

# JOINDER OF CRIMINAL AND CIVIL PROCEEDINGS

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Civil liability consists in one's duty to repair the material and/or moral damage suffered by another person in consequence of an event for which one is answerable (Art. 2028 Civil Code). This event may or may not be in the form of a criminal offence, but if it is in such a form, then a civil liability may be incurred together with a criminal liability. Indeed, the principle as stated in Art. 2035 Civil Code is that a person is civilly liable where he infringes a specific and explicit legal provision and thereby causes damage to another.

Both types of liability differ in nature and raise different questions which are normally settled by different courts, for the objects of criminal and civil proceedings are not identical nor are the justification, purposes and effects of criminal penalties and civil remedies. However, owing to the fact that both types of liability originate from one and the same unlawful behaviour, it may in some cases be expedient to allow a joinder of criminal and civil proceedings so that the criminal and civil aspects of the case be decided by one and the same court. A court trying a criminal offence may thus decide on the civil liability of the convicted person. But the reverse is not possible and a court trying a civil claim, such as a claim for maintenance, would have no jurisdiction to sentence the defendant to a criminal punishment even where it should consider that he has committed an offence contrary to Art. 625 Penal Code.

This joinder of proceedings, which is now expressly provided for by Art. 100 Penal Code and Arts. 154-159 Criminal Procedure Code, is not a novelty in Ethiopian law; it could occur under the 1930 Penal Code already, many provisions of which empowered the court trying a criminal case to order that the convicted person pay damages to the injured party (e. g. Arts. 273, 296-299). What is new, however, is the generality with which the principle of joinder is now formulated. Moreover, the conditions under which a claim for compensation may be heard by a criminal court and the effects of a joinder of criminal and civil proceedings are regulated today with greater precision than they were in the past.

## I - CONDITION

Art. 100 Penal Code lays down that "where an offence has caused considerable damage . . . ,<sup>(1)</sup> the injured party or the persons having rights from

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1. The word "considerable" should have been omitted for it may lead one to think, wrongly, that a joinder of proceedings may not be allowed where an offence has caused little damage.

him shall be entitled to claim that the offender be ordered to make good the damage or to make restitution<sup>(2)</sup> or to pay damages by way of compensation . . . . For the purpose of establishing his or their claim, the injured person or the persons having rights from him may be joined as parties in the criminal proceedings. The conditions, form and manner of such joinder shall be governed by the provisions of the Criminal Procedure Code, which provisions are Arts. 154-159.

1. According to Art. 154 (3) Criminal Procedure Code, (3) an order for joinder may be made whether the prosecution in the proceedings is public or private. However, such an order may not be made by a criminal court of its own motion; and written application for joinder must always be submitted by the injured party at the opening of the hearing (Art. 154 (1) )<sup>(4)</sup> in the court of first instance <sup>(5)</sup>.

Whereas a joinder or proceedings is not permissible except on specific conditions, the application for joinder must contain particulars so as to enable the court to decide whether such conditions are fulfilled. In this respect, Art. 154 merely provides that the applicant will state: (a) the nature of the relief sought, *i. e.* restitution or damages or both; (b) where appropriate, the amount of compensation claimed;<sup>(6)</sup> and (c) the witnesses to be called in support of the civil claim, if he considers that witnesses other than those called by the prosecution and defence need be summoned to testify on the question of compensation.<sup>(7)</sup> These requirements seem incomplete, and an application for joinder

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2. It may be noted that restitution of property may sometimes be ordered by a criminal court of its own motion even though a joinder of proceedings has not been applied for (Arts. 99 (2) and 144 (2) Penal Code).
  3. Unless otherwise indicated, all Code references will be to the Criminal Procedure Code.
  4. This would seem to mean that the application is made after the identity of the accused has been established (Art. 128) and before the charge is read out (Art. 129). In fact, it ought to be made after the settlement of preliminary objections and before the recording of the accused person's plea. For the accused may be acquitted or discharged following the settlement of such objections, and there is no point in making an application unless and until it is known whether the criminal proceedings will be continued.
  5. Although this is not specified by law, the context in which Arts. 154—159 appear would tend to indicate that an application for joinder, if made at all, must be made to the court of first instance and may not be made for the first time on appeal.
  6. Where the injured party claims compensation for material and moral injury, the amount claimed on each ground should be stated separately.
  7. An applicant who at the same time acts as private prosecutor must specify which witnesses he calls in support of the prosecution and which he calls in support of the civil claim, so that witnesses do not appear and give evidence for a purpose different from that for which they have been summoned. On the other hand, where, in public proceedings, the injured party does not wish to call additional witnesses, he must specify by which of the prosecution or defence witnesses he proposes to prove his claim.

should actually contain such particulars as would appear in a statement of claim if the action were tried by a civil court. Particulars as to the relief sought and the witnesses to be called are necessary in view of the provisions of Art. 155 (1) (e) and (2). But further particulars are necessary in view of the provisions of Art. 155 (1), (c), (d) and (f). Failing such, the court will not be in a position to decide whether the application may be granted. Therefore, the applicant should also specify *e. g.* the facts showing that the defendant is liable to be called upon to answer the claim,<sup>(8)</sup> the legal provisions under which the claim is brought, the documents, if any, which will be put in evidence, and the like, so as to enable the accused to prepare his defence on the question of compensation, should the application be allowed.

2. The court will then consider the application and will reject it of its own motion or on the request of the prosecutor or the accused where there exists any reason for rejecting the same under Art. 155 (1) or (2). In this respect, the following observations may be made:

a) Art. 155 (1) (a) and (b) states that the application must be dismissed where the court:

(i) is trying a young person, *i. e.* (Art. 3) a person between nine and fifteen years of age. The purpose of this prohibition is not clear. Assuming that the parents or persons *in loco parentis* (Arts. 2124 and 2125 Civil Code) are jointly liable with the minor, there seems to be no good reason why the injured party should be precluded from joining in the proceedings since he may sue any of the persons declared by law to be liable, including the minor himself. On the other hand, if Art. 155 (1) (a) were intended to avoid that the trial of the offence be delayed by the formalities which a joinder would render necessary (appointment of guardian for the suit), then it should have provided for the dismissal of the application, not merely where the accused has not attained criminal majority (15 years), but whenever he has not attained civil majority (18 years); or

(ii) is trying the accused in his absence. Again the reasons for this restriction, which is rather uncommon, are not apparent since the claim, if it

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8. Indeed, the claim may have to be brought against another person than the one who caused damage by an offence. Thus, where a driver is charged with an offence of negligent homicide and he is not the owner of the car he was driving at the time of the offence, compensation must as a rule be claimed, not from the driver, but from the owner of such car (who is liable "in the absence of an offence" committed by himself, Art. 2081 Civil Code).

were filed in a civil court, could be tried notwithstanding that the defendant should fail to appear.<sup>(9)</sup>

It might have been better to prescribe that an application for joinder may be made in neither case, for there is no point in filing and considering an application which must be dismissed. In practice, an injured party indicating his intention to require a joinder in such cases should forthwith be referred to a civil court without his having to make a written application for joinder or to be shown the list of witnesses, since these formalities would serve no purpose in the particular instance.

b) The application will also be dismissed where the civil claim is pending in a civil court or the applicant is not qualified to sue. In the first case, the dismissal is based on the rule *electa una via, non datur recursus ad alteram*: the injured party may at his option claim compensation in a civil or a criminal court, but if he has elected to sue in either of such courts, he may not subsequently sue in the other.<sup>(10)</sup> As for dismissal by reason of want of qualifications, this would have to be ordered if the injured party were suing in a civil instead of a criminal court.<sup>(11)</sup>

c) Any dismissal ordered under Art. 155 (1) (e) or (f) on the ground that the hearing of the civil claim would complicate or delay the hearing of the criminal case can be explained by referring to the general principle laid down in Art. 100 (3) Penal Code, according to which "in cases of a complicated nature or where the circumstances of the case make it expedient so to do, particularly where an inquiry has to be held in connection with the offence or where it is necessary to have the report of experts, the court sitting in criminal

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9. This restriction presumably also entails that an application for joinder must be dismissed if it is made in a case where the court is trying a petty offence, since in such a case the accused need not appear (Art. 168) or may be tried notwithstanding that he fails to appear (Art. 170 (4) l).

10. However, the choice thus made is not necessarily final. On the one hand, the injured party who has been allowed to join in criminal proceedings may at any time before judgment withdraw his claim and file it in a civil court (Art. 157). On the other hand, foreign precedents would show that a person who filed a claim in a civil court may withdraw it and join in criminal proceedings where the civil court had no jurisdiction or the claim was filed therewith in ignorance of the fact that the cause of action arose from a criminal offence. May it also be noted that the court may not of its own motion dismiss an application on the ground of pendency; pendency has to be pleaded by the parties, as it would have to be if the claim were tried by a civil court.

11. Doubts have sometimes arisen as to which persons exactly can be deemed to be injured parties or persons having rights from such parties. In France, for instance, it was held that the person to whom the victim of the offence assigns his claim may not apply for a joinder since, properly speaking, the cause of action then arises from a contract, and not from an offence (Court of Cassation, February 25, 1897). Such a situation could not occur in Ethiopia (see Art. 2146 (1) Civil Code).

court may remit the case for decision by the civil court."<sup>12</sup> Inasmuch as a joinder of proceedings may be allowed where it is convenient for the purpose of justice, it follows that it may not be granted where it is inexpedient.

d) So too, the application will be dismissed where the amount of compensation claimed in such as to fall outside the pecuniary jurisdiction which the court trying the offence would have if it sat as a civil court. Thus, where in the case of an offence contrary to Art. 539 Penal Code (common wilful injury, triable by a Woreda court) the injured party claims 1000 dollars compensation, a joinder of proceedings may not be allowed for a Woreda court has jurisdiction to hear such civil cases only where the amount involved does not exceed 100 dollars.

In all such cases, the court is obliged by law to reject the application. There are but two questions in respect to which the court has some discretion: (a) are the witnesses to be called in support of the civil claim too numerous; and (b) will the hearing of the civil case complicate or delay the hearing of the criminal case? Where either question is answered in the affirmative, the application must be dismissed.

3. One may wonder whether an application may be dismissed on other grounds than those mentioned in Art. 155 and, more specifically, whether the accused may raise such preliminary objections as a defendant would be entitled to raise if the claim were tried by a civil court. This question, which is not expressly dealt with in the law, can be answered as follows.

A defendant may apply for the dismissal of a claim on the ground that it has previously been tried or settled by compromise; that it is pending in another court; that the other party is not qualified to sue or, where appropriate, has not obtained prior permission to sue; that the claim is to be settled by arbitration. What would be the effect of any such objection (other than an objection based on pendency or lack of qualifications to sue, covered by Art. 155 (1) (c) and (d) ) being raised at the time when a joinder of proceedings is applied for?

a) An application for joinder will be dismissed where the subject matter of the claim is *res judicata*. If, prior to the institution of the criminal proceedings, a decision has been given on the question of compensation, the injured party may not take advantage of the institution of such proceedings in order to cause the said decision to be revised. This is true whether the claim has

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12. Under the Criminal Procedure Code, the dismissal is then compulsory, and not optional as it is under the Penal Code.

been decided by a court or the parties have compromised on the amount of damages (Art. 3312 (1) Civil Code). However, if the Civil Procedure Code should adopt the rule *le criminel tient le civil en état*, it would then be unlikely that a judicial decision would be previously given whereas, if a civil claim should arise from a criminal offence, the civil proceedings would have to be suspended until the completion of the criminal proceedings.

b) where the accused objects to the joinder on the ground that the civil claim is barred by limitation, the objection will be overruled in accordance with Art. 2143 (2) Civil Code: a civil claim arising from a criminal offence is not barred so long as the criminal proceedings in respect of such offence are not barred.

c) Where the accused declares that the court has no local jurisdiction, the objection will again be overruled: as the injured party is given the choice of suing in a civil or a criminal court, his choice may not be questioned on the ground that, had the claim been filed in a civil court, it would have been tried in a different area of jurisdiction.<sup>13</sup> If, on the other hand, the accused pleads to the material jurisdiction of the court, two situations may occur. Where he alleges that, by reason of its *amount*, the claim is triable by another court, the provisions of Art. 155 (2) will apply. Where he alleges that, by reason of its *nature*, the claim is triable by another court, no joinder may be allowed if the objection is well-founded.<sup>14</sup> One will remember that a court which has not material jurisdiction must decline to hear the case and need not wait for an objection to be raised on this point.

d) With regard to the want of prior permission to sue, it will be recollected that the Civil Code in some cases, especially in cases of filiation, makes the institution of proceedings conditional upon a permission given to this effect by the court. However, these cases are quite different from those in relation to which a joinder may be applied for, since the purpose of requesting the said permission is not to be allowed to claim compensation.

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13. The cases where the accused may wish to raise such an objection are likely to be few, for both areas of jurisdiction ordinarily coincide. A criminal offence is normally triable at the place where it was committed. Similarly, a claim for the compensation of the damage caused by an unlawful act is normally triable at the place where such act was performed (although there is at present no specific legal provision to this effect).

14. This may occur where, under the law, the civil claim comes within the exclusive jurisdiction of a given court, different from that which is trying the offence. For instance, it might be provided that all cases involving the civil liability of public servants for offences committed in the discharge of their official duties are triable by the High Court. Such a provision would have the effect of prohibiting a joinder of proceedings whenever the criminal offence giving rise to liability is not also triable by the High Court (and few of them are so triable under the First Schedule to the Criminal Procedure Code).

e) Finally, the accused may allege that the claim is to be settled by arbitration and any such allegation will, for all practical purposes, amount to an objection to the jurisdiction of the court. In this respect, some attention will be paid to the provisions of Art. 2148 Civil Code, under which the parties may, after damage has been caused, agree on the conditions under which it will be made good. If the terms of the agreement are that the question of compensation will be settled by arbitrators and the injured party does not abide by this agreement, the accused may demand the specific performance thereof under Art. 3344 Civil Code, and an application for joinder may thus not be entertained in such a case.

4. Any decision whereby a criminal court dismisses an application for joinder of proceedings is final in that no appeal lies from it (Art. 155 (3)). The prohibition against appealing is quite natural, not because it may appear useless to challenge a decision which the court has under the law the duty to make, but because such decision does not have the effect of depriving the injured party of his right to sue and in no way prejudices the decision which will ultimately be given on the question of compensation. In other words, the dismissal merely results in debarring the injured party from the exercise of his general right to select the court in which he will claim compensation. The door to criminal proceedings having been closed upon the dismissal of the application for joinder, the door to civil proceedings naturally remains open and the injured party is entitled to file his claim in a civil court. As pointed out before, the Civil Procedure Code might prescribe that the civil court to which the claim is so referred may not decide thereon except after the completion of the criminal proceedings in which the claimant was not allowed to participate, and it is worth while remembering in this connection that, under Art. 2149 Civil Code, a civil court which is called upon to decide whether a civil liability has been incurred is not bound by an acquittal or discharge ordered by a criminal court.

## II - EFFECTS

When his application for joinder is allowed, the injured party will participate in the proceedings in the capacity of plaintiff with the same rights, and for that matter the same duties, as an ordinary party, *i. e.* as the prosecutor and the accused (Art. 156 (1)). This principle entails, for instance, that the injured party will in appropriate cases receive a copy of the charge in accordance with Art. 109 (4); that any witness he wishes to call in support of his claim, if not a witness for the prosecution or the defence, will be summoned pursuant to Art. 124; that, if any such witness fails to appear, the

injured party will be entitled to apply for an adjournment under Art. 94 (2) (b); that the injured party may not put leading questions to a witness except on the conditions laid down in Art. 137 nor say, prior to conviction, anything that may allow the court to know of the accused person's antecedents (Art. 138). On the other hand, the accused will have the same rights as a defendant in a civil case and may, for instance, apply for an adjournment on the ground that he requires time to prepare his defence on the question of compensation or that he must call witnesses to give evidence on such question.

But the effects of a joinder extend much further since, under the mentioned principle, the injured party has the rights of an ordinary party "with regard to evidence," too. Unfortunately, the implications of this general rule are not stated with sufficient precision, and the plaintiff is thus given rights without being told exactly how he should exercise them. This might in a number of cases result in defeating the purposes of Art. 100 Penal Code: being left in doubt as to what will happen if they grant an application for joinder and as to the part which the plaintiff will play in the proceedings, the criminal courts, for fear of confusion, might be tempted to dismiss any such application without even considering it.

The injured party's position is indeed clearly described by two provisions only, namely Art. 142 (1), which prescribes that evidence for the injured party is taken when the case for the prosecution is concluded, and Art. 156 (2), which authorizes the plaintiff to address the court on the question of compensation at the close of the case for the defence. A court might well consider that these indications are not such as to enable it to know how to enforce the rule that the plaintiff's rights with regard to evidence are the same as those of an ordinary party. The Criminal Procedure Code being incomplete, the court might be inclined to seek clarification in foreign laws which also provide for joinder of proceedings. Such laws, however, would be found to be of little assistance. In England, for instance, although "at common law the remedies for civil injuries and crimes cannot be enforced together ( . . . ) in a few cases the court which tries an indictable offence is authorised by statute to award compensation to persons injured by it."<sup>(15)</sup> But no real joinder of proceedings occurs, for the injured party is merely entitled to claim compensation after conviction and does, therefore, play no part in the criminal proceedings.<sup>(16)</sup> In France, on the other hand, there are fewer difficulties as regards

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15. Archbold, *Criminal Pleading, Evidence and Practice*, 32nd ed., p. 281.

16. The system prevailing in England (see also Criminal Procedure Codes of India, Art. 545; Sudan, Art. 311; Malaysia, Art. 431; South Africa, Art. 363) should, logically speaking, have been adopted in Ethiopia too, inasmuch as a criminal court may not adjudicate the question of compensation unless the accused is convicted (Art. 158).



the plaintiff's right in connection with evidence, since the procedure of examination-in-chief, cross-examination and re-examination does not exist as such, and above all since the injured party is entitled to speak in support of the prosecution.<sup>(17)</sup>

It may thus be said that the system laid down in the Ethiopian Criminal Procedure Code is, to a large extent, unprecedented, and it follows that the difficulties which may be encountered in applying it must be solved having regard both to the general principles which the said Code contains and to the purposes which the procedure of joinder aims at achieving. Bearing in mind that such procedure is intended to expedite decisions on matters of civil liability arising from an offence and results in the injured party being permitted to participate in criminal proceedings *with a view solely to claiming compensation*, any case where an application for joinder has been granted ought to be dealt with in the following manner:

1. After the charge has been read out and the plea of the accused recorded (Art. 132), the prosecutor, if a plea of not guilty has been entered or the accused has not been convicted forthwith upon his pleading guilty (Art. 133, and 134), will open his case and call his witnesses whom he will examine-in-chief and whom he may, after they have been cross-examined by the accused, re-examine on points raised in cross-examination (Art. 136 and 139). If any witness for the prosecution has been designated by the injured party, on his being shown the list of witnesses (Art. 154 (2), as susceptible of giving evidence on the civil case, such witness, after giving evidence on the criminal case in the manner provided by Art. 136, will give evidence on the civil case before new witnesses are called. But one may also proceed differently and allow the plaintiff to put questions to a witness for the prosecution before the latter is cross-examined on his statements touching the criminal case, and the cross-examination will then relate to statements made on points involving the criminal as well as the civil liability of the accused.

Either method is acceptable, and the court is at liberty to adopt whichever course it deems more convenient in the circumstances, since nothing in the law compels it to proceed in one rather than in the other way. All that may be said is that the second method might have the effect of confusing the issues. It might also be regarded as inconsistent with Art. 142 (if the latter were to be interpreted strictly), under which the injured party plays his part after the case for the prosecution is concluded, for it might then be contended that the

<sup>17</sup> See *e. g.* Code d'instruction criminelle, Art. 335: "A la suite des dépositions des témoins . . . , la partie civile ou son conseil et le procureur général seront entendus et développeront les moyens qui appuient l'accusation."

evidence of a witness for the prosecution is not concluded except after he has been cross-examined and, where necessary, re-examined on his statements regarding the criminal case.

Whatever the time at which a witness for the prosecution gives evidence in support of the claim, such evidence will be taken as though it were given in a civil case, without interference by the prosecutor. The witness will thus be examined-in-chief by the plaintiff (the injured party), cross-examined by the defendant (the accused) and may be re-examined by the plaintiff. The accused may object to the putting of a question to a witness testifying as to the civil claim on the ground that it is irrelevant, and the objection will be disposed of in accordance with Art. 146.<sup>(18)</sup> The provisions of Art. 147 regarding the recording of evidence will apply to evidence given on the question of compensation.

2. After the witnesses for the prosecution have been heard, and whether or not they have been examined on the question, of compensation, the injured party will produce his own evidence, if any, on the civil claim, and call such witnesses as may have been summoned to appear at his request. However, it must be remembered that this will not occur where the court considers under Art. 141 that there is no case for the prosecution and that the accused need not enter upon his defence. For the court must in such a case acquit the accused and, as has been mentioned before, no judgment may be given on the civil liability of the accused unless he be convicted (Art. 158). Therefore, it is only when the court is of the opinion that there is a case for the accused to answer that the injured party will be called on to produce evidence or additional evidence, as the case may be, on the civil claim. Such evidence will be taken in the manner described above, *i.e.*, the witnesses will be examined-in-chief by the plaintiff, cross-examined by the accused and, where appropriate, re-examined by the plaintiff.

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18. This may occur in particular where the injured party does not restrict his questions to points showing that the accused is liable to pay compensation. Indeed, injured parties sometimes tend to act as assistant-prosecutors and to produce evidence such as to show that the accused is guilty. Any such evidence, if adduced, by the plaintiff, is naturally inadmissible inasmuch as he then endeavours to act outside the scope of the order having granted the application for joinder. True enough, it may in many cases be difficult to draw the line between what is admissible and what is not, since the injured party may want to prove *e.g.*, that the defendant acted intentionally, this being of particular importance where compensation for moral injury is claimed (Art. 2106 Civil Code). But one must recall that, however poorly the prosecution is conducted, the injured party has no right to remedy the mistakes made by the prosecutor and actually has no justification for doing so whereas, if the accused is acquitted or discharged in consequence of such mistakes, this does not prejudice the decision that may be made on the question of compensation by the civil court to which the claim will have to be referred (Art 2149 Civil Code).

3. When the case for the injured party is concluded, the case for the defence will open and the accused will call his witnesses who will give evidence on the criminal case as provided by Art. 142 (2) and (3). Such witnesses for the defence as may also have been called by the injured party in support of the civil claim will, on completing their statements on the criminal case, be examined-in-chief on the claim by the plaintiff, cross-examined by the defendant and, if need be, re-examined by the plaintiff. On the other hand, where the accused has called witnesses for the purpose of testifying on the question of civil liability, such witnesses will be heard after the taking of the evidence for the defence on the criminal case and will be examined-in-chief by the accused, cross-examined by the injured party and may be re-examined by the accused.

4. The injured party may then, in accordance with Art. 156 (2), address the court on the question of compensation, explaining why he considers the civil liability of the accused to have been established and why he regards himself as being entitled to the amount of compensation he claims. Under the law, this address is made "at the close of case for the defence" and the accused has the right to reply. Does it mean that the injured party addresses the court after the taking of the evidence for the defence or after the accused has made his final speech as provided by Art. 148 (2) ? The latter solution is presumably the correct one (see also Art. 149 (1) ). Indeed, if the addresses were made in a different order, there would hardly be any need to prescribe that the accused may reply on the question of compensation, since he could do so while making his final speech. At this stage, therefore, it seems that the ordinary sequence (prosecutor-injured party-accused) is replaced by a different sequence (final speech of prosecutor-final speech of accused-address of plaintiff-reply of accused) with a view to avoiding a confusion of issues.

5 Most of the above explanations, which apply in public proceedings where evidence is produced, hold good in private prosecutions or in proceedings where no evidence for the prosecution or defence is produced.

a) In a private prosecution where the injured party does not act as private prosecutor, the civil case will be dealt with in the same manner as in public proceedings. On the other hand, where the plaintiff also conducts the prosecution, he will first call his witnesses on the criminal case and then his witnesses on the civil case: provided that, where the former can also testify on the claim, they will be heard in connection therewith after having been cross-examined and re-examined on their statements regarding the criminal case.<sup>(19)</sup>

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19. One will bear in mind that all the indications given with regard to the order in which evidence is produced are without prejudice to the general remark made hereinbefore concerning the court's power to decide otherwise for purposes of convenience.

b) As pointed out before where the accused pleads guilty, he may be convicted on his plea without evidence having to be produced either by the prosecutor or the defence, unless the court otherwise directs.<sup>(20)</sup> This, of course, is not to prejudice the rights of the injured party. Consequently, he will open his case before the prosecutor addresses the court on sentence in accordance with Art. 149 (3). If the plaintiff intended some of the witnesses who would have given evidence for the prosecution or the defence, had the accused not been convicted forthwith, to testify on the civil claim, such witnesses will be heard in the ordinary manner, the only difference being that evidence on the claim will then be taken after and not before conviction. The injured party also retains the right to address the court on the question of civil liability - and the accused is then entitled to reply - notwithstanding that no final speeches have been made by the prosecutor and the accused under Art. 148.

### III - JUDGMENT

1. After the prosecutor and the accused have made their final speech, if any, and the injured party has addressed the court on his claim, judgment will be given (Art. 149 (1) ), and the sentence will be passed upon the submissions on sentence that have been made (Art. 149 (5) ).<sup>(22)</sup> As mentioned before, the court may not adjudicate the civil claim unless the accused is found guilty (Art. 158) and the plaintiff will have to institute fresh proceedings in a civil court if the accused is not convicted.<sup>(22)</sup> Where the court considers that the injured party has proved his case, its judgment will contain: (a) as regards the criminal case, the particulars required by Art. 149, and (b) as regards the civil case, the particulars required by Art. 159.<sup>(23)</sup>

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20. However, evidence as to the character and antecedents of the accused may non-the-less be produced after conviction (Art. 149 (3) and (4) ).

21. This is without prejudice to the above-mentioned case where, the accused being convicted his plea of guilty, the plaintiff does not address the court before the conviction provided for by Art. 149 (1), but after conviction and before sentence.

22. It is doubtful whether Art. 2143 (2) Civil Code (limitation of actions based on criminal offences) may still be invoked in cases of acquittal since one can then no longer properly speak of a claim arising from a criminal offence. The French Court of Cassation, however, ruled (June 14, 1941) that, notwithstanding the acquittal, the civil claim remains subject to the period of limitation prescribed for the offence in respect to which the order of acquittal was recorded.

23. Art. 159 is incomplete, as a judgment whereby a criminal court also decides on a civil claim should contain with regard to such claim all the particulars it would contain if it had been given by a civil court (the reasons for the court's decision, the provisions of the law under which the decision is made, and the like).

a) The powers of the criminal court are restricted to the question of compensation only, and the court may not decide on any other civil consequences that may flow from a criminal offence.<sup>(24)</sup> For instance, on convicting the accused of rape, the court may not, where the victim of the offence alleges to be or to have been made pregnant as a result thereof, declare under Art. 758 Civil Code that the convicted person is the father of the child thus conceived. Similarly, where in an adultery case evidence is produced which would tend to show that the injured party cannot be the father of a child, the court may not grant such party the permission to institute an action to disown provided by Art. 782 Civil Code.

b) The court may grant compensation for such damage only as results from the offence. For example, where an offence of homicide by negligence has also caused damage to property, compensation may be awarded for loss of life only, and not for damage to property; indeed, any such damage, if caused by negligence, does not give rise to a criminal liability, as indicated by Art. 653 Penal Code, which only penalizes damages intentionally caused. There being then no civil liability arising from a criminal offence, the general conditions set out in Art. 100 Penal Code so that a criminal court may award compensation are, therefore, not fulfilled.<sup>(25)</sup>

c) In granting compensation, the court will have regard to such rules as are laid down in the Civil Code regarding the assessment or payment of compensation. For instance, where compensation is claimed by the relatives of a person who died in consequence of the offence, the court may not order the payment of a lump sum and is bound to order the payment of an alimony (Art. 2095 (2) Civil Code). Where compensation is claimed for moral injury, the amount of compensation awarded may not exceed 1000 dollars (Art. 2116 (3) Civil Code).

d) Where the injured party succeeds in his claim, the accused will have to pay such court fees and costs as would be payable if the claim had been tried by a civil court (Art. 159 and 222), but where the injured party fails in his claim, he will be liable for such payment, and the costs will include the

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24. This actually is a general principle which applies even where no joinder has been requested or allowed. Thus, on finding the accused irresponsible, a criminal court may not interdict him under Art. 351 Civil Code. Whether some exceptions may be made to this principle, as regards in particular orders for abatement of nuisance, is debatable.

25. On the other hand, in cases of combined offences within the meaning of Art. 63 Penal Code, where an intentional offence of damage to property has resulted in the unforeseen, albeit foreseeable, death of a human being, compensation may be granted for damage to property as well as loss of life.

costs incurred by the accused in his capacity as defendant. No mention is made of how court fees (which are not payable on the filing of the application for joinder – Art. 154 (1) – but only after judgment has been given on the claim – Art. 159 (1) (c) and costs are paid where the claim is dismissed in consequence of the accused being acquitted or discharged; one might consider that they ought then to be paid by the injured party, subject to partial or total reimbursement by the accused where the plaintiff succeeds in his claim after filing the same in a civil court.

e) Where judgment is given on both the criminal case and question of compensation, the injured party who does not also act as private prosecutor may not appeal against conviction or sentence.<sup>(26)</sup> All he may do is to appeal against the court's refusal to grant compensation (Art. 186 (1)) or, where compensation has been granted, against the amount awarded (Art. 186 (3)), the appeal being in the latter case subject to the conditions laid down in Art. 2153 Civil Code. As for the accused, he may, without appealing against conviction or sentence, appeal against the court's decision to grant compensation or, on the same conditions as the injured party, against the amount of compensation awarded (Art. 186 (2)). Any appeal on the question of compensation will follow the appeal against conviction or sentence<sup>(27)</sup> or, where no appeal is made on the criminal aspect of the case or it is withdrawn, will be lodged with the civil court having appellate jurisdiction (Art. 186 (4)). When an appeal regarding compensation is heard by a criminal court, the principle that compensation may not be awarded unless the accused is convicted remains naturally applicable. This entails that, where the accused appeals against conviction and sentence and an appeal is also made on the question of compensation, and the court of appeal acquits the accused, it will dismiss the appeal regarding compensation,

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26. If, in public proceedings taken on an offence punishable on complaint, the public prosecutor refuses to appeal, he may not give the injured party a certificate authorizing him so to appeal. Art. 44 (1) only applies in cases of refusal to prosecute, and not at a later state. If public proceedings have been instituted, the decision to appeal or not lies with the public prosecutor exclusively. Furthermore, Art. 185 makes it clear that an appeal touching the criminal side of the case may only be made by those who are interested in, or affected by, the decision given thereon, *i. e.*, the prosecutor and the accused; the injured party who does not act as private prosecutor is concerned but with the civil side of the case and his right to appeal is dealt with under a distinct provision, namely Art 186.

27. The decision of the court of first instance to allow a joinder binds the appellate court, and the latter may not refuse to accept an appeal on the question of compensation on the ground that the hearing of the appeal regarding the civil side of the case would delay or complicate the hearing of the appeal against conviction or sentence.

which appeal will then have to be lodged in the civil court having appellate jurisdiction from the court which on the civil claim made the decision against which the appeal is preferred.<sup>(28)</sup>

f) To the extent that it adjudicates a civil claim and, for that matter, court fees and costs, the judgment given by the criminal court is to be executed as though it had been given by a civil court (Art. 210) This applies insofar only as the convicted person is capable of paying the amount of compensation awarded. In other cases, the rules laid down in Art. 101 Penal Code should apply and compensation (but not court fees and costs) should, if the injured party so requires, be paid out of the proceeds of the sale of confiscated articles, sums deposited as sureties or paid by way of fines, and the like.<sup>(29)</sup> On the making of such a request, the court ought to order an inquiry into the convicted person's resources, similar to the inquiry made in cases where legal aid is applied for, and should not direct that compensation be paid as provided by Art. 101 Penal Code unless it is satisfied from the results of the inquiry that the convicted person is a pauper. If the request is granted, the State will be subrogated to the plaintiff's rights as against the judgment-debtor (Art. 101 (3) Penal Code).

2. These are the main problems that may arise in connection with a joinder of criminal and civil proceedings. However, other difficulties, though of lesser importance, may be encountered as regards in particular the trial of a civil claim in cases of discontinuance (on grounds other than those dealt with hereinbefore) of the criminal proceedings in which the injured party had been allowed to join. These difficulties may present themselves in cases of death of the accused or granting of an amnesty, but can easily be solved by applying the general principles governing joinder.

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28. A peculiar situation may arise where the accused is acquitted upon an appeal taken against conviction and sentence only, and not against compensation. Should then the appellate court quash the decision on the civil claim, though the parties are apparently satisfied with it, on the ground that Art. 158 prohibits a criminal court from awarding compensation unless the accused is convicted? The answer probably is in the negative. Firstly, a court of appeal may not, as a rule, adjudicate points not submitted for decision. Secondly, Art. 158 merely prohibits the court trying the offence *and* the claim from granting compensation where the accused is acquitted or discharged. An acquittal and the payment of compensation may, therefore, not be ordered by one and the same court. But nothing in the law permits saying that a judgment on a civil claim against which no appeal is made should not remain where the accused is acquitted by another court than the one which gave the said judgment.

29. The principle set out in Art. 101 Penal Code already existed in Art. 18 of the Preface of the 1930 Penal Code. It is doubtful whether it can be enforced in the absence of further subsidiary legislation.

a) Where an accused person dies prior to conviction, the right to prosecute lapses; as provided by Art. 223 Penal Code, the proceedings may not be continued and a sentence may not be passed.<sup>(30)</sup> However, civil proceedings may be continued against the heirs of the accused (Art. 2144 (3) Civil Code), and one may wonder whether the criminal court in which the claim had been filed may decide thereon. Unlike in France, where the answer is in the affirmative (Court of Cassation, March 7, 1936), the answer in Ethiopia is definitely in the negative; whereas a criminal court may not adjudicate a question of compensation unless the accused is convicted, it is automatically deprived of its civil jurisdiction in cases of joinder where the accused dies before having been found guilty. But the civil claim then remains subject to the period of limitation prescribed for the offence in respect to which criminal proceedings have to be discontinued, for one cannot say that such a claim does not arise from a criminal offence.

b) Where a law of amnesty is passed, it "discontinues any prosecution from the moment of its promulgation" (Art. 240 (2) Penal Code). The solution is then the same as in cases of death. However, since an amnesty "cancels the indictment" (*Ibid.*) and has, therefore, the effect that the act in respect to which criminal proceedings had been instituted is deemed never to have been unlawful, it follows that any civil claim based on such act can no longer be said to have its source in a criminal offence, and this entails that such claim is no longer subject by virtue of Art. 2143 (2) Civil Code to the periods of limitation laid down by penal laws; it is subject to the ordinary limitation period prescribed by Art. 2143 (1) Civil Code. As for an amnesty voted, or pardon granted, after conviction, this will not affect "civil reparation and the payment of damages to injured persons" (Art. 241 (1) Penal Code).

The system of joinder of proceedings, which in Ethiopia like in many other countries has historical justifications, is of unquestionable advantage to those who have been injured by criminal offences. However, in applying the pertinent provisions of the Criminal Procedure Code, one will remember that, as has been said by a French jurist, "il s'agira avant tout d'assurer la prépondérance de l'intérêt général sur les intérêts privés en cause".

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30. On the other hand, if the injured party dies, the civil proceedings may be continued by his heirs (Art. 2144 (1) Civil Code), unless the right to sue does not survive him (Art. 2144 (2) Civil Code).