



**ADDIS ABABA UNIVERSITY**  
**College of Law and Governance Studies**  
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**Compensation for Wrongful arrest in international  
law and Ethiopian legal system**

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A THESIS SUBMITTED TO THE SCHOOL OF GRADUATE STUDIES OF ADDIS ABABA UNIVERSITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTERS OF LAW (LLM) IN PUBLIC INTERNATIONAL LAW

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## DECLARATION

I, Tayech Gashaw Ayele, 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, Dr-Wondwossen Demissie have read this thesis and approved it for examination.

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## ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
APTD	Arbitrary Pre-trial Detention
CPCE	Criminal Procedure Code of Ethiopia
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
EHRC	Ethiopian Human Rights Commission
FDRE	Federal Democratic Republic of Ethiopia
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
ILC	International Law Commission
NISS	National Intelligence Security Service
PTD	Pre-trial detention
UDHR	Universal Declaration of Human Rights
UNCAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
WGAD	The United Nations Working Group on Arbitrary Detention

## ABSTRACT

*Despite the fact that unlawful and arbitrary detention is common in Ethiopia, the practice of demanding compensation for such detention is weak.. Furthermore, this study found that there is criminal liability, civil liability, and disciplinary actions under the Ethiopian legal system for unlawful and arbitrary arrest and detention. Moreover, the study found that Ethiopia has not ratified optional protocols or made sufficient declarations allowing individuals to lodge lawsuits against the State alleging violations of the United Nations Human Rights treaties and Furthermore, because Ethiopia has not declared and accepted the African Court of Human Rights' jurisdiction, individual victims of human rights in Ethiopia are not eligible to seek justice before the Court. Although a claim for compensation decision can be made based on the Ethiopian Tort Law, Criminal law and the international law that Ethiopia has ratified, the payment of compensation for the damage is difficult to apply for. The paper incorporates glimpse of recent practical unlawful and arbitration arrest and detention and identified the gaps in the Ethiopian legal system regarding compensation for unlawful and detention.*

*Key words: unlawful, compensation, physical liberty, detention, arrest, human rights*

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# Chapter One

## 1 Background

Liberty is one of the human rights recognized in different international and regional Laws. But it is not absolute right. Sometimes, for example, when enforcing criminal laws, deprivation of liberty is justified. These laws specify that it can be restricted if different conditions set by the laws are fulfilled. The states shall formulate their laws that prohibit the violation of the right to liberty and different preconditions to deprive the right. Therefore, anyone cannot be deprived of his right to liberty unlawfully. In reality there are cases where individuals are deprived of their liberty unlawfully and detained for short or long time and suffer different harms. Different International and Regional Laws prohibit the unlawful detention of individuals and also obliged the party state to formulate the laws that oblige them to compensate the innocent individuals for the harm they suffered at the time of their detention. Individuals can be released after months or even years of detention. Furthermore, courts may convict innocent people based on erroneous evidence, resulting in a variety of harms, some of which may be irreversible. Be it lawful or not, detention causes different harms against the detainee which includes loss of jobs, loss of family, loss of dignity, social disgrace against the detainee and his family, revenge against the detainee or his family from the victim or his family, he can suffer physical and psychological harm and etc. It is logical for the criminal to suffer from these harms, but not for the innocent individual.

Like other Legal systems, Ethiopian legal system protects the right to liberty. The Ethiopian constitution prohibits arbitrary deprivation of one's right to liberty. But it also specifies that there can be deprivation of liberty right based on the ground and procedures established by law. The criminal procedural law of Ethiopian sets the procedural rules that specify how the individual will lose his/her liberty right.

According to the Ethiopian legal system, individual can be detained if he/she is suspected for commission of crime. The law requires the police officer to present the arrested person within 48 hours of his detention at the nearest court. The court has an authority to decide either to order the release of the arrested person or remand him/her in custody. It is illegal to arrest a person after a court granted his bail right and to arrest and detain without a charge or conviction. Moreover, the law requires arrest and detention should not be carried out

against the law and provides that neither arrest nor detention should be arbitrary. However, in practice individuals are arrested and detained unlawfully or arbitrarily. As a result, there are innocent individuals forced to suffer different harms due to the unlawful or arbitrary detention some of which are not reversible. These individuals should get compensation to redress their harm.

## **1.1 Statement of the problem**

Ethiopia has ratified international and regional instruments that provide the right to be free from arbitrary detention and compensation for those who have been unlawfully detained. These instruments require the state to take certain legal and other measures to give effect to the right to be free from unlawful detention, as well as to provide remedies in the event of a violation of rights. Ethiopia, for instance, has ratified the International Covenant on Civil and Political Rights (ICCPR). In Article (5) of the Convention, victims of unlawful arrest or detention have the right to be released from detention and to compensation. Furthermore, Article 9 of the Ethiopian constitution states that these instruments ratified by Ethiopia are an integral part of the law of the land. Ethiopia's constitution also recognizes the right to be free from arbitrary detention as a fundamental right. Ethiopian procedural laws provide different protections for those who have been arrested or detained. Despite the fact that persons arrested and detained in Ethiopia have constitutional and statutory rights not to be detained and arrested unlawfully and arbitrarily, many arbitrary and unlawful arrests and detentions have happened in practice. People have been unlawfully and arbitrarily arrested and detained for years without being charged or convicted and people also arrested and detained after the bail right is granted by the court. More importantly, while their detention; these individuals faced various material and moral harms. They may lose their family, their dignity, their livelihood, and a variety of other things, some of which may not be recoverable.

Though Ethiopia's compensation laws have some limitations, domestic courts can use them to award compensation to victims of unfairly and arbitrarily detained and arrested individuals. Ethiopian criminal law and Ethiopian tort law are sources of legislation for compensating people who have been detained arbitrarily and unlawfully. In addition, when a domestic legal system fails to provide adequate protection against human rights violations, victims must turn to international, regional, or sub-regional instruments for protection and compensation. The International Covenant on Civil and Political Rights (ICCPR) and other international

instruments are important sources of Ethiopian law that victims of unlawful detention can use and that courts might apply in considering claims brought by such victims. The Ethiopian Federal courts proclamation no 25/1996 article 6 states that Federal courts shall settle cases or disputes, submitted to them within their jurisdiction on the basis Federal Laws and International Treaties. However, no unlawfully detained persons in Ethiopia have received compensation from an Ethiopian court, a regional court, or international institutions based on those domestic, international, and regional instruments. This thesis analyses domestic and international laws dealing with remedies of people whose liberty has been deprived illegally and investigates the gaps therein.

## **1.2 Research questions**

The study attempt to address the following research questions;

1. What do international and regional laws provide regarding compensation for wrongful deprivation of liberty?
2. What does Ethiopian law provide regarding compensation for wrongful deprivation of liberty?
3. What does the practice regarding recent wrongful arrest/detention look like in Ethiopia?

## **1.3 Significance of the study**

The research explores the gaps in Ethiopian legal system regarding compensation for wrongful arrest. Drawing on different international and regional laws the research recommends the enactment or implementation of relevant laws that govern compensation for wrongful detention in Ethiopia.

## **1.4 Methodology of the study**

This study follows doctrinal research method that the researcher has reviewed different international, regional and Ethiopian legal provisions in order to analyze the gaps in Ethiopian legal system relating to compensation for wrongful detention.

## **1.5 Limitation of the study**

The researcher conducted many interviews and request for data related to compensation claims from Ethiopian Human rights commission office, Justice for All- Prison fellowship

office, Federal Criminal Investigation Office, Federal Attorney General Office, Federal High Court. The result of interview and request of data from these offices shows victims of wrongful detention are barely seen in domestic courts seeking redress. Because of lack of court cases relating to compensation for unlawful deprivation of liberty the research could not be supported by court cases.

## 1.6 Related literature review

Here I cite a few illustrative references work done related to compensations for unlawful detention.

Tauqueer in his research paper 'Pre-Trial Detention and its Compensation in International and Pakistani Law, Policy Perspectives' states that if the court finds that the accused was unlawfully detained in pre-trial custody, Pakistani law states that he must be paid for his loss of liberty and sufferings. In all circumstances where detention was made unlawfully, any person, even a public servant or official, should be personally liable, because the state is not liable for the unlawful acts of its servants for it does not delegate authority for unlawful acts. Moreover, the issue of pre-trial detention of an innocent person, on the other hand, does not cease to exist, since many times an accused person suffers as a result of a police or judicial authority's mistaken action, even if it is justified. However, the Pakistan law has yet to provide any compensation when pre-trial detention is caused by a state servants or an individual's erroneous or mistaken action. As a result, if a person is acquitted after or before the end of their trial, the state or its officials have no obligation to compensate them. In practice, there is no legislation or specific provision of law that allows victims of pre-trial detention to seek compensation for police or judicial authorities' mistakes and errors. Under the guise of a "mistake of facts" or "good faith," the state and public employees are free from civil liability in such cases. Regarding the standard of compensation, the paper states that the Pakistan law does not provide effective and adequate compensation. Section 250 of the CrPC enables a Magistrate to award compensation to the extent of Rs.25, 000 to person charged on the basis of a false accusation upon his acquittal. Such compensation is in addition to and not in derogation of any civil or criminal liability, which the wrongdoer might have incurred. It is not an effective or suitable remedy for the innocent victims of pre-trial detention. Therefore, the paper conclude that an additional or corresponding remedy is needed through legislation.<sup>1</sup>

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<sup>1</sup>Hussain, Tauqueer. Pre-Trial Detention and its Compensation in International and Pakistani Law. Policy Perspectives. 15. 47. 10.13169/polipers.15.3.0047,2018.

Niyibizi Tite in his PHD thesis 'Remedies against unlawful detention in Rwanda' states that, though Rwanda ratified different regional and international that provides for the right to be released (right to habeas corpus) and compensation for unlawful detention, the writer revealed that in Rwanda due to the lack of a detailed domestic law procedures on enforcement of these rights, unlawfully arrested persons do not claim compensation by national and international law.<sup>2</sup> Also, the paper mentioned that the Criminal procedure of Rwanda does not allow claiming compensation for the victims of unlawful detention against the state. It only allows against then an individual who is responsible for the unlawful detention. Therefore, the victim detainee shall identify the specific police officer and to prove his fault of the detention as precondition to claim compensation. His study revealed that Rwanda has no explicit law and clear procedure that provides compensation for unlawful detention as result of this unlawfully detained person cannot seek and obtain compensation in Rwanda. Fear of being detained again in retaliation for filing claim, ignorance of law, limited access to legal assistance and being considered guilty by the society are additional obstacles to claim compensation in addition to the challenge of the lack of clear and defined legal frame work. Moreover, individual victims of wrongful detentions cannot present their claim to compensation at human rights committee of the optional protocol to the International Covenant on Civil and political since Rwanda is not a signatory state of the protocol rights. Once more, Rwanda as result of the withdrawal of its declaration from the African court, victims of unlawful detentions cannot get justice before the court.<sup>3</sup>

Hijratullah Safi in his research paper 'Ensuring compensation for wrongful imprisonment and wrongful detention in Afghanistan' mentioned that the Afghan laws prohibits torture, force confessions, arrest, detention, prosecution without due process of law and the laws guarantees procedural right. Moreover, the criminal procedure code bases its policy that the trials shall be conducted fairly and no criminals left unpunished and in other way no innocent person shall be punished, which is specified under art2 of the criminal procedure code of Afghanistan. The researcher also points that contrary to the law due to false confessions and obtained by force and torture during interrogations by the police officer, thousands of Afghans have been wrongfully arrested and imprisoned in Afghanistan and many of them confined for charges that are not crimes under the existing Afghan law. The writer reveals in recent time reports by the Human Rights Watch shows that at least 250 hidden detention

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<sup>2</sup> Niyibizi Tite. Remedies against unlawful detention in Rwanda, PHD thesis Erasmus University Rotterdam, 2018

<sup>3</sup> Ibid

centers in Afghanistan and most detainees have been exposed to torture in order to acquire confessions and being detained in this condition for indefinite period of time.<sup>4</sup> Also in his research, he mentioned that though Afghanistan constitution under article 7 states that, any person who suffers damages caused by the state shall be eligible for compensation, there is no specific laws that enforce this right. While compensation is specified in the Afghanistan constitution and also is implied in the criminal procedure code, there are no specific and detailed laws that provide compensation for the wrongful detention. The paper state that both Afghan Constitution and Criminal Procedure Code include compensation right in relation to detention. But, compensation for wrongful incarceration doesn't explicitly state in both documents. However, in general, any person who suffers damages by an act of the administration has a right to compensation and can file for compensation in court is stated under the Constitution of Afghanistan. Compensation in at least two circumstances related to detention is explicitly provided in the CPC, but provides no compensation for those wrongfully convicted. CPC of Afghanistan states that, "An accused person can file for compensation against a private individual whose false claim caused damages to the accused." In addition, another article states that, "If a person has been exonerated by a court . . . the state will compensate the person for their days spent in detention, according to the daily income of the person, and for jobless persons, the court will specify the amount that a jobless person will be compensated accordingly."<sup>5</sup> Finally in his conclusion, although Afghanistan has obligations under the ICCPR to legislate and ensure compensation for wrongful imprisonment and detention, it has not yet adopted a law for this purpose.<sup>6</sup>

Tesfaye Boresa 'Wrongful convictions and the quest for remedies under the Ethiopian criminal justice system' and MulunehWoldetsadik 'Ethiopia Legal Frame Work Regarding Compensation for Wrongful Conviction' state that, though Ethiopia is a party state of ICCPR which provides the right to compensation for the wrongful conviction by way of review of judgment when new facts occurred which have a potential to reverse the former judgment, the Ethiopian legal system does not have a legal mechanism which enables the victim of wrongfully convicted person to claim review of judgment, and also to claim compensation. In Ethiopia either the Federal or Regional legislation do not provide clear provisions for the right to compensation for wrongful conviction. They conclude that the mere reason for the

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<sup>4</sup> Hijratullah Safi. Ensuring compensation for wrongful imprisonment and wrongful detention in Afghanistan California Western International Law Journal, Vol. 47, No. 1 [2017], Art. 3

<sup>5</sup> Ibid

<sup>6</sup> Ibid

absence of legal provision does not prohibit the victim to claim compensation against the state and do not protect the state to evade from compensating the victim. And both conclude that ensuring the right by specific provisions is the main obligation of the government but till that the court has an obligation to entertain such type of claim by way of interpretation since International treaties ratified by Ethiopia is an integral part of the law of the land (Article 9 ,FDRE constitution)<sup>7,8</sup>. Both researchers do not include the right to compensation for wrongfully arrested or detained persons. Liberty right may be deprived when an individual is arrested, detained or convicted. International instruments recognized the right to compensation for all. Therefore, the need to investigate the gaps for the wrongful arrest and wrongful detention cases in Ethiopia is vital and fills the gap of the above researchers.

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<sup>7</sup> Tesfaye Boresa Senbeta. Wrongful convictions and the quest for remedies under the Ethiopian criminal justice system, Addis Ababa University, 2015(unpublished)

<sup>8</sup> Muluneh Woldetsadik Ossa. Ethiopia Legal Frame Work Regarding Compensation for Wrongful Conviction, Journal of Law, Policy and Globalization Vol.49,2016

## Chapter Two

### 2 General overview Arrest and pre-trial detention

The notion of freedom from arbitrary arrest and detention appeared traced back to the early European documents, such as the Magna Charta, the Habeas Corpus Acts of England, and the French Declaration of the Rights of Man and the Citizen. These instruments delivered the first definitions of freedom of person against arbitrary arrest and detention, and form the foundation upon which the Universal Declaration and the Covenant on Civil and Political Rights rest.<sup>9</sup>

For the first time, the right to liberty of persons found its legal formulation enshrined under article 9 of the Universal Declaration.<sup>10</sup> The text of Article 9 of the Universal Declaration of Human Rights contains four essential concepts arbitrary, arrest, detention, and exile. The Declaration prohibits arbitrary arrest, detention, and exile.<sup>11</sup> Then, the protection of the right to liberty has been reiterated in most of the existing international and regional human rights documents. These instruments prohibit the arbitrary arrest and detention of individuals and guarantee to all deprived of their liberty right to humane treatment and fulfillment of certain minimum conditions of pre-trial detention and imprisonment. But none of these awards absolute freedom against arrest or detention.

It follows that not all deprivations of liberty are considered a breach of a citizen's fundamental right to liberty. According to Article 9 (1) of the ICCPR 'No one shall be subjected to arbitrary arrest or detention'. No one's liberty shall be taken away unless and until certain grounds and procedures are defined by statute.<sup>12</sup> Article 9(1) second sentence forbids arbitrary detainment, while the third sentence prohibits unlawful deprivation of

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<sup>9</sup> Laurent Marcoux, Jr., Protection from Arbitrary Arrest and Detention Under International Law, 5B.C. Int'l & Comp. L. Rev. 345 (1982)

<sup>10</sup> Universal Declaration of Human Rights, art. 9, G.A. Res. 217A, 3 U.N. GAOR, pt. I, at 71, U.N. Doc. A/810 (1948) [hereinafter cited as Universal Declaration].

<sup>11</sup> Ibid article 9

<sup>12</sup> International Covenant on Civil and Political Rights, art. 9(1), G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter cited as Covenant on Civil and Political Rights].

liberty, which is described as deprivation of liberty that is not enforced on legal grounds and procedures.<sup>13</sup>

In addition to the legality requirement, article 5 (1) of the ECHR lays out an exhaustive list of grounds for deprivation of liberty rights. As a result, individuals' liberty rights could be deprived for the listed cases in article 5(1) of ECHR.<sup>14</sup>

The ACHPR article 6 guarantees the right to liberty and security. No one may be unlawfully arrested or detained.<sup>15</sup> This ensures that officials should only deprive people liberty if they do so in accordance with the law. The term "law" encompasses not only domestic legislation, but also internationally recognized protections enshrined in conventions and standards on human rights.<sup>16</sup>

As a state party of ICCPR and ACHPR, Ethiopia has the duty to take appropriate measures to protect the right to liberty of person against deprivation by third party.<sup>17</sup> The right to liberty is one of the constitutional rights recognized under article 17 of the FDRE constitution as an inviolable and inalienable right. It provides that no person shall, except on certain grounds and in compliance with the procedures provided for by statute, be deprived of his liberty and that no person may be arbitrarily arrested, detained or imprisoned without charge or conviction. The right to personal liberty can only be stripped away lawfully, but not arbitrarily or unlawfully, according to the FDRE constitution. Therefore all legislative, executive and judicial organs at federal and state levels have the responsibility to respect and uphold the right to freedom from arbitrary arrest and detention.<sup>18</sup>

## 2.1 Arrest

The use of compulsion to bring an individual who is suspected of an offense under the immediate custody of the investigating or judiciary body is recognized under different state laws. An authority to arrest and detention is subject to legal limitations that aim at preventing

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<sup>13</sup> ICCPR, General comment No. 35 of Article 9 (Liberty and security of person),2014

<sup>14</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, article 5(10) as listed a to f available at: [https://www.echr.coe.int/documents/guide\\_art\\_5\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_5_eng.pdf) [accessed 19 March 2021]

<sup>15</sup> ACHPR, article 6

<sup>16</sup> A Guide to the African Charter on Human and Peoples' Rights, Amnesty International Publications, 2006

<sup>17</sup> ICCPR, General comment No. 35 of Article 2 (Liberty and security of person),2014

<sup>18</sup> FDRE Constitution, Art. 13(1).

its abuse and providing protections to the persons against unnecessary deprivation of his personal freedom.<sup>19</sup>

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the United Nations General Assembly (resolution 43/173) defines 'arrest' as "the act of apprehending a person for the alleged commission of an offense or by the action of an authority".<sup>20</sup>

An arrest definition includes the period from the moment that the suspect or accused is physically restrained and placed under custody up to the time that he is brought before a court that is competent to order his continued custody or his release.<sup>21</sup> It is the deprivation of liberty of the suspect or the accused by an authorized body that has a duty to enforce the law or by private person on the ground of suspicion of committing or having committed a crime.<sup>22</sup>

An individual's right to liberty might be deprived for the purpose of safeguarding the national security or public order.<sup>23</sup> When an offense has been committed; an investigation leading to the prosecution of the offender has to be started by the competent authorities.<sup>24</sup>

An arrest is a method by which the suspect's liberty is restrained in order that he may be brought under the control of the investigating authority and, in proper cases, held in custody pending further investigation or trial.<sup>25</sup> It may be necessary for the police to hold the suspect for some hours at least so that the facts can be promptly established or the disappearance of the evidence prevented.<sup>26</sup>

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<sup>19</sup> Study of the right of everyone to be free from arbitrary arrest, detention and exile, UNITED NATIONS New York, 1964, Page 25

<sup>20</sup> United Nations General Assembly resolution 43/173 of 9 December 1988 (resolution 43/173)

<sup>21</sup> Study of the right of everyone to be free from arbitrary arrest, detention and exile, UNITED NATIONS New York, 1964, Page 25

<sup>22</sup> Pre-trial detention assessment tool, European Union and the Council of Europe. available at: <https://www.refworld.org/pdfid/503489533b8.pdf>

<sup>23</sup> In the meaning of national security, see UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, paragraphs 29-32, available at: <http://www.unhcr.org/refworld/docid/4672bc122.html>.

<sup>24</sup> Guide on Article 5 of the European Convention on Human Rights, right to liberty and security, Updated on 31 August 2020

<sup>25</sup> Monica Macovei, The right to liberty and security of the person, A guide to the implementation of Article 5 of the European Convention on Human Rights, Human rights handbooks, No. 5

<sup>26</sup> Study of the right of everyone to be free from arbitrary arrest, detention and exile, UNITED NATIONS New York, 1964

## 2.2 Detention or Pre-trial detention (PTD)

Detention or Pre-trial detention refers to a measure of restraint by which a person accused of committing a crime is kept in custody, ordered by a judicial authority at the pre-trial or trial stage of proceedings to ensure his/her appearance before a court, prevent his/her further criminal activity, and/or prevent unlawful interference with the investigation of the case.<sup>27</sup>

Each country must resolve the problem of establishing lines within which it may exercise the power to deprive a person of his liberty. Arrest and detention may constitute a violent invasion of the freedom of the individual. The suspect under custody is subjected to complete interruption of his normal activities, probable loss of employment, and separation from family, and particularly if his detention is continued he is obliged to suffer from the close confinement, regimentation, and abnormal living conditions of prison life.<sup>28</sup> He might be subjected to humiliation and tainted with suspicion in the eyes of his surroundings. Therefore, arrest or detention should be observed as a last resort, to be resorted to only when strictly necessary. They are considered preventative measures whose primary purpose is to ensure that the administration of the criminal justice system will not be frustrated or obstructed by those who may become subject to its processes.<sup>29</sup>

Pre-trial detention should not be applied as a penalty and should never be employed to accomplish ends that legitimately fall within the authority of penal sanction. Therefore, the need to control such measures is universally recognized and is reflected in the many safeguards and limitations with which most codes of penal procedure surround its application.

The term arrest and detention have meaning to some extent different from one legal system to the other. Human rights instruments use the idea of deprivation of a person's liberty as the overall concept.

## 2.3 Unlawful Arrest or Detention

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<sup>27</sup> Pre-trial detention Monitoring tool, European Union and the Council of Europe, available at: <https://rm.coe.int/assessment-tool-on-pre-trial-detention-en/16807823b7>

<sup>28</sup> Study of the right of everyone to be free from arbitrary arrest, detention and exile, UNITED NATIONS New York, 1964

<sup>29</sup> Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, Detention Guidelines, UNHCR 2012

Unlawful detention is defined differently in international, regional, and domestic legislation. There is no universal definition of unlawful detention or arrest. International and regional treaties do not define specifically the word. But different international and regional treaty bodies based on case law provide elements that constitute the unlawfulness of detention.

Article 9 of ICCPR and article 5(1) of the ECHR specifies that any deprivation of liberty must be in accordance with a procedure prescribed by law that is national law. It means if arrest or detention carried out in violation of the domestic law, it is unlawful.<sup>30</sup>

But the requirement of lawfulness is not satisfied merely by compliance with the relevant domestic law. Domestic law must itself be in conformity with international law and hence a violation of international law is considered unlawful nevertheless it fulfilled with domestic law.<sup>31</sup>

## **2.4 International and Regional Principles to protect unlawful arrest or detention**

When someone suspected for the commission of the alleged crime International and Regional Law allows him/her for the subjection of a deprivation of his/her liberty right by the authorized body. These instruments require policymakers to limit the use of arrest. An arrest has a purpose to bring the suspect before trial and to safeguard the whole criminal process.<sup>32</sup> But arrests or detention is one of the worst things that have a negative impact on the detainee. His/her normal activities and economic livelihood are shortly stopped, and he/she is confined at the will of the police or investigating authority for a certain period which, may last for several days. At this period, he/she is usually in police custody, subject to search by the police and to questioning which may be unreasonable in intensity precisely because of the time limits against which the police must work. When he is the hand of the police or investigating officials, the arrested person is in total control, and possibly kept incommunicado and this leads to the danger of abuses being committed seems to be the

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<sup>30</sup> Communication No. 770/1997, Gridin v. Russian Federation (Views adopted on 20 July 2000), in UN doc. GAOR, A/55/40(vol. II), p. 175, para. 8.1. and ICCPR ART9.

<sup>31</sup> Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, 31 December 2020, Page 12

<sup>32</sup> PROFESSIONAL TRAINING SERIES No. 9, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Chapter 5

greatest. The law has placed a wide variety of limitations upon the power to make arrests to control and to minimize the risk of mistakes and abuses that occurred during arrest.<sup>33</sup>

International and Regional treaties provide guidelines that safeguard against the abuse of power by the authorized body and to protect an individual from arbitrary and unlawful arrest or detention. These principles are specified below.

#### 2.4.1 Principle of legality

The right to personal liberty needs that persons not be subjected to arrest or detention except as prescribed by law and provided by the law itself. Therefore, domestic law should provide for the grounds and procedures for the arrest or detentions.<sup>34</sup>

According to the United Nation Human Rights Committee, a violation of legality occurs if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.<sup>35</sup> According to this principle, it is essential to confirm first whether the requirement of the relevant national law has been satisfied when someone has been deprived of his or her liberty. This is a matter of evaluating whether there is a legal provision or determining whether a procedure has been followed or not. Moreover, domestic law must be precise and clear that could be understood by the arrested person to foresee the circumstances of the lawful arrest and the remedies for the deprivation of liberty.<sup>36</sup> Lack of enough guarantees in national laws to guard against arbitrary deprivation of liberty such as no access to an effective remedy to challenge its illegality or arbitrariness, could also call in to question the legal validity of a detention.<sup>37</sup>

The principle of legality is included under article 9(1) of ICCPR, art 6 of ACHPR, art 7 of ACHR, and art 5 of ECHR According to these treaties, detention shall be ordered and carried out based on a substantive and domestic procedural law. The ECHR listed down exhaustive lawful detentions.<sup>38</sup> All require that a lawful deprivation of liberty to be based upon grounds previously established in law against which a proposed invasion of privacy and personal integrity can be measured. The principle of legality must be continued in the entire time of detention. According to the UN Human Right Committee and the European Court, detention that initially complies with article 9 of ICCPR and article 5(1) of ECHR respectively can be

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<sup>33</sup> Ibid

<sup>34</sup> Monica Macovei, The right to liberty and security of the person, A guide to the implementation of Article 5 of the European Convention on Human Rights, Human rights handbooks, No. 5

<sup>35</sup> Human rights committee views A/152/40/PSR231, PAR5.5

<sup>36</sup> The committee eccpr/co/70/to find on Saudi document

<sup>37</sup> UNHCR, Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives, to detention, 2012, Page 14

<sup>38</sup> Article 5 of ECHR

considered as arbitrary and unlawful detention, if it continues beyond the time it can be justified and that where a person has initially been detained for a specific purpose, there must be appropriate justifications to continue detention once the original purpose no longer applies.<sup>39</sup>

#### **2.4.2 The principle of Non-Arbitrariness**

The international human rights instruments recognize the right to be protected against arbitrary and unlawful deprivations of liberty. It is an essential component of due process rights necessary to protect the right to liberty and security of the person in all situations of deprivation of liberty and to prevent arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment.<sup>40</sup> This protection applies for criminal proceedings, administrative detention, military detention, security detention, and detention under counter-terrorism measures. But international instruments do not give clear answer to the question when does an arrest or detention become arbitrary.

The prohibition of arbitrary deprivation of the right to liberty is protected under article 9 of UDHR and ICCPR, article 5 of ECHR, article 6 of ACHPR, article 7 of ACHR, and article 14 of the Arab Charter on Human Rights. Under these treaty provisions, arbitrary detention is considered a violation of the right to liberty. An arrest is considered arbitrary if the arrest did not comply with national and international standards but complying with these standards does not make it unarbitrary.<sup>41</sup> Detention may be illegal without being arbitrary or detention may be arbitrary without being illegal. Unclear laws could be a reason for arbitrariness since it could be the ground to exercise of powers in broad circumstances that are not sufficiently defined.<sup>42</sup>

Different international and regional treaty institutions provide different interpretations from their respective conventions to the word arbitrary detention based on practical cases. Within the UN system, there are two human rights bodies with the primary responsibility of setting international standards against the use of arbitrary deprivation of liberty. The first entity is the UN Human Rights Committee; it is the body of independent experts that monitors

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<sup>39</sup> ECHR article 5(1)

<sup>40</sup> Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court, 2015

<sup>41</sup> Communication No. 458/1991, A. W. Mukong v. Cameroon (Views adopted on 21 July 1994), in UN doc.GAOR, A/49/40(vol. II), p. 181 para. 9.8

<sup>42</sup> Pre-trial detention assessment tool, European Union and the Council of Europe.

implementations of the ICCPR by states parties. The word arbitrary arrest specified under article 9(1) of the ICCPR is explained by the Committee as arbitrariness is not to be equated with against the law but must include elements of inappropriateness, injustice, lack of predictability, and due process of law.<sup>43</sup> This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”.<sup>44</sup>

The United Nations Working Group on Arbitrary Detention (WGAD) is the second body helping to define arbitrary detentions. One of its duties is to investigate cases of deprivation of liberty imposed arbitrarily otherwise inconsistently with the relevant international standards set forth in the United Declaration of Human Rights or in the relevance of international instruments accepted by states concerned.<sup>45</sup>

The Group considers any deprivation of liberty to be arbitrary if a case falls into one of the following five categories;<sup>46</sup>

Category I - When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him);

Category II - When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20, and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights;

Category III - When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character;

Category IV - When asylum seekers, immigrants, or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy;

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<sup>43</sup> International Covenant on Civil and Political Rights, General comment No.35 ccpr/c/gc/35 par 12, 16 December 2014

<sup>44</sup> Communication No. 305/1988, H. van Alphen v. the Netherlands (Views adopted on 23 July 1990), in UN doc.GAOR, A/45/40(vol. II), p. 115, para. 5.8; emphasis added

<sup>45</sup> Universal Declaration of Human Rights, article 9, Fact Sheet No. 26, The Working Group on Arbitrary Detention

<sup>46</sup> A/HRC/WGAD/2017/20, Human Rights Council Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Category V - When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinions, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings.

Within the meaning of Article 5 (1), the European Court of Human Rights has not given the universal definition for the types of conduct considered on the part of authorities that might constitute “arbitrariness”, rather the court elaborates on some principles which explain arbitrary detention by confined its case law.<sup>47</sup> The detention will be considered “arbitrary” if there has been an element of bad faith on the part of the authorities, or where the domestic authorities have neglected to attempt applying the relevant legislation correctly despite complying with the letter of national law. Moreover, detention is considered arbitrary when;

- The reason of arrest was off the list of charges formally presented , the real reason of detention was different from what was formally presented, and these reasons are masked behind formal procedures of deprivation of liberty<sup>48</sup>
- Undocumented and unrecognized arrest and detention by the authorities<sup>49</sup>
- The formal purpose given by authorities for depriving a person of liberty did not comply with the procedural and substantive law grounds for arrest or detention<sup>50</sup>
- Detention was used as a disguised form of penalty for the crime with which the accused was charged. Where the authorities simply disregard a decision by court or another competent authority to release a person and he/she continued to be deprived despite the existence of a court order for release<sup>51</sup>

In another case, Article 6 of the African Charter guarantees the right to liberty and security of the person. The indefinite detention of those who protested against torture as described in communication 25/89 violates article 6 and it had been violated and it is arbitrary, when an individual is arrested for an indefinite time since he does not know the

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<sup>47</sup>European Court of human rights, Article 5 (1)

<sup>48</sup>European Court of Human Rights Ilgar Mammadov v. Azerbaijan, Applications no. 15172/13, § 101,13/10/2014

<sup>49</sup>European Court of Human Rights Baisuev and Anzorov v. Georgia, Applications no. 39804/04, § 59,18/03/2013

<sup>50</sup>European Court of Human Rights James, Wells and Lee v. the United Kingdom, Applications nos. 25119/09, 57715/09 and 57877/09, 11/02/2013

<sup>51</sup>European Court of Human RightsLabita v. Italy, no. 26772/95, § 172, Assanidze v. Georgia, Applications no. 71503/01, § 172-173, 6 April 2000

extent of his punishment.<sup>52</sup> In addition to this detention becomes arbitrary and a violation of article 6 of the Charter when a person is detained without charges and without the possibility of bail.<sup>53</sup>

### 2.4.3 Presumption of innocence

Every defendant has the right to be presumed innocent and to be held as innocent until proven guilty in the course of criminal proceedings in compliance with the law.<sup>54</sup> In its General Comment 13,<sup>55</sup> paragraph 7, the HRC claims that by reason of the presumption of innocence, the result of the trial could not be prejudged by all public authorities. Thus, before the results of the trial, attorneys and police officers cannot make claims about an accused's guilt or innocence. For all standards upholding the interests of pre-trial prisoners, the right to be presumed innocent forms the starting point. Much of the pre-trial detainee treatment requirements and procedures are set out in Rules 84 to 92 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR).<sup>56</sup> In *A. W. Mukong v. Cameroon* case, as to the conditions of detention in general, the HRC observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development.<sup>57</sup> Based on this decision, prisoners under arrest or awaiting trial presumption of innocence as a part of the standard minimum rules for the treatment of prisoners and that States parties are obliged to enforce them.<sup>58</sup>

### 2.4.4 The Right to be brought promptly before a judge

According to article 9(3) of the ICCPR any person “arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”. Consequently, this right safeguards judicial control over arrested or detention of the person charged with criminal offence and in addition it also empowers the court to determine whether legal reasons exist for one’s loss of liberty. The Human Right Committee specified that “states parties should take action to ensure that detention in police

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<sup>52</sup> ACPHR, *World Organization against Torture and Others v. Zaire*, Communications Nos. 25/89, 47/90, 56/91 and 100/93, decision adopted during the 19th session, March 1996, para. 67;

<sup>53</sup> ACPHR, *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication No. 102/93, decision adopted on 31 October 1998, para. 55

<sup>54</sup> UDHR, Article 11; the ICCPR, Article 14(2); ACHPR, Article 7(1)(b) and Paragraph 2(D) of the African Commission Resolution, ACHPR/Res. 4(XI) 92

<sup>55</sup> UN Doc. CCPR/C/21/Rev.1 (twenty-first session, 1984)

<sup>56</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the UN Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

<sup>57</sup> Communication No. 458/ 1991 in UN Doc. GAOR, A/49/40

<sup>58</sup> Concluding observation on the United States of America, UN Doc. CCPR/C/79/Add. 50

custody never last longer than 48 hours. The requirement of ‘promptness’ is determined on case-by-case basis; nevertheless, the delay between the arrest of an accused and the time before he or she is brought before a judicial authority “should not exceed a few days”.<sup>59</sup> In the case of *M. Freemantle v. Jamaica* the Human Rights Committee stated “in the absence of a justification for a delay of four days before bringing the author to a judicial authority the notion of promptness in article 9(3) is violated”.<sup>60</sup> The subject of ‘who’ qualifies as an officer authorized to exercise judicial power was reflected in the case of *Kulomin v. Hungary* (521/1992). The case had pre-trial detention which had been extended several times by the public prosecutor. The Human Right Committee specified that “... it is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with”.<sup>61</sup> The Human Rights Committee was not pleased that the public prosecutor could be viewed as having the institutional objectivity and unprejudiced nature important to be considered as ‘officer authorized by law to exercise judicial power’ within the meaning of article 9(3) of the Covenant.

#### **2.4.5 The right to trial within a reasonable time or release pending trial**

Different International and Regional instruments require that any person charged with a criminal offence and held in pre-trial detention should be tried within a reasonable time or be release from detention.<sup>62</sup> These rules ensure security considering the way that suspects of criminal offenses are assumed innocent until proved guilty before the court. In *Girjadat and Others v. Trinidad and Tobago* (938/2000) the HRC stated that “what period constitutes ‘reasonable time’ within the interpretation of article 9 paragraph 3, must be assessed on a case by case basis. The authors submit that the 34 month delay between arrest and trial is unreasonable and constitutes a violation of article 9, paragraph 3 of the ICCPR Covenant.”<sup>63</sup> Another case of *Paguouille (on behalf of Mazou) v. Cameroon* (2000) AHRLR 5 (ACHPR 1997) in which the African Commission stated that delay to give judgment for over two years without giving the applicant any reason for such delay violates Article 7(1) (d) of the ACHPR which protects “the right to be tried within a reasonable time by an impartial court or tribunal”.<sup>64</sup> The HRC as per article 9(3) regarding ‘release pending trial’ has consistently

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<sup>59</sup> General Comment 8, UN Doc. CCPR/C/21/Rev.1 (sixteenth session, 1982) paragraph 2

<sup>60</sup> UN Doc. GAOR, A/51/40 (Vol. II) p.19 para 7:4

<sup>61</sup> UN Doc. GAOR, A/51/40 (Vol. II)

<sup>62</sup> ICCPR, article 9(3); ACHPR, Article 7(1)(d) and Paragraph 2(C) of the African Commission Resolution

<sup>63</sup> CCPR/C/81/D/938/2000 (Jurisprudence) paragraph 6.1

<sup>64</sup> Quoted from the Compendium of Key Human Rights Documents of the African Union (the Compendium) Pretoria University Law Press, 2005 ISBN 0-620-34672-8, p.122 para 19

stated that “pre-trial detention should be the exception and that bail should 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”.<sup>65</sup>

Similarly, the African Commission has determined that persons detained on a criminal charge must not be held in detention awaiting prosecution unless there is ample evidence to prevent them from escaping, interfering with witnesses or presenting a direct and serious risk to others.<sup>66</sup>

To reduce pre-trial detention, states should take various steps. Prosecutors shall not begin or pursue litigation or make any attempt to stay proceedings if the allegation is found to be baseless by an unbiased inquiry.<sup>67</sup> If the trial is not launched within a reasonable amount of time, the suspect should be released from arrest.<sup>68</sup>

#### **2.4.6 The right to challenge legality of deprivation of liberty**

The ICCPR covenant under Article 9(4) allows any person to challenge the lawfulness of his loss of personal liberty before the court through ‘habeas corpus’ proceeding. This right is crucial for the preservation of the rule of law as it safeguards legal control over the public officials who violate the rights to personal liberty and security of persons. Consequently, it holds those officials accountable to sanctions for the misuse of rights of the individuals. As indicated by the HRC, the privilege ensured by article 9(4) is said to be breached when the person himself or his lawful delegate shows proof that he did request a prompt decision on the lawfulness of his detention and denied the opportunity to have the lawfulness of his detention reviewed in court without delay.<sup>69</sup> This article demands that the court before which the case is presented must have the power to order discharge of the person in custody if the detention does not meet the requirements of 9(1) of the Covenant. Furthermore, Article 9(5) of the Covenant grants an enforceable right to compensation to any “victim of unlawful arrest or detention...” The States parties are bound, in compliance with Article 9(5) of the ICCPR Covenant, to take appropriate steps to redress the breaches endured by a victim of an unconstitutional deprivation of liberty and to award him compensation.

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<sup>65</sup> Hill and Hill v. Spain Communication No. 526/1993 UN Doc. GAOR, A/52/40

<sup>66</sup> Principles of the right to a fair trial in Africa, section M (1)(e).

<sup>67</sup> The Tokyo Rules, Rule 5.1; and UN Guidelines on the Role of Prosecutors, para.14 and 18

<sup>68</sup> The Luanda guidelines, guideline 13(c).

<sup>69</sup> Stephen v. Jamaica, 373/89

### 2.4.7 Prohibition of Torture and other Ill Treatment

Torture and other ill-treatment are prohibited by numerous human rights instruments, both at the international and regional levels, including the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture (UNCAT), the UN Convention on the Rights of the Child, the Geneva Conventions and Additional Protocols, the African Charter for Human and Peoples' Rights, the American Convention on Human Rights, and the European Convention on Human Rights and Fundamental Freedoms.

According to article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity is defined as torture.<sup>70</sup>

Other cruel, inhumane, or degrading treatment is prohibited by international law like torture. But it is not defined by the UNCAT or other human rights instruments. Any form of physical punishment is naturally degrading, and in many cases may also amount to cruel and inhuman punishment or torture in violation of international human rights law.<sup>71</sup>

Poor detention conditions, over-crowding, lack of adequate sanitary provision, lack of light, and also the use of certain forms of punishments and restraints have been recognized as cruel, inhumane, or degrading conditions.<sup>72</sup> The UNCAT enforce member states to prevent torture and other ill-treatment by all possible means on Articles 2 and 16; such as to prevent torture and ill-treatment states mandatorily provide training for security personnel and ex-officio investigations into allegations of torture.<sup>73</sup>

In addition, article 15 of the UNCAT, article 14(3)(g) of the ICCPR and the UN Human Rights Committee (HRC ) provide that no one must be “compelled to testify against himself

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<sup>70</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 1, September 2018.

<sup>71</sup> Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk, Open Society Foundations, 2011

<sup>72</sup> Ibid

<sup>73</sup> Ibid

or to confess guilt and any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings and states also the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.<sup>74</sup>

International law also recognizes that people deprived of their liberty are particularly vulnerable to these forms of abuse. The following comprehensive ranges of standards and safeguards have been elaborated to address this detention-related risk:

- UN Standard Minimum Rules for the Treatment of Prisoners;
- the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- the European Prison Rules; the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas;
- and the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines): it set different standards and safeguards to address detention related risks and provide a broad framework of protection and rights of pretrial detainees since most of them are at risk of being subjected to torture during the investigatory stages<sup>75</sup>.

## **2.5 The Right to Protection from Arbitrary Arrest or Detention under the Legal Framework of Ethiopia**

Ethiopia is subject to international and regional law in addition to domestic laws. At the international level, the applicable law includes the universal human rights treaties Ethiopia has ratified. These include the International Covenant on Civil and Political Rights (ICCPR)<sup>76</sup>, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>77</sup>, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)<sup>78</sup>, etc. Ethiopia is also subject to African

<sup>74</sup> Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk, Open Society Foundations, 2011

<sup>75</sup> Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk, Open Society Foundations, 2011

<sup>76</sup> Federal Democratic Republic of Ethiopia Combined Report (Initial and Four Periodic Reports) to the African Commission on Human and Peoples' Rights Implementation of the African Charter on Human and Peoples' Rights, 2008, table 32, p.167

<sup>77</sup> Ibid

<sup>78</sup> Federal Democratic Republic of Ethiopia Combined Report (Initial and Four Periodic Reports) to the African Commission on Human and Peoples' Rights Implementation of the African Charter on Human and Peoples' Rights, 2008, table 32, p.167

regional instruments including the African Charter on Human and People rights.<sup>79</sup> Ratification of those treaties means that the government of Ethiopia has committed itself to ensuring that the rights inherent therein are upheld and secured and has accepted obligations.

In compliance with Article 9(4) and Article 13 of the Constitution, international agreements ratified by Ethiopia are an integral part of land law and the fundamental rights and freedoms laid down in the Constitution must be interpreted in a manner compatible with the principles of the UDHR, the ICCPR, the ICESR and other international instruments adopted by Ethiopia. As a result, in the Ethiopian criminal justice system, international protection at the pretrial level provides guidance and imposes some duties in relation to pretrial detention. This helps the court to explain and extend national laws in line with the principles of universal standards of human rights and to fill the domestic law gaps.

At the national level, the applicable law includes the Constitution FDRE, the revised criminal code, the criminal procedure code (CPCE), the Federal Police Commission Establishment Proclamation of 2011, Federal Prisons Commission Establishment Proclamation No. 365/2003 and Council of Ministers Regulations No. 138/ 2007, Treatment of Federal Prisoners and etc.

### **2.5.1 The principle of prohibition of Arbitrary-Arrest or Detention**

The Ethiopian law, like the UDHR, ICCPR and ACHPR, does not define the term 'arbitrary detention.' However, the right to be free from arbitrary detention is protected by the criminalization of unlawful deprivation of liberty in the Ethiopian Criminal Code.' A charge or conviction against a suspect' is prescribed by Article 17 of the FDRE constitution as a criterion for determining whether or not the detention of a person is arbitrary. That means, to say arbitrary detention, a person should be detained in the absence of a charge or conviction made against him.

Article 13(2) of the FDRE constitution forces all federal and regional legislative, executive, and court organs are under a duty to respect and enforce the right to protection from arbitrary arrest and detention.<sup>80</sup> Moreover, the criminal code of FDRE (2004) states unlawful arrest or detention is punishable with rigorous imprisonment not exceeding ten years and a fine if the offender is a public servant. Furthermore, it declares that "whosoever commits illegal restraint against the other is punishable with simple imprisonment not exceeding three years.

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<sup>79</sup> FDRE Accession to the African Human and Peoples' Rights Charter Proclamation No. 114/1998

<sup>80</sup> Constitution of the Federal Democratic Republic of Ethiopia (FDRE), Proclamation No. 1/1995, Article 13

In such a case, the punishment shall be rigorous imprisonment not exceeding five years where: the crime is committed on the false pretext of mental illness or dangerous condition of the victim, or the crime persists for more than five days. Where it is committed to compelling the government, an international organization, a natural or a juridical person to do or to abstain from doing an act, by carrying out threats of endangering the life, person or liberty of the detainee or of prolonging his detention, the punishment shall be rigorous imprisonment from five years to ten years. Where such crime is committed by a public servant or official, a special provision of Article 423 of the same code shall apply.<sup>81</sup> In addition, the jurisprudence of the HRC and the African Commission on the definition of "arbitrary arrest and detention" can apply in accordance with Article 13(2) of the FDRE Constitution.

### **2.5.2 The Principle of Legality**

Like ICCPR and other regional human rights instruments referred above, the constitution of FDRE declares the "principles of legality" to be satisfied in order to take lawful restrictive measures against the right to liberty of a person. Accordingly, an arrest or detention of an individual person is only reasonable if it has been made when the grounds provided by prior enacted law ("substantive requirement") are satisfied and by strictly following the procedures provided therein ("procedural requirement"). In addition to the constitution, article 2 of the Criminal Code strengthens this idea that courts when they give decisions to deprive one's liberty they must base the enacted law.<sup>82</sup>

Like International and Regional Human Right Instruments, the Ethiopian law also recognizes different justifiable grounds that have to be met to arrest or detain through following the procedures prescribed by law; taking the right to protection from arbitrary arrest and detention is not an absolute right.

### **2.5.3 Lawful Arrest under the Ethiopian Legal System**

In relation to the commission of a crime, the first responsible person is a police officer for the protection of the suspect's right. Whenever the police receive any information regarding the commission of an offense, he should not ride to deprive the liberty of an individual. Therefore, the police have to take the necessary precaution before deciding to have the body of a person and the means used has to also be carefully evaluated. Before proceeding to summons or arrest which are the legal means to deprive the liberty of the suspect, the police

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<sup>81</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia 2004 article 585(4)

<sup>82</sup> Constitution of the Federal Democratic Republic of Ethiopia (FDRE), Proclamation No. 1/1995, Article 17

have to make sure that there are reasonable grounds to resort to a summons or, as the case may be, to arrest.

After the police are being convinced that the process should continue, then the police have to consider the means of bringing the suspect to the police station. Under the Ethiopian legal system, Summons and arrest are the two means of bringing the suspect to the police. While the first mode<sup>83</sup> of bringing the suspect to the police station is a peaceful system of taking a person into custody the second one may involve force.<sup>84</sup>

#### **2.5.4 Presumption of innocence**

Like an international and regional laws, the Ethiopian constitution describes the right to be innocent until proven guilty. Article 20(3) of the FDRE Constitution states “during proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against them”. An example of a breach of the right to be presumed innocent is when a public announcement is made by the public authority finding the defendant guilty of the alleged crime. In that regard, the HRC noted in its General Comment No. 13, paragraph 7, that it is the responsibility of all public authorities not to prejudge the outcome of the proceedings.’ This suggests that only the courts of law have the power to determine the defendant's guilty status after reviewing all relevant facts provided by the prosecution.

#### **2.5.5 Appearance before a judicial authority without undue delay**

Article 19(3) of the Constitution enshrines the right to appear before a judge within 48 hours of detention. The 48 hours does not include the time it takes for the police station to move. The Constitution requires the police to deliver a suspect within 48 hours who has been arrested and detained in custody. Similarly, the CPCE requires the production of the suspects within 48 hours.<sup>85</sup> The prisoners have the right to be given a prompt and specific clarification of the grounds for their detention on account of the alleged crime committed while appearing before a judge.<sup>86</sup>

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<sup>83</sup> Criminal procedure code of Ethiopia, Article 25

<sup>84</sup> Criminal procedure code of Ethiopia, Article 26(1)

<sup>85</sup> Criminal procedure code of Ethiopia, Art.29(1)

<sup>86</sup> FDRE Constitution, Art. 19(3).

### 2.5.6 The right to bail

By balancing, on the one hand, the interests of justice and on the other, the right to freedom of liberty and the presumption of innocence of the defendant, bail is a basic feature of the criminal justice system. The right to bail is guaranteed by the FDRE Constitution, although it can be withheld under certain conditions.<sup>87</sup>

Bail can be issued by the police or courts under Ethiopia's criminal justice system, although the police have more limited jurisdiction in this regard. Where the alleged crime does not require rigorous imprisonment, or when it is unlikely to believe that the alleged crime has been committed by the suspect the police may release the suspect on bail bond.<sup>88</sup> If the arrested person is not released by police bail bond, he/she is entitled to appear before the court within 48 hours.<sup>89</sup> The court before which the arrested person appears either releases him/her on bail or remands him/her to custody as the case may be.<sup>90</sup> The court may then recommend granting bail either on the accused person's request or on its own motion. Any of the offences such as dangerous vagrancy<sup>91</sup> and corruption offences punishable by 10 years of rigorous imprisonment or more is non-bail able with regard to the type of offences.<sup>92</sup> Again, offences committed against a physical individual and where the victim has died or is likely to die and such crime is punishable by death or rigorous imprisonment for 15 years or more are non-bail able.

On the other hand, according to Article 67 of the CPC, the court may grant bail depending on the nature of the suspects for bail able offenses. If the court agrees not to release the defendant on bail, the suspect may appeal to the appeal court against that order; and the decision of the appeal court on the matter is final.<sup>93</sup>

### 2.5.7 The right to challenge the legality of detention and remedies

Habeas corpus is a remedy available to a person who is unlawfully arrested or detained or who is not brought before a court of law within the prescribed period, according to the FDRE Constitution.<sup>94</sup> It is important for the security of the right to liberty and the prevention of APTD. Art 177-179 of the Ethiopian Civil Procedure Code lays down the procedures for filing a writ of habeas corpus.

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<sup>87</sup> Ibid, Art.19(6).

<sup>88</sup> CPCE, Art. 28.

<sup>89</sup> FDRE Constitution, Art. 19(3); and CPCE, Art. 29

<sup>90</sup> CPCE, Art. 59.

<sup>91</sup> Vagrancy Control Proclamation: Proc.No. 384/2004, Art. 6(3).

<sup>92</sup> The Revised Anti-Corruption Special Procedure: Proc. No. 882-2015, Art. 4(1).

<sup>93</sup> CPCE, Art. 75

<sup>94</sup> FDRE Constitution, Art.19(4).

Habeas corpus is available for the purpose of checking the validity of any arrest, either on the grounds of a criminal offense commission charge or for any other reason. Habeas corpus is a legal recourse available to those who have been detained by the government but have not been brought to court. It's a civil proceeding. Despite being arrested on criminal charges; the person is claiming civil rights. As a result, the Civil Procedure Code contains provisions that govern it. Thus, habeas corpus is one of the remedies available in exceptional circumstances of denial of the rights of persons.<sup>95</sup>

### **2.5.8 Prohibition of Torture and Inhuman Treatment**

Furthermore, the Constitution's Article 28(1) specifically refers to torture as one of the crimes against humanity. The CPCE prohibits any police officer or authority from offering or using or causing actions to be offered, making or using any inducement, intimidation, pledge or any other inappropriate method to the effect that the person examined confesses or provides information.<sup>96</sup>

Although the term torture is not explicitly specified in that section, it is in fact consistent with its technical meaning that all the inappropriate methods given in the cited provision are intended to extract information. Any proof collected by using such improper techniques was also exempt from the statute.<sup>97</sup>

The Federal prisons commission establishment proclamation number 365/2003, specifically imposes an obligation on all prison guards to fulfill their responsibility by completely upholding the human and democratic rights of individuals enshrined in Ethiopia's constitution and other international instruments.<sup>98</sup> The proclamation also grants all prisoners the right to be treated in such a way as to uphold their integrity.<sup>99</sup>

Furthermore, under Proclamation No. 313/2003 of the Federal Police Commission, every police officer has an obligation to fulfill his duties by, inter alia, strictly upholding the civil and democratic rights guaranteed by the Constitution. Specifically, any treatment or behavior that is cruel or degrading is forbidden. Similarly, under the administration in general, three of the key instruments in the care of prisoners at the federal level are the Proclamation on the

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<sup>95</sup> Aderajew Tekllu & Kedir Mohammed, Ethiopian Criminal Procedure Teaching Material, March 2009 available at: [https://www.lawethiopia.com/images/teaching\\_materials/CRIMINAL%20PROCEDURE.pdf](https://www.lawethiopia.com/images/teaching_materials/CRIMINAL%20PROCEDURE.pdf)

<sup>96</sup> The Criminal Procedure Code of Ethiopia, Negarit Gazzeta, Proclamation No. 185/1961, Art 31.

<sup>97</sup> Ibid, Art 31.

<sup>98</sup> The Federal Prisons Commission Establishment Proclamation, Proclamation No. 365/2003, Federal Negarit Gazzeta, Art 18 (1)

<sup>99</sup> Ibid, Art 22(1).

Creation of Federal Prisons Commission 365/2003, the Federal Wardens Administration Council of Ministers Regulations No. 137/2007 and the Treatment of Federal Prisoners Council of Ministries Regulations No. 138 Regulations No. 86/2003 of the Federal Police Commission, abuses of human and democratic rights provided for in the Constitution may have occurred.

### **2.5.9 Lawful arrest under Ethiopian Legal system**

The right to liberty is not absolute, as many other fundamental rights. There are cases where it is possible to legally limit the right. The FDRE constitution prescribes, in a similar manner to the ICCPR and ACHPR, the principle of legality to be met in order to take lawful restrictive action against a person's right to liberty.

Any arrest or detention must have a legal basis under the Ethiopian criminal justice system. Hence, pretrial detention is justified if there is a fair suspicion that a crime has been committed by the accused.<sup>100</sup> This means that a person should not be arrested unless there is a clear suspicion that a crime has been committed and there is ample evidence that the crime has taken place. In cases where there is no proof that the person has committed a crime, police officers do not apprehend people on criminal charges. This is endorsed by Articles 53 and 54 of the CPCE, which provide that a warrant of arrest can be provided only by a court where there is an "absolute necessity" to ensure that the defendant appears in court and that attendance "cannot be obtained otherwise."

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<sup>100</sup> CPCE, Art 25, 50 and 51

## Chapter Three

### 3 The Right to Compensation for unlawful arrest under International, Regional and Ethiopian Law

#### 3.1 The Right to Compensation under International and Regional Law

##### 3.1.1 Reparation

Specific right to remedies for human rights violations is found in a variety of international and regional human rights treaties and declarative instruments by focusing on the right to an effective remedy, a broader concept that encompasses both access to justice and the issue of reparation. Article 8 of the Universal Declaration of Human Rights addresses this issue, which states that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Article 2(3) of the International Covenant on Civil and Political Rights also lays down the right to an effective remedy, and similar provisions are found in several multilateral conventions concerning human rights. Examples include article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance. The International Law Commission has adopted a clause on reparations owed to individuals in its draft articles on crimes against humanity, draft of Article 12, paragraph 3.<sup>101</sup>

Regional human rights conventions also provide for the right to an effective remedy and have regulated the issue of compensation for individuals. There are specific provisions in the American Convention on Human Rights and the European Convention on Human Rights which regulate these matters.<sup>102</sup> In addition, other regional instruments and structures, such as the African Charter on Human and Peoples' Rights (Article 7, paragraph 1 reads, “the right to an appeal to competent national organs against acts of violating his fundamental rights as

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<sup>101</sup> Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), United Nations, Page 16

<sup>102</sup> American Convention on Human Rights, Article 10 and Article 5(5) European Convention on Human Rights

recognized and guaranteed by conventions, laws, regulations and customs in force”).) offer guidance.

Decisions by a range of treaty bodies, such as the Committee on Human Rights and the Committee against Torture, also provide valuable guidance on the determination of the parameters and appropriate scope of remedy to be given, on the basis of the applicable instrument.<sup>103</sup>

In human rights law, there are two facets to the right to redress: the right to a domestic remedy and the right to appropriate and efficient forms of redress. The relationship between the process by which reparation is sought and the ultimate award is understood as indivisible, and the principles of 'effective remedy' and 'reparation' have been defined as redress together.<sup>104</sup> A successful remedy is a key component of a right, as it gives victims the means by which they can claim their rights and obtain redress for the infringement. All human rights treaties and instruments require States Parties to provide redress under national law, either explicitly or implicitly.<sup>105</sup> The UN Basic Principles and Guidelines clarify the obligation to uphold, ensure that international human rights law and international humanitarian law are upheld and implemented as giving rise to a duty to provide, inter alia, remedies including the right to fair and efficient access to justice; sufficient, effective and prompt reparation for the harm suffered; and access to adequate information concerning violations and reparation mechanisms.<sup>106</sup> Five ways of reparation are defined by the UN Basic Principles and Guidelines, acknowledging that these are not exhaustive. These are restitution, compensation, rehabilitation, satisfaction and non-repetition guarantees. A reparation award may involve one or more of these types of reparation, according to the infringement of the award and the precise harm caused to the claimant. This chapter focuses on compensation way of reparation under international and regional instruments.

### 3.1.2 Compensation

According to United Nations General Assembly compensation should be provided for: “any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case... such as: (i) physical or mental harm; (ii) lost opportunities such as employment, education or social benefits; (iii) material damages

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<sup>103</sup>See annex B Paragraph 12, Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019)

<sup>104</sup> Committee against Torture, General Comment No. 3, para.2

<sup>105</sup> M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Hum R LR 203.

<sup>106</sup> UN Basic Principles and Guidelines, above n. 4.

including loss of earning potential; (iv) moral damage; and (v) any costs incurred for legal assistance, medical services, and psychological and social services.”<sup>107</sup>In addition General Comment No. 3 states that compensation awarded to a victim should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary.<sup>108</sup>

A number of international and regional human rights conventions and declarative instruments include an express right to compensation for human rights violations. Article 9(5) of the International Covenant on Civil and Political Rights states that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”, and this provision shall extend to all arrests and detentions that are unlawful or arbitrary.<sup>109</sup> Article 5(5) of the European Convention specifies that “everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation”. Article 10 ACHR provide expressly for compensation for unlawful arrest, detention or conviction. And the Arab Charter on Human Rights in article 14(7) states that ‘Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation’.<sup>110</sup>

### **3.1.3 Enabling mechanisms for individuals to obtain compensation**

The possibility of receiving compensation on an inter-State, International, and domestic level is discussed further down.

Person compensation is pursued at the inter-State level by the conventional method of diplomatic protection, a subject that the International Law Commission (“ILC”) thoroughly studied in its Draft Articles on Diplomatic Protection.<sup>111</sup>

International compensation includes international and regional tribunals as well as treaty bodies which allow individuals to lodge complaints against States for IHRL violations. Via these processes, people pursue, either in the form of a decision, recommendations, an

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<sup>107</sup> UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution adopted by the General Assembly, 21 March 2006, A/RES/60/147, Section 20, Hereinafter referred to as “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law.”

<sup>108</sup> General comment No. 3 (2012) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>109</sup> See General Comment No. 8 (16) in UN doc. GAOR, A/37/40, p. 95, para. 1 and p. 96, para. 4.

<sup>110</sup> League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005)

<sup>111</sup> Draft Articles on Diplomatic Protection, with commentaries, United Nations International Law Commission, Yearbook of the International Law Commission, 2006, vol. II, Part Two, UN Doc. A/CN.4/SER.A/2006.

objective finding of wrongdoing and an authoritative declaration on the necessary compensation that should be given.<sup>112</sup>The right to have recourse to an international or regional human rights court, once all avenues of seeking redress at the domestic level are exhausted, has been accepted only partially. Under the EHCR, individuals may appeal to the permanent European Court of Human Rights, whose judgments are legally binding. The American Convention on Human Rights, the African Charter on Human and People's Rights-Optional Protocol and the Economic Community of West African States (ECOWAS) Treaty also provide for an individual complaints mechanism, subject to specific rules in each case. Individuals may also file complaints with the treaty body in charge of protecting compliance with each of the core international human rights treaties.<sup>113</sup>

At the domestic level, individuals can bring before the domestic courts of a State usually the State alleged to be responsible for the violation, claims for the violation of IHRL or IHL. Domestic mechanisms are meant to provide an adequate remedy for the affected individuals in order to comply with the applicable international law, including sufficient compensation if the violation is confirmed. On the other hand, access to international procedures also needs to comply with certain requirements, such as the exhaustion of local remedies, to avoid the misuse of international mechanisms and respect the principle of subsidiarity. International and domestic mechanisms may complement each other.<sup>114</sup>

### 3.1.4 Standard of Compensation

Although the amount of compensation varies from country to country, the United Nations Human Rights Committee has reported in many instances that States are expected to provide adequate compensation, except purely 'symbolic' compensation amounts<sup>115</sup>.

Likewise, in many situations involving breaches of Article 5 of the Charter, the African Commission has stressed that the State is required to pay 'adequate compensation to the victim for the abuse and trauma suffered,<sup>116</sup> to' compensate the victims adequately in compliance with international standards,<sup>117</sup> to take effective steps to ensure compensation to

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<sup>112</sup> See e.g. the friendly settlement process offered by the Inter-American Commission on Human Rights that allows States and aggrieved individuals the opportunity to find a mutually agreeable solution to a human rights violation without resorting to a contentious proceeding.

<sup>113</sup> See chapter 2 on Human Rights, Handbook for Parliamentarians N° 26, Inter-Parliamentary Union 2016

<sup>114</sup> See annex B Paragraph 8, Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019)

<sup>115</sup> Human Rights Committee, *Bozize v Central African Republic*, Communication No. 449/1990; *Mjica v Dominican Republic*, Communication No. 449/1991; *Griffin v Spain*, Communication No. 493/1992

<sup>116</sup> African Commission, *Gabriel Shumba v Zimbabwe*, Communication 288/04

<sup>117</sup> African Commission, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 334/06

the victims<sup>118</sup>, or to ensure payment of compensation to the victims.<sup>119</sup>The circumstances of the situation, the form of breach and the harm sustained by the victim determine what is adequate or necessary<sup>120</sup>.

In addition to this, the Committee against Torture stresses that monetary compensation alone will not be adequate redress for a torture and ill-treatment victim. The Committee reiterates that monetary compensation alone is inadequate for a State Party to meet its obligations under Article 14.<sup>121</sup> Under article 14, a victim's right to timely, fair, and adequate compensation for torture or ill-treatment is multi-layered, and any compensation awarded to a victim shall be sufficient to compensate for any economically assessable harm arising from torture or ill-treatment, whether pecuniary or non-pecuniary.<sup>122</sup>

### 3.1.5 Compensable damages

Compensation should be given for any economically assessable damage arising from gross violations of international human rights law and serious violations of international humanitarian law, as necessary and proportional to the gravity of the violation and the circumstances of each situation, such as:<sup>123</sup>

#### A) Material harm

Compensation is provided for material damage (also referred to as 'pecuniary damage').Such losses can include, for example loss of personal property; loss of earnings/income, as well as loss of future income; costs arising from legal assistance, as well as from medical and psychological assistance. Furthermore the United Nations Basic Principles and Guidelines provide that compensation should cover missed opportunities, including employment, education and social benefits.<sup>124</sup>

#### B) Moral damages

The UN Basic Principles and Guidelines specify that as a result of the infringement of human rights, compensation should also include moral damage or non-material loss. Moral damage, including mental anguish, shame and a sense of injustice, is intended to compensate for harm,

<sup>118</sup> African Commission, Curtis Francis Doebbler v Sudan, Communication 236/00

<sup>119</sup> African Commission, Malawi African Association, and others v Mauritania

<sup>120</sup> Reaching for Justice, The Right to Reparation in the African Human Rights System, October 2013, Page 39

<sup>121</sup> UN CAT, General Comment No.3, para.9

<sup>122</sup> UN CAT, General Comment No.3, para.10

<sup>123</sup> See Reparation for harm suffered (Paragraph 20) from Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, IX.

<sup>124</sup> Ibid

pain and suffering. In cases of gross human rights abuses, one of the key functions of compensation is to provide restitution for harm to the physical and well-being of an individual, because in such cases, *restitutio in integrum* is usually not possible for such damage.<sup>125</sup>

Non-material injury may take different forms, such as mental anguish, emotional injury, embarrassment, shame, degradation, loss of social status, or injury to the credit or prestige of the victim. The International Commission of Jurists noted, referring to the experience of the Inter-American Court, that 'non-pecuniary damage may include distress, suffering, tampering with the victim's core values, and changes of a non-pecuniary nature in the person's everyday life'.<sup>126</sup> In the jurisprudence of human rights mechanisms, including mechanisms which do not specify the amount of compensation owed to victims, the right to compensation for moral damages is well established.<sup>127</sup> The African Commission has also proposed that States award compensation for 'trauma endured' following a finding of torture in breach of Article 5 of the Charter.<sup>128</sup>

### 3.2 Compensation under Ethiopian Legal system

As part of its commitment to the promotion, protection, respect and fulfillment of human rights, Ethiopia has ratified a number of human rights treaties. Indeed, all signed human rights treaties are by virtue of the Constitution, an integral part of the law of the land.<sup>129</sup>

According to the ICCPR, there is an enforceable right to compensation for persons deprived of their liberty by unlawful arrest or detention.<sup>130</sup> The HRC has clarified that in addition to ratification and domestication, the ICCPR's state parties have a duty to enact domestic legislation to provide compensation for arbitrary detention.<sup>131</sup> Person claims occur where the provisions of Article 9(1) to (4) and/or a provision of domestic law have been violated by arrest or detention. And States should endeavor to establish national programs for reparation

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<sup>125</sup> International Commission of Jurists, 'The Right to a Remedy and to Reparation for Gross Human Rights Violations- a practitioners' guide, ('The Right to a Remedy'), p. 134

<sup>126</sup> International Commission of Jurists, 'The Right to a Remedy and to Reparation for Gross Human

<sup>127</sup> UN Human Rights Committee in the case of 'María del Carmen Almeida de Quinteros et al. v. Uruguay, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), para.40.

<sup>128</sup> African Commission, *Gabriel Shumba v Zimbabwe*, dispozetif.

<sup>129</sup> Article 9(4) of the FDRE constitution.

<sup>130</sup> ICCPR, Art. 9(5).

<sup>131</sup> HRC, General Comment No. 35, para.50

and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.<sup>132</sup>

Analogous to universal standards, there are also various potential legal solutions recognized under Ethiopian legislation. Those include criminal liability, civil liability, and disciplinary measures. With regard to criminal liability, Article 423 of the Ethiopian Criminal Code provides that “Any public servant who, contrary to the law or in disregard of the forms and safeguards prescribed by law, arrests, detains, or otherwise deprives another of his freedom is subject to punishment”. Police officers are therefore legally liable if they perform a neglect of their official duties. On the other hand, an indirect approach which is stated in tort law is the use of extra contractual liability to make for way of compensation claim. According to Civil Code of Ethiopia article 2027, there are three sources of extra contractual liability. *1. Irrespective of any undertaking on his part, a person shall be liable for the damage he causes to another by an offence. 2. A person shall be liable, where the law so provides, for the damage he causes to another by an activity in which he engages or by an object he possesses. 3. A person shall be liable where a third party for whom he is answer able in law incurs a liability arising out of an offence or resulting from the law.*

In the above article (2) that a person who causes damage without legal justification makes it good holds<sup>133</sup>. The victim may then claim compensation pursuant to Article 2040 and pursuant to the civil code against police officers. In compliance with the rules of the police establishment, disciplinary measures are taken against police officers for violation of human rights.

Regarding state liability for claiming compensation, any civil servant or government employee shall make good of any harm caused by his mistake to another. If the fault is a professional fault, the claimant may demand the State's compensation, provided that the State may subsequently claim the fault of the servant or employee.<sup>134</sup>

The state, like every other person, hires civil servants to provide the public with services. The civil servant or state employee can commit fault while delivering these services. It could be a personal or professional mistake. The state shall not be responsible where the fault is

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<sup>132</sup> See Reparation for harm suffered (Paragraph 16) from Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, IX.

<sup>133</sup> CCE Art. 2027(2)

<sup>134</sup> Ibid Art. 2126

personal.<sup>135</sup> However, if the fault is professional, the claimant can seek compensation from the state. Nonetheless, the state will later demand it from the servant or the worker at fault.<sup>136</sup>

Under Article 2127, the distinction between personal and professional faults is given. Nevertheless, to distinguish the two types of faults, that article does not set objective standards. Therefore, if, in good faith, the public servant or employee claims that he/she behaved within the scope of his/her duties and in the interest of the state, the fault shall be considered professional. Moreover, there is a presumption of good faith. Therefore, one who questions that presumption needs to prove the reverse. The law uses the removal mechanism to tell what personal negligence is by specifying that in all cases a fault is personal fault, i.e. where it is not professional fault.<sup>137</sup>

### **3.2.1 Compensation for damages in Ethiopian Legal system**

The liable person should compensate the injured party in extra contractual liabilities. There are three types of compensations, material, moral and others.

For material damage, according to Ethiopian Civil Code Article 2090, it should be compensated by awarding the victim an equivalent amount in damages. Based on Article 2102, if the exact amount of the damage cannot be calculated, the court shall fix it equitably, taking into account the ordinary course of events and the measure taken by the injured party, at no indemnity may be awarded in respect of damage of which the very existence, and not only the amount, is doubtful. This enables wrongful arrest or detained person to claim compensation for the material damage that is lost during his time of arrest.

Compensation should be awarded for moral injury not for material injury only. The rule relating to the form of compensation for moral injury is explicitly specified in Article 2105 of the civil code. The author of a wrong is required to make good the moral harm caused by the wrong where an adequate procedure for such redress exists, according to Sub-Article one of this provision. Sub-Article two went on to say that monetary compensation for moral harm could only be paid in circumstances where the law expressly allowed it. The phrase "only in cases expressly provided by law" emphasizes the rarity of receiving monetary compensation for moral harm. As a result, in Ethiopian extra contractual liability law, non-pecuniary

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<sup>135</sup> CCE 2126 (3)

<sup>136</sup> Ibid 2126 (2)

<sup>137</sup> CCE article 2127

compensation is the standard rule for redressing moral loss.<sup>138</sup>Physical assault (article 2107) and unlawful restraint (article 2108) offenses need moral compensation.

Civil code from Article 2118 to article 2123 provide an “alternative way of compensation” available to the victim other than monetary compensation. Non-monetary modalities of compensation include restitution, restoration in kind, retraction of defamatory publications, enjoining situations of unfair competition, and injunctions, which can be issued in addition to or instead of monetary compensation in appropriate instances specified in Article 2090(2) of the civil code.<sup>139</sup>Victims of wrongful arrest or detention can get this compensation modalities in addition to material damage compensation.

The law does not provide a general guideline for the court to follow when assessing material or moral damages based on equity. Because there is no concrete standard for calculating where there is difficulty in assessing pecuniary damage and for non-pecuniary (moral) loss in terms of money, there is a risk that courts will award disparate amounts for the harm in similar cases. Even in those specified cases of moral injuries specified as pecuniary compensable under Articles 2105 through 2115 of the civil code, the court is not required to provide monetary compensation to the claimant.

The law is not clear whether or not the maximum compensation for moral damage 1000birr in Article 2116(3) is given per person. No clue is provided as to the existence of separate claim for each claimant. However, the Federal Supreme Court Cassation Decision interpreted 2116(3) that when the claimants for moral damage is more than one individual, moral compensation is not being payed 1,000 birr for each of them<sup>140</sup>.

The Ethiopian tort law sets a time limit of two years to claim compensation for damages. Due to the short limitation period (article 2142) and the victim's immediate need for money to cover his current expenses, the victim frequently cannot delay his action unnecessarily. And, under article 2151's res judicata prohibition, he may not be able to file a new action after the final prognosis for the plaintiff is technically prohibited to split his claim for present and future damages unless case leads to a criminal liability and if the crime has a period of limitation more than two years, the time fixed for asking compensation shall be substituted by

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<sup>138</sup> Abdulmalik Abubeker & Desta G/Michael, Extra-Contractual Liability, Teaching material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009

<sup>139</sup> Ibid

<sup>140</sup> Awash Insurance Share Company vs. Mohammed Abaali(two persons), Feb 4, 2004 E.C., Federal Supreme Court Cassation Decision Volume 13 file no. 69428

the period of limitation of the crime 2143(2).<sup>141</sup>In addition to this, if the person is dead due to unlawful arrest, the plaintiff stated under article 2095 must proof themselves as they are legal beneficiary from his death to claim compensation on their behalf from civil courts. During the process of proving the beneficiary, if the court case takes longer period and passes the period of limitation stated for claiming compensation or the period of limitation of the crime, then the beneficial can't exercise their right as per Federal Supreme Court Cassation Decision.<sup>142</sup>

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<sup>141</sup> Abdulmalik Abubeker & Desta G/Michael, Extra-Contractual Liability, Teaching material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009

<sup>142</sup> Ethiopian Insurance Corporation Vs. W/ro Aregash Kebede, Nov 19, 1998, Federal Supreme Court Cassation Decision Volume 3 File no.16062

## Chapter Four

### 4 A Glimpse on Recent Unlawful Deprivation of Liberty Cases in Ethiopia

In the previous chapters, this thesis discussed the notion of arbitrary detention and the basic legal protections provided by both foreign and domestic law to people stripped of their liberty. This chapter will discuss cases of unlawful or arbitrary detention.

As discussed in the previous chapters, in Ethiopia, there are many main pieces of law related to legal arrest and detention, most importantly the Constitution of the FDRE and the CPCE. An individual should not be prosecuted under the CPCE until there is reasonable suspicion that they have committed a crime and being about to commit a crime. In spite of these safeguards in the law, sample data collected from justice organs and from reports of different organizations indicate that in practice the police frequently arrest individuals without having sufficient evidence, arrest individuals unlawfully.

#### 4.1 The Ethiopian Human Rights Commission reports

According to the role of Ethiopian Human Rights Commission, when there are human right violations in the country, it will investigate and make a report. Reporting arbitrary and unlawful detention is part of its mandate.<sup>143</sup>

On April 17, 2012 E.C., Ethiopian Human Right Commission report recaps that the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, as approved by the African Commission on Human and Peoples' Rights, including Ethiopia, clearly state that pre-trial detention under international human rights law before a charge is only allowed in exceptional circumstances. It urges them to improve the administration of criminal justice by eliminating arbitrary detention by resorting to alternatives instead of detaining people before trial.

Article 9 (1) of the International Covenant on Civil and Political Rights, Article 6 of the African Charter, and Article 17 of the Ethiopian Constitution provide that one of the ways in which freedom is guaranteed is to avoid arbitrary arrests and to respect the right to bail.

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<sup>143</sup> Human Rights Commission Proc. No. 210/2000, Article 6.

However, according to Ethiopian Human Rights Commission report pre-trial detention is on the rise in Ethiopia and it is a matter of concern that the constitutional right to bail is not fully respected.

It is well-known that any order, decision, or judgment imposed by the courts must be implemented by anyone. This order must also be obeyed by the police. Both Addis Ababa and the Federal Police Commission are required to comply with and enforce court orders and decisions.

Article 6 of the Addis Ababa City Police Commission Establishment Regulation Council of Ministers Regulation No. 96/1996 lists the powers and functions of the Police Commission. Related to this is Article 6 (7), which is relevant to this case, and provides for the execution of orders or decisions by federal and city courts. Article 6 (3) of the Federal Police Commission Establishment Proclamation 720/2004 also gives the police commission the duty to carry out orders and decisions issued by the courts.

The police are empowered to arrest, investigate and prosecute anyone who suspects or commits a crime. However, when exercising this legal authority and function, as it is the responsibility of any government institution, it must do so only in accordance with the law and the rule of law. To achieve this, the police leadership at all levels of the institution has a great responsibility.

As stated as an example in Ethiopian Human Rights Commission report, Yayesew Shimeles, a Journalist, although he was granted bail twice in his 27 days in jail, law enforcement bodies changed the nature of the charge and arrested him for administrative reasons. The journalist was released on bail for the third time after being charged with an offense. The journalist Yayesew is accused of spreading false information on social media. However, from the outset, in the light of the alleged crime, it was not clear whether there was a reasonable and necessary condition to deny bail.

Also EHRC recalls that judicial and procedural remedies should not be discontinued or restricted even during emergency times. One of the proofs of this legitimacy is the guarantee of right of bail. Pursuant to Article 19 (6) of the Constitution, persons arrested for alleged offenses have the right to be released on bail, unless otherwise provided by law. The right to bail is a fundamental human right to ensure that suspects have a right to a fair trial, including the right not to be considered as guilty.

Accordingly, it is illegal to detain a person who has been granted bail right by the court unless the person is not wanted by the police for another crime.

## **4.2 The mass arrest after a rally held to celebrate the return of the Oromo Liberation Front (OLF)**

In September 2018, 1,204 young people were arrested by city police in Addis Ababa, accused of having a connection to the conflict that erupted after the OLF returned.<sup>144</sup> According to the then Addis Ababa police commissioner, arrests were made in reaction to rising criminal activity in Addis Ababa, with robbers and thieves being targeted. Police arrested 1204 young people at the Tolay Military Training Camp and gave them a month of "rehabilitation". Police released 1,174 detainees on October 18, 2018 after 'rehabilitation'. At the end of the year, the government did not announce the fate of the remaining 30 young people arrested by the authorities.<sup>145</sup>

The Addis Ababa Police Commission is given different power and duty by Article 6 of the Council of Ministers Regulation No. 96/1996. Despite the fact that the provision grants the Commission 14 (fourteen) powers and tasks, including the prevention and investigation of crimes, it does not have the authority to 'rehabilitate' and correct those arrested on suspicion of crime. Proclamation No. 365/1995 authorizes the administration of federal prisons to administer correction and rehabilitation of convicted offenders. In addition, Criminal Code of Ethiopia Article 162, the desecration power to order correction and rehabilitation is only given to the court against young criminals.

In this case the young people who are suspected in criminal activity are not yet convicted and, the Commission has no legal authority to correct or rehabilitate the 1204 individuals that are suspected for a crime. Thus, the 1204 people who were remanded in Tolay by police whom they suspected had a connection with the violence without charge of the prosecutor, without being convicted by a court of law, have been deprived of their different constitutional rights.<sup>146</sup>

## **4.3 Federal Prosecutor File No. 198/2011**

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<sup>144</sup> U.S. Department of State reports, 2019 Country Reports on Human Rights Practices: Ethiopia

<sup>145</sup> Ibid

<sup>146</sup> FDRE Constitution, Art 19(3) & Art 17(2)

45 charges filed against Getachew Assefa with 26 defendants, in Federal Prosecutor File No. 198/2011 and Federal Police Record No. 488/2011. The case is during the time when the defendants held various positions in the former Ministry of National Immigration and Refugee Affairs currently named National Intelligence Security Service Minister (NISS). By abusing their power, they forcibly detaining and torturing various individual victims, as well as forcing them to give information, for this purpose they have set up unnamed prisons in Addis Ababa and other cities in the country, as well as in unknown locations in regional cities. And it was done by themselves, by police and other security personnel.<sup>147</sup>

As stated in the record the defendants make inhuman treatment on the individuals to confess the crime they are suspected of or by threatening to kill their family members and when they confess, the defendants record, insult, and humiliate them and make a variety of painful actions.

Also people were arrested and detained on suspicion of involvement in criminal activities, particularly those associated with the OLF, Ginbot 7, as well as religious extremism and economic crimes. To this end, by setting up detention centers in Addis Ababa and regional cities, Oromia, South, Amhara, and other regional cities, individuals were subjected to torture and other cruel, inhuman or degrading treatment and death.

From the individuals that were unlawfully arrested, the following are selected victims: Ishmael Ejigu, who was forcibly arrested on suspicion of terrorism, was taken from a place called Torhailoch in Addis Ababa on July 2, 2005 at 1.30pm, and detained and tortured for 5 months and 21 days in a secret detention center. Mohammed Yimer Abate was forcibly taken at 7:00 pm January 11, 2001 E.C. on suspicion of terrorism from his home in Nifas Silk Lafto, Hanna Mariam, and detained for 9 months in unknown detention center and he was beaten by handcuffing his hands and foot. Bekalu Yeshe Yifru was arrested in Debre Berhan, Amhara Region, at around 6:00 pm on May 18, 2008 E.C. and taken to Addis Ababa. He was detained for more than seven months in an undisclosed prison and beaten. And finally they blindfolded him and drove him off the road. Daba Gere was taken to a security office in Hawassa on 17/4/2002 at 1pm on suspicion of terrorism and was beaten to tell the OLF members he knows and finally become unconscious and was taken to Dukem. After a week they arrested him to a place called Meakelawi and resulting in 45 percent of permanent disability. Mohammed Ibrahim was repeatedly beaten for a long time, and died. Temesgen

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<sup>147</sup> Federal Prosecutor File No. 198/2011 and Federal Police Record No. 488/2011

Ayana forcibly arrested in Nekemte town at around 5:00 pm on 27/7/2008 E.C. for allegedly committing a terrorist offense and he was beaten to get information from him and causes severe kidney problem and long-term vision loss.

- Article 13 of the FDRE constitution states that all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the fundamental rights and freedoms which is enumerated under chapter three of the constitution. However, as stated in the charge, the above NISS authorities deprive individual liberty unlawfully and individuals were not protected according to the constitution.
- According to the FDRE constitution, 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. And no person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him. In addition, everyone has the right to protection against cruel, inhuman or degrading treatment or punishment. Even if the law states this, practically as shown in this charge, individuals were deprived of their liberty with charge and conviction for long period, as stated in the charge, the investigators at the detention center use coercive torture or other ill-treatment techniques on prisoners, individuals suffered psychological and physical pain even death,
- Based on CPCE provisions, the power to arrest is given to Police and with the exception of flagrant offense where individuals can make an arrest and bring to police. However, individuals were deprived of their liberty by unauthorized organ in the above case.
- According to CPCE article 31 and FDRE constitution article 19 states that persons arrested shall not be compelled to make confession or admission which could be used in evidence against them.

The defendants are not yet convicted by the court till this paper finalized and one of the main defendant is not still detained. And one defendant charge is withdrawn since he is seriously ill. If the court after examining the public prosecutor evidences, decides they are liable that will be their evidences for the victims to claim compensation. According to Civil code article 2149 and Federal Cassation Court decision<sup>148</sup>, a person who has been acquitted in a criminal case does not have to be free of a civil liability. Based on this, if the court decides that the

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<sup>148</sup> Ethiopian Electric Power Corporation vs. Dereje W/Kidan, May 5, 2000 E.C., Federal Cassation Court decision volume 6 file No. 34585

defendants charged in the above case are not liable for the charge presented by the public prosecutor, it does not mean they will be free from civil liability.

Prime Minister Abiy Ahmed also said while addressing parliament on June 18, 2018 “Our constitution doesn’t allow it, but we have been torturing, causing bodily damages and even putting inmates in dark prison cells. These were terrorist acts committed by us, and using force just to stay in power is a terrorist act too.” Even if the admittance of such an unlawful act by the State, and the state media presented the victims' cases to the public, the issue of compensation for the damage was not raised by victims and the media.

#### **4.4 Federal High court Civil Appellate Court: File No. 261170**

Tsegaye Degefu, who is accused of murdering his wife, has been in police detention since November 18, 2012 E.C. Following the investigation, Addis Ababa police requested remand in the first instance court, which was denied. As a result of this Addis Ababa police's appeal to the Federal High Court, the appellate court adjourned the case until 6/1/2013 E.C., after which the police were unable to complete the investigation on the due date and the court closed the case without confirming the defendant's right to bail. The defendant was later detained for more than five months without charge. Based on his request to respect the right to physical liberty (habeas corpus) at first instance court, the court granted his bail right and ordered his release on bail. The police appealed the decision to the Federal High Court's Lideta Division, and the court examined the case, stating that under the law, a suspect should be charged within a reasonable period of time, and that in this case, it is illegal for the suspect to be detained for five months from December 18, 2013 E.C. to the date of the decision to investigate the murder. And the court upheld the first instance court decision of the suspect's bail right.<sup>149</sup>

FDRE Constitution article 19(3) and article 17(2) are violated, this individual who is unlawfully detained for a period of 5 months is eligible to proceed for compensation claims.

#### **4.5 The mass arrest in Metekel Zone**

To protect the right of suspected person, it is a constitutional requirement to bring the detained person within the reasonable time to court. And the court has to ascertain the legality of arrest. According to FDRE Constitution Article 19(3), suspects must be brought to

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<sup>149</sup>Tsegaye Degefu vs Addis Ababa Police Commission, 05/05/2013 E.C., Federal High court Civil Appellate Court: File No. 26117:

court within 48 hours. And the Constitution Article 17 (2) stipulates that no person may be subjected to arbitrary arrest, and no person may be detained without charge or conviction against him. However, at Benishangul Gumuz Metekel Zone, 614 suspects were arrested without trial for two years. After 2 years the federal prosecutor's office and the police, in collaboration with an integrated task force set up by Prime Minister Abiy Ahmed, brought the suspects to justice, and 614 suspects were released on bail on January 14:2013 E.C.<sup>150</sup>

On this case the constitutionally guaranteed right of to be brought before a court within the specified time and the right not to be detained without charge or conviction is violated.

Thus the suspects, who were released on bail for this case and were unlawfully detained for two years, if charged and the court proved them not guilty or if they are sentenced for less time than the previous 2 year detention, they are unlawfully detained for a period of the difference and are eligible for compensation of damage.

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<sup>150</sup> <https://www.fanabc.com/ብሔራዊ-ሰነድ-የሰነድ-የሰነድ-የሰነድ-ከቆይ/>, January 14:2013 E.C

## Chapter Five

### 5 Conclusion and Recommendation

#### 5.1 Conclusion

The cases presented in chapter four shows that still there are many cases in Ethiopia regarding unlawful arrest. Despite obvious violations of the right to physical liberty as seen in the cases, Ethiopian human rights litigation is rare. Victims who are unlawfully arrested are not seen demanding justice in domestic courts.

This research found that the practice in proceeding compensation claim for such unlawful arrest is poor and the research couldn't find a single case the success or failure of such claim. According to Mr. Feyissa Bedada, a judge who has been serving in the Federal Court and the Federal First Instance Court for 12 years, "No compensation claim has been filed at criminal or civil bench trial related to unlawful arrest during all these years in my working area. Usually a released person does not want to get into an argument again, but to enjoy his freedom. They do not seek compensation, especially since they are afraid to re-engage with the government and fear that they may re-arrested. Most of our community is unaware of the existence of compensation laws."<sup>151</sup> The observation is confirmed by Seada Ahmed, IT system data analyst at Lideta High Court, and Bezaw Degu, Registrar at Lideta First Instance Court Bench. They noted "No claim has been filed related to compensation for wrongful arrest or detention in past few years. Also there was no claim registered in the database related to compensation for wrongful arrest or detention from 6 years' log."<sup>152</sup>

When people who have been illegally detained want to claim compensation, as the budget allocated by government institutions is only for the administration of the institution and does not cover such matters, it makes difficult to proceed compensation claims. According to Mr. Bedilu Tadesse and Mr. Mesganaw Mulugeta, an Investigation officers at Ethiopian Human Rights Commission (EHRC), "they prescribe and amicably settle compensation with the institutions in the event of a human rights violation. However, during request for redress, the institutions challenges ECHR for unavailability of budget for such matters."<sup>153</sup> However, as

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<sup>151</sup>Feyissa Bedada, Judge at Federal High court, Lideta bench. an interview conducted on 31 May, 2021

<sup>152</sup>Bezaw Degu, Registrar at Lideta First Instance Court Bench and Seada Ahmed, IT system data analyst, at Lideta High Court, an interview conducted on 31 May, 2021

<sup>153</sup>Bedilu Tadesse and Mesganaw Mulugeta, Investigation officers at Human Rights Commission, an interview conducted and data collected on 13 January, 2021

signatory state for ICCPR instruments, Ethiopia has an obligation to establish the legal framework within which compensation can be afforded to victims of unlawful arrest or detention but the remedy must not exist in merely theory and must operate effectively and payment must be made within a reasonable period of time according article 9(5). Although a claim for compensation decision can be made based on the Ethiopian Tort Law and the international law that Ethiopia has ratified, the execution of decision related compensation is difficult to apply for the damage.

Ethiopian Criminal Code, Ethiopian Civil Code have separately stated a pieces of legal ground for a legal criminal liability, civil liability, and disciplinary measures related to unlawful arrest and victim's compensation proceeding.

Ethiopian tort law regarding compensation has some gaps. The law does not provide a general guideline for the court to follow when assessing material or moral damages based on equity. This make courts will award disparate amounts for the harm in similar cases. And since the moral compensation is under the discretion power of the court, the court may deny of monetary compensation. In addition, the amount of moral monetary compensation is a maximum of 1000 birr which doesn't consider the current time value of money. Based on the binding effect of Federal Supreme Court Cassation Decision<sup>154</sup> interpreted Civil Code of Ethiopia article 2116(3) that when the claimants for moral damage is more than one individual, moral compensation is not being payed 1,000 birr for each of them instead divided which is unfair to redress the damage. Regarding the period of limitation for claiming compensation of damage, the time is short so that the claimant may lose to exercise his right.

Moreover, the study found that Ethiopian tort law makes it difficult to decide who may be sued for compensation during an employee made wrongful arrest because of the ambiguity related to distinguish the two types of faults (professional or personal fault). Moreover, Ethiopian tort law requires victims of unlawful detention to pursue legal charges, against the individuals and the state responsible for the unlawful detention. It is also the first step for an illegally detained person to seek liability to identify the detaining officer who is liable for unlawful detention. In addition, as a pre-condition for seeking compensation, he or she is expected to prove the detention officer's fault. In identifying the detaining officer the

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<sup>154</sup> Awash Insurance Share Company vs. Mohammed Abaali (two persons), Feb 4, 2004 E.C., Federal Supreme Court Cassation Decision Volume 13 file no. 69428

claimant has to know the address, names and sometimes group of police officers to forward in claiming the compensation and that makes it difficult and discourage to proceed.<sup>155</sup>

In addition, the most frequently cited reasons for police remand applications are until we gather evidence, accept the suspect's statement, and submit the investigation file to the prosecutor's office; the suspect may disappear if released on bail. These reasons are probably not good enough to ask for a remand other than except the reason to receive the suspect's statement. Without good reason, extending remand can cause significant disruption to the lives and rights of individuals suspected of committing a crime, especially for the law allows several days with the maximum of 4 months for requesting remand even in new draft Criminal Procedure and Evidence Code Article 119(2). Yet in my supervision I saw the court grant remand repeatedly without examining different reasons by accepting these unconvincing reasons.<sup>156</sup>

With respect to sub-regional, regional and international human rights frameworks, this study showed that a number of international and regional human rights instruments have been ratified by Ethiopia, which provide for the right to compensation for, unlawful detention.

In addition, Ethiopia has not ratified optional protocols nor made sufficient declarations allowing individuals to lodge lawsuits against the State alleging violations of the United Nations human rights treaties. Accordingly, individual victims of abuses of human rights in Ethiopia do not seek justice before the Committee on these Human Rights. Moreover, Ethiopia did not declare and accept the jurisdiction of the African Court of Human Rights so it is not permissible for individual victims of human rights in Ethiopia to seek justice before the Court. The non-ratification by the Ethiopia government of the treaty bodies responsible for the implementation of these instruments and the restriction by the Ethiopian government of individual access to regional and international conventions might be one possible explanation for the lack of redress for unlawfully detained persons in Ethiopia through the mechanisms developed.

## 5.2 Recommendation

1. The State shall raise public consciousness of the current regional and international frameworks for human rights. And the State shall raise public awareness of suspects'

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<sup>155</sup> Tefera Hailu, Public prosecutor at the Federal Public Prosecutor Office, an interview and discussion conducted on 3 January, 2021

<sup>156</sup> Anonymous, Federal Criminal Investigation Officer at Federal Criminal Investigation Office, an interview and discussion conducted on October 5, 2020

rights to seek for compensation when wrongful arrest/detention is made. Ethiopian Human Rights Commission and Non-governmental institutions shall promote public awareness about Ethiopian legal grounds of rights towards compensation proceeding for unlawful arrest and detention.

2. The Ethiopian tort law shall be reviewed: to improve moral compensation maximum amount; to improve the period of limitation to claim for compensation of damages; to include guidelines for the court to follow when assessing material or moral damages based on equity to redress the loss effectively and to avoid discrepancy of decision for the same case; to set objective standards to distinguish the two types of faults in Article 2127(Professional vs. Personal fault),
3. Review the criminal procedure code to include, if a guilty judgment has resulted from the unlawful detention, the compensation for unlawful detention to consist of a reduction of the sentence.
4. State shall plan a budget for compensation for unlawfully detained victims.
5. The State shall take concrete action to put the unconstitutional practice of detention without charge or trial to an immediate end.
6. Ethiopia shall ratify the optional protocols and make appropriate declarations that would allow individuals to submit complaints against the State alleging violations of UN human rights treaties. And review its declaration to allow access to the African Court on Human and Peoples' Rights for individuals;

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