating “*everyone has the right to liberty and security of person*”, is missing from Article 17 of the FDRE Constitution. However, the procedural requirements under Article 17 presuppose the ‘right to liberty’, i.e., the procedural guarantee flows from the substantive right to liberty (the title of the Article is also about right to liberty). The corollary to the fundamental right to liberty is protection against arbitrary or unlawful arrest or detention. This is clearly manifested in both of the above provisions. Similar to Article 9(1) of the ICCPR, Article 17(1) of the Constitution strictly requires deprivation of liberty to comply with “such procedures as are established by law”. As to what constitutes ‘established law’ for the purpose of Article 17(1) must be understood broadly. This is because an arrest or detention which is lawful may nonetheless be arbitrary under international standards.¹⁵⁴ Therefore, procedures governing arrest and/or detention as stipulated in Article 17(1) must conform not only to domestic law, but also to international standards.

As far as the protection against arbitrary arrest is concerned the English version of Article 17(2) of the Constitution is consistent with Article 9(1) of the Covenant. However, the Amharic version of the same provision diverges both from the English version of the same and that of the Covenant. When translated, the first limb of the Amharic version of Article 17(2) reads: “No person may be subjected to arrest except on such grounds and in accordance with such procedures as are established by law...”(translation mine). The omission of the term “arbitrary”

¹⁵⁴ Submission to the Victorian Parliament Law Reform Committee (VPLRC) Inquiry into Warrant Powers and Procedures, P.4, available at: www.humanrights.gov.au/sites/default/files/Warrant%20powers.pdf, accessed on 26/01/2013.

in the Amharic version narrows the scope of the protection therein. The English version, which prohibits *arbitrary* arrest, on the other hand, affords a broader protection. Consistent with Article 9(1) of the ICCPR, the English version protects all persons against (acts of) arbitrary arrest as well as arbitrary laws that may give rise to arbitrary arrest. Though the Amharic version is the final authority pursuant to Article 106 of the Constitution, the English version may be preferred when read together with Article 13(2) which, in a mandatory manner, requires the interpretation of fundamental rights and freedoms in Chapter 3, Article 17 inclusive, to conform, *inter alia*, to the principles of International Covenant on Human Rights and international instruments adopted by Ethiopia.

Furthermore, it is understandable that the guarantee under Article 17 of the FDRE Constitution also goes beyond the requirement of lawfulness of deprivation of liberty and covers the prohibition against arbitrary laws. This requirement can be deduced from the close reading of Article 17 in conjunction with Articles 13(1) and 9(1) of the Constitution. Article 13(1) of the Constitution imposes the responsibility and duty to respect the provisions of Chapter 3 on all organs of Government, one of which is the legislature. By virtue of the duty to respect, the legislative organ must refrain from passing laws that deprive a person of his/her right to liberty. If, however, the legislatures (of both Federal and States) happen to enact such laws, they will be of no effect in the terms of Article 9(1).

3.2.2 Arbitrary Detention

Similar to the protection against arbitrary arrest, the prohibition of arbitrary detention is one of the most fundamental of all human rights guarantees. Both the UDHR and the ICCPR affirm such an assertion.¹⁵⁵ Furthermore, Article 17(2) of the FDRE Constitution strictly prohibits detaining a person without a charge or conviction against him. In fact, the procedural requirement under sub-article 1 of Article 17 must also be observed in the course of leveling a charge against and /or convicting a person suspected to have committed a crime.

Expounding on Article 9(1) of the ICCPR, which affords similar guarantee as Article 17(2) of the Constitution, the Human Rights Committee has explained that the term ‘arbitrary’ in article 9(1) of the ICCPR is not only to be equated with detention which is ‘against the law’, but is to be

¹⁵⁵ Beth Stephens, Judith Chomsky, Jennifer Green, Paul Hoffman and Michael Ratner, *International Human Rights Litigation in U.S. Courts* (2nd Ed.), Martinus Nijhoff Publishers, 2008 [hereinafter Stephens], P.176. See also, Articles 9 of the UDHR and 9(1) of the ICCPR.

interpreted as more broadly as to include elements of inappropriateness, injustice and lack of predictability.¹⁵⁶ The Committee has further stated that any deprivation of a person's liberty must be subsequent to law, necessary, reasonable and absent arbitrariness.¹⁵⁷ On top of that, it is submitted that the aim of detention should be legitimate. That is, detention will be arbitrary because of elements of injustice, inappropriateness, unreasonableness or indeterminacy or if it is 'not necessary in all the circumstances of the case' or not a proportionate means to achieving a legitimate aim'.¹⁵⁸

3.2.3 Pre-trial Detention/ Denial of Bail

Personal liberty 'is the rule, not the exception'.¹⁵⁹ Put differently, "bail is rule, jail exception".¹⁶⁰ The general rubric of international human rights law assert that pre-trial detention should be an exception and as short as possible, and that bail should instead be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses, or flee from the jurisdiction of the State party.¹⁶¹ To this end, the ICCPR constituted one of the most important articulations on the right to bail.¹⁶² The Covenant clearly states the following:

Article 9(3)

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgments.

In the first place, this provision prohibits detention short of judicial knowledge. It goes on to prohibit detention of persons pending trial; particularly, excessive length of pre-trial detention.

¹⁵⁶ Supra, note 154.

¹⁵⁷ Conte, supra not 71, P.112.

¹⁵⁸ Supra, note 154. See also, Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc, CCPR//59/D/560/1993, 30 April 1997, Para. 9.2.

¹⁵⁹ See, www.timesofmalta.com/.../Personal-libert...

¹⁶⁰ See, www.thehindu.com/.../bail...rule...

¹⁶¹ Conte, supra note 71, P.122.

¹⁶² Melron C Nicol-Wilson, 'The Realisation of the Right to Bail in the Special Court for Sierra Leone: Problems and Prospects', in *African Human Rights Law Journal*, Vol.7, No.2, JUTA, 2007 [hereinafter Nicol-Wilson], P.497.

This is evident in the requirement that ‘*anyone arrested or detained...shall be entitled to trial within a reasonable time or release*’. On certain occasions, the Committee has further expressed its concern whether the practices in certain categories of criminal cases in some countries have been in conformity with the entitlement to ‘trial within a reasonable time or to release’ under the provision.¹⁶³ Stressing on the latter, the Human Rights Committee held that the general rule is for bail to be granted and that provisional release should not be the exception.¹⁶⁴

Regional systems for the protection of human rights have also enacted provisions dealing with the right to bail. The European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights provide, in a similar fashion, that everyone arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.¹⁶⁵ Unlike its European and American counterparts, the African Charter on Human and Peoples' Rights does not contain any specific provision on the right to bail. As a result, some contend that the Charter does not effectively protect human and peoples' rights in Africa in this regard.¹⁶⁶

A person arrested may be released on condition of bail when remand is granted. The question of remand presupposes the lawfulness of the very arrest. It is submitted ‘that the question of bail is a distinct and separate issue, which only comes into play when the arrest and detention are lawful.’¹⁶⁷ Consequently, the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices.¹⁶⁸ In deciding whether the extension of remand for more than four years by Russian Courts before conviction of *Kalashnikov* had violated Article 5(3) of the ECHR.¹⁶⁹ Obstruction of evidence, a ground relied upon by Russian courts to deny *Kalashnikov* bail was unanimously determined by judges of the European Human Rights Court to have lost its relevant and sufficient character during the course of his lengthy

¹⁶³ Ibid.

¹⁶⁴ Nicol-Wilson, *supra*, note 162.

¹⁶⁵ Id., P.498.

¹⁶⁶ Ibid.

¹⁶⁷ Alistair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford-Portland Oregon, 2004 [hereinafter Mowbray], P.80.

¹⁶⁸ Id., P.81.

¹⁶⁹ Ibid.

detention.¹⁷⁰ The reason submitted was that, as the investigation progressed, his ability to obstruct the collection of evidence was correspondingly reduced. Furthermore, the Court found that the applicant's period of pre-trial detention exceeded a reasonable time due to a poor quality investigation which had delayed proceedings. The Court thus held a breach of Article 5(3) had occurred.¹⁷¹ The decision of the Court has two issues to engrain. The first is that the national authorities must grant detainees bail unless there are cogent public interest grounds for refusing to release particular detainees.¹⁷² The second is that the domestic courts are obliged, in such cases, to monitor the ongoing justification of these detainees' detention and they cannot be held on remand for more than a reasonable period of time.¹⁷³

Against this back ground, it now seems appropriate to consider the Ethiopian laws on bail. Seen generally, the Ethiopian laws seem to be pro-bail.¹⁷⁴ At the very initial stage of investigation, the Criminal Procedure Code gives the investigating police officer the discretion to release a person arrested on the terms of bond.¹⁷⁵ Where the accused is not released on bond, he may apply to the court to be released on bail; and an application for bail may be granted by any court.¹⁷⁶ Further, the application for bail is not subject to statute of limitation. Article 64(1) of the Ethiopian Criminal Procedure Code affirms this assertion by stating that "a person under arrest may at any

¹⁷⁰ Ibid.

¹⁷¹ Ibid. Article 5(3) of the ECHR provides:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

¹⁷² Mowbray, *supra* note 166 at 82.

¹⁷³ Ibid.

¹⁷⁴ See also, Simeneh Kiros Assefa, THE PRINCIPLE OF THE PRESUMPTION OF INNOCENCE AND ITS CHALLENGES IN THE ETHIOPIAN CRIMINAL PROCESS, MIZAN LAW REVIEW Vol. 6 No.2, December 2012, P.280.

Simeneh emphasizes the following provisions of the Criminal Procedure Code as *mostly* in conformity with the spirit of the Constitution. Articles 11-21 dealing with the initiation of investigation; and Articles 22-39 and 49-79 providing for investigation and other police activities pending investigation, Articles 32-33 dealing with search and seizure, Articles 49-59 dealing with arrest and Articles 60-79 dealing with bail and remand, Articles 40-48 providing for the prosecution of the suspect; and, finally, Articles 94-159 dealing with the trial of the case.

¹⁷⁵ The Criminal Procedure Code of Ethiopia, Proclamation No.185 of 1961, Negarit Gazeta. Article 28(1) Code provides: Article 28(1) states: "...the investigating police officer may in his discretion release such person' on his executing a bond with or without sureties that he will appear at such place, on such day and at such time as may be fixed by the police".

¹⁷⁶ Criminal Procedure Code, Article 28(2). Pursuant to this provision, an application for bail may be granted by any court. If any court may grant bail, there would not be jurisdictional issue. In so doing, the Code seems to have intended to ensure accessibility with the effect of minimizing pretrial detention where bail is allowed. However, this original intention of the then legislature does not seem to apply exactly as intended as a result of the change in the state structure from unitary to federal.

time apply for bail”. Where bail has been refused by such a court, the accused may take an appeal from the decision. Moreover, persons who have been convicted to have committed a crime may be released on bail, in which case the execution of the sentence of imprisonment shall not commence before the court of appeal delivers its judgment.¹⁷⁷ Once bail has been granted, the Criminal Procedure Code does not stipulate the possibility of challenging the decision by way of appeal.

With this, next will be considered some specific provisions of the Criminal Procedure Code that provide for the exceptional cases where bail may be denied.

Art. 67. - Bail not allowed

An application for bail shall not be allowed where:

- (a) the applicant is of such nature that it is unlikely, that he will comply with the conditions laid down in the bail bond;*
- (b) the applicant, if set at liberty, is likely to commit other offences;*
- (c) the applicant is likely to interfere with witnesses or tamper with the evidence.*

Denial of bail under the above provision serves three aims: securing the appearance before a court for trial of an applicant who would otherwise abscond, prevention of the applicant from committing further crimes, and prohibition of the applicant from interfering with witnesses and tampering with evidence. As the foregoing discussions have revealed, pre-trial detention is an exception to the general rule of bail; thus, remand of the accused under this provision should not exceed reasonable time required for investigation. What constitutes reasonable time in each particular case is to be determined having regard to the ‘special diligence’ the responsible authorities display in the conduct of the proceedings. Where the interest of justice so requires, Article 19(4) of the FDRE Constitution requires the remand in custody of an arrested person under close judicial scrutiny. Such a remand must be ‘for a time strictly required to carry out the necessary investigation’.

Pursuant to Article 59(3) of the Criminal Procedure Code, the court may remand a person in custody up to the maximum of 14 days for a single request by authority in charge of the investigation. There is no limit in this provision as to how many requests may be made to obtain the extension of the remand. Neither is there fixed the total number of days the courts may grant remand in custody. Even so, courts must ascertain whether the grounds relied on by the

¹⁷⁷ Criminal Procedure Code, Article 188(2).

investigation authorities would justify continuous deprivation of liberty (denial of bail). To this end, the FDRE Constitution, in Article 19(4), states that the “court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial”.

Article 19 also offers procedural guarantees to prevent arbitrary detention. Sub-article 2 of this Article requires the authority effecting the arrest promptly to explain to those arrested the reasons for their arrest in a language that they understand. Where the arresting police officer or law enforcer fails to bring them before a court within 48 hours and provide reasons for their arrest, the Constitution provides them with an inalienable right to petition the court to order their physical release.¹⁷⁸

Art. 63. - Principle.

(1) Whosoever has been arrested may be released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying.

(2) No person shall be released on bail unless he has entered into a bail bond, with or without sureties, which, in the opinion of the Court, is sufficient to secure 'his attendance at the court when so required to appear.

(3) Nothing in this Article shall affect the provisions of Art. 67.

The second limb of sub-article 1 of the above article has ever remained the most controversial provision. Both the practitioners and academicians have divided among themselves on the interpretation of the provision. The cause of the split in the stance between those persons boils down to the use of conjunction ‘and’ in this first sub-article. The proponents of the first position argue that bail is denied ‘where the crime with which the person arrested is charged is punishable with rigorous imprisonment for fifteen years and more *and* where there is the possibility of the person in respect of whom the offence was committed dying’. Here, that the crime carries 15 years of rigorous imprisonment and that the victim is dying is a cumulative requirement to refuse bail. For the proponents of this position, since denial of bail is an exception to the general rule of release on bail, and since exception has to be interpreted narrowly; such an

¹⁷⁸ The FDRE Constitution, Article 19(4).

interpretation will afford more protection than pursuing the otherwise construction. This position is also welcomed under human rights instruments.

The proponents of the second position hold that it suffices to deny bail either where the crime with which a person has been charged carries rigorous imprisonment of 15 years or more *or* where the victim is dying. This second interpretation affords less protection than the first. Following this interpretation, bail is not allowed for crimes such as aggravated robbery, sexual outrages committed on infants, attempt of aggravated homicide and the like. Given the lack of consensus in the interpretation of the provision, lack of uniformity in denying or granting bail is inevitable. As a result, it is highly likely that persons who otherwise ought to be released on bail remain in custody. Anyhow, it remains to be an important question to ask whether our courts, while interpreting the provision either way, test it against Ethiopia's international obligation under ratified human rights treaties.

3.2.4 Wrongful Conviction

The phrase *wrongful conviction* is sometimes used synonymously with *miscarriage of justice*.¹⁷⁹ In this study, the former is preferred to the latter. This is because the latter is as broad as to cover other types of injustice and errors of law rather than errors of fact¹⁸⁰, which it is not the aim of this study to deal with. For instance, it could be regarded as miscarriage of justice for the victim and his/her family if an accused that is guilty goes unpunished.¹⁸¹ On the other hand, the term *wrongful conviction* encompasses a restrictive definition of injustice and excludes cases such as the above and many others. To mention, it does not cover such cases in which persons were detained for long periods of time without ever having been found guilty of anything; it also excludes cases in which the initial conviction was overturned due to procedural errors without any determination of factual innocence.¹⁸²

Most convictions, be it wrongful or genuine, lead to imprisonment except a few cases where fine is exclusively imposed as a punishment; or penalty is conditionally suspended having regard to

¹⁷⁹ C. Ronald Huff and Martin Killias (eds.), *WRONGFUL CONVICTION: International Perspectives on Miscarriages of Justice*, Temple University Press, Philadelphia, 2008, P.5.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

the particular circumstance of the accused convicted.¹⁸³ The phrase *wrongful conviction* is self-explanatory that it is about a conviction obtained by mistake. Mistakes that lead to wrongful convictions are inherent in any criminal justice system. The leading causes of wrongful convictions include “eyewitness misidentification, unreliable science, false confessions, governmental misconduct, evidence obtained from informants and jailhouse snitches, and ineffective assistance of counsel.”¹⁸⁴ Conviction of an innocent individual may also be obtained because the evidence against him/her was fabricated or perjured.¹⁸⁵

The FDRE Constitution, in Articles 19 and 20, implicitly safeguards persons arrested/accused against factors that may lead to wrongful convictions.¹⁸⁶ But this very guarantee cannot be absolute one. Mistakes that lead to wrongful convictions inevitably occur as a byproduct of criminal justice system. This is the problem of every criminal justice system, even that of developed nations with advanced science of crime investigation.

Studies in the United States show that hundreds of individuals have been exonerated after being convicted of crimes that they did not commit. Exonerations are even on the rise, partly due to recent scientific advancements in DNA testing.¹⁸⁷ According to the Innocence Project, there have been 238 exonerations due to DNA evidence; 170 have occurred between 2000 and 2010.¹⁸⁸ Of the 238, 17 DNA exonerations occurred in death penalty cases after the exoneree served time on

¹⁸³ The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Proclamation No.414/2004, Federal Negarit Gazeta, 9th of May, 2005. See, Article 190.

¹⁸⁴ Undoing Time: A Proposal for Compensation for Wrongful Imprisonment of Innocent Individuals, Committee on Capital Punishment and Committee on Corrections, New York City Bar Association, October 2010, available at: <http://www.digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1677...>, P.2, accessed on January 11, 2014.

¹⁸⁵ Daniel Layne, Compensation for Miscarriage of Justice, Internet Journal of Criminology, 2010, P.19.

¹⁸⁶ The following provisions of the FDRE Constitution, in one way or the other, afford protection against wrongful conviction. The right to prompt explanation of the reasons for their arrest (Article 19(1)), the right to remain silent (Article 19(2)), the right to be brought before a court within 48 hours of their arrest (Article 19(3)), the right to petition the court to order their physical release (*habeas corpus*) (Article 19(4)), the right not to be compelled to make confessions and the inadmissibility of evidence obtained under coercion (Article 19(5)), the right to bail as a general rule (Article 19(6)), the right to a public trial by an ordinary court of law (Article 20(1)), the right to be informed with sufficient particulars of the charge brought against them (Article 20(2)), the right to be presumed innocent (Article 20(3)), the right to full access to any evidence presented against them and the right to confront them (Article 20(4)), the right to legal representation (Article 20(5)), the right of appeal (Article 20(6)), and the right to request for assistance of interpreter (Article 20(7)); all reinforce protection against wrongful convictions.

¹⁸⁷ *Supra*, note 184 at 3.

¹⁸⁸ *Ibid*.

death row.¹⁸⁹ The project has also calculated the average length of the time served by an exoneree to be 12 years; a total of 2,968 years served by innocent people.¹⁹⁰ More striking, over 140 people have been exonerated and freed from death row since 1973, the most recent exoneration being *Reginald Griffin* (No.143) on October 25, 2013.¹⁹¹ These are people who wrongfully served significant amount of years in prison cells.

The most immediate remedy for wrongfully convicted and imprisoned individual is obtaining physical freedom. Yet, wrongfully convicted individuals tend to serve longer sentences in prison because of their inability to participate in behavior and rehabilitation programs that require them to take accountability for their crimes and admit guilt.¹⁹² The continual affirmation of their innocence preoccupies their times while incarcerated and makes it difficult for them to exhibit the degree of repentance expected of individuals who are truly guilty.¹⁹³ “[M]aintaining innocence while incarcerated proves to be, as Denov and Campbell describe, a “burden of innocence”, by attracting the attention of the prison administration as a threat to recidivism.”¹⁹⁴ As a result, the situation of wrongfully convicted individuals ends up even worse off than those who are rightly convicted.

The above assertion is true particularly in countries such as ours where DNA technology is not economically feasible to ascertain innocence, where appropriate. Currently, the Ethiopian criminal justice does not provide for a review of judgment. Unlike, the Civil Procedure Code, the 1960 Criminal Procedure Code does not provide for review of judgments even though, subsequently to the judgment of conviction, a new and important matter such as forgery, perjury or bribery, which was not within the knowledge of the accused during the trial but later came to render the conviction erroneous. Once the appeals are exhausted, the hope of wrongfully convicted individuals comes to rest with pardon. Because request for pardon presupposes acceptance of guilt, wrongfully convicted individuals may not be happy or succeed in pursuing it. Even though they may succeed in obtaining pardon, with all its ramifications, another

¹⁸⁹ Ibid.

¹⁹⁰ Id., P.4.

¹⁹¹ See, Death Penalty: BREAKING: New death row exoneration!, available at: <http://www.deathpenalty.org/article.php?id=699>, accessed on January 4, 2014.

¹⁹² Dioso-Villa, Rachel, Without Legal Obligation: Compensating the Wrongfully Convicted in Australia, Albany Law Review, 2012, P.2, available at: <http://www.thefreelibrary.com/-/print/PrintArticle.aspx?id=297426803>

¹⁹³ Ibid.

¹⁹⁴ Ibid.

additional burden would await exonerees. Pardon shall not cancel their criminal record.¹⁹⁵ This makes it difficult for exoneree employees seeking for new jobs or ‘re-entering the work force with long unexplained gaps in their work histories’.¹⁹⁶ Their chance of reinstatement to the post before the conviction is also very minimal. For instance, Article 27(1) (j) of the Labour Proclamation¹⁹⁷ allows termination of contract of employment without notice on the ground of “absence from work due to a sentence of imprisonment passed against the worker for more than 30 days”.

Therefore, it is necessary and just for Ethiopia to devise compensation schemes so as to *ease* the burden of arbitrary arrest or detention, and wrongful convictions. As some succinctly put, a just government cannot wrongfully deprive its citizens of liberty without compensation (emphasis added).¹⁹⁸ The following quote offers a clear account of the rationale for compensating such victims.

*...It is fully appropriate that the state provides compensation. It is generally accepted that mistakes are an inherent part of a large criminal justice system. Given that society as a whole accepts this risk of error in order to maintain public safety, “the loss when [an error] occurs should be borne by the community as a whole and not by the injured individual alone.”*¹⁹⁹

The problems associated with arbitrary arrest or detention, and wrongful convictions are multifaceted. The times the victims are robbed under the circumstances cannot be reinstated. Most of the victims, especially those who have served a substantial amount of time in prison, struggle to find housing and work after their release from prison.²⁰⁰ Therefore, the criminal justice which stands to safeguard the *public interest* should not do injustice to the small innocent segment of the larger public who happen to fall within the domain of criminal suspects. Errors being inherent to the criminal justice, the loss incurred by the victims of deprivation of liberty should be distributed among the community at large. This makes it so crucial for countries to

¹⁹⁵ Criminal Procedure Code, Article 229(2).

¹⁹⁶ Rachel, *supra* note 192, P.3.

¹⁹⁷ Labour Proclamation No.377/2003, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 10th Year, No.12, 26th February 2004.

¹⁹⁸ *Supra*, note 184 at 5.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

have a compensation scheme to redress the harms sustained by such individuals to the extent possible.

3.3 Possible Legal Avenues of Compensatory Remedies for Breach of Human Rights: A Comparative Perspective

The coherence of the legal system necessarily prevents compensation for acts that do not contravene any statutory code.²⁰¹ Corollary, there must be a legal remedy whenever there is breach of a legal right. In different jurisdictions, there were, and still are different legal avenues for victims of breach of fundamental rights to base the claims for compensation on. Ordinary civil law or law of tort, constitutional law and human rights law are set to be dealt with next.

3.3.1 Law of Tort

Generally, the law of tort governs relational duties of non-injury; that is, duties to conduct oneself in certain ways toward certain persons so as to avoid injuring them.²⁰² One who breaches a relational duty of non-injury is (prima facie) subject to liability.²⁰³ Being subjected to liability, in this context, means being vulnerable to a claim that is initiated by the victim and backed by the power of the state.²⁰⁴

Prior to the Human Rights Act, for instance, it was a principle of English law that the ordinary law of the land applied to everyone, and that there was no separate system of public law through which compensation could be sought from a public authority.²⁰⁵ This was consistent with the Diceyan premise that the rule of law means “equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts”.²⁰⁶ In principle, therefore, until the advent of the Act, a person who claimed that they had suffered

²⁰¹ Layne, *supra* note 185, P.2.

²⁰² John C.P. Goldberg, Tort Law at the Founding, *Florida State University Law Review*, Vol. 39:85 [hereinafter Goldberg], P.86. The root of tort law can also be traced back into the theory of ‘state of nature’. In the state of nature, Lock and others advocate, it is the natural privilege of individuals to respond to wrongdoings in the form of self-help. Entering the social contract, they delegate governments their natural privilege of preventing themselves against imminent physical harm. Insofar as individuals delegate their natural privileges to the governments, and insofar as governments justifiably deny individuals the privileges of self-help and self-assertion in the name of civil peace and justice, it becomes government’s responsibility to provide alternatives. Tort law is said to be a fulfillment of this responsibility.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Jane Wright, *Tort Law and Human Rights*, Hart Publishing, Oxford - Portland Oregon, 2001 [hereinafter Wright], P.3.

²⁰⁶ *Ibid.*

harm as a result of tortuous conduct by a public body would seek redress by bringing proceedings in the ordinary courts through the usual actions by writ.²⁰⁷

In India, as well, early cases of fundamental rights adjudication justified awards of a ‘constitutional monetary remedy’ for breaches of rights by stressing the tortuous nature of the breach.²⁰⁸ In line with this, the Indian Supreme Court held that the right to compensation under Article 32 of the Indian Constitution should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court.²⁰⁹ This holding of the court, without ruling out the possibility of claiming compensation on the basis of the Constitution, had taken heed of the alternative remedy in the ordinary civil law.²¹⁰

Be that as it may, tort law has often been contested as unsuitable to have recourse to by victims of breach of human rights for the purpose of redress. To illustrate, wrongfully convicted individuals may base their claim on tort law and seek redress from police officers, lawyers, or state officials who they believe are responsible for the events that led to their wrongful convictions.²¹¹ A tortuous claim may have a basis in false imprisonment, malicious prosecution, or misfeasance/abuse of power; however, these claims may be difficult to demonstrate and doing so can be time consuming and expensive.²¹² A person may be wrongfully convicted as a result of inevitable and unfortunate events, where police officers, lawyers, and state officials acted without ill intent or malice.²¹³ In all instances, there is no guarantee whether their claims will be successful, how much compensation will be awarded, or how long the process may take.²¹⁴

3.3.2 Constitutional Law

In countries where the right to compensation for breach of the right to physical liberty is recognized in the constitution, victims have the opportunity to invoke the provisions in their claims for compensation, and courts grant the remedies accordingly. In the United States, the Section 1983 which was enacted in 1871 to provide damages remedy against state and local

²⁰⁷ Ibid.

²⁰⁸ Tortell, *supra* note 29, P.82.

²⁰⁹ Id., P.49.

²¹⁰ Ibid.

²¹¹ Rachel, *supra* note 192, P.4.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

government officials and local governments for violations of constitutional rights was construed to require breach of a constitutional right before the remedy was available.²¹⁵ In other words, it is necessary for the action complained of to be phrased as ‘a recognized breach of a recognized constitutional right’.²¹⁶ Similarly, in New Zealand, a constitutional claim that warrants a constitutional remedy is required to be based on one of the rights listed in the Bill of Rights Act.²¹⁷ In this sense, tort law is distinguished from Bill of Rights’ breaches.

In India, on the other hand, the cause of action based on constitutional rights overlaps significantly with tort breaches.²¹⁸ Due to this overlap, the position of Indian courts at the beginning was that compensation would be available under Article 32 of the Constitution only in exceptional cases, particularly for breaches that are qualified as incontestable, gross and heinous.²¹⁹ The first constitutional tort remedy decided by the Indian Supreme Court, *Rudul Sah case*, concerned a particularly heinous illegal detention and unlawful death. In cases such as these, it was taken to be certain that civil compensation would eventually be granted.²²⁰ Consequently, it was taken to be appropriate to award compensation under Article 32 of the Constitution, which would in effect dispense the petitioner with the requirement of pursuing a long, inflexible and expensive civil action.²²¹ Despite that, there seems to have been no explicit expression of such a requirement and, in later cases, it became clear that the scope was significantly wider.²²²

In Uganda, the post 1995 Constitution period offered two options of legal avenues to victims of human rights violations. These options are filing such a claim before the courts of law based on the Law Reform (Miscellaneous Provisions) Act, or filing the claim as a ‘human right’ based on the Human Rights Commission Act.²²³

²¹⁵ Tortell, *supra* note 29, P.80.

²¹⁶ *Id.*, P.82.

²¹⁷ *Ibid.*

²¹⁸ *Id.*, P.83.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Id.*, P.84.

²²³ Henry Onoria, Jurisdiction *ratione materiae* of the Uganda Human Rights Commission: Making sense of the ambiguity in the jurisprudence, in *African Human Rights Law Journal*, Vol.10, No.1, 2010, P.62. See also:

Article 53(2) of the Ugandan Constitution provides for the payment of compensation for infringement of a human right. It is admitted that the claim for compensation under the provision can give rise to claims in ‘human rights’ as well as in

3.3.3 Human Rights Law

Remedies in human rights law are distinguished from that of tort law. While tort law safeguards people against injustices that may be inflicted by anyone, human rights law is specifically concerned with the state and its constituent public authorities.²²⁴ This is partly manifest in the “super legislative (i.e., constitutional) normative status they are given precisely because the legislative and the executive branches are likely to infringe them”.²²⁵ Some scholars succinctly put this notion as:

*Human rights were originally conceived as rights and freedoms vis-à-vis the State and other public authorities. Their very fundamental purpose was to protect the individual against the omnipotent State with its vast powers of detention, expropriation and censorship. The major function of human rights thus was to mitigate the imbalance between two unequal parties, the public authority and the individual. In this respect, human rights constitute an integral part of public law.*²²⁶

The human rights approach to the deprivation of liberty reflects the idea that the state’s authority, which is manifested especially in its powers lawfully to arrest or detain, and convict people brings with it special responsibilities to those over whom it exercises such authority.²²⁷ Indeed, it is the realization of this and similar special normative relationship between states and their citizens that lies at the heart of the emergence and growth of human rights instruments and institutions.²²⁸ It is also for this reason that human rights law may provide a remedy for “mere” maladministration, something the law of tort resolutely refuses to do.²²⁹

‘tort’. In effect, there is a hybrid character to claims presentable as human rights violations in Uganda. For instance, claim for loss of life is in a particular context inherently a claim for a violation of the right to life. Similarly, an occupation of land may raise tortious elements of trespass on land but is manifestly a violation of the right to property. Thus, a claim that manifests other civil elements should nonetheless be receivable if it similarly manifests human rights issues.

²²⁴ du Bois, Francois, Human Rights and the Tort Liability of Public Authorities, in Law Quarterly Review Vol. 127, University of Nottingham, 2011, pp.588-606, P.594, available at SSRN: <http://ssrn.com/abstract=2323702>.

²²⁵ Daniel Friedmann and Daphne Barak-Erez (eds.), Human Rights in Private Law, Hart Publishing, Oxford-Portland Oregon, 2001, P.17.

²²⁶ Francois du Bois and Daniel Friedmann and Daphne Barak-Erez (eds.), Human Rights in Private Law, Hart Publishing, Oxford-Portland Oregon, 2001, P.1.

²²⁷ du Bois, Francois, supra note 224, P.595.

²²⁸ Ibid.

²²⁹ Ibid.

The prevalence of “positive” duties in human rights law reflects an understanding of the state as bearing special responsibilities in respect of those over whom it exercises authority, differing from the responsibilities individuals owe one another.²³⁰ The notion that the state bears special responsibilities is also present in “negative” human rights against the state, with the result that the content and approach of tort law and human rights law also differ when it comes to commissions.²³¹ For example, it is submitted that, whereas the common law tort of false imprisonment requires actual restraint and thus cannot be committed against a compliant person, the right to liberty protected by art.5(1) of the ECHR is already infringed if the detention took place under flawed procedures.²³² Thus, because the state occupies a special role in society bringing with it special responsibilities, individuals sometimes enjoy “negative” rights against the state which they do not have against other individuals, or have “negative” rights that have a greater reach against the state than against private persons.²³³

Substituting tort law remedies for human rights violations (‘human rights tort’) may have the effect of downplaying the very essence of human rights law, i.e., its function of limiting power. To be noted is the practice in England before the Human Rights Act. The then judicial practice fueled suspicions on the suitability of tort law to address breach of human rights. Relying on the common law tort, the English courts were overly reluctant in bringing public bodies to account, and have in effect failed in some instances to ensure that human rights standards have been upheld.²³⁴ In the midst of this turmoil, the Human Rights Act 1998 came into force with the effect of remedying the pitfalls in the tort law; and heralded that a claim for the violation of the Convention right could be brought against a public body under the Act.²³⁵

To sum up, the practice of other jurisdictions depicts that there are times when the law of tort is used to provide an avenue for victims of breach of human rights to seek remedies. In other jurisdictions, victims rely on law of tort or Constitution, or both. In some others, a remedy in tort law is considered as parallel to a constitutional remedy. Still others base their claims on human rights law, particularly human rights treaties. In Ethiopia, as will be dealt with next, the law of

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Wright, *supra* note 205, P.3.

²³⁵ Ibid.

tort provides for damages remedies in certain cases of breach of human rights. But the award of damages under the law of tort is conditioned upon proof of three cumulative requirements: fault, damage and causation. But a person may sustain damage where fault cannot be attributed to no one else. So, too immunity of public officials responsible for the harm suffered may bar claims for compensation against them.

3.3 The Legal Basis of Compensatory Remedies for Breach of the Right to Physical Liberty under Ethiopian Law

3.3.1 Preliminary Considerations

Before indulging into the discussions of the legal basis of compensatory remedies for breach of the right to physical liberty within the Ethiopian legal framework, it is worthwhile to first consider some preliminary issues: (1) justiciability, (2) standing, (3) cause of action, and (4) jurisdiction. The first two concepts will be dealt with subsequently and independently. The third concept will be considered in conjunction with the relevant laws to be examined. Finally, for the sake of convenience, the discussion of the forth concept is moved forward to be discussed in chapter 4 of this work.

3.3.1.1 Justiciability

Justiciability concerns the limits upon legal issues over which a court can exercise its judicial authority.²³⁶ So much so that, some contend that there is no such thing as justiciability except for the narrow requirement that the courts handle only judicial proceedings.²³⁷ Accordingly, to say that a case before the court is non-justiciable is to say that the plaintiff has no judicially enforceable right.²³⁸ The right may, however, exist in someone else or under different circumstances, or it may exist without being judicially enforceable.²³⁹

²³⁶ Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post communist States of Central and Eastern Europe*, Springer, 2005[hereinafter Sadurski], P.70.

²³⁷ Wayne McCormack, *The Justiciability Myth and the Concept of Law*[hereinafter McCormack] P.597, available at: <http://www.hastingsconlawquarterly.org/.../>

²³⁸ *Id.*, P.595.

²³⁹ *Ibid.*

As the issue of justiciability does not address the actual merit of the case, it is determined as a preliminary matter.²⁴⁰ Hence, before proceeding to hear a case, a court first examines whether the matter is justiciable. In American law, justiciability seeks to address whether a court possesses the ability to provide adequate resolution of the dispute; where a court feels it cannot offer such a final determination, the matter is not justiciable.²⁴¹ Thus, in order for an issue to be justiciable by a United States federal court, all of the following conditions must be met: (1) that the parties must not be seeking an advisory opinion, (2) that there must be an actual controversy between the parties, (3) that the question must neither be unripe nor moot, and (4) that the suit must not be seeking judgment upon political question.²⁴² For the court to proceed to the hearing, the case needs to survive these four tests of justiciability.

Justiciability, as noted by Michael Addo, has a direct derivation from the administration of justice.²⁴³ As such, non-compliance with the terms of the legal regime will require some form of redress; and justiciability ideally therefore calls on the role of a person or body with no interest in the controversy giving rise to the review.²⁴⁴ On the other hand, declaring an issue to be non-justiciable is said to leave three points in the hands of the political branches: (1) the question of whether the Constitution contains any limits on governmental action; (2) the question of what those limits should be if they exist at all; and (3) whether the limits are transgressed in a given circumstance.²⁴⁵

When it comes to the relevant Ethiopian law on the matter under consideration, the judiciaries of both the Federal and State governments bear the responsibility and duty to respect and enforce

²⁴⁰ See, McCormack, cited above #237, P.597: It may be that the result of a “refusal to decide” is just as effective a denial of relief to that litigant and those similarly situated as a “decision on the merits,” but the court purports to leave open the possibility that the claimed “right” exists.

²⁴¹ Wojciech Sadurski, *supra* note 236.

²⁴² *Ibid.* See also, <http://legal-dictionary.thefreedictionary.com>: Here also, with a slight difference from the above mentioned tests, at their simplest, four tests are identified that the United States courts apply to determine whether a matter is justiciable. These tests concern: (1) the plaintiff (the requirement of standing), (2) the adversity between the parties (the requirement of a legal relationship of the parties in the case), (3) the substance of the issues in the case (the requirement of real and substantial controversy), and (4) the timing of the case (the requirement that the harm asserted has matured sufficiently to warrant judicial intervention).

²⁴³ Michael Addo, *Justiciability Re-examined*, in Ralph Beddard and Dilys M. Hill, *Economic, Social and Cultural Rights*, Macmillan, 1992, P.94.

²⁴⁴ *Ibid.*

²⁴⁵ McCormack, *supra* note 237, P.598.

the human right provisions of Chapter 3 of the Constitution.²⁴⁶ The judiciary cannot logically be expected to enforce rights that are beyond judicial scrutiny. The responsibility and duty of the judiciary to enforce fundamental rights and freedoms protected by the Constitution is therefore an expression of the justiciability of the rights.²⁴⁷ That fundamental rights and freedoms are justiciable is further strengthened by Article 37(1) of the Constitution which provides that ‘everyone has the right to bring a justiciable matter to court, and to obtain a decision or judgment by a court of law....’ Moreover, the Federal Courts Establishment Proclamation No.25/1996 which came into force subsequent to the Constitution confirmed in a rather plain language that ‘federal courts shall have jurisdiction, *inter alia*, over cases arising under the Constitution’.²⁴⁸

3.3.1.2 Standing

Standing is “a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court; it is the right to take the initial step that frames legal issues for ultimate adjudication by court”.²⁴⁹ The concept of standing is concerned with whether a person who approaches the court is a proper party to present the matter in issue to the court for adjudication.²⁵⁰ Unlike justiciability which concerns the issues the plaintiff wishes to have adjudicated, standing concerns the party who brings the matter before the court.²⁵¹ An inquiry into standing thus focuses on the party who brings the matter before the court, not on the issue to be adjudicated.²⁵²

In private law, it is the party who has interest in the subject matter of the case that can bring a law suit before courts of law.²⁵³ In determining such a party, one may need to ask two questions: who the cause of action aims to protect; and who is entitled to bring the cause of action.²⁵⁴ In fact, the distinction seems to be of only conceptual, not practical as an individual who the cause

²⁴⁶ The FDRE Constitution, Article 13(1).

²⁴⁷ Yeshanew, *supra* note 17, P.5.

²⁴⁸ Federal Courts Proclamation No.25/1996, Federal Negarit Gazeta, 2nd Year, No.13, 15th February, 1996, Article 3(1). See also, Sisay, note 247 at 7.

²⁴⁹ Black’s Law Dictionary, *supra* note 19.

²⁵⁰ Cheryl Loots, Access to the Courts and Justiciability, Constitutional Law of South Africa [hereinafter Loots], P.7, available at: <http://www>.

²⁵¹ *Ibid*.

²⁵² *Id.*, P.8.

²⁵³ *Ibid*.

²⁵⁴ Tortell, *supra* note 29, P.88.

of action aims to protect will be entitled to rely upon the cause of action.²⁵⁵ However, doctrines of standing have assumed increasing importance “in public law because often the party who brings a public-law issue before the court does so not for personal gain, but out of a sense of conviction that public authorities or representative bodies should not be allowed to act unlawfully.”²⁵⁶

In the context of constitutional rights, for instance, it seems that people other than those who the cause of action aims to protect may also rely upon the cause of action and bring a case before a court. In other words, the group of individuals who the cause of action protects may be a subset of a larger group who can bring the cause of action.²⁵⁷ This is asserted as a recognition of ‘*actio popularis* or public interest litigation (class action), where a person or an organization may institute a case on behalf of a third person or an indiscriminate mass of people with similar grievances without being required to show a vested interest in the case’(emphasis added).²⁵⁸ The procedure of *actio popularis* would, for instance, enable human rights NGOs to take human rights violations to national courts and international monitoring bodies on behalf of certain individuals.²⁵⁹ Expanding standing rule to the extent of providing NGOs with such an avenue is particularly important in developing countries where fear of further victimization prevents victims of human rights violations from bringing the matter to the attention of judicial and quasi-judicial organs.²⁶⁰ Liberalizing the law defining standing in human rights cases, some hold, would ensure the full justiciability of the rights.²⁶¹

With this, we now turn our attention to the scenario in Ethiopia. To begin with, the Civil Procedure Code²⁶², in Article 33(2) provides, “no person may be a plaintiff unless he has a vested interest in the subject-matter of the suit.” The requirement of this provision means that only someone with legal title to the right affected by the defendant’s conduct could sue at law. The same requirement has also been imported into Article 38 of the same Code, according to which several persons who have the same interest in a suit may upon their consent be represented

²⁵⁵ Ibid.

²⁵⁶ Loots, *supra* note 250, P.8.

²⁵⁷ Tortell, *supra* note 29, P.88.

²⁵⁸ Yeshanew, *supra* note 17, P.20.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² The Civil Procedure Code of the Empire of Ethiopia of 1965, Decree No.52 of 1965, *Negarit Gazeta*, Extraordinary Issue No.3 of 1965.

by one or more of such persons and sue the defendant(s).²⁶³ Generally, “for a case of a group of people to be taken to court, all those who are interested should give power of representation to one or more of them (class action) or a power of attorney to a lawyer; such power is also required to take a case on behalf of an individual”²⁶⁴ (emphasis added).

Since this study concerns a remedy for breach of a particular human right, and since human rights law is part of the general public law, namely the Constitution, public law standing is the theme of this research. So, the next few paragraphs will be devoted to the examination of both who the cause of action aims to protect and who is best suited to bring claims of breach of constitutional (human rights) within the Ethiopian legal framework. The principal source for determining such matters is the constitutional document itself.²⁶⁵ Pertinent to this point, Article 37 of the FDRE Constitution, which is replicated in the nine National Regional State Constitutions, is reproduced, and reads, as follows:

Right of Access to Justice

1. *Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.*
2. *The decision or judgment referred to under sub-Article 1 of this Article may also be sought by:*
 - (a) *Any association representing the Collective or individual interest of its members; or*
 - (b) *Any group or person who is a member of, or represents a group with similar interests.*

From the reading of this provision, three categories of persons have the right (standing) to bring a justiciable matter to a judicial or quasi-judicial body: (1) an individual on behalf of her/himself or representing a group with whom s/he shares similar interest; (2) an association representing the collective or individual interest of its members; and (3) a group of persons with similar interests. As compared to its Indian counterpart, the requirement of standing under the above provision is restrictive and likely to restrain the enforcement of the right guaranteed under the Constitution. In India, particular significance is attached to ensuring the enforcement of the

²⁶³ Article 38(1) of the Civil Procedure Code provides:

(1) Where several persons have the same interest in a suit, one or more of such persons may sue or be sued or may be authorized by the court to defend on behalf or for the benefit of all persons so interested on satisfying the court that all persons so interested agree to be so represented.

²⁶⁴ Yeshanew, *supra* note 17, P.20-21. See also, Civil Procedure Code, Articles 57-64.

²⁶⁵ Tortell, *supra* note 29, P.88.

rights rather than the identification of the person enforcing the rights.²⁶⁶ To this effect, Article 32 of the Indian Constitution guarantees the right to move the Court by proceedings ‘for the enforcement of the rights’ without referring to standing.²⁶⁷

The requirement of having legal interest in the subject matter of a suit means that the above provisions of both the Civil Procedure Code and the FDRE Constitution do not allow *actio popularis*. In other words, there is no general action in the public interest under the provisions. For instance, a person or group of persons having no interest in the case of mass arrest or detention in contravention of the Constitution cannot bring a claim for compensation against the violator(s). Neither do human rights NGOs have the standing to claim compensation on behalf and for the benefit of the victims.

Nevertheless, there are some special laws in which litigation in public interest is permissible. To mention, the Federal Courts Advocates Licensing and Registration Proclamation provides for *actio popularis* in the section that deals with the issuance of Federal Court Special Advocacy License.²⁶⁸ The Proclamation, in Article 10, provides that any Ethiopian who defends the general interests and rights of the society will be issued with a Federal Court Special Advocacy License upon the fulfillment of certain requirements.²⁶⁹ These requirements include, *inter alia*, having a degree in law from a legally-recognized educational institution, knowing the basic Ethiopian laws and having work experience of five years, willing to render the service free of charge.²⁷⁰

Similarly, the proclamations establishing the Human Rights Commission²⁷¹ and the Institution of the Ombudsman²⁷² also allow the *actio popularis*. Article 22(1) of the respective proclamations make it possible for complaints to be lodged by a third party (without the need to show a vested

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Federal Courts Advocates’ Licensing and Registration Proclamation No. 199/2000, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 6th Year, No. 27, 9th March, 2000 (hereinafter Proc. No.199/2000).

²⁶⁹ See also, Sisay Alemahu, *supra* note 17, P. 21.

²⁷⁰ Proc. No.199/2000, Article 10.

²⁷¹ The Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 6th Year No.40, 4th July, 2000[hereinafter Human Rights Commission Proc.No.210/2000].

²⁷² The Institution of the Ombudsman Establishment Proclamation No.211/2000, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 6th Year No.41, 4th July, 2000.

interest) and even anonymously.²⁷³ Whether the recognition of this procedure under these two proclamations merits practical significance for the purpose of compensation is discussed under the section dealing with the two institutions.

Even though NGOs are in a better position for public interest litigation, the scenario in Ethiopia does not offer much prospect. In one case, an effort by the APAP to be issued with the Federal Court Special Advocacy License had proved a failure on the ground that only natural persons or individual members of the Association but not the Association in its own name qualify for the license.²⁷⁴

To conclude, in Ethiopia, the rule of standing in seeking a judicial remedy is generally restrictive. The requirement of ‘vested interest’ is implicit in the rule.

3.3.2 Cause of Action

The concept “cause of action” is described as: “The fact or facts which give a person a right to judicial redress or relief against another; the legal effect of an occurrence in terms of redress to a party to the occurrence; a situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf.”²⁷⁵ This is a descriptive account of ‘cause of action’. It may be that the concept can better be described than defined. Be that as it may, no remedy can be awarded without consideration of the legal aspects that make up a cause of action.²⁷⁶ In other words, it is a mandatory requirement that every action for judicial redress or relief must show the cause of action on which it is based. This concept can better be explained in conjunction with the relevant laws on which claims of compensation for breach of the right to physical liberty may be based.

²⁷³ See Yeshanew, *supra* note 17, P. 21.

²⁷⁴ See, *supra* note 17, P. 21, Cited by Sisay Alemahu: “The maiden trial of APAP, a local NGO of lawyers, to secure a Special Advocacy Licence as an organisation failed. The Ministry of Justice demonstrated in this application that it would rather issue a licence for individual staff of NGOs who fulfil the requirements set by art 10 of Proclamation 199/2000 and actually licensed two employees of APAP.”

²⁷⁵ Black’s Law Dictionary, *supra* note 19.

²⁷⁶ Tortell, *supra* note 29, P.3.

3.3.2.1 Constitutional (Fundamental) Rights Cause of Action

In the case of breach of constitutional right, what is the cause of action that sounds in compensatory remedy? With regard to this, some jurisdictions have faced with determining whether actions amounting to a breach in civil law were sufficient to found a constitutional claim. In the United States, fundamental rights cause of action is distinguished from tort cause of action.²⁷⁷ Accordingly, it was held that mere tort breaches were not sufficient to found a Section 1983 cause of action; it was necessary for a constitutional right to be breached before the remedy was available.²⁷⁸ In the New Zealand, similar to the U.S, the distinction between tort law and Bill of Rights' breaches is stressed.²⁷⁹ In *Baigent's Case*, the plaintiffs sought damages for the established tort (wrong) of trespass, as well as breach of the right under the Bill of Rights Act to be secure from unreasonable search and seizure.²⁸⁰ It was then submitted that "the cause of action was clearly positioned within public law with tort claims considered parallel, suggesting that something extra would be needed to convert a tort action into constitutional claim".²⁸¹ In India, as opposed to the above two jurisdictions, the cause of action based on constitutional rights overlaps significantly with tort breaches.²⁸²

Cause of action presupposes breach of a right. So, in the United States, the breach is required to be one that is of a public nature.²⁸³ To this end, the courts require the actions at the base of the cause of action to be state actions, be it lawful or unlawful, and for the breach to have been part of official conduct.²⁸⁴ In India, rape has been considered to be a breach of the right to life and liberty, thus "constitutionalizing the crime and rendering the victim entitled to the constitutional monetary remedy".²⁸⁵

But breach of a right will not always be sufficient to found the cause of action. In the United States, the *Bivens*²⁸⁶ cause of action has distinguished between compensable breaches of

²⁷⁷ Ibid.

²⁷⁸ Ibid. See also, supra note 215.

²⁷⁹ Ibid.

²⁸⁰ Id., P.59.

²⁸¹ Id., P.81.

²⁸² Ibid.

²⁸³ Id., P, 86.

²⁸⁴ Id., P.85.

²⁸⁵ Id., P, 86.

²⁸⁶ *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388, 91 S Ct 1999 (1971).

constitutional rights and breaches for which the constitutional remedy will not be available.²⁸⁷ Accordingly, for the *Bivens* cause of action to apply, a constitutional right will need to be breached in a context to which the constitutional remedy relates.²⁸⁸ The scenario in India deviates from that of the United States in that Article 32 of the Constitution requires the Supreme Court to adjudicate any actions shown to be a breach of a right guaranteed in the Constitution notwithstanding that an alternative legal remedy is available.²⁸⁹

Against this background, it now seems appropriate to consider the scenario in Ethiopia. In the Ethiopian legal system, for every legal claim, cause of action is required to be ascertained as a preliminary matter. To this effect, the Civil Procedure Code requires the plaintiff to state the cause of action on which his/her statement of claim is based for the claim to withstand preliminary scrutiny. Pursuant to Article 231(1)(a) of the Civil Procedure Code, the court in which a statement of claim is filed ‘shall reject the statement of claim where it does not disclose any cause of action’. True as for jurisdiction, cause of action is a legal requirement checked by the judge.

By the same token, a claim for compensatory remedy for breach of the right to physical liberty needs to disclose cause of action. The right to liberty has attained the status of constitutional human rights in Ethiopia. As there is no remedy where there is no breach, the right to physical liberty entrenched in the constitution must be breached to found the cause of action entailing compensatory remedy. As stated above, there is a further requirement that the breach must be compensable within the Constitutional framework. This latter requirement marks the beginning of the worries while dealing with the compensatory remedy under consideration. That is, remedies provision is lacking in the Constitution, making it difficult for the victims to base their action for compensation on the Constitution and for the courts to grant same. But, is that a license for persons acting in official capacity to breach the right to physical liberty without the obligation to pay compensation for the victims for the damage he/she sustained? What possible recourse do such victims have, given the existing laws?

²⁸⁷ Tortell, *supra* note 29, P.84.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is infringed.²⁹⁰ In other words, cause of action for breach of an established right necessarily flows from and intrinsic to the right.²⁹¹ The cause of action may take one of two forms: express or implied. Implied cause of action is a term used in the United States statutory and constitutional law for circumstances when a court will determine that a law that creates rights also allows private parties to bring a lawsuit, even though no such remedy is explicitly provided for in the law.²⁹² The *Bivens v. Six Unknown Named Agents Case*²⁹³ is best known for creating an implied cause of action for constitutional rights. In this case, the United States Supreme Court ruled that an individual whose Fourth Amendment freedom from unreasonable search and seizures had been violated by federal agents could sue for the violation of the Amendment itself, despite the lack of any federal statute authorizing such a suit. The Court held that the existence of a remedy for the violation was implied from the importance of the right violated.²⁹⁴ A later decision of the Supreme Court has revealed that a cause of action would not be implied for the violation of rights where the U.S Congress had already provided a remedy for the violation rights at issue, albeit the remedy was inadequate.²⁹⁵

Similarly, the absence of remedies provision in the New Zealand's Bill of Rights Act did not prevent the Court from granting a monetary remedy for breach of the Bill of Rights. The case in point is the *Baigent's Case*.²⁹⁶ The Bill of Rights version of the plaintiff's pleading was that Section 21, which created the right to be secure against unreasonable search or seizure was violated and the plaintiff claimed damages for the breach. But the Crown denied that the Bill of Rights Act gave rise to a cause of action in damages; it also pleaded that statutory immunity was available to the Crown under Section 6(5) of the Crown Proceeding Act 1950.²⁹⁷ The Court of

²⁹⁰ Implied cause of action, available at: http://www.en.wikipedia.org/wiki/Implied_cause_of_action, visited on 13 February, 2014.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ See, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), available at: http://www.en.wikipedia.org/wiki/Bivens_v._Six_Unknown_Named_Agents

²⁹⁴ Supra note 289.

²⁹⁵ Ibid.

²⁹⁶ Tortell, supra note 29, P.59.

²⁹⁷ Section 6(5) of the Crown Proceedings Act 1950 provides:

No proceeding shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

appeal-by a majority-rejected the contention of the Crown and held that the alleged infringement of the Bill of Rights Act provisions entitled the plaintiffs to claim damages for the breach.²⁹⁸ The decision presented a very strong and authoritative pronouncement that monetary remedy lies for breach of the Bill of Rights Act.²⁹⁹ The reasoning of the Court was that “despite the absence of remedies provision, the rights in the Bill of Rights should not be allowed to become empty words; the Court would develop appropriate remedies to ensure the enforcement of those rights and freedoms.”³⁰⁰ In arriving at this conclusion, the Court heavily relied on the international jurisprudence in the area of human rights, including the Court’s important role in ensuring the effectiveness of the ICCPR and the previous decision of the House of Lords.³⁰¹

In the light of the above submission, it seems that the Courts in Ethiopia can utilize a similar line of argument in an effort to imply a cause of action for a compensatory remedy for breach of the fundamental right to physical liberty guaranteed in the Constitution. There are, however, some factors that hamper the import of the practice in the above two jurisdictions into the Ethiopian legal system. That remedies provision is absent from the Constitution gives rise to the need for constitutional evolution by way of interpretation or amendment if compensation should be awarded to victims of breach of the right to physical liberty. Since amending the Constitution is beyond the province of the judiciary, the role of the courts is, if at all, limited to expounding and interpreting the provisions of the Constitution. Again the task of constitutional interpretation itself is constitutionally given to the HoF, a political organ, whereas the judicial task is to apply the law as written and with exacting objectivity. This has so far led the Ethiopian courts to

The Crown contended that the search warrant was judicial process and therefore the Crown was not vicariously liable under Section 6. The Court of Appeal, by a majority, held that, on the facts as pleaded, the Crown was liable not only vicariously but also directly for the conduct of the police. Section 6(5) did not provide a defense, because the Court was prepared to read in a requirement of good faith in executing the search warrant, which was not met on the pleaded facts ([1994] 3 NZLR 667, 674, 690, 696, 716). The plaintiffs in the case pleaded that an unlawful search of Mrs. Baigent’s house was performed by police officers, and alleged that an officer asserted in a telephone conversation to Mrs. Baigent’s daughter: “we often get it wrong, but while we are here we will have a look around anyway”. The court held that the alleged infringement of the Bill of Rights Act provisions entitled the plaintiffs to claim damages for the breach. Publication_40, P.4

²⁹⁸Tortell, *supra* note 29, P.59.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

relinquish their proper provinces into the hands of the CCI/HoF³⁰² which Takele Soboka has this to say:

*...In Ethiopia, the trend appears to depict the polar opposite: regular courts seem to have thrown in the towel long before the jurisdictional battle begins. The trend of judicial referral of constitutional issues from and by the regular judiciary to the House of the Federation (HoF) via the Council of Constitutional Inquiry (CCI) shows that the regular courts have been too willing to relinquish their jurisdiction over constitutional disputes readily into the hands of the CCI/HoF.*³⁰³

This has characterized the Ethiopian judges as seeking to clothe themselves in anonymity when it comes to the application of a clear provision of the Constitution³⁰⁴, let alone expounding the meaning of the Constitution by way of interpretation so as to imply the cause of action and reach at a remedy which is absent outright. Therefore, in the absence of a clear constitutional provision creating a constitutional remedy, it seems to be a rather far-fetched possibility to expect the Ethiopian courts to grant a compensatory remedy for breach of the constitutional right to physical liberty.

3.3.2.2 Tort Cause of Action

Compensatory remedy on the basis of the Constitution being an uphill struggle, it is worthwhile to consider if there is an alternative recourse for victims of breach of the right to physical liberty under a private law, particularly the law of tort. The law of extra-contractual liability (tort) is a law that provides for a remedy by awarding, *inter alia*, compensation to the victim when his or her rights and interests protected by the Constitution and other laws are violated. The right to

³⁰² The Council of Constitutional Inquiry (CCI) is an advisory body established by Council of Constitutional Inquiry Proclamation No.250/2001 pursuant to Article 82 of the FDRE Constitution. The House of Federation (HoF) is one of the Federal Houses, established in terms of Article 53 of the FDRE Constitution and entrusted with the power of constitutional interpretation pursuant to Article 62 of the Constitution.

³⁰³ Takele Soboka Bulto, Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory, *African Journal of International and Comparative Law* 19.1 (2011): 99–123, Edinburgh University Press, P.100. One of the cases where the court is said to have readily relinquished its proper jurisdiction, cited by Takele Soboka, was the *Coalition for Unity and Democracy v Prime Minister Meles Zenaw Asres*, Federal First Instance Court, File 54024, ruling of 3 June 2005.

³⁰⁴ Yeshanew, *supra* note 17, P.12. Sisay rejects the argument that the generality of the constitutional provisions has precluded the courts from directly applying the provisions to specific cases. He holds that the Constitution enshrines provisions specific enough to be applied by courts (e.g., rights of persons under arrest and rights of the accused under Articles 19 and 20 respectively).

physical liberty is one of the rights protected by the FDRE Constitution. A person whose right to liberty or freedom of movement, as the case may be, is unlawfully restricted could thus sue the person who is responsible for the interference and move the court to award him/her damages or compensation. Next will be discussed the pertinent provision of the Civil Code dealing with extra-contractual liabilities.

Art. 2040. - Interference with the liberty of another. - 1. Principle

- (1) A person commits an offence where, without due legal authority, he interferes with the liberty of another person, even for a short time, and prevents him from moving about as he is entitled to do.*
- (2) In such a case, an offence shall be deemed to have been committed notwithstanding that no injury is done to the plaintiff's person.*
- (3) It shall be sufficient for the plaintiff to have been compelled to behave in a certain manner by the threat of a danger of which he could not be unaware.*

Within the meaning of the above provision, an offence (fault) is said to have been committed as a result of interference with the liberty of another where the following elements are met. First, the interference need to be “without due legal authority”. For instance, pursuant to Article 49 of the Ethiopian Criminal Procedure Code, a person who is suspected to have committed a crime cannot be arrested without a warrant of arrest issued in advance by a competent court of law save as is expressly provided by law. If, under circumstances where warrant is required by law, a police officer effects the arrest without complying with this legal requirement, the police is said to lack legal authority; and it is an offence within the meaning of the above provision.³⁰⁵ Second, it suffices that there is a restraint of liberty or detention no matter for how long the restraint or the detention may be; a time as short as one minute may suffice for the act to be regarded as fault. Third, the phrase “...prevents him from moving about as he is entitled to do” means that the interference is against an established legal entitlement. The above entitlement finds its basis in the Constitution.³⁰⁶ Fourth, the offence is deemed to have been committed notwithstanding that the plaintiff sustained no material injury. That is, material injury is not a requirement for the article to apply.

³⁰⁶ The FDRE Constitution, Articles 17 and 32.

Where the above requirements are met and where the offender fails to avail him/herself of the defenses under Article 2041 of the Civil Code, the victim is entitled to compensation pursuant to Article 2090 of the same Code.³⁰⁷ But ‘no offense shall be deemed to have been committed where the constraint has been imposed in a reasonable manner on a person in the legal custody of the defendant and for the purpose of enforcing the authority conferred upon the latter by law’ (emphasis added)³⁰⁸. In this case, the defendant is relieved from the obligation to pay compensation to the plaintiff.

Interference with the liberty of another is also a crime under the Ethiopian Criminal Code. Moreover, criminal wrong under the Code gives rise to tortious liability.³⁰⁹ However, “in deciding whether a civil offence has been committed, the court shall not be bound by an acquittal or discharge by a criminal court.”³¹⁰ Therefore, there might be a cause of action for damages or compensation in tort even where the defendant has been acquitted by a criminal court.

Definitions of fault (offense) by some provision of the Civil Code governing non-contractual liability clearly overlap with the elements of provisions of the Criminal Code creating a specific crime. A look into Articles 2040 (reproduced and discussed above) of the Civil Code and 585 of the Criminal Code best illustrate this situation. Article 585 of the Criminal Code which criminalizes an illegal restraint states that “whoever, contrary to law or without legal order, arrests, confines or detains or otherwise restrains the freedom of another, is punishable with simple imprisonment not exceeding three years”. As one may see, this provision is an equivalent of Article 2040 of the Civil Code in terms of its elements. Of the requisite elements for the crime under Article 585 to have been committed, the first two deserve particular attention at this point. First, that the arrest, confinement or detention or restraint of freedom is contrary to a law in force. This is without having regard to the identity or official status of the perpetrator. Second, that the act is done without legal order, i.e., the actor is not executing a legal order made duly.

³⁰⁷ The Civil Code of the Empire of Ethiopia, Proclamation No.165 of 1960, Negarit Gazeta, Gazette Extraordinary, 19th Year No.2, 5th May, 1960 [hereinafter referred to as Civil Code], Article 2090 reads:

Modes of compensation

(1) *Unless otherwise provided, the damage shall be made good by awarding the victim an equivalent amount in damages.*

(2) *The court may, subject to the liberty of persons and to the rights of third parties, order in lieu of or in addition to damages any appropriate measures to make good or limit the damage.*

³⁰⁸ Civil Code, Article 2041.

³⁰⁹ Criminal Code, Articles 407, 423, 543, 559, 580, 585, 602, cum 2035 of the Civil Code, as the case may be.

³¹⁰ Civil Code, Article 2149.

This provision implicitly relieves from criminal responsibility persons who are authorized to restrain the right to liberty insofar as they comply with the law. Accordingly, a police officer who has arrested a person according to a warrant of arrest duly issued by a competent court cannot be said to have committed a crime of illegal restraint. By the same token, it is not a crime under Article 585 to detain a person (suspect) on an order of remand granted by a court of law. In both cases, the police cannot be held criminally responsible. Neither can there be the possibility for civil liability of the police for it does not meet the elements of offence under Article 2040 of the Civil Code and/or the police may avail him/herself of the defense under Article 2041, so far as the restraint has been imposed in a reasonable manner.

More pertinent to the theme of this study, the Criminal Code clearly stipulates *unlawful arrest or detention* as a grave crime. The relevant provision of the Code is reproduced as follows:

Article 423:- Unlawful Arrest or Detention

Any public servant who, contrary to law or in disregard of the forms and safeguards prescribed by law, arrests, detains or otherwise deprives another of his freedom, is punishable with rigorous imprisonment not exceeding ten years and fine.

This provision specifically addresses breach of the right to physical liberty by any public servant contrary to law (substantive) or in disregard of established legal procedures (procedural). Unlike Article 585, discussed above, this article does not have a direct equivalent in the Civil Code dealing with tort. Nonetheless, thanks for the inclusion of Article 2035 in the Civil Code in lieu of which virtually all breaches of rights are fault proper for the purpose of extra-contractual liability.

Art. 2035. - Infringement of a law.

(1) A person commits an offence where he infringes any specific and explicit provision of a law, decree or administrative regulation.

(2) Ignorance of the law is no excuse.

From this, infringement of any laws, be it federal or state, as the case may be, is deemed to be a fault *per se* and gives rise to the application of the provision. The provision has a pulling effect in that any breach of a law propels its application. It is, however, required for the infringement to be of an explicit provision of a law (not implied); and for the law to be specific (not general) as to require no interpretation. By virtue of this provision, breach of Articles 17 and/or 32 of the

Federal Constitution and its equivalents in the States' Constitutions would urge the application of Article 2035. In this context, breach of the right to physical liberty under both Constitutions may give rise to cause of action in tort. This entails that, when those rights and interests, which are protected by the Constitution and other laws, are violated, courts will award a sum of money, known as damages (compensation) for infringement of protected rights and interest³¹¹.

The import of Article 423 of the Criminal Code above into Article 2035 of the Civil Code means that breach of the right to physical liberty contrary to law (both substantive and procedural) entails the application of the latter and an award of the attendant compensatory remedy to the victim. But it goes without saying that the cause of action for a compensatory remedy for breach of the constitutional right to liberty does not apply where the action of the public servant/police or any other state official, for that matter, was lawful. This is contrasted to the case in the United States. There, as mentioned in sec. 3.3.2.1 above, much more emphasis is placed on the constitutional right that was breached rather than the legitimacy or otherwise of the official's action; the cause of action applies where a lawful or unlawful action breached a constitutional right.³¹²

On the other hand, compliance with the law or the order itself might only be of an expression of the formal conception of the rule of law but lack in substantive wise. Indeed, substantive conception of the rule of law also includes its formal conception. It nonetheless "adds to it certain substantive limits, such as the requirement for the law to comply with principles of natural justice and, in the contemporary world, human rights guarantees and other constitutional limits, to the acceptability of law".³¹³ At times, certain laws are often criticized to have lacked in this essential element. In our context, the current Ethiopian anti-terrorism law³¹⁴, which is alleged, *inter alia*, as expanding police powers of arrest, search and seizure without due process guarantees, is highly disputed by scholars and human rights activists as failing to meet the requirement of substantive justice. So, what is lawful should be seen in the broader spectrum of

³¹¹ John Cooke, Law of Tort; Pearson Longman, 2007.P.3.[Hereafter Cooke] see also the Civil Code of Ethiopia, article 2090 proclamation No 165/1960.

³¹² Lisa, *supra* note 29, P.85.

³¹³ Abebe, A., (April 2012) 'Rule *by* law in Ethiopia: Rendering constitutional limits on government power nonsensical', CGHR Working Paper 1, Cambridge: University of Cambridge Centre of Governance and Human Rights, P.3.

³¹⁴ See, A Proclamation on Anti-terrorism, Proclamation No. 652/2009, Federal Neggarit Gazeta of the Federal Democratic Republic of Ethiopia, 15th Year No.57, 28th August, 2009, Articles 19 and 20.

the contemporary world, i.e., in the light of Ethiopia's international obligations under international law, particularly international human rights law and/or human rights treaties.

3.3.2.3 Human Rights Law Cause of Action

The general rubric of international human rights law manifests the international attention to remedies for breach of human rights. So too, the ancient maxim *ubi jus, ibi remedium* (where there is a right there is a remedy) is evident in the importance given to the right to effective remedies in international human rights law (or international human rights treaties). This in turn reflects concern with upholding and ensuring the effective enjoyment of the rights guaranteed in the human rights instruments. Of the human rights instruments to which Ethiopia is a party, this section is set to deal with the ACHPR (to some degree) and the ICCPR (to a larger detail).

3.3.2.3.1 The African Charter

The African Charter is the 'Constitution' of the African human rights system. Like its counterparts, the European and the American Human Rights Conventions, it is a binding human rights treaty. As a State party to the Charter, Ethiopia is bound to respect, protect, promote and fulfill the Charter-based rights. Article 6 of this Charter protects the right of individuals to liberty and security and also prohibits imprisonment except for reasons and conditions predetermined by law. The same provision particularly prohibits arbitrary arrest or detention.

But neither the Charter nor the Rules of Procedure of the Commission provide for remedial measures to be adopted.³¹⁵ Article 7 of the Charter generally deals with the right to due process of law and procedural laws without making any particular reference to the right to compensation. This seems to be the reason why the decisions of the Commission on communications were largely silent on the question of remedies since it first began to issue decisions on communications under its Article 55 procedure.³¹⁶ Even at the times when the Commission has had the chance to prescribe monetary compensation, it rather refrained from stating the amount.³¹⁷

³¹⁵ Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, Cambridge University Press, 2008, P.79.

³¹⁶ Malcolm D. E vans and Rachel Murray (Eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000*, Cambridge University Press, 2002, P.324

³¹⁷ Ibid.

Unlike the Commission, optimistic view suggests, the African Court of Human and Peoples' Rights will not face with the same dilemma as Article 27(1) of the Protocol specifically requires the Court to 'make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'. But in contrast to comparable provisions in the European and the American human rights instruments, the African Charter suffers from a number of clear deficiencies.³¹⁸ To mention some, the Charter lacks in a right to review of a detention order, a claim for damages after arbitrary/unlawful imprisonment and a right to the immediate notification of the reasons for detention.³¹⁹ Besides, it does not include any right to free legal defense for the destitute, as the two other regional Conventions formulate.³²⁰ These are deficiencies which the Court cannot compensate through more far-reaching interpretation of the Charter.³²¹

Though the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (the Court Protocol) entered into force in 2004, Ethiopia is not a state party to it, until the time of writing this thesis. Due to this, the jurisprudence of the court has little, if not none, to offer to the Ethiopian Courts. To the extent the Court becomes more engaged in human rights litigation and Ethiopia comes to ratify the Protocol, perhaps the decision of the Court will provide valuable interpretative insights for Ethiopian courts to enforce the right to compensation in an effort to comply with the decision of the supranational Human Rights Court. But, as it currently stands, the African Charter has little influence to exert on the domestic laws of Ethiopia for the purpose of compensatory remedies under consideration.

3.3.2.3.2 The ICCPR

Given the sources of the Ethiopian human rights law, the absence in the Constitution of an explicit provision on the right to compensation for breach of the right to physical liberty cannot be an absolute bar for the pursuit of compensatory remedy. In Ethiopia, the right to liberty is protected both by the Federal and State Constitutions, giving it the status of constitutional human

³¹⁸ Mathias R. Bortfeld, *The African Court on Human and Peoples' Rights: Prospects and Procedures*, P.22.

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

right. So, the import of the remedies available for breach of the right to liberty in the ratified human rights treaties would be of help to bridge the gaps in the remedies provision of the Constitution. Of the ratified human rights treaties that constitute a source of Ethiopian human rights law, one needs to have a look at the ICCPR. First and foremost, the ICCPR purports to ensure the enjoyment of the Covenant-based primary rights. By becoming a State party to the Covenant Ethiopia has undertaken not only to ensure the enjoyment by the individuals of the Covenant-based primary rights but also to provide a secondary right to a remedy whenever the primary rights are violated. As has been discussed in section 2.3.2 above, the Covenant leaves to a State party the choice of what remedies it may provide domestically, in so far as it is effective. But, this is not the case when it comes to breach of the right to physical liberty (arbitrary arrest or detention, and wrongful conviction). In these particular cases, the Covenant specifically prescribes a right to compensation enforceable before the domestic authority and requires the State parties to provide by law a compensation scheme respectively.

3.3.2.3.2.1 Compensation for Arbitrary Arrest or Detention

The ICCPR guarantees the right to liberty and security of person. Article 9(1) of the Covenant establishes a general prohibition against interference with a person's right to liberty (first sentence) and against arbitrary arrest or detention (second sentence).³²² It moves on and provides for two forms of limitation: (1) by interpretation of the term 'arbitrary'³²³; or (2) by the qualification that no deprivation of liberty may occur except on grounds and procedures established by law.

Paragraphs (2) to (5) of Article 9 then set out rights triggered by a person's arrest or detention.³²⁴ These rights, *amongst others*, include: the right to be informed promptly of the reasons for one's arrest or any charge against him³²⁵, the right to be brought promptly before a judicial body and trial within reasonable time or release³²⁶, the right to take proceedings before a court and have

³²² Conte, *supra* note 71, P.499. See also, first and second sentences of Article 9(1) of the ICCPR.

³²³ *Id.*, See, P.299: The term arbitrary is broadly understood to include: (1) an act or omission which is against the law, (2) in the context of deprivation of the right to liberty, elements of inappropriateness, injustice, lack of predictability, and lack of due process of law, (3) a guarantee that even reasonable conduct which is provided for by law should be in accordance with the provisions, aims and objectives of the ICCPR.

³²⁴ See also, Article 10 of the ICCPR: It also provides for rights triggered by a person's arrest or detention

³²⁵ The ICCPR, Article 9(2).

³²⁶ *Id.*, Article 9(3).

the court decided without delay the lawfulness of the arrest and be released if the detention is not lawful³²⁷, the right to compensation in case of a breach.³²⁸

Of the rights guaranteed in Article 9 of the Covenant, paragraph 5, which provides for an enforceable right to compensation, is the writer's point of concern. Basically, the Covenant also establishes, in Article 2(3), the right to "an effective remedy" for any violations of the rights guaranteed therein. An effective remedy in the meaning of this article seems to be what is appropriate in the particular circumstance of the case. Professor Oscar Schachter, cited in Roht-Arriaza, suggests that "undoing, repairing and compensating for violations" constitute appropriate remedies.³²⁹ This, according to him, may include, at the least, injunctive relief, restoring the victim to his previous position if possible, and monetary compensation.³³⁰

So, cause of action sounding in compensatory remedy within the meaning of paragraph 5 of Article 9 of the Covenant presupposes that a violation of one of the other paragraphs has been established. Once the breach has been established, then it is compensable by virtue of Article 9(5). To reiterate, Article 9(5) of the ICCPR reads, "[a]ny one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." The provision provides for a right that shall be enforceable before a domestic authority.³³¹ But, does the provision provide a private individual (victim) with a cause of action? This question will be considered together with the *compensation for wrongful conviction*.

3.3.2.3.2.2 Compensation for Wrongful Conviction

The Covenant is cognizant of one of the major problems inherent in every criminal justice system, *wrongful conviction*. Article 14 of the Covenant stands to remedy the possible injustice that individuals may encounter as a result of the inevitable errors in the system. Paragraphs (2) to (5) of the article contain procedural guarantees available to persons charged with a criminal

³²⁷Id., Article 9(4).

³²⁸ Id., Article 9(5).

³²⁹Roht-Arriaza, supra note 97, P.33.

³³⁰ Ibid.

³³¹ English-Redress, available at: http://www.redress.org/.../Security_for_all_Fin..., P.11, accessed on 20/11/2013.

offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases.³³²

Article 14(6)

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

From the reading of the above provision, the cause of action for the right to compensation for wrongful conviction is based on the following four conditions: First, a person has by a *final decision* been convicted of a criminal offence. What does final decision mean? There was an apparent division of opinion among the members of the Committee on Civil and Political Rights (hereinafter the CCPR) on what constitutes a ‘final decision’ within the meaning of the above provision. In Communication 880/1999, *Irving v Australia*, as cited by Alex Conte, the majority implied that a final decision is only made where there are no further available grounds of appeal from that decision; but in the opinion of two dissenting members, the word ‘final’ in article 14(6) does not mean that only a conviction that cannot be reversed is ‘final’.³³³ For the two dissenting members of the Committee, construing a final decision as *a decision from which no further appeal lies* would render the reference to a final decision being ‘reversed’ within the wording of paragraph 6 meaningless.³³⁴ Insisting that there cannot be a single criterion of what a final conviction is, the dissenters held that whether the decision had become final must be assessed on a case-by-case basis.³³⁵ On the facts of the above case, the dissenting opinion was that the conviction of Mr. Irving became ‘final’ when the ordinary period during which leave of appeal was to be sought expired, and, due to the denial of legal aid, Mr. Irving was unable to apply for leave to appeal.³³⁶

³³² International Covenant on Civil and Political Rights, General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August, 2007, par.3.

³³³ Conte, *supra* note 71, P. 198. See also, *Irving v Australia*, Communication 880/1999, UN Doc CCPR/C/74/D/880/1999(2002), par.8.3.

³³⁴ *Id.*, P.199.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

In Ethiopia, criminal law is a federal law. So, within the meaning of Article 3(1) of Proc. No.25/1996, it is the jurisdiction of Federal Courts to entertain criminal cases. Sticking to this above provision, State courts can only come to exercise the jurisdiction of Federal Courts on criminal matters through delegation as stipulated in Article 80(2) & (4) of the FDRE Constitution. Hence, State Supreme Courts and High Courts respectively exercise the criminal jurisdiction of Federal High Court and First Instance Courts. This theoretically leaves State First Instance Courts without Criminal Jurisdiction. Practically, however, State First Instance Courts are exercising jurisdiction on the majority of criminal cases. On the other hand, Article 4 of Proc.No.25/1996, which enumerates a few matters over which Federal Courts shall have criminal jurisdiction, leaves all the rest to accrue to the State Courts. Incidental as it is, the writer would like to cut the discussion of this issue short.

Following the interpretation by the majority in the above *Irving v Australia case*, for the purpose of Article 14(6) of the ICCPR, *final decision* within the Ethiopian context, at the federal level, as provided under Proc. No.25/1996 and the FDRE Constitution include: (1) under the Proclamation, decision of the Federal Supreme Court over: (a) criminal cases in its exclusive first instance jurisdiction (Article 8), (b) decisions of the Federal High Court rendered in its first instance jurisdiction (Article 9(1)), (c) decisions of the Federal High Court in its appellate jurisdiction in variation of the decision of the Federal First Instance Court (Article 9(2)), and under the Constitution: (d) decisions rendered by a State Supreme Court in its appellate jurisdiction in variation of the decision of the State High Court (Article 80(5), application of Article 9(2) of the proclamation by analogy), (e) decisions rendered by a State Supreme Court on Federal matters (Article 80(6); (2) decisions of the Federal High Court in its appellate jurisdiction in confirmation of the decision of the Federal First Instance Court (the *a contrario* reading of Article 9(2) of the Proclamation). Review by way of cassation is not considered as appeal. It is a petition filed with the cassation division of the Federal Supreme Court on the allegation that basic error of law, not of fact, has been committed by the lower court(s). Finally, the right to compensation under Article 14(6) is triggered not only following a conviction or

sentence by a court of first instance, but also where a court of appeal imposes a conviction following acquittal by a lower court.³³⁷

Second, subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice. The text of Article 14(6) is not clear whether the words ‘a new or newly discovered fact’ give rise only to pardon or refer also to the case of reversal.³³⁸ The majority of the Committee in the *Irving v Australia* case adopted the view that the paragraph requires a new or newly established fact to justify both a reversal and pardon.³³⁹ Seen from this perspective, the scenario in Ethiopia seems to be wanting. For example, what if (a) an appeal does not lie from a final judgment wrongfully convicting a person? Or (b) an appeal lies from the judgment but a new or newly discovered fact comes to the knowledge of the person wrongfully convicted after the expiry of the time for appeal?³⁴⁰

With regard to the first question, there is only one mechanism by which a final decision to which no appeal lies may be reviewed. That is review by way of cassation.³⁴¹ But review by way of cassation is available only for a final court decision containing a basic error of law; and review by way of cassation is not available for error of fact(s) no matter how decisive. For it is the discovery of fact(s) that entails the application of Article 14(6) of the Covenant, review by way of cassation would be of no help to trigger the right to compensation under the provision even where the review results in the reversal of the decision on the ground of the Court’s finding of basic error of law. Thus, on the face of the absence of a provision on review of judgment in the current Ethiopian criminal justice, there is no prospect of getting the final judgment of conviction reversed, legally so to speak. From this, granting pardon to a person wrongfully convicted

³³⁷ *Terr’on v Spain*, Communication 1073/2002, UN Doc CCPR/C/82/D/1073/2002 (2004), Para. 7.4; *Gomariz Valera v Spain*, Communication 1095/2002, UN Doc CCPR/C/83/D/1095/2002 (2005), Para. 7.1; and *Moreno v Spain*, Communication 1381/2005, UN Doc CCPR/C/90/D/1381/2005 (2007), Para... 7.2

³³⁸ *Id.*, P.199.

³³⁹ *Id.*

³⁴⁰ See Criminal Procedure Code, Article 187(1) & (2): It provides that “notice of appeal against a judgment shall be made by the appellant...within fifteen days of the delivery of the judgment appealed against. The memorandum of appeal shall be filed within thirty days of the receipt of the copy of the decision appealed against”. So, the appellant has the maximum of 45 days to avail him’/herself of an appeal in criminal cases. Where the appellant fails to file the memorandum of appeal within the above time framework, he/she may apply for leave to appeal out of time, at the pain of rejection, by clearly stating the reasons why the appeal should be heard out of time and the reasons which occasioned the delay (Article 191 of the Criminal Procedure Code).

³⁴¹ The FDRE Constitution, Article 80(3).

remains to be the only option that can trigger the right to compensation under Article 14(6), as the Ethiopian law currently stands. Yet, this only avenue is also further restricted. Not all convictions qualify for pardon.³⁴²

The second question concerns, in the case where an appeal lies from a *decision*, a new fact which shows conclusively that there has been miscarriage of justice is discovered after the lapse of the time for appeal. Here again, there is no review mechanism for such a *decision* in the Ethiopian current criminal justice. Worse, as can be observed from the foregoing discussion, *decision* of this kind cannot be considered as *final* in the proper sense of the legal term. Seen roughly, the import of the dissenting opinion in the above *Irving v Australia* case, which highly insisted that decision of this sort must be considered final, seems to offer a solution. Actually, it does not. In the absence of a *review of judgment* mechanism in criminal cases, there is no possibility to have the decision reversed, no matter how it is considered final.

The good news, if at all, is that the revision of the existing Criminal Procedure has been underway and the Draft Criminal Procedure Code³⁴³ which aims to replace the former is coming up with a provision on *review of judgment* in criminal matters. The objective of review of a final judgment in Article 466 of the Draft law, when translated slightly states: “to correct a judgment so as not to punish an innocent person wrongfully convicted” (translation mine). Sub-article 1 of Article 467 of the same lists the persons who are capable of filing the application where there is sufficient evidence that the person was wrongfully convicted. Sub-article 2 of the same details what constitutes sufficient evidence for the purpose of sub-article 1. Accordingly, such evidence is said to be sufficient ‘if the judgment of conviction could not have been given without doubt had the evidence been disclosed before the judgment’.³⁴⁴ Article 468 of the Draft law requires

³⁴² A Proclamation to Provide for the Procedure of Granting Pardon, Proclamation No.395/2004, Federal Negarit Gazeta of the FDRE, 10th Year No.35, 17th April, 2004. See, for instance, Article 12(1) of this Proclamation states that “any person who is convicted and sentenced by a court may, unless the granting of pardon is prohibited by law, apply for pardon ...”.

³⁴³ The Draft Criminal Procedure Code of the Federal Democratic Republic of Ethiopia, Proclamation No.____/2013. The Draft which had long been underway was finished in 2013 but not approved and given force yet. Book II, Section IV, Articles 466-470 of the Draft law provide for objective of review of final judgment, application for review of judgment, content and time of application, hearing and deciding on the application and compensation for wrongful conviction.

³⁴⁴ Id., Article 467(2) of the Draft law provides what it considers sufficient evidence for the final review of criminal judgment as: if after the final judgment a useful evidence sufficient to exonerate the convicted is obtained, if after

the application to follow the same formality as an appeal; and that it can be brought at any time. Thus, if the Draft law comes into law, it would broaden the chance for wrongfully convicted persons to have the conviction reviewed and reversed.

Third, the person who was convicted is not responsible for the non-disclosure of the unknown fact in time. The requirement is consonant with the principle that ‘one should not benefit from his own fault’. Article 14(3) (b) of the Covenant provides that an accused must have adequate time and facilities for the preparation of his or her defense, and to communicate with counsel of choosing. Determination of what constitutes adequate time requires an assessment of the individual circumstances of each case, but the Committee has taken the view that “time and facilities must include access to documents and other evidence that the accused requires to prepare the defense case, as well as the opportunity to engage and communicate with counsel”.³⁴⁵ Similarly, it is submitted that defense must be given the opportunity to familiarize itself with the documentary evidence against the accused by way of full and prompt disclosure, and all the materials the prosecutor plans to offer in court against the accused, or that are exculpatory, not only that which establishes innocence but also that give the indication that a confession was not voluntary,³⁴⁶ must be disclosed to the defense. The HRC has also emphasized that there is an obligation to grant reasonable request for adjournment, particularly when an accused is charged with a serious criminal offense and additional time for preparation of the defense is needed.³⁴⁷

In Ethiopia, with the adoption of BPR (Business Process Re-engineering), both Federal and State justice sectors have employed the so-called RTD (Real Time Dispatch)³⁴⁸ with a view to

judgment obtained through scientific method, if in connection with the matter the judge rendering the decision has been held criminally liable, if in connection with the matter another person who has been acquitted gives his statement out of court in a convincing manner pleading guilty, if an evidence produced as true has been found falsified or obtained by way of forgery.

³⁴⁵ Conte, *supra* note 71, P.182.

³⁴⁶ *Id.*, P.182-83.

³⁴⁷ *Ibid.*

³⁴⁸ See, Concise Law Dictionary, 3rd Ed. AlyarRamanatha P. Wadhwa& Con Naggur (2006): Thus, *real time* means “action to be taken at a given time at which information about the occurrence of something is made available to the concerned body”³⁴⁸. And, Dispatch means “a prompt completion & sending off of something that does not strictly follow the custom of the business especially, to avoid delays resulting from a crowded.” See also, Black’s Law Dictionary, *supra* note 19: Dispatch means “a prompt completion & sending off of something that does not strictly follow the custom of the business especially, to avoid delays resulting from a crowded.” If the above two words are combined together, Real Time Dispatch in the context of criminal proceedings means “a mechanism whereby the investigation of a crime committed is promptly completed and brought before the court for the final decision”.

accelerate the justice machinery. The focus has since been on the speed of the trial; the usual motto being obtaining an average conviction rate as high as 95% within a very short time, ‘the next day of justice’ for crimes that are tried by way of RTD.³⁴⁹ Given this, it is hardly possible for the accused to know the legitimacy and source of every fact produced against him or her. Even worse, the great majority of persons arrested cannot afford the cost of legal service to be assisted by a legal counsel of their choice from the very beginning of the criminal proceeding. On the other hand, Article 20(5) of the FDRE Constitution provides that “accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense”. Thus, it is only after a person is accused that the state provides legal counsel at its own cost to prevent miscarriage of justice. Similarly, Article 20(7) of the Constitution entitles accused persons to request for the assistance of an interpreter at state expense where the court proceedings are conducted in a language they do not understand. This provision does not seem to apply to the case where interrogation is conducted.

Given the prevailing linguistic diversity in Ethiopia, the absence of such a guarantee poses a serious problem to the persons being interrogated. The Human Rights Committee in *Singarasa v Sri Lanka* found a violation of article 14 in circumstances where the author’s conviction relied solely on his confession where there was no interpreter provided during his interrogation.³⁵⁰ It has thus been confirmed that State parties to the Covenant have an obligation to ensure that any person accused of a crime is able to exercise the right to defense.³⁵¹

Fourth, penalties have been actually implemented. This is self-explanatory. It would be a premature for the cause of action resulting from wrongful conviction if the penalties have not been implemented at the time of claiming compensation.

In this respect, the Draft Criminal Procedure in Article 470(1) provides that ‘if the judgment of conviction is reversed or altered on review, the court shall order the payment of compensation by

³⁴⁹ The writer served as a zonal public prosecutor at the Oromia Justice Bureau from 2001-2003 E.C, and knows from his own experiences and different trainings that all crimes, without regard to their gravity, entertained by way of RTD and decided within less than three days. The writer is well aware that this procedure is being carried out both by the Federal and States governments.

³⁵⁰ Conte, *supra* note 70, P.191. See also, cited in footnote: *Singarasa v Sri Lanka*, Communication 1033/2001, UN Doc CCPR/C/81/D/1033/2001 (2004), para 7.2.

³⁵¹ *Id.*, P.183.

the government commensurate with the moral and material damage sustained by the person as a result of the judgment of conviction.³⁵² This is a radical departure from the 1961 Criminal Procedure Code of Ethiopia currently in force.

3.3.2.3.3 Domestic Cause of Action for Breach of the Covenant Right to Liberty

The dominant issue as to the implementation of the ICCPR remains to be whether the Covenant creates only duties of result, as the duty to refrain from human rights violations, or also duties of conduct, as the enactment of specific safeguards against violations.³⁵³ Article 2(2) of the Covenant specifies that each party will “take the necessary steps, in accordance with its constitutional processes” to give effect to the rights recognized in the ICCPR. This above provision speaking of “the necessary steps, in accordance with its constitutional process” seems to leave the choice how to implement the Covenant to the States parties as long as the Covenant rights become effective.³⁵⁴ Accordingly, States parties to the Covenant may choose to accept the provisions of the Covenant as a self-executing or non-self-executing. Self-executing treaties are capable of direct and automatic domestic application upon ratification creating domestic cause of action for individuals to vindicate violations of their treaty based substantive rights. To the contrary, a non-self-executing treaty does not itself provide an individual with a private cause of action to seek a remedy for violations of the treaty’s substantive provisions.³⁵⁵

In Ethiopia, all ratified treaties form an integral part of the law of the land by virtue of Article 9(4) of the Constitution. So, a human rights treaty, be it self-executing or non-self-executing, upon ratification, becomes part of the domestic law of Ethiopia. In the light of this, the ICCPR, which Ethiopia acceded to in 1993, is part of Ethiopian law. When consenting to the ratification of the ICCPR, Ethiopia did not enter any declaration (or an act with a similar effect) that would

³⁵² Article 470(1) of the Draft Criminal Procedure Code provides for three requisite elements to be met for a person wrongfully convicted to be granted compensation: (1) that the conviction has been reversed or reduced; (2) that the victim has suffered moral and/or material damage; and (3) that there is a causal relationship between the judgment of wrongful conviction and the harm/damage suffered-i.e., the victim suffered the damage as a result of the wrongful conviction.

³⁵³ Seibert-Fohr, *supra* note 77, P.401.

³⁵⁴ *Ibid.*

³⁵⁵ William M. Carter Jr., *Treaties as Law and the Rule of Law: the Judicial Power to Compel Domestic Treaty Implementation*, Maryland Law Review, Vol.69, Issue 2, Article 5, 2012, P.358 [hereinafter Carter].

render some provisions of the Covenant non-self-executing. Therefore, one may argue that the Covenant creates domestic cause of action for individuals in the same manner as other domestic laws of Ethiopia and individuals whose Covenant rights are violated can pursue a compensatory remedy by invoking the provisions of the Covenant. Pursuing this line of thought, victims of arbitrary arrest or detention, and wrongful conviction may directly avail themselves of Articles 9(5) and 14(6) of the Covenant in seeking a compensatory remedy. This, however, has provoked a debate to which the writer will turn in Chapter 4, section 4.4.1.

CHAPTER FOUR

THE INSTITUTIONAL FRAMEWORK OF COMPENSATORY REMEDIES FOR BREACH OF THE RIGHT TO PHYSICAL LIBERTY IN ETHIOPIA

4.1 An Overview

The right to liberty is enshrined in the FDRE Constitution and the Constitutions of the regional States in Ethiopia. Entrenchment in the Constitution of the right to liberty as a fundamental right is a necessary but not a sufficient condition for the enjoyment, by the beneficiaries (individuals), of the right. The effective enjoyment of the right is the function of the clarity in the laws and the existence of strong institutions entrusted with the power to enforce them. Though the function of enforcing human rights cuts across all institutions, it is worthwhile to keep in tune with the major actors for the purpose of this work. Accordingly, the writer seeks to assess the institutional competence of the Ethiopian Human Rights Institutions (the Human Rights Commission and the Institution of the Ombudsman) and the courts of law in the enforcement of human rights in general and providing compensatory remedies for victims of breach of the right to physical liberty in particular.

Further, the Constitution establishes the Federal Supreme Court, the Federal High Court and the Federal First Instance Court at the federal level and stipulates the establishment by the States of their respective Supreme, High and First Instance Courts.³⁵⁶ This section examines the powers and duties of these institutions to grant compensatory remedies to victims of breach of the right to physical liberty.

4.2 The Ethiopian National Human Rights Institutions

National human rights institutions play paramount roles in the promotion and protection of the human rights of peoples guaranteed in the constitution. The international community has learned that human rights are best monitored, protected, promoted and fulfilled domestically. National human rights institutions (NHRIs) are created expressly for this purpose.³⁵⁷ They can, to a

³⁵⁶ The FDRE Constitution, Article 78(2) & (3).

³⁵⁷ C. Raj Kumar, National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights, *Human Rights Quarterly*, Vol. 28, The Johns Hopkins University Press, 2006, (755–779), P.761.

greater extent, support compliance with international standards as well as the existence of internal accountability systems, and can also help to ensure that the administration of justice conforms to human rights standards. The institutionalization of human rights is of paramount importance for their enforcement both at the international and domestic levels. At the international level, there are various institutions established under the UN (charter bodies) and those established under human rights treaties (treaty bodies). Domestically, NHRIs play this role.³⁵⁸ NHRIs have adopted a variety of forms and functions depending on the national context in which they operate.³⁵⁹ But the core idea behind all of them is that enforcement of human rights takes place at the domestic level.³⁶⁰ In the context of Ethiopia, the Constitution stipulates the establishment by law of the two human rights institutions, the Human Rights Commission and the Institution of the Ombudsman. Subsequently, the institutions were established pursuant to laws passed by the HPR in 2000.

4.2.1 The Ethiopian Human Rights Commission

In line with 55(14) of the Constitution which states that the HPR “shall establish a Human Rights Commission and determine by law its powers and functions”, the House promulgated Proclamation No.210/2000 and established the Commission as an autonomous organ of the Federal Government having its own juridical personality.³⁶¹ The preamble of the Proclamation establishing the Commission is generally modeled on the preamble as well as Article 13(1) of the Constitution which provides for the responsibility and duty of all government organ of all levels, both federal and regional, to respect and enforce the peoples’ rights and freedoms guaranteed under Chapter 3 of the Constitution. Its principal objectives are promoting, protecting and enforcing all human rights and freedoms provided for in the operative Constitution, the other laws of the land and under the international human rights instruments to which Ethiopia is a party.

The preamble of the proclamation adds that the establishment of the Commission is found necessary, not as the sole organ but, as one of the organs that play a major role in enforcing such rights and freedoms. Seen from this perspective, it could be alleged as too late to establish an

³⁵⁸ Id., P.773.

³⁵⁹ Pohjolainen, Anna-Elina, *The Evolution of National Human Rights Institutions - The Role of the United Nations*, The Danish Institute for Human Rights, 2006, P.1.

³⁶⁰ Ibid.

³⁶¹ Human Commission Proc.No.210/2000, *supra* note 270, See Article 3(1).

organ trusted to have such a role almost five years after the Constitution entered into force,³⁶² and to get it into operation after more than a decade following the Constitution.

Unlike the Indian Human Rights Commission, the power and function of which is prescribed in the Constitution, in Ethiopia, it is the House, a legislative and political body, that is entrusted with the mandate to establish and determine by law the powers and functions of the Commission. This, in fact, does not contradict with the Paris Principles which require the mandates, composition and sphere of competence of National Human Rights Institutions to be specifically set forth in a constitutional or legislative text.³⁶³ At any rate, these are institutions which, although established by the State, are supposed to be independent of it. Guiding the establishment and operation of these institutions are the Paris Principles of 1993. The principles, among other things, urge these institutions to maintain their independence notwithstanding their legal status as statutory bodies. Also, States are urged to respect and ensure the independence of these institutions and to fully fund them. This is regarded as a rather tricky relationship, which requires both political maturity and tolerance on both sides.³⁶⁴

The role of the Commission is both promotional and protection. Pertaining to this role, Article 6 of the Proclamation enumerates the powers and duties of the Commission. Accordingly, the promotional and protection roles of the Commission include; ensuring that the human rights and freedoms recognized by the Constitution are respected by all citizens, organs of state, political organizations and other associations as well as by their representative officials, ensuring that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution, and creating awareness of the public and enhancing the tradition of respect for human rights, investigating human rights violations, and making recommendations for the revision of existing laws and enactment of new ones,³⁶⁵

³⁶² Whereas the FDRE Constitution has entered into force on 21st of August, 1995, the Human Rights Commission Establishment Proclamation has entered into force on 4th July, 2000. Even worse, the commission came to operation in 2007.

³⁶³ Paris Principles on National institutions for the promotion and protection of human rights, United Nations General Assembly, A/RES/48/134, 85th plenary meeting, 20 December 1993, Principle 2, available at: http://www.info.gov.hk/info/eoc/annex6_e.pdf, visited on 12/02/2014.

³⁶⁴ Peter, *supra* note 148, P.352.

³⁶⁵ Human Rights Commission Proc. No. 210/2000, Article 6.

facilitating an amicable settlement of complaints, and seeking redress or remedies through the courts.³⁶⁶

As far as the limitation of power of the Commission is concerned, Article 7 of the Proclamation provides that “the Commission shall have full powers to receive and investigate all complaints on human rights violations made against any person, save cases brought before the HPR, the HoF, and Regional Council or before the courts of law, at any level. It is further enunciated that the right to lodge complaints, as under the Proclamation, shall be no bar to the institution of criminal or civil proceedings over the same case. In other words, the judicial principles of *double jeopardy* and *res judicata* do not preclude the complainants from pursuing remedies before courts of law.”³⁶⁷ This seems to imply that courts, natural in the human rights discourse, are well situated and more trusted to grant effective remedies and to protect and enforce human rights.

4.2.1.1 The Power of the Commission to grant compensatory Remedies

In the case of a human rights violation, the required remedy may be a criminal prosecution or an award of compensation. As for the criminal jurisdiction, it is exclusively reserved to the ordinary courts. So too, the Commission does not have the power to grant a compelling compensatory remedy; that is the mandate of courts proper. It may, however, propose compensation in its endeavor to settle complaints amicably.³⁶⁸

Ordinarily, a national human rights institution is not established to substitute itself for the judiciary. The rationale behind is the requirements of natural justice that *one cannot be a judge in his own cause*. The inquisitorial nature of the institution does not allow it to simultaneously act as an impartial tribunal to give alleged perpetrators of human rights violations a fair hearing. The solution would seem to be to allow the human rights institution the power to initiate cases before the courts or to have a relationship with the prosecutorial authorities that automatically allows such cases to proceed. The precise mechanism is likely to vary with circumstances and

³⁶⁶ Id., Article 26.

³⁶⁷ Id., Article 22(3).

³⁶⁸ Id., Article 26(1) of the Proclamation requires the Human Rights Commission to settle complaints amicably. In practice, there are incidences where individual victims are awarded compensation by way of amicable settlement under the supervision of the Commission where the rights violators are private persons as opposed to persons acting in an official capacity.

with different legal systems.³⁶⁹ The remedial power of the Commission includes amicable settlement of complaints brought before it, notification with a proposed remedy of the finding of its investigation to the relevant authority. The remedy proposed by the Commission “shall expressly state that the act having caused the grievance be discontinued, that the law having caused the grievance be rendered inapplicable, and that the injustice committed be redressed or any other appropriate measure be taken”.³⁷⁰

Against all odds, some national human rights institutions have been vested with the power to grant compensatory remedies. The Ugandan and the Indian Human Rights Commissions best illustrate this scenario. The Ugandan Human Rights Commission may under Section 53(2) of the Ugandan Constitution, in case of infringement of human rights, order the release of a detained person, payment of compensation or any other legal remedy or redress. Section 53(3) provides that orders made by the Commission can be appealed to the High Court.³⁷¹ Similarly, the Indian National Human Rights Commission while inquiring into complaints has the powers of a civil court trying a suit under the Code of Civil Procedure. The power mainly concerns omission to answer inquiries, produce documents and sign statements requested by the Commission, against which the Commission can take steps to prosecute persons refusing to cooperate by bringing the case to the Magistrate.³⁷²

In sum, the Ethiopian Human Rights Commission does not have the institutional competence to grant compensatory remedies to victims of breach of the right to physical liberty. Let alone ordering the payment of compensation to the victims, there is no clear provision if it can have the court grant such a remedy or intervene as an *amicus curiae* in a case pending before the court.

4.2.2 The Institution of the Ombudsman

The Institution of the Ombudsman was established in the same year together with the Human Rights Commission by Proclamation No.211/2000. Ensuring compliance with the requirements of

³⁶⁹ ___, *Performance & Legitimacy: National Human Rights Institutions* (2nd ed.), International Council on Human Rights Policy, 2004, P.92.

³⁷⁰ *Supra*, note 366.

³⁷¹ Peter, *supra* note 149, P.361.

³⁷² Lindholt, Lone; Lindsnaes, Birgit; Yigen, Kristine (eds.), *National Human Rights Institutions : Articles and Working Papers*, Danish Centre for Human Rights, 2001, P.28.

the rule of law by laying the foundation for good governance, and ‘setting up an easily accessible means for the prevention or rectification of administrative abuses, arbitrarily committed against citizens,’ is the *raison d’être* of the Institution.³⁷³ As compared to the Commission, the scope of competence of the Ombudsman is very narrow from the angle of the rights abusers. It is limited to the prevention or rectification of ‘the unjust decisions and orders of executive organs and officials thereof’.³⁷⁴

4.2.2.1 The Power of the Institution of the Ombudsman to Grant a Compensatory Remedy

The standing to lodge a complaint before the Ombudsman is formulated exactly in the same wordings as in the case of the Commission. Accordingly, ‘a complaint may be lodged by a person claiming that his rights are violated or, by his spouse, family member, his representative or by a third party’. Having regard to the gravity of the violation, the Institution may also receive anonymous complaints and proceed with the investigation. However, in all cases, the Institution does not have first instance jurisdiction to consider complaints. Any person who suffered from maladministration is required to first bring the complaint before the relevant organs and take recourse to the Institution where the organs fail to respond in a reasonable time or where he/she is dissatisfied with the decision of the organs. This limitation does not exist in the law establishing the Human Rights Commission.

Upon receiving a complaint, the Institution shall first endeavor to settle the matter amicably.³⁷⁵ Failing settlement, the Institution shall notify, in writing, the findings of its investigation and its opinion thereon, to the superior head of the concerned organ and to the complainant.³⁷⁶ The Institution does not on its own have the power to rectify the injustice by granting compensatory remedy to a victim whose rights have been violated. Rather, by facilitating the rectification of the injustice caused to the victims, it plays an intermediary role.

³⁷³ Ombudsman Proc. No.211/2000, see Preamble, Para.1.

³⁷⁴ Ibid., Para.3.

³⁷⁵ Id., Article 26(1).

³⁷⁶ Ibid., Article 26(2).

4.3 The Judiciary

Ethiopia's federal and States governments have their respective judicial powers vested in courts.³⁷⁷ The judiciary, like NHRIs, plays a significant role in the internal approach to the institutionalization of human rights by interpreting the constitution and other laws of the state.³⁷⁸ In Ethiopia, the authority to interpret the Constitution has been apportioned between the regular judiciary and the Council of Constitutional Inquiry (CCI)/House of Federation (HoF).³⁷⁹ The HoF is entrusted with the power of deciding the constitutionality of laws and resolving constitutional disputes. In either case, its mandate does not include the application of constitutional provision to concrete factual controversies. It is an exclusive mandate of the courts to resolve concrete disputes between litigants by applying laws, including constitutional law, to the factual controversies.³⁸⁰ In so doing, the regular courts grant judicial remedies. The HoF, on the other hand, delivers constitutional remedies. Constitutional remedies differ from judicial remedies in that it extends to the extent of invalidating a law or conduct contested to be unconstitutional, whereas judicial remedy is more concrete and includes, *inter alia*, the granting of a compensatory remedy for breach of the right to physical liberty.

The judiciaries of the federal and the state governments share the responsibility and duty to respect and enforce the human rights in Chapter 3 of the FDRE Constitution. Besides, they have the duty to interpret the fundamental rights and freedoms guaranteed in the Constitution in line with the principles of international human rights instruments. The States' judiciaries have the additional responsibility and duty of respecting and enforcing the respective States' bill of rights and interpreting them in harmony with international human rights norms.

This section discusses the responsibility and duty of courts, both federal and states, to respect and enforce the human rights guaranteed in Chapter 3 of the FDRE Constitution and the States' constitutions, as the case may be; and the power of courts to interpret and apply the Constitution and international human rights instruments (with particular reference to the ICCPR). It then goes on to examine the power of the courts to apply the right to compensation for breach of the right to liberty as provided for in the ICCPR.

³⁷⁷ The FDRE Constitution, Articles 50(2) cum 79(1).

³⁷⁸ Kumar, *supra* note 123, P.773.

³⁷⁹ See also, Bulto, *supra* note 303, P.106.

³⁸⁰ *Id.*, P.103.

4.3.1 Federal Courts

The federal judiciary consists of regular courts functioning at three levels: First Instance, High and Supreme Courts and the Cassation division of the Supreme Court. The following discussion generally concerns the powers and responsibility of the three levels without making any particular reference to one or the other.

4.3.1.1 The Responsibility and Duty to Respect and Enforce the Constitution

In the first place, the judiciary, as an organ of the government, has the common duty to respect and enforce human rights provisions of the Constitution.³⁸¹ The obligation to respect requires courts to take hands off from violating human rights of individuals guaranteed by the Constitution and human rights treaties ratified by Ethiopia. To exemplify in terms of the issue in hand, it would be breach of the obligation to respect for courts to issue an unfounded warrant of arrest and license the police to deprive persons of their right to liberty. It would also amount to breach of the obligation to respect for the court to order the detention of a person, without a charge against him/her, under the guise of contempt of court, who is actually exercising his right to be heard or exercising his freedom of speech in the court.

Unlike the duty to respect, the duty to enforce the rights enshrined in the Constitution requires judicial activism. This duty includes applying the provisions of the Constitution to specific cases brought before the courts.³⁸² Insofar as a given case finds its way into the provisions of the Constitution, application of the provision to the case does not seem to pose difficulty to the courts. Rather, it is where the Constitution is silent on the case brought before it that the courts face with a dilemma. In such a case, more degree of engagement would be required of the courts in the course of finding legal solution to the factual controversy arising under the Constitution. The case in point is the right to compensation for breach of the right to physical liberty. While the right to (physical) liberty is protected under the Constitution, the breach of which is a constitutional case, the right to compensation for breach of the same right is not provided in the

³⁸¹ The FDRE Constitution, Article 13(1).

³⁸² Yeshanew, *supra* note 17, P.7.

Constitution. On the face such a silence, the task of finding a legal remedy for breach of the right in question would be never easy. The next section examines if interpretation is of some help.

4.3.1.2 Interpreting the Constitution

Formulated in a mandatory fashion, Article 13(2) of the Constitution requires the interpretation of the Fundamental rights and freedoms in Chapter 3 of the Constitution in a manner conforming to the principles of international human rights instruments. The question is: whose mandate is it to interpret the Constitution? A glance at Articles 62(1) and 84(1) of the Constitution tends to suggest that Article 13(2) is a grand rule of interpretation for the HoF, and not for the courts.³⁸³ However, the responsibility and duty of the judiciary (courts), in the preceding Article 13(1), to enforce the Bill of Rights together with the right of access to justice under [A]rticle 37(1) means that the Bill of Rights is justiciable.³⁸⁴

A further argument can be gained from Article 3(1) of Proclamation No.25/1996 by virtue of which federal courts have jurisdiction over cases arising under the Constitution. Obviously, cases arising under the Constitution are those cases that have their causes of action in the Constitution. This is another expression of justiciability of constitutional rights. By justiciability, it means that provisions of the Constitution are not only invocable by the right-holders but also they can be applied directly by courts of law.

If the Federal Courts are competent to apply the provisions of the Constitution, then they cannot be precluded from expounding and interpreting the same and determining the scopes and limits of the rights thereof. In the words of Chief Justice Marshall, “those who apply the rule to particular cases must of necessity expound and interpret that rule”.³⁸⁵ Hence, where the interpretation of a provision on fundamental rights and freedoms is in doubt, courts have the opportunity to interpret and apply the provision in the light of the applicable international legal

³⁸³ While Article 62(1) provides that “the House (HoF) has the power to interpret the Constitution”, Article 83(1) provides that “all constitutional disputes shall be decided by the House of Federation”. The latter provision, on its face, excludes any other organ, but the HoF, from deciding constitutional disputes are concerned.

³⁸⁴ See also, Yeshanew, *supra* note 17. That Federal Courts have jurisdiction over cases arising under the Constitution is clearly provided in Article 3(1) of Proc.No.25/1996. The Constitution confers rights on citizens and residents. The cumulative reading of Articles 37(1) and 13(1) of the Constitution and Article 3(1) of Proc.No.25/1996 evidence the justiciability of Constitutional rights.

³⁸⁵ Edward D. Re, *Judicial Enforcement of International Human Rights*, Akron Law Review, Vol. 27, No.3, Article 4 (281-300), P.287.

norm/principle. In so doing, the courts cannot be said to be usurping the mandate/function of the HoF. The application of law to the facts of the case is clearly a judicial function.³⁸⁶ This interpretative latitude fosters *indirect application* of treaty provisions. Moreover, it should be noted that the Constitution is not merely referring to human rights in the abstract, but international human rights that are to be given legal effect and enforced. So, the relevant provisions of international human rights instruments would supplement interpretation of constitutional rights to the extent that the rights are guaranteed in the Constitution.³⁸⁷

But the right in question may be one for which there is no explicit constitutional guarantee. The case in point is the right to compensation for breach of the right to physical liberty, a right guaranteed in the ICCPR but not in the FDRE Constitution. In this case, the treaty provisions have nothing to supplement. Rather, the situation calls for direct application of the relevant provisions of the Covenant. Some even suggest that the relevant provisions of the treaties shall be taken as Ethiopian law.³⁸⁸ Accordingly, Ethiopian courts should apply Article 9(5) or 14(6) of the ICCPR, as the case may be.³⁸⁹ As will be seen subsequently, this judicial function, nonetheless, seems to be a theoretical possibility rather than a practical reality.

4.3.2 State Courts

State Courts³⁹⁰ share with Federal courts the common responsibility and duty to respect and enforce the human rights provisions of Chapter 3 of the federal Constitution.³⁹¹ Besides, they also have the responsibility and duty to respect and enforce the bill of rights in the Constitutions of the respective States. As for the federal courts, the duty to enforce the fundamental rights and freedoms may sometimes require the courts to interpret the scope and limitations of the rights in question. Accordingly, the courts may be required to apply clear and specific provisions of ratified treaties to cases brought before them, particularly where the treaty provisions have no domestic law substitute.

³⁸⁶ Id., P.286.

³⁸⁷ Yeshanew, *supra* note 17, P.13.

³⁸⁸ Ibid.

³⁸⁹ See, the FDRE Constitution, Article 9(4): The ICCPR, as a ratified treaty is considered as domestic law of Ethiopia.

³⁹⁰ 'State Courts' as used in this study refers to the courts of Member States of the Federal Democratic Republic of Ethiopia enumerated under Article 47 of the FDRE Constitution, namely: Tigray, Afar, Amhara, Oromia, Somalia, Beneshangul/Gumuz, Southern Nations, Nationalities and Peoples, Gambela and Harari.

³⁹¹ See, Article 13(1) of the FDRE Constitution.

4.4 Domestic Application of the ICCPR

The application of international human rights treaties by national courts depends on a decision by domestic legal systems.³⁹² It is only when a human rights instrument and its provisions have become part and parcel of domestic law that national courts and quasi-judicial bodies will be able to apply them to cases brought before them by private individuals or organizations, as the case may be.³⁹³ At present, however, there is no general rule of international law providing how States should incorporate provisions of treaties of general international law into municipal legal systems.³⁹⁴ It is for the domestic laws and law making organs to choose the manner and means of incorporating international human rights treaties into the law of the land.³⁹⁵ Nonetheless, this liberty of choice of means of incorporating ratified human rights treaties into the domestic legal system is not a license for local authorities to decide whether to incorporate them at all because the State's duty to incorporate them results from the act of ratification.³⁹⁶

Be that as it may, the relationship between the Covenant and domestic law is crucial when it comes to the question how the Covenant is to be implemented in the Ethiopian legal system. As is elsewhere, this provokes three issues: whether an individual may directly invoke the Covenant provisions before Ethiopian courts and/or courts can apply them directly, whether the provisions are applied indirectly, or whether there is a need for legislative incorporation.³⁹⁷

Based on the particular case of their respective domestic legal systems, the States parties to the Covenant may choose between direct application, indirect application, and legislative incorporation to give effect to the Covenant rights.

³⁹² Ximena Fuentes Torrijo, *International Law and Domestic Law: Definitely an Odd Couple*, P.3, available at: <http://www.law.yale.edu/.../XimenaFuentes...>, accessed on 3 March, 2014.

³⁹³ Francois-Xavier Bangamwabo, *The implementation of international and regional human rights instruments in the Namibian legal framework*, P.166, available at: <http://www.kas.de/.../namibia/HumanRights/...>, accessed on 5 March, 2014.

³⁹⁴ Torrijo, *supra* note 392.

³⁹⁵ Takele Soboka Bulto, *The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia*, 23 J.Eth.L.No.1, P.139.

³⁹⁶ *Ibid.*

³⁹⁷ Seibert-Fohr, *supra* note 77, P.418.

4.4.1 Direct Application

The term ‘directly applicable’ is used if a norm of international law can be applied by domestic courts.³⁹⁸ It is usually the case where the norm is of self-executing. Accordingly, a self-executing treaty provision is “regarded as conferring rights on individuals and, consequently, may (and should) be applied by the courts as an independent legal basis for judicial decisions.”³⁹⁹ In other words, a self-executing treaty is invocable by private parties and capable of direct application by the courts without a need for any domestic implementing legislation.⁴⁰⁰ Furthermore, it is generally recognized that self-executing provisions create rights (and obligations) for private parties, even if those rights and obligations have no direct equivalent in domestic legislation.⁴⁰¹ The classical civil and political rights to physical integrity (the right to life, right to liberty, and right to security of person) are often considered as self-executing rights.

To say a particular treaty provision is self-executing sometimes means that it is automatically incorporated into domestic law upon ratification of the treaty. Under this interpretation, the statement that a treaty provision is not self-executing means that it has no status as domestic law in the absence of implementing legislation.⁴⁰² However, it is true that a ratified treaty has the ‘force of law’ regardless of whether it is self-executing or not.⁴⁰³ Yet, some argue that even though the treaty has the force of law, the court’s duty to enforce the treaty on behalf of an individual depends on whether it is self-executing.⁴⁰⁴ In other words, only self-executing treaties can be applied directly by the judiciary. Further, no treaty provision can be directly applicable unless it is also automatically incorporated—that is, judges cannot rely on a provision as a rule of decision if it has no status as domestic law.⁴⁰⁵

³⁹⁸ Id., P.404.

³⁹⁹ Sloss, *supra* note 59, P.12.

⁴⁰⁰ Ibid. The point is that “self-executing treaty provisions are automatically incorporated into domestic law without the need for legislative action, apart from legislative approval of the treaty itself, which is necessary for international entry into force”.

⁴⁰¹ Id., P.400.

⁴⁰² David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *Yale J. Int’l L.* 129, *Santa Clara University School of Law*, P.146.

⁴⁰³ Id., P.148.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

When it comes to the ICCPR, Article 2, as has been stated in section 3.3.2.3.3, seems to convey two contradicting messages. While paragraph 1 which provides that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...” could be read to provide for directly applicable rights, paragraph 2 seems to contradict this assumption by requiring ‘[n]ecessary steps of implementation in accordance with the States parties’ constitutional process to give effect to the Covenant rights’, thereby excluding an automatic direct applicability.⁴⁰⁶ However, it is submitted that the wording of Article 2(2) does not necessarily exclude a duty to make the Covenant directly applicable which could be based on the duty to respect and ensure the Covenant rights pursuant to Article 2(1) or on the purpose of Article 2 in general.⁴⁰⁷ At the least, owing to the logical and legal consequence of the duty to respect and ensure the Covenant rights, direct judicial application of provisions of the Covenant for which there are no substitute or equivalent in the domestic laws becomes inevitable if the treaty obligation has to be observed. In Ethiopia, however, this has provoked a debate to which we now turn.

Scholars and practitioners split in opinion regarding the direct judicial application of ratified human rights treaties in Ethiopia. While some argue that provisions of ratified human rights treaties are capable of direct application by Ethiopian courts, others contend this to be a practical impossibility. At the beneath of the controversy lies the question whether publication in the law gazette of ratified human rights treaties is a condition *sine quo non* or not for their direct application.

Those in the first camp, proponents of direct judicial application, have the normative basis for their arguments in Article 9(4) of the FDRE Constitution by virtue of which ratified treaties are considered as forming ‘an integral part of the law of the land’. They argue that ‘an international treaty becomes part of the Ethiopian law as soon as it is ratified’; and publication, a requirement in the case of national legislation, adds no validity to the treaties which are already valid by

⁴⁰⁶ Ibid.

⁴⁰⁷ Id., P.425. Seibert-Fohr sees to Article 2 of the Covenant from two angles. On the one hand, the decision not to exclude explicitly domestic effects can be taken as an indication that a direct application was at least deemed to be possible. On the other, one cannot conclude that the drafters wanted to make the Covenant directly applicable as a matter of international law.

virtue of ratification.⁴⁰⁸ In the light of this argument, Ethiopian courts would be required to take judicial notice of ratified treaties and enforce the rights guaranteed therein.

The second argument totally negates this above position. Proponents of this stance base their argument on the Negarit Gazeta Establishment Proc.No.3/1995⁴⁰⁹ and the FDRE Constitution. Article 2(3) of the former requires government organs of the federal as well as the states to take judicial notice of laws published in the Negarit Gazeta. The proponents assert this requirement to be equally applicable to treaties and all other laws enacted by the HPR.⁴¹⁰ In the case of the latter, Article 71(2) of the Constitution is heavily relied. Article 71(2), dealing with the powers and functions of the FDRE President, provides that the President ‘shall proclaim in the Negarit Gazeta laws and international agreements approved by the HPR in accordance with the Constitution’.⁴¹¹ The provision refers to laws and ‘international agreements’. By laws, it refers to laws enacted by the federal legislature. The term ‘international agreements’, pursuant to the VCLT, refers to treaties.⁴¹² Those in this camp assert publication as a mandatory requirement for treaties to be applied by Ethiopian Courts.⁴¹³ Following this line of argument, direct application of ratified treaties that are not published in the law gazette is impossible, no matter how the provisions are traditionally considered as self-executing; sufficiently clear and specific enough.

There are some major problems the crux of which lies in the very requirement of publication. Taking this requirement for granted, Getachew Assefa has identified three such problems.⁴¹⁴ First, it may leave Ethiopia in a situation where it is bound internationally by the terms of a treaty which has no domestic effect. This may so happen because the fact of ratification of some

⁴⁰⁸Girma Amare, as cited by Ibrahim Idris, supra note 16, P.124, The Ethiopian Human Rights Regime, Federal Democratic Republic of Ethiopia’s Constitution and International Human Rights Conventions Ethiopia has Ratified: A Paper Presented to the International Conference on the Establishment of the Ethiopian Human Rights Commission and the Institution of Ombudsman, from May 18-22, 1998, Addis Ababa, Ethiopia.

⁴⁰⁹A Proclamation to Provide for the Establishment of the Federal Negarit Gazeta, Federal Negarit Gazeta Establishment Proclamation No.3/1995, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 1st Year No.3, 22 August, 1995.

⁴¹⁰ Idris, supra note 401.

⁴¹¹ Ibid.

⁴¹² The Vienna Convention on the Law of Treaties 1969, YBAAA 40 (1970) XXVII, provides the following:

Article 2

1. For the purposes of the present Convention:

(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

⁴¹³ Ibid.

⁴¹⁴ Assefa, supra note 10.

of the important treaties to which Ethiopia is a party has already been deposited with the UN Secretary General without publication of the same for the purpose of domestic consumption.⁴¹⁵ Second, even in cases where ratification has been followed by publication, the practice is that nothing more than a precise statement of the fact that the treaty under consideration has been ratified is actually published in the law gazette. The non-publication of the full text of those treaties has rendered it inaccessible both in terms of content and the working language.⁴¹⁶ Third, he asserts that the lack of implementing legislation for most provisions of the treaties that lack specificity to be readily applicable by the courts has added up to the problems in the enforcement of the rights and freedoms entrenched in the ratified treaties.⁴¹⁷ With these pragmatic problems in mind, Getachew concludes that “the federal judicial system leaves a lot to be desired in terms of protecting constitutionally guaranteed rights and freedoms.”⁴¹⁸

4.4.1.1 Indirect Application

Indirect application occurs when a court invokes a treaty as an aid to the interpretation of a domestic constitutional or statutory provision.⁴¹⁹ Courts may refer to treaties as an aid for interpreting statutes; they may also apply legislation that has been enacted pursuant to a treaty. These are examples of “indirect” judicial application of treaties.⁴²⁰ Unlike direct judicial application, when courts apply treaties indirectly, some provisions of law other than the treaty itself provide a rule of decision in the particular case.⁴²¹ In that sense, the statutory and/or constitutional provisions providing a rule of decision should be interpreted to conform to international obligations codified in unincorporated treaties.⁴²² While direct application requires

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid. See also, Yeshanew, *supra* note 17, P.12: To the contrary, he argues that the Ethiopian Constitution enshrines provisions specific enough to be applied by courts, and constitutional avoidance on the ground of generality of the provisions is not tenable where the provisions have no perfect substitute in ordinary legislation. Even though there is no harm in having implementing legislation, there seems to be a leeway for Ethiopian courts to apply clear and specific provisions the treaties to particular cases to meet the need of the day.

⁴¹⁸ Id., P.268.

⁴¹⁹ Sloss, *supra* note 59, P.14.

⁴²⁰ Ibid.

⁴²¹ Sloss, *supra* note 402, P.145.

⁴²² Sloss, *supra* note 59, P.7.

treaty provisions to be self-executing, judges can apply treaty provisions indirectly, regardless of whether they are self-executing or not.⁴²³

It goes without saying that the Cassation division of the Federal Supreme Court in *Tsedale Demissie v Kifle Demissie Case*⁴²⁴ passed a groundbreaking decision by adopting an indirect application of Article 3(1) of the UN Convention on the Rights of the Child (CRC)⁴²⁵ and Article 36(2) of the FDRE Constitution. This interpretation of the Court serves as a precedent and binds on federal as well as regional courts of all levels as law.⁴²⁶ No matter how crucial the above decision of the Cassation division may be, the import of the interpretation to other human rights treaties such as the ICCPR may give rise to some questions. While the fact of ratification of the CRC⁴²⁷ was enacted into a proclamation by making reference to the text of the Convention, the ICCPR was not. So, there remains doubt if the Cassation division can follow a similar interpretation for cases arising under human rights instruments that have not been proclaimed in the Negarit Gazeta.

4.4.1.2 Legislative Incorporation

Traditionally, scholars posit two approaches in respect of the reception of international law, human rights law inclusive, into the national legal system, characterizing countries as *monist* or *dualist*.⁴²⁸ The monist theory provides that international law and national law are manifestations of a single conception of law.⁴²⁹ It follows that municipal courts are bound to directly apply international human rights law (treaty provisions) without any recourse to adoption by courts or

⁴²³ Ibid.

⁴²⁴ *Tsedale Demissie v Mr Kifle Demissie*, Federal Supreme Court Cassation Division, File 23632, in Decisions of the Cassation Division of the Federal Supreme Court of the FDRE, Vol. 5, judgment 6 November, 2007, P.188-191. In this decision, the Cassation Division of the Federal Supreme Court found the regional courts of the SNNP to have committed basic error of law and held that the aunt of the child Beniam Kifle to be a legal guardian of the child having regard to Articles 3(1) of the CRC and 36(2) of the FDRE Constitution which provides for ‘the best interest of the child as a primary consideration’.

⁴²⁵ Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with Article 49.

⁴²⁶ Federal Courts Proclamation Reamendment Proclamation No.454/2005, Federal Negarit Gazeta of the FDRE, 11th Year No.42, 14th June, 2005, Article 2(1).

⁴²⁷ The Convention of the Rights of the Child Ratification Proclamation No.10/1992, Negarit Gazeta, Year 51, No.5.

⁴²⁸ Bangamwabo, supra note 389.

⁴²⁹ Magnus Killander (ed.), International law and domestic human rights litigation in Africa, Pretoria University Press, 2010, P.5 [hereinafter Killander]

transformation by the legislature.⁴³⁰ To the contrary, dualist theory provides that international law and domestic law are separate legal systems. As a result, if international (human rights) law is not transformed into national law through legislation, national courts cannot apply it.⁴³¹ So much so that, only with the passage of implementing legislation by national legislative body would human rights treaties come to have direct effect on internal law.⁴³² Be that as it may, the monist/dualist dichotomy is held to be losing its currency in the area of human rights law, environmental law and commercial law.⁴³³

Nonetheless, it should be noted that not all treaties require legislative incorporation. Legislative incorporation is not necessary: (a) for those treaties that operate purely on the international plane, without requiring any domestic legal effect from the parties; and (b) for treaties that obligate a state to protect certain private rights within its domestic legal system but preexisting legislation already protects those rights to the fullest extent required by international law.⁴³⁴ In the case of the latter, the idea is that additional legislation would be superfluous.⁴³⁵ Thus, legislative action is needed only if a proposed treaty (1) does not operate purely on the international plane and (2) obligates the state to protect private rights that are not already protected by preexisting domestic law.⁴³⁶

In so far as the first is concerned, the ICCPR textually requires domestic implementation. To this end, [A]rticle 2(1) requires each State Party to the Covenant to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. So, the Covenant guarantees rights of individuals intended to be enforced on the domestic plane. With regard to the second, Article 2(2) provides that “[w]here not already provided for by existing [domestic law], each State party...undertakes to take the necessary

⁴³⁰ Ibid.

⁴³¹ Id., P.11.

⁴³² Sloss, *supra* note 59, P.80.

⁴³³ Bangamwabo, *supra* note 388. International and national laws have traditionally addressed relatively different issues: the former concentrating on the relationships among states, and the latter on relationships among persons within national jurisdictions. In recent times, however, there is a gradual convergence of interest, and the ultimate goal of both systems is to secure the well-being of individuals. This common goal manifests itself in human rights law, environmental law, and commercial law, i.e. areas where there is increasing interaction between national and international law. Thus, “international and national laws have a lot in common, and an attempt to compartmentalize or isolate them will be analytically flawed and practically inapposite at present”.

⁴³⁴ Sloss, *supra* note 59, P.17.

⁴³⁵ Ibid.

⁴³⁶ Ibid.

steps, in accordance with its constitutional processes ...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”⁴³⁷ Moreover, Article 2(3)(a) of the Covenant states that “[e]ach State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.

Under the above provisions of the Covenant, Ethiopia has the following legal obligations:⁴³⁸ (1) to “respect” the rights provided in the ICCPR by refraining from violating those rights; (2) to “ensure” the rights in the ICCPR by taking the steps necessary to prevent others from violating those rights; (3) to take whatever measures may be necessary to effectuate ICCPR rights if those rights are not already protected under domestic law; and (4) to provide individuals whose Covenant rights are violated with an effective remedy (including compensation, as provided for in Articles 9(5) and 14(6)). But, neither the preexisting law of Ethiopia nor the subsequently enacted legislations provide for the right to compensation in a similar fashion as Articles 9(5) and 14(6) of the Covenant. If legislative incorporation is a precondition for the application of the provisions of the Covenant including the above two provisions on the right to compensation, Ethiopia would be duty bound to incorporate the provisions by legislation.

4.4.1.3 Judicial Enforcement of the Right to Compensation under the ICCPR

International human rights treaties largely rely on the cooperation of domestic governments for their enforcement. On the other hand, the international implementation systems of reporting, inter-state complaint and individual complaint procedures are set up as a secondary means of implementation providing for a control system.⁴³⁹ In line with this, domestic implementation is the primary mechanism envisaged by the ICCPR to give effect to the rights of individuals that it enshrines. In effect, the enjoyment of the Covenant rights, by and large, depends on the implementation measures taken by the States parties.⁴⁴⁰ Thus, to ensure all aspects of the Covenant rights and their effective enjoyment, it is not enough to make it directly applicable and

⁴³⁷ See also, Carter, *supra* note 351, P.374.

⁴³⁸ *Ibid.*

⁴³⁹ Seibert-Fohr, *supra* note 77, P.400.

⁴⁴⁰ *Ibid.*

to bring domestic law into line with the Covenant.⁴⁴¹ The Constitutional provisions incorporating the Covenant need to be implemented.⁴⁴² Moreover, the precise content of the Covenant rights needs to be elaborated.⁴⁴³

Therefore, Ethiopia, as a State party to the ICCPR, needs to develop institutions which remove impediments to the realization of the Covenant rights. One example is an independent judicial system as required by Articles 9 and 14.⁴⁴⁴ Some reasons are forwarded why it is important for domestic courts to provide remedies for individual victims of treaty violations. Two such reasons deserve a mention here. First, many modern treaties codify an agreed understanding about the content of universal moral norms, such as an acceptable ways of treating individual human beings, and governments are more likely to comply with those norms to the extent domestic courts enforce them.⁴⁴⁵ Second, the fact that many treaties create private rights without granting private parties access to international dispute resolution mechanisms creates a right-remedy gap on the international plane. Thus, domestic courts play a vital role in bridging the gap, but are not the only actors capable of filling it.⁴⁴⁶

Nevertheless, domestic courts can help promote compliance with vertical treaty obligations.⁴⁴⁷ In the claims for breach of vertical treaty obligations, the obvious defendant is the government department or government officials. Particularly, in the claim for compensation for arbitrary arrest or detention, and wrongful conviction, as provided in Articles 9(5) and 14(6) of the ICCPR, the defendant may be the police department or a police officer or the office of the public prosecution or a prosecutor thereof.⁴⁴⁸ In the case of absence of remedies provision in the Constitution and other especial laws, Ethiopian courts can only fill the rights-remedies gap by directly applying the above provisions of the Covenant. The practice of Netherlands, Germany and Poland very well depicts this above assertion. In these three jurisdictions, domestic courts directly apply a provision

⁴⁴¹ Id., P.453.

⁴⁴² Ibid.

⁴⁴³ Ibid.

⁴⁴⁴ Id., P.457.

⁴⁴⁵ Sloss, *supra* note 59, P.5.

⁴⁴⁶ Ibid. See also, General Comment No.20/44 on Article 7(1992), in: HRI/GEN/1/Rev.1, P.31, para.8, General Comment No.18/37, para.9. The Committee asks for administrative, judicial and other measures apart from legislative steps in order to prevent and punish violations of Covenant rights. Therefore, all three branches of government-the legislature, the judiciary and the administration-are charged with the implementation of the Covenant.

⁴⁴⁷ Seibert-Fohr, *supra* note 77, P.400.

⁴⁴⁸ Ibid.

of a treaty that is part of the domestic legal order when it is sufficiently clear, and if it is designed to benefit private parties.⁴⁴⁹ The ICCPR is part of the domestic law of Ethiopia as per Article 9(4) of the FDRE Constitution and Articles 9(5) and 14(6) of the ICCPR are sufficiently clear and designed to safeguard private individuals against encroachment by the government or its agents. So, save the otherwise arguments regarding the requirement of publication, there is nothing flaw for the Ethiopian courts in following the footstep of the courts in the above jurisdictions and applying the provisions of the Covenant on the right to compensation based on Article 9(4).

This above assertion is so crucial in the light of alternative recourse victims of breach of the right to physical liberty have within the Ethiopian context. For one thing, the African Commission currently stands the only institution before which Ethiopian citizens and residents may file complaints of breach of the right to physical liberty. For the other, even assuming that complaints of breach of the right to physical liberty that are made by Ethiopian citizens and residents are reviewable by the existing international human rights treaty-monitoring bodies, the cost associated with such an international litigation system may discourage many individuals from resorting to those mechanisms. It is still the case that any decision made by an international human rights treaty-monitoring body may not be enforced on a domestic level.⁴⁵⁰ Consequently, there is a pressing need for the creation of such a mechanism at a national level in Ethiopia. Domestic courts are thus the most competent bodies at enforcing an individual's rights under international treaties.⁴⁵¹ However, the competence and effectiveness of the domestic courts depends on the availability and clarity of the laws.

4.4.1.4 Jurisdictional Issues

The term 'jurisdiction' is broadly defined as "the court's raw, baseline power and legitimate authority to hear and resolve the legal and factual issues in a class of cases".⁴⁵² Put succinctly, jurisdiction concerns the power of a court to hear and render a binding decision. It defines the

⁴⁴⁹ Sloss, *supra* note 59, P.13.

⁴⁵⁰ Amissi M. Manirabona & François Crepeau, Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body, *Canadian Journal of Human Rights*, 2012, P.32.

⁴⁵¹ *Ibid.*

⁴⁵² Howard M. Wasserman, Jurisdiction, Merits, and Procedure: Thoughts on Dodson's Trichotomy[Wasserman], P.215, available at: <http://www.law.northwestern.edu/lawreview/colloquy/2008/6/>, accessed on 25/11/2013.

‘powers of courts to inquire into facts, apply the law, make decisions, and declare judgment.’⁴⁵³ Thus, before turning to the merits of the case, the Court must address or determine if it had jurisdiction to hear civil disputes and /or criminal prosecutions. It is one of several procedural preliminaries that courts consider mainly at the outset of litigation, with the court acting as finder of fact for all of them.⁴⁵⁴ Non-waivability and independent judicial obligation to investigate are the unique elements of jurisdiction.⁴⁵⁵

Since Ethiopia has adopted a federal system, there has been a dual court system, i.e., federal and state courts operating parallel to each other. Indeed, this is an inevitable by-product of the division of power in any federal state. The FDRE Constitution thus provides for the division of judicial power between the Federal and State governments. To this end, the Constitution in Article 80(2) speaks of the concept of ‘Federal matters’ and ‘State matters’ with respect to the judicial powers of the Federal and the State Supreme Courts. Yet, it neither defines nor describes what such matters refer to. However, Proclamation No.25/1996, which subsequently came into force, seems to solve this old problem of crudity by elaborating the principle in Article 80(2). Accordingly, Article 3(1) of the Proclamation gives jurisdiction to the federal courts over, *inter alia*, [c]ases arising under the Constitution, Federal Laws and International Treaties.

Sadly, Article 5 of the Proclamation emerged with new problems to darken the horizon. By enumerating only a few matters that fall under the jurisdiction of federal courts, it excluded a bulk of civil matters there from.⁴⁵⁶ In the terms of Article 52(1) of the FDRE Constitution, the residual power accrues to the States. In the light of this, Article 5 of the Proclamation in effect means that “state courts will have jurisdiction over cases involving fundamental rights and freedoms provisions of the Federal Constitution, other federal laws and international treaties.”⁴⁵⁷ Insofar as specific human rights cases that fall within the jurisdiction of federal courts are concerned, Article 5 makes mention of only one case, *an application for habeas corpus*.⁴⁵⁸ This

⁴⁵³ Black’s Law Dictionary, *supra* note 19.

⁴⁵⁴ Wasserman, *supra* note 450, P.221.

⁴⁵⁵ *Ibid*.

⁴⁵⁶ Assefa, *supra* note 10, P.263. Article 5 of Proc.No.25/1996 enumerates a few civil cases over which federal courts have jurisdiction.

⁴⁵⁷ *Ibid*.

⁴⁵⁸ Federal Courts Proclamation No.25/1996, Article 5(10) provides that “Federal Courts shall have jurisdiction over ...application for Habeas Corpus”. See also, Getachew Assefa, P.264: The jurisdiction to entertain all the other civil cases involving fundamental rights and freedoms that arise, *inter alia*, under ratified treaties is given to the state courts.

means that all civil cases that have the seed of human rights fall within the jurisdiction of the state courts with the exception of an application for *habeas corpus*.

Indeed, there is no problem in leaving the implementation of a treaty largely to the States. The ICCPR itself provides that “the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”⁴⁵⁹ It follows that for all pragmatic concerns, State courts are within the proper reach of individual right holders under a human rights treaty. In other words, State courts are more accessible to the greatest majority of the Ethiopian population. A rather problem seems to arise when Article 5 is read together with Article 3(1) of the same Proclamation. As mentioned above, the latter provides that “federal courts shall have jurisdiction over cases arising under...international treaties”. If this is construed to exclude State courts from entertaining cases arising under international treaties, Article 5 which leaves a bulk of human rights cases to State courts becomes nonsensical. In effect, individuals whose treaty-based rights have been violated would remain without a remedy.

⁴⁵⁹ The ICCPR, Article 50.

CHAPTER FIVE

CONCLUSION BY WAY OF ANALYSIS AND RECOMMENDATIONS

5.1 Conclusion by way of Analysis

Subsequent to the introductory chapter one of this study, the writer has attempted, in chapter two, to explore the rationale for a remedy for breach of the right to physical liberty (arbitrary arrest or detention, and wrongful conviction). These forms of deprivation of liberty are highly likely to occur in the criminal justice system of any country no matter how advanced it may be. As a result, victims of deprivation of these rights inevitably undergo physical, economical/financial, social and moral hardships. Thus, providing such victims with a remedy (compensation) to the extent it can redress the harm suffered is submitted to be in the interest of justice-i.e., a significant aspect of ensuring the rule of law. Basically, this assertion is premised on the general principle that ‘where there is a right, there must also be a remedy’. According to this notion, the right to physical liberty will be meaningless if persons who are deprived of the right cannot demand a remedy and/or get it enforced. This in turn calls for the availability of the legal and institutional avenue that will enable vindication of the breach possible.

With this view in mind, the study conducted has revealed that the right to compensation has its normative foundation in the international human rights instruments and national laws of a few jurisdictions that have been examined. The countries so examined follow different approaches when it comes to the domestic application of human rights treaties. In the United States for example the Supremacy Clause provides that treaties are supreme federal law.⁴⁶⁰ By virtue of this, the U.S looks to be a good example where international treaties are directly applied. But the practice depicts otherwise. U.S courts bifurcate between self-executing and non-self-executing as well as between horizontal and vertical application of the treaties and grant remedies to individuals claiming against private actors but avoid holding government accountable for treaty violations, albeit they have the authority to apply treaties directly in some cases. This has long been a point of criticism against the U.S courts. Similar to that of the United States, the FDRE

⁴⁶⁰ The Constitution of the United States, Article VI.

Constitution assimilates ratified treaties to the law of the land. Though the above practice in the U.S has little, if not none, to offer to the subject of the study in hand, Ethiopian Courts may also directly apply ratified treaties to resolve disputes between private actors.

The United Kingdom is a dualist legal system whereby legislative incorporation is required for a treaty to have domestic legal force. The U.K Courts thus grant remedies to victims of violation of treaty based rights in either of two ways: (1) by applying implementing statute; or (2) by interpreting the statute to conform to treaty obligations codified in unincorporated treaty. The U.K is the best example in direct implementation and verbatim incorporation of the right to compensation for wrongful conviction in Article 14(6) of the ICCPR. Moreover, the U.K came to have a Human Rights Act in 1998 which empowers courts to grant remedies including compensation to victims of breach of the ECHR. So, what if Ethiopia also directly incorporates the provision by way of legislation? Obviously, the question of compensation has a resource implication. It requires the government to plan and assign budget from which compensation would be paid to the victims. This kind of budget plan in itself seems to have a negative implication for it could be translated to mean that the government is planning to deprive persons of their liberty-i.e., planning to change (or buy) liberty for money. Anyhow, this is an inevitable contradiction if the government had to pay compensation for the breach.

If victims of breach of the right to liberty have an enforceable right to compensation, and if compensation has a resource implication, then another question that follows is whether this right creates immediate obligation or the States parties are only required to enhance the realization of the very right according to their particular abilities. Answering this question requires a look at the nature of obligation created by the Covenant. There is an assumption that civil and political rights create immediate and stringent (i.e., unconditional) obligation of implementation. Seibert-Fohr well asserts this as follows:

“...A further argument is based on Article 2(3) of the Covenant requiring domestic remedies in case of Covenant rights violations. It is questionable whether one could speak of violations of the rights if they did not create stringent legal obligations. There would also be no need for the provision on derogation in Article 4 of the ICCPR if the States parties were only required to enhance the realization of the Covenant rights according to their particular abilities. In that case states could base derogations on the grounds of their lacking ability to implement the Covenant rights in times of public

emergency without the need for a derogation clause such as Article 4(1). Finally, if certain rights cannot even be derogated from in times of public emergency (article 4(2)), non-compliance with them in times of peace cannot be justified on the ground of lack of available resources.”⁴⁶¹

According to the above assertion, Ethiopia cannot take the advantage of lack of available resources as a legitimate ground to consider the right to compensation under the Covenant as a matter of progressive realization and suspend its obligation to provide victims of arbitrary arrest or detention, and wrongful conviction with compensation up until prosperity comes.

There is another issue that has long been raised against direct incorporation of the right to compensation into the domestic law. Section 133 of the U.K’s Criminal Justice Act⁴⁶² which directly incorporated Article 14(6) of the ICCPR was highly criticized. The critics have voiced concern that direct incorporation of the provision would give rise to floodgate of lawsuit for compensation. But this theoretical speculation did not occur in reality; and there is no evidence for it to occur in Ethiopia if the provision is directly incorporated into the domestic law. Basically, not all claims merit award of compensation under the Covenant. According to David Sloss, only non-frivolous, non-redundant claims (claims which are well founded in the treaty, and which attempt to vindicate treaty rights that are not protected under other provisions) are to be entertained under an incorporated Article 14(6) of the ICCPR. Frivolous claims and redundant claims are thus excluded. In effect, this would minimize the number of claims that would otherwise find their way into Article 14(6).

Australia does not have a bill of rights. Neither is there a statutory right to compensation. All that victims have is either to apply for an *ex gratia* (out of grace) payment, or file tort claim against liable parties, or propose an individualized compensation bill through parliament. *Ex gratia* awards and compensation bill do not come into effect immediately. In both cases, lobbying the relevant authorities has a significant place and this takes unfairly long time; and not all victims such power of lobbying. Therefore, *ex gratia* payment and individual compensation bill are alleged as arbitrary. Thus, it is not advisable to suggest for Ethiopia to adopt this mode of redress. In Germany and the Netherlands, on the other hand, many treaties form part of their domestic legal systems and courts apply the treaties both directly and indirectly. Accordingly,

⁴⁶¹ Seibert-Fohr, *supra* note 77, P.405.

⁴⁶² See, *supra* note 111.

they provide victims with compensation in Article 5(5) of the ECHR where governments of the respective jurisdictions are found to have violated the right to liberty under the Convention. As sticking to either one of direct or indirect application may not in some circumstances yield the requisite outcome, flexible application of the one which is appropriate for the particular circumstance of the case is a good lesson to be drawn by the Ethiopian courts.

The Indian and the Ugandan Constitutions specifically guarantee the right to compensation for breach of the right to liberty. The Indian Constitution empowers the High and the Supreme Courts to grant compensation for breach of constitutional human rights. The government in addition established an independent National Human Rights Commission which is enormously assisted by NGOs and credited for directing huge amount of compensations for victims of human rights violations that was complied with by the government. Indeed, it is submitted that NGOs play a crucial role in ensuring State's compliance with treaty obligations. For example, NGOs, together with National Human Rights Institutions, can attend the interactive dialogue at the UN Universal Periodic Review (UPR) mechanism, provide reliable information (shadow report) as a basis for review, and take the floor before the adoption of the final outcome report of this process.⁴⁶³

Ethiopia is subject also to the United Nations Human Rights Council Universal Periodic Review which provides a mechanism for every country to have its human rights record reviewed and critiqued by its peers. However, there is no international process that dictates to sovereign states how to perform their human rights treaty obligations effectively. What is more, Ethiopia has enacted a Charities and Societies law that leaves civil society organizations unable to contribute adequately to the United Nations review process.⁴⁶⁴ As such, this international monitoring mechanism cannot ensure effective compliance with human rights obligations by Ethiopia on a domestic level. Moreover, the Universal Periodic Review is considered to take place in a climate of dissent and division within the Human Rights Council, a body perceived as politically directed and controlled by states with distinct ideological goals and sociopolitical objectives;⁴⁶⁵ and can

⁴⁶³ Elvira Domínguez-Redondo, Role of the UN in the Promotion and Protection of Human Rights, P.141.

⁴⁶⁴ Charities and Societies Proclamation No.621/2009, Federal Negarit Gazeta of the FDRE, 15th Year No.25, 13th February, 2009. The Charities and Societies limits the workings of civil society organizations especially financially.

⁴⁶⁵ Joanna Harrington, Canada and the United Nations Human Rights Council: Dissent and Division, 60 UNBLJ, 2010, P.78.

hardly be expected to address cases such as compensatory remedy for breach of the right to liberty.

The Ugandan Constitution in Article 23 specifically provides that a person “[u]nlawfully arrested, restricted or detained by any other person or authority shall be entitled to compensation from that other person or authority whether it is the State or an agency of the State or other person or authority.” The Constitution goes on and provides in [A]rticle 50(1) which reads: “Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation”. This has enabled the court to plainly award compensation for breach of the right to physical liberty. Seen from this angle, the Ethiopian Constitution leaves a wide gap.

In South Africa, as differed from the above two jurisdictions and similar to that of Ethiopia, there is no right to compensation in the Bill of Rights. However, the Constitutional Court has actively read the right to compensation for unlawful imprisonment into Section 8 of the Constitution dealing with freedom and security of person. This reveals the acceptance by the Court of the right to compensation for breach of the right to liberty as intrinsic to the right to liberty itself. To the contrary, the HoF which is entrusted with the authority to interpret the Federal Constitution has the mandate only to decide on abstract legal issues and does not seem to have the power to grant compensatory remedies to individual victims. For that matter, the complaint submitted to the House or the decision thereof may not even name specific beneficiaries.

Chapter three of this study is devoted to the assessment of the constitutional guarantee of the right to liberty, instances of breach of the right to physical liberty, available legal avenues for an action for compensation for breach of the right in question and the cause of action thereof. The right of individuals to physical liberty is guaranteed in both the Federal and the State Constitutions. Arbitrary arrest, arbitrary detention, pre-trial detention and wrongful convictions have been asserted to be instances of breach of the right to physical liberty that occurs in every jurisdiction including Ethiopia. Because of wrongful convictions innocent persons are forced to spend significant number of years in prison for crimes they did commit and this is true even in countries with advanced science of crime investigation. With regard to this, the situation in Ethiopia is no doubt wanting for the criminal justice mostly relies on eye-witnesses’ testimony.

Given the nature of human memory, eye witness testimony can never be totally accurate and reliable. The more witness testimony is inaccurate and non-reliable, the more errors are committed and the more is breach of the right to liberty to occur. Moreover, statutory prohibition of bail in respect of some crimes such as homicide, terrorism, corruption crimes, and dangerous vagrancy means that innocent persons who are incarcerated in respect of these crimes based on non-reliable eye-witnesses' testimony spend significant amount of time before they are acquitted or exonerated after conviction.

The study has revealed that damages/compensation for breach of human rights may be sought based on law of tort, constitutional law or human rights law (human rights treaties). But the law of tort has often been alleged as unsuitable to be relied on by victims of breach of human rights. Amongst others, it is disputed as difficult to demonstrate, inflexible, time consuming, expensive and of little prospect of success. Some even distinguish between the remedy in public law such as the constitution and that of tort law: the former was held to concern the protection of rights while the latter protected interests.⁴⁶⁶ So, in the United States, for example, the action for breach of fundamental right needs to be phrased as a recognized breach of a recognized constitutional right.⁴⁶⁷ So too, in New Zealand, for a constitutional remedy to be granted, there need to be breach of one of the rights listed in the Bill of Rights Act. In India, cause of action based on constitutional rights overlaps with tort breaches and a victim is granted constitutional monetary compensation with a leave to sue for damages in civil law. To the Contrary, compensation based on the constitution is not available in the U.S where there is an alternative remedy in other laws. Above all, some jurisdictions such as India and Uganda have specifically provided compensatory remedy in their Constitutions and authorized courts to grant when demanded by victims.

In our case, the law of Extra-Contractual Liabilities (tort) contains some provisions that may help victims to seek damages/compensation for the harm they suffer as a result of breach of the right to physical liberty. Here, breach of the right to physical liberty that form the subject of this study is arbitrary arrest or detention, and wrongful conviction. These are breaches of liberty mostly by persons acting in official capacity, i.e., government officials/agents. The police, the public prosecutor, the judge or the respective officials' institutions may involve in the breach. The question of immunity of these officials and the aforementioned pitfalls in the law of tort to rely

⁴⁶⁶ Tortell, *supra* note 29, P.81.

⁴⁶⁷ Ibid.

on for the purpose of redress would also be the case in Ethiopia. The law of tort requires fault, damage and causal link between the two to be established for one to qualify for damages for the harm suffered. As for the other jurisdictions, damages remedy under the Ethiopian law of tort will be time consuming, expensive, and of little prospect of success. These all suggest us to look for other better legal avenue, if any.

The other important issue so examined is the distinction between human rights law and tort law. First, the two differ in the scope of application. Tort law safeguards people against damage inflicted by anyone whereas human rights law is specifically concerned with the state and its public authorities. So, human rights are ordinarily given super legislative or normative status in the constitution so as to impose limitation on the authorities in the exercise of public powers. It governs the vertical relationship between the state and individuals; the former being the duty holder and the latter right-holders. The state thus bears both positive obligations promoting, protecting and fulfilling the rights it has promised to safeguard and the negative obligation of refraining from interfering with the exercise by the individuals of some of the rights, like for example the right to liberty. This obligation of the state is distinguished from the obligations individuals owe one another.

The state thus bears a special relationship with and responsibility toward the individuals. As such, it has the authority manifested in its power lawfully to arrest or detain, and convict people which brings with it special responsibilities to those over whom it exercises such authority. So, substituting tort law remedies for human rights tort may basically compromise the power limiting nature of human rights. Just to illustrate, prior to the Human Rights Act, the U.K Courts used to entertain human rights cases based on tort law and were overly reluctant to hold public bodies accountable and in effect failed to ensure that human rights standards have been upheld.

So, the analysis reveals that private remedy-i.e., remedy in tort law is, for the most part, not a legal avenue proper for the purpose of compensation for breach of human rights. The tendency is that remedies in public law, constitutional law and/or human rights law is more flexible, less costly, time efficient and easy to demonstrate, hence preferable.

Justiciability, standing, cause of action and jurisdiction: Beyond the substantive issues of interpretation of a given human rights provision and determination of possible limitations, courts are required to consider procedural issues such as justiciability, standing, cause of action and

jurisdiction. Accordingly, fundamental rights are shown to be justiciable under the Ethiopian Constitution and individuals have the standing to sue when their constitutional rights are violated. However, the *standing* rule requires the plaintiff to have (vested) interest in the subject matter of the suit with the exception of proceedings before the Ethiopian Human rights institutions; though this is of little significance here for the institutions do not have the authority to order the payment of compensation, albeit they may reach on such a conclusion while settling disputes amicably. In so doing, Ethiopian law excludes *actio popularis*. As opposed to Article 37 of the FDRE Constitution and the State Constitutions, the Indian Constitution provides for expansive rule of standing by focusing on the enforcement of the rights rather than referring to who may bring an action. Allowing this kind of standing is of paramount importance in countries such as ours where the great majority of the populations are not assertive of their rights as a result of the high rate of illiteracy in general and legal illiteracy in particular.

Cause of action: Cause of action presupposes breach of a right. So, in the case of breach of the right to physical liberty, what is the cause of action that sounds in a compensatory remedy? Answering this question necessitates the re-examination of the laws previously discussed, namely: the law of tort, constitutional law and human rights law. The practice in some jurisdictions discussed in this study reveals that mere tort breaches are not sufficient to found (fundamental) constitutional/human rights cause of action. For instance, the cause of action for breach of the right to be secure from unreasonable search and seizure protected under the Bill of Rights Act of the New Zealand was found to be positioned within public law.⁴⁶⁸ Furthermore, the breach is required to be one that is of a public nature-i.e., the action responsible for breach of the right should be attributed to state action or part of official conduct. In this study, the issue under consideration-i.e., arbitrary arrest or detention, and wrongful conviction are state actions and the breach is part of official conduct.

Implied cause of action: Courts in the United States and the New Zealand implied cause of action from the constitutional right breached in awarding compensation to the victims despite the fact that the respective Constitutions do not contain remedies provision. In *Bivens v. Six Unknown Named Agents Case*⁴⁶⁹ it was held that the existence of a remedy for the violation of the Fourth Amendment freedom from unreasonable search and seizure was implied from the

⁴⁶⁸ See, supra note 296.

⁴⁶⁹ See, supra note 293.

importance of the right violated. In a similar fashion, *Baigent's Case* in the New Zealand involved unreasonable search and seizure for the breach of which there was no remedies provision in the Bill of Rights Act. But the court's reasoning in implying the cause of action and awarding the remedy demanded by the victims was very interesting. It held that "despite the absence of a remedies provision, the rights in the Bill of Rights should not be allowed to become empty words; the Court would develop appropriate remedies to ensure the enforcement of those rights and freedoms."⁴⁷⁰ So too, the South African Constitutional Court has implied a cause of action with respect to Section 8 of the Constitution dealing with freedom and security of person even though there is no provision in the Bill of Rights which provides for compensation for violations of its provisions.⁴⁷¹

In a similar vein, there is no remedies provision in the Ethiopian Constitution (both Federal and States). However, both the Federal and the State Constitutions well extend protection to fundamental rights and freedoms of which the right to liberty is one. So, the import of the practice in the above jurisdictions means that the Ethiopian Courts will be able to grant compensatory remedies to victims of arbitrary arrest or detention, and wrongful conviction. This must also be seen together with Ethiopia's international obligation under the ICCPR.

Domestic cause of action for breach of the right to physical liberty under the ICCPR: Human rights treaties generally leave to the State parties the kind of domestic remedy they have to provide to individuals for violations of treaty-based rights; but at the minimum, the remedy is required to be effective. However, the above liberty of choice of remedy is not without an exception. In the case of arbitrary/unlawful arrest or detention, and wrongful conviction, the Covenant specifically provides for an enforceable right to compensation. As a State party to the Covenant, Ethiopia thus bears an international obligation in terms of Articles 9(5) and 14(6) of the same. The obligation to provide effective domestic remedy entails creating the domestic legal and institutional avenue so as to enable victims of breach of Covenant rights demand the remedy and the institutions grant it. Otherwise, a remedy which does not exist at the outset cannot be effective.

⁴⁷⁰See, supra note 300.

⁴⁷¹See, supra note 147.

Taking for granted that Ethiopia complies with its international obligation to provide compensatory remedy under the Covenant, there must be a breach for the cause of action to arise. Thus, arbitrary arrest or detention, and wrongful conviction need to be established for the cause of action under Articles 9(5) and 14(6) of the Covenant to arise. In the case of the former, what may constitute arbitrary/unlawful arrest or detention should be seen in the light of both substantive and procedural laws. If the arrest or detention does not comply with the procedures as are established by law, or if a certain law allows an arrest or detention contrary to Ethiopia's international obligation and, say, a police effects an arrest based on that law, then the first requirement, that is 'breach' is said to have occurred. Also, for wrongful conviction, the following elements of Article 14(6) must be fulfilled: (1) a person has by a *final decision* been convicted of a criminal offence; (2) subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice; (3) the person who was convicted is not responsible for the non-disclosure of the unknown fact in time; and (4) penalties have been actually implemented.

In Chapter four of this work has been assessed the institutional framework for compensatory remedies for breach of the right to physical liberty in the context Ethiopia focusing on the Ethiopian National Human Rights Institutions and the Courts (of both Federal and States). The study has revealed that the Human Rights Institutions do not have the legal and institutional competence to order the award of compensation for breach of the right by State actors. The HoF, a political organ with the mandate of constitutional interpretation is also not well situated to grant compensatory remedies to victims of breach of constitutional rights. Its constitutional and institutional mandate allows it to decide abstract legal issues rather than resolving concrete cases between litigants. Thus, courts, with all the ramifications, are better situated both legally and rationally to grant awards of compensation to victims of constitutional (human) rights.

What are the challenges that inhibit the award of compensation by the court to victims of breach of the right to physical liberty in Ethiopia?

The first relates to gap in the law. This takes different forms. (A) Absence of an explicit remedies provision in both the Federal and State Constitutions. But both Constitutions protect individuals against arbitrary arrest or detention. Because no remedy can be awarded without consideration of the legal aspects that make up a cause of action, the provision of the

Constitution guaranteeing the right violated should be interpreted if the award of compensation is to be granted based on it. This, as will be seen next, gives rise to jurisdictional dilemmas between the HoF and regular courts. (B) Absence/unfeasibility other laws providing for compensatory remedy for breach of the right to physical liberty. With regard to wrongful conviction, there is no national law providing for compensatory remedy. Moreover, to date, there is no implementing legislation for the constitutional Bill of Rights. The law of Extra-Contractual Liabilities in the Civil Code which precedes the Constitution by 35 years contains provisions, discussed under section 3.3.2.2, that provide for awards of damages in case of interference with liberty of another, referred to as false imprisonment in the common law legal system. Besides, the Criminal Code in Article 423 criminalizes unlawful arrest or detention which may entail award of damages in the terms of Article 2035 of the Civil Code. Yet, remedies in tort are said to protect interest while constitutional remedies aim at protecting rights. Based on the Constitution, breach of the very right to liberty triggers a constitutional remedy. But in the case of tort, for the most part, it is interests other than the right breached that trigger the damages. On top of that, a remedy under tort law is alleged as inflexible, costly, time consuming and of little prospect of success. In effect, tort law is not feasible for compensatory remedy in question. No matter the legal hurdles and whatever the case may be, victims of breach of the right physical liberty are not seen seeking compensation before the Ethiopian courts.

Nonetheless, there were clear incidences of breach of the right to liberty as a result of lengthy detention of criminal suspects before actual trial and acquittal. For instance, some of the Derg officials who were suspected to have involved in the ‘red terror’ and other human rights abuses were acquitted after serving in prison for more than a decade. At the time, these persons contended that acquittal was not enough if justice were to be served to them; and raised the question of compensation for the damage they sustained.⁴⁷² But none of them had taken the matter to the court.⁴⁷³ Similarly, there were cases where corruption suspects were acquitted after serving years in prison.⁴⁷⁴ But all of the judges whom this writer interviewed answered that compensation claim for breach of the right to physical liberty (arbitrary arrest or detention) is

⁴⁷² Daniel Aregawi, Judge at the Federal First Instance Court, an interview conducted on 29 May, 2014.

⁴⁷³ Ibid.

⁴⁷⁴ Endashaw Hailu, Judge at the Federal High Court, an interview conducted on 29 May, 2014.

practically absent.⁴⁷⁵ According to the judges, the scanty provisions in the above tort law and Article 9(5) of the ICCPR have not as yet been practically tested.

In so far as compensation for wrongful conviction is concerned, the study has revealed that there is no domestic legal remedy for individual victims of miscarriage of justice due to wrongful conviction in Ethiopia. The case in point is *Public Prosecutor v. Shume Regassa*⁴⁷⁶ in which the latter was charged to have committed aggravated homicide on 30/02/2000 E.C. He was accordingly convicted and sentenced to life in prison by the Federal High Court of Ethiopia on 24/02/2002 E.C, after two years of detention. On appeal from the judgment of the High Court, the Federal Supreme Court upheld the conviction but reduced the sentence to 20 years. But after Shume served more than five solid years in prison, a new fact was disclosed indicating that the real person who committed the homicide for which the former was convicted and penalized was found to be a person called Getu Assefa.⁴⁷⁷ Following the incidence, the office of the prosecution was busy searching for a law on the basis of which Shume could be released. An attempt was made to have the judgment of conviction reviewed on the basis of Article 6 of the Civil Procedure Code but dismissed by the Court on the ground that the provision does not apply to criminal matters.⁴⁷⁸ Finally, the victim (Shume) was made to request pardon and released from prison but awarded no compensation. Now, the case *Public Prosecutor v. Getu Assefa* is pending in the Federal High Court and Shume (the exoneree) is one of the witnesses the prosecutor has called to give their testimony against the former.

(C) Lack of clarity in the law on jurisdiction of Federal Courts vis-à-vis State Courts in the area of treaty enforcement. (D) Lack of legal clarity in the domestic application of ratified international human rights treaties. The Ethiopian laws including the Constitution beg clarity regarding the domestic effect of ratified human rights treaties. Whether or which treaties are capable of direct/indirect application or as to which ones may require legislative incorporation is not clear. This poses a stiff challenge in awarding compensation by directly applying Articles 9(5) and 14(6) of the ICCPR. (E) Absence of a law on review of judgment in criminal cases. For the enforcement of the right to compensation for wrongful conviction in Article 14(6) of the

⁴⁷⁵ Bula Wakgari and Daniel Aregawi (Judges at the Federal First Instance Court), Kasahun Guteta (Judge at the Oromia Supreme Court), Tokuma Daba (Attorney at Law), an interview conducted on 29 May, 2014.

⁴⁷⁶ *Public Prosecutor v. Shume Regassa*, Federal High Court, Criminal Case File No. 65177.

⁴⁷⁷ Tolamariam Magarsa, Federal Public Prosecutor, an interview conducted on February 21, 2014.

⁴⁷⁸ Dalke Debela, Federa Prosecutor at the Ministry of Justice, an interview conducted on January 15, 2014.

ICCPR, it is a requirement that the judgment of conviction must be reversed or the person wrongfully convicted be granted a pardon. Since, in the legal terms, pardon does not expunge the criminal record, the former is preferable for a person convicted for a crime he/she did not commit. But it is impossible to have the conviction reversed without first there being a review mechanism, and this mechanism is absent from the Ethiopian law in the case of criminal matters.

(F) Lack of assertiveness on part of the victims (coupled with lack of *actio popularis* standing rule) and lack of specialization in the field of human rights on part of the judges.

(G) Jurisdictional dilemmas. The absence of remedies provision in the Constitution requires the interpretation of the scope and limit of the constitutional right violated if the court had to imply a cause of action from the right violated in order to award a remedy, say compensation. But, there are jurisdictional dilemmas between the HoF and regular courts in the interpretation of the Federal Constitution. State courts also face with similar dilemmas. (H) Federal Negarit Gazeta Establishment Proc.No.3/1995 (Article 2(3)) denies the domestic effect of ratified treaties by providing for the requirement that international human rights instruments shall be published in the Federal Negarit Gazeta to have domestic legal force.

In Ethiopia, both the Federal and States Bill of Rights are codified and essentially guaranteed, but the trend seems to suggest that the rights aim at serving as a check on the government, not as a mechanism for individuals to assert violations of their rights against the government in the courts. The idea that an individual could assert a cause of action and collect damages against a government official for violation of constitutional rights is a relatively recent phenomenon, almost everywhere. As recent as it may be, there is no evidence if this kind of action has practically been tested in Ethiopia. Nonetheless, it is the need of the day, as discussed previously, to devise a compensation scheme for victims of breach of the right to physical liberty, namely: arbitrary arrest or detention, and wrongful conviction in Ethiopia.

5.2 Recommendations

Based on the above findings of the study, the writer forwards the following recommendations:

A. To the Legislature

- Since Article 13(1) of the FDRE Constitution imposes on both Federal and State legislatures the responsibility and duty to respect and enforce the human and democratic rights provisions of Chapter 3 of the same, and since these organs can well discharge this above responsibility making the use of their legislative powers, they should fill the gaps in the law on compensatory remedies for breach of human rights in general and the right to physical liberty in particular by enacting laws in line with the Constitution and ratified human rights treaties. While the FDRE Constitution and State Constitutions guarantee the right of individuals to be protected against arbitrary arrest or detention, remedies provision for violation of the rights is absent from the Constitutions. In the absence of a clear provision in the Constitutions, implying constitutional cause of action and awarding compensation on that basis is challenging for courts such as ours where judicial activism in the area of human rights is almost lacking. Some contend that constitutional provisions are too general to be applied to specific cases, albeit they can serve as guidelines. Lack of clear constitutional provision on the matter also leaves victims of arbitrary arrest or detention in uncertainty and discourages them from pursuing compensation for violations of their rights. In the case of wrongful conviction, both the Federal and State Constitutions do not contain provisions providing for compensation to be awarded to the victims.

Therefore, the legislature should enact an *implementing legislation* that translates the general provisions of the Constitution into specific provisions so as to enable courts to apply them and in effect enforce constitutional rights. The implementing legislation should provide for remedies provision for breach of the human rights guaranteed in the Constitution, particularly for arbitrary arrest or detention, and wrongful conviction. Such implementing legislation should as well empower the courts to order the award of compensation to individual victims to be paid by the government.

- Insofar as compensation for wrongful conviction is concerned, the Draft Criminal Procedure Code of the Federal Democratic Republic of Ethiopia should shortly be passed

into binding law with Articles 466-471 on review of judgment and compensation for wrongful convictions.

- While Article 3(1) of Federal Courts Proclamation No.25/1996 gives to Federal Courts jurisdiction over cases arising under International Human Rights Treaties, ICCPR (Articles 9(5) & 14(6)) inclusive, Article 5 of the Proclamation leaves a bulk of human rights cases to the State Courts which they cannot entertain without first having jurisdiction over the same. Though State Courts may exercise the jurisdiction of federal courts by way of delegation, it does not give sense for the issue under consideration as only application for habeas corpus is mentioned as falling within the jurisdiction of Federal Courts. Federal courts have been given jurisdiction but denied specific cases on which the jurisdiction is to be exercised while all other cases have impliedly been left to the State Courts without them having statutory jurisdiction over cases arising under international treaties. At any rate, positive construction of the provisions should allow State courts to entertain all cases other than the application of habeas corpus. Otherwise, ratified human rights treaties would be left without domestic legal effect. Therefore, the legislature (HPR) should amend the Proclamation to the extent it leaves the implementation of human rights treaties in dilemma. Particularly, Federal Courts should be given jurisdiction over cases of compensation for breach of treaty based rights; and so as to allow State courts exercise jurisdiction over cases arising under international treaties, the jurisdiction of Federal Courts over cases arising under international treaties should be formulated in such a way as not to imply Federal Courts to have exclusive jurisdiction over the matter.
- Federal Negarit Gazeta Establishment Proclamation No.3/1995 (Article 2(3)) requires a law including international human rights treaty to be published in the official law gazette before it comes to have legal force. But, so far, only few such treaties were published in the gazette. The major human rights treaties such as the ICCPR were not published up until now. Ethiopia acceded to the ICCPR, with its provisions on the right to compensation, in 1993. Proclamation No.3/1995, however, came into force in 1995 impliedly prohibiting the courts from taking judicial notice of ratified treaties if not published. This proclamation seems to negate the country's international obligation. It

also seems to contravene with Article 9(4) of the Constitution. This has the effect of breach by Ethiopia of its international treaty obligation; a country cannot invoke provisions of its domestic laws as a defense for its failure to perform treaty obligations as per Article 27 of the VCLT since the Covenant was already binding on the country at the time the Proclamation was enacted. In the light of this, even Article 71(2) of the Constitution which requires international treaties to be promulgated in the Negarit Gazeta cannot be invoked to justify Ethiopia's failure to perform its treaty obligation. Thus, Article 2(3) of the above Proclamation should be amended and clearly state that the requirement of publication refers only to national laws. Or, alternatively, if the Proclamation is to be maintained, all international human rights treaties ratified by Ethiopia should be published in the Negarit Gazeta in the working language of the country so that Articles 9(5) and 14(6) of the ICCPR should be implemented.

B. To the Government

- The Government should create public awareness to be assertive of their human rights especially when the rights are violated. For this, the Ethiopian Human Rights Institutions (the Human Rights Commission and the Institution of the Ombudsman) should play a significant role. The curriculum should also be designed in such a way as to help the citizens actively assert their own and others' rights.
- Since breach of the right to physical liberty is inevitable, and since the payment of compensation requires money, and since absent money to be paid for this purpose the court cannot pass an order the implementation of which it knows is impossible, Government should plan and assign annual budget from which compensation should be paid to the victims.
- The relevant government organ should initiate the amendment of Article 71(2) of the FDRE Constitution in order to harmonize it with Article 9(4) for ratified human rights treaties to have a direct effect. This would also help the courts play active role in treaty application, both directly and indirectly.
- The Government should offer trainings for judges and other stakeholders in the area of human rights

- There should also be established by law a ‘National Human Rights Court’. Traditionally, human rights issues are politically sensitive and individuals and residents in Ethiopia seem to refrain from seeking compensation for breach of human rights considering the issue as a political question. The establishment of National Human Rights Court, the writer believes, would attract the attention of the people and raise their awareness that human rights are justiciable.

C. To Victims of Breach of the Right to Physical Liberty

- Persons who are subjected to arbitrary arrest or detention, and wrongful conviction should invoke the provisions of the Constitution or of the ICCPR, as the case may be, and seek compensatory remedies for the breach. This, even if it fails to take the victims to the desired outcome, would nonetheless make the court emphasize the problem and seek the possible leeway.

D. To the Courts

- Both Federal and State Courts should interpret the scope of the constitutional human rights and imply cause of action for breach of the right to physical liberty (arbitrary arrest or detention). In so doing, they should be informed by the practices in the other jurisdictions that a remedy is intrinsic to the right. They should also live up to their constitutional mandate in line with the terms of the Constitution which provides that ‘judicial power vests with the courts’.
- The courts should interpret the provisions of the Civil Code on Extra-contractual liabilities providing for damages for unlawful arrest or detention in conformity with the Constitution and ratified human rights treaties, as the case may be. To this end, they should capitalize on the decision of the Federal Supreme Court’s Cassation division in *Tsedale Demissie v Kifle Demissie Case*.

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