An Examination into the Legality of Parole Granted to Dergue Officials: A Justifiable Decision or A Mockery of Justice?

Hiwot Wudu*

Abstract

Parole is an early release of a prisoner after serving a portion of the sentence. It can be granted if certain predetermined conditions are met. After political reform of 2018, it has been a usual trend to parole inmates. This has been the subject of public discourse and debate. Some questioned the legality of the move and its adverse effects on law enforcement, and symbolic effects that unrestrained parole produces. This short article briefly explores the conditions for parole under international and Ethiopian law; analyzes the legality of granting parole for convicts of serious crimes like genocide under Ethiopian law and examines the legality of parole granted to the former Dergue officials in light of the conditions set by law. In doing so, this work briefly examines the nature, legal conditionalities of granting parole, and rationale by applying doctrinal research methodology.

Key terms: Parole, former Dergue officials, conditions of parole, Criminal Code, Ethiopia, serious crimes, core crimes, international criminal law

1. Background

The political confrontations and rivalry during the Dergue Regime resulted in bloodshed. The nation lost a large number of citizens including the elite community that Ethiopia hugely invested in aspiration for modernization.[1] With the view to redress the violations and the injustice perpetrated during the 17 years of Dergue rule, the EPRDF-led government worked to bring suspects of heinous crime to justice. Colonel Mengistu Hailemariam and his colleagues were prosecuted for the widespread human right abuses, including extra judicial killings, and genocide against political groups.[2] The EPRDF Government rendered unprecedented focus in prosecuting its arc enemies that

*LL.B., LL.M., Senior Legal Officer, Ethiopian Broadcasting Corporation (EBC). The author can be reached at: hiwiwudu16@gmail.com

[1] Girmachew Alemu, 'Apology and Trials: The Case of the Red Terror Trials in Ethiopia', *Journal of African Human Rights* (2006), p. 66.

[2] Yalemfikir Girma, 'Collective Criminal Responsibility of the Dergue Members in the case of *special prosecutor v. Colonel Mengistu Hailemariam et* al', AAU archives (2010), p. 2.

fought for seventeen years by setting up a special prosecutorial office (SPO) that could investigate and prosecute perpetrators of heinous crimes.[3] The SPO's establishment Proclamation empowered the Special Prosecutor to prosecute Dergue Officials for violations that the Ethiopians suffered during the Dergue reign.[4]

After two years of investigation, the SPO filed its first criminal charge of the Red Terror in 1994 at the then Central High Court which was later renamed as the Federal High Court.[5] The criminal charge was filed against 106 *Dergue* officials including, Colonel Mengistu Hailemariam. Twenty-one of the suspects were tried in absentia that included the former president of the nation (Mengistu Hailemariam), the last Prime Minister of Dergue Regime (Birhanu Bayeh), and the then Minister of Foreign Affairs (Haddis Tedla).[6] Ultimately, fifty-two defendants, including Haddis Tedla and Birhanu Bayeh were found guilty for all the crimes charged. They were convicted for violation of core crimes, viz, public provocation and preparation to commit genocide, the commission of genocide, unlawful detention and abuse of power.[7] The Federal High Court imposed rigorous life imprisonment by majority vote.[8] However, the SPO appealed against this judgment to the Federal Supreme Court, which sentenced capital punishment on 18 defendants, including Birhanu Bayeh and Haddis Tedla in absentia.[9]

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[3] Special Prosecutor's Office Establishment Proclamation No. 22 of 1992, Art. 6.

[4] *Id*. Art. 7.

[5] *SPO V. Colonel Mengistu Hailemariam et al*, Federal High Court of Ethiopia, criminal charge as amended on November 28, 1995 and December 2, 2002, criminal File No 1/87(07458) (1995).

[6] *Id*.

[7] *Id*. p, 122 – 274.

[8] *Colonel Mengistu Hailemariam case* (2006), supra n 6, Verdict, 12 Dec 2006.

[9] Birhanu Bayeh and Haddis Tedla had been sheltered in the Italian Embassy, Addis Ababa. The government of Ethiopia requested Italian authorities to hand over the officials for prosecution, but the Italian authorities refused arguing that Ethiopia might apply capital punishment that was outlawed in Ethiopia. *Appellant-public prosecutor v. Respondent – Colonel Mengistu Hailemariam et al*, Federal Supreme Court of Ethiopia, Judgment. File No. 30181, (2008).

After sheltering in the Italian embassy for about 30 years, in December 2020, the capital punishment of Berhanu Baye and Haddis Tedila was commuted to life imprisonment.[10] After approval of the reduced punishment by the Head State of the country, on 23 December 2020, the Federal High Court declared a parole release judgment of the two former officials – Berhanu Bayeh and Haddis Tedla.[11] Following the release of the convictees, it was noticeable that there was huge public discourse and legal debate for and against the release. It is pretty clear that victims of the infamous Red Terror campaign and their loved ones denied the legitimacy of the move. The legal community questioned the legality of parole on the point that the convictees were not confined in jail. It is debatable whether spending life in a well-furnished and luxury compound was really imprisonment. As provided under the law, the Prison Administration can recommend commutation on the basis of visible changes of the behaviors of inmates in the prison. To recommend, therefore, the subjects should be within the administration of the jail managers. The recommendation is a basic requirement to commute sentences. Further, staying in the Embassy is not included among the definition of prison under the federal legislation. Moreover, sheltering in escape is beyond the common sense of defining jail. The non-fulfillment of the requirement of commutation and parole appears to make the release of Berhanu Baye and Haddis Tedla outside of the contours of the law. Therefore, it is cogent to explore the nature, rationale and effects of parole under Ethiopian criminal justice and international fora.

2. Parole: Conceptual Underpinning and Rationale

Convicted inmates have the privilege of being released before the expiry of the maximum term of imprisonment through parole. Parole is regarded as a means of reformation and social reinstatement.[12] It is one of the mechanisms of managing the penalty of offenders so that the

[10] *Colonel Mengistu Hailemariam et al* (2020), supra n 6, Certificate of Pardon of Haddis Tedla and Birhanu Bayeh of 16 December 2020.
[11] *Colonel Mengistu Hailemariam et al*, Federal High Court of Ethiopia, Parole Judgment of 23 December 2020, criminal File No 1/87(07458). p.1.
[12] Crim. Code of Federal Democratic Republic of Ethiopia Proc. No. 414, Art. 201.

purposes of criminal law are served. Defining an exact meaning of the term 'parole' is not easy as it may seem. But it is generally viewed as early release from confinement. The word parole is derived from the French word '*parol*' which means 'word of honor'.[13] The practice of allowing prisoners to be released from prison before serving full sentence dates back to 18th century[14] and the word parole was associated with the release of prisoners giving their word of honor to abide by certain restrictions. In spite of several attempts of scholars to define parole, it is not easy to give a single and all-inclusive connotation to the concept. Even if it is difficult to have a single definition, it is indisputable that parole is a conditional release of prisoners by courts before the inmates complete a full sentence.

In the modern criminal justice system, the doctrine of early release of prisoners originated in the practice of the international criminal tribunals, ICTY and ICTR.[15] When these modern *ad hoc* tribunals were established, the concept of early release gained a systematic character.[16]

The Statute of the International Criminal Tribunal for the former Yugoslavia, which was established for the prosecution of persons responsible for serious violations of international law committed in the territory of former Yugoslavia, provide how a convicted person gets a pardon or commutation of a sentence as follows:

> If pursuant to the applicable law of the state in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the state concerned shall

[13] The Law Office of Greg Tsioros, *The History of Parole*, (2018), https://txparolelaw.com/history-of-parole/.
[14] Thomas J. Bernard, 'Parole', *Britannica online Encyclopedia*.
[15] Jonathan H. Choi. 'Early Release in International Criminal Law,' *The Y. J. L.* Vol. 123 No.6, (2014), p.1784.
[16] *Id*. The tribunals were setup by the United Nations Security Council to prosecute atrocities in former Yugoslavia and Rwanda respectively.

> notify the International Tribunal accordingly. The President of the international tribunal, in consultation with the judges, shall decide on the matter on the basis of the interests of justice and the general principles of law.[17]

The Statute of the International Tribunal for Rwanda, which was established for the prosecution of persons responsible for the genocide committed in the territory of Rwanda,[18] inhibits nearly identical rules.[19]

Both ICTY and ICTR Statutes declare convicted person's eligibility for pardon and commutation of sentence, but it did not prescribe conditions for eligibility. Consequently, the United Nations Security Council (UNSC) adopted general standards and procedures for granting pardon or commutation.[20] The ICTR explicitly adopted the ICTY rules and procedures for granting pardon or commutation.[21] The rules declare that the President must take in to account the gravity of the crime for which the prisoner was convicted, the treatment of similarly situated prisoners, the prisoner's demonstration of rehabilitation and substantial cooperation with the prosecutor, while determining the decision of early release.[22] Procedurally, the rules first require the state of imprisonment or the enforcing state to notify the president about the prisoner's eligibility for pardon or commutation.[23] After receiving the notice, the president should consult members of the Bureau and the permanent Judges of the sentencing chamber who remain the Judges of the tribunal, whether the prisoner is eligible for early release or not.[24]

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[17] Statute of the International Criminal Tribunal for Yugoslavia, (1993), Art. 28.
[18] Statute of the International Criminal Tribunal for Rwanda (1994), Art. 27.
[19] *Id*.
[20] ICTY Rules (1994), *UN. Doc*.IT/32/Rev.7, Part 9.
[21] *Id.* Rule. 14.
[22] *Id.* Rule 125.
[23] *Id*. Rule 123.
[24] *Id*. Rule 124.

The Special Court of Sierra Leone (SCSL) has also set out the requirements for pardon and commutation that are totally identical with the provisions of the earlier *ad hoc* tribunals, ICTY and ICTR.[25] SCSL also mirrored the requirements for pardon and commutation from the rules of procedure and evidence of ICTR, and additionally allowed the Judges to adopt additional rules. The statute provides:

> […] Judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone. [26]

The international criminal tribunals were setup by the United Nations Security Council for the prosecution of persons responsible for the commission of a crime in a specified place and specified time.

In accordance with the Statute of International Criminal Court (The Rome Statute) only the Court can determine pardon or reduction of sentence.[27] The conditions and procedures for review of sentence express that the Court can review sentence after the convicted person served two-thirds of the sentence or after 25 years of imprisonment in the case of life sentence.[28] In determining pardon or reduction of the sentence, the Court will consider the behavior of the convicted person. Remorse or other form of character change or cooperation during the investigation, prosecution, and enforcement process are some of the factors that can possibly prove a clear and significant change as provided

[25] Statute of the Special Court for Sierra Leone (2002). Art 23.
[26] *Id*. Art. 14(2).
[27] Rome Statute of the International Criminal Court (1998), https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf. (Last visited on 03 June 2022).
[28] *Id*. Art. 110(3).

in the rules of procedure and evidences are vital in making the decision.[29]

Parole is not a right that can be granted automatically after serving a determined period in jail. Character change of a convicted person is one of the vital requirements. The convicted person should be rehabilitated. Before releasing the convicted person with the view to integrate him into society the Court should be sure that the convicted person has shown change during the correction process. Therefore, the competent authority with the power to grant parole shall determine an observable behavior and to ensure the safety of the public.[30] In addition to the general criteria provided under Article 110 of the Rome Statute,[31] the Rules of Procedures ad Evidence requires the Appeal Chambers to take into account the following criteria so as to make a positive determination on the conditional release:

> (a) the conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; (b) the prospect of the re-socialization and successful resettlement of the sentenced person; (c)whether the early release of the sentenced person would give rise to significant social instability; (d) any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; (e)individual circumstances of the sentenced person, including a

[29] *Id*. Art. 110(4).
[30] UN General Assembly Resolution 45/110 of 14 December 1990. Art. 12.
[31] The statute clearly states that "When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time." See Article 110 (3) of the Rome Statute.

> worsening state of physical or mental health or advanced age. [32]

When the convicted person served two-thirds of the sentence or 25 years in case of life imprisonment, the hearing shall be conducted in participation of the sentenced person. The judges shall invite the prosecutor, the state of enforcement of any penalty - the state where the convicted person has been serving the sentence and the victims or their representatives to participate in the hearing or submit written observations[33] "After hearing the three Judges of the Appeal Chamber who had conducted the hearing, shall communicate the decision and accompanying justification to all who took part in the review proceeding as soon as possible."[34] If the "reduction of sentence is denied, the sentenced person has a right to apply for review after three years, or in exceptional circumstances the Judges can permit the person to apply before lapse of the three years."[35]

2.1. Regulation of Parole under Ethiopian Law

The FDRE Criminal Code does not use the term 'parole'. Instead, the Code employs the expression, conditional release.[36] In Ethiopia, anticipatory conditional release may be awarded where a convicted inmate has served two-thirds of the sentence of imprisonment or 20 years in case of life imprisonment.[37] A parole, therefore, is a conditional release from prison granted prior to the expiration of a sentence. Parole, as a rule, can be granted for good conduct that the parolee shows during

[32] *Id*. Rule 223.
[33] *Id*. Rule 224(1).
[34] *Id*. Rule 224(2).
[35] *Id*. Rule 224(4).
[36] In Ethiopia parole is permitted in accordance with Arts. 201-207 of the Crim. Code.
[37] *Id*. Art. 202(1).

the prison period. It is believed that the rationale behind parole aligns with the purposes of criminal law. In this regard, the Criminal Code succinctly states that: "Conditional release must be regarded as a means of reform and social reinstatement. It must be deserved by the criminal to whom it is applied and must be awarded only in cases where it affords a reasonable chance of success."[38] From this it is clear that the purpose of conditional release is to rehabilitate convicted criminals and increases community safety by providing prisoners with a structured, supported and supervised transition so that they can adjust from prison back into the community, rather than returning straight to the community at the end of their sentence without any form of follow up.

In Ethiopia parole can be initiated in two ways: by the prison administration or by the inmate.[39] Prison administration can request parole when a prisoner behaves in line with the accepted mores, is believed to be commendable after release, has settled all payments required under Court decision, and has already served two-third of the term of his sentence or served 20 years of life imprisonment sentence, and has positive inclination towards life.[40] The Federal Prison Administration has set up a parole committee consisting of a chairperson and four members who are mandated to assess the behavior of inmates who are candidate for parole.[41] The committee after scrutinizing the inmate's eligibility for parole makes recommendation to chief administrator of the prison for approval. Upon endorsement of the chief administrator of the prison, the recommendation is submitted to the

[38] Crim. Code of Ethiopia, *supra* note 12. Art. 201.
[39] The Codes provides that "Where a prisoner has served two-thirds of a sentence of imprisonment or twenty years in case of life imprisonment, the Court may, on the recommendation of the management of the institution or on the petition of the criminal, order conditional release" Article 202 (1) of the Criminal Code.
[40] Federal Prison Regulation No. 138 of 2007. Art. 46.
[41] *Id*. Art. 47(1).

appropriate Court for the final decision.[42]After receiving the petition for parole approved by the chief administrator of the prison the Court awards conditional release (parole). [43]

The first step in the parole process is the determination of prisoner's eligibility.[44] As pointed out above, an inmate is eligible for petition to parole after serving two-thirds of a sentence of imprisonment or 20 years in case of life imprisonment.[45] According to Federal Prison Proclamation No.1174/2019 a prisoner is "a convicted prisoner serving a sentence term."[46] It also defines prison as "a publicly known Federal correctional institution where sentenced prisoners serve their terms, are reformed and rehabilitated; and includes custodial places for prisoners held on remand."[47]

After the prisoner has served the requisite period of time in the prison, the Court may, on recommendation of the institution or by the petition of the prisoner, order conditional release if the prerequisites listed under Article 202(1) (a-c)[48] are satisfied. In determining the possibility of parole, the behavior of the convicted person is vital. The way he/she interacts with prison administration or fellow prisoners proves how he would act after release. The Prison Administration assesses the behavior of the inmates from several sources and recommends to the final authority who can petition to court. The other condition is whether the candidate for parole has repaired the damage he/she made.[49]Finally, the Court should believe the fact that the candidate for parole should warrant the fact the inmate will be of good conduct when released and the

[42] *Id*. Art. 47(2).
[43] Crim. Code of Ethiopia, *supra* note 12. Art. 202(1).
[44] Bernard, *supra* note 16.
[45] Crim. Code of Ethiopia, *supra* note 12. Art. 202 (1).
[46] The Ethiopian Federal Prison Proclamation No. 1174 of 2019. Art. 2(8).
[47] *Id*. Art. 2(5).
[48] *Id.*
[49] *Id.* Art. 2021(b).

measures will be effective.[50] The court will ascertain whether the inmate was recidivist. If an inmate is a recidivist, fulfillment of the requirements of current or future behavior cannot be determinative.[51]

3. Exploring the Legality of Parole Granted to Former Dergue Officials in Light of the Ethiopian Law and International Norms

As highlighted in Section One of this work, following the fall of *Dergue* regime, numerous former officials were prosecuted for multiple crimes that were executed under the general nomenclature of "Red Terror."[52] The trial was popularly captioned as Red Terror Prosecution and the charges covered those crimes that were perpetrated from 1975 to 1991. The former officials were charged for international crimes. For instance, in the Mengistu and others case the accused were charged with 209 counts.[53] The two *Dergue* officials, Birhanu Bayeh and Haddis Tedla, were among the officials who were charged with 209 counts *in absentia*.[54] The Special Prosecutor Office before filing the charge in 1994, requested the Italian Embassy in Addis Ababa to surrender, the fugitives but was not successful. The Embassy denied the request asserting that surrender was contrary to Italy's international commitments that the suspects would risk their lives.[55] Consequently, the suspects were tried in *absentia*.

The Federal High Court convicted Birhanu Bayeh and Haddis Tedla on the eleven the charges laid against them—first second, third, and fourth

[50] *Id.* Art. 2021(c).
[51] *Id*. Art. 202(2).
[52] Yalemfikir, *supra*, note 2. p. 113.
[53] *Colonel Mengistu Hailemariam et al v. SPO*, *supra* note 5.
[54] Before Addis Ababa fall under the control of TPLF and its allies, a number of Dergue officials fled the country and some like Birhanu Bayeh and Addis Tedla sought refuge in the Italian Embassy, Addis Ababa.
[55] *Colonel Mengistu Hailemariam et al v. SPO*, *supra* note 5. p.162 and 249.

charges. Specifically, the convictees were found guilty of public incitement to commit genocide, genocide, unlawful arrest and abuse of power.[56] The Court then sentenced the convictees to rigorous life imprisonment, including Birhanu Bayeh and Haddis Tedla by a majority vote.[57] However, the SPO appealed against the sentence to the Federal Supreme Court, which passed capital punishment on many *Dergue* officials including Haddis Tedla and Birhanu Bayeh on the ground that they were members of the Permanent Committee of the *Dergue* that had planned and ordered the execution of Red Terror and commission of heinous crimes that perished thousands of lives.[58]

The Italian Embassy continued the denial to surrender the convictees after the judgment and sentence.[59] This helped the convictees to avoid the enforcement or execution of the sentence passed against them for 30 years. Following the 2010 political change and release of numerous convictees on pardon/amnesty, the convictees who were sheltering at the Italian Embassy petitioned to the Italian Ambassador to try pardon akin to other convictees that were being released from the federal correctional institutions. Ambassador Arturo Luzzi, accredited Ambassador of the Republic of Italy in Ethiopia at the time, formally requested the Ethiopian Government to set the two convictees free on the ground of pardon.[60] Ambassador Luzzi formally requested the Federal Attorney General (now renamed as Ministry of Justice) for a positive solution describing the situations of the two convictees as a state of the

[56] *Id.*
[57] *Id*. p.771-776.
[58] *Id*.
[59] *Id*. p.250.
[60] A letter dated December 8, 2020 that was written by Birhanu Bayeh and Haddis Tedla reads:

> "We would like to express our sincere gratitude to your Excellency, the Italian embassy and the Italian government for granting us asylum and protection for the last thirty years. Considering that Prime Minister Dr. Abiy Ahmed has, on more them one occasion, made positive statements regarding our case, we request your Excellency to intercede with the Ethiopian government on our behalf so that we would regain our freedom in the shortest possible time."

deprivation of liberty for about 30 years.[61] Then the Attorney General tabled a motion of commutation of the death penalty of Berhanu Bayeh and Haddis Tedla to life imprisonment. After six days, President Sahlework Zewde accepted the recommendation and commuted the death penalty to life imprisonment.[62] Despite the fact that the two convictees were not formally jailed, the Ministry of Justice reported commutation to the Federal Prison Commission.[63] The Addis Ababa Prison Administration requested the then President of Federal High Court to give a solution for the case of the two individuals.[64] The convictees were not prisoners in line with the FDRE Federal Prison Proclamation.[65] In accordance with the Proclamation, a prison is a building designed by law, or used by the police, or by court order for confinement.[66] Normally, therefore, a prison is a publicly known correctional institution in which inmates serve their terms, are reformed and rehabilitated; and include custodial places for prisoners held on remand.[67] The main objective of the Federal Prison Commission is to ensure prisoners are returned to the community rehabilitated and ethically sound, abiding, peaceful and productive citizens.[68] For a

[61] *Id*. The letter evidences, how the self-confinement was began. It states how the Dergue officials "[…] entered the embassy of Italy in May 1991 and for almost 30 years they have been living in a situation of deprivation of liberty. They have never left the premises of the embassy of Italy and are assisted by their respective families for everyday needs."

[62] *Colonel Mengistu Hailemariam et al* (2020), certificate of commencement of death penalty to life imprisonment of Haddis Tedla and Birhanu Bayeh, letter No. 247/2020, on 16 Dec 2020.

[63] A letter wrote by FDRE Attorney General (Now Ministry of Justice) to Federal Prison Commission, 17 Dec 2020, Ref No A/G/1390.

[64] A letter wrote by Federal Prison Commission to Federal High Court President, 17 December 2020, Ref No PA/387/3/13.

[65] Federal Prison Proclamation, *supra* note 46, Art. 2(8).

[66] Black's Law Dictionary 2nd ed.

[67] Federal Prison Proclamation, *supra* note 46. Art. 2(5).

[68] *Id*. Art. 32/4/.

prisoner who is rehabilitated and is with good behavior, the prison commission provides special benefits like petition for parole.[69]

However, the Addis Ababa Prison Administration, High Security Prison Administration No.2 without rationalizing whether it has the power to request parole on behalf of non-inmates requested the Federal High Court immediately after initiation by the Ministry of Justice. The request by the Prison Administration indicated that it petitioned on behalf of persons refugeed in the Italian Embassy but not under their control, and supervision. The letter written by the Prison Administration stated that the Administration had no objection if parole is granted. It is pretty clear that the request of the Prison Administration is not a recommendation for parole -- rather it is a simple expression that the Prison Administration had no objection should parole be granted. [70]

After receiving the request for commutation that included the opinion of the prison administration, the Federal High Court, passed a decision to grant parole by majority and one dissenting decision.[71] In granting the request, the Court considered the second formal request of the Italian Ambassador to Ethiopia that was directed to the Attorney

[69] *Id*. Art. 67.

[70] Addis Ababa Prison Administration High Security Prison Administration No.2. Letter to FHC President. 18 Dec 2020. The Amharic letter reads as: ሻለቃ አዲስ ተድላ እና ሻለቃ ብርሃኑ ባየህ በከፍተኛ ጥበቃ ማረሚያ ቤት ታስረው የማያውቁ እና የማሰሪያ ዋራንታቸውም ያልደረሰን ሲሆን ነገር ግን ከኢፌዲሪ ጠቅላይ ዓቃቤ ህግ በተፃፈ ደብዳቤ በደብዳቤ ቁጥር ጠ/ዐ/ህግ/4390 በቀን 08/04/2013 ከጣሊያን ኤምባሲ በደብዳቤ ቁጥር 2198 በቀን 01/04/2013 ለኢፌዲሪ ጠቅላይ ዓ.ህግ በተፃፈ ደብዳቤ ከግንቦት 1983 ጀምሮ ለ30 አመታት ከጣሊያን ኤምባሲ ቅጥር ግቢ እንዳልወጡ በአማርኛ የተተረጎመው የደብዳቤው ኮፒ ያትታል። በመሆኑም የኢፌዲሪ ፕሬዝዳንት ከሞት ፍርድ ወደ እድሜ ልክ እስራት የቀየሩላቸው መሆኑና የኢፌዲሪ ጠቅላይ ዓቃቤ ህግ ለፌደራል ማረሚያ ኮሚሽን በደብዳቤ ቁጥር ጠ/ዓ/ህ/ማ/4390 በቀን 08/04/2013 ከሞት ፍርድ ወደ እድሜ ልክ እስራት የተቀየረላቸው መሆኑና የጣሊያን ኤምባሲም ለ30 ዓመታት ቅጥር ግቢው ውስጥ በጥበቃ ስር የነበሩ መሆኑን የገለፁልን ስለሆነ እና የእድሜ ልክ እስረኛ ለአመክሮ መታሰር ያለበት 20 ዓመት ስለሆነ በእኛ በኩል በአመክሮ ቢፈቱ ተቃውሞ የሌለን መሆኑን ለተከበረው ፍርድ ቤት በማክበር እንገልፃለን።

[71] The two Judges (Birhanemeskel Waqqari and Gidelew Ginbeto) dissented from the majority view. For details see *Colonel Mengistu Hailemariam et al, supra* note 13. p. 7.

General. The Court examined the authoritative provisions of the FDRE Constitution and other relevant laws involving the constitutional right to life, fair trial, the right of accused and arrested persons by defining imprisonment and rigorous imprisonment. The Court did not use the Criminal Code of Ethiopia because the Code does consider the commutation of convictees who did not serve prison terms—those who have not gone through the formal execution, rehabilitation and reform system. So the Court chose to apply the laws of pardon by the executive organ for parole. The following excerpt from the parole decision of the Court strengthens the view that the Pardon of Berhanu Bayeh and Addis Tedla was not legally justified. It states:

> The convicted persons were found guilty in this Court but the sentence was not executed, nor the convictees were in a prison. The Court found that the premise of the Embassy was not a prison. So the Court decided that the two convicted persons have not passed through the normal processes of execution, rehabilitation and reform system.[72]

The Court found that there was no law to regulate commutation or parole to convictees sheltered outside regular jail. Consequently, the Court had no option other than construction of the provision of the current regulatory framework on pardon and using it by extension to parole. The Court attempted to keep the aspiration of the executive organ by resorting to the liberal interpretation of Article 3 of the Proclamation No. 840/2014.[73] The Court extended the scope of the

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[72] *Id.* p. 3. The dissenting opinion expressed: "ፍርደኞቹ በዚሁ ፍርድ ቤት ፍርድ የተሰጣቸው ቢሆንም ወትሮ ፍርድ ቤት የሚሰጠውን ፍርድ የሚያስፈፅም የአስፈፃሚው አካልም ሆነ ማረሚያ ቤት ያልገቡ መሆኑ የተረጋገጠ ሲሆን የኤምባሲ ቅጥር ግቢ ደግሞ ማረሚያ ቤት አለመሆኑን ፍርድ ቤቱ ተገንዝቧል። በመሆኑም በተለመደው የህግ ማስፈፀም እና የማረም እንዲሁም የማነፅ ስርዓት ውስጥ ያላለፉ ፍርደኞች ጉዳይ ሆኖ አግኝተነዋል።"

[73] *Id.*

Proclamation by considering confinement in restricted vicinity, the age of the two convictees, and the 30 years confinement in the Embassy compound.[74] The whole process that the Court went through appeared searching for a leeway to keep the wishes of the executive organ in releasing the convictees even if the move was contrary to the dictates of the law. The Court unconvincingly summed that confinement in the luxurious Embassy campus was equivalent to serving in a regular jail as follows:

> Life imprisonment or rigorous imprisonment is considered from the point of view of former convicts, regardless of whether Addis Ababa Prison itself imprisoned them or not; Whether it is a regular prison or not, the inmates have been deprived of their freedom or restrictions or prohibitions for years and were under strict control, restricting their freedom of movement and taking strict precautionary measures taken by other institutions. It is imprisonment.[75]

Detention has a broad meaning under criminal case, but such expansive interpretation and the conclusion of the court is questionable and apparently influenced by the long arms of the executive organ. It is true that the convictees were not absolutely free to get out of the Embassy compound and roam in Addis Ababa as free citizens, nonetheless, their situation was incomparable to someone in Ethiopia's prison system; at least the two convictees within the compound, they could entertain

[74] *Id*. p.4.

[75] The majority decision is based on analogy of equivalence of selfconfinement and jail. In the words of the Court, "የእድሜ ልክ ፅኑ እስራት ወይንም ፅኑ እስራት በራሱ ከቀድሞ ፍርደኞች አንፃር ሲታይ አዲስ አበባ ማረሚያ ቤት እራሱ ቢያስራቸውም ሆነ ባያስራቸውም፤ የተለመደው መደበኛ ማረሚያ ቤት ቢሆኑም ባይሆኑም ለፍርደኞቹ ነፃነት ማጣት ወይም ገደብ ወይም ክልከላ ለአመታት የነበረባቸው እና ጥብቅ ቁጥጥር ያለበት ሁኔታ የመንቀሳቀስ ነፃነትን ገድቦ መቆየትና ሌሎች ተቋማት የሚወስዷቸውን ጥብቅ የጥንቃቄ እርምጃዎች የሚያስወስዱ መሆኑ በተያዘው ጉዳይ ተከሳሾቹ/ፍርደኞቹ በጣሊያን ኤምባሲ በተገለፀው መሰረት መቆየታቸው በራሱ ከውጤት አንፃር ሲታይ ያው ነው። እስራት ነው።" *Id*. p.4.

freely. It was the convictees that determine how to spend their time in the Embassy. Such a minimum restriction characterizes refugees even if they were abroad. The Ethiopian law enforcement was unable to apprehend them and enforce the judgment of the court of law. The convictees were fugitive of justice in complete disregard of the request of the SPO and the legal system. Is the confinement in one place without freedom of movement for a longer period considered as serving rigorous imprisonment?

Surprisingly, the Court summed that even if the two individuals were not under the control and supervision of the prison administration, the prison administration could recommend parole release.[76] The English translation of parole judgment states:

> The Addis Ababa prison can execute the sentence when executive organs, police and public prosecutor arrest and transfer the convict to the prison with its arrest order. Even if this had not happened in the case of the two Dergue officials, it's the duty of the prison to petition for parole and give recommendation for parole, for defendants eligible for parole.[77]

One may fairly question whether the Prison Administration that had no clue about the convictees behavioral characterization could be obligated to submit an unrealistic recommendation. The remarks of the Court and executive organ underpin the inference that if there was no petition for parole or the prisoner is not eligible for parole, he/she has the right to be released after serving 25 years of confinement.[78] Consequently, the Court summed that the convictees refugeeing in the Italian embassy for about 30 years can be paroled as per Ethiopian

[76] *Id.*
[77] *Id*. p.6.
[78] *Id* p.6.

law.[79] Ultimately, the Court by taking into account the age of the defendants, their right to life and movement, in flagrant contradiction to the spirit and conditions stated under the law, ordered the release of the two defendants from the Italian Embassy by granting parole by majority vote.[80]

The dissenting judge convincingly argued against the parole of the convictees. The dissenting judge argued that the convictees did not serve their sentence in prison; but they were under self-confinement as refugees at the Italian Embassy. They were convicted by the same Court but never served their sentence in prison. A loosely translated Amharic version of the dissenting opinion reads:

> According to the United Nations Convention on Refugees of 1951and the African Union Conventions of 1966, persons who have been granted refugee protection have the basic rights to freedom of movement and protection, access to justice, the right to move, etc. The reason for the loss of these rights is not specified or confirmed. The fact that the individuals were staying in the Italian embassy or taking refuge could not be deprived of the rights that inmates are deprived of during confinement.[81]

The dissenting Judge, after defining what constitute a prison and prisoner, expounded the goals of incarcerating a convictee in the purposely constructed prison and also elaborated the conditions and procedures that were required for the parole process under Ethiopian laws.[82] The judge opined that releasing the two convictees who were tried in absentia could not serve the purposes of criminal law and not

[79] *Id*.
[80] *Id*. p.7.
[81] Google translation with slight modification of dissenting opinion of opinion Judge Samuel Tadesse. *Id.* p.8.
[82] *Id*. p.9-10.

legally justified. The judge further remarked that the convictees had been sheltering in the Italian embassy, which was not a legally established prison. The dissenting judge viewed that the convictees did not pass through a formal rehabilitation and reformation processe that was required by law. The convictees were not prisoners in the real sense of the term and their behavioral change was not assessed in line with the accepted norms and practices that were considered key precondition for candidacy to parole. Therefore, the dissenting judge concluded that granting parole to the refugees who were in hideouts was contrary to the clear terms of the law.[83]

The other ground for dissent was the fact that the trial was conducted in absentia on account of convictees avoidance of law enforcement. The police and prison administration had been looking for convictees to apprehend them and make them defend the case that was filed against them, but the whole attempt was unsuccessful due to the refugee status at the Embassy. Accordingly, the dissenting Judge argued that without execution of Court sentence, decision, and compliance with the requirements of law, assuming confinement in the hideout as a jail is contrary to the rules and purposes of parole. To force a court of law to comply with the direction of political actors was against the doctrine of against independence of the judiciary.[84] The dissenting judge concluded that the convictees without serving their sentence in prison cannot be released on parole.[85]

[83] In the words of the dissenting judge: "ተከሳሾች ግን በኤምባሲ የተጠለሉ እንጂ በህግ በተቋቋመ ማ/ቤት ያልገቡና የማነውም ሆነ የግንባታ ስራ ያልተሰራባቸው በጥቅሉ ታራሚዎች ባለመሆናቸው እንደዚሁም ፀባያቸው በማ/ቤቱ ተገምግሞ አመክሮ ያልተሰራላቸው በመሆኑ ህግን መሰረት ያደረገና የተከተለ በአመክሮ መፈታት ነው ብቤ አላምንም።" *Id.* p.10.

[84] *Id.*

[85] *Id.*p.11.

4. Legal and Procedural Requirements

Granting parole necessarily requires verification of the fulfillment of a strict legal and the procedural prerequisites. Before the Head of State declares parole, the Board is expected to scrutinize fulfillment of the requirements of parole. The Board, which is accountable to the FDRE President, examines petition and submits recommendation to the President, then if the petition and recommendation are acceptable, the President gives final a decision.[86] The Ministry of Justice, by the initiation of convicted persons, or other mandated organs or by its own initiation can petition to the Board.[87]

As pardon has the effect of full release of an inmate from detention or commutation of sentence, [88] the fulfillment of legal and procedural requirements is pivotal for the legitimacy of parole or commutation of sentence.[89] If an inmate is sentenced to the death penalty, before release on parole, the death penalty sentence should be commuted to life imprisonment.[90] The FDRE Constitution confers the President with the power of commuting death sentence to life imprisonment. Since pardon and commutation are acts of the executive mandate, the sentence passed to punish the convictees was in line with the dictates of the law. The most prominent among the procedural and legal requirements is positive recommendation of prison administration. As pointed out above, prison managers periodically record behavioral changes and inmate's way of life in the correctional centers. Needless to say, inmates should be objectively corrected in line with the requirements and purposes of parole or commutation of sentence.[91] Plausibly, an inmate to be paroled

[86] The Procedure of Granting and Executing Pardon Proclamation 840 of 2014, Art. 21(3).
[87] *Id*. Art. 15(4).
[88] *Id.*
[89] *Id*. Art. 16.
[90] FDRE Constitution, The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1 of 1995, *Fed. Neg. Gaz. Y. 1, No. 1* (Aug. 1995), Art. 28(2).
[91] Proc. No. 840/2014, *supra* note 86. Art .15(4).

should be sufficiently rehabilitated. Releasing a person with a criminal mentality to the community is not only dangerous but also hoodwinks law enforcement and respect for the law. Finally, if parole or commutation of sentence is granted, this fact should be communicated to the Prison Administration through a certificate of parole or commutation.

One of the purposes of parole is to encourage inmates to act in a good manner and in rehabilitation. The prison administration uses the possibility for parole or commutation of sentence as a mechanism for peaceful administration of inmates in the prison. The possibility of parole, supposedly, motivates inmates to behave in accordance with accepted norms and show respect to law and law enforcement agents. Thus, the conviction *in absentia* and the failure to respect terms of the sentence deprives the convictees from the possibility of enjoying parole. In the case at hand the two individuals were away from custody. Consequently, the Prison Administration initially refused to grant any form of recommendation but later, supposedly, by the insistence of the executive organ the Prison Administration expressed that it did not object parole. As the dissenting judge opined, a no-objection to parole cannot be taken as a recommendation.

The Criminal Code of Ethiopia provides the power to grant parole to Courts. Courts acts in accordance with the petition submitted by the Prison Administration. When the director of the Prison recommends for release of an inmate and the inmate agrees petition to be submitted on his/her behalf, the director of Prison Administration submits petition to the Court with the recommendation revealing behavioral change and rehabilitation the candidate to be released on parole to the Court.[92]

[92] Criminal Code of Ethiopia. *supra* note 12. Art. 202/1/ and 203/2.

Regarding parole of Berhanu Baye and Haddis Tedla, the Federal High Court, expressed that the judgment was based on the letter written by the Addis Ababa Prisons Administration. As repeatedly pointed out an opinion is different from a recommendation. As parole is simply a privilege which cannot be invoked as a right, the Court was required to explore the fulfillment of critical pre-conditions. The pre-conditions should be carefully scrutinized. One of the critical conditions for consideration was serving a specified portion of prison sentence. There was no proof that Berhanu Bayeh and Haddis Tedla were jailed. No doubt, the convictees were sheltered in the Italian Embassy, Addis Ababa for fear of prosecution and execution of judgment. The letter written by the Italian Ambassador did not reveal that the convictees were jailed nor they served a portion of the sentence as required by law. The amnesty request written by the Italian Ambassador that was presented to the Court revealed that the convictees were refugees sheltered in the Embassy getting the privileges of refugees. They did not lose a certain portion of rights as inmates normally do.[93]

The second criterion for granting parole is showing tangible proof of behavioral change.[94] One of the objectives of the Federal Prison Commission is to offer psychological, academic and vocational trainings to prisoners so that they are ethically and attitudinally rehabilitated which will in turn help in ensuring that they are law abiding, peaceful and productive citizens.[95] To be successful in the correction and rehabilitation of the prisoner, the prison offers psychological assistance through individual, group and peer confidential consultation services. This supports prisoners to develop social life skills.[96] Also with a view to ensure that prisoners join society as ethically

[93] *Id*.
[94] Crim. Code of Ethiopia, *supra* note 12. Art. 202(1).
[95] Federal Prison Proclamation, *supra* note 46, Art .6.
[96] *Id*. Art. 42.

rehabilitated, productive and capable citizens, the prison organizes educational or special training programs for each prisoner that are relevant for his life.[97] The Prison Administration with the aim of rehabilitation of the prisoners organize them in association and engage them in developmental activities and make inculcate them as productive citizens by developing working and saving culture.[98]

After offering all the necessary correctional and rehabilitation measures, if a prisoner is believed to be commendable after his/her release, has a positive inclination towards social life and behave well during his imprisonment,[99] the prison commission requests parole for the prisoner. Under the Prison Administration there is a manual that is meant for behavioral assessment for parole. The manual declares the requirements that should be met to release an inmate in parole. Birhanu Bayeh and Haddis Tedla passed none of the pre-determined correctional and rehabilitation standards because they were not prisoners jailed in the correctional house. And also there is no evidence of their rehabilitation or correction during their stay in the Embassy. The only written evidence that was furnished to the Court was that the obvious fact: the fact that the convictees stayed in the Embassy for about 30 years by getting their day to day needs. Since the two officials did not pass the mandatory requirements of rehabilitation and correction process, the prison could not give proof of behavioral assessment. In this scenario the parole judgment was itself incomplete.

The third criterion to be eligible for parole is, the prisoner has to show remorse and is required to repair the damage he made to the victims or victim's family as far as he could.[100] The entire period of *Dergue* was characterized by serious human right violations; these constituted state

[97] *Id*. Art. 43.
[98] *Id*. Art. 44.
[99] Federal Prisoners Proclamation *supra* note 46, Art. 46.
[100] Crim. Code of Ethiopia, *supra* note 12. Art. 202/1/.

sponsored terror in the form of sexual abuse, summary executions, arbitrary arrest and detentions, disappearances, torture and unlawful dispossession of property and forced settlement.[101] In relation to the two *Dergue* officials there was no attempt made to apologize to victims and victim's families for what they did while they were in power. Even when they applied for consideration of their stay in the embassy, there was no issue of acceptance of past mistakes done knowingly or unknowingly and no remorse on the side of the perpetrators.

Even if the law says showing remorse and compensation of victims is one criterion, in practice no regard is given. The prison administration and the Courts only focus on the execution of the sentence as required under the law and the rehabilitation and behavioral change of the prisoner as basic conditions for parole.

In a nutshell, the parole granted to the former *Dergue* officials did not fulfill any of the requirements provided under the law. The international instruments, statutes of *ad hoc* tribunals, ICTY, ICTR, ICSL and statute of ICC provide that pardon and commutation of a sentence including parole are granted as a privilege for a prisoner who is serving his prison term and proved that the prisoner is rehabilitated. Under the domestic legislations also to talk about early release of the prisoner, first of all, the convicted person must be under the custody of authorized organ to enforce the sentence imposed.

5. Conclusion

The two former Dergue officials that were convicted for crimes against heinous international crimes were sentenced to the death penalty in *absentia* in 2008 and never visited publicly managed jail to serve the sentence. Since 1991 they refugeed in the Italian Embassy compound in Addis Ababa for nearly 30 years. However, the Federal High Court

[101] Girmachew, *supra* note 1. P. 67.

granted them parole by considering their confinement in the Italian Embassy for 30 years as deprivation of liberty and consequently considered that as serving rigorous imprisonment. The parole judgment was the first of its kind that was applied on convictees who never served their sentence in a formally established prison. As parole by definition is early release of prisoners after serving a portion of sentence, the case at hand failed to meet the requirements of the law. It can be legally granted only if an inmate sheltered in a publicly managed jail in which prison administration can prove visible change of behavior. Contrary to the expectation of the law, the two Dergue official were paroled in consideration of political interests in utter disregard of the express provisions of the law. Needless to say, the very elementary condition of parole, viz. serving two-thirds of the sentence imposed or 20 years in case of life imprisonment, as required by law was not met. Generally, the parole granted to the two former *Dergue* officials was not compatible with the conditions provided under international instruments and domestic laws. This simply appears a mockery of justice, promotion of impunity, and a clear violation of the duty to provide effective remedies for victims of crimes.