Contextual Legal Analysis of Terrorism Prosecutions Involving Journalists and Politicians in Ethiopia

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Acronyms and abbreviations

ATP	Anti-Terrorism proclamation (Ethiopia)
Cr. App. No.	Criminal Appeal No
Cr. F. No.	Criminal File No
Cr. Pro. C.	Criminal Procedure Code of Ethiopia (1961)
Cr. Code	Criminal Code of Ethiopia (2004)
CTC	Counter terrorism Committee
EPRDF	Ethiopian People's Revolutionary Democratic Front
ESAT	Ethiopian Satellite Television
FDRE	Federal Democratic Republic of Ethiopia
F.H. Ct.	Federal High Court of Ethiopia
F. Sup. Ct	Federal Supreme Court of Ethiopia
Ginbot 7	Ginbot 7 Movement for Freedom and Democracy
ICCPR	International Convention on Civil and Political Rights
IGAD	the Inter Government Authority for Development
OLF	the Oromo National Liberation Front
ONLF	the Ogden National Liberation Front
R 1-17	Respondent Pseudonym
UDJ	Unity for Democracy and Justice Party
UNSC	United Nations Security Council

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Abstract

In 2009, Ethiopia passed its Anti-Terrorism Proclamation (ATP) citing Security Council Resolution 1373, the increasing terrorism threat, and inadequacy of existing laws as justifications. Counterterrorism prosecutions involving journalists and the opposition have increased following the promulgation of the ATP. This has prompted criticism against the Ethiopian government of misusing the ATP to stifle dissent. The government dismisses the criticism as lacking solid evidence and being based only on a superficial knowledge of the prosecutions. This thesis examines whether or not the prosecution of journalists and opposition politicians is attributable to their proven involvement in terrorism. Both doctrinal and empirical research methods have been used to address this issue.

The first two chapters provide background information in light of which both the promulgation of the ATP and subsequent counterterrorism prosecutions should be viewed. The first chapter deals with the distinct vulnerability of Africa to the misuse and abuse of counterterrorism. Through its description of Ethiopia as a country where there is a constitution without constitutionalism, the second chapter provides a broad politico-legal context of Ethiopia in particular.

The following two chapters focus on two aspects of the ATP: the definition of a terrorist act and its scope, and the incorporation of a precautionary standard. Chapter three identifies two guiding definitions in view of which the scope of the ATP's definition can be examined. The first is the definition provided under the 1999 Organisation of African Convention on the Prevention and Combatting of Terrorism to which Ethiopia is a party. The second is inferred from the Security Council Resolution 1373. Reading the resolution between the lines and in conjunction with the 1999 International Convention for the Suppression of the Financing of Terrorism with which the resolution is closely connected, and the Security Council's post 2001 practices, it is inferred that the resolution tacitly endorses the definition that the Convention incorporates. Through an analysis of preparatory and status offences and associated human rights

concerns, chapter four examines how the ATP accommodates the precautionary approach with counterterrorism.

The next part of the thesis analyses the application of the ATP by scrutinising two counterterrorism prosecutions, which involve journalists and leaders of lawfully registered political opposition parties. It draws mainly on analysis of criminal charge sheets, evidence of the parties, and court rulings and judgments. The accounts of court documents have been supplemented with semi-structured interviews with defence lawyers, prosecutors and judges involved in the cases along with those of political opposition leaders and journalists. The cases demonstrate the ramifications of a precautionary approach to counterterrorism in an authoritarian regime where the courts are not independent. They reveal a misapplication of the law and the court's inconsistency and deviation from established rules, thereby contributing to an occurrence of miscarriage of justice.

Finally, the thesis revisits the official justifications for adopting the ATP and investigates their validity taking into consideration several factors including the findings from the analysis of the prosecutions. The appraisal suggests that the validity of these justifications is questionable and points to the ATP's implicit purpose of disciplining dissenting views.

The research promises to be a valuable contribution to an understanding of the nature of counterterrorism in Ethiopia, about which little has been documented and even less that has relied on primary field research.

Declaration

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

Signed: _____

Date: _____

Acknowledgment

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INTRODUCTION

A. Background

The purpose of this thesis is two-fold. First, it provides a legal analysis of selected provisions of the Ethiopian Anti-Terrorism Proclamation (ATP), which was enacted in 2009. Second, in two case studies, it critically examines terrorism prosecutions that involve journalists and political opposition party members and leaders.

International law had been in use to deal with terrorism before 9/11.[1] However, at that stage, global terrorism had not yet been categorically considered a threat to international peace and security.[2] The events of 9/11 changed this. In its resolution 1368 which 9/11 prompted, the United Nations Security Council (UNSC) regards *any act of international terrorism as a threat to international peace and security.*[3] This decision results in what Rostow refers to as the transfer of issue of terrorism from the United Nations General Assembly to the UNSC.[4]

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[1] Some of the legal instruments that were in existence before 9/11 include: the 1999 International Convention for the Suppression of the Financing of Terrorism; the 1997 International Convention for the Suppression of Terrorist Bombings; the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; the 1988 Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; the 1980 Convention on the Physical Protection of Nuclear Material; the 1979 International Convention against the Taking of Hostages; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, and the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft.

[2] The 1994 General Assembly Resolution on Measures to Eliminate International Terrorism states that international terrorism 'may jeopardize the security of States.' *Measures to eliminate international terrorism,* GA Res 49/60, UN GAOR, 84th Plen mtg, UN Doc A/RES/49/60 (9 December 1994) Annex (Measures to Eliminate International Terrorism) para 2.

[3] SC Res 1368, UN SCOR, 4370th mtg, UN Doc S/RES/1368 (12 September 2001) para 1.

[4] Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism Since Sept 11th' (2001-2002) 35 *Cornell International Law Journal* 480. Before 9/11, it was the General Assembly which, through its Sixth (Legal) Committee, had been the primarily organ responsible for handling terrorism issues. Eric Rosand, 'Security Council Resolution 1373, the Counter-terrorism Committee, and the Fight Against Terrorism' (2003) 97(2) *The American Journal of International Law* 333.

After 9/11, the Security Council passed several counterterrorism resolutions[5] of which the UNSC Resolution 1373 gained primacy in setting 'a roadmap' of post 9/11 global counterterrorism.[6] The measures that the resolution requires states to take are prescribed with a view to dealing with a hypothetical threat to the peace and security posed by that, which is called terrorism.[7] This resolution, unlike other UNSC counterterrorism resolutions, is neither situation-specific nor is addressed to a particular state(s). Rather, it sets the direction of global counterterrorism, which Ramraj refers to as the 'vertical dimension' of the global anti-terrorism law.[8]

Central in counterterrorism as it is, resolution 1373 stimulates serious concerns in the post 9/11 counterterrorism discourse.[9] Among other reasons, the resolution has been criticised for its failure to define the term 'terrorism' and for its introduction of a precautionary approach to counterterrorism. Samuel characterises the absence of a universal definition of terrorism as the major lacuna in the rule of law framework of international counterterrorism.[10] While recognising that the absence of a definition of terrorism provides the states the flexibility to consider domestic realities in their anti-terrorism legislation, Saul expresses concern that the lack of guidance enables states to include in their own

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5 These include, but are not limited to, UN Security Council Resolutions 1390 (2002), 1526 (2004), 1617 (2005).

6 Curtis A Ward, 'Building Capacity to Combat International terrorism: the Role of the United Nations Security Council' (2003) 8(2) *Journal of Conflict & Security Law* 289.

7 Jane E Stromseth, 'An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390' (2003) 97 *American Society of International Law Proceeding* 41.

8 Victor V Ramraj, 'The Impossibility of global anti-terrorism law?' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 44.

9 There is consensus that the resolution has a legislative nature. This feature of the resolution resonates in the debate among scholars on the competence of the Security Council to pass resolutions having a legislative nature. C H Powell, 'The United Nations Security Council, terrorism and the Rule of Law' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 19**.**

10 Katja L H Samuel, 'The Rule of Law Framework and its Lacunae: Normative, Interpretive, and/or Policy Created?' in Ana María Salinas de Frías, Katja L H Samuel, and Nigel D White (eds), *Counter-Terrorism International Law and Practice* (Oxford University Press, 2012) 14.

anti-terror legislation those acts, which do not qualify as being threats to international peace and security.[11]

Resolution 1373 requires states to criminalise not only the perpetration of terrorist acts. It obliges them to prohibit involvement in the preparation for, and planning of, a terrorist act.[12] Moreover, the Counterterrorism Committee and the UN Office on Drugs and Crime have called upon states to include 'extended modes of criminal participation' in their anti-terrorism legislation.[13] As noted by Virta, 'the "precautionary principle"' has been the basis of post 9/11 counterterrorism policymaking.[14]

The UNSC's call for a proactive approach entails 'criminalizing acts that are committed BEFORE any terrorist acts take place.'[15] This approach invites states to push the traditional reach of criminal law and criminalise planning and preparatory acts, which transpire earlier than inchoate offences of attempt and conspiracy in the continuum of contemplation and commission of a crime.[16] It paves a way for state authorities to 'anticipate and forestall that which has not yet occurred and may never do so.'[17] This drift towards criminalising innocuous conduct by opening a space for increasingly early and more intrusive measures,[18] results in 'greater tolerance for false positives.'[19]

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[11] Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985-2004' (2005) 4(1) *Chinese Journal of International Law*, 141.

[12] SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) Para 2 (e).

[13] Ben Saul, 'Criminality and Terrorism' in Ana María Salinas de Frías, Katja L H Samuel, and Nigel D White (eds), *Counter-terrorism: International Law and Practice* (Oxford University Press 2012) 148

[14] Sirpa Virta 'Re/building the European Union Governing through Counter terrorism' in Vida Bajc and Willem de Lint, *Security in Everyday life*, (Routledge, 2011) 185, 186.

[15] Jean Paul Labrode, 'Countering Terrorism: New International Criminal perspectives', 132nd International Senior Seminar Visiting Experts Papers (2007) 71 Resources Material Series 10, 11 (emphasis original) <http://www.unafei.or.jp/english/pdf/RS_No71/No71_06VE_Laborde2.pdf>.

[16] Jude McCulloch and Dean Wilson, *Pre-crime: Pre-emption, precaution and the future* (Routledge, 2015).

[17] Lucia Zedner, 'Pre-crime and post-criminology?' (2007) 11(2) *Theoretical Criminology* 261, 262.

[18] Lucia Zedner, 'Neither Safe Nor Sound? The Perils and Possibilities of Risk' (2006) *Canadian Journal of Criminology and Criminal Justice* 423, 430.

[19] Kent Roach, *The Eroding Distinction between Intelligence and Evidence In Terrorism Investigations* (2011) 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884999>.

These coupled with a lack of requirement of human rights conditionality in counterterrorism[20] provoke concern that counterterrorism, as outlined in resolution 1373, would open a space for potential human rights violations in the name of counterterrorism[21] leading to tension between counterterrorism and human rights.[22] The UN Working Group on Terrorism indicates:

> The rubric of counterterrorism can be used to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent and/or suppression of resistance to military occupation.[23]

Similarly, Duffy argues 'counterterrorism practices have … jeopardized, strained and violated most if not all aspects of the human rights framework.'[24] A report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism indicates that anti-terror lawshave been 'misused to curb otherwise legitimate activities and to target journalists, human rights defenders, minority groups, members of the political opposition or other individuals.'[25]

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[20] Rosemary Foot, 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29 *Human Rights Quarterly* 489.

[21] Report of the United Nations High Commissioner for Human Rights submitted pursuant to General Assembly resolution 48/141, 'Human rights: a uniting framework', E/CN.4/2002/18 (27 February 2002), para. 31. Presentation given to the CTC by the Director of the New York Office of the Office of the High Commissioner for Human Rights, Bacre Waly Ndiaye, 11 December 2001 (S/2001/1227)) in Clémentine Olivier, 'Human Rights Law and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373) (2004) 73 *Nordic Journal of International Law* 399, 401, note 10.

[22] Helen Duffy, 'International human rights law and terrorism: An Overview' in Ben Saul, *Research Handbook on International Law and Terrorism* (Edward Elgar, 2014); Helen Duffy, *The War on Terror and the Framework Of International Law* (Cambridge University Press, 2nd ed., 2015) Chapter 7; Federico Fabbrini, 'The Interaction of Terrorism Laws with Human Rights', in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge: 2015) 85.

[23] Report of the policy working group on the United Nations and terrorism, Annex to Doc. A/57/273, S/2002/875 in Cephas Lumina, 'Terror in the backyard: Domestic terrorism in Africa and its impact on human rights' (2008) 17(4) *African Security Review* 112, 125.

[24] Duffy, 'International Human Rights Law', above n 22, 335.

[25] Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, 28th sess, A/HRC/28/28, (19 December 2014) para 21.

Thus, counterterrorism is deemed a potent instrument that both democracies and repressive regimes could use to promote their own interests under the pretext of fighting terrorism. The events of 9/11 have created an opportunity for the United States and its allies to pursue interests not related to counterterrorism.[26] Similarly, repressive regimes have used counterterrorism 'as an excuse to tighten pre-existing measures restricting individual rights and liberties.'[27]

Africa is referred as the most vulnerable continent to potential abuse of counterterrorism. Malan warns that implementation of resolution 1373 'may pave the way for the further abuse of state power and the derogation of human rights' in Africa.[28] Similarly, Cephas Lumina argues that anti-terrorism legislation in Africa can easily be used to supress or undermine democratic opposition.[29] Omotola states:

> The enthusiasm with which the counterterrorism call was received in Africa appears to be linked to the possibilities for adapting counterterrorism instruments for the survival of state power, and for the advancement of the interests of incumbent African leaders.[30]

Several years after these concerns were expressed, claims have been made that these fears are proved to be valid. For example, Downie has stated that the anti-terrorism legislation in Africa have been used as a 'politically useful tool against regime opponents.'[31] Similarly, Ford has

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[26] Douglas Kellner, 'Bush Speak And The Politics Of Lying, Presidential Rhetoric In The "War On Terror"' (2007) 37(4) *Presidential Studies Quarterly* 622; Richard Jackson, "Constructing enemies: 'Islamic terrorism' in political and academic discourse" (2007) 42(3) *Government And Opposition* 394; Jude McCulloch, 'Transnational Crime As Productive Fiction' (2007) 34(2) *Social Justice* 19; Willem de Lint and Wondwossen Kassa, 'Evaluating U.S. Counterterrorism: Failure, Fraud or Fruitful Spectacle?' (2015) 23(3) *Critical Criminology* 349.

[27] Fabbrini, above n 22, 89. Also see: Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985-2004' (2005) 4(1) *Chinese Journal of International Law* 141.

[28] Mark Malan, 'The Post-9/11 Security Agenda and Peacekeeping in Africa' (2002) 11(3) *African Security Review* 53, 58.

[29] Lumina, above n 23.

[30] J. Shola Omotola, 'Assessing Counter-Terrorism Measures in Africa: Implications for Human Rights and National Security' (2008) 2 *Conflict Trends* 41, 43.

[31] Center for Strategic and International Studies, '*The Use and Abuse of Anti-terrorism Laws in Africa'* 8 June 2011 (Richard Downie) <http://csis.org/event/use-and-abuse-anti-terrorism-laws-africa>.

accused Africa of having used counterterrorism as a pretext to discipline dissent.[32]

B. Problem statement

Ethiopia has been at the forefront of the African states criticised for misusing and or abusing counterterrorism.[33] The country has been on the news in connection with the prosecution of journalists and political opposition party members for terrorism charges since it passed its anti-terrorism proclamation in 2009. In a report that Amnesty International released in December of 2011, it indicated that beginning from March 2011 at least 114 opposition party members and journalists were charged for terrorism.[34] The arrest and prosecution of journalists and politicians in connection with terrorism has continued.[35]

It is not only the staggering number of politicians and journalists charged with terrorism but also that these people are prosecuted for being critical of the government that alarms governmental and non-governmental organisations and governments[36] alike. For example, Amnesty

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[32] Jolyon Ford, *Counter terrorism, Rule of Law and Human Rights in Africa* (November 2013) <https://www.issafrica.org/uploads/Paper248.pdf>.

[33] Tesfa-Alem Tekle, 'Eritrea, Ethiopia worst journalist jailers in Sub-Sahara', Sudan Tribune (*online*) 29 April 2016 <http://www.sudantribune.com/spip.php?article58815>.

[34] Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (2011) 5 <http://www.amnestyusa.org/sites/default/files/afr250112011en.pdf>.

[35] Neamin Ashenafi 'Ethiopia: Opposition Political Parties Rant Over Recent Crackdown', *allAfrica* (online) 12 July 2014 <http://allafrica.com/stories/201407140328.html>; BBC, 'Ethiopia Zone 9 bloggers charged with terrorism' '18 July 2014 <http://www.bbc.com/news/world-africa-28366841>; Mahlet Fasil, 'Ethiopia: Breaking - Ethiopia Charges Prominent Opposition Member Bekele Gerba, Others With Terrorism', *Addis Standard (*online*)* 22 April 2016 <http://allafrica.com/stories/201604221480.html>*;* Associated Press, 'Ethiopia: Activist charged with terrorism over Facebook post', *Daily Mail Australia* (online) 7 May 2016 <http://www.dailymail.co.uk/wires/ap/article-3577828/Ethiopia-Activist-charged-terrorism-Facebook-post.html>.

[36] The governments that have expressed their concern on the manner in which counterterrorism legislation is applied in Ethiopia include the governments of the United States (U.S. State Department, press statement, *Zone 9 Bloggers Move to Trial on Amended ATP Charges in Ethiopia* (29 January 2015) <http://www.state.gov/r/pa/prs/ps/2015/01/236963.htm>; U.S. State Department *Country Reports on Terrorism 2014* (June 2015) 25-26, <http://www.state.gov/documents/organization/239631.pdf>) and the United Kingdom (Foreign and Commonwealth Office of the United Kingdom, *Ethiopia—media freedoms: A case study from the Human Rights and Democracy 2014 Report*

International indicates its belief that the journalists and members of opposition parties listed in its 2011 report were arrested because of their peaceful and legitimate activities as journalists and politicians.[37] Furthermore, the UN Human Rights Committee stated that it

> [i]s concerned by [...] the inappropriate application of this law in the combat against terrorism, as illustrated by the closure of many newspapers and legal charges brought against some journalists. [...] The State party should revise its legislation to ensure that any limitations on the rights to freedom of expression are in strict compliance with article 19, paragraph 3, of the [ICCPR] [...] and ensure that media are free from harassment and intimidation.[38]

On the other hand, the Ethiopian government defends its counterterrorism legislation and practice. It dismisses the criticism against the prosecution as lacking solid evidence and being based only on a superficial knowledge of the cases — on the fact that politicians and journalists are prosecuted — and/or making a deliberate effort to defame the government.[39]

The late Prime Minister Meles Zenawi blamed Western monitoring groups for harbouring anti-Ethiopian biases that lead them to conclude the law is being misused for political purposes without having sufficient information.[40] For example, referring to one of the cases in which journalists were arrested, Meles describes the criticism as baseless in the following terms:

(12 March 2015) <https://www.gov.uk/government/case-studies/ethiopia-media-freedoms>).

[37] Amnesty International, above n 34, 6, 15. Other non-governmental organizations include Human Rights Watch, Article 19 and Committee to Protect Journalists. For the detailed concerns that each has raised see below chapter nine.

[38] United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee on Ethiopia*, 102nd sess, CCPR/C/ETH/CO/1 (19 August 2011) para 24. Other governmental organisations include the UN Commissioner for Human Rights, the UN Special Rapporteur on Counter-Terrorism and Human Rights, the UN Special Rapporteur on Human Rights Defenders, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, the UN Special Rapporteur on the Independence of Judges and Lawyers, the African Commission on Human and People's Rights, and the European Union. For specific concerns that each has expressed see below Chapter nine.

[39] VOA, *Ethiopian PM Defends Anti-Terror Law, Condemns Critics*, (7 February 2012) <http://www.voanews.com/content/ethiopian-pm-defends-anti-terror-law-condemns-critics-138976759/159572.html>

[40] Ibid.

> The government gave a small statement that such people have been put [in] prison. The next day the campaign was launched, 'Free press, innocent people with no issue at all!' They just give pronouncements before the case has gone to court, before evidence has been heard. The pronouncement was there; the government is the criminal and the people are innocent.[41]

In short, while the critics assert that critical journalism and political associations are suppressed in the name of countering terrorism, the government defends its actions arguing that offenders should not be permitted to pursue their terrorist agenda under the guise of journalism and political activism.

C. Purpose of the research

Whether the prosecution of journalists and opposition politicians is attributable to their proven involvement in terrorism needs to be evaluated through an investigation of terrorism prosecutions, with due regard to the broadness of the definition of terrorism under the ATP and its misapplication. However, no such study has been conducted. Despite the severity of the problem, there has been little research on the ATP, none of which relates to prosecutions.

Hiruy Wubie's article 'Some Points of the Ethiopian Anti-Terrorism Law from Human Rights Perspective' provides an overview of the broadness and vagueness of the definition of a terrorist act under the ATP and has warned that it can potentially be used to discipline dissent.[42] Similarly, Sekyere and Asare's article 'An Examination of Ethiopia's Anti-Terrorism Proclamation On Fundamental Human Rights' discusses the relationship between some of the provisions of the ATP and human rights instruments and concludes that 'there is a real potential for the state to crack down on political dissent in governance and curtail the growth of democracy in Ethiopia.'[43] While the article refers to prosecutions against journalists, it

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[41] Ibid.

[42] Hiruy Woubie, 'Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective' (2011) 25(2) *Journal of Ethiopian Law* 24.

[43] Peter Sekyere and Bossman Asare, 'An Examination Of Ethiopia's Anti –Terrorism Proclamation On Fundamental Human Rights' (2016) 12(1) *European Scientific Journal* 351, 351.

simply uses that fact alone as evidence of misapplication of the law without providing evidence and identifying the discrepancy between law and practice. A thirteen pages report by the Oakland's Institute on 'Ethiopian Anti-terrorism law a tool to stifle dissent' provides a brief description of some of the cases of politicians and journalists against whom it argues the law has been misapplied.[44] It provides a narrative of the circumstances under which they were arrested and prosecuted without examining the details of the cases. Wondwossen Kassa's two articles discuss some aspects of the substantive and procedural provisions of the ATP without going into their practical applications. 'Criminalization and Punishment of Inchoate Conduct and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law' assesses the aptness of criminalising precursor and inchoate conduct and criminal participation under the ATP in the light of criminal law theories.[45] 'Reflective Analysis of Procedural and Evidentiary Aspects of the Ethiopian Anti-Terrorism Law' analyses provisions of the ATP on procedural and evidentiary matters and examines their compatibility with the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution).[46]

None of these undertakes an in-depth investigation of any of the terrorism prosecutions. The thesis aspires to fill this gap. It does so by addressing the following research questions:

1) How broad is the definition of a terrorist act under the ATP?
2) How is the ATP applied in prosecutions involving journalists and politicians?

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[44] Lewis Gordon, Sean Sullivan and Sonal Mittal, *Ethiopia's Anti-Terrorism Law A tool to Stifle Dissent* (2015)

<http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf>

[45] Wondwossen Demissie Kassa, 'Criminalization and Punishment of Inchoate Conduct and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law' (2010) 24(1) *Journal of Ethiopian Law* 147.

[46] Wondwossen Demissie Kassa, 'Reflective Analysis of Procedural and Evidentiary Aspects of Ethiopian Anti-Terrorism Law' (2009) in Wondwossen Demissie Kassa (ed), *Human Rights in Criminal Proceedings: Normative and Practical Aspects* (Addis Ababa University Press, 2009).

3) What do these prosecutions tell about the (mis)application of the ATP and might this be suggestive of its *raison d'etre*?

D. Methodology

The importance of methodology in a research project cannot be overemphasised. Yin goes as far as rating its importance even higher than that of the research itself:

> More important than the type of research being undertaken is the fit between strategy (case study, archival analysis, survey etc.), the form of the research question …, whether the research focuses on contemporary or historical events, and whether the researcher needs to have control over participant behaviour or events or, by contrast, is operating in a naturalistic setting in which lack of control poses few if any problems.[47]

Similarly, Cane and Kritzer emphasise the ability to communicate core methods of research to a wider community as a feature of truly successful research.[48] Despite this preeminent place of methodology in research, as Chynoweth observes, '[l]egal researchers have always struggled to explain the nature of their activities to colleagues in other disciplines.'[49] That is so because, as Posner notes, law is 'not a field with a distinct methodology, but an amalgam of applied logic, rhetoric,…, and familiarity with a specialized vocabulary and a particular body of texts, practices and

[47] Yin, R K *Case Study Research Design and Methods* (Sage Publications, 2nd ed, 1994) quoted in Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926,933.

[48] Peter Cane and Herbert M Kritzer, 'Introduction' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 1.

[49] Paul Chynoweth, 'Legal research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 28, 28. That has caused legal scholars to experience what Schmidt and Halliday call 'methodological anxiety syndrome' which refers to 'a pervasive and sometimes debilitating doubt about whether one has the necessary methodological skills to embark on empirical sociological research. Patrick Schmidt and Simon Halliday 'Introduction: Beyond Methods — Law and Society in Action' in Patrick Schmidt and Simon Halliday (eds), *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009) 1, 2-3.

institutions'[50] and is therefore 'largely autonomous.'[51] Posner, citing Aristotle, notes that judgments are to be made in areas which are not suitable for scientific or 'exact inquiry.'[52] Schuck characterises legal research as:

> 'freestanding, self-referential, self-justifying, even solipsistic. It neither looks backward to a tradition of theory building nor forward to a tradition of theory testing. Although the work sometimes cites the work of other legal scholars, it seldom builds on it self-consciously and rarely seeks to generate testable, falsifiable hypotheses.'[53]

There has been pressure on legal researchers to be explicit in the methods they employ while undertaking legal research. While acknowledging the problems that legal researchers have in articulating their methods to external readers owing to their lack of formal training, Schmidt and Halliday observe that 'there is no immunity from the obligation to be as complete and transparent as possible in describing one's steps in … research.'[54] Hutchinson and Duncan urge that legal scholars 'be more open and articulate about their methods.'[55]

Indeed identifying the right way of approaching a research problem is central to reaching the right answer thereby bestowing validity to the research process and weight to its findings. Thus, a description of the methods that have been used in undertaking this research has been provided.

There are two broad categories of legal research: doctrinal and non-doctrinal. The former deals with the question 'what is the law? in particular contexts' and involves 'the study of legal texts.'[56] In addressing

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[50] Richard A Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38 *University of Toronto Law Journal* 333, 345. The tools to be used instead include 'analogy, precedent, and intuition shaped by experience and training': at 339.

[51] Richard A Posner, 'The Present Situation in Legal Scholarship' (1980-1981) 90 *Yale Law Journal* 1113, 114.

[52] Posner, 'Conventionalism', above n 50, 339.

[53] Peter H Schuck, 'Why Don't Law Professors Do More Empirical Research?' (1989) 39 *Journal of Legal Education* 323, 328.

[54] Schmidt and Halliday, 'Introduction: Beyond Methods', above n 49, 3.

[55] Terry Hutchinson and Nigel Duncan, 'Defining and Describing what we Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 83.

[56] Chynoweth, above n 49, 29.

'what is the law?', doctrinal research will take 'an internal, participant-orientated epistemological approach to its object of study.'[57] Non-doctrinal research that is otherwise known as empirical legal research,[58] interdisciplinary legal research[59] or 'law and…'[60] examines how law works in practice and involves an 'external enquiry into the law.'[61] Thus, among other questions, the latter seeks to answer 'are the laws properly administered and enforced (or do they exist only in text-book)?'[62] It involves 'collecting and analysing data about law.'[63] The method of this type of research is 'to pose questions about an aspect of law; to gather evidence; to interpret the evidence; and then draw conclusions.'[64]

The appropriate method for research mainly depends on the question that the research addresses.[65] The questions concerning how the law is applied in prosecutions involving opposition politicians and journalists and what these prosecutions tell about the (mis)application of the ATP cannot be answered by a purely traditional doctrinal analysis of the law. It requires investigating more about what actually transpires in the terrorism prosecutions. This can be achieved through an empirical investigation into actual terrorism prosecutions that involve journalists and opposition politicians. As noted by De Goede and Graaf, 'terrorism trials are key places where the scope, legitimacy, and meaning of post

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[57] H L A Hart, *The Concept of Law* (1961) in Chynoweth, above n 49, 30.

[58] Mandy Burton, 'Doing Empirical Research: Exploring the decision-making of magistrates and juries' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2013) 55.

[59] Markus D Dubber, 'Critical Analysis of Law: Interdisciplinarity, Contextuality, and the Future of Legal Studies' (2014) 1(1) *Critical Analysis of Law: An International & Interdisciplinary Law Review*.

[60] Jan M Smits, 'Law and Interdisciplinarity: On the Inevitable Normativity of Legal Studies' (2014) 1(1) *Critical Analysis of Law: An International & Interdisciplinary Law Review* 75

[61] Chynoweth, above n 49, 30.

[62] S N Jain, 'Doctrinal and Non-Doctrinal Legal Research' 1975 17(4) *Journal of the Indian Law Institute* 516, 526.

[63] D J Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 976, 979.

[64] Ibid.

[65] Laura Beth Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 951; Webley, above n 47.

9/11 terrorism law is implemented, contested, and performed.'[66] Thus, the research involves an empirical study of the application of the ATP.

The first objective of empirical research is to acquire 'an understanding of how the law works in the circumstances and a second step may be taken to relate the findings with wider issues.'[67] Empirical research is premised on that 'law as it is written is one thing, how it works in reality is another.'[68] The main impetus of this type of research is 'to find out how the law works, how people use it, and how they are treated by it.'[69] Thus, empirical research is the tool for verifying the success or exposing the failure of the law to achieve its objective.[70] The value and importance of research of 'law in action' as opposed to 'law on (or 'in') the books' has been known for long time.[71] Roscoe Pound urged researchers to support 'the law on books' with the investigation of 'the law in action' as early as 1910.[72]

The problem that this research is concerned with is not related to measuring the degree to which terrorism prosecutions involve journalists or opposition political party members but how the law is applied in their prosecution. Thus a qualitative, as opposed to quantitative, empirical approach is employed. Methodologically, as Rowley explains, the best qualitative empirical research method is determined based on three factors, of which the first is the most important: the type of the research question; the extent to which the researcher controls the behavioural events; and whether the research focuses on historical or contemporary events.[73] Based on these criteria, the case study method is appropriate for research on a contemporary event over which the investigator has

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[66] Marieke De Goede and Beatrice De Graaf, 'Sentencing Risk: Temporality and Precaution in Terrorism Trials' (2013) 7 *International Political Sociology* 313, 315.
[67] Roger Cotterrell quoted in Galligan, above n 63, 979.
[68] Galligan, above n 63, 983.
[69] Ibid.
[70] Ibid 976.
[71] Cane and Kritzer, above n 48, 1.
[72] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.
[73] Jennifer Rowley, 'Using Case Studies in Research' (2002) 25(1) *Management Research News* 16.

little or no control and which needs deep and detailed inquiry to answer how and why questions.[74]

This research investigates terrorism prosecutions that involve journalists and opposition political party members — a current legal phenomenon in Ethiopia. In the main, it probes the prosecutions to how the ATP has been applied in cases that involve journalists and political opposition party members and leaders. The dearth of research relating to Ethiopian counterterrorism prosecutions is another factor that supports the case study method. As Eisenhardt notes, case studies are 'particularly well suited to new research areas or research areas for which existing theory seems inadequate.'[75] The usefulness of the case study method in enabling the researcher to undertake investigation into a 'phenomenon in its context'[76] reinforces the appropriateness of this method to this research — contextual analysis of counterterrorism prosecutions in Ethiopia. Thus, a case study method has been employed to collect data.

E. Case selection and data collection process

Ethics approval for the thesis was sought from the Social and Behavioural Research Ethics Committee (SBREC) at Flinders University (project No. 5912) and was secured on 25 January 2013. The researcher of this study went to Ethiopia for data collection at the end of March 2013 and stayed there until 30 June 2013.

Terrorism prosecution has been a major task for the prosecution and the courts in Ethiopia since 2011. A special team which constitutes five prosecutors has been established under the Ministry of Justice.[77] This team is exclusively concerned with the investigation and prosecution of terrorism cases.[78] Similarly one of the benches of the Federal High Court

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[74] Ibid; Robert K Yin, *Case Study Research: Design and Methods* (Sage, 1994) 9.

[75] Kathleen M Eisenhardt, 'Building Theories from Case Study Research' (1989) 14(4) *Academy of Management Review* 532,548-549.

[76] Rowley, above n 73, 18.

[77] The Ministry of Justice was rearranged and renamed as General Attorney in May 2016. Fekadu Wubete*,* 'Ethiopia: New Attorney General - Ingenious Mechanism to Shore Up Good Governance' *The Ethiopian Herald* (online) 15 May 2016 <http://allafrica.com/stories/201605150032.html>.

[78] Interview with Birhanu Wondemagegn, head of the Terrorism Prosecution Team, (Addis Ababa, Ethiopia) 17 June 2013. While the court cases that the thesis relies

is exclusively entrusted with terrorism case trials.[79] However, there is no publicly available figure relating to either the number of terrorism prosecutions in general or those prosecutions involving journalists and political opposition party members in particular. The attempt of the researcher to discover the number of terrorism prosecutions that involve opposition political party members and journalists from the court and the prosecution department was not successful.[80]

Thus, it was necessary to look for other sources of information. The search began with the above-referred Human Rights Watch's forty-three-page report on 'Dismantling Dissent Intensified Crackdown on Free Speech in Ethiopia' which provides information as to the number of journalists and opposition politicians arrested in connection with terrorism. According to this report, which was published in November 2011, '[s]ince March 2011, at least 108 opposition party members and six journalists have been arrested in Ethiopia for alleged involvement with various proscribed terrorist groups … [a] further six journalists, two opposition party members and one human rights defender, all living in exile, were charged in absentia.'[81] This report is based on six prosecutions: *FPP v. Teshale Bekashi et al*; *FPP v Ghetnet Ghemechu Ghemta et al*; *FPP v Bekele Gerba et al*; *FPP v Elias Kifle et al; FPP v Andualem Arage et al;* and *FPP v Abdiwole Mohammed Ismael et al*.

To determine if there were other prosecutions that involve journalists and/or opposition politicians that have got coverage on the news media, the internet was searched in two ways. First, the key English terms 'Ethiopia + terrorism prosecutions + journalists' were typed into the Google search engine search box and the news was customised within

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on are related to domestic terrorism, unlike the PATRIOT Act of the United States, the ATP does not make a distinction between domestic and international terrorism.

[79] Interview with Woubeshit Shiferaw, president of the Federal High Court of Ethiopia, (Addis Ababa, Ethiopia) 12 June 2013.

[80] Woubeshit indicated that the system they have in place does not allow them to know the actual numbers. Interview with Woubeshit Shiferaw, President of the Federal High Court of Ethiopia, (Addis Ababa, Ethiopia) 12 June 2013. Similarly head of the Terrorism Prosecution team that is in charge of leading counterterrorism prosecutions informed that they do not have the figure on how many terrorism prosecutions they initiated since the promulgation of the ATP. Interview with Birhanu Wondemagegn, (Addis Ababa, Ethiopia) 17 June 2013.

[81] Amnesty International, above n 34, 5.

a particular date range between 1 July 2009 (when the ATP was passed) and 30 June 2013, the cut-off date, which was when the field visit was completed. This search produced 467 web pages of which none refers to any terrorism prosecution other than those which the Human Rights Watch report mentions. Only *FPP v Elias Kifle et al*, *FPP v Abdiwole Mohammed Ismael et al*, and *FPP v Andualem Arage et al* are covered in one or more than one of the web pages. The other three cases — *FPP v. Teshale Bekashi et al*, *FPP v Ghetnet Ghemechu Ghemta et al*, *FPP v Bekele Gerba et al* — are not covered in any of the web pages.

Second, the key English terms 'Ethiopia + terrorism prosecutions + opposition politicians' were entered into the search box in the Google search engine and the news was customised within a particular date range between 1 July 2009 and 30 June 2013. This search resulted in 766 web pages. In this search, *FPP v Bekele Gerba et al,* in addition to the three prosecutions, which were found in the first search, was covered in the news. None of the 766 refers to the other two cases — *FPP v. Teshale Bekashi et al* and *FPP v Ghetnet Ghemechu Ghemta et al*.

Though the defendants' conduct is alleged to be terrorism-related,[82] the criminal charges in three of the six prosecutions that the Human Rights Report refers to –*FPP v. Teshale Bekashi et al*, *FPP v Ghetnet Ghemechu Ghemta et al* and *FPP v Bekele Gerba et al*– are based on the ordinary Criminal Code provisions instead of the ATP.[83] Thus, these three cases are not relevant to the thesis's research problem. Only two of the other three prosecutions are selected for the case study owing to the depth of research that a case study method involves. As Webley observes, using case study research means the 'research must focus in-depth on each one, it may be prohibitively time consuming to undertake case studies for a large number of situations or events.'[84] That is because

[82] Ibid 10.
[83] Ibid. Perhaps this explains the absence of news covering these prosecutions in the search.
[84] Webley, above n 47, 940.

'each case is viewed as an experiment, and not a case within an experiment.'[85]

Even if the inclusion of more prosecutions for the case study were opted for, other factors would still hinder this possibility. Several terrorism prosecutions that involve opposition politicians and domestic journalists have been filed since June 2013.[86] However, the complete set of any of these cases was not able to be accessed. That is because there was no online access to court judgments in Ethiopia nor was there an opportunity to return to Ethiopia for a second round of data collection. For two reasons, the case *FPP v Abdiwole Mohammed Ismael et al,* which had been decided upon before the researcher went to Ethiopia in 2013.did not suit the research problem. First, this prosecution did not go to the highest court level. Once the trial court convicted the defendants, they did not appeal. Instead they were released on pardon through a diplomatic process.[87] It was eventually settled extra-judicially a fact with which the thesis is not concerned. Second, unlike the other two cases in which local journalists are prosecuted, this prosecution involves two foreign journalists.

Thus, the case study is confined to *Federal Public Prosecutor v Elias Kifle et al* and *FPP v Andualem Arage et al.* The former involves five defendants*.* Three of them are journalists and the other two are opposition politicians of whom one was a leader of a political opposition

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[85] Rowley, above n 73, 20.

[86] Gordon, Sullivan, and Mittal, above n 44; ARTICLE 19, *Ethiopia: Terrorism charges against Zone 9 Bloggers and journalists must be dropped*, Press release, (18 July 2014) <https://www.article19.org/resources.php/resource/37625/en/ethiopia:-terrorism-charges-against-zone-9-bloggers-and-journalists-must-be-dropped>; Amnesty International, *Ethiopia: End the onslaught on dissent as arrests continue* (10 July 2014) <https://www.amnesty.org/en/latest/news/2014/07/ethiopia-end-onslaught-dissent-arrests-continue/>; Menachem Rephun*, '*US State Department Expresses Concern Over Terrorism Charges Against Ethiopian Activist', *jpupdates (online)* 5 February 2016 <http://jpupdates.com/2016/05/02/us-state-department-expresses-concern-over-terrorism-charges-against-ethiopian-activist/*>;* Amnesty International, *Ethiopia must release opposition politician held for Facebook posts* (6 May 2016) <http://www.amnestyusa.org/news/press-releases/ethiopia-must-release-opposition-politician-held-for-facebook-posts>.

[87] Aaron Maasho, 'Ethiopia pardons two jailed Swedish journalists', *Reuters* (online) 10 September 2012 <http://www.reuters.com/article/us-ethiopia-sweden-journalists-idUSBRE8890IS20120910>; Mike Pflanz, 'Swedish journalists set to be freed in Ethiopian amnesty', *The Telegraph* (online) 10 September 2012 <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/ethiopia/9533976/Swedish-journalists-set-to-be-freed-in-Ethiopian-amnesty.html>.

party at the time of arrest.[88] While one of the journalists was tried in absentia, the other four attended the court. *FPP v Andualem Arage et al* involves 24 defendants of whom six are journalists, two are political opposition party members, and the rest are leaders and members of the proscribed Ginbot 7 Movement for Justice Freedom and Democracy (Ginbot 7)[89] including its chairman. Of these, eight attended the court.[90] The other 16, five of whom are journalists, were tried in absentia.

Because the extent of detail available for a case study needs to be maximised,[91] such a method of research calls for reliance on 'as many data sources as possible.'[92] The case studies on the two prosecutions draw on a variety of sources of information giving it a quality of what Nielsen calls a 'multi-method research.'[93] The major source of information is court documents such as contents of criminal charges, evidence produced by the prosecution and the defence, and decisions of the trial and appellate courts.

In addition, first-hand information obtained through face-to-face interviews with legal actors involved in these prosecutions has been used to supplement the findings from the analysis of the court documents. The ethics approval process ensures, among others, that the interviewees are selected based on informed consent and that they are represented anonymously. Interviewees include two Federal High Court judges, three justices of the Federal Supreme Court, two federal prosecutors, an investigating police officer and two defence lawyers involved in terrorism prosecutions, three journalists, three senior political opposition party

[88] At the time of the arrest, Zeryehun G/Egzeabhair was president of the Ethiopian National Democratic Party. Amnesty International, above n 34, 9.

[89] This opposition organisation is named after Ginbot 7, May 15 according to Ethiopian Calendar, to signify the polling date of the third national and regional election that took place in 2005 which was followed by a protest that claimed the life of 193 people. See below Chapter 2.

[90] Office of the United Nations High Commissioner for Human Rights Special Procedures of the Human Rights Council, Reference: UA G/SO 214 (67-17) G/SO 214 (107-9) G/SO 214 (3-3-16) Terrorism (2005-4) G/SO 214 (53-24) ETH 7/2011, 3.

[91] Rowley, above n 73, 16, 17.

[92] Webley, above n 47, 940.

[93] Nielsen, above n 65, 952. As Nielsen notes, 'the empirical study of law almost always is in fact multi-method' as it necessarily involves collecting data in several ways even where this is not done on purpose: at 952.

leaders, and a government state minster. They are represented from R1 to R17. The interviews were conducted between 1 May and 30 June 2013. The court judgments are written and the interviews are conducted in Amharic, the working language of the Federal Government of Ethiopia. Interviews and the relevant parts of the judgment were translated into English by the researcher.

The two prosecutions garnered substantial attention both nationally and internationally, and involved important political pressures from governmental and non-governmental organisations. Thus, various types of reports issued and news reported form part and parcel of the sources of information. Two other terrorism prosecutions, *FPP v Abdiwole Mohammed et al*, and *FPP v Zelalem Workagegnehu et al,* (Fed. H. Ct., Cr. F. No. 158194) have been used to substantiate some points.

Meaningful empirical research needs to be based on strong doctrinal research. As Baxi notes, such research 'cannot thrive on a weak infrastructure base of doctrinal type analyses of the authoritative legal materials.'[94] In support of this, Burton states, 'theory is an important part of empirical research.'[95] Jain explains the reason as follows:

> The primary objectives of the sociology of law are to reveal, by empirical research, how law and legal institutions operate in society, to improve the contents of the law, both in substantive and procedural aspects, to improve the structure and functioning of legal institutions whether engaged in law administration, law enforcement, or settlement of disputes (adjudicatory process), and these objectives cannot be achieved unless the researcher has in-depth knowledge of the legal doctrines … Further such a knowledge is essential for identifying issues, delimiting areas, keeping the goals in view, and determining the hypotheses on which to proceed. In the absence of these, the sociological research will be like a boat without a rudder and a compass, left in the open area.[96]

[94] Upendra Baxi, Socio-Legal Research in India: A programschrift 7 (I.C.S.S.R., 1975) quoted in Jain, above n 62, 527.
[95] Burton, above n 58, 56.
[96] Jain, above n 62, 527.

Moreover, providing a theoretical basis for the empirical investigation allows the finding of the research to be generalised.[97] Thus, a doctrinal analysis forms an integral component to the thesis. That said, empirical research does not necessitate a robust analysis and understanding of legal theory. According to Weber, who is described as 'a master empirical researcher,' empirical research does not require entertaining 'finer distinctions of legal theory.'[98] Similarly, Galligan points out that empirical research into law needs to be informed with a 'working knowledge of theories of law.'[99]

Thus, before delving into the examination of the two prosecutions, provisions of the ATP which deal with the definition of a terrorist act and preparatory and status offences are analysed to be used as a framework to examine and evaluate the judicial decisions in the two cases. This part of the research analyses relevant legal provisions and answers the question 'what is the law?' To that extent it is expository of the meaning of the law and, therefore, employs doctrinal legal research which is characterised by 'the study of legal texts' and involves 'interpretative' and 'qualitative' analysis.[100] In analysing what the law is the research will take what Hart has referred to 'an internal, participant-orientated epistemological approach to its object of study.'[101] Doctrinal research is not purely confined to the analysis of the legal text though; it involves reference to external factors to explain the legal text being analysed.[102] Thus, in analysing the law, reference to another body of literature and laws in other jurisdictions has been made.

As noted above, the research more importantly involves 'external inquiry into the law' through an investigation of the terrorism prosecutions where the law has been applied. By so doing, it evaluates the degree to which

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[97] Rowley, above n 73.

[98] Weber M, 'Basis Sociological Terms' in G Roth and C Wittick (eds), *Economy and Society* (University of California Press, 1968) 3 cited in Galligan, above n 63, 988.

[99] Galligan, above n 63, 988. For Galligan, 'naivety with respect to legal theory need not mar empirical work': at 988. For Dworkin rough definition of law is enough for empirical research. Dworkin R, *Justice in Robes* (Harvard University Press, 2007) cited in Galligan, above n 63, 988-989.

[100] Chynoweth, above n 49, 29-30.

[101] H.L.A. Hart, *The Concept of Law* (1961) in Chynoweth, above n 49, 30.

[102] Chynoweth, above n 49, 30.

the law is complied with actual court cases, thereby applying what is known as 'interdisciplinary research.'[103] However, while the '*interdisciplinarity'*[104] of this approach involves evaluation of the law from outside, as opposed to from inside, as Posner notes this would still be oriented by the tradition of the doctrinal analysts.[105] Therefore, the research is neither exclusively 'pure research' nor wholly 'applied.' It combines both methods. As such, the research employs what is referred to as the 'applied form of doctrinal research,'[106] the dominant one in academic legal research.[107]

Applying this approach means that the researcher of this study is 'involved in an exercise in logic and common sense rather than in the formal application of a methodology'[108] as known to researchers in the scientific field. As Posner notes, doctrinal researchers do not employ 'the theories and methods of the social sciences or of philosophy.'[109] That is, the actual process of the analysis involves more 'argument based' rather than 'data-based' methods[110] rendering it to 'humane rather than scientific.'[111] As Posner rightly notes:

> The writing style, the research interests, the overall approach of the doctrinal analyst are close to those of judges and brief writers, and doctrinal analyst move smoothly between academic positions and positions in the private practice, in the judiciary …[112]

Thus, the validity of this research is to be seen in light of its ability to 'develop a consensus within the scholastic community, rather than on an appeal to external reality.'[113] That leads Posner to state that 'the doctrinal analyst … identifies more with the community of lawyers than with the

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[103] Ibid.
[104] Dubber, above n 59
[105] Posner, 'The Present Situation in Legal Scholarship', above n 51.
[106] Chynoweth, above n 49, 30; Ian Dobinsin and Francis Johns 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press, 2007) 16.
[107] Chynoweth, above n 49; Posner, 'The Present Situation in Legal Scholarship', above n 51.
[108] Chynoweth, above n 49, 32.
[109] Posner, 'The Present Situation in Legal Scholarship', above n 51, 1114.
[110] Chynoweth, above n 49, 30.
[111] Posner, 'The Present Situation in Legal Scholarship', above n 51, 1122.
[112] Ibid.
[113] Chynoweth, above n 49, 30

community of scholars.'[114] The thesis offers scholastic arguments open to 'subsequent criticism and reworking by others scholars' instead of attempting to provide findings which 'purport to be definitive and final.'[115]

F. Limitations

Three limitations of the research should be noted. The first relates to the case study method of research in general. Case studies had been criticised for 'lacking rigour and objectivity when compared with other … research methods.'[116] However, over time well known researchers have proven the success of this technique.[117] Its significance is recognised in particular in exploratory research such as this, which provides 'answers to "How?" and "Why?" questions"',[118] as it is capable of offering 'insights that might not be achieved with other approaches.'[119] Moreover, as noted above, multiple data sources have been used which allows 'triangulation'[120] to reach a 'well rounded conclusion' that adds 'weight to the findings' and enhances the credibility of the research.[121]

The second limitation relates to the number of prosecutions used for the case study. As noted above, only two terrorism prosecutions are selected for analysis for both methodological and practical reasons. The proneness of counterterrorism legislation to misuse is an unavoidable and significant context for the analysis of the prosecutions in this thesis. That said, since the greater picture of counterterrorism is still mostly unknown, the representativeness of misuse in the sample of cases investigated in what follows cannot be established with any certainty. They form only part of a mostly unknown Ethiopian and still lesser known African counterterrorism account, the full exposition of which awaits further research. While the difficulty of making generalisations, based on

[114] Posner, 'The Present Situation in Legal Scholarship', above n 51, 1122.
[115] Chynoweth, above n 49, 32.
[116] Rowley, above n 73, 16.
[117] Robert E Stake, *The Art of Case Study Research* (Sage, 1995); Yin, above n 74; Helen Simons, *Case Study Research in Practice* (Sage, 2009).
[118] Rowley, above n 73, 16.
[119] Ibid.
[120] Nielsen, above n 65, 953; Webley, above n 47, 940.
[121] Webley, above n 47, 940.

this data, is appreciated, it is believed that this does not detract from the significance of the findings.[122]

The third limitation relates to the doctrinal component of the research unlike the first two, which are linked to the empirical dimension of the research. As pointed out earlier, there is very limited literature on Ethiopian anti-terrorism legislation and none on the prosecutions. Nor is it common for the courts to engage in extensive interpretation of legal provisions including the ATP. Thus, while available internet sources in the form of online newspapers, reports and recommendations of international non-governmental and governmental organizations pertaining to the legislation and its application have been used to the extent available, the doctrinal part of the thesis relies heavily on literature, legislation, and prosecutions in other jurisdictions and the researcher's interpretation of the provisions. In view of the fact that public officials claim that the ATP is drafted after consulting the anti-terrorism legislations in other jurisdictions such as Australia, the United Kingdom and the United States,[123] making use of literature pertaining to the latter without losing sight of the difference between the legal systems may be justified.

Furthermore, as noted above the study involves author's translation of interviews and relevant parts of court judgments from Amharic into

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[122] In fact, as Davis has noted, there are 'a good many judgments which fall far short of scientific findings' which, despite that, are still 'valuable, respectable and urgently needed.' K C Davis, 'Behavioural Sciences and Administrative Law' (1964-65) 17 *Journal of Legal Education* 137, 152.

[123] The late Prime Minster Meles Zenawi indicated that the proclamation is copied word by word from the UK. Yemane Negash, 'ኤርፖርት ላይ እንደሚታነቁ የሚያምኑ ሰዎች ቢኖሩም ኢሕአዴግ ግን ስለመኖራቸውም አያውቅም' [though Some believe that people are caught at the airport, EPRDF does not know this] *Reporter Amharic* (online) 10 December 2014 <http://www.ethiopianreporter.com/index.php/politics/item/8182>; Patrick Griffith, 'Ethiopia's Anti-Terrorism Proclamation and the right to freedom of expression' *freedom now*, 30 August 2013 <http://www.freedom-now.org/news/ethiopias-anti-terrorism-proclamation-and-the-right-to-freedom-of-expression/>. During a discussion of the draft version of the ATP, it was indicated that the definition part is directly copied from the anti-terrorism law of the United Kingdom. ፌዴራል ዴሞክራቲክ ሪፐብሊክ ኢትዮጵያ ፫ኛዉ የሕዝብ ተወካዮች ም/ ቤት ፬ኛ አመት የፀደቁ አዋጆች ፣የሕዝብ ዉይይቶች እና አሥተያየቶች ቅፅ ፯ ገፅ [Federal Democratic Republic of Ethiopia, 3rd House of Peoples Representatives 4th year Adopted Proclamations, Public Discussions and Recommendations, Volume 7] 116-117.

English. While maximum attention has been given to avoid possible mistranslation, unintended translation errors cannot be ruled out.

G. Significance

Concerned by concentration of legal research in certain areas, Martin Shapiro once urged researchers to study 'any public law other than constitutional law, any court other than the Supreme Court [of the US], any public lawmaker other than the judge, and any country other than the United States.'[124] A parallel assertion can be made in relation to counterterrorism. Research has focused on the law and practice of counterterrorism in liberal democracies. Not much work has been done on counterterrorism in other jurisdictions in particular in Africa.[125] Dealing with counterterrorism in Ethiopia, this thesis in general, will contribute to fill this lacuna. In particular, by providing in-depth examination of the two terrorism prosecutions, this research promises to be a valuable contribution in providing an original evidence-based story about the practice of counterterrorism in Ethiopia, about which little has been written, none in fact that relies on primary field research.

Another significance of the thesis is the originality of its approach to evaluate the scope of a domestic definition of a terrorist act. The thesis disputes the consensus that the UN Security Council does not provide the meaning of a terrorist act in resolution 1373. Having inferred the meaning of a terrorist act under resolution 1373, the thesis uses this as a standard to evaluate the scope of the definition of a terrorist act under the ATP. Three published articles that this PhD work has generated, one

[124] Martin Shapiro in Tamir Moustafa and Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tamir Moustafa and Tom Ginsburg (eds), *Rule by law the politics of courts in Authoritarian Regimes* (Cambridge University Press, 2008) 1.

[125] However see: Chris Oxtoby and C. H. Powell, 'Terrorism and Governance in South Africa and Eastern Africa' in Victor V. Ramraj et al (eds.) *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 573; Martin Ewi AND Anton Du Plessis, 'Counter-terrorism and Pan-Africanism: From non-action to non-indifference,' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar, 2014) 734.

in national and two in international peer reviewed journals,[126] might be seen as an additional significant consequence of the thesis.

H. Organisation

In *Research Methods in Law*, which is aimed at fostering the use of sociological and social science research methods in law and socio-legal studies, Watkins and Burton note 'the researcher must appreciate that the law operates within the distinctive legal culture of each jurisdiction, a culture that the researcher will need to fully engage with in the course of her [sic] project.'[127] Thus, the first two chapters are intended to serve this purpose. While the first chapter deals with the existing fertile ground for potential misuse of counterterrorism in Africa and the internal and external factors thereof, the second chapter deals with the politico-legal conditions in Ethiopia in particular. The latter titled 'Ethiopia's Constitution without Constitutionalism' provides a wide range of information on the disconnect between the normative order and the practice in Ethiopia, which has to be viewed in the light of the internal factors that render Africa susceptible to misuse of counterterrorism.

The subsequent two chapters relate to part of the ATP focusing on those legal provisions that define a terrorist act and criminalise precursor activities. Professor Roach rightly noted almost a decade ago that 'failure to agree on a definition of terrorism is a luxury that can no longer be afforded in the … context of increased anti-terrorism laws and activities.'[128] However, Roach and other scholars have continued to emphasise the absence of definition and blame the Security Council for this gap. While it is recognised that there is no clear definition of a terrorist

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[126] Wondwossen D Kassa, 'Rethinking the *No Definition Consensus* and the *Would Have Been Binding Assumption* Pertaining to Security Council Resolution 1373' 2015 17(1) *Flinders Law Journal 127;* Wondwossen Demissie Kassa, 'The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments' 2014 8(2) *Mizan Law Review* 371; Wondwossen Demissie Kassa, 'Examining Some of the *Rasions d'étre* for the Ethiopian Anti-terrorism Law' 2013 7(1) *Mizan Law Review* 49.

[127] Dawn Watkins and Mandy Burton, 'Introduction' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2013) 1, 5.

[128] Kent Roach, 'The Case for Defining Terrorism With Restraint and Without Reference to political or Religious Motive' in Andrew Lynch, Edwina MacDonald, and George Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press, 2007) 39, 41.

act under resolution 1373, based on the logical premise that the Security Council could not have used the term terrorism to refer to *'nothing'* or '*everything*' but only to *'something',* the third chapter disputes the no definition consensus. Through a critical reading of the resolution in conjunction with the 1999 International Convention for the Suppression of the Financing of Terrorism, with which it has much in common, and post 2001 resolutions and practices of the UNSC, this chapter investigates what this '*something'* is. This meaning of a terrorist act as inferred from resolution 1373 is used as a standard to evaluate the scope of the definition of a terrorist act under the ATP, which was passed, among others, to implement the resolution.

As pointed out above, another major concern in the post 9/11 counterterrorism discourse relates to the criminalisation and prosecution of precursor crimes. The fourth chapter analyses provisions of the ATP that create precursor crimes, their relation with the definition of a terrorist act under the ATP, and human rights issues associated with their criminalisation.

Comparing the impact on human rights of the broadness of the definition of terrorism with the criminal law's proactive approach, McCulloch attaches more significance to the latter.[129] Indeed most of the counterterrorism prosecutions are based not on principal terrorist acts but on provisions that criminalise preparatory offences.[130] Terrorism prosecutions in Ethiopia that involve journalists and opposition politicians, as in other jurisdictions,[131] relate to preparatory offences but not to perpetrated terrorist act.

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[129] Jude McCulloch, 'Human Rights and Terror Laws' (2015) 128 *Precedent* 26, 28.

[130] Robert Cornall, 'The Effectiveness of Criminal Laws on Terrorism,' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law And Liberty In The War On Terror* (The Federation Press, 2007) 50, 59.

[131] Andrew Lynch, George Williams, and Nicola McGarrity, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth, 2015); Jude McCulloch and Dean Wilson, *Pre-crime: Pre-emption, precaution and the future* (Routledge, 2015); Human Rights Watch and Colombia Law School Human Rights Institute, Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions 2014 <https://www.hrw.org/sites/default/files/reports/usterrorism0714_ForUpload_1_0.pdf>.

As Golding[132] and others[133] note, the law cannot be judged in isolation from the context of its application. For Golding, 'the process or procedure of judicial decision making'[134] is the key to appraising the quality of a court judgment. Thus, the next four chapters deal with precautionary prosecutions as applied in the two terrorism cases.

Chapter five examines the contents of the criminal charges, objections that the defence raised relating to their content and form, and court rulings thereon. In particular, it evaluates whether the conduct alleged against the journalists and opposition politicians constitutes a pre-crime terrorist activity as defined under the ATP.

Chapter six concerns major evidential issues involved in the two prosecutions. These include: examining the aptness of using the defendant's written and verbal communications and expressions as evidence against them in the light of their freedom of expression; the reversal of onus of proof in light of the principle of presumption of innocence; and the repercussions on the defence of the reversal of onus of proof.

Chapter seven deals with several matters of interest in the courts' reasoning in their rulings and judgments in the two prosecutions. These include: the courts' interpretation pertaining to conduct that constitutes a precursor offence; the relationship between a precursor offence and a principal terrorist act; the relevance of unconstitutionality of an act to it being a terrorist act; and trial by media.

Chapter eight is an appraisal of the court's approach to handling the two terrorism cases. This chapter draws on Easterbrook's two criteria for evaluating a court decision: the compatibility of the court's decisions with applicable legal provisions and principles, and the consistencies between and within judgments of the court and its ability to explain its decisions.

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[132] M P Golding, 'Principled Decision-Making and the Supreme Court' (1963) 63 *Colombia Law Review* 35, 37.
[133] Cane and Kritzer, above n 48; Pound, above n 72.
[134] Golding, above n 132, 37.

The chapter further deals with the miscarriage of justice involved in the two prosecutions and its relation with a government-driven tunnel vision.

Chapter nine, *Rethinking the justification for the ATP,* interrogates the official justification for the ATP. The scrutiny of these justifications in the first part of the chapter indicates that the government's claim is untenable and the justifications not well-founded. The second half of this chapter explores implicit purposes of the law in light of several factors including the findings from the prosecutions.

Finally, the thesis provides concluding statements. It concludes that the ATP has been used against citizens who have expressed their opposition to the government and its policies without their involvement in a terrorist act being established in accordance with the law.

This thesis interpolates material from the three journal articles published in the course of the writing of this thesis. Chapter three uses 'Rethinking the *No Definition Consensus* and the *Would Have Been Binding Assumption* Pertaining to Security Council Resolution 1373' and 'The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments.' 'Examining Some of the *Rasions d'étre* for the Ethiopian Anti-terrorism Law' has been used in chapter nine. The rules of citation in the third edition of the *Australian Guide to Legal Citation* has been used.

A brief note on the Ethiopian criminal legal system

A criminal trial in Ethiopia is predominantly a civil law type where there is no jury system.[135] The court adjudicates both questions of law and fact.

[135] Even if Ethiopia chose the Continental law approach and codified its civil and criminal laws in the late 1950s and early 1960s, the influence of the common law approach in the drafting of the 1961 Criminal Procedure Code has been significant. Stanley Z. Fisher, *Ethiopian Criminal Procedure: A Sourcebook* (The Faculty of Law Haile Selassie University, 1969); Aberra Jembere, *Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws*, (Erasmus Universiteit, 1998); Wondwossen Demissie Kassa, *Ethiopian Criminal Procedure A Textbook* (American Bar Association, 2012). Similarly, the ATP is drafted based on anti-terrorism legislation in Common Law jurisdictions. For example, the late Prime Minster Meles Zenawi indicated that the ATP is copied word by word from the UK's antiterrorism legislation. Yemane Negash, 'ኤርፖርት ላይ እንደሚታነቁ የሚያምኑ ሰዎች ቢኖሩም ኢሕአዴግ ግን ስለመኖራቸውም አያውቅም' [While Some Believe People are caught at the Airport, EPRDF does not know that] *Reporter Amharic* (online)

In relation to the source of law, that which is known as 'common law' in the Anglo Saxon system is unknown. Unlike in the common law tradition where legal rules are to be found within cases in addition to statutes, the exclusive source of law in Ethiopia, as in continental law tradition, is legislation passed by the law making body.[136] The concept of precedent had not been known to the Ethiopian legal system until June 2005--- when a proclamation was passed to give binding force to the interpretation of the law by the Cassation division of the Federal Supreme Court.[137] This Proclamation, requires lower courts to follow the interpretation of law given by the Cassation bench of the Federal Supreme Court where not fewer than five judges sit and decide. No terrorism case had been decided by the Cassation bench before the prosecutions analysed in this thesis were decided. Thus, court rulings and judgments in these prosecutions are evaluated in light of applicable statutory or code provisions instead of previous court decisions. Related to this, the jury system is unknown in Ethiopioa. Both questions of fact and law are decided by the court.

A note on Ethiopian names

Ethiopians are called by their first names. While some sources refer to the person with their family name or second name, the thesis follows Ethiopian naming tradition by using the first name as the primary reference, although the second name (the person's father's name) is habitually added for clarification. The work makes no use of designations such as '*ato*' and '*weyzero*', even if this is customary when referring to prominent persons in Ethiopia. This should not be read as a sign of impoliteness.

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10 December 2014 <http://www.ethiopianreporter.com/index.php/politics/item/8182>. Similarly during a discussion of the ATP in its draft form it was indicated that the definition part is directly copied from the anti-terrorism law of the United Kingdom. ፌዴራል ዴሞክራቲክ ሪፐብሊክ ኢትዮድያ ፫ኛዉ የሕዝብ ተወካዮች ም/ ቤት ፬ኛ አመት የፀደቁ አዋጆች ፣የሕዝብ ዉይይቶች እና አሥተያየቶች ቅፅ ፯ ገፅ 116-117 [Federal Democratic Republic of Ethiopia, 3rd House of Peoples Representatives 4th year Adopted Proclamations, Public Discussions and Recommendations, Volume 7, 116-117] As a result, reference to common law principles, as appropriate, has been made throughout the thesis.

136 Owing to the federal structure there are state and federal law making bodies with their own respective legislative jurisdictions. Constitution (Ethiopia) Articles 50-53.

137 The Federal Courts Proclamation No. 25/1996 (as amended by the Federal Courts Proclamation Re-amendment Proclamation No.454/2005) (Ethiopia) Art 10.

CHAPTER ONE: AFRICA'S VULNERABILITY TO MISUSE OF COUNTERTERRORISM

1.1 Introduction

Many have expressed their concern that counterterrorism, as outlined in the UNSC Resolution 1373, would be misused against human rights.[1] Essentially, this concern arises from two alleged gaps in the Resolution: its failure to both define terrorism and to include human rights conditionality while countering it.[2]

Martin Scheinin, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, emphatically referred to the risk arising from the absence of a definition as follows:

> Of particular concern to the Special Rapporteur's mandate is that repeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights. Calls by the international community to combat terrorism, without defining the term, can be

[1] Commission on Human Rights, *Report of the High Commissioner submitted pursuant to General Assembly 48/14, 'Human rights: a uniting framework',* 58th sess, UN Doc. E/CN.4/2002/18, para. 31 (27 February 2002); Presentation given to the CTC by the Director of the New York Office of the Office of the High Commissioner for Human Rights, Mr. Bacre Waly Ndiaye, 11 December 2001 (S/2001/1227)) cited in Clementine Oliver, 'Human Rights Law and the International Fight Against Terrorism: How Do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373)' (2004) 73 *Nordic Journal of International Law* 399, 401.

[2] However, two years after Resolution 1373 was passed, the UN Security Council passed Resolution 1456 in which it requires states to be mindful of their human rights obligation while countering terrorism. Flynn argues that this Resolution is widely seen as remedying the Resolution 1373's silence on human rights, and that the Resolution became the touchstone for the argument that human rights should be considered by the Counterterrorism Committee. E.J. Flynn, 'the Security Council's Counterterrorism Committee and Human Rights' (2007) 7(2) *Human Rights Law Review* 371. Moreover the UN Human Rights Committee maintains that while interpreting obligations that the UN Security Council imposes on the states there should 'be a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights.' Human Rights Committee, *Views of the Human Rights Committee under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 1472/2006*, 94th sess, UN Doc. CCPR/C/94/D/1472/2006, (29 December 2008). Similarly, both the HRC and ECtHR indicate that Security Council resolutions must be interpreted in the manner most consistent with human rights obligations. Helen Duffy, *The 'War on Terror' and International Law Framework of Human Rights*, (Cambridge University Press, 2nd ed., 2015).

> understood as leaving it to individual States to define what is meant by the term. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term. [3]

Amnesty International notes, 'the terms "terrorists" and "terrorist acts" in resolution 1373 are open to widely differing interpretations' and may facilitate rights violations.[4] The UN Working Group on Terrorism indicates that 'the rubric of counter-terrorism can be used to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent and/or suppression of resistance to military occupation.'[5] Citing Fuller, White notes that legislating indirectly against terrorism, as the SC does in its resolution 1373, is incompatible with the fundamental requirement of rule of law which entails that conducts prohibited by law be clearly defined.[6] Similarly, Samuel characterises absence of a universal definition of terrorism as the major lacuna in the rule of law framework of international counter terrorism.[7] Saul, commenting on the absence of a definition of terrorism, writes that although this provides the states the flexibility to consider domestic realities in their anti-terrorism legislation, the lack of guidance to ensure that only terrorist acts having an international dimension are encompassed by the Resolution enables them to include in their own anti-terror legislation those acts which do not qualify as being threats to international peace and security.[8]

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[3] Martin Scheinin, *Report of the Special Reporter on the Promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc E/CN.4/2006/98, (28 December 2005) para. 27.

[4] Amnesty International, *Statement by Amnesty International on the Implementation of SC Res 1373* (1 October 2001).

[5] Report of the policy working group on the United Nations and terrorism, Annex to Doc. A/57/273, S/2002/875 quoted in Cephas Lumina, 'Terror in the backyard: Domestic terrorism in Africa and its impact on human rights' (2008) 17(4) *African Security Review*, 112, 125.

[6] Nigel D. White, 'The United Nations and Counter-Terrorism: Multilateral and Executive Law-Making' in Ana Maria Salinas De Frias, Katja LH Samuel, and Nigel D White (eds.), *Counter terrorism International Law and Practice* (Oxford University Press, 2012) 54.

[7] Katja LH Samuel, 'the Rule of Law Framework and its Lacunae: Normative, Interpretive, and/or Policy Created?' in Ana María Salinas de Frías, Katja LH Samuel, and Nigel D White (eds.) *Counter-Terrorism International Law and Practice* (oxford University Press, 2012) 14.

[8] Ben Saul, 'Definition of ''Terrorism'' in the UN Security Council: 1985–2004' (2005) 4(1) *Chinese Journal of International Law* 141.

Regarding the factor of conditionality, Goldman, the UN independent expert on the protection of human rights and fundamental freedoms while countering terrorism, states that the resolution 1373 'regrettably, contained no comprehensive reference to the duty of States to respect human rights in the design and implementation of such counter-terrorism measures.'[9] The United Nations High Commissioner for Human Rights[10] and others indicate that the Security Council's failure to make the counterterrorism measures prescribed under its Resolution 1373 conditional upon the respect for human rights introduces the potential for misapplication of the resolution thereby resulting in human rights violations.[11] Goldman hypothesises that 'this omission may have given currency to the notion that the price of wining the global struggle against terrorism might require sacrificing fundamental rights and freedoms.'[12]

1.2 Scepticism in Africa's counterterrorism[13]

Though theoretically these two concerns relate to all states, Saul has asserted that the problem is worse in non-democratic states.[14] The Special Rapporteur expresses the seriousness of the problem in repressive regimes as follows:

> There is a risk that the international community's use of the notion of "terrorism", without defining the term,

[9] Robert K. Goldman, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. Doc. E/CN.4/2005/103 (7 February 2005) para 6.

[10] Commission on Human Rights, *Report of the High Commissioner submitted pursuant to General Assembly 48/14, 'Human Rights: a uniting framework,* 58th sess*,* UN Doc. E/CN.4/2002/18), para. 3 (27 February 2002).

[11] Oliver, above n 1. Oliver identifies four factors that make this lack of qualification potentially dangerous for human rights. These are: '(1) the Security Council does not define terrorism; (2) the Resolution is very broad in its content; **(3)** its effects are not limited to a particular country, and (4) it has neither implicit nor explicit time limitation': at 401.

[12] Ibid. For the view that UN Security Council Resolutions are always subject to the Council's obligation to respect for human rights see, for example,: Erika de Wet and André Nolkaemper, 'Review of Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law 166*; Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States' (2006) 4 *Journal of International Criminal Justice* 1044.

[13] Misuse of counterterrorism in Africa is not a post 9/11 phenomenon. See for example : Paul Rich, 'Insurgency, Terrorism and the Apartheid System in South Africa' (1984) 32 *Political Studies* 68; Brian Lawatch, 'Legitimizing Torture: How Similar Ideologies of the United States in the War on Terror and the French in Algeria Led to Torture' (2009) 5 *McNair Scholars Research Journal* 10.

[14] Ben Saul cites a disturbing trend by oppressive regimes in other parts of the world of conflating opposition with Al-Qaeda. Saul, above n 8.

> results in the unintentional international legitimization of conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against "terrorism" however defined. [15]

Repressive regimes, the Special rapporteur states, 'would deliberately misuse the term so as to cover range of conduct not related to countering terrorism.' [16] Similarly Human Rights Watch indicates that 'states with dubious human rights records actively suppress political opposition, curtail civil and political rights, or simply continue human rights abuses under the new pretext of taking the required steps to fight terrorism.' [17]

Thus, some associated the Resolution's potential detrimental effect on human rights particularly with Africa. Cilliers and Sturman observe that '[t]he dilemma for Africa is the need to act against terrorists as a national security risk without destroying the often tenuous rule of law that exists in many of our constituent states.'[18] Malan warns that implementation of Resolution 1373 'may pave the way for the further abuse of state power and the derogation of human rights'[19] in Africa. Similarly, Cephas Lumina, referring to the concern expressed back in 2002 in the Report of the policy working group on the United Nations and terrorism, argues that anti-terrorism legislation in Africa can easily be used to supress or undermine democratic opposition.[20]

While acknowledging that some African governments engage in counterterrorism arising from genuine perceptions of a terrorism threat, Ford indicates that there was a risk from the beginning that some African governments would, on the pretext of countering terrorism, engage in

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[15] Scheinin, above n 3, para. 27.
[16] Ibid.
[17] Human Rights Watch, Opportunism in the Face of Tragedy: Repression in the Name of *Anti-Terrorism*, quoted in Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation' (2006) 29(1) *Boston College International and Comparative Law Review* 23, 44.
[18] Jakkie Cilliers and Kathryn Sturman, 'An Overview and Introduction' in Jakkie Cilliers and Kathryn Sturman (eds.) *Africa and Terrorism Joining the Global Campaign, ISS Monograph Series No 74,* (Institute for Security Studies, 2002) 3, 13.
[19] Mark Malan, 'The Post-9/11 Security Agenda and Peacekeeping in Africa' (2002) 11(3) *African Security Review* 52, 58.
[20] Lumina, above n 5, 125.

wrongful activities against peaceful political opposition.[21] He asserted 'some African governments took advantage of the cover of global counter-terrorism approaches to pursue domestic opponents.'[22] Asserting that this concern is shared by others, he notes that 'many foresaw the damaging effect that a global counter-terrorist narrative might have on African authorities' respect for human rights and due process, and the potential to abuse it for domestic political purposes.'[23] Indeed, many have expressed this concern vigorously. [24]

Similarly, Kane argues that passing anti-terror laws in the name of countering terrorism which could then be applied to the media and political opposition was the immediate and opportunistic reaction of many African states to the 9/11.[25] Furthermore**,** Zeleza notes:

> Many African governments have rushed to pass broadly, badly and cynically worded anti-terrorism laws and other draconian procedural measures, ---, which they use to limit civil rights and freedoms, and to harass, intimidate, and imprison and crackdown on political opponents.[26]

Powell's survey of anti-terrorism laws in Africa confirms this. Based on his survey, Powell expressed concern that governments would make use of the legislation to crack down on opposition.[27]

1.3 Factors contributing to misuse of counterterrorism in Africa

Africa has adopted a regional counterterrorism instrument that predates the Resolution: the OAU Convention on Combating and Preventing

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[21] Jolyon Ford, *Counter terrorism, Rule of Law and Human Rights in Africa* (November 2013) <https://www.issafrica.org/uploads/Paper248.pdf>.

[22] Ibid 2.

[23] Ibid 4.

[24] J. Shola Omotola, Assessing Counter-terrorism Measures in Africa: Implications for Human Rights and National Security, (2008) *Conflict trends* 41.

[25] Ibrahim Kane, 'Reconciling Protection of Human Rights and the Fight Against Terrorism in Africa' in Ana María Salinas de Frías, Katja LH Samuel, and Nigel D White (eds.) *Counter-Terrorism International law and Practice* (Oxford University Press, 2012) 838, 841.

[26] P Tiyambe Zeleza, 'Introduction: The Causes & Cost of War in Africa: From Liberation Struggles to the "War on Terror" in A Nhema and P Tiyambe Zeleza (eds.), *The Roots of African Conflicts: the Causes and Costs* (UNISA Press, 2008) 1, 14.

[27] Chris Oxtoby and C. H. Powell, 'Terrorism and Governance in South Africa and Eastern Africa' in Victor V. Ramraj et al (eds.) *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 573.

Terrorism (Algiers Convention). The potential impact of counterterrorism on human rights in Africa has been emphasised despite the fact that the Algiers Convention does not have gaps similar to those in the Resolution. The Algiers Convention, as opposed to the Resolution, defines what constitutes a terrorist act,[28] and enjoins the states parties to adopt 'any *legitimate* measures aimed at preventing and combating terrorist acts in accordance with the provisions of [the] Convention and their respective national legislation.'[29] Article 22(1) of the Convention cautions that no provision of the Convention may be interpreted in a manner that derogates from the general principles of international law, particularly the principles of international humanitarian law and the African Charter on Human and Peoples' Rights. Moreover, the preamble of the African model of anti-terrorism law incorporates a paragraph 'reaffirming that the fight against terrorism must be carried out in accordance with international law, including international human rights, refugee, and humanitarian law.'[30] In another regional instrument, African states commit themselves to outlawing torture and other degrading and inhuman treatment including, discriminatory and racist treatment of terrorist suspects which are inconsistent with international law.[31]

> The African Commission on Human and People's Rights, drawing on legal instruments of the United Nations, highlights the requirement of human rights protection during counterterrorism. In the preamble part of its Resolution on the 'Protection of Human Rights and the Rule of Law in the Fight against Terrorism', the Commission refers to several UNSC and UNGA resolutions which reaffirm that 'States should ensure that all measures taken to combat terrorism conform to their obligations under the terms of international law in general, and international human rights law, international humanitarian law …'[32]

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[28] See below Chapter three.

[29] *OAU Convention on the Prevention and Combating of Terrorism*, opened for signature 14 June 1999 (entered into force 6 December 2002) Article 4(2) (emphasis mine).

[30] The African Model Anti-terrorism law, Final Draft as Endorsed by the 17th Ordinary Session of the Assembly of the Union, Malabo, 30 JUNE – 1 JULY 2011 preamble, Paragraph 7.

[31] *Protocol to the OAU Convention on the Prevention and Combating of Terrorism*, adopted 8 July 2004, Article 3(k)

[32] Africa Commission on Human Rights, *Resolution on the Protection of Human Rights and the Rule of Law in the Fight against Terrorism,* 37th Ordinary Session, (December 2005).

The cumulative reading of these regional counterterrorism instruments indicates that the room for interpreting counterterrorism as authorising departures from human rights norms while countering terrorism has been foreclosed. It is despite these safeguards that Africa is said to be more susceptible to the anticipated risk of counterterrorism. External and internal factors account for Africa's vulnerability.

1.3.1 External factors

The external factors discussed below relate to America's approach to counterterrorism. Two features of this approach as it impacts on African counterterrorism are specifically noted. The first is that following 9/11 the US has securitised its relation with Africa. The other, which is related to the first, pertains to US' neglect of human rights violations in Africa that take place in the name of counterterrorism.

(a) US securitisation[33] of Africa

International law had been in use to deal with terrorism before 9/11.[34] However, international terrorism had not yet been categorically considered as a threat to international peace and security.[35] The events of 9/11 changed this. In Resolution 1368, which 9/11 prompted, the Security Council regards '*any act of international terrorism as a threat to*

[33] For a summary of different meanings and interpretations of securitisation see: Jonathan Fisher and David M. Anderson, 'Authoritarianism and the Securitization of Development in Africa' (2015) 91(1) *International affairs* 131, 133-135.

[34] Some of the legal instruments that were in existence before 9/11 include the 1999 International Convention for the Suppression of the Financing of Terrorism; the 1997 International Convention for the Suppression of Terrorist Bombings; the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; the 1988 Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; the 1980 Convention on the Physical Protection of Nuclear Material; the 1979 International Convention against the Taking of Hostages; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, and the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft.

[35] Paragraph 2 of the 1994 General Assembly Resolution on Measures to Eliminate International Terrorism states that international terrorism '*may* pose a threat to international peace and security.' United Nations General Assembly, Measures to Eliminate International Terrorism, 84th Plenary meeting A/RES/49/60 (9 December 1994) (emphasis mine).

international peace and security.'[36] After 9/11, the Security Council passed several counterterrorism resolutions[37] of which Resolution 1373 gained primacy in setting a 'roadmap' of the post 9/11 global counterterrorism.[38] While the impetus for Resolution 1373 is the September 11 terrorist attacks, its reach is far beyond that.[39] The actors behind 9/11 intended to cause damage in the United States and, despite the fact that the victims happened to be from across the globe, the United States remains the principal casualty of the attack. However, the United States portrayed it as an attack on every state and on all human beings and, instead of acting in and by itself, it mobilised the UN against those who were behind the attack naming it a 'global war on terrorism.'[40] Resolution 1373, as observed by Ramraj, is the result of the US's effort to establish a legal framework for global coordination and cooperation.[41] Thus, though in principle the global counterterrorism regime is equally applicable to all states to maintain global peace and security, the US

[36] SC Res 1368, UN SCOR, 4370th mtg, UN Doc S/RES/1368 (12 September 2001), Paragraph 1 (emphasis mine).

[37] These include, but are not limited to, SC Res 1390, UN SCOR, 4452nd mtg, UN Doc S/RES/1390 (16 January 2002); SC Res 1526, UN SCOR, 4908th mtg, UN Doc S/RES/1526 (30 January 2004); and SC Res 1617, UN SCOR, 5244th mtg, UN Doc S/RES/ 1617 (29 July 2005).

[38] Curtis A. Ward, 'Building Capacity to Combat International terrorism: the Role of the United Nations Security Council' (2003) 8(2) Journal of Conflict & Security Law 289, 289.

[39] This contrasts with the SC's actions in the past when its resolutions were confined to dealing with particular incidents such as when it reacted to the Lockerbie bombing (SC Res 731, UN SCOR, 3033rd mtg, UN Doc S/RES/731 (21 January 1992) and SC Res 748, UN SCOR, 3063rd mtg, UN Doc S/RES/748 (31 March 1992), the attempted assassination of Hosni Mubarak (SC Res 1044, UN SCOR, 3627th mtg, UN Doc S/RES/1044 (31 January 1996) and SC Res 1054, UN SCOR, 3660th mtg, UN Doc S/RES/1054 (26 April 1996), and the attacks of the US embassies in Kenya and Tanzania (SC Res 1189, UN SCOR, 3915th mtg, UN Doc S/RES/1189 (13 August 1998).

[40] With respect to how an emerging policy brokered a strong international consensus, in a speech to the North Atlantic Council on Dec 18, 2001, Donald Rumsfeld stated: '[i]n the global war against terrorism, President Bush has assembled the largest coalition in the history of mankind … The scope of this alliance is truly breathtaking in its breadth and its depth. Some 90 nations – nearly half of the countries on the face of the earth – are participating in the global war on terrorism.' Donald H. Rumsfeld, 'Remarks by Secretary of Defense Donald H. Rumsfeld', (Speech Delivered at Fortune Global Forum, Washington, DC, 11 November, 2002) <https://www.hsdl.org/?view&did=2650>. This is contrary to the Cold war period when the Security Council was dormant and mobilising member states in the Security Council was difficult. Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16(3) *Leiden Journal of International Law* 593.

[41] Victor V. Ramraj, 'The Impossibility of Global Anti-terrorism law?' in Victor V. Ramraj et al (eds.) *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 44.

demonstrates a special stake in its enforcement. As such, as documented by many, in the post 9/11 era the US has securitised and militarised its relations with Africa, in particular with states that are deemed to be 'hot spots' in the global war on terror and of which East Africa is one. [42]

Tynes has identified the re-militarising of African states as among the characteristic features of the US counterterrorism policy in Africa.[43] This approach is evidenced from the growing military assistance, the sponsoring of security sector reform programs, and the support of state security and military institutions.[44] Gebremedhin notes:

> Washington has attached huge importance to its military and security interests in its relations with the rest of the world … For over a decade now [this] has remained the main driver of United States diplomatic, political and economic relations with other nations.[45]

The US believes that securitising its relation with Africa is in its national interest.[46] Former commander of AFRICOM General Carter Ham states 'the way that we best protect the national security interests of the United States in Africa, is by strengthening the defense capabilities of African nations so that they are able to provide for their own security and,

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[42] Robin E. Walker and Annette Seegers, 'Securitization: the case of post 9/11 United States Africa policy' (2013) 40(2) *Scientia Militaria* 22; Jude Howell and Jeremy Lind, *Counter-terrorism, aid and civil society: before and after the war on terror* (Palgrave Macmillan, 2009); Rita Abrahamsen, 'Blair's Africa: the politics of securitization and fear' (2005) 30(1) *Alternatives* 55.

[43] Robert Tynes, 'US counter-terrorism policies in Africa are counter to development' (2006) 15(3) *African Security Review* 109.

[44] 'The Securitisation of Aid? Reclaiming security to meet poor peoples' needs' *Saferworld briefing* February 2011; Mark Bradbury and Michael Kleinman, *Winning hearts and minds? Examining the Relationship between Aid and Security in Kenya* (Feinstein International Center, 2009) < http://fic.tufts.edu/assets/WinningHearts-in-Kenya.pdf>.

[45] Kefyalew Gebremedhin, 'In the Twilight of Obama's presidency' *The Ethiopian observatory* (31 July 2014) <http://ethiopiaobservatory.com/2014/07/31/in-the-twilight-of-obamas-presidency/>

[46] Not only the U.S. but also the UK, France and the EU have invested in security sector reform and peacekeeping missions in Africa with a view to advance their respective national security interests. Stephanie B. Anderson, *Crafting EU Security Policy: in Pursuit of a European Identity* (Lynne Rienner, 2008). Securitization being a legitimate policy direction from the viewpoint of a donor's military and national security objectives has support from other sources. Jo Beall, Thomas Goodfellow and James Putzel, 'On the Discourse of Terrorism, Security and Development' (2006) 18(1) *Journal of International Development* 51; Bradbury and Kleinman, above n 43; Ashley Jackson, 'Blurred vision: why aid money shouldn't be diverted to the military' *The Independent (*online) 21 February 2013.

importantly, increasingly contribute to regional security and stability as well.'[47]

From the African public point of view, 'when so many governments in Africa are part of the development and security problem, enhancing their militaries is hardly a neutral or even welcome activity.'[48] As argued by Jackson, militarisation of American-African relations could, inter alia, end up being reassuring of 'unpopular, repressive regimes that are supportive of American strategic interests.'[49] An Algerian man expressed the views of many when he said: 'Now that they [the Algerian authorities] have the Americans behind them, they have become even bigger bullies'.[50] Thus, Keenan argues that the US intervention in Africa is 'prolonging and perhaps even entrenching fundamentally undemocratic regimes, while weakening or delaying the development of autonomous and more democratic civil societies.'[51]

However, such side effects of securitisation are not of much concern to the US. As Fisher and Anderson indicate 'donors are often willing to sacrifice social development and governance goals in exchange for perceived advantages in the security realm, even if doing so involves the marginalization of civil society actors.'[52]

(b) Ignoring human rights violations in Africa

The corollary of the securitisation of US relations with Africa has been that the former ignores human rights violations in the latter when committed in the name of counterterrorism. As Allo has noted '[t]he obsessive focus of the West on the "war on terror" and the tendency to

[47] US AFRICOM Public Affairs, Presentation on the Role and Mission of United States Africa Command (Transcript) 27 January 2013 <http://www.africom.mil/Newsroom/Transcript/10243/transcript-presentation-on-the-role-and-mission-of>.

[48] Sean McFate 'Briefing US AFRICA Command: Next step or next stumble?' (2007) 107 (426) *African Affairs* 111, 120.

[49] Paul B. Jackson, 'Missions and Pragmatism in American Security Policy in Africa' (2009) 30(1) *Contemporary Security Policy* 45, 46.

[50] Jeremy Keenan, *The Dying Sahara: US Imperialism and Terror in Africa (*Pluto press, 2009) in Jeremy Keenan, 'Demystifying Africa's Security' (2008) 35 (118) *Review of African Political Economy* 634, 638.

[51] Ibid.

[52] Fisher and Anderson, above n 33, 150.

define human rights policy through the lens of the war on terror means that those who abuse their citizens under the guise of the war on terror are impervious to criticism.'[53]

While the US exerts considerable pressure on states to be part of the global war on terror, no corresponding effort is made in relation to ensuring legality of counterterrorism measures. The US has never seriously scrutinised abuse in the application of counterterrorism laws and policies. Cilliers and Sturman describe the US interest in seeing that Africa join the war on terror as so strong that it returns 'to cold war partnership and the near abandonment of multilateralism, the promotion of democracy and advancement of human rights.'[54]

Many others contend that securitisation of what is normally a political issue has resulted in adverse consequences to human rights.[55] As Malan observes, 9/11 makes the US, which desperately looks for intelligence, airfields and military bases, disregard human rights, good governance and accountability issues.[56] Thus, Foot observes that as 9/11 has caused the United States to abandon its post-cold war practice of incorporating human rights elements into its foreign policy, it has embraced governments that it believes are important in counterterrorism operations even if they have had a poor record of human rights.[57] For example, it is despite the fact that governments in East Africa, most notably Ethiopia and Uganda, have maintained power through 'authoritarian and militarized practices'[58] such as harsh repression of internal dissent, that the US continues to increasingly support, train and arm the military and security services of these states.[59] Tynes discerns that the US counterterrorism policies in Africa, has been 'counter-productive,

[53] Awol K Allo, 'The 'Ethiopia rising' narrative and the Oromo protests' *Aljazeera,* 21 June 2016 <http://www.aljazeera.com/indepth/opinion/2016/06/ethiopia-rising-narrative-oromo-protests-160620140306460.html>.
[54] Cilliers and Sturman, above n 18, 14.
[55] Adewale Aderemi, 'The Post-Bipolarity, Terrorism and Implications for Africa' in Malinda S. Smith (ed.), *Securing Africa Post -9/11 Discourses on Terrorism,* (Ashgate, 2010) 129.
[56] Malan, above n 19.
[57] Rosemary Foot, 'Collateral Damage: Human Rights Consequences of Counterterrorist Action in the Asia-Pacific' (2005) 81(2) *International Affairs* 411.
[58] Fisher and Anderson, above n 33, 131.
[59] Ibid 131, 138.

facilitating and/or maintaining autocratic styles of government.'[60] One analyst emphatically indicates that 'counterterrorism, like communism in the past, has relegated other concerns to the backburner.'[61]

The following examples illustrate how far the counterterrorism agenda has blinded the US.[62] As noted by Human Rights Watch, Egypt had been using 'anti-terrorism decrees and emergency rule to suppress peaceful dissidents.'[63] Post 9/11, Secretary of State Colin Powell lauded Mubarak's government as being 'really ahead of us on this issue.' This made Mubarak feel more justified and go on to state that 'there is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual.'[64]

Similarly, despite the accusations against the Ugandan government for misusing its Anti-Terrorism Act to target its opponents and journalists, US economic and military assistance to Uganda increases three times between 2000 and 2005.[65] Owing to its desire to form counterterrorism alliances with the Sudan, the Whitehouse 'Senior House Republicans … have postponed debate on the Sudan Peace Act, a bill that would have bolstered support to the southern rebels …'[66] He further notes that although 'any form of dissent is terrorism' and 'most voices critical of the

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[60] Tynes, above n 43, 110.

[61] Aderemi, above n 55, 139.

[62] There was an instance where the US encouraged a foreign government to characterise its opponents as terrorists. At the time when there was a domestic controversy on whether or not the Moro Islamic Liberation Front (MILF) of the Philippines should be labelled as terrorist President Bush said of the Philippine president Arroyo: 'she's tough when it comes to terror; she fully understands that in the face of terror, you've got to be strong, not weak. The only way to deal with these people is to bring them to justice. You can't talk to them. You can't negotiate with them. You must find them.' 'Text of Bush, Arroyo remarks' *Associated Press*, Washington, D.C., (19 May 2003).

[63] Human Rights Watch, 'In the name of counter-terrorism: Human Rights Abuse Worldwide, A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights' (25 March 2003) 11 <www.hrw.org/un/chr59/counter-terrorism-bck.pdf>.

[64] Human Rights Watch, Opportunism in the face of tragedy: Repression in the name of anti-terrorism, 'Egypt' section 2006 <www.hrw.org/campaigns/september11/opportunismwatch.htm>.

[65] Beth Elise Whitaker, 'Exporting the Patriot Act? Democracy and the "war on terror" in the Third World' (2007) 28: 5, *Third World Quarterly* 1017, 1027.

[66] Aderemi, above n 55, 139.

state have been silenced under the law' in Ethiopia, the State Department merely releases an annual state of human rights report criticising Ethiopia.[67] This 'hasn't prevented the Department of Defence from continuing on its part to underwrite Ethiopia's many development projects and to praise the Ethiopian leadership.'[68] As noted by Abbink, because the international donor community sees Ethiopia as a rather powerful ally in the global counterterrorism campaigns, they are usually prepared to accept new promises from the Ethiopian leadership even in the face of 'the recurring political crisis, the repression of opposition … '[69]

This cold war style approach by the US is criticised for being likely to ultimately bolster pro-war sentiment in terror regimes 'to become impervious to public opinion buoyed by tacit American support.'[70] Because 'participation in counterterrorism is akin to a "bullet-proof vest" that buys them immunity against criticism over any domestic malfeasance',[71] African states conflate political opposition with terrorism.[72] Foot argues that repressive governments note that 9/11 has allowed counterterrorism to overshadow human rights issues.[73] They learnt that aligning with the US in the war against terror would permit them do whatever they liked in the name of counterterrorism. They also saw that this alignment was a lucrative source of increased economic, political and military support. For example, Ali Mazuri, commenting on the keenness of Kenyan authorities to be seen as allies by the US, notes that 'authorities became so eager to please the Americans that they were tempted to repatriate their own Kenyan citizens to the United States on

[67] Ibid.
[68] Ibid.
[69] John Abbink, 'The Ethiopian Second Republic and the Fragile "Social Contract"' (2009) 44(2) *Africa Spectrum* 9, 18.
[70] Aderemi, above n 55.
[71] Abdullahi Boru Halakhe, 'Through the looking glass: Counterterrorism and the securitisation of Africa's politics' *Mail & Guardian Africa* (20 May 2014) <http://mgafrica.com/article/2014-05-20-through-the-looking-glass-counterterrorism-and-the-securitisation-of-africas-politics>
[72] Anneli Botha cited Ethiopia as an example where the late Prime Minister Meles Zenawi had used this ploy to secure assistance from the US. Anneli Botha, 'Challenges in Understanding Terrorism in Africa' in Wafula Okumu and Anneli Botha (eds.), *Understanding Terrorism in Africa Building Bridges and Overcoming the Gaps*, (Institute for Security Studies, 2008) 9.
[73] Foot, above n 57.

the slightest encouragement.'[74] Similarly, Halakhe, East Africa analyst, observes that '"smart" African leaders have cleverly exploited this new "securitised" environment to shrink political space and criminalise dissent by labelling their political opponents "terrorists".'[75] Thus, he notes, 'the labelling of any anti-state group as terrorist has become a default position of the state.'

Describing the US counterterrorism policy towards Africa as one where 'more manure were being applied to the fields of autocracy',[76] Tynes argues that the war on terror is a strain on Africa's reform towards democratisation.[77] He forcefully argues that the US counterterrorism policy has resulted in the compromise of civil and political rights, constriction of liberty, and squashing of democracy.[78] Similarly, Makinda, noting that 'the US … increasingly paid less attention to human rights'[79] observes that the war on terror has had a deleterious effect on human rights in sub-Saharan Africa.'[80]

1.3.2 Internal factors

Two internal factors that expose Africa to misuse of counterterrorism are considered below. First, there is a prevalent discrepancy between the law and the practice which makes Africa a fertile ground for misuse of counterterrorism. Second the African rulers exploited the securitization of US Africa relation to promote their own interests as opposed to that of the citizens of the state they rule.

[74] Alamin M. Mazrui, *Cultural Politics of Translation: East Africa in a Global Context* (Routledge, 2016) 103.
[75] Halakhe. Above n 71.
[76] Tynes, above n 43, 112.
[77] Ibid 113.
[78] Ibid 110.
[79] Samuel M. Makinda, **'**The Impact of the War on Terror on Governance and Human Rights in Sub-Saharan Africa' in Wafula Okumu and Anneli Botha (eds.) *Understanding Terrorism in Africa Building Bridges and Overcoming the Gaps (*Institute for Security studies*,* 2008) 32, 33.
[80] Ibid.

(a) Lack of commitment to democratic norms and institutions

Internally, there are numerous factors, such as the absence of rule of law and judicial independence, which make counterterrorism more likely to be misused in Africa.

On how the African repressive governments use the court system as a tool for their political purpose, the following comment has been made:

> In some countries a pliant judiciary is prepared to comply with the wishes of the executive and imprison critics of the government in a parody of due process. This has been the case in, for example, Togo, Côte d'Ivoire, Cameroon and sometimes Kenya. Elsewhere, criminal charges have been used frivolously, with no intention that the accused will ever be brought to court. Instead opposition politicians, journalists and others must labour with the threat of outstanding sedition or subversion charges. In the worst cases the accused are refused bail and spend months or years in prison before charges are dropped. For example, in recent years in Uganda more than one hundred people have been charged with treason--an offence where the courts have no discretion to grant bail. Few of these cases have ever come to trial.[81]

As noted above, the OAU Convention on Combating and Preventing Terrorism incorporates provisions that define terrorism and impose human rights conditionality on counterterrorism. Furthermore, constitutional provisions of most African states are comparable with those of democratic states in terms of recognising human rights.[82] However, in a system that does not honour rule of law and judicial independence such legal provisions have no practical significance. Oxfoby and Powell have emphasised this point specifically in relation to abuse of anti-terrorism legislation as follows:

> In a system where rule of law is not respected, governmental obedience to its own legislation will be piecemeal. Government is likely, in other words, to rely on extra powers which anti-terrorism legislation grants it, but ignore the legal restriction of those powers. In

[81] The Status of Human Rights Organizations in Sub-Saharan Africa Overview: Some Issues Facing Sub-Saharan African Human Rights Groups <https://www1.umn.edu/humanrts/africa/issues.htm>.

[82] Yash Ghai, 'The Theory of the State in the Third World and the Problem of Constiutionalism' (1990-1991) 6 *Journal of International Law* 411.

> such cases, anti-terrorism legislation is more likely to become an alibi for the abuse of power than an instrument to prevent terrorism within a clear legal framework.[83]

Had there been judicial independence and rule of law, the two gaps in Resolution 1373 would not have much impact in Africa as the regional instrument could be used to fill them. However, in the absence of a strong judiciary, the mere existence of the instrument does not have any significance. On the contrary, in liberal democracies, where the principle of judicial independence is respected, research indicates that the Resolution's claimed gaps have been mitigated by judicial activism even in the absence of a regional counterterrorism instrument comparable to the one that Africa has. [84]

(b) Adaptation of the securitisation approach by repressive regimes

While the securitisation approach is criticised for having been negative to civilian populations by impacting on key development areas such as social development, human rights and governance reform,[85] for African repressive regimes it is not problematic.[86] Fisher and Anderson's article on 'Authoritarianism and the securitization of development in Africa' argues compellingly how repressive regimes 'eagerly embraced' the securitisation approach initiated by western states and 'actively promoted its practice' and how this enables the regimes to consolidate and maintain power.[87]

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[83] Chris Oxtoby and C. H. Powell, 'Terrorism and Governance in South Africa and Eastern Africa' in Victor V. Ramraj et al (eds.) *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 573, 595.

[84] Keiran Hardy and George Williams, 'What is "terrorism"? Assessing Domestic Legal Definitions' (2011) 16 UCLA *Journal of International Law & Foreign Affairs* 77.

[85] Lars Buur, Steffen Jensen and Finn Stepputat (eds.), *The security–development nexus: expressions of sovereignty and securitization in southern Africa* (HSRC Press, 2007); Jeremy Lind and Jude Howell, 'Counter-terrorism, the politics of fear and civil society responses in Kenya' (2010) 41(2) *Development and Change* 335; Fisher and Anderson, above n 32.

[86] Will Jones, Ricardo Soares de Oliveira and Harry Verhoeven, Oxford University Refuge Studies Centre, 'Africa's illiberal state-builders', Working Paper No. 89 <https://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp89-africas-illiberal-state-builders-2013.pdf>; Fisher and Anderson, above n 32, 131.

[87] Fisher and Anderson, above n 33.

Being beneficiaries of the securitisation approach,[88] the regimes adopt a strategy of constructing their enemy as enemy of the donors as well. This advocates the securitisation agenda with a view to ensuring sustainable support from the donors in the security sector. For example, on several occasions, the late Prime Minister Meles Zenawi of Ethiopia argued that US and Ethiopian interests converge when it comes to threats from Islamist groups in Somalia. As captured in WikiLeaks, in discussions with donors[89] and interviews with western media,[90] he described the Islamist Court Union of Somalia as a 'Taliban' arrangement in 'Talibanizing all of Somalia,' which is viewed as an attempt to link Ethiopia's enemy to that of the UK and US.[91] Museveni of Uganda employed the same strategy to successfully lobby to get two rebel groups in Uganda – the Lord's Resistance Army (LRA) and Allied Democratic Forces (ADF) – proscribed as terrorist by the United States.[92] In 2001, he told journalists that Al-Qaeda had a plot to kill him through the ADF and that bin Laden recruited members of the ADF to be trained in Afghanistan.[93]

Though such construction is dismissed by many as farfetched, [94] the regimes have been successful in employing the strategy as it reinforces already existing views and fears among western donors. In justifying his decision to send 100 military advisers to Uganda, president Obama

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[88] Ibid 132.

[89] WikiLeaks, Leaked Cable, US Embassy, Addis Ababa, (29 June 2006) <http://wikileaks.org/cable/2006/06/06ADDISABABA1783.html>.

[90] 'Interview with Meles Zenawi' *The Somaliland Times*, (online) <http://somalilandtimes.net/sl/2006/256/0280.shtml>

[91] Fisher and Anderson, above n 33, 148.

[92] Jonathan Fisher, '"Some more reliable than others"' (2013) 51(1) *Modern African Studies* 1.

[93] Alfred Wasike, 'Kampala on Bin Laden hit-list' (17 December 2001) *New Vision* http://allafrica.com/stories/200112170189.html

[94] See for example: 'LRA: Rebels worth sending US troops to Africa?' *CBS News* (15 October 2011) <http://www.cbsnews.com/news/lra-rebels-worth-sending-us-troops-to-africa/>; 'Political payback behind US special forces deployment to Uganda?' *NBC News* (15 October 2011) <http://www.nbcnews.com/id/44912923/ns/world_news-africa/t/political-payback-behind-us-special-forces-deployment-uganda/#.V5hWg8kdkgI>; Bronwyn Bruton, 'Al Shabab Mainly a Local Problem in Somalia' *The New York Times,* [online] (1 October 2013) <http://www.nytimes.com/roomfordebate/2013/09/30/does-al-shabab-pose-a-threat-on-american-soil/al-shabab-mainly-a-local-problem-in-somalia>; Ken Menkhaus, 'A Shabab Attack in the U.S. Is Unlikely' *the New York Times [online]*, (30 September 2013) <http://www.nytimes.com/roomfordebate/2013/09/30/does-al-shabab-pose-a-threat-on-american-soil/a-shabab-attack-in-the-us-is-unlikely>.

indicates that pursuing the LRA was in the 'national security interests' of the US, which is referred to as the peak of a successful adaptation of the securitisation strategy by Museveni.[95] Moreover, both governments of Ethiopia and Uganda have continued to be among the major recipients of US aid despite the accusation that they have used the securitisation of development to build 'semi-authoritarian and illiberal states',[96] thereby becoming increasingly intolerant of dissenting views and opposition.[97]

1.4 Repercussion of US counterterrorism approach on Africa's counterterrorism

Ford describes the interplay between the American and African counterterrorism law and practice as follows:

> Leadership matters, and leading by example speaks volumes. Therefore, efforts to promote rule of law based counter-terrorist measures at the national level in Africa will remain closely linked to whether the rule of law obtains at the international level. The example shown by the United States and others in terms of the methods they adopt to deal with their national security threats will be critical to their credibility when pushing for principled actions by African countries where they cooperate operationally and legally, and where they provide military, policing, justice and human rights support.[98]

President Obama, in his 2014 State of the Union address, acknowledged the importance of setting a good example in countering terrorism. He stated 'we counter terrorism not just through intelligence and military action, but by remaining true to our Constitutional ideals, and setting an example for the rest of the world.'[99]

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[95] Fisher and Anderson, above n 33, 149.

[96] Ibid.

[97] For example in relation to Ethiopia see: Christopher Clapham, 'Post-war Ethiopia: the trajectories of crisis' (2009) 39: 120 *Review of African Political Economy* 181; Tobias Hagmann and Jon Abbink, 'Twenty years of revolutionary democracy in Ethiopia, 1991–2011' (2011) 5(4) *Journal of Eastern African Studies* 579. For the case of Uganda see: Aili Mari Tripp, *Museveni's Uganda: paradoxes of power in a hybrid regime* (Lynne Rienner: 2010); Roger Tangri and Andrew Mwende, 'President Museveni and the politics of presidential tenure in Uganda', (2010) 28(1) *Journal of Contemporary African Studies* 31.

[98] Jolyn Ford, Institute for Security Studies, 'Counter terrorism, Rule of Law and Human Rights in Africa' Paper 248, (November 2013) 4 <https://www.issafrica.org/uploads/Paper248.pdf>

[99] The White House Press of Secretary, *President Barack Obama's State of the Union Address***,** (28 January 2014) <https://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>.

However, in reality the US does not conform to this ideal. Its counterterrorism legislation, policies and practices have not been compatible with the principles of legality and human rights.[100] As such, and contrary to what president Obama has stated, the US may not be an ideal model.[101] Commenting on how the way the US conducts its counterterrorism in general, and the description of the response to 9/11 as a 'war on terror' in particular creates opportunities for abusive governments to misuse counterterrorism, Mary Robinson notes:

> By responding in this way the United States has, often inadvertently, given other governments an opening to take their own measures which run counter to the rule of law and undermine efforts to strengthen democratic forms of government. The language of war has made it easier for some governments to introduce new repressive laws to extend security policies, suppress political dissent and stifle expression of opinion of many who have no link to terrorism and are not associated with political violence.[102]

Similarly, Hans Corell, former Legal Counsel of the United Nations, commenting on the designation of countering terrorism as war has indicated the following:

> To suppress terrorism is not a war. You cannot conduct a war against a phenomenon. As a matter of fact to name the fight against terrorism a "war" was a major disservice to the world community including the State from where the expression emanates. The violations of

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[100] The Human Rights Committee (HRC) accuses the United States of abusing counterterrorism. A preliminary framework draft of principles and guidelines concerning human rights and terrorism, prepared by the Special Rapporteur to the Human Rights Sub-Commission in Andrea Bianchi, Security Council's Anti-terror Resolutions and their Implementation by Member States, (2006) 4 *Journal of International Criminal Justice* 1044, 1051.

[101] According to a 2007 BBC World Service poll of more than 26,000 people across 25 different countries, 67 per cent disapprove of the US handling of Guantanamo detainees. The poll shows that the view of the United States' role in world affairs significantly worsened in 2007. In the 18 countries that were previously polled, the average percentage saying that the United States was having a mainly positive influence in the world has dropped seven points from a year ago — from 36 to 29 per cent— after having already dropped four points the year before. Across all 25 countries polled, one citizen in two (49 per cent) now says the US is playing a mainly *negative* role in the world. BBC World Service, 'Poll: World View of US Role Goes From Bad to Worse' (23 January 2007) <http://www.globescan.com/news_archives/bbcusop/detail.html>.

[102] Mary Robinson, 'Human Rights and Counter-terrorism: how the issue is framed' (Remarks made at the First International Conference on Radicalisation and Political Violence, London, 17-18 January 2008) <http://icsr.info/wp-content/uploads/2012/10/1234261883ICSRRemarksbyMaryRobinson.pdf>.

> human rights standards that have occurred in the name of this so called war – no matter how necessary it is to counter terrorism – have caused tremendous damage to the efforts by many to strengthen the rule of law.[103]

This misguided approach has impacted on Africa's counterterrorism in several ways. First, it has enabled repressive regimes to defend their wrongdoings by invoking the laws and practices of the US. Second, it deprives the US of a moral authority to be critical of counterterrorism in Africa. Third, it gives strong leverage to repressive regimes in their relation with the US and with other donors even if the latter were to be critical of counterterrorism in Africa.

1.4.1 Africa's Emulation of America

As noted above, US counterterrorism law and practice have been contrary to that which President Obama describes it should be. While US counterterrorism not being consistent with its ideals makes relatively democratic states in Africa hesitant in cooperating with the US in counterterrorism,[104] the repressive states, which are eager and ready to use any means of suppression against any form of opposition and dissent, have used this as an excuse for their illegitimate laws and abusive practices.[105] Citing instances of human rights violations by the US while responding to 9/11, Juan Méndez comments that the failure to respect civil liberties while responding to the tragedy of terrorism would encourage authoritarian regimes to do the same.[106] Similarly, Foot, having described the damage that the war on terror has caused in the Asia-Pacific, makes a far-reaching conclusion:

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[103] Ibid.

[104] These countries include South Africa, Nigeria and Kenya. Beth Elise Whitaker, 'Soft balancing among weak states? Evidence from Africa' (2010) 86(5) *International Affairs* 1109, 1112-13, 1124. Same is true in other parts of the world. For example, the Executive Order that created military commissions with the jurisdiction to try foreigners against whom the US President has 'reason to believe' that they are associated with al-Qaida provoked Spain in particular and members of the European Union in general to express their position that they would not cooperate with the U.S. in extraditing suspected Al-Qaeda members if the Executive Order is to be applied on them. Juan Méndez, 'Human Rights Policy in the Age of Terrorism' (2002) 46 *Saint Louis University Law Journal* 377, 384.

[105] Peter J. Katzenstein and Robert O. Keohane (eds.), *Anti-Americanisms in world politics (*Cornell University Press*,* 2007)*;* Fisher and Anderson, above n 32, 136; Whitaker, 'Soft balancing', above n 103, 1124.

[106] Méndez, above n 104, 383-384

> Emulation of the most powerful has always been important in world politics; thus U.S. behaviour has done untold damage, not only to the rights of those held in U.S. detention centres, but far more broadly to the human rights regime itself, particularly in a part of the world where the hold of this norm was already somewhat tenuous.[107]

Similarly, Kenneth Roth, executive Director of Human Rights Watch, once noted that 'other governments are using the United States as a cheap excuse for their own misconduct.'[108] Indeed, African states engage in what Foot calls 'emulation of America',[109] where the US counterterrorism practice is used as a justification to defend wrong practices elsewhere in the world. Some mockingly compare their counterterrorism legislation and practice with that of the United States. For example, Eritrea defended the arrest of journalists stating that detaining them without charge is the same practice as that the Western countries use for terrorists.[110] A spokesperson for the Zimbabwean president Robert Mugabe said 'we agree with US President Bush that anyone who in anyway finances, harbours or defends terrorists is himself a terrorist. We too, will not make any difference between terrorists and their friends and supporters.'[111] When Kenneth Roth raised Egypt's use of torture with the Egyptian Prime Minster, the latter looked at Roth 'with a straight face, not missing a beat, and said, "That's what Bush does."'[112] When challenged on not being compatible with human rights it is not uncommon for Ethiopian authorities to refer to western counterterrorism legislation to defend the nation's anti-terrorism legislation.[113]

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[107] Foot, above n 57, 424.

[108] Craig Kennedy, 'The Wrong Way to Combat Terrorism' , Interview with Kenneth Roth, Executive Director of Human Rights Watch (Providence, Rhode Iland, 1 May 2007) (2007) 14(1) *Brown Journal of World Affairs* 263, 268.

[109] Foot, above n 57, 423.

[110] See Human Rights Watch, 'Opportunism in the face of tragedy' above n 63, Eritrea Section.

[111] Ibid, Zimbabwe section.

[112] Kennedy, above n 108, 268.

[113] Patrick Griffith, 'Ethiopia's Anti-Terrorism Proclamation and the right to freedom of expression' *freedom now*, 30 August 2013 <http://www.freedom-now.org/news/ethiopias-anti-terrorism-proclamation-and-the-right-to-freedom-of-expression/>. For example, the late Prime Minster Meles Zenawi indicated that the ATP is copied word by word from the UK's antiterrorism legislation. Yemane Negash, 'ኤርፖርት ላይ እንደሚታነቁ የሚያምኑ ሰዎች ቢኖሩም ኢሕአዴግ ግን ስለመኖራቸውም አያውቅም' [While Some Believe People are caught at the Airport, EPRDF does not know that] *Reporter Amharic* (online) 10 December 2014

1.4.2 Lack of moral authority[114]

As noted above the United States has ignored human rights abuses committed in the name of counterterrorism. Even if the US were to be critical of counterterrorism in Africa, there are several factors that would make such attempts at criticism ineffective. The US's flawed counterterrorism legislation, policies and practices would make African states unable to take US concern for human rights seriously. Moreover, the US promotes and supports most of the counterterrorism laws, policies and practices in Africa.[115] By securitising its relations with Africa, the US has given priority to security over liberty.[116] These and other factors ensure that the US has no moral authority to demand a rule of law-based approach to counterterrorism in Africa.

In 'U.S. Agents Visit Ethiopian Secret Jails',[117] the *Washington Post* reported how Ethiopian, Kenyan and US officials cooperated and/or conspired in the illegal treatment of terrorism suspects from 19 countries. The suspects were deported from Kenya to Somalia and then flown to Ethiopia to be detained in a black site and to be interrogated by US

<http://www.ethiopianreporter.com/index.php/politics/item/8182>. Similarly Getachew Reda, Minster of Communication and Shimeles Kemal, state Minster of Communication reiterated that the provisions of the ATP are taken from legislation of democratic countries. Ethiopian Political parties Position on the Anti-terrorism law part two <https://www.youtube.com/watch?v=-g5JhwpAt4U>; Ethiopian political parties position on the Anti-terrorism law part three <https://www.youtube.com/watch?v=boeUIk1d4Zo>.

[114] See the articles 1) on plausible legality and sentencing risk that Jude refers to. 2) *Political Punch,* ABCNEWS.COM (June 9, 2009, 5:01 PM), http://blogs.abcnews.com!politicalpunchl2009/06/todays-qs-for-os-wh-692009.html (last visited Oct. 19, 2010) (in response to a reporter's question regarding the credibility of the United States' criminal justice system, White House spokesperson Robert Gibbs declines to confirm that suspects who are found "not guilty" in United States' courts would be released). The impression that the post-September II military commissions were created to circumvent the rule of law and Constitution has cast doubt on the credibility of the United States as a leader on developing governmental procedures that comport with the rule of law. *See, e.g.,* Editorial, *A Travesty of Justice,* N.Y. TIMES (Nov. 16, 2001), <http://www.nytimes.com!2001l111l6/0pinion/a-travesty-of-justice.html> (last visited Oct. 9, 2010). in Sudha Setty's Comparative Perspectives On Specialized Trials For Terrorism

[115] Whitaker, 'exporting the Patriot Act?,' above n 64; Tynes identifies initiating of repressive legislation as among the characteristic features of the U-S counterterrorism policy in Africa. Robert Tynes, 2006. US counter-terrorism policies in Africa are counter to development, *African Security Review* 15(3), 109-113, 111.

[116] Whitaker, 'Soft balancing', above n 104, 1124; Jonathan and Anderson, above n 33.

[117] Anthony Mitchell, 'US Agents Visit Ethiopian Secret Jails' *The Associated Press (*online*),* 3 April 2007. <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/03/AR2007040301042_pf.html>.

agents. While Ethiopia denied the suspects' presence there, Kenya said it did not know that the suspects would be deported to Ethiopia. Moreover, a diplomat in Kenya disclosed that the extraordinary rendition was guided by US agents who admitted that they interrogated suspects in Ethiopia without any breach of US law. The US agents' argument that they were not involved in acts illegal under the US law makes little sense. This is a clear case of conspiracy of states in the illegal treatment of human beings. They participated in an activity prohibited under international law. More importantly, having witnessed this illegal activity, it would be very unlikely for Kenyan and Ethiopian authorities to take seriously any expression of human rights concern by the US.

As Méndez rightly questions, why should authoritarian governments listen to the United States who is not loyal to human rights principles, when the latter tells them to respect human rights?[118] Foot observes that its disrespect for rule of law and international humanitarian law and its tolerance for the use of torture against terrorist suspects have all discredited America's claim to be a champion of respect for human rights.[119] For example, when the US ambassador to Egypt was asked to talk to the Egyptian government about the latter's serious human rights abuses, 'he had to admit sheepishly that he could not raise these.'[120] Roth notes 'How could he? It's not just him or his personal squeamishness. No U.S. representative today can credibly talk about these kinds of issues.'[121]

Criticising others for not respecting human rights while itself engaging in multiple violations would only be hypocritical. In instances where the US expresses its concern relating to human rights situations in some of its ally countries, these governments are aware that the US is not so serious that it would terminate its relations or take other forms of action.[122]

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[118] Méndez, above n 104.
[119] Foot, above n 57.
[120] Kennedy, above n 108, 268.
[121] Ibid.
[122] Thomas Carothers, 'Promoting Democracy and Fighting Terror' *Foreign Affairs*, January/February Issue, <http://www.foreignaffairs.com/articles/58621/thomas-carothers/promoting-democracy-and-fighting-terror>

Commenting on the long term implications of US abuse of counterterrorism, Kenneth Roth indicates that it enormously undermined the credibility of the US, a potentially powerful ally in promoting human rights around the world which, in turn, has made it no longer possible to rely on the US to influence abusers.[123] On the gravity of the problem, Roth hints that the US position on human rights issues in the age of terror is much worse than its double standard position during the cold war. While the support provided to some unsavoury regimes during the cold war had an impact on its credibility, 'U.S. agents themselves were usually careful to maintain a certain deniability with respect to their involvement, and senior U.S. officials maintained a façade of respect for human rights.'[124] In the age of the global war on terror many of the abuses

> have been openly embraced and actively defended by the highest levels of the Bush administration. There is no longer any credible deniability at the top—these abuses are U.S. policy. This makes it … difficult for the U.S. government to credibly challenge other governments that flout human rights standards.[125]

1.4.3 Increased Leverage of African States

The imprudent US approach to counterterrorism enables African repressive regimes to gain strength not only domestically but also in their external relations with the donors. Logically, states that are economically dependent on US support would agree with the US line. Following this logic, most states in Africa, being beneficiaries of economic aid from the U.S., are expected to support US backed initiatives and policies. However, the behaviour of some African states defies this expectation. Repressive regimes including those of Ethiopia and Uganda have been intolerant of foreign intervention in policy areas related to defence and security.[126] These governments have made clear to donors that the

[123] Kennedy, above n 108, 263.
[124] Ibid 270.
[125] Ibid.
[126] Jonathan and Anderson, above n 33. On the other hand there are relatively democratic and economically better off states such as Kenya, Nigeria and South Africa resisting the hegemony. Whitaker documents several cases of resistance by these states against US initiatives including the Iraq war, global war on terror, Article 98 Agreement relating to the ICC, and the establishment of AFRICOM. The resistance by these states is explained, inter alia, in terms of domestic pressure on the governments not to bend to US pressure, regional balance of power concerns, availability of alternative international alignment and economic interests. Owing to

defence and security sectors are off the agenda in their negotiations and that they should support and not question spending on these areas at all.[127] There are instances where actual attempts by the donors to convince the governments of Ethiopia and Uganda to cut their defence spending did not succeed.[128]

An independent task force on the future of US-Africa relations identified this trend of resistance in 2006 and warned the then US administration and congress as follows.

> In Uganda and Ethiopia, the demands on the United States are less for resources than for exerting influence on the processes of democracy. In those cases, however, even where both countries are major recipients of international assistance, negative leverage is limited. The leaders of these countries are strong willed and Ethiopia has already talked of reaching out to China to offset pressures from the EU and the United States on its electoral practices. The United States has not yet, however, assigned high-level diplomats to undertake special efforts with Ethiopia or to mobilize a consortium of countries, both African and others, to address the crisis there. In Uganda, perhaps the best path is for the United States to invest much more in the civil and political institutions that can survive yet another term of Museveini's presidency. In any case, [these] countries … deserve special attention if democracy is to flourish on the continent and the recent positive trends are to be sustained. Such a strategy is not yet evident.[129]

Although Ethiopia is one of the top recipients of foreign donation, it has been impervious to the criticism from the US relating to its human rights

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the available comparative political freedom, civil society has been able to mobilise against US policies to which the governments respond. Moreover, as the US does not retaliate to the resistance by terminating or reducing its aid, politicians in relatively democratic countries tend to gain popular support by looking tough on the US. Whitaker, 'Soft balancing', above n 103. Both the repressive and relatively democratic states resist US pressure as they think that it is a challenge to their dominance from different angles. While the repressive regimes fear that the pressure may incapacitate them from being able to control opposition and dissent, the relatively democratic governments felt their dominance in their respective subregions was threatened. Jonathan and Anderson, above n 32; Whitaker, 'Soft balancing', above n 103.

[127] Fisher and Anderson, above n 33, 144.

[128] Ibid.

[129] Anthony Lake and Christine Todd Whitman, Council on Foreign Relations, 'More than Humanitarianism: A Strategic U.S. Approach Toward Africa Report of an Independent Task Force' Independent Taskforce report no. 56, 2006.

records in general and counterterrorism prosecutions in particular.[130] An extreme case of defiance against the US was witnessed when Ethiopia advanced an alternative approach to the problem in Somalia to that which the US suggested. Ultimately, the US quit its proposed solution and followed the Ethiopian path in what was described as 'a radical change of attitude.'[131]

The following statement from the late prime Minster Meles Zenawi of Ethiopia succinctly expressed the hostility to external pressure in relation to democratisation. The Prime Minster told Peter Gills:

> We believe that democracy, good governance and transparency and fighting corruption are good objectives for every country, particularly for developing countries. Where we had our differences with the so-called neoliberal paradigm is first on the perception that this can be imposed from outside. We do not believe that is possible. Internalization of accountability is central to democratisation. The state has to be accountable to the citizens, and not some embassy or foreign actor.'[132]

Fisher and Anderson note that 'donors appear to have come to accept that any serious attempt to demand oversight on these areas [security and defence] would prove an exercise in futility, tacitly acknowledging that they are not "in control"'.[133] On the other hand, these regimes allow the donors to have a major say in other policy areas such as social and

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[130] However, "[A]ssistance to Ethiopia's government has increased while its human rights record has deteriorated," Peligal said. Thus, Donors are criticised for 'contradicting their own principles on human rights and good governance by increasing funding without adequate safeguards.' Roberto Schmidt, Human Rights Watch, 'Ethiopia: Donors Should Investigate Misuse of Aid Money: National Parliaments and Audit Institutions Should Demand Accountability' 17 December 2010 <http://www.hrw.org/news/2010/12/17/ethiopia-donors-should-investigate-misuse-aid-money>.

[131] US and Ethiopian officials held an extensive and detailed discussion on how to respond to the Islamic Courts Union (ICU) following the conquest of Mogadishu, Somalia's capital. As documented by WikiLeaks each proposed a completely different approach. While the US clearly expressed its objection to military intervention, Ethiopia suggested entering Somalia and taking military measures against the extremist group. Likewise, while the US was hesitant of supporting the Transitional Federal Government of Somalia over the coalition of war lords, Ethiopia was determined to support the latter. Similar tendencies were observed when Uganda decided to enter into Democratic Republic of Congo. Fisher and Anderson, above n 32, 145-46.

[132] Peter Gills, 'Meles Zenawi in his own words' *African Arguments* 22 August 2012 <http://africanarguments.org/2012/08/22/meles-zenawi-in-his-own-words-%E2%80%93-by-peter-gill/>

[133] Fisher and Anderson, above n 33, 145.

economic development[134] to the extent where some find it difficult to differentiate between donors and policy-makers.[135] As argued by Fisher and Anderson, the repressive regimes' strategy of allowing donors to have a say in development areas but exclude them from the security sector has been a useful strategy and has elevated them to a stronger position.[136] By so doing, the regimes have been successfully funding their military and security budgets 'either directly or through diverting aid intended for other purposes without donors' approval.[137] Moreover, these regimes gain increased control over securitisation through building trust within the relationship that they have with the donors.[138]

1.5 Conclusion

Africa's susceptibility to abuse of counterterrorism is attributable to internal and external factors. Internally, the core problem relates to an absence of democratic culture and independent and impartial legal institutions which can oversee the proper implementation of counterterrorism legislation. Lack of such culture and institutions mean repressive governments can freely make use of the opportunity created by the counterterrorism regime to pursue local political opponents.[139]

From outside, the impact of flawed policies of the US has been significant. Normally a government is supposed to be primarily accountable and loyal to its constituency, but this is not true in most parts of Africa. Not having legitimacy at home, African rulers believe that they can stay in power as long as they have good relations with greater powers.[140] Commenting on the significance that the African states attach

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[134] Ibid 143.

[135] Graham Harrison, 'Post-conditionality politics and administrative reform: reflections on the cases of Uganda and Tanzania', (2001) 32(4) *Development and Change,* 657. This leads Whitaker to describe Ethiopia and Uganda, as opposed to Kenya and others, as 'extensively cooperative' and as 'tools of the Americans'. Whitaker, 'Soft balancing', above n 103, 1116.

[136] Fisher and Anderson, above n 33, 145.

[137] Fisher and Anderson, above n 33, 145.

[138] Ibid, 143.

[139] In liberal democracies independent institutions oversee the compatibility of anti-terrorism legislation and practice with human rights thereby mitigating the problem created by the claimed gaps in Resolution 1373. Hardy and Williams, above n 83.

[140] Christopher Clapham, *Africa and the international system: the politics of state survival* (Cambridge University Press, 1996); Jean-Francóis Bayart, 'Africa in the world: a history of extraversion' (2000) 99 (395) *African Affairs* 217.

to recognition by other states Clapham notes 'the weaker the state, …, in terms of its level of physical control over its people and territory, and its ability or inability to embody an idea of the state shared by its people, the greater the extent to which it will need to call on external recognition and support.'[141] Thus, it is likely for repressive regimes to work with the US irrespective of the adverse consequences of the cooperation to their people. [142] This is perhaps, at least partly, why Africa has quickly joined the war on terror.[143]

Conversely, while the US did not consider Africa as an important partner immediately after 9/11, it did not take long to realise Africa's significance in the war on terror. The US was concerned about the potential of Africa, of East Africa in particular, of being a safe haven for terrorists and a place where Islamic fundamentalism thrives making it interested in seeing the continent join the war on terror.[144] As predicted by Sankore, the United States government has sought African governments to 'demonstrate full commitment to tackling evil' and 'make it impossible for terrorists to operate within their borders'.[145]

Thus, Africa's alliance with the US in the war on terror serves respective interests of African rulers and the US. This association creates a permissive counterterrorism environment where both African repressive regimes and the US would engage in political opportunism. While the US

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[141] Clapham, above n 140, 11.

[142] Deborah Welch Larson, 'Bandwagoning images in American foreign policy: myth or reality?' in Robert Jervis and Jack Snyder (eds.), *Dominoes and bandwagons: strategic beliefs and great power competition in the Eurasian Rimland* (Oxford University Press, 1991) 85; Steven R. David, 'Explaining Third World alignment' (1991) 43(2) *World Politics* 233; J. S. Levy and Michael M. Barnett, 'Alliance formation, domestic political economy, and Third World security' (1992) 14(4) *Jerusalem Journal of International Relations* 19 in Whitaker, 'Soft balancing', above n 103.

[143] Fisher and Anderson emphatically criticised governments in Africa for calibrating their 'counterterrorism policies with the global "war on terror"'. Fisher and Anderson, above n 32, 135. Moreover they indicated that these governments eagerly accepted and actively promoted practice of the securitisation agenda which was initiated by the west. They argue that African governments have actively pursued, advocated and benefited from securitisation: at 131, 132.

[144] Aderemi, above n 55. The United States recognizes that "Africa's institutional weaknesses, autocratic governance and economic marginality pose a serious threat to the U.S security interests." Stephen Morrison, 'Testimony Before the House International Relations Committee on Africa' 2001 quoted in Aderemi, at 141.

[145] Rotimi Sankore, 'Anti-Terror Legislation and Democracy in Africa' *Pambazuka News* 29 November 2001 <http://www.peace.ca/antiterrorlegislationafrica.htm>.

prioritises security over liberty and human rights, repressive governments exploit counterterrorism as a tool to discipline opposition and dissent without having to concern themselves with possible criticism and condemnation from the United States. Ford captures this disturbing trend as follows:

> After 2001 (and contrary to the UN framework), a more 'permissive' global counter-terrorism environment prevailed. Some African governments took advantage of the cover of global counter-terrorism approaches to pursue domestic opponents. At the same time, some donors focused narrowly on counter-terrorism at the expense of broader rule of law issues.[146]

As a result and, as observed by Halakhe, 'with the advent of terrorism and counterterrorism in Africa, mobilising against the state has become incredibly difficult, holding back the evolution of democracy.'[147] Oppositions can easily be treated as terrorists and result in prosecution and long jail terms.

While in the end it is up to the citizens of every country to determine their own fate, there is at least a moral obligation on the United States to do what it can for the counterterrorism regime introduced through its initiatives not to be misused by repressive regimes. Even more importantly, the US should be mindful that its cooperation with repressive regimes should not be used to strengthen repressive regimes against their own citizens. However, blinded by its own perceived interest, the US does not seem to be preoccupied with the repercussions of its alliance with repressive regimes on democracy, rule of law and human rights in Africa. So, what is more concerning is not the US failure to be critical of counterterrorism enforcement in Africa or its failure to be a model of countering terrorism, but its backing of repressive regimes which makes it complicit in the misuse of counterterrorism.

[146] Ford, above n 98, 2.
[147] Halakhe. Above n 71.

CHAPTER TWO: ETHIOPIA'S CONSTITUTION WITHOUT CONSTIUTIONALISM

2.1 Introduction

Having a constitution without constitutionalism is one of the defining features of Africa. [1] As Nolutshungu succinctly states:

> Although all African states attach some importance to their constitutions,… only very few can be said to abide by them with any consistency. None consider themselves much bound by them on matters such as limitation of government power, the rights of citizens, the division and separation of powers, or, above all the objective enforceability of the provisions of the constitutions. Indeed, those elements of the constitution that place limits on executive are least respected.[2]

Similarly, Ghai, having provided a list of illiberal practices by African governments, notes that 'there is … despite occasionally outward forms of liberal constitutional guarantees and institutions …, an absence of constitutionalism and the rule of law.'[3]

As noted in Chapter one, government's failure to respect the constitution and other subsidiary laws is among the reasons that expose Africa to misuse of counterterrorism. This chapter provides an overview of this problem and presents explanations for the case of Ethiopia. Three selected areas where there is a divergence between the norm and the practice — election, human rights and independence of the judiciary — are discussed consecutively to be followed by a discussion on the underpinning causes for the discrepancy. Before proceeding to these discussions a brief background to the Ethiopian People's Revolutionary Democratic Front (EPRDF), the party that has been in power for over two

[1] For important exceptions see: Zibani Maundeni, 40 years of democracy in Botswana 1965-2005 (Mimegi Publishing House, 2005) and R W Johnson & Lawrence Schlemmer (ed), Launching Democracy in South Africa The First Open Election (Yale University Press, 1996).

[2] Samuel C. Nolutshungu, 'Constitutionalism in Africa: Some Conclusions' in Douglas Greenberg, Stanley N Katz, Steven C Wheatley, and Melanie Beth Oliviero (eds.) *Constitutionalism and Democracy: Transitions in the Contemporary World*, (Oxford University Press 1993) 366, 366.

[3] Yash Ghai, 'The Theory of the State in the Third World and the Problem of Constitutionalism' (1990-1991) 6 *Journal of International Law*, Vol 6, 411.

decades, and the Constitution of the Federal Democratic Republic of Ethiopia, adopted after the party came into power is offered below.

2.2 EPRDF and the Ethiopian Constitution

Ethiopia had been under an absolute monarchy until 1974, when a military junta (known as the Derg) overthrew Emperor Haile Selassie I.[4] The military junta ended the imperial regime and officially adopted Marxist socialism as its ideology; it then proceeded to establish the People's Democratic Republic of Ethiopia with a Constitution in 1984.[5] During its first ten years in power, the military pursued a revolutionary socialist policy with no political party of any sort. In 1984, the Derg introduced single party rule and established the Ethiopian Workers' Party, modelled on Soviet ruling parties, until the Ethiopian People's Revolutionary Democratic Front (EPRDF) overthrew it in May 1991 after seventeen years of fighting. The EPRDF is an alliance of four political parties: the Tigray People's Liberation Front (TPLF); the Amhara National Democratic Movement (ANDM); the Southern Ethiopian People's Democratic Movement (SEPDM); and the Oromo People's Democratic Organisation (OPDO).

Once the EPRDF overthrew the military government, it took three years of transition to establish the Second Ethiopian Republic,[6] the Federal Democratic Republic of Ethiopia (FDRE) with the 1994 Constitution. The EPRDF entered into state-building with a 'nicely worded'[7] Constitution[8] incorporating provisions on federal structure, parliamentary and republican forms of government, a multi-party system, separation of powers, and independence of the judiciary, among others. Most notably, the Constitution has given much emphasis to fundamental rights and

[4] Christopher Clapham, *Transformation and Continuity in Revolutionary Ethiopia* (Cambridge University Press, 1988).

[5] Jon Abbink, 'The Ethiopian Second Republic and the Fragile "Social Contract"' (2009) 44(2) *Africa Spectrum* 3, 9.

[6] Ibid; Fasil Nahum, 'Constitution for a Nation of Nations' (1998) 60 *The Review* 91.

[7] Abbink, above n 5, 13.

[8] This is officially known as the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution or Constitution). The official text is published in the Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 1st Year No. 1, dated 21 August 1995. The Constitution was adopted on 8 December 1994 and promulgated by the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 which entered into force on 21 August 1995.

freedoms. In addition to allocating almost one third of its provisions,[9] the Constitution incorporates provisions, which would help promote fundamental freedoms and rights.[10]

2.3 Manifestations of the Discrepancy

2.3.1 Election

Studying elections is a good starting point to investigate the nature of politics and political manipulation in Africa in general and in Ethiopia in particular.[11] Some observe that following the removal of the Derg regime, there had been significant building of political institutions and the state and that a feeling of democracy had been starting to emerge in Ethiopia.[12] Ethiopia has run national elections every five years since 1995.[13] Owing to the tight control of the EPRDF through the use of oppressive means to control the electorate, as well as the denial of a level playing field for the opposition,[14] the first two elections did not offer much hope for the opposing parties. The ruling party won almost all parliamentary seats with only handful taken by the Opposition. The third election, which took place in May 2005, is remarkable for seeing major opposition gains. The ruling and opposition parties engaged in open debate and a widespread campaign preceded the election.[15] Scholars

[9] Nahum, above n 6, 97.

[10] Article 13(1) provides "all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter." Article 13(2) stipulates, "the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia." Moreover, its Article 105 provides for stringent conditions for amendment of its human rights related provisions.

[11] Jon Abbink, 'Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath' (2006) 105 *Affrican Affairs* 173, 175, 180.

[12] Ibid; Sarah Vaughan, 'Revolutionary Democratic State-building: Party, State and People in the EPRDF's Ethiopia' (2011) 5(4) *Journal of Eastern African Studies*, 619.

[13] However, Abbink suggests that such praise is misleading for its measure is the overthrown dictatorial *derg* and the collapsed neighbouring Somalia. Abbink, 'Discomfiture of Democracy?', above n 11, 177.

[14] Siegfried Pausewang, Kjetil Tronvoll, and Lovise Aalen (eds), *Ethiopia since the Derg: a decade of democratic pretention and performance* (Zed Books, 2002).

[15] For account of problems that were observed in the pre-election campaign see: Abbink, 'Discomfiture of Democracy?', above n 11, 182-83.

refer to it as a 'founding',[16] and 'formative'[17] election for true democracy throughout the country.

However, following the polling date sharp disagreement arose between the incumbent government and the opposition parties. At the conclusion of the polling, the then Prime Minster Meles Zenawi[18] announced a one-month ban on public demonstrations and meetings,[19] and declared an 'overwhelming victory' for his party on the second day of the election date[20] before official tallying was completed and the result announced.[21] Anticipating the Opposition's entry into the House, the outgoing parliament introduced major changes to the rules of conduct in parliament in order to limit the impact of the Opposition in parliament. The required quorum of parliamentarians for an initiative to be on the House's agenda was changed from 20 to 51 per cent. A rule that allowed the parliament to remove Ministers of Parliament (MPs) from the House on the grounds of using insulting and defamatory language was introduced. Moreover, following the EPRDF's concession that they had lost Addis Ababa City Council to the Opposition, the parliament passed several items of legislation relating to Addis Ababa city with a view to restricting the autonomous power of the City Council.[22]

The belated official result announced in September 2005, already preceded by over three months of disagreement between the government and the opposition parties and public protests, confirmed the

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[16] Christopher Clapham, *Comments on the Ethiopian Crisis* **(**2005) <http://www.african.cam.ac.uk/people/registry/subjectlist/clapham.html>

[17] John W. Harbeson, 'Ethiopia's Extended Transition' (2005) *16 Journal of Democracy* quoted in Lovise Aalen & Kjetil Tronvoll, 'The End of Democracy? Curtailing Political and Civil Rights in Ethiopia' (2009) 36 (120) *Review of African Political Economy* 193,194.

[18] Meles Zenawi had been the chair of both the TPLF and the EPRDF since 1989. After EPRDF overthrew the *derg* regime, he was President of Ethiopia from 1991 to 1995 and became the Prime Minister of Ethiopia in 1995. He maintained this position until his death in 2012. Meles Zenawi Foundation, *Leader of TPLF and EPRDF*, <http://www.meleszenawi.org.uk/tplf_eprdf.html>

[19] 'Ethiopian PM Bans Demonstrations in Addis Ababa'*, The Sudan Tribune* (online) 15 May 2005 <http://www.sudantribune.com/spip.php?article9584>.

[20] BBC, 'Ethiopia ruling party claims win', *News,* 17 May 2005 <http://news.bbc.co.uk/2/hi/africa/4550839.stm>;*The Reporter, 18 May 2005* quoted in Abbink, 'Discomfiture of Democracy?', above n 10, 183.

[21] Many note that EPRDF did not expect that the opposition could mobilize support that would amount to any real challenge to its position. Lovise Aalen and Kjetil Tronvoll, 'The end of democracy?', above n 17, 196;

[22] On the changes introduced see: ibid 199.

Prime Minister's declaration. From 547 seats at the Federal Parliament, the EPRDF gained 371 and the rest were taken by opposition.[23]

The Opposition on its part, claimed victory, accused the government/ruling party of vote-rigging, and demanded a re-run of elections in disputed constituencies which the government did not accept. The Opposition called for protests demanding the government to concede defeat or allow new elections in contested areas. The state media construed the call for public protests and press releases by the Opposition as crimes as grave as plotting to overthrow the government.[24] Demonstrations and protests in opposition of the alleged vote-rigging and the proclaimed result provoked harsh repressive measures resulting in loss of life of both members of the security forces and protesters, and in the arrest of tens of thousands of demonstrators and alleged opponents.[25]

The new parliament started its five-year period in October 2005, however, the leaders of the Coalition for Unity and Democracy (CUD) — the leading opposition party — announced their decision to boycott entry into

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[23] National Electoral Board of Ethiopia website (23 September 2005) <http://www.electionsethiopia.org/Index.html> in Abbink, 'Discomfiture of Democracy?', above n 11, 183.

[24] Abbink, 'Discomfiture of Democracy?', above n 11, 186-87.

[25] BBC, 'Ethiopian Protesters 'Massacred'', *News,* 19 October 2006 <http://news.bbc.co.uk/2/hi/africa/6064638.stm>; An Inquiry Commission was established to investigate "the disorder occurred on June 8, 2005 in Addis Ababa, between the 1st of November and 10th of November, as well as between the 14th of November and 16th of November 2005 in Addis Ababa and in some parts of the country." The Commission's decision has been controversial. The official Commission's decision communicated to the parliament is that the measure taken by the security forces is proportional to the disorder that faced them. Leaked video records indicate otherwise. In the voting eight of the ten members, including the chairperson, voted that the measure was not proportional to the existing threat. Only two voted in favour of the proportionality of the measure. Ethiopian Post Elections Violence Inquiry Commission Vote (10 September 2012) <https://www.youtube.com/watch?v=S_KCsJVRenU>; ESAT Special Sene 1 victims & inquiry commission June 2012 Ethiopia <https://www.youtube.com/watch?v=1Gisf3MenFs>. The Observatory for the Protection of Human Rights Defender confirms the authenticity of the leaked report. Its report indicates that "In early July 2006, shortly before completing their report, the team [of the Inquiry Commission] held a vote and ruled eight against two that excessive force was used, and concluded in its report that Ethiopian security forces massacred 193 people including 40 teenagers - i.e. fivefold the official death toll - due to the use of excessive force. Only two of the Commission members said the government responded appropriately." International Federation for Human Rights, *Ethiopia: The Situation of Human Rights Defenders From Bad to Worse*, (December 2006) 12 <http://www.refworld.org/pdfid/46af4d2b0.pdf>.

parliament and instead called for continued public protest.[26] The tension between the government and the Opposition eventuated in mass arrest and prosecution of the opposition leaders, civil society leaders and journalists in November 2005. They were charged with treason and plotting to overthrow the constitution and the constitutional order for which they were convicted and sentenced to life imprisonment.[27] They were finally pardoned and released in 2007.[28]

The 2005 election and its aftermath have been a turning point in post-1991 Ethiopian politics. Abbink describes the government's post-2005 election behaviour as having created disillusion among the Ethiopian public and the international community.[29] Under the constitution, the people elect members of parliament based on universal suffrage and through direct, free and fair elections held by secret ballot.[30] Moreover, a political party, or a coalition of political parties that has the greatest number of seats in parliament forms an executive branch of the government.[31] However, the 2005 election proves in reality that Ethiopians are not able to change their government through ballot despite this constitutional framework.

One of the observations Abbink makes in his analysis of the 2005 election crisis in Ethiopia and its aftermath is that 'perhaps more than in other African countries today, the executive in Ethiopia is prepared to use coercive force to prevent change.'[32] In view of this, Abbink further notes: 'Ethiopian voters will have great difficulty in ever voting the existing government out of office.'[33] Similarly, the 2006 Freedom House Report states that 'Ethiopians cannot change their government democratically,

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[26] Abbink, 'Discomfiture of Democracy?', above n 11, 175-76.
[27] Andrew Heavens, 'Ethiopian opposition leaders get life sentence', *Reuters*, (online), 16 July 2007 <http://www.reuters.com/article/us-ethiopia-opposition-idUSL167803820070716>.
[28] Tsegaye Tadesse, 'Ethiopia pardons jailed opposition figures', *Mail &Guardian (*online*)*, 20 July 2007, <http://mg.co.za/article/2007-07-20-ethiopia-pardons-jailed-opposition-figures>**;** BBC, 'Ethiopia opposition members freed', 18 August 2007, <http://news.bbc.co.uk/2/hi/africa/6953225.stm>.
[29] Abbink, 'Discomfiture of Democracy?', above n 11, 174.
[30] *Constitution* (Ethiopia) Article 54(1).
[31] Ibid, Article 56.
[32] Abbink, 'Discomfiture of Democracy?', above n 11, 195.
[33] Ibid.

although the 2005 election marked a potential step forward in the development of the country's democratic political culture.'[34] Subsequent election results confirm this. In 2010, the Opposition won only one of the 547 parliament seats,[35] and in the 2015 election the Opposition gained no seat at all as seats were taken by the EPRDF and its affiliates.[36] Thus, some consider Ethiopia as an example where 'elections are used as instruments of political control rather than devices of liberation.'[37] Indeed the Gallup poll of 2007 indicated that only 13% of Ethiopians had confidence in the honesty of elections.[38] This supports Kassahun's observation that 'the autocratic mentality bequeathed by past rigid political culture … and the tendencies that uphold the politics of command … are very much alive today, as they were during the imperial and revolutionary times.'[39]

2.3.2 Human Rights

The impact of the May 2005 election on human rights conditions has been enormous. In June 2005, the Ministry of Information cancelled the accreditation of five Ethiopian journalists working for foreign media for allegedly unbalanced election reporting. Four private newspaper editors were arrested for linking a story that embarrassed the government with the unrest arising in relation to the election. [40] A newspaper editor was sentenced for one month in connection with that newspaper's coverage

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[34] Freedom House, *Ethiopia,* (2006) <https://freedomhouse.org/report/freedom-world/2006/ethiopia>.

[35] Xan Rice, 'Unease over extent of ruling party's landslide in Ethiopia', *the Guardian*, (online) 26 May 2010, <http://www.theguardian.com/world/2010/may/26/ethiopia-election-result-meles-zenawi>.

[36] National Electoral Board of Ethiopia, *Official Results of the 24th May 2015 General Elections*, **<**http://www.electionethiopia.org/en/>.

[37] Aalen & Tronvoll, above n 17, 193.

[38] Magali Rheault, 'Few Ethiopians Confident in Their Institutions', *Gallup*, (2008), <http://www.gallup.com/poll/104029/Few-Ethiopians-Confident-Their-Institutions.aspx>. Citizen's lack of trust and confidence in government institutions is among features that distinguish a repressive regime from liberal democracies. Ronald Crelinsten, *Counterterrorism*, (Polity press, 2009) 50.

[39] Kassahun Berhanu, 'Party Politics and Political Culture in Ethiopia', in Salih, M.A.Mohamed (ed.) *African Political Parties: Evolution, Institutionalization and Governance* (Pluto press, 2003) 115, 142.

[40] International press Institute, 'Ethiopia: IPI Criticises Arrest of 4 Editors in Ethiopia, Says Government Must Stop Harassing Media', *AllAfrica*, (online) 29 June 2005, <http://allafrica.com/stories/200506300706.html>**;** Ethiopian Free Press Journalist's Association, 'Government arrests five journalists again', *Ethiomedia* (online) 30 June 2005, <http://www.ethiomedia.com/newpress/journalists_arrested_june30.html>.

of the court's handling of election results.[41] On 2 November 2005, the Ministry of Information accused the private media of being mouthpieces for the Opposition in its protest against the election results. Being accused in the same manner as domestic media, many foreign journalists left the country for fear of punitive measures.[42] Finally, the highly criticised Mass Media and Freedom of Information Proclamation No. 590/2008 was passed in July 2008.[43]

Furthermore, several measures were taken against civil society. Of the arrested in connection with the post-election protest, some were civil society leaders.[44] As a direct consequence of its request for an independent inquiry into the death of demonstrators in the post-election protests and its pre-election activities, the government threatened the Christian Relief and Development Association (CRDA), an umbrella organisation of over 250 national and international NGOs operating throughout the country, with revoking its licence. Another civil society organisation targeted by the government was the Ethiopian Legal Professionals Association, the members of which provided pro bono service to the Opposition during the post-election complaints process and in petitioning habeas corpus cases following the arrest of the opposition leaders.[45] As in the case of the media, the repressive practices in connection with the civil society culminated in the promulgation of the Charities and Societies Proclamation No. 621/2009, the purpose of which was to limit civil society's ability to act as a watchdog. This legislation was criticised for being incompatible with the Ethiopian constitution and international human rights instruments.[46] As Freedom House observes

[41] Aalen & Tronvoll, above n 17.
[42] Ibid.
[43] Tracy J. Ross, 'A Test of Democracy: Ethiopia's Mass Media and Freedom of Information Proclamation' (2010) 114(3) *Penn State Law Review*, 1047; Committee to Protect Journalists, 'Ethiopian press bill flawed, needs revision', (11 July 2008), <https://cpj.org/2008/07/ethiopian-press-bill-flawed-needs-revision.php>.
[44] Amnesty International, Justice under Fire: Trials of Opposition Leaders, Journalists and Human Rights Defenders in Ethiopia (2011).
[45] Aalen & Tronvoll, above n 17, 201-202.
[46] Center for International Human Rights North Western University School of Law, 'Sounding the horn: Ethiopia's Civil Society Law threatens human rights defenders' (November 2009) <https://www.law.northwestern.edu/legalclinic/humanrights/documents/EthiopiaCSOPaper-Nov2009.pdf>; Meskerem Geset, 'The New Charities and Societies

the legislation 'effectively forbids NGOs from working in areas considered to be politically sensitive.'[47]

As noted above, the Constitution incorporates vital provisions to ensure the enforcement of the fundamental freedoms and rights that it recognises. Referring to human rights-related provisions of the Constitution, Fasil Nahom remarks that the Constitution 'is serious with the respect for human rights.'[48] Despite the emphasis that the Constitution gives to human rights, in practice it has remained fragile.[49] Political parties are routinely denied permission to engage in peaceful demonstrations and to call meetings for their supporters.[50] The Freedom House reports indicate that freedom ratings in Ethiopia have been deteriorating. While until 2010, the freedom rating status was 'partly free', since then it has been 'not free'.[51] Human rights violations by the government have been routinely reported from time to time and governmental and non-governmental organisations have expressed their dismay concerning human rights conditions in Ethiopia.[52]

Proclamation and its Impact on the Operation of Save the Children Sweden-Ethiopia', (2009) <http://resourcecentre.savethechildren.se/sites/default/files/documents/1605.pdf>.

47 Take Dizard, Christopher Walker, and Vanessa Tucker (eds), *Countries at Crossroads: An Analysis of Democratic Governance*, (Freedom House, 2011), 241.

48 Nahum, above n 6, 98.

49 Aalen & Tronvoll, above n 17, 193.

50 Neamin Ashenafi, '*መድረክ ሠልፍ የማድረግ መብቱ እንዲከበር ጠየቀ' the Reporter Amharic newspaper (online)* 16 February 2016 <http://www.ethiopianreporter.com/content/>; 'Ethiopia bans peaceful demonstration called by Semayawi party', *Awuramba Times* (online) 22 May 2013 <http://www.awrambatimes.com/?p=7963>.

51 Ethiopia, Freedom House Reports, 2004-2005.

52 United Nations Office of the High Commissioner for Human Rights, *UN experts urge Ethiopia to halt violent crackdown on Oromia protesters, ensure accountability for abuses*, (21 January 2016) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16977&LangID=E#sthash.hwDLNG56.dpuf>; United Nations Special Rapporteur, *Continued detention of Ethiopian journalists unacceptable – UN human rights experts* (24 April 2015) <http://freeassembly.net/news/ethiopia-zone-nine/>; United Nations Human Rights Office of the High Commissioner, *UN experts urge Ethiopia to stop using anti-terrorism legislation to curb human rights,* (18 September 2014) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E#sthash.fAjGHmFB.dpuf>; United Nations Human Rights Office of the High Commissioner, *Ethiopia: UN Experts Disturbed at Persistent Misuse of Terrorism Law to Curb Freedom of Expression* (7 February 2012) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11793&LangID=E#sthash.sX1KwJh2.dpuf> ; Human Rights Watch, *Suppressing Dissent: Human Rights Abuses and Political Repression in Ethiopia's Oromia Region*, (9 May

The *Crossroads* project of Freedom House has released reports relating to civil liberty, rule of law, and accountability and public voice ratings of selected countries including Ethiopia. In this report, seven was the highest (best) score and zero was the lowest (worst). In 2005, Ethiopia's rating was 2.83, 2.06 and 1.88 for civil liberties, rule of law, and accountability and public voice respectively.[53] Two years later, the rating changed to 2.85 for civil liberties, 2.35 for rule of law, and 1.85 for accountability and public voice.[54] The 2011 ratings indicate deterioration in the ratings of all three areas: 2.75, 1.98 and 1.33 for civil liberties, rule of law, and accountability and public voice respectively.[55]

2.3.3 Independence of the judiciary

Another problematic area relates to the independence of the judiciary. The Constitution vests exclusive jurisdiction over judicial matters in courts,[56] recognises their independence,[57] and provides mechanisms for ensuring independence.[58] Following the coming into power of the EPRDF, the judiciary was significantly revamped with almost all personnel replaced or reshuffled.[59] The Constitution provides for the procedures for the appointment of judges. The federal parliament appoints federal judges upon the recommendation of the Prime Minster from among the candidates selected by the Federal Judicial Administration Commission.[60] Nevertheless, as Justice Evans Gicheru rightly notes, in sub-Saharan Africa 'due to imperfections in the electoral

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2005) <https://www.hrw.org/reports/2005/ethiopia0505/>; Felix Horne, 'Ethiopia's Invisible Crisis Protests broke out in Ethiopia in November, and the government is continuing its massive crackdown', *Foreign policy in focus (*online*)* 22 January 2016, <http://fpif.org/ethiopias-invisible-crisis/>.

[53] Freedom House, *Countries at the crossroads 2005: Ethiopia* <https://freedomhouse.org/report/countries-crossroads/2005/ethiopia>.

[54] Freedom House, *Countries at the crossroads 2007: Ethiopia* <https://freedomhouse.org/report/countries-crossroads/2007/ethiopia>

[55] Freedom House, *Countries at the crossroads 2011: Ethiopia* <https://freedomhouse.org/report/countries-crossroads/2011/ethiopia>.

[56] *Constitution* (Ethiopia) Article 79(1). However, the Courts do not have the power to interpret the Constitution. This task is given to the House of Federation, which is composed of representatives of Nations, Nationalities and Peoples: at Articles 61(1) and 62 (1).

[57] Ibid Article 78(1).

[58] Ibid Article 79(2) and (3).

[59] Abbink, 'The Ethiopian Second Republic', above n 5, 13

[60] *Constitution* (Ethiopia) Article 81(2). Similarly, State judges are appointed by the state law making body upon recommendation of the state president from among those selected by the state Judicial Administration; at Article 81(3).

systems, elected parliamentarians are not always true representatives of the people nor do they always possess sufficient legal knowledge to enable them to successfully vet potential candidates for judicial office.' [61] He notes that 'this more often leads to a situation where proposed judges are approved or disapproved purely on grounds of party affiliation and affinity, ethnic or other local connections.'[62]

According to Gicheru, this has a far-reaching implication for the independence of the judiciary especially in Africa.[63] In support of Gicheru's observation, Professor Gutto remarks that the independence of the judiciary in sub-Saharan African countries remains fragile and requires nurturing.[64] Similar observations are made specifically in relation to Ethiopia's judiciary. In Ethiopia, Abbink observes that 'political-judicial institutions are still precarious, and their operation is dependent on the current political elite and caught in the politics of the dominant (ruling) party.'[65] Different studies confirm this problem. A 2007 Gallup poll indicated that about 25% of Ethiopians have confidence in the performance of the judicial system and the courts.[66] While acknowledging the court's independence in theory, yearly reports from Freedom House between 2004 and 2015 indicate that either 'there are no' or 'there have been few' significant examples of decisions at variance with government policy.[67]

Similarly, the National Judicial Institute for the Canadian International Development Agency (NJICIDA)[68] and the World Bank[69] citing

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[61] Peter Wendoh, *Independence of the Judiciary in Sub-Saharan Africa* (2006) Rule of Law Program for Sub Saharan Africa, <http://www.kas.de/rspssa/en/events/23358/>

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Abbink, 'Discomfiture of Democracy?', above n 11, 173.

[66] Magali Rheault, *Few Ethiopians Confident in Their Institutions* (30 January 2008) Gallup <http://www.gallup.com/poll/104029/Few-Ethiopians-Confident-Their-Institutions.aspx>.

[67] Freedom House, *Ethiopia*, <https://freedomhouse.org/country/ethiopia>.

[68] National Judicial Institute for the Canadian International Development Agency, *Independence, Transparency and Accountability in the Judiciary of Ethiopia* (2008) 106-108 <http://www.abbaymedia.com/pdf/nij_ethiopian_judiciary_assessment.pdf>.

[69] The World Bank, *Ethiopia: Legal and Judicial Sector Assessment* (2004) 18, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EthiopiaSA.pdf>.

constitutional and other subsidiary legal provisions, acknowledge the independence of courts at the constitutional level. However, both studies question the actual record of judicial independence in Ethiopia. Noting that 'the true test of judicial independence … is whether it exists in practice,'[70] the NJICIDA cited several manifestations of the executive's interference in the judiciary to conclude that there is 'some gap between the constitutional principles and the actual practice of judicial independence.'[71] Likewise, the World Bank reports the perceived executive's 'substantial influence on certain aspects of judicial operations.'[72] The Bank's report reiterates that in cases 'where government interests are at stake, direct interference has been noted.'[73] Additionally, Human Rights Watch observes 'Ethiopian courts have little independence from the government.'[74] Abbink also draws on the public's consistent complaints to affirm the court's lack of independence.[75]

Recent developments illustrate the precarious condition of the judiciary. At the beginning of February 2016, the House of Peoples' Representatives (HPR) terminated a federal judge's tenure for his lack of 'loyalty to the constitution.'[76] The judge's loyalty to the Constitution had been under question for two reasons. First, in a meeting of stakeholders to discuss a draft of a Code of Conduct for judges, the judge 'reflected on the issue of whether a judge can have a reservation on the Constitution.'[77] In that particular meeting and on other occasions the judge allegedly indicated his 'reservations on some of the provisions of the Constitution'[78] and suggested the need for their amendment. Another

[70] National Judicial Institute For the Canadian International Development Agency, above n 68, 116.
[71] Ibid 117.
[72] The World Bank, above n 69. 21.
[73] Ibid.
[74] Human Rights Watch, *Ethiopia: Terrorism Law Used to Crush Free Speech Donors Should Condemn Verdicts, Demand Legal Reforms* (27 June 2012) <https://www.hrw.org/news/2012/06/27/ethiopia-terrorism-law-used-crush-free-speech>.
[75] Abbink, 'The Ethiopian Second Republic', above n 5, 13.
[76] Solomon Goshu, 'Constitutional loyalty: is it a must for the judiciary?' *The Ethiopian Reporter* (online) 20 February 2016 <http://www.thereporterethiopia.com/content/constitutional-loyalty-it-must-judiciary>.
[77] Ibid.
[78] Ibid.

reason relates to his comment during a judicial training session where he allegedly expressed a view that 'Ethiopia is not a member of the International Criminal Court (ICC) because the leadership at the helm of the government violates human rights.'[79] In particular, he was accused of stating that the government should have been held accountable for the violence that occurred following the 2005 election as many people were killed to keep the interests of those in power.[80]

Lack of loyalty to the Constitution is not among the reasons to terminate a judge's tenure under the Constitution.[81] However, the Judicial Administration Council (JAC) and the HPR interpreted his views on both constitutional amendment and on the ICC as indicating his disloyalty to the Constitution and as amounting to 'disciplinary breaches', one of the constitutionally recognized grounds to terminate a judge's tenure. Asmelash Woldeselasse, Member of Parliament and member of the Judicial Administration Council, states that a judge's loyalty to the Constitution has to be 100%.[82] Referring to the dismissed judge, he notes that the judge 'is saying that a judge can criticise the Constitution. He was speaking about amending the Constitution repeatedly. For me with this type of opinion, a person should be a politician rather than a judge.'[83]

Constitutional experts in Ethiopia express their dismay that this decision would 'further erode the already weakened status of the judiciary in the country.' Yared Legesse argues that 'the measure taken tends to silence judges.'[84] Similarly, Assefa Fiseha asserts that 'the judiciary continues to suffer from the political influences; and its independence yet to be

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[79] Ibid.
[80] Ibid.
[81] Article 79(4) of the FDRE constitution states:
No judge shall be removed from his duties before he reaches the retirement age determined by law except under the following conditions:
(a) When the Judicial Administration Council decides to remove him for violation of disciplinary rules or on grounds of gross incompetence or inefficiency; or
(b) When the Judicial Administration Council decides that a judge can no longer carry out his responsibilities on account of illness; and
(c) When the House of Peoples' Representatives or the concerned State Council approves by a majority vote the decisions of the Judicial Administration Council.
[82] Goshu, above n 76.
[83] Ibid.
[84] Ibid.

established.'[85] An anonymous expert describes the repercussion of the decision to dismiss the judge because of his expression as follows: 'In an open meeting organized by the government itself, if you punish a judge for expressing his view, the message is clear. The government is saying if you are not thinking like me, you don't serve your country.'[86]

Moreover, there were 'self-initiated' resignations from top positions in the judiciary within a period of four months. Tegene Getaneh, the President of the Federal Supreme Court, resigned from his position in February 2016. While in his application to be relieved of his responsibility he states reasons related to his health, 'reports have also claimed that his resignation is associated with other factors.'[87] Citing similar grounds, the president of the Federal High Court resigned from his position in November 2015.[88]

The preceding brief appraisal indicates a clear discrepancy between what the Constitution prescribes and the practice. While the Constitution provides for 'universal suffrage' and 'direct, free and fair elections,' the 2005 election and subsequent practices demonstrate resistance of the ruling party to countenance these tenets. Despite the Constitution's declaration of independence of the judiciary, studies indicate a different practice. The human rights situation has been deteriorating in spite of the 'nicely worded' provisions of the Constitution. A 'constitution without constitutionalism', which Borón has referred to as a 'double discourse,'[89] exists in Ethiopia.

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[85] Ibid.
[86] Ibid.
[87] Yonas Abiye, 'Parliament expected to appoint new Supreme Court president', *The Ethiopian Reporter* (online) 20 February 2016 <http://www.thereporterethiopia.com/content/parliament-expected-appoint-new-supreme-court-president>.
[88] Dawit Endeshaw, 'High Court President's Resignation Raises Questions', *Addis Fortune* (online) 30 November 2015 <http://addisfortune.net/articles/high-court-presidents-resignation-raises-questions/>.
[89] Atilio A. Borón, 'Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism' in Douglas Greenberg, Stanley N Katz, Steven C Wheatley, and Melanie Beth Oliviero (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) 339, 341.

Many agree that there is a clear gap between what the Constitution proclaims and what is practically done in Ethiopia.[90] Peebles describes the rulers in Ethiopia as 'tyrannical wolves in democratic sheep's clothing'[91] While acknowledging Ethiopia's post-1991 progression towards democratisation, Abbink states that it has 'a high ingredient of rhetoric not backed by practice'[92] so much so that he suggests that evaluations of the EPRDF based on formal politics is 'misleading.'[93] Abbink observes that while the FDRE Constitution is nicely worded, republican values are 'seriously underdeveloped'[94] without which democracy will not grow.[95] Thus, citing Castiglione, he suggests the term republicanism might have been chosen not sincerely but for its ability to project 'a positive vision of politics as the way of reconciling the natural differences traversing the social body.'[96] UN Watch's observation in relation to the mismatch between the government's declaration and its practice in connection with torture is telling on the government's two-facedness:

> Ethiopia has rejected recommendations relating to torture, which contradict the government's declarations about having zero tolerance for torture. There have been allegations that political detainees have been subjected to torture at detention centres in Addis Ababa. If the government is serious in its commitment to end torture, its proclamations must be matched with concrete measures.[97]

Similarly, Peebles writes 'The Ethiopian People's Revolutionary Democratic Front (EPRDF) government repeatedly scoffs at international law and consistently acts in violation of its own federal constitution – a

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[90] Sarah Vaughan and Kjetil Tronvoll, *The Culture of Power in Contemporary Ethiopian Political Life* (sida, 2003); Gedion Timothewos, 'I won't lie by claiming that I am not dead' *The Reporter* <http://www.thereporterethiopia.com/content/i-won%E2%80%99t-lie-claiming-i-am-not-dead>.

[91] Graham Peebles, Ethiopian *Regime Repression* (10 September 2013) <http://www.redressonline.com/2013/09/ethiopian-regime-repression/>.

[92] Abbink, 'Discomfiture of Democracy?', above n 11, 174.

[93] Ibid 178.

[94] Abbink, 'The Ethiopian Second Republic', above n 5, 8

[95] Ibid

[96] Ibid. In his view, the discrepancy between the constitutional provisions and the reality is so much so that it has led him to wonder if Ethiopia is a failed state in this sense: at 19-20.

[97] UN Watch, *End Human Rights Violations in Ethiopia* (19 September 2014) <http://www.unwatch.org/end-human-rights-violations-in-ethiopia/>.

liberal document written by the regime to please and deceive its foreign supporters.'[98]

In its editorial, contrasting the constitutional principles and the reality on the ground, *The Reporter* states the following:

> The Ethiopian constitution stands for justice. In practice, however, the judiciary and law enforcement organs are becoming feeble and sinking to new lows due to corruption and unwarranted interferences. Citizens are not getting the access to justice that the constitution guarantees them. The supremacy of the constitution is slowly giving way to the supremacy of interests. The constitution also champions good governance. Sadly bad governance is becoming the order of the day. Likewise the constitution enshrines the democratic and human rights that all persons enjoy. However, instances of human rights violations abound.[99]

Furthermore stating 'posters saying "[W]e shall abide by the constitution" have sprung up all over the country but in actual fact the constitution is being ignored and trampled,'[100] the editorial points to the pretence that the government respects the constitution. *The Reporter* concludes: 'Consequently, we as a nation are degenerating into a state where we lack confidence in the ability of the constitution to afford us protection.'[101]

The following figure portrays the problem. A citizen and the Constitution are looking at each other, both with angry face. Prevalent oppressive practices bind, restrict, and inhibit the citizen from freely availing himself of the liberal principles that the constitution incorporates. He is only able to beg for help in this desperate condition. The constitution is not happy either. While it declares itself as the supreme law of the land and requires government laws, policies and practices to conform with it, it finds itself having been subjugated to the role of a bystander, unable to regulate the relationship between the citizen and the government and, thereby,

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[98] Peebles, above n 90.

[99] Editorial, 'Enforcing the Constitution: the Most Fundamental of All Decisions', *The Ethiopian Reporter* (online), 30 March 2013 <http://old.thereporterethiopia.com/index.php/editorial/item/287-enforcing-the-constitution-the-most-fundamental-of-all-decisions>.

[100] Ibid.

[101] Ibid.

incapable of freeing the citizen from repression.

Figure 1 An Ethiopian citizen and the constitution looking at each other with angry face

It is noteworthy that while the government's record in respecting the Constitution is questionable, as discussed above, it is quick to accuse 'others' of disloyalty to the Constitution rendering it 'a political instrument, quoted only when the ruling elite wants to discredit, imprison and accuse opponents.'[102] As noted above, the opposition leaders were prosecuted and convicted for crimes of outrage against the Constitution and the constitutional order.[103] Furthermore, it is in those situations where treating the judge's expressions as a manifestation of disloyalty to the Constitution is contentious that his tenure has been terminated. This has led one observer to note 'loyalty to the constitution is misconstrued as

[102] Goshu, above n 76.
[103] International Federation for Human Rights, *Ethiopia: The Situation of Human Rights Defenders From Bad to Worse*, (December 2006) 15 <http://www.refworld.org/pdfid/46af4d2b0.pdf>.

loyalty to the EPRDF,'[104] the ruling party. This demonstrates that in Ethiopia 'the role of constitutions and laws … becomes totally instrumental, unmediated by autonomous processes and procedures. Law itself becomes a commodity that only the state may mobilize and manipulate."[105]

2.4 Underpinning causes for the discrepancy

The government's duplicity – repressive practices and liberal norms – is attributed to the incompatibility between the party's political-economic ideology known as *abyotawi* democracy (revolutionary democracy) from which it gets its name (Ethiopian People's Revolutionary Democratic Front) and its 'legal ideology'[106] as enshrined under the Constitution (liberal democracy).[107] In particular, the government's use of coercive forces against dissenting views, its unwillingness and lack of readiness to surrender power, and its non-realisation of 'the democratic-republican potential of the 1991 regime change'[108] are all attributed to the ruling party's ideology[109] which stands in sharp contrast to the values and norms the Constitution embodies.[110]

As one of the founders of the EPRDF indicates, the notion of revolutionary democracy is taken from Lenin's *Theses on Bourgeois Democracy and the Proletariat Dictatorship*.[111] Linking the notion of

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[104] Goshu, above n 76.
[105] Ghai, above n 3, 421.
[106] Ibid 415.
[107] Jean-Nicolas Bach, 'Abyotawi democracy: neither revolutionary nor democratic a critical review of EPRDF's conception of revolutionary democracy in post-1991 Ethiopia', (2011) 5(4) *Journal of Eastern African Studies* 641, Vaughan, above n 11; Kjetil Tronvoll, 'The Ethiopian 2010 Federal and Regional Elections: re-establishing the one party system' (2011) 110(438) *African Affairs* 121
[108] Abbink, 'The Ethiopian Second Republic', above n 5, 17.
[109] Vaughan, above n 12; Bach, above n 107; Tronvoll, above n 107.
[110] Bach approaches the problem slightly differently. Bach has a reservation on drawing a line between liberal norms or values reflected in legal documents and policies on the one hand and authoritarian practices on the other. Thus he questions the opposition between "liberal" values and *abyotawi* [Revolutionary] democracy" arguing that in Ethiopia these notions feed each other. What Bach refers as the "hybridation" between the two ideologies explains the nature of Ethiopian "rethought authoritarianism." He argues that EPRDF has been using revolutionary democracy, instead of as a sharp contrast with liberal democracy, as a 'flexible and adaptable discursive tool in evolving international liberal and national contexts" thereby defying the contradiction between the two ideologies. Bach, above n 106, 643.
[111] Aregawi Berhe, *A political History of the Tigray People's Liberation Front (1975-1991): Revolt, Ideology and Mobilization in Ethiopia (Tsehai Publishers,* 2009) in Vaughan, above n 11, 622.

revolutionary democracy to disapproval of the capitalist liberal ideology, Bach confirms the idea that democracy can be achieved through revolution is partly developed from a Leninist understanding of Marx's Proletariat thesis.[112] Indeed, the EPRDF likens revolutionary democracy to proletariat democracy as opposed to bourgeois or liberal democracy.[113] Bach affirms that the EPRDF presents revolutionary democracy as 'the exact opposite of liberal democracy.'[114]

This ideology has been functional since the party's establishment.[115] As previously noted, following its victory against the Derg, the EPRDF announced liberal policies such as privatisation and the multiparty system, which are later incorporated into the 1995 Constitution. However, introducing such policies does not mean relinquishment of revolutionary democracy. Rather the EPRDF 'have since stuck to the ideological line.'[116] In 1994, Prime Minster Meles Zenawi reaffirmed the appropriateness of Revolutionary Democracy to Ethiopia stating that it 'had to be firmly grasped if Ethiopia was to embark on sustainable development.'[117] In 2001, he stated that 'liberal democracy is not possible in Ethiopia.'[118] Since then, the ruling party has on several occasions reiterated the continuation of revolutionary democracy,[119] which is interpreted as a paradox for it rejects the underlining premises of the officially announced liberal policies.[120]

Through revolutionary democracy, the EPRDF sees itself 'as a vanguard political force, which is not inclined to compromise with opposition forces

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[112] Bach, above n 107, 641.
[113] Vaughan, above n 12, 622.
[114] Bach, above n 107, 641
[115] For the origin and development of the ideology with in EPRDF see: Sarah Vaughan, above n 11.
[116] Bach, above n 107, 643.
[117] Aregawi Berhe, *A political History of the Tigray People's Liberation Front (1975-1991)*: *Revolt, Ideology and Mobilization in Ethiopia (Tsehai Publishers, 2009)* 190 quoted in Bach, above n 107, 643.
[118] The Reporter (2001) (Amharic Magazine) vol. 4 no. 36 in Abbink, Discomfiture of Democracy?', above n10, 195; Abbink, 'The Ethiopian Second Republic', above n 5, 10-11.
[119] Medhane Tadesse and John Young, 'TPLF: Reform or Decline?' (2003) 30(97) *Review of African Political Economy*, 389

[120] Bach, above n 107, 643.

because it is convinced that it has the solution for everything.'[121] The EPRDF, as a vanguard party, treats itself as being on the 'correct course.'[122] Thus, the EPRDF does not see opposition parties as alternative forces but as enemies and a force of destruction.[123] Having labelled the parties this way, the EPRDF uses language that is intended to 'convince the people that, without EPRDF in power, Ethiopia would turn into chaos.'[124]

Commenting on the EPRDF's post-2005 authoritarian practice, Abbink notes that 'the party in power … is one advocating "revolutionary democracy", not liberal democracy.'[125] As argued by Abbink, 'the specific model of Revolutionary Democracy officially espoused by the ruling EPRDF … represents in many ways a contradiction to the proclaimed constitutional principles.'[126] Citing the party's documents and statements, others have made similar observations.[127]

Bach asserts that the EPRDF appropriates liberal institutions such as election and the multiparty system as they fit with international standards,[128] but not because the party believes in and intends to practice them. Bach characterises the EPRDF's pretence that it accepts liberal values as an African style[129] in general when he likens the party's approach to Vincent Foucher's description of the African regimes as having 'learnt how to play the game of democratisation by distorting it in thousands of ways.'[130] By so doing, Abbink notes that the leadership 'has effectively tuned in to the donor discourse of liberalization and

[121] J. Abbink, 'Discomfiture of Democracy?', above n11, 195.
[122] Abbink, 'The Ethiopian Second Republic', above n 5. 23.
[123] Tronvoll, above n 107.
[124] Ibid 124
[125] Abbink, 'Discomfiture of Democracy?', above n 11, 195
[126] Abbink, 'The Ethiopian Second Republic', above n 5, 6.
[127] Vaughan and Tronvoll, above n 90, 116-17.
[128] Darbon, La politique des modéles en Afrique in Bach, above n 107, 646.
[129] Suggesting that the shift from the Soviet-type to liberal type political system by African countries, following the end of the Cold War, was more of a necessity than a conviction by liberal values, Sinjela observes "the ruling circles in these countries [African countries which had Soviet political system] had to change, if they did not wish to face political annihilation or extinction from the face of the earth." Mpazi Sinjela, 'Constitutionalism in Africa: Emerging Trends' (1998) 60 *The Review* 23, 23.
[130] Foucher, 'Difficiles successions en Afrique subsaharienne' quoted in Bach, above n 107, 646.

democratization.'[131] While there is a constitutional framework for the multiparty system, it does not mean to endanger the existing power structure where 'the party dominated executive branch of government (controlling the economy, the army and the security forces) always retains strict control.'[132] Similarly, while there is a constitutional principle on the independence of the judiciary,[133] it does not mean the party-dominated government will not control the judiciary.[134] In reality, there is strong 'non-transparent interference.'[135] Abbink asserts that important political decisions are made informally to the exclusion of the parliament and the court.[136] Professor Beyene Petros, a long time opposition leader, points to this problem when he states: 'the government made it so that we could not even predict the political environment in the country.'[137]

Thus, despite the liberal institutions put in place, according to Bach, the ruling party remains totalitarian. As such, Bach compares current Ethiopia to the third democratisation wave of the early 1990s in Africa and the 1980s in Latin America where authoritarianism evolved rather than disappeared. Similarly, Aalen and Tronvoll observe that 'Ethiopia is not an incomplete democracy; it is rather an authoritarian state draped in democratic window-dressing in which manipulated multiparty elections are a means to sustain power.'[138]

One research study indicates the most appropriate description of Ethiopia as 'a one dominant-coalition party state.'[139] As Sinjela observes

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[131] Abbink, 'Discomfiture of democracy?', above n11, 179

[132] Abbink, 'Discomfiture of Democracy?', above n 5, 195; Abbink, 'The Ethiopian Second Republic' above n 4, 22-23.

[133] In a revolutionary democracy, Costea argues, the judiciary's theoretical independence is "a vain claim" far from being practicable. Peter Costea, 'the Legal System and the Judiciary in the Marxist-Leninist Regimes of the Third World' (1990) 16 (3) *Review of Socialist Law* 225, 263.

[134] Abbink, 'Discomfiture of Democracy?', above n 11.

[135] Abbink, 'The Ethiopian Second Republic', above n 5, 7, 10.

[136] Abbink, 'Discomfiture of Democracy?', above n 11, 178.

[137] Neamin Ashenafi, 2016 Staggering Opposition *The Reporter* Jan 30. <http://www.thereporterethiopia.com/content/staggering-opposition>.

[138] Lovise Aalen and Kjetil Tronvol, 2009, The End of Democracy? Curtailing Political and Civil Rights in Ethiopia, Review of African Political economy vol. 120, 193-207, P. 203

[139] Michael Chege, Political Parties in East Africa: Diversity in Political Party Systems, Report prepared for the International Institute for Democracy and Electoral Assistance (International IDEA) as part of its global Programme on Research and Dialogue with Political Parties, (2007)

'under one party rule the executive branch wielded wide and all-embracing powers. The Courts were stripped of any meaningful power to check against abuse of power by the executive branch of government.'[140]

The following cartoon,[141] portraying Meles Zenawi's uncomfortable position, succinctly summarises the paradox of having incompatible ideologies. Bach interprets the cartoon as follows. Meles Zenawi is represented with one foot on the left chair—'liberal democracy'—and the other on the right chair—'revolutionary democracy'. This uncomfortable position seems to be heightened, as he is no longer able to grasp the ropes previously supporting him. At the top left-hand corner, which is supposed to represent liberal principles, one can read: 'Supremacy of law, The law of the riches, The Rights of individuals'; as opposed to *abyotawi* democracy doctrine which is represented at the top right-hand corner: 'Marx, Engels, Lenin, Stalin … .'

<http://www.idea.int/publications/pp_east_africa/upload/PP_East_Africa_Web.pdf> .

[140] Sinjela, above n 129, 25.

[141] Originally from *The Reporter* Magazine of May 2001, in Bach, above n 107, 656

Figure 2: Meles Zenawi's uncomfortable position with the paradox of having incompatible ideologies

Abbink, in 'Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath,'[142] approaches the discrepancy between provisions of the Constitution and the practice in light of the theory of neopatrimonialism. Neopatrimonialism is one of the explanations that has been offered to expound the difficulty of establishing a system that operates in accordance with the rules which regulate power in Africa.[143] While acknowledging the role of different factors in shaping African politics, Ghai gives primacy to the theory of

[142] Abbink, 'Discomfiture of Democracy?', above n 11, 173-199.

[143] Hinnerk Bruhns, 'Weber's Patrimonial Domination and Its Interpretation' in Daniel C. Bach and Mamoudou Gazibo (eds), Neopatrimonialism in Africa and Beyond, (Routledge, 2012) 9; Ghai, above n 2, 412-413; Abbink, Discomfiture of democracy, above n 11, 174-175.

patrimonialism/neopatrimonialism.[144] Similarly, for Gazibo, neopatrimonialism is "quintessential expression of the failings of the African state."[145] Neopatrimonialism denotes 'configurations where the state, while claiming to be modern, combines public and private norms, unlike the Weberian bureaucratic state that relies upon impersonal rules.'[146]

According to neopatrimonial theory, while there is a constitution prescribing a system based on 'legal rationality and domination,' [147] a state 'with highly personalized authority'[148] emerges. Thus, neopatrimonialism refers to 'the co-existence of conflicting norms':[149] 'the nominal features of a bureaucratic-legal state structure'[150] on the one hand, and the 'personalized forms of domination'[151] on the other, which occurs due to the lack of rule of law.[152] Emergence of the patrimonial state from the legal foundations of the constitutional state can take place through different illegitimate means including formal amendments, although mainly through 'the manipulation, trivialization, and disregard of the law.'[153]

Using neopatrimonial theory, Abbink explains the profound economic logic behind current Ethiopian politics.[154] He links the EPRDF's resistance to sharing power to its background. As noted above, the EPRDF came to power after fighting for seventeen years. Because its members sacrificed much during this time, Abbink notes that the EPRDF's political-economic interest s great which, in turn, exposes the incumbent government to neopatrimonialism. 'Loyalty to a party'[155] is the basis for appointments from the highest to the lowest positions. The

[144] Ghai, above n 3. For the difference between patrimonialism and neopatrimonialism see Bruhns, above n 141.
[145] Mamoudou Gazibo, 'Introduction' in Daniel C. Bach and Mamoudou Gazibo (eds), Neopatrimonialism in Africa and Beyond (Routledge, 2012) 1, 3.
[146] Ibid 2.
[147] Ghai, above n 3, 422.
[148] Ibid.
[149] Jean-Francois (1979) quoted in Gazibo, above n 145, 2.
[150] Abbink, 'Discomfiture of Democracy?', above n 11, 175
[151] Ibid.
[152] Ghai, above n 3, 414.
[153] Ibid 422.
[154] Abbink, 'Discomfiture of Democracy?', above n 11, 177.
[155] Ibid.

political-economic stakes of the people in positions of power are high not to be able to 'afford to relinquish hard-earned power.'[156] Rather 'constituencies of the power holders insist on their privileged access to resources and thus reject change towards more equitable structure.'[157] Indeed, the Prime Minster justified his one-month ban on all post-2005 election demonstrations in Addis Ababa due to his fear that 'the [O]pposition's strong showing in the capital might enrage ruling party supporters and spark confrontations with overly jubilant government foes.'[158] Abbink concludes his evaluation indicating the current political system as 'one of neo-patrimonial governance … and ideology of power as a commodity possessed by a new elite at the centre.'[159] As a manifestation of the neopatrimonialist state,

> the country and its politics is treated as the privileged domain of power holders who operate in an informal and often non-transparent manner, and over which the formal institutions do not have a decisive role. Changes in the formal institutional sphere (parliamentary votes or elections), or independent operation of the judiciary, are not 'allowed' … if the existing power network is threatened.[160]

Furthermore, in Ethiopia 'vital political decisions are made in the informal sphere, behind the façade, in circles and networks of a neopatrimonialist nature, impervious to what institutions like parliament or a high court say.'[161]

Finally, Ghai's explanation for the absence of constitutionalism and rule of law despite liberal constitutional guarantees and institutions in Africa[162] is in order. Unlike in the west where state legitimacy is based on rule of law and constitutionalism, there are other sources of legitimacy in Africa. One such source is economic development. Governments justify consolidation of power and disregard human rights issues on the pretext

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[156] Ibid.
[157] Abbink, 'Discomfiture of Democracy?', above n 11, 180.
[158] 'Ex-US president Carter defends Ethiopian demo ban, lauds election', *Sudan Tribune* (online), 16 May 2005 <http://www.sudantribune.com/spip.php?article9599>.
[159] Abbink, 'Discomfiture of Democracy?', above n 11, 193.
[160] Ibid 196-197.
[161] Ibid 178
[162] Ghai, above n 3.

of development.[163] Indeed, as noted by Bach, the Ethiopian government 'increasingly claims economic rather than democratic legitimacy'[164] and, on several occasions, proclaims that democracy is a means of achieving an economic end rather than an end in itself. The 2006 EPRDF report states that 'democracy is a key instrument in promoting the struggle of putting in place the developmental political economy, and removing the rent collection political economy. Democracy is a key for development.'[165] In 2008, the Prime Minster stated:

> The effort to promote democratization in Africa without the transformation of political economy from one pervasive and rent seeking to one value creation has simply provided democratic to pre-reform zero sum politics all over the continent. It hasn't so far succeeded in establishing stable democracy.[166]

As Ghai argues, if the rule of law is not important ideologically, it is also unimportant in its substantive aspect so much so that governments can easily justify concentration of power and dismiss human rights and good governance issues.[167] By giving primacy to economic development and an instrumental role to democracy, the government and the ruling party are implying that the latter can be set aside if and where needed in the interest of development. This is despite the primary place that the Constitution gives to democracy.[168] As Ghai observes, in the name of economic development, leaders would tend to tailor and bend constitutions and laws. [169]

2.5 Conclusion

The FDRE Constitution entered into force in 1995. It was adopted following the coming into power of the EPRDF in 1991after overthrowing the military regime in a 17 year deadly civil war. The constitution incorporates core principles of liberal democracy. However, the practice

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[163] Ibid.
[164] Bach, above n 107, 650.
[165] EPRDF, 2006, EPRDF Congress report in Bach, above n 107, 649.
[166] Meles Zenawi, 'Dead End Neo Liberal Paradigm in the African renaissance', *The Ethiopian Herald* (online), 15 February 2008, note 68.
[167] Ghai, above n 3, 417
[168] See for example Articles 1, 8(3) and 10(2) of the FDRE Constitution.
[169] Ghai, above n 3, 417.

on the ground has been at odds with the constitutionally enshrined democratic values and norms. The underpinning cause for this discrepancy is that the ideology of the ruling party, which regulates the day to day life in Ethiopia, is inconsistent with the democratic values and principles that the constitution embraces. The liberal democratic principles and institutions are recognized in the constitution not because the ruling party has the intention or commitment to be governed by these principles but to appear as democratic in the eyes of the international community. As exemplified through the review of the law and the practice relating to elections, human rights and independence of the judiciary, the constitution is the supreme law of the land only in paper. In reality most of its provisions and their underpinning principles are yet to be given effect to. This renders the constitution to be a 'constitution without constitutionalism.' The discrepancy between the law and the practice, as illustrated in Chapters five to eight, is replicated in the divergence between the ATP and the terrorism prosecutions.

CHAPTER THREE: SCOPE OF DEFINITION OF A TERRORIST ACT UNDER THE ANTI-TERRORISM PROCLAMATION

3.1 Introduction

There has been a proliferation of counterterrorism legislation following 9/11,[1] a turning point in the history of counter-terrorism. International and regional counterterrorism instruments urge states to prevent commission of a terrorist act through, inter alia, criminalisation. Ethiopia passed its anti-terrorism law, the Anti-Terrorism Proclamation (ATP or proclamation), in July 2009 in which a terrorist act is defined and criminalised.[2] The definition provision with which this chapter is concerned is important as it establishes the threshold of a 'terrorist act' from a legal perspective.

The Ethiopian government has been accused of adopting a broad definition of a terrorist act. Scope of the definition of a terrorist act under the ATP has been controversial ever since the law was presented in its draft form. In its analysis of the ATP, Human Rights Watch identifies several problems of the law of which one is its 'extremely broad' definition of a terrorist act. [3] David Shinn and Thomas Ofcansky describe the definition as broad.[4] Similarly, ARTICLE 19 identifies over-broadness of the definitional provision as a particularly worrying aspect of the ATP.[5] Gordon, Sullivan, and Mittal note that 'Ethiopia's anti-terrorism law is premised on an extremely broad and vague definition of terrorist

[1] Kent Roach, 'Defining Terrorism: the need for a restrained Definition' in Laviolette N, Forcese C (eds.), *the Human Rights of Anti-terrorism* (Irwin Law, 2008) 97; Beth Elise Whitaker, 'Exporting the Patriot Act? Democracy and the 'war on terror' in the Third world' (2007) 28 (5) *Third World Quarterly* 1017.

[2] Anti-Terrorism Proclamation No. 652/2009 (Ethiopia) Art 3.

[3] Human Rights Watch, *An Analysis of Ethiopia's Draft Anti-Terrorism Law* (30 June 2009)1, 4 <http://www.hrw.org/sites/default/files/related_material/Ethiopia%20CT%20Law%20Analysis%20June%202009_2.pdf>.

[4] David H. Shinn and Thomas P. Ofcansky, *Historical Dictionary of Ethiopia* (Scarecrow Press, 2nd ed, 2013) 388.

[5] ARTICLE 19, *Comment on Anti-Terrorism Proclamation, 2009, of Ethiopia,* (2010) 3, 4. Available at: <http://www.article19.org/data/files/pdfs/analysis/ethiopia-comment-on-anti-terrorism-proclamation-2009.pdf>.

activity.'[6] The United Nations Human Rights Committee observes that though it 'appreciates the State party's [Ethiopia's] need to adopt measures to combat acts of terrorism, it regrets the unclear definition of certain offences in Proclamation 652/2009 [ATP] and is concerned by the scope of some of its provisions …' [7]

In response to such criticism government officials claim that the language was simply pulled from the existing laws of countries like the United Kingdom, Australia and Canada.[8] Sasahuleh[9] evaluates the scope of the definition under the ATP in light of definitions provided in anti-terrorism legislation of other democratic jurisdictions and concludes that the latter have a similar, if not broader, scope than the former.[10] This Chapter deals with the scope of the definition of a terrorist act under the ATP.

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[6] Lewis Gordon, Sean Sullivan, and Sonal Mittal, The Oakland Institute and Environmental Defender Law Center, '*Ethiopia's Anti-Terrorism Law A tool to Stifle Dissent'* (2015) 9. <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf>

[7] Human Rights Committee, *Concluding Observations of the Human Rights Committee Ethiopia,* 102nd sess, UN Doc CCPR/C/ETH/CO/1 (19 August 2011), Para15.

[8] Patrick Griffith, 'Ethiopia's Anti-Terrorism Proclamation and the right to freedom of expression' *freedom now*, 30 August 2013 <http://www.freedom-now.org/news/ethiopias-anti-terrorism-proclamation-and-the-right-to-freedom-of-expression/>. For example, the late Prime Minster Meles Zenawi indicated that the ATP is copied word by word from the UK's antiterrorism legislation. Yemane Negash, 'ኤርፖርት ላይ እንደሚታነቁ የሚያምኑ ሰዎች ቢኖሩም ኢሕአዴግ ግን ስለመኖራቸውም አያውቅም' [While Some Believe People are caught at the Airport, EPRDF does not know that] *Reporter Amharic* (online) 10 December 2014 <http://www.ethiopianreporter.com/index.php/politics/item/8182>. Similarly during a discussion of the ATP in its draft form it was indicated that the definition part is directly copied from the anti-terrorism law of the United Kingdom. ፌዴራል ዴሞክራቲክ ሪፐብሊክ ኢትዮድያ ፫ኛዉ የሕዝብ ተወካዮች ም/ ቤት ፭ኛ አመት የፀደቁ አዋጆች ፣የሕዝብ ዉይይቶች እና አሥተያየቶች ቅፅ ፯ ገፅ 116-117 [Federal Democratic Republic of Ethiopia, 3rd House of Peoples Representatives 4th year Adopted Proclamations, Public Discussions and Recommendations, Volume 7, 116-117].

[9] Sasahuleh Yalew, *A Comparative Review of Ethiopian and Western Anti-Terrorism Legislation[s]* <http://www.aigaforum.com/articles/Ethiopia-anti-terrorism.pdf>.

[10] Ethiopian courts do not have the tradition to refer to foreign legislation to inform their interpretation of Ethiopian law. Thus, even if it were true that Ethiopian definition is adopted from other jurisdictions and, as some argue, it were equivalent with, if not narrower than these definitions, the comparison with other jurisdictions might be useful only for legal scholarship and political purposes. Its significance to resolve cases before courts of law, if any, is remote. Furthermore, the definitions of jurisdictions that are invoked to have been used as basis for Ethiopia's definition have been criticised by international human rights bodies. For example, in 2005, the Human Rights Committee found that the definition of terrorism in the Canadian Anti-Terrorism Act 2001, which is quite similar to the definition in the ATP, was overly broad. Human Rights Committee, *Concluding Observations of the Human Rights Committee, Canada*, 85th sess, UN Doc. CCPR/C/CAN/CO/5, (2 November 2005). The Committee found the similar language in the Australian Anti-Terrorism Act (No.

Section 3.2 explores the elements of the definition of a terrorist act under the ATP to the extent necessary to evaluate its scope. It is not intended to provide an in-depth analysis and interpretation of the definition. Section 3.3 discusses how the commonly held view on the lack of a universally applicable definition of a terrorist act could be a major obstacle for conducting a meaningful assessment on the scope of definition of a terrorist act under a domestic legislation. Section 3.4 revisits Resolution 1373 with a view to finding what the Security Council means when it refers to a terrorist act. This section proposes the so far overlooked aspect of the resolution — that it endorses the definition of a terrorist act under the 1999 International Convention for the Suppression of the Financing of Terrorism (hereafter Suppression of Financing Convention) as a generally applicable definition for counterterrorism measures that the resolution prescribes, including criminalisation of a terrorist act. This definition and the definition of a terrorist act provided under the OAU Convention on the Prevention and Combatting of Terrorism (OAU Convention) are identified as standards to examine the definition of terrorist act under the ATP. Analysis of the elements of the definitions in the two legal instruments follows in section 3.5.

Section 3.6 examines the scope of the definition of a terrorist act under the ATP is examined against the two definitions. Having made an interim finding that the definition manifests a mixture of narrowness and broadness depending on which element of the definition is being compared with the standard definitions; this section further considers the effect of the definition's deviation from the standards on its validity.

2) 2005 violated international human rights norms and recommended its amendment. Human Rights Committee, *Concluding Observations of the Human Rights Committee, Australia*, 95th sess, UN Doc. CCPR/C/AUS/CO/5, (2 April 2009). Thus, unless it is argued that if advanced democracies could not escape criticism for having a broad definition of a terrorist act how can Ethiopia be expected to do better, by the government's own admission the definition would be subject to the same criticism as those jurisdictions from which the definition is said to have been borrowed. In view of the fact that the definitions in these jurisdictions have already been criticised by the UN human rights body by the time Ethiopia passed its anti-terrorism law, Ethiopia should not have adopted these definitions.

3.2 Definition of a terrorist act under the ATP

Article 3 of the ATP states as follows:[11]

> Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:
>
> 1/ causes a person's death or serious bodily injury; 2/ creates serious risk to the safety or health of the public or section of the public; 3/ commits kidnapping or hostage taking; 4/ causes serious damage to property; 5/ causes damage to natural resource, environment, historical or cultural heritages; 6/ endangers, seizes or puts under control, causes serious interference or disruption of any public service; or 7/ threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article; is punishable with rigorous imprisonment from 15 years to life or with death.

Different authors analyse definitions of a terrorist act by examining different elements.[12] Here two elements of the definition are considered. The first element is the 'base offence,' which refers to the ordinary crime that forms the basis of a terrorist act. [13] The second is the 'purpose of the act,' which denotes the mental element that distinguishes a terrorist act from ordinary crimes. [14]

3.2.1 Base offence

[11] Though Article 3 of the ATP is captioned as 'terrorist acts', it simply prescribes the punishment attached to the acts which are listed thereunder. However, it looks that the provision is intended to define a terrorist act as an act which constitutes one of those listed thereunder.

[12] For example, Fletcher identifies eight variables of terrorism. George P. Fletcher 'The Indefinable Concept of Terrorism' (2006) 4 *Journal of International Criminal Justice* 894; Cassese approaches the notion of terrorism in terms of its objective and subjective elements in Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933; Duffy analyses definition of terrorism in terms of 'conduct,' 'purpose', 'the actors' and 'protected interest' elements. Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press, 2015).

[13] Thomas Weigend, 'The Universal Terrorist: The International Community Grappling with a Definition' (2006) 4 *Journal of International Criminal Justice 912,* 929.

[14] Cassese, 'The Multifaceted Criminal Notion of Terrorism', above n 12, 938.

The definition provides a list of seven 'base offences' the commission of which would constitute a terrorist act when accompanied by subjective elements incorporated in the introductory part of the provision. While some of the base offences require that a certain result (harm) be achieved for others creating danger or risk of harm suffices. The former includes causing a person's death or bodily injury, serious damage to property, damage[15] to natural resources, the environment, historical or cultural heritages, causing serious interference or disruption of any public services, and kidnapping or taking of hostages. Two of the offences on the list — creating serious risk to safety or health of the public or section of the public and endangering, seizing or putting under control of any public services — belong to the second category. The seventh on the list criminalises, as a terrorist act, a mere threat to commit any of the other six.

3.2.3 Purpose

The purpose for which the actor committed an act makes what is otherwise an ordinary crime, a terrorist crime. Young argues 'intimidation or coercion should be regarded as a necessary element of terrorism as a legal concept at international law.'[16] Similarly, Weigend notes "the offender's 'specific' intent accompanying his overt act is what sets a terroristic murder, bombing or assault apart from an 'ordinary' crime of the same kind."[17]

The definition under the ATP requires that the base offence be committed with intent to serve one of the several purposes for it to be a terrorist act. Three possible purposes are envisaged.[18] These are: coercing a government in Ethiopia (at state or federal level) or foreign government

[15] The Amharic version requires that the damage be serious as in the case of damage to property.

[16] Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation' (2006) 29(1) *Boston College International and Comparative Law Review* 23, 57.

[17] Weigend, above n 13, 923.

[18] While in the Amharic version of the provision these are clearly stated as 'purposes' for committing an act, the wording of the English version is not that clear whether these are provided as purposes or means to achieve a certain purpose. In case of discrepancies between the two versions, the Amharic version prevails. *Federal Negarit Gazeta Establishment Proclamation No*. 3/1995 (Ethiopia) Art 2(4).

or international organisation;[19] intimidating the public or section of the public; or destabilising or destroying the fundamental political, constitutional, economic or social institutions of Ethiopia. With regard to the level of pressure on the government, it is required that the actor intends to 'influence' the government. It is noteworthy that the Amharic version provides for 'coercion,' which is a higher and narrower form of pressure. A preliminary draft of the law, dated January 2009, used the terms 'coercing or intimidating' in place of 'influence.'[20] As Human Rights Watch observes 'it is not clear if the change represents a government attempt to make the definition of terrorism broader …, or whether this is primarily a translation issue.'[21]

3.2.3 Motive

Article 3 of the ATP incorporates an additional element —motive — on which there is no agreement concerning whether or not it should be included in a definition of terrorism.[22] In principle motive is irrelevant in criminal law. [23] Under the ATP, that a conduct is committed in order to 'advance a political, religious or ideological cause' is a necessary condition for the conduct to be a terrorist act.

3.3 Evaluation of the scope of the definition of a terrorist act under the ATP

3.3.1 The Problematic Nature of Evaluating Scope of a Definition

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[19] Article 2(9) of the ATP stipulates 'government' means 'the federal or a state government or a government body or a foreign government or an international organisation.'

[20] Human Rights Watch, above n 3, 3.

[21] *Ibid.* Be the reason for change of words as it may, for interpretation purpose the Amharic version of legislation prevails over the English. *Federal Negarit Gazeta Establishment Proclamation* No.3/1995 (Ethiopia), Article 2(4).

[22] For a summary of arguments for and against inclusion of motive in a definition of a terrorist act and supporters of both sides see: Ben Saul, 'The Curious Element of Motive in definitions of Terrorism: Essential Ingredient or Criminalizing Thought?' In Andrew Lynch, Edwina MacDonald and George Williams (eds.), *Law and Liberty in the war on terror* (The Federation Press, 2007) 28-38. The definition of terrorism that the 1994 UN General Assembly Declaration on Measures to Eliminate International Terrorism provides requires a political purpose. International terrorism is defined as 'criminal acts intended or calculated to provoke a state of terror in the general public …for political purposes.' Measures to Eliminate International Terrorism, 49/60, A/RES/49/60, 84th Plenary Meeting 9 December 1994, Paragraph 2

[23] George P. Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) 452.

While resolution 1373 is applauded for mobilising states against terrorism (something which was not achieved through the treaty process),[24] it has been subject to several criticisms.[25] As noted in Chapter one, among the major criticisms is that the resolution fails to define terrorism. Indeed, though the resolution mentions terrorism or terrorist act numerous times, it does not explicitly provide for their meaning. Both Roach and Samuel describe the absence of definition of terrorism as a major gap in resolution 1373.[26]

In view of the fact that terrorism does not have a universally accepted meaning,[27] many have asserted that by adopting resolution 1373 the Security Council has left the definition of terrorism to individual governments.[28] Similarly, others interpret the imposition of an obligation on a state to criminalise a 'terrorist' act without providing a definition or guideline as authorising states to 'define terrorism according to its own history, objectives and concerns'[29] which permits a range of overbroad definitions. Requiring states to take measures against terrorism without defining it, Guillaume argues, enables states to make 'unilateral interpretations geared towards their own interests.'[30] Claiming that it is the Security Council's instruction to states to take counterterrorism

[24] Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism since September 11th' (2001-2002) 35 *Cornell International Law Journal* 475.

[25] Resolution 1373 is criticised for circumventing the requirement of consent of States as a conventional law making process by instructing them to adopt and implement anti-terrorism measures. Nigel D. White, 'The United Nations and Counter-Terrorism: Multilateral and Executive Law-Making' in Ana Maria Salinas De Frias, Katja LH Samuel, and Nigel D White (eds.), *Counter terrorism International Law and Practice* (Oxford University Press, 2012) 54; Rostow, above n 24, 482; Ben Saul, 'Definition of ''Terrorism'' in the UN Security Council: 1985–2004' (2005) 4(1) *Chinese Journal of International Law* 141.

[26] Roach, above n 1; Katja LH Samuel, 'the Rule of Law Framework and its Lacunae: Normative, Interpretive, and/or Policy Created?' in Ana María Salinas de Frías, Katja LH Samuel, and Nigel D White (eds.) *Counter-Terrorism International Law and Practice* (Oxford University Press, 2012) 14.

[27] Two courts, one national another international, have adopted a different view on the definition controversy. The UN Special Tribunal for Lebanon and an Italian court recognise a customary law definition for the crime of terrorism. Ben Saul 'Civilizing the Exception: Universally Defining Terrorism' in Aniceto Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012) 79, 80, 85.

[28] Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2012) 316-17, 320; Rostow, above n 2, 484; Roach, above n 1; Young, above n 16.

[29] Kent Roach et al, 'Introduction' in Kent Roach et al (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press , 2nd ed., 2012) 1, 4.

[30] Gilbert Guillaume 'Terrorism and International Law' (2004) 53 *International and Comparative Law Quarterly* 537, 540.

measures without telling them what terrorism is which facilitates the promulgation of domestic anti-terror laws with sweeping definitions, Roach goes as far as attributing complicity to the UN Security Council in the violation of rights arising from broad definitions. [31]

Critics on adopting a broad definition of a terrorist act use the word broadness with a connotation that the definition is improperly stretched making its reach beyond that which it should be. Claiming broadness of a definition of a terrorist act, in that sense, involves judging the definition's reach according to a standard. At times there has been a commonly held view that there is no universally accepted definition of a terrorist act so much so that 'one person's terrorist is another's freedom fighter,'[32] which suggests the futility of evaluating a definition without a standard.

Thus, it is thought appropriate to identify a definition that can be used as a standard to undertake a meaningful evaluation of the scope of the definition of a terrorist act under the ATP. One of the objectives of the ATP is to enforce regional and international counterterrorism instruments.[33] Furthermore, a recommendation that the Legal and Administration and Defence and Security Affairs Standing Committees submitted to the Ethiopian House of Peoples' Representatives indicates that the ATP is drafted based on these instruments.[34] It would be reasonable to use definitions provided under these instruments as standard to examine consistency of the scope of the definition provided under the ATP with the international and regional definitions. Of the regional counterterrorism instruments that Ethiopia is a party to and, thus, the ATP is meant to implement, the OAU Convention on Combating and Preventing Terrorism (which is commonly known as the Algiers

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[31] Roach, above n 1.

[32] Fletcher, 'The Indefinable Concept of Terrorism', above n 12, 906. For the minority view on this issue, see above n 27.

[33] Anti-Terrorism Proclamation No.652/2009 (Ethiopia), Preamble; Wondwossen Demissie Kassa 'Examining Some of the *Rasions d'étre* for the Ethiopian Anti-terrorism Law' 2013 7(1) *Mizan Law Review* 49. However, as can be seen from the subsequent Sections the definitions in these instruments are not necessarily compatible in terms of scope of conduct that they capture.

[34] Federal Democratic Republic of Ethiopia, 3rd House of Peoples Representatives (2008/2009), 4th year Adopted Proclamations, Public Discussions and Recommendations, Volume 7, 133.

Convention) is the one that provides for a general definition of terrorism.[35] This is one of the definitions in light of which the scope of the definition of a terrorist act under the ATP is examined. The ATP is meant to implement not only regional but also international counterterrorism instruments applicable to Ethiopia. As noted above resolution 1373 is the most important international counterterrorism instrument. The following subsection attempts to infer the meaning of a terrorist act under resolution 1373 to be used as another definition against which the scope of the definition under the ATP is to be assessed.

3.3.2 Implied meaning of a terrorist act under Resolution 1373

True, resolution 1373, by not expressly defining a terrorist act, makes it unclear what exactly its subject matter is. Nevertheless, the resolution is not intended to give states a blank cheque to fight terrorism according to their own definitions.[36] By requiring or calling up states to take the several measures provided under the resolution individually and collectively against a terrorist act, it would be logical to assume the Security Council would not be using the term 'terrorist act' to mean *everything* or *nothing*.[37] It must have been referring to *something*.[38] A close reading of the resolution indicates what this *something* is.

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[35] Organization of African Unity (OAU), *OAU Convention on the Prevention and Combating of Terrorism* , opened for signature 14 June 1999, (entered into force 6 December 2002) Art 1(3). Ethiopia acceded to the Convention on 24 February 2003 and deposited the instrument of accession on 05 March 2003. Africa Union, List of Countries which have signed, ratified/acceded to the OAU Convention on the Prevention and Combating of Terrorism <http://www.au.int/en/sites/default/files/treaties/7779-sl-protocol_to_the_oau_convention_on_the_prevention_and_combating_of_terrorism_14.pdf>.

[36] Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States' (2006) 4 *Journal of International Criminal Justice* 1044.

[37] Indeed as argued by Professor Schachter even the lack of a comprehensive definition 'does not mean that international terrorism is not identifiable. It has a core meaning that all definitions recognize.' Oscar Schachter 'The Extraterritorial Use of Force Against Terrorist Bases' (1989) 11 *Houston Journal of International L*aw 309, 309.

[38] Other sources confirm this. The Counter Terrorism Committee indicates that its members have a fair idea of the meaning of terrorism under the resolution. CTC Chair (Ambassador Jeremy Greenstock), Presentation to Symposium: Combating International Terrorism: The Contribution of the United Nations, Vienna, 3–4 June 2002 quoted in Saul, 'Definition of "Terrorism"', above n 25,157. Furthermore, Greenstock has stated: 'increasingly, questions are being raised about the problem of the definition of a terrorist. Let us be wise and focused about this: terrorism is terrorism … What looks, smells and kills like terrorism is terrorism.' John Collins, *Terrorism, in Collateral Language: A User's Guide to America's New War* (John Collins & Ross Glover eds., 2002) quoted in Alex Schmid, 'Terrorism-the Definitional

Logical consistency requires that a terrorist act, the financing of which states are obliged to criminalise under paragraph one of resolution 1373, should not be different from (that is, broader or narrower in scope than) a terrorist act that the Suppression of Financing Convention refers to.[39] Paragraph 3(d) of the resolution calls upon states to become parties to the Suppression of Financing Convention.[40] The Security Council would not have made this call, had it used the term 'terrorist act', the financing of which it requires states to criminalise, under paragraph 1 of the resolution, differently from its meaning under the Suppression of Financing Convention that it refers to under its paragraph 3(d). This is because if the meaning of terrorist acts, as used under paragraph 1 of the resolution, were different from its meaning under the Convention, states would not be able to comply with both paragraphs 1 and 3(d) of the resolution simultaneously.[41] Where a state, responding to the Security Council's call under paragraph 3(d) of the resolution, ratifies the

Problem' (2004) 36 *Case Western Reserve Journal of International Law*, 375. Though some states have expressed their concern about lack of explicit definition in the resolution, others believe that definition is unnecessary as it was defined in a previous General Assembly Resolution. Saul, 'Definition of "Terrorism"', above n 25, 159. Moreover, resolution 1373 was passed on the assumption that the meaning of terrorism is known from previous counterterrorism legal instruments. Rostow, above n 24.

[39] Szasz asserts that 'the provisions of operative paragraph 1 of resolution 1373… are clearly based on the International Convention for the Suppression of the Financing of Terrorism.' Paul Szasz, 'The Security Council Starts Legislating' (2002) 96 *American Journal of International Law*, 901, 903. The Counter Terrorism Committee opined that 'resolution 1373 should be interpreted in compliance with existing international agreements.' UN Information Service 'Human Rights Committee Briefed on Work of Counter-terrorism Committee' (press release HR/CT/630 27 March 2003) <http://www.un.org/News/Press/docs/2003/hrct630.doc.htm>. Wainwright, former expert adviser to the Counter Terrorism Committee, indicates that because resolution 1373 calls upon states to give effect to the relevant counterterrorism international instruments, 'the CTC has seen fit to import into its interpretation of the resolution concepts included in those instruments, in particular, the fairly detailed description of terrorism included in the Financing Convention.' *Jeremy Wainwright* 'Some aspects of compliance with UN Security Council Resolution 1373' (2005) <http://www.opc.gov.au/calc/docs/Loophole_papers/Wainwright_Mar2005.pdf>.

[40] The obligations that the resolution imposes on the states under its paragraph 1 are so similar to those imposed under the Suppression of Financing Convention that Bantekas describes Paragraph 3(d) of the resolution which, he argues, makes a needless call for states to ratify the Convention as 'ironic'. Ilias Bantekas 'The International Law of Terrorist Financing' (2003), 97(2) *The American Journal of International Law*, 315, 326.

[41] The Security Council would like the States both to implement paragraph 1 and to ratify the Convention in compliance with paragraph 3(d) of the resolution. Thus, the resolution has to be interpreted in such a manner that compliance with both paragraphs at the same time is possible.

Suppression of Financing Convention, it undertakes to criminalise financing of a terrorist act as defined under the Convention.[42] If the meaning of a terrorist act that paragraph 1 of the resolution refers to is different from that provided under the Suppression of Financing Convention, then it will neither practically nor theoretically be possible for the state to comply with both paragraphs of the resolution concurrently. This anomalous consequence would not be the Security Council's intention. The only way to circumvent this anomaly is to interpret a 'terrorist act' under paragraph 1 of the resolution and in the Suppression of Financing Convention to refer to the same conduct.

It is reasonable to assume that the Security Council, in mentioning the term 'terrorist act' in the different paragraphs of the resolution,[43] refers to the same conduct. That is, for example, a 'terrorist act' the financing of which the states are instructed to criminalise under paragraph 1 of the resolution would not be different from a 'terrorist act' the commission of which the states are required, under paragraph 2(b) of the resolution, to prevent.

Because the meaning of a terrorist act, as used in other paragraphs of the resolution, would not be different from the meaning given to a terrorist act under the resolution's first paragraph, which refers to the meaning of a terrorist act as defined under Article 2 (1) of the Suppression of Financing Convention, it stands to reason that this definition is applicable to a terrorist act that resolution 1373 refers to in all of its different paragraphs. Thus, even though absence of a clear definition of a terrorist act in the resolution seems to suggest that 'each country must decide within its legislation on the underlying criminal acts to which resolution 1373 is applicable,'[44] a critical cumulative reading of the resolution and the Suppression of Financing Convention indicates that the term 'terrorist

[42] Szasz, above n 39.
[43] The resolution has made about forty mentions of *terrorism, terrorists or terrorist acts.*
[44] Curtis Ward, 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council' (2003) 8 *Journal of Conflict and Security Law* 289, 294-95.

act' under resolution 1373 refers to the conduct that Article 2 (1) of the Suppression of Financing Convention envisions.[45]

The Council's subsequent practice supports this argument. Though states routinely claim terrorist attacks are being made in their territories (based on their own definition of terrorism), the UNSC has never taken every allegation seriously.[46] The Council has consistently confined its involvement to attacks which are grave enough to be captured by the definition provided under the Suppression of Financing Convention.[47]

The definition of a terrorist act provided under Security Council resolution 1566 of 2004 is additional evidence to demonstrate the term as understood by the Security Council. Under Paragraph 3 of resolution 1566, the Security Council,

> *Recalls* that criminal acts, …, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, …;

[45] It is not uncommon to infer the intention of the Security Council from what it has expressly stated. For example, Szasz argues that in resolution 1373 the Security Council implicitly approves previous General Assembly recommendations. Szasz, above n 39. Similarly, Saul notes that resolution 1373 implicitly authorised self defence against terrorism. Saul, 'Definition of "Terrorism"', above n 25.

[46] For the sporadic involvement of the Security Council in domestic terrorism cases, which arguably do not fall under the Convention's definition, see: Kassa, above n 33.

[47] See the different resolutions the Security Council has adopted denouncing terrorist attacks in different parts of the world: SC Res 1438, UN SCOR, 4624th mtg, UN Doc S/RES/1438 (14 October 2002); SC Res 1465, UN SCOR, 4706th mtg, UN Doc S/RES/1465 (13 February 2003); SC Res 1516, UN SCOR, 4867th mtg, UN Doc S/RES/1516 (20 November 2003); SC Res 1530 UN SCOR, 4923rd mtg, UN Doc S/RES/1530 (11 March 2004); SC Res 1611, UN SCOR, 5223rd mtg, UN Doc S/RES/1611 (7 July 2005); SC Res 2249, UN SCOR 7565th mtg, UN Doc S/RES/2249 (20 November 2015).

There is consensus that this is an attempt by the Security Council to define terrorism and fill the claimed gap in resolution 1373.[48] However, the Security Council does not seem to introduce a new definition as it simply '*recalls'.* As Hardy and Williams have rightly noted this definition is 'practically indistinguishable'[49] from the definition under the Suppression of Financing Convention. This 'striking' similarity[50] gives credence to the argument that the Council understands the term terrorist act, while passing resolution 1373, to refer to a terrorist act as defined under the Suppression of Financing Convention.[51]

A purposive and critical revisiting of the resolution indicates that the Security Council has tacitly endorsed the definition of a terrorist act provided under the Suppression of Financing Convention which is originally intended to be used for the specific purpose of defining a terrorist act for the purpose of criminalising its financing.

Summary

The argument advanced in this Section to infer the meaning of a terrorist act in Resolution 1373 can be summarised as follows. By incorporating paras 1 and 3(d) in Resolution 1373, the Security Council intends that states implement both paragraphs. States can implement both paragraphs if and only if a terrorist act under para 1 of the Resolution and a terrorist act under the Suppression of Financing Convention have the same meaning. It follows that a terrorist act under para 1 of Resolution 1373 parallels a terrorist act as defined under art 2(1) of the Suppression of Financing Convention. As the Security Council would use the term terrorist act throughout Resolution 1373 consistently (to refer to the same

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[48] Luis Misguel Hinojosa-Martinez, 'A Critical Assessment of United Nations Security Council Resolution 1373' in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (Edward Elgar: 2014), 626, 647;

[49] Keiran Hardy and George Williams, 'What is "terrorism"? Assessing Domestic Legal Definitions' (2011) 16 *UCLA Journal of International Law & Foreign Affairs* 77, 93. Also, see Weigend, above n 13, 920.

[50] Ibid.

[51] Curtis Ward, Legal Expert for the Security Council's Counter-Terrorism Committee (CTC), invoked a legal instrument (The Ministerial Declaration annexed to Security Council resolution 1456 (2003)) which was passed after resolution 1373 to support his view that the Security Council intended, under resolution 1373, to require states to ensure that their counter terrorism activity is compatible with human rights. UN Information Service above n 39.

conduct), the meaning of a terrorist act under para 1 of the Resolution would be applicable to the term throughout the Resolution. Therefore, a terrorist act under Resolution 1373 refers to an act that the definition provided under art 2(1) of the Suppression of Financing Convention captures.

3.4 The meaning of a terrorist act under the standard definitions

3.4.1 Under the International Definition

As argued above the meaning of a terrorist act under resolution 1373 refers to a terrorist act as defined under Article 2(1) of the Suppression of Financing Convention. The latter defines a terrorist act as:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.

Under Article 2(1) (a), a conduct would be regarded as a terrorist act if it falls within one of the nine treaties listed in the annex to the convention.[52]

[52] They are: Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

Two exceptional instances where an act that falls within one of these treaties may not be considered as terrorist act for a state party to the Suppression of Financing Convention are provided under Article 2(2) of the Convention. According to Article 2 (2) (a) a state, at the time of becoming a party to the Suppression of Financing Terrorism, has the right to express its reservation that any treaty, which it is not party to, not be deemed to be included in the annex referred to under Paragraph 2(1) (a). If it does not express its reservation, the treaty to which it is not a party will be applicable to that state, by virtue of Article 2(1) (a) of the Convention, for the purpose of criminalising financing of the act prohibited under the treaty. Similarly by virtue of Article 2(2) (b) where a state which had been a party to any of the treaties referred under Article 2(1) (a) of the Suppression of Financing Convention ceases to be so, it can terminate the applicability of the Suppression of Financing Convention to the act covered by the treaty which it ceases to be a party to by making a declaration to that effect.

By making either of the declarations, a state which is not a party to any of the treaties listed in the Annex to the Suppression of Financing Convention precludes the treaty from the list of treaties in the Annex that Article 2(1) (a) of the Convention refers to. However it is noteworthy that the exclusion of a certain act from Article 2(1) (a) provides eligibility to the act to be included under Article 2(1) (b), which is applicable to acts other than those which fall under Article 2 (1) (a). Nevertheless, exclusion of an act from Article 2(1) (a), though necessary, is not sufficient to be regarded as a terrorist act under Article 2(1) (b). Two additional conditions, namely the base offence and the purpose requirements, should exist.

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988, and International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

At the time of the adoption of the Suppression of Financing Convention, there were ten countering terrorism instruments: eight conventions and two protocols. The annex (Paragraph 2(1) (a)) to the convention refers to seven of the conventions and to both protocols. The only convention not included in the list is the 1963 Convention on Offences and Certain Other Acts Committed On board Aircraft (Aircraft Convention) which prohibits conduct that do or may affect in-flight safety.

(a) base offence

The first limb of Article 2(1) (b) which goes '[a]ny other act intended to cause death or serious bodily injury …' refers to the base offence element of a terrorist act.[53] The base offence has nothing to do with property offences or victimless offences.[54] As noted by Fletcher, 'terrorism is premised on the violent attack on life and security of human beings.'[55] That is, because the conduct is, in and by itself, '*already criminalised*'[56] under national criminal law, it would have been an ordinary crime (but not a terrorist crime) of intentional homicide or grave bodily injury or an attempt to commit these offences had it not been for the specific purpose accompanying the act.

Young refers to this element of the definition as the 'proscribed harm.'[57] While Weigend describes it as the only objective element[58] of definition of a terrorist act, Cassese describes this element as the actus reus of an international crime of terrorism.[59] However, in addition to the doing of a certain act this element has a mens rea component — the intent to cause death and grave bodily injury.

(b) purpose of the act

Fulfilment of the above element makes a certain conduct eligible to be a terrorist act under Article 2(1) (b) of the Suppression of Financing Convention.[60] The conduct would be a terrorist crime where the actor possesses the 'right' state of mind[61] which constitutes the second element under paragraph 2(1) (b) of the Convention. This element relates to the purpose of doing the act. A base offence would be a terrorist act 'when the purpose of such act … is to intimidate a population, or to

[53] Anthony Aust, 'Counter-Terrorism—A New Approach: The International Convention for the Suppression of the Financing of Terrorism' (2001) 5(11) *Max Planck Institute UNYB,* 298.
[54] Fletcher, 'The indefinable concept of Terrorism', above n 12, 894-911.
[55] Ibid, 894, 901.
[56] Cassese, 'The Multifaceted Criminal Notion of Terrorism', above n 12, 938 (emphasis in the original).
[57] Young, above n 16, 53-55.
[58] Weigend, above n 13.
[59] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed., 2008).
[60] Weigend, above n 13.
[61] Ibid.

compel a government or an international organisation to do or to abstain from doing any act.' The actor must have at least one of the three purposes while committing an act intending to cause death or serious bodily injury on a civilian. Any act that is intended to cause or has actually caused death or serious bodily injury not accompanied at least by one of these purposes would not constitute a terrorist act. Thus, the purpose for which the doer of the act committed it gives to what is otherwise an ordinary crime a terrorist nature.[62] Thus, Cassese refers to this component as 'the hallmark' of a terrorist act.[63]

While the definition provides three alternative purposes of a terrorist act, its primary goal is always that of compelling a public or private institution to take a certain course of action. Logically, intimidating a population, though listed as one possible purpose of a terrorist act, can only be used as a means as opposed to a purpose, for compelling a government or another institution to do or to refrain from doing something. As observed by Fletcher, the imposition of fear on the population is a means to realising some political objective.[64] In a similar fashion, Cassese referring to scaring the population, notes that 'it is never an end in itself.'[65]

Incorporating intimidating a population as one possible end of a terrorist act makes it easy for law enforcement agencies to get one's conviction where the doer's demands in connection with certain acts are unclear.[66] In such cases it is enough for the prosecution to show that the actor's immediate purpose is to spread fear among the public. The purpose of the act being inferred from the 'nature' or 'context' of the act,[67] as

[62] Weigend, above n 13; Young, above n 16.
[63] Cassese, 'The Multifaceted Criminal Notion of Terrorism', above n 12, 939.
[64] Fletcher, 'The Indefinable Concept of Terrorism', above n 12.
[65] Cassese, 'The Multifaceted Criminal Notion of Terrorism', above n 12, 939.
[66] Fletcher, 'The Indefinable Concept of Terrorism', above n 12.
[67] On this, Weigend has written that inference from nature or context 'means that all that has to be proved is that the actor had *mens rea* with respect to the base crime (murder, assault or destruction of property) and that that crime was committed in a 'context' that the court deems indicative of terrorism.' Weigend, above n 13, 924. However, Weigend finds this approach unacceptable for two reasons. First, 'the largely increased penalties provided for terrorists can be justified only when the actor is proven to have intended or known that his acts will intimidate the population or interfere with important government functions': at 924. Second 'since the *actus reus* of terrorist attacks does not differ from 'ordinary' offences, being labelled a terrorist hinges on the presence of a specific subjective element.' For him 'leaving determination of that defining element to inference means that the court can without

opposed to knowledge or intent on the part of the actor that his action will intimidate the population, gives credence to this interpretation.

3.4.2 Under the regional definition

The Algiers Convention defines a terrorist act under Article 1(3) (a) as:

> any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State.

(a) base offence

The definition captures 'any act … which *may* endanger the life, physical integrity or freedom of, or cause serious injury or death …or causes or *may* cause damage to public or private property, natural resources, environmental or cultural heritage …' Broad as it is, not every act falls within the domain of the base offence of a terrorist act. An act has to be committed against specific protected interests — the act should endanger or be a transgression against life, physical integrity or liberty of a human person, or it should be a wrongdoing against public or private property, natural resources, environmental or cultural heritage.[68]

The definition provision does not require that there be *actual* or *risk* of harm or damage or that there be actual endangering of life, physical integrity, or freedom. It simply requires that an act *may* result in any of

conclusive proof put the terrorist label on one defendant and withhold it from another': at 924.

[68] These acts would not be considered as terrorist acts if the situation in which they were committed falls under article 3 of the Convention. According to this provision, 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.' *OAU Convention on the Prevention and Combating of Terrorism*, opened for signature 14 June 1999 (entered into force 6 December 2002), Art 3.

the proscribed consequences. 'May' is a vague term which includes any probability (greater than zero but less than 100 percent) that an act would result in the consequences or states of fact.[69] There is no requirement that the actor intends to bring about these consequences or states of fact. Thus, in so far as other elements of the definition are satisfied, almost any act arguably *may* result in the proscribed consequences or states of fact, which deprives any value of incorporating this element.

There is another area where the Convention embraces a non-terrorist act as terrorist one. Andreu-Guzman states:

> The Algiers Convention … eliminates the frontier between political crimes and terrorist acts. By assimilating insurrection to terrorism, the Algiers Convention denies the existence of any political crimes. Terrorist acts and political crimes are two different criminal categories, subject to distinct rules, especially as regards extradition. It is likely that, during an insurrection, terrorist acts are committed (and their authors must be tried for those acts)… International law does not prohibit insurrection. What is forbidden, and illicit, is the perpetration of certain acts, because the prohibition of the recourse to terror and terrorist acts is not general nor abstract and is in strict relationship with the notions of civil population and protected persons under international humanitarian law.[70]

The definition speaks about the status of the base offence under the criminal law of a state party to the convention. By providing that terrorist act means 'any act which is a violation of the criminal laws of a State Party …' the definition provision indicates that it does not capture every perpetration of violence against the above mentioned protected interests. It requires that the act, even where not accompanied by the purpose elements of the definition of a terrorist act, be criminalised under criminal law of member states as a non-terrorist ordinary offence. In other words, it is not any act that causes death, bodily injury, damage to property and other consequences or states of fact that falls within the domain of acts

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[69] International Federation for Human Rights, Counter-Terrorism Measures and Human Rights: Keys for Compatibility Human rights Violations in Sub-Saharan African Countries in the Name of Counter-Terrorism: A High Risks Situation (November 2007) 7 <https://www.fidh.org/IMG/pdf/afriqueantiterr483eng2007.pdf>.

[70] F. Andreu-Guzman, Terrorism and human rights: new challenges and old dangers, International Commission of Jurists, Occasional papers No. 3, March 2003, quoted in ibid 7.

which are potentially terrorist acts. An act which *may* cause any of the proscribed harms or states of fact would be eligible to be in the category of terrorist acts to the extent it is criminalised in a domestic criminal law.[71]

(b) Purpose of the Act

The definition provides for a list of three possible purposes that the actor might intend their act to serve. Each consists of a broad range of purposes. The first purpose is to 'intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles.' This purpose has four component elements. First, it relates to exerting certain pressure with a view to terrorise — intimidate, put in fear, force, coerce or induce. Second, this pressure is exerted on 'any government, body, institution, the general public or any segment thereof.' Third, the actor's demand for action or abstention may be directed at any of those against whom they exercise the pressure. This is as opposed to the definition under the Suppression of Financing Convention where although the pressure might be directed at the public or its part and the government, it is only the government that the actor demands to do or not to do something. [72] Fourth, the demand might have a variety of forms — 'to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles.'

The second purpose of committing any of the base offences relates to disrupting any public service, the delivery of any essential service to the public or creating a public emergency. The third possible purpose of doing any of the base offences is the creation of general insurrection in a State. Because the three purposes of committing an act are provided alternatively, it seems that an act can be a terrorist act without being

[71] Because national criminal laws relating to protection of life, security and freedom of a person and to property are not likely to be identical, including this requirement opens a room for a variety of definitions of a terrorist act across the continent thereby tolerating a situation where a terrorist act for one state is not so for another state.

[72] Christian Walter, 'Defining Terrorism in National and International law' in Christian Walter et al (eds.) *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, 2003) 23.

intended to compel government or public or part of it to do an act or refrain from doing an act. To this extent, the definition lacks what is considered as the quintessential of a terrorist act.[73]

3.5 Appraisal of the definition under the ATP

As noted in section 3.3 above, the ATP is intended to facilitate implementation of international and regional counterterrorism legal instruments. This section examines the definition of a terrorist act provided under the ATP in light of the definition of terrorism under the two counterterrorism instruments: the 1999 Suppression of Financing Convention[74] and the Algiers Convention.[75] The evaluation is made in terms of the base offence and purpose elements of the definitions

[73] Cassese, 'The Multifaceted Criminal Notion of Terrorism', above n 12; Weigend, above n 13; Young, above n 16.

[74] Young supports the aptness of evaluating the definition of terrorism in domestic laws in the light of international definitions. Young, above n 16, 65-66. Young notes 'legislating in harmony with international law is crucial and drawing on international law's jurisprudence concerning the definition of terrorism is logical' and suggests 'states' definition should be assessed against this standard' : at 98 and 100 respectively.

[75] Ibrahim Kane observes that because of the broadness and ambiguity of the convention's definition of terrorist acts, it has become 'the chief legal instrument invoked by states to restrict the exercise of numerous fundamental rights and liberties recognized by African Charter and to transgress the basic principles of international law and principles of rule of law.' Ibrahim Kane, 'Reconciling Protection of Human Rights and the Fight Against Terrorism in Africa' in Ana María Salinas de Frías, Katja LH Samuel, and Nigel D White (eds.) *Counter-Terrorism International law and Practice* (Oxford University Press, 2012) 838, 842. Kane remarks that the convention is open to misuse by state parties. He argues that while terrorist acts and political offences are different under criminal law, the Algiers Convention effectively eliminates the difference between the two and could even be construed as denying the very existence of political offences. He indicates three features of the convention that would produce this result. First, it employs vague expressions as 'according to certain principles', 'contribution', and 'encouragement'. Second, the way the definition is coined allows criminalization of exercise of fundamental freedoms such as the right to strike which could easily be construed as 'terrorist' methods. Third, it assimilates insurrection with terrorism: at 842. Moreover, Kane condemned the definition for being contrary to principle of legality. The definition, he argues, by making it possible to criminalise legitimate acts, contravenes international human rights law and the general conditions prescribed by international law: at 843. While the principle of legality requires criminal offences to be defined without ambiguity, the Algiers Convention fails to provide for a specific and strict definition of a terrorist act. Thus, owing to the overly broad definition of a terrorist act under the OAU Convention on Prevention and Combatting of Terrorism, perhaps many would not support using this definition as a standard to evaluate the scope of the definition of a terrorist act in domestic anti-terrorism laws.

3.5.1 In light of the Definition under the 1999 Suppression of Financing Convention

(a) base offence

The base offence element of the definition of a terrorist act under the ATP deviates from the international definition on two major points. First, it encompasses conduct not incorporated in the latter. Among the seven acts listed under Article 3 of the ATP, Paragraph 2(1) (b) of the Suppression of Financing Convention captures only the first, namely, an act that 'causes a person's death or serious bodily injury.' Others are not envisaged by the definition of a terrorist act under the Convention.

Second, the definition in the ATP fails to include the actor's mental element relating to the consequence of their act. Under the Convention's definition, for conduct to be considered as a terrorist act, it must have been intended to cause death or bodily injury. The definition under the ATP does not require that the act be intended by the actor to cause the harm or risk listed thereunder. Nor does the definition call for the harm or risk to result from negligence. Thus, at first sight it seems that in so far as one's act results in death, bodily injury or any of the consequences listed in the definition it constitutes a base offence of a terrorist act under the ATP irrespective of mens rea of the actor relating to the consequence. However, this is more apparent than real. The silence of Article 3 on mental state of the actor invites resort to the Cr. Code.[76] Article 57(1) of the Cr. Code provides that a person is guilty and responsible under the law where 'he commits a crime either intentionally or by negligence.' Article 59 (2) provides 'crimes committed by negligence are liable to punishment only if the law so expressly provides.' Thus, the cumulative reading of the two provisions indicates that where the law creating the offence does not specify the mental element, intention is presumed to be the required mental element under that law. It follows that no reference to a mental element under Article 3 of the ATP means the acts envisaged thereunder would be a terrorist act only where the actor does any of the acts intentionally. In its relevant part on the meaning of intention, Article

[76] Anti-Terrorism Proclamation No.652/2009 (Ethiopia), Article 36.

58(1) of the Cr. C. provides that a person is deemed to have committed a crime intentionally where she/he commits an act 'with full knowledge and intent in order to achieve a given result.' It follows that even if other elements of the definition are fulfilled an act which causes death, bodily injury, or any other harm or danger of harm listed thereunder would not be treated as a terrorist act if the actor did not intend the act to bring about such result.

(b) Purpose of the Act

For a certain act to be a terrorist act under the Suppression of Financing Convention, its purpose should be 'to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.' A range of purposes of committing the base offence of a terrorist act is provided in the ATP's definition. These are 'coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country.' While broadly speaking the two definitions refers to similar purposes, there are still important differences. '[D]estabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country,' which constitutes one possible purpose for a terrorist act under the ATP, is not included in the Convention's definition. On the other hand while the Convention's definition captures intimidation against the public in any part of the world, the definition under the ATP refers to the public or section of the public in Ethiopia. That is, unlike the action directed against a foreign government which is captured under Article 3 of the ATP, action directed against a public or section thereof of a foreign country does not fall under the definition provision of the ATP.

Under the international definition, the coercion against the government is to force it to take some steps—to do or to refrain from doing a certain act(s). Apart from requiring that there be coercion, the ATP does not explicitly indicate that the actor demands the government to do or to refrain from doing something. Any sort of coercion (with no need to show that the coercer demands the government to take a stand — to do or to

refrain from doing a specified act) suffices to satisfy this element of the definition. Furthermore, while the requirement that the actor be motivated by religious, political or ideological causes is incorporated under the ATP's definition, it is not relevant under the international definition.

3.5.2 In light of the definition under the Algiers Convention

(a) base offence

While the definition under the ATP and that under the Algiers convention share most of the base offences of a terrorist act, a close look at the definitions reveals some differences. Under both definitions, any act that causes death or bodily injury would constitute a terrorist act if accompanied by other elements. However, while the Ethiopian definition requires actual death or bodily injury, under the OAU definition an act 'which *may endanger'* one's 'life, physical integrity' constitutes a base offence for a terrorist act. Similarly, unlike the definition under the ATP which requires actual kidnapping or taking of hostages, an act that 'may *endanger* freedom' suffices to constitute a base offence under the Algiers Convention. While both the Algiers Convention and the ATP declare causing damage to property as one of the base offences, only the latter requires that the damage be *serious*. There are acts which the ATP, but not the Algiers Convention, treats as base offences. These are an act that causes damage on historical heritage, and an act that 'creates serious risk to the safety or health of the public or section of the public.'

Article 1(3) of the Algiers Convention does not specifically mention the prerequisite mental element for a terrorist act. It simply requires that the acts listed thereunder be prohibited under criminal law of state parties, opening a room for an act to be considered as a terrorist act even where committed negligently in so far as other elements thereunder are fulfilled. As noted above, although Article 3 of the ATP does not explicitly specify the criminal fault relating to the act that causes any of the harms or risks listed thereunder, by virtue of its Article 36, it is applicable only where the act is committed intentionally.

(b) Purpose

Under the definition of the Algiers Convention, an act which would otherwise be an ordinary crime is a terrorist act where it is committed to 'intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof.' The actor demands any government, institution, or the public 'to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles.'

The definition under the ATP does not provide what is being demanded and from whom. Disrupting the delivery of any essential service to the public, which is treated as a base offence under the ATP, is treated as one possible purpose along with intimidating, forcing, coercing or inducing a government body, institution, the general public or any segment thereof under the Algiers Convention. As a result, in the latter, but not in the former, causing property damage or any of the base offences provided thereunder with a view to 'disrupt any public service or the delivery of any essential service to the public' would constitute a terrorist act with no need to establish intimidation, putting in fear, forcing, coercing or inducing any government, body, institution, the general public or any segment thereof.

While the definition under the Algiers Convention envisions different levels of pressure (forcing, coercion or inducement) as constituting the purpose of committing the base offence, the ATP's definition captures only the extreme influence —coercing the government. Finally, while motive is an integral part of definition under the ATP, it is not relevant under the definition in the Algiers Convention.

3.6 What do the discrepancies mean for the validity of the domestic definition?

It is noted, in the previous section, that the definition of a terrorist act under the ATP deviates from the regional and international definitions. While relating to some aspects the former is wider in scope, on other aspects it is narrower. Whether or not these discrepancies have an effect on the validity of a domestic definition turns on what resolution 1373 and the Algiers Convention require of states in relation to the criminalisation

of a terrorist act. Do the instruments instruct states to criminalise certain conduct, without prohibiting criminalisation of other conduct as a terrorist act, or do they require states to criminalise only and only what each instrument envisions as a terrorist act?

If the former, a state would comply with the instruments by criminalising each and every conduct that falls within the respective meaning of a terrorist act in the two instruments. States are free to adopt a definition that captures conduct beyond what the instruments treat as a terrorist act. It follows that a domestic definition would be in conflict with an international or regional definition only where it fails to capture, but not where it goes beyond, a conduct criminalised by the latter. If, on the other hand, the instruments require a state to criminalise as terrorist act only a conduct that their respective definition captures (*no less no more*), the state would be obliged to confine its definition of a terrorist act to those in the regional and international instruments. Within this scenario, for a state to comply with the instruments, its definition of a terrorist act should match that provided under the respective definitions of the two instruments.[77] It follows that the state definition would contravene with the respective definitions of the two instruments not only where it fails to include, but also where it goes beyond, a conduct that the latter captures.

Scholars who criticise the Security Council for not including a definition of a terrorist act under resolution 1373[78] would support the second interpretation. In their view, states would have been required to adopt the definition under resolution 1373 had there been one thereby preventing abusive unilateral national definitions, which raise human rights problems. That is why they attribute the proliferation of divergent definitions of a terrorist act across the globe to the Security Council's

[77] Because the definitions provided under the OAU Convention and the Suppression of Financing Convention are different in scope this interpretation would make it practically impossible for a state party to the OAU convention to adopt a definition of a terrorist act that would satisfy both definitions.

[78] Roach, above n 1; Saul, Definition of "Terrorism", above n 25.

alleged failure to define a terrorist act in resolution 1373[79] and blame[80]the Council for this. Amnesty International shares this view.[81]

Scholars' reaction to what is deemed as a definition of a terrorist act under UN Security Council Resolution 1566 (2004) as being a late response[82] to rectify resolution 1373's failure to define a terrorist act gives credence to this inference. The criticism is that the definition came after many of the states had already adopted their own definition of a terrorist act since 2001, following the instruction under resolution 1373. This criticism is based on a premise that had that definition been incorporated in resolution 1373, it would have been a definition to be adopted by states, thereby preventing the diversified and broad definitions of a terrorist act among domestic legislation.

On the other hand, Young supports the first view. While it is crucial that states harmonise domestic anti-terrorism laws with international law, Young notes, the latter is 'only one of the relevant considerations to be taken into account in the anti-terrorism law-making process.' While in view of the international nature of counterterrorism it is logical that states draw on 'international law's jurisprudence concerning the definition of terrorism,' Young argues, 'states are … entitled to proscribe conduct beyond that which they are required to proscribe pursuant to international obligations.'[83] In the following paragraph which summarises the gist of his argument, Young indicates the right of the states to define a terrorist act as derived from their sovereignty.

> The international definition should be regarded as a minimum; states' definitions should be assessed against this standard. States are entitled to proscribe further conduct … To think otherwise would wrongly construe

[79] Roach, above n 1; Whitaker, above n 1.
[80] Roach, above n 1.
[81] Noting that "the terms 'terrorists' and 'terrorist acts' in resolution 1373 are open to widely differing interpretations,'' Amnesty International expresses its fear that this may facilitate rights violations. Amnesty International, *Statement by Amnesty International on the Implementation of Security Council Resolution 1373* (1 October 2001).
[82] Saul, Definition of "Terrorism", above n 25, 165; Roach, above n 1.
[83] Young, above n 16, 99-100.

> international law, rather than the state, as the source of sovereignty.[84]

A close reading of relevant provisions of the resolution and the OAU Convention confirms Young's view. The instruments simply instruct states to criminalise terrorist act and other related conduct and punish those who are involved in such conduct. According to Paragraph 2(b) of resolution 1373, 'states shall take necessary steps to prevent the commission of a terrorist act' of which one is criminalisation and prosecution. This duty is explicitly stated under Paragraph 2(c) of the resolution which requires states to 'ensure that … terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.' In connection with prosecution, the same paragraph instructs states to 'ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice.' Similarly Article 2(a) of the OAU Convention provides for obligation of state parties to 'establish criminal offences for terrorist acts as defined in this Convention and make such acts punishable by appropriate penalties that take into account the grave nature of such offences.'

Owing to the transnational nature of terrorism both the OAU Convention and the resolution, in their preambular[85] and operative paragraphs,[86] make reference to cooperation among states in counterterrorism. While these paragraphs suggest that states ought to adopt a definition that

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[84] Ibid, 100.

[85] The seventh and eighth paragraphs of the resolution respectively state: '*Calling* on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,' and *'Recognizing* the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism.' The sixth paragraph of the OAU Convention provides: 'desirous of strengthening cooperation among Member States in order to forestall and combat terrorism …'

[86] Paragraph 2(f) of the resolution requires that states 'afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings'; Paragraph 3 (a-e) of the resolution call for states to engage in different joint activities with a view to fight terrorism. Article 5 of the OAU Convention provides for range of areas where state parties need to cooperate in countering terrorism.

would make cooperation possible,[87] it does not necessarily mean that states need to define a terrorist act in exactly the same way as provided in the definitions of the regional and international instruments. It is only to the extent that a state anti-terror law relates to a terrorist act that falls within the definitions of the regional and international instruments that these instruments called upon states to cooperate in the enforcement of the law. [88]

The provisions relating to cooperation should not be construed as calling for one state to cooperate with another in the enforcement of the latter's anti-terrorism law to its full extent. As provisions relating to cooperation in counterterrorism are applicable in relation to terrorist acts as understood in the respective definitions of the two instruments, defining a terrorist act in such a manner that it encompasses a conduct that the respective definitions of the two instruments captures plus some other conduct would not have an impact on the enforcement of these provisions. These provisions simply reinforce the argument that state definitions should be broad enough to encompass every act that falls within the scope of the definitions of the OAU convention and the resolution.

Thus, the provisions, the enforcement of which envisages communality among domestic definitions of a terrorist act, should not lead one to the conclusion that states are not allowed to define a terrorist act differently from the definitions under the regional and international instruments.

Both the regional and international legal instruments require states to criminalise certain conduct as terrorist acts with no explicit or tacit prohibition that states adopt a broader definition of it. Thus, a state definition's being broader than the regional or international definition

[87] Paragraphs relating to cooperation among states in counterterrorism would be effectively implemented if states define a terrorist act consistently. Thus, state compliance with the definition provided under the respective definitions of the OAU Convention and the resolution would facilitate consistency among domestic definitions which in turn facilitates the cooperation in countering terrorism.

[88] United Nations Office on Drugs and Crime, *Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-terrorism Instruments*, 13 <https://www.unodc.org/pdf/terrorism/TATs/en/3IRoLen.pdf>.

does not make it incompatible with the latter.[89] The definition of a terrorist act under the ATP, by incorporating acts which are not within the scope of the base offence of the international and regional definition of a terrorist act, is broader than the latter. Yet, this does not make it in contravention of these instruments. However, a definition that is broad so as to embrace conduct other than that envisioned under the Suppression of Financing Convention and the OAU Convention may have a negative consequence on human rights.[90]

A state definition will be incompatible with the international and regional definition to the extent it fails to capture a conduct which falls within the scope of the international and regional definitions respectively. The definition of a terrorist act under the ATP, by requiring motive as an additional element and by excluding a crime committed against a public in a foreign state,[91] makes it narrower than the meaning attributed to a terrorist act under resolution 1373 and the Algiers Convention. To that extent the definition provided under the ATP is in conflict with the latter.

3.7 Conclusion

Where domestic anti-terrorism legislation of democratic states is criticised for adopting a broad definition of terrorism, it would be unrealistic to expect Ethiopia to do better in this regard. However, defects in definitions within other jurisdictions should not be a justification for Ethiopia to have a similarly flawed definition.

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[89] In relation to whether or not member states to the Suppression of Financing Convention can adopt a broader definition than that the Convention incorporates the UK Supreme Court has stated "it is not as if there is anything in … the 1999 Convention which excludes a signatory state going further than the requirements of the Convention" and named this as 'gold-platting'. R v Gul (Appellant) [2013] UKSC 64, paras 53 and 55.

[90] For example, Laetitia Bader, Human Rights Watch's researcher on Ethiopia, criticises the definition under the ATP as being broad so as to include peaceful protests and free speech. IRIN, *Briefing: Ethiopia's ONLF Rebellion (*29 October 2012*)* <http://www.irinnews.org/report/96658/briefing-ethiopia-s-onlf-rebellion>.

[91] Walker disapprovingly notes extending the scope of the anti-terrorism legislation to capture acts that target foreign government or public in a foreign state as a net-widening. Clive Walker, 'Terrorism Prosecutions and the Right to a Fair Trial' in Ben Saul (ed.) *Research Handbook on International Law and Terrorism*, (Edward Elgar, 2014), 418.

Thus, this chapter proposes two definitions to be used as standards in light of which the scope of the definitions of a terrorist act under the ATP is to be evaluated. These are the definition provided under the International Convention for the Suppression of the Financing of Terrorism, which as argued, has been endorsed by the Security Council Resolution 1373, and the definition under the Algiers Convention. Although evaluation of the definition under the ATP, against the suggested standards, is difficult owing to the difference in approach of defining a terrorist act, one can still safely conclude that in respect to some elements, the former is broader while in others, it is narrower.

For the reason that the regional and international instruments instruct states to criminalise conduct that falls within the scope of their respective definitions, narrowness of a domestic definition makes the definition incompatible with the international and regional definitions. This is because their strict application would mean non-prosecution or, in the event of prosecution, acquittal of persons who are treated as terrorists under regional and international law. The domestic definition, by leaving some terrorist acts unaddressed, makes Ethiopia unable to fully discharge its counterterrorism responsibility.

This defeats one of the declared purposes of the ATP — enforcement of the regional and international counterterrorism instruments —, and this could mean that the law has another purpose. This would be more so in light of the definition's ability to capture a range of conduct other than that which the regional and international definitions envisage.[92] Though broadness does not per se make the definition under the ATP incompatible with the standard definitions, it might ultimately render the definition to be constitutionally and, from human rights perspective, suspicious. This is so because, the consequence is that the ATP with a broader definition is a latent instrument to potentially catch legitimate activities thus endangering freedom of expression, freedom of association or the right to participate in political affairs of one's country.

[92] See below chapter nine.

CHAPTER FOUR: PREPARATORY OFFENCES UNDER THE ATP

4.1 Introduction

This chapter deals with proactive counterterrorism, otherwise known as the precautionary approach to counterterrorism, as incorporated under the ATP. It has three sections. The first provides a theoretical background to proactive counterterrorism in the light of which the approach under the ATP is to be examined. It discusses the major justifications for the precautionary approach in the context of countering terrorism, the human rights concerns associated with adopting the approach and the safeguards that need to be put in place to minimise the human rights impact of the approach. The second section deals with preparatory offences under the ATP. Specifically it analyses the physical and mental elements of preparatory offences and their relationship with a principal terrorist act as provided under the ATP. The third section is concerned with how the ATP treats membership in a terrorist organisation. Though criminalisation of membership is arguably an extension of proactive counterterrorism, unlike preparatory offences resolution 1373 does not require the states to criminalise it. Thus, states have different approaches to criminalising membership of a terrorist organisation. This section analyses the legal provisions of the ATP dealing with membership of a terrorist organisation in comparison with the approach in other jurisdictions.

4.2 Proactive counterterrorism and its potential intrusion on human rights

4.2.1 Proactive counterterrorism

Security Council Resolution 1373 requires states to criminalise not only perpetration of terrorist acts. It obliges them to prohibit involvement in the preparation for and planning of a terrorist act.[1] Even where counterterrorism instruments do not require states to criminalise

[1] SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) Para. 2 (e).

preparatory acts, the states have been encouraged to do so.[2] The Counterterrorism Committee and the UN Office on Drugs and Crime have called upon states to include 'extended modes of criminal participation' in their anti-terrorism legislation.[3]

In response to the Security Council's instruction and to encouragement from different corners, states have adopted a proactive approach to fight against terrorism. A proactive approach calls for 'a strategy to permit intervention against terrorist planning and preparation before they mature into action.'[4] This, in turn, entails 'criminalizing acts that are committed BEFORE any terrorist acts take place.'[5] Under this approach, state anti-terrorism laws push the traditional reach of criminal law and criminalise planning and preparatory acts which transpire earlier than inchoate offences of attempt and conspiracy in the continuum of contemplation and commission of a crime.[6] Preparatory offences 'stretch the thread between the substantive crime that the law seeks to pre-empt — terrorism — and the criminalized acts.'[7] These offences are referred to by different names such as precursor crimes,[8] pre-inchoate crimes,[9] or pre-crime.[10] Criminalising acts preparatory to terrorist attacks is a feature

[2] Ben Saul, 'Criminality and Terrorism' in Ana María Salinas de Frías, Katja LH Samuel, and Nigel D. White (eds.) *Counter-terrorism: International Law and Practice*, (Oxford University Press, 2012) 148; Luis Misguel Hinojosa-Martinez, 'A Critical Assessment of United Nations Security Council Resolution 1373' in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (Edward Elgar: 2014) 626.

[3] Saul, above n 2, 148.

[4] United Nations Office on Drugs and Crime Terrorism Prevention Branch, *Preventing terrorist acts: A criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments*' (2006) 2 <https://www.unodc.org/pdf/terrorism/TATs/en/3IRoLen.pdf>.

[5] Jean Paul Labrode, 'Countering Terrorism: New International Criminal perspectives', 132nd International Senior Seminar Visiting Experts Papers (2007) 71 *Resources Material Series* 10-13, 11 (emphasis original).

[6] Jude McCulloch and Dean Wilson, *Pre-crime: Pre-emption, precaution and the future* (Routledge, 2015).

[7] Jude McCulloch, 'Human Rights and terror laws' (2015) 128 *precedent* 26, 28.

[8] Stuart Macdonald, 'Understanding Anti-terrorism policy: Values, rationales and principles' (2012) 34 *Sydney Law Review* 317.

[9] Tamara Tulich, 'Prevention and Pre-emption in Australia's domestic Anti-terrorism legislation' (2012) 1(1) *International Journal for Crime and Justice* 52, 56; Andrew Lynch, George Williams, and Nicola McGarrity, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth, 2015) 32.

[10] Jude McCulloch and Sharon Pickering, "Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'" (2009) 49(5) *British Journal of Criminology*, 628. Chesney refers to the prosecution involving such acts as "anticipatory". Robert M. Chesney, 'the Sleeper Scenario: Terrorism-support laws and the Demands of prevention' (2005) 42 (1) *Harvard Journal on Legislation* 1; Robert M. Chesney,

of ‘a precautionary criminal law’[11] where authorities ‘anticipate and forestall that which has not yet occurred and may never do so.’[12] As noted by Virta, the ‘“precautionary principle”’ has been the basis of the counterterrorism policymaking.[13]

In view of the seriousness of the potential harm that might occur if the traditional criminal law approach were followed, support for the proactive approach comes from many.[14] For example, Labronde suggests given that terrorism is one of the most serious crimes, maximum attention should be given to prevent it.[15] According to Saul, the probability of catastrophic harm is among the factors that justify the peculiarity of the regulating of terrorism from other crimes.[16] Williams argues that ‘given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack.’[17] Officials from the United States, the frontrunner in the global war on terrorism, vigorously expressed the need for a proactive approach on different occasions. For example, in May 2006, Deputy Attorney General Paul McNulty indicated:

> On every level we [are] committed to a new strategy of prevention. The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention. We resolved not to wait for an attack or an imminent threat of an attack to investigate or prosecute.[18]

‘Beyond Conspiracy? Anticipatory Prosecution and the Challenges of Unaffiliated terrorism’ (2007) 80 *Southern California Law Review* 425.

[11] Andrew Goldsmith, ‘preparation for terrorism: catastrophic Risk and precautionary Criminal Law’ in Andrew Lynch, Edwina MacDonald and George Williams (eds.) *Law and Liberty in the war on terror (*The Federation Press, 2007).

[12] Lucia Zedner, ‘Pre-crime and post-criminology?’ (2007) 11(2) *Theoretical Criminology* 261, 262.

[13] Sirpa Virta, ‘Re/building the European Union Governing through Counter terrorism’ in Vida Bajc and Willem de Lint, *Security in Everyday life (*Routledge, 2011)186.

[14] Lynch, Williams, and McGarrity, above n 9; Goldsmith, above n 11; Robert Cornall, ‘the effectiveness of Criminal Law on Terrorism’ in Andrew Lynch, Edwina MacDonald and George Williams (eds.) *Law and Liberty in the war on terror* (the Federation Press, 2007) 50; McCulloch, above n 7.

[15] Labrode, above n 5, 10.

[16] Saul, above n 2, 149.

[17] George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35 *Melbourne University Law Review* 1136, 1161.

[18] Paul J. McNulty, Prepared Remarks of Deputy Attorney General Paul J. McNulty at the American Enterprise Institute (24 may 2006) <https://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html>. A month later, Homeland Security Secretary Michael Chertoff echoed:

While the prevention rationale dominates the proactive approach,[19] there is another related justification for it. Deterrence, one of the core functions of punishment, is unworkable as far as jihadist terrorists are concerned. There are terrorists who are ready to die for their cause rendering punishment unable to serve its deterrent purpose.[20] As Ruddock notes, '[t]he underlying motivation of terrorism provides a compelling, nihilistic drive to terrorists that often trumps their value of the perpetrators' own lives.'[21]

Research by Baker, Harel, and Kugler indicates what they call 'virtue of uncertainty.'[22] According to their research, and other things being equal, uncertainty relating to the extent of sanction or the likelihood of detection before the commission of crime increases deterrence.[23] Citing this research, Zedner notes that 'in the case of determined terrorists it is probably fair to assume a high degree of calculative rationality, such that uncertainty could be expected to play a large part in deterrence.'[24] Furthermore, she endorses Baker et al's view that 'if uncertainty in fact increases deterrence, then increasing uncertainty may be a cost-effective way to increase deterrence in situations in which there is reason to believe the existing level of deterrence is not optimal.'[25] Similarly, Saul argues that criminalising preparatory acts would have a strong deterrent effect on potential terrorists, who would otherwise not be deterred by the

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> 'prevention is the goal of all goals when it comes to terrorism because we simply cannot and will not wait for these particular crimes to occur before taking action. Investigating and prosecuting terrorists after they have killed our countrymen would be an unworthy goal. Preventing terrorism is a meaningful and daily triumph.'
>
> Alberto Gonzales, U.S. Att'y Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (16 August 2006) <https://www.justice.gov/archive/ag/speeches/2006/ag_speech_060816.html>.

[19] McCulloch and Pickering, above n 10, 632. For more on the rationale from the perspective of different actors in different jurisdictions see: McCulloch and Wilson, above n 6.

[20] Goldsmith, above n 11, 59; Cornall, above n 14, 50.

[21] Philip Ruddock, 'Law as a Preventative Weapon Against Terrorism' in Andrew Lynch, Edwina MacDonald and George Williams (eds.) *Law and Liberty in the war on terror* (The Federation press, 2007) 3, 5.

[22] Tom Baker, Alon Harel, and Tamar Kugler, 'The virtues of uncertainty in law: an experimental approach' (2004) 89 *Iowa Law Review* 443.

[23] Ibid.

[24] Lucia Zedner, 'Neither Safe Nor Sound? The Perils and Possibilities of Risk' (2006) *Canadian Journal of Criminology and Criminal Justice* 423, 429.

[25] Ibid 429.

post-crime punishment, not to take the first step towards commission of a terrorist act.[26]

While accepting that the post-2001 Security Council resolutions focus on prevention of terrorist acts, others contend that the novelty of this approach is exaggerated.[27] For example, Laborde reiterates that public safety institutions have always attempted 'both to prevent crime and to solve offences already committed.'[28] Supporting this view, Saul notes that criminal law has never been exclusively reactive; it has played a preventive role as well.[29] Similarly, Ashworth and Zedner observe that 'even the most retributively focused system of criminal law could hardly fail to have regard to the prevention of the wrongs for which it has decided to censure people.'[30] While acknowledging the seemingly perplexing nature of criminalising preparation for committing a terrorist act, Saul remarks that this is to be viewed as part of a wider expansion of liability in international criminal law as a whole.[31] Thus, he rejects the novelty of the proactive approach in counterterrorism noting that though the new terrorism offences reach much earlier or farther into acts preparatory to terrorism than in ordinary inchoate offences it is 'more a matter of degree than kind.'[32]

4.2.2 Human rights concern associated with proactive counterterrorism

Prevention of commission of a terrorist act a laudable goal as it is, the criminal law's proactive approach to achieve this purpose has provoked

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[26] Saul, above n 2, 149.

[27] Labronde, above n 5, 10. Similarly, some legal scholars tend to refer to planning for and preparation to commit a terrorist act as inchoate offences on the grounds that they are similar to the traditional inchoate offences as in both cases defendants are convicted without completion of the substantive crime and with no harm caused. Bernadette McSherry, 'Terrorism offences in Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27 *University of New South Wales Law Journal* 354; Saul, above n 2, 149.

[28] Labrode, above n 5, 10.

[29] Saul, above n 2.

[30] Andrew Ashworth and Lucia Zedner, *Preventive Justice (*Oxford University Press: 2014) 95.

[31] Saul, above n 2.

[32] Ibid 149. Still others contend that "[t]he concept of prevention, while always in the picture of law enforcement, took on a particular meaning and urgency after September 11th." Gonzales, above n 18.

concerns.[33] These concerns relate to a very difficult question in anticipatory prosecution which Chesney calls 'the early intervention dilemma',[34] the dilemma of 'when to arrest and begin prosecution.'[35] As Williams observes '[a]nti-terror laws raise important questions as to how early the law should intervene to pin criminal responsibility on actions that may give rise to a terrorist attack.'[36] It is a question of where the line should be drawn between 'innocent' conduct and that, which needs to be prohibited.[37]

As Zedner notes the criminal law's proactive approach opens a space for increasingly early and more intrusive measures,[38] which in turn results in an undesirable consequence of false positives.[39] It is true that on the continuum of anticipation and execution of a criminal thought the earlier the intervention, the lesser the evidence available to the prosecution. As Chesney rightly notes the further one moves from a foretold completed

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[33] Lucia Zedner, 'pre-crime and pre-punishment: a health warning' (2010) 81(1) *Criminal justice matters* 24; Helen Duffy, *The 'war on terror' and the Framework of International Law (*Cambridge University press, 2nd ed., 2015) 196, 200. On the other hand, while acknowledging the potential human rights impact of a proactive approach in illiberal states, Laborde suggests that the approach would not be problematic in liberal jurisdictions. Labronde, above n 5, 11.

[34] Chesney, 'Beyond conspiracy?', above n 10, 433.

[35] Gonzales, above n 18.

[36] Williams, above n 17, 1162.

[37] Lynch, Williams, and McaGrrity, above n 9, 43.

[38] Zedner, above n 24, 430.

[39] Early intervention has another problematic side. It affects the prosecution's success rate. There is a possibility that while some of the arrested are truly dangerous, available evidence might not be adequate to result in their conviction (false negatives). Chesney agrees that early termination of gathering intelligence and evidence entails "greater risks of acquittals." Chesney, 'Beyond Conspiracy' above n 10, 427. On losing a court case being acceptable risk in an anticipatory prosecution, former U.S. Attorney General Alberto Gonzales notes "preventing the loss of life is our paramount objective. Securing a successful prosecution is not worth the cost of one innocent life." Gonzales, above n 18. Furthermore the United States Deputy Attorney General Paul J. McNulty states "a reality of our prevention strategy is that we may find it more difficult in certain cases to marshal the evidence sufficient to convince 12 jurors beyond a reasonable doubt. That is because we must bring charges before a conspiracy achieves its goals – before a terrorist act occurs. To do so, we have to make arrests earlier than we would in other contexts where we often have the luxury of time to gather more evidence. This heightened risk of acquittals is one we acknowledge and accept given our unwavering commitment to prevent terrorist risks from materializing into terrorist acts." McNulty, above n 18. Similarly the Australian Federal Commissioner has noted:

> one of the biggest challenges we face is the acute need to manage risk … we must balance the needs of preventing an incident from occurring against the need to have gathered as much evidence as possible to ensure successful prosecution. As a result we intervene in a terrorist matter earlier than we normally would in other criminal investigations.

McCulloch and Pickering, above n 10, 634-35.

act to the earlier stages of attempt, preparation, planning, 'the more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated.'[40] Though false positives cannot be avoided in criminal prosecution, be it proactive or reactive, the demand for prevention, by calling for intelligence and law enforcement agencies and blurring the distinction between evidence and intelligence, opens a space for 'greater tolerance for false positives.'[41]

As McCulloch has noted, under the proactive approach 'behaviours deemed to be preparatory acts are usually innocuous, harmless and lawful except for what is perceived to be the intention to engage in future act of terrorism.'[42] Similarly Galli observes 'the *actus res* of terrorist inchoate offences' are usually made to include 'a wide range of behaviours, sometimes apparently innocuous.'[43] For example, the law's 'going too far in criminalizing action engaged in prior to the commission of any terrorist act'[44] has been a common criticism against the Australian anti-terrorism legislation. Maidment, in connection with Australian anti-terrorism law, observes that the type of conduct which may be caught by the provisions criminalising preparatory acts is unlimited.[45] Similarly, McSherry, referring to the same legislation, observes that 'any act' would be eligible to be the physical element of planning or preparation.[46]

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[40] Chesney, 'Beyond Conspiracy?', above n 10, 435.

[41] Kent Roach, 'the Eroding Distinction between Intelligence and evidence in terrorism investigations' in Nicola McGarrity, Andrew Lynch and George Williams (eds.) *Counter-Terrorism and Beyond: the Culture of Law and Justice after 9/11* (Routledge, 2010) 48, 49.

[42] McCulloch, above n 7, 28-29.

[43] Francesca Galli, "Freedom of thought or 'thought-crimes'? Counter-terrorism and freedom of expression" in Aniceto Masferrer and Clive Walker (eds.), *Counter-terrorism, human rights and the rule of law: crossing legal boundaries in defence of the state (*Edward Elgar, 2013) 106, 121.

[44] Lynch, Williams, and McGarrity, above n 9, p.42.

[45] Richard Maidment, 'Australia's Anti-terrorism Laws –the offences provisions' A paper delivered to the National Imams Consultative Forum (21 April 2013) 5.n <http://asiainstitute.unimelb.edu.au/__data/assets/pdf_file/0009/760779/Theterrorismoffenceprovisions_-_21_April_2013.pdf>.

[46] McSherry, above n 27, 366.

David Anderson, the UK's Independent Reviewer of the Terrorism Legislation, observes the following in relation to preparatory offences under the UK Terrorism legislation:

> The potential for abuse is rarely absent … By seeking to extend the reach of the criminal law to people who are more and more on the margins, and to activities taking place earlier and earlier in the story, their shadow begins to loom over all manner of previously innocent interactions. The effects can, at worst, be horrifying for individuals and demoralising to communities.[47]

A drift towards criminalising innocuous conduct with the purpose of preventing future harm, Jakobs notes, is a feature of what he calls 'enemy criminal law.'[48] Thus, while criminalisation of preparatory conduct is described as 'a move from criminalizing conduct to criminalizing intention or thought,'[49] the anticipatory prosecution is described as 'a shift from prosecuting tangible terrorism conspiracies to prosecuting bad thoughts.'[50] Consequently, contrasting the impact on human rights of the broadness of the terrorism definition with the criminal law's proactive approach, McCulloch has attached more significance to the latter.[51]

While Zedner recognises that 'prevention makes good sense', she notes the impossibility of an accurate prediction of human behaviour as a major problem that would call for what she states is 'a health warning.'[52] A precautionary approach as a measure 'that act[s] coercively against individuals,' Zedner advises, 'need[s] to be subject to rigorous principled restraint.'[53] Zedner recommends firmness 'on proof beyond reasonable doubt that an individual has the necessary intention … to commit the

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[47] David Anderson, 2013, 'Shielding the Compass: How to Fight Terrorism without Defeating the law' quoted in Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 105.

[48] G Jakobs, "Terroristen als personen im Recht? (2006) Zeitschrift fur die gesamte Strafrechtswissenschaft 839 in Galli, above n 43, 117.

[49] Inayat Bunglawala, "Don't Even Think about It", *The Guardian*, (online) 6 December 2007 <http://www.theguardian.com/commentisfree/2007/dec/06/donteventhinkaboutit>. Also see: Duffy, above n 33.

[50] Dahlia Lithwick, 'Stop Me Before I Think Again' *The Washington Post (online)* 16 July 2006, B03, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/14/AR2006071401383_pf.html>.

[51] McCulloch, above n 7, 28.

[52] Zedner, above n 33.

[53] Ibid 25.

substantive offence before we punish'[54] as a restraint to minimise the chance of conviction of innocent persons. As noted above, owing to the 'tendency to devise offences around a minimal *actus reus*'[55] almost any conduct can satisfy this element of terrorist preparatory offences. Consequently, it is the requirement that the defendant does the act with an intention to commit a terrorist act that is seen as a bulwark against the potential overreach of the law that creates preparatory offences.[56] As such, Galli observes that in terrorist preparatory activities more importance is given to '*mens rea* over the *actus reus*.'[57] The wordings of provisions criminalising preparatory offences make the decisiveness of intention in preparatory offences clear. For example, the UK Terrorism Act Section 5(2) criminalises an act where 'an individual with the *intention* of committing acts of terrorism … engages in any conduct in preparation for giving effect to his intention.'[58] Relating to the Australian anti-terrorism legislation, Maidment points to the requirement that there be proof of a link between the alleged conduct and a foretold terrorist act, which is satisfied by proof of intention. [59] There is an intention to commit a terrorist act where the actor meant to 'do an act in preparation for a terrorist act.'[60] This accompanying intention gives an otherwise lawful/harmless activity a terrorist character.

On the importance of the requirement of intention to mitigate a potential intrusiveness of criminalising precursor offences, Rose and Nestorovska observe that an 'increasing remoteness of the supporting act is likely to be directly proportional to the increasing difficulty of proving mens rea. If no mens rea is established, then it is clear that no offence is proved.'[61] Though proving intention is 'a complex and exacting task for the

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[54] Ibid.
[55] Galli, above n 43, 121.
[56] McCulloch, above n 7, 29. However, Saul observes that there are times where the standard of proof for these offences is lowered by requiring recklessness or dispensing with the *mens rea* requirement at all. Saul, above n 2,148-149.
[57] Galli, above n 43, 121.
[58] Section 5(2), Terrorism Act quoted in Zoe Scanlon, 'Punishing proximity: Sentencing Preparatory Terrorism in Australia and the United Kingdom' (2014) 25(3) *Current Issues in Criminal Justice* 764, 769 (emphasis added).
[59] Maidment, above n 45, 5.
[60] Ibid.
[61] G.L. Rose and D. Nestorovska, 'Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms' (2007) 31(1) *Criminal Law Journal* 20, 29.

prosecution',[62] it is this requirement that filters out innocuous activities which would have been otherwise caught under the broad physical element of preparatory offences.

However, McCulloch and Wilson observe that the guarantee that the requirement of proof of intention offers to safeguard the prosecution and conviction of innocent persons has been more apparent than real — the courts interpret the law in such a manner that satisfying the intention requirement is not difficult. Having reviewed court cases in Australia, UK and US, they conclude that 'perceptions about the defendant's threatening identity have been bundled with evidence of intent.'[63] That is 'suspicious identity … stands in as proxy for intention,' a shortcut to get conviction.[64] In reality, they argue that 'prosecution of non-imminent crimes makes it difficult for defendants to establish their innocence.'[65] Similarly Lynch, Williams, and McGarrity, citing court judgments in different terrorism prosecutions in Australia, argue that criminalising the very early stages of a terrorist act has exposed individuals to criminal responsibility without forming 'a clear criminal intent.'[66]

4.3 Preparatory offences under the ATP

Coming to the ATP, Article 4 provides '[w]hosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article.' This provision creates preparatory offences and prescribes punishment for the offences.[67] It establishes five different terrorism-related offences

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[62] Maidment, above n 45, 6.
[63] McCulloch and Wilson, above n 6, 64.
[64] McCulloch, above n 7, 29.
[65] McCulloch and Wilson, above n 6, 66.
[66] Lynch, Williams, and McGarrity, above n 9, 33.
[67] As Bentham has noted the laws that criminalise conduct and the laws that prescribe for its punishment are different:

> A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws; not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal; and, Let the judge cause whoever is convicted of stealing to be hanged*

representing different steps towards the commission of a principal terrorist act: planning, preparation, conspiracy, incitement and attempt.[68] Article 4 criminalises both inchoate[69] and pre-inchoate offences of planning[70] and preparation.[71]

Apparently, by referring to '[w]hosoever plans, prepares, … to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation,' Article 4 does not seem to require an overt act.[72] The phrasing of this provision is different from parallel provisions in other jurisdictions, where an overt act is explicitly required. For example, Article 101.6 (1) of the Australian Criminal Code criminalises doing 'any act in preparation for, or planning a terrorist act.'[73] The UK's equivalent provision, *Section 5(2) of the Terrorism Act,* criminalises when an individual 'with the intention of committing acts of terrorism or assisting another to commit such acts, engages in any *conduct* in preparation for giving effect to his intention.'[74] Though arguably preparation necessarily involves an overt act,[75] planning can purely be a mental activity with no

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J. Bentham, *A Fragment on Government and an Introduction to the Principles of Morals and Legislation* (W. Harrison, 1948) 430. On the other hand, Meir Dan-Cohen notes the laws that prescribe for punishment of a conduct necessarily *imply* the laws that criminalize conduct. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, (1984)* 97 Harvard Law Review 625, 627. Hart has argued that such approach obscures "the specific character of law as a means of social control." H.L.A. Hart, *The Concept of Law* (Clarendon press, 1961) 39.

[68] As discussed in the next chapter this blend of different offences into one criminal provision has been a source of confusion for the defendants charged under this provision and opens a space for arbitrariness by the prosecution and the courts.

[69] Attempt is a crime under Article 27 of the Cr. Code in general terms to apply to all principal crimes. Articles 36 and 38 of the Cr. Code deal with incitement and conspiracy respectively. While Article 36 (2) criminalises incitement only where the incited person at least attempts the crime, Article 4 of the ATP does not have such condition for incitement of the commission of a terrorist act. Under the Cr. Code conspiracy is criminalised in exceptional cases, which are provided under Articles 257 (b), 274 (b), 300 and 478 of the Cr. Code. By virtue of Article 38(1) of the Cr. Code, in other cases, conspiracy serves as aggravating circumstance during the sentencing stage. On the other hand, Article 4 of the ATP makes it a crime to conspire to commit a terrorist act.

[70] Planning to commit crimes against the constitution or the state and international law are punishable under Articles 257(b) and 274(b) of the Cr. Code respectively.

[71] As provided under Article 26 of the Cr. Code, in principle, preparation to commit a crime is not punishable.

[72] Wondwossen Demissie Kassa, 'Criminalization and punishment of Inchoate Conduct and Criminal participation: the Case of Ethiopian Anti-Terrorism Law' (2010) 24(1) *Journal of Ethiopian Law* 147.

[73] Criminal Code Act (1995).

[74] Terrorism Act 2006 (UK) (emphasis added).

[75] Article 26 of the Cr. Code defines preparatory acts as '*acts* which are committed to prepare or make possible a crime, particularly by procuring the means or creating

overt act. To the extent that Article 4 of the ATP criminalises planning that does not involve an overt act, it does criminalise a mere thought contrary to Article 29 of the Ethiopian Constitution that provides for freedom of thought and opinion.[76] This renders Article 4 of the ATP to be susceptible for what Lithwick describes as the worst case scenario of anticipatory prosecution where individuals are prosecuted for their 'bad thoughts.'[77]

Having expressed prosecuting bad thoughts as undesirable, Lithwick warns that maximum care has to be taken for this not to happen.[78] Thus, to avoid this anomalous consequence one may argue that because '*planning*' is listed along with conspiracy, attempt and incitement (inchoate offences which normally require an overt act), a physical element (conduct) has to be read into it. This approach is supported by Article 23 of the Cr. Code. By virtue of Article 23 (2) of the Code, 'a crime is only completed when all its legal, material and moral ingredients are present.' Though the wording of Article 4 of the ATP does not appear to incorporate what is referred to as a material element, Article 23(2) of the Cr. Code in tandem with the preceding construction suggests that the material element is implicitly part of the crimes that Article 4 establishes. [79] It follows that planning which does not involve an overt act does not fall under Article 4 of the ATP. This would make Article 4 congruent with Article 29 of the FDRE Constitution.[80]

While reading conduct element into Article 4 narrows its scope compared to its reach without the physical act requirement, the lack of restraint on the range of activities that constitute this element lessens the significance of this interpretation in narrowing its scope and protecting innocent people. There is no limit on the type of physical act that would fall under Article 4. Any act is eligible to fulfil the physical element requirement of

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the conditions for its commission.' (emphasis added). Article 36 of the ATP authorizes resort to the Cr. Code where doing so is necessary to fill gaps in or interpret its provisions.

[76] For further analysis see Chapters six and seven below.

[77] Lithwick, above n 50.

[78] Ibid.

[79] Article 36(2) of the ATP states '[w]ithout prejudice to the provisions of sub article (1) of this Article, the provisions of the Criminal Code and Criminal Procedure Code shall be applicable.'

[80] See Chapters six and seven below.

the offence.[81] Any slightest action suffices to satisfy the act requirement. Thus, the concern raised above in relation to the human rights impact of preparatory offences in general is relevant to Article 4 of the ATP.

Furthermore, Article 4 of the ATP does not specify the mental element for the offence thereunder. This silence invites resort to the Cr. Code.[82] Article 57(1) of the Cr. Code provides that a person is guilty and responsible under the law where 'he commits a crime either intentionally or by negligence.' Article 59 (2) provides 'crimes committed by negligence are liable to punishment only if the law so expressly provides.' Thus the cumulative reading of the two provisions indicates that where the law creating the offence does not specify the mental element, intention is presumed to be the required mental element under that law. It follows that no reference to a mental element under Article 4 of the ATP means the acts envisaged thereunder would be criminal and punishable only where the doer does any of the acts intentionally. Because, as noted above, almost any conduct satisfies the material element of Article 4, the real test of whether or not someone's act constitutes preparation for or planning a terrorist act centres on the actor's intention.

In its relevant part on the meaning of intention, Article 58(1) of the Cr. Code provides that a person is deemed to have committed a crime intentionally where he [sic] commits an act 'with full knowledge and intent in order to achieve a given result.' As noted above, Article 4 criminalizes planning, preparation… to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of the ATP. These offences are created to prevent commission of any of the six terrorist acts listed under

[81] Only acts that are specifically criminalised under a separate provision of the ATP would be excluded from the scope of an act under Article 4. For example, Article 7 of the ATP criminalises taking training or becoming 'a member or participating in any capacity for the purpose of … committing a terrorist act ….' Similarly possessing or using 'property knowing or intending it to be used to committing or facilitating a terrorist act' is criminalised under Article 8 of the ATP.

[82] Anti-Terrorism Proclamation No. 652/ 2009 (Article 36), see note 79 above.

Article 3.[83] To use Moore's terms these offences are 'wrongs by proxy'[84] but not stand-alone offences. Thus, for the purpose of Article 4 of the ATP, intention refers to one's doing of an act knowing and intending that she/he is doing the act in planning, conspiring, attempting, inciting or preparation for commission of any of the six terrorist acts listed under Article 3 of the ATP. The intention element under Article 4 is established where the prosecution proves one or a combination of the six offences listed under Article 3 as foretold crime/s.

To prove a pre-crime terrorist activity under Article 4, the prosecution needs to establish certain conduct and is required to show that the prospective action to which the conduct in preparation or planning was directed has all of the characteristics of a terrorist act, save completion. That is, the prosecution has to establish that the actor engages in certain conduct with a view 'to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional, economic or social institutions of the country' through the commission of one of the six acts listed under Article 3. Thus, at the time of carrying out a certain deed in preparation for or planning of committing any of the six acts that Article 3 refers to, the actor has the motive and accepted the means of advancing the cause to which Article 3 refers.[85]

[83] Thus, preparation for or planning of committing any act other than those listed under Article 3 (1)-(6) of the ATP would not fall under Article 4 even if it is accompanied by the requisite motive and meant to coerce the government, intimidate the public or section of the public, or destabilise or destroy the fundamental political, constitutional, economic or social institutions of the country.

[84] Michael Moore, Placing Blame: a General Theory of the Criminal Law 784 (Clarendon Press, 1997) cited in Kimberly Kessler Ferzan 'Inchoate Crimes at the Prevention/punishment Divide' (2011) 48 *San Diego Law Review* 1273, 1283.

[85] To have the motive and to decide on the means of advancing the cause are mental processes that do not need an overt physical activity. What needs preparation or planning is the actual causing of the damage or imperilment through committing the acts listed under Article 3. Indeed, the motive to advance any one of the three causes and the conviction to use the violent means to promote one's cause precede even the planning and the preparation. In that sense what makes planning and preparation different from attempt is that the latter is closer to causing the damage or endangerment.

This makes these elements of Article 3 central to prove a precursor crime under Article 4.[86]

As noted above while proving the existence of elements of a terrorist act for a prospective act is a complex and exacting task for the prosecution, it is that requirement which gives an alleged conduct its terrorist character and provides a safeguard against prosecution of innocent persons for non-terrorism related conduct.[87] Following Maidment's argument, it is the applicability of elements of Article 3 that qualifies a conduct as preparation for or planning of *the commission of a terrorist act* under Article 4.[88] Had it not been for this requirement, the type of conduct that Article 4 refers to, as noted above, would have been boundless. This relation between Articles 3 and 4 can be illustrated by employing Richard Maidment's approach[89] to distinguish a precursor crime from a principal terrorist act.

Violation of Article 3 would be established where the following are proved.

1) A defendant's conduct,
   And
2) The defendant's motivation being to 'advance a political religious or ideological cause',
   And
3) The defendant's intention of:
   a) Coercing the government,
      Or
   b) Intimidating the public or Section of the public
      Or
   c) Destabilizing or destroying the fundamental political, constitutional or, economic
      or social institutions of the country
   And
4) The defendant's conduct has:

[86] The act would be categorized as planning, preparation, conspiracy, attempt and incitement depending on several factors including its proximity to the principal terrorist act.
[87] Scanlon, above n 58, 764; Maidment, above n 45; Rose and Nestorovska, above n 61, 55.
[88] Maidment, above n 45; Rose and Nestorovska, above n 61, 55.
[89] Maidment, above n 45, 5.

a) caused a person's death or serious bodily injury; or

b) created serious risk to the safety or health of the public or section of the public; or

c) caused kidnapping or hostage taking; or

d) caused serious damage to property; or

e) caused damage to natural resource, environment, historical or cultural heritages; or

f) endangered, seizes or puts under control, causes serious interference or

disruption of any public service; or

g) threatened commission of any of the acts stipulated a to f above.

Violation of Article 4 would be established where the following are proved.

1) A defendant's conduct,

   And

2) The defendant's motivation being to 'advance a political religious or ideological cause',

   And

3) The defendant's intention of:

   a) Coercing the government,

      Or

   b) Intimidating the public or Section of the public

      Or

   c) Destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country

   AND

4) The defendant's intention that their conduct would be of a kind that would under normal circumstances:

   a) cause a person's death or serious bodily injury; or

   b) create serious risk to the safety or health of the public or section of the public; or

   c) cause kidnapping or hostage taking; or

   d) cause serious damage to property; or

   e) cause damage to natural resource, environment, historical or cultural heritages; or

   f) endanger, seize or put under control, causes serious interference or disruption of any public service;

From this two points can be made on the relation between Article 3 and Article 4. First, the difference between the two provisions lies in the fourth

component.[90] While a prosecution is to be based on Article 3 where any of the six acts has actually materialised, it would be based on Article 4 where there is merely an intention to commit any of these acts. Second, the last three components of Article 4 relate to the phrase '*to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3* of this Proclamation.' These components can only be established by linking the first element of Article 4 (conduct) to Article 3. This interpretation, by reading key elements of a terrorist act incorporated under Article 3 into Article 4, confines the scope of conduct that Article 4 captures to acts which are truly precursor to a principal terrorist act.

4.4 Membership offences under the ATP

Unlike preparation for or planning of a terrorist act, resolution 1373 does not require states to criminalise membership of a terrorist organisation.[91] As a result, there are variations among jurisdictions in the criminalisation of membership. This is despite the similarity between the justifications for criminalisation of membership and preparation for and planning of a terrorist act. Both are meant to prevent a 'remote risk of grave harm to highly important legal interests.'[92] In that sense criminalisation of membership of a terrorist organisation is an extension of a proactive application of the criminal law for the sake of prevention of commission of a terrorist act. However, many do not support criminalisation of mere membership of a terrorist organisation.[93] There are different reasons for this. First, it contradicts the principle of legality/rule of law. For example, Allen, in *The Habits of Legality: Criminal Justice and the Rule of Law,* has argued:

> [a]lthough the point seems not often made, the *nulla poena* principle has important implications not only for the procedures of justice but also for the substantive

[90] While conduct under Article 3 refers to that which has actually caused any of the damages or risks listed under number four, a conduct under Article 4 is the conduct that the actor engages in with the intention to cause one of the damages or risks listed under number four.

[91] Paragraph 2(a) of the Security Council Resolution 1373 requires states to suppress 'recruitment of members of terrorist groups.' SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).

[92] Liat Levanon, 'Criminal prohibitions of Membership in terrorist organizations' (2012) 15(2) *New Criminal Law Review* 224, 225.

[93] However see ibid.

> criminal law. It speaks to the questions, What is a crime? And Who is the criminal? The *nulla poena* concept assumes that persons become criminals because of their acts, not simply because of who or what they are.[94]

Allen notes that laws criminalising one's status/membership of an association deny an opportunity to members to adapt their conduct to the law's requirement.[95] Citing Allen, McSherry argues that governments should punish criminal conduct not criminal types.[96] This is 'an important premise' of the rule of law which requires that there should be no punishment without law (*nulla poena sine lege*).[97] Thus, in analysing section 102.3 of the Criminal Code of Australia which criminalises membership of a terrorist organisation, McSherry argues that laws that criminalise mere membership breach the *nulla poena* principle.[98] Under such laws, one is deemed to commit a crime not because they committed a terrorism-related activity but simply because they are a member of a terrorist organisation.[99]

Second, criminalisation of membership is objectionable on freedom of association and due process grounds.[100] Legislative history of 18 U.S.C. Section 2339B which criminalises material support to a Designated Foreign Terrorist Organisation indicates that its preceding versions were rejected on the ground that the drafts capture mere membership in violation of Freedom of Association that the First Amendment to the Constitution recognises.[101] Thus, Roach notes that criminalising membership of proscribed organisations is a practice found in non-democratic countries.[102]

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[94] Francis Allen, *The Habits of Legality: Criminal Justice and the Rule of Law, (*Oxford University Press, 1996) 15.
[95] Ibid 15-16.
[96] Bernadette McSherry, 'The Introduction of Terrorism-Related Offences in Australia: Comfort or Concern?' (2005) 12(2) *Psychiatry, Psychology and Law* 279.
[97] Ibid 282.
[98] Ibid 283.
[99] Edwina MacDonald & George Williams, *Combating Terrorism* (2007) 16(1) *Griffith Law Review* 27, 37.
[100] Rachel E. VanLandingham, 'Meaningful Membership: making war a bit more criminal' (2013-2014) 35 *Cardozo Law Review* 79, 82-83.
[101] Ibid 81-89; Chesney, 'The Sleeper Scenario', above n 10, 4-18.
[102] Kent Roach 'The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001' (2004) *Studi Senesi*, 510-511 in MacDonald and Williams, above n 99.

The United States, without directly criminalising membership of a terrorist organisation, prohibits provision of material support to a Designated Foreign Terrorist Organisation.[103] 'Material support or resources' is defined as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[104]

Owing to the capacious nature of the definition, many liken criminalisation of material support to criminalisation of membership or guilt by association.[105] For example, Cole argues that by criminalising what is otherwise a lawful and peaceful act in the name of material support to a terrorist organisation, the statute criminalises the moral innocent which means treating the actor as 'guilty only by association.'[106] But the US Supreme Court decided that because the statute prohibits not being a member of a terrorist organisation but provision of material support, it does not contradict freedom of association under the First Amendment.[107] The court makes a distinction between membership and material support. Critics do not agree with this distinction on the ground that the conduct, which the statute criminalises constitutes manifestations of one's membership.[108] However, one thing is clear. Mere membership, without more (passive-nominal membership), is not a crime under this law.[109] In the US:

> Supreme Court jurisprudence has long provided a bulwark against the criminal prohibition based solely upon group membership. Since the 1960s, this protection has taken the form of a scienter requirement,

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[103] 18 USC § 2339B.
[104] 18 USC § 2339A (b).
[105] David Cole, "Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'" in Andrea Bianchi & Alexis Keller (eds.) *Counter terrorism: Democracy's challenge* (Hart Publishing, 2008) 233; Levanon, above n 92.
[106] Cole, above n 105, 241.
[107] *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010), 130 S.Ct. 2705
[108] Cole, above n 105; VanLandingham, above n 100.
[109] *VanLandingham,* above n 100, 81.

> which protects members who lack the specific intent to further a particular group's criminal objectives.[110]

Similarly, in both Canada and New Zealand mere membership of a terrorist organisation is not criminalised. Under the title 'Participation in Activity of Terrorist Group', the Canadian Criminal Code criminalises those who 'knowingly *participate in* or *contribute to*, directly or indirectly, any activity of a terrorist group *for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity*.'[111] Similarly, the *New Zealand's Terrorism Suppression Act 2002* captures those who participate in a terrorist group or organisation 'in order to enhance the ability of the group or organisation to commit or participate in the commission of a terrorist act.[112] Thus, a person's participation should be with a certain purpose related to terrorism in mind for the statute to capture the person.[113]

On the other hand, the United Kingdom and Australia criminalise membership of a terrorist group. The UK Terrorism Act 2000 prohibits belonging or professing to belong to a proscribed terrorist organisation.[114] By confining its applicability to membership of a proscribed organisation, s 11 of the UK Terrorism Act 2000 is narrower in scope than its parallel in the Australian Criminal Code which captures membership of both proscribed and non-proscribed terrorist organisations.[115] Within the Australian approach there is a risk that a group of people who do not consider themselves as an organisation could be treated as such with a consequence of liability for membership and leadership in the group. There is a chance that they know they have formed an organisation where charges are laid.[116]

The requirement of participation in a terrorist organisation or terrorist act serves the underlying purpose of the membership offence —preventing commission of a terrorist act — while ensuring that punishment is

[110] Scales v. United States, 367 U.S. 203, 208 (1961) in ibid*,* 83.
[111] § 83.18(1) R.S.C., ch. C -46 (1985) (emphasis added).
[112] Terrorism Suppression Act 2002 (NZ), s 13.
[113] MacDonald and Williams, above n 99, 39.
[114] Terrorism Act 2000 (UK), s 11 in MacDonald and Williams, above n 99, 38.
[115] Section 102.3 Criminal Code.
[116] MacDonald and Williams, above n 99, 38.

imposed for an act of participation but not for one's mere status as a member of the organisation.[117] Thus, the requirement of participation in a terrorist organisation has been recommended to replace the mere membership offence in Australia.[118]

Within the ATP, participation in a terrorist organisation is addressed under Article 7. It provides that:

> 1/ Whosever recruits another person or takes training or becomes a member or participates in any capacity for the purpose of a terrorist organisation or committing a terrorist act, on the basis of his level of participation, is punishable with rigorous imprisonment from 5 to 10 years.
>
> 2/ whosever serves as a leader or decision maker in a terrorist organisation is punishable with rigorous imprisonment from 20 years to life.

Article 7 envisions a range of crimes that one may commit. It criminalises participation in a terrorist organisation or terrorist act ranging from participating *in any capacity* to serving as a leader of that organisation. While Sub Article 2 deals with leadership of a terrorist organisation, Sub Article1, like Article 4 of the ATP, refers not only to one type of criminal conduct. It criminalises training, membership, recruiting and participation *in another capacity* for the purpose of a terrorist organisation or carrying out a terrorist act. In relation to membership, at first sight mere membership of a terrorist organisation, a type of membership in a terrorist group that involves doing nothing of value for the group appears to fall under Article 7(1).[119] In so far as one is a member in a terrorist organisation, it does not seem that the prosecution needs to prove more (involvement in a certain terrorism-related conduct) to charge one under this provision.

However, a close reading of the provision suggests that mere membership is not criminalised. The term *participation,* which refers to 'the action of taking part in something,'[120] has a vital place under Article

[117] Ibid 40
[118] Parliamentary joint committee on Intelligence and Security, Parliament of Australia (2006), 74 in ibid.
[119] *Van Landingham,* above n 100, 93.
[120] Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/participation>.

7. First, the caption of the Article is 'participation in a terrorist organisation' which means membership is listed under the umbrella of *participation*. Second, the content of Subarticle 1 indicates the weight given to the term *participation* and reinforces the relation between it and membership. The first limb of the subarticle by providing '[w]hosever recruits another person or takes training or becomes a member or *participates in any capacity* for the purpose of a terrorist organisation or committing a terrorist act …', suggests that it provides an illustrative list of *participation* in a terrorist organisation or in the commission of a terrorist act. This, in turn, indicates that the 'membership' envisioned is not a passive-nominal membership but that which involves some form of *participation.* Moreover, the second limb of the sub article which provides that one is punishable with rigorous imprisonment from 5 to 10 years 'on the basis of *his* [sic] *level of participation*,' indicates that the punishment needs to match to one's degree of involvement in a terrorist organisation strengthening the significance of participation.

In jurisdictions where mere membership is prohibited, it is criminalised separately from other acts that require participation.[121] Under the ATP, membership is mentioned along with conduct that requires some form of involvement in an activity relating to a terrorist organisation or terrorist act. It is associated with engaging in recruiting members for a terrorist organisation, taking training or participating in any other capacity in a terrorist organisation or committing a terrorist act, all of which involve some kind of a positive step towards contributing to the terrorist organisation or to the commission of a terrorist act.

Whether or not being a member, in and by itself, satisfies the requirement of *participation* in a terrorist organisation has been discussed in relation to anti-terrorism laws in other jurisdictions. MacDonald and Williams compare and contrast anti-terrorism laws of Australia, Canada, New Zealand, the United Kingdom and the United States in relation to the approach to criminalising membership of a terrorist organisation.[122] As

[121] For example Terrorism Act 2000 (UK), S 11; Criminal Code (Australia) Section 102.3.
[122] MacDonald and Williams, above n 99, 36-40.

noted above, while Australia[123] and the United Kingdom[124] criminalise membership in a terrorist organisation, others do not. New Zealand's Terrorism Suppression Act 2002[125] and the Canadian Criminal Code[126] target those who participate in a terrorist organisation or in its carrying out of a terrorist act. MacDonald and Williams referring to the requirement of *participation* interpret both provisions as not capturing 'merely the status of membership'[127] but one who participates with some purpose related to terrorism in mind.

In view of its emphasis on participation, Article 7(1) of the ATP is akin to parallel anti-terrorism provisions in these jurisdictions. Thus, MacDonald and William's interpretation of these provisions of the anti-terror laws of New Zealand and Canada would be relevant to interpret Article 7(1) of the ATP. Thus, following the same logic, Article 7(1) of the ATP does not allow prosecuting and punishing one for being a member of a terrorist organisation. To be prosecuted, the member has to *participate* in a certain capacity for the purpose of the terrorist organisation or committing a terrorist act.[128]

Another reason to construe Article 7(1) of the ATP to require some form of participation in addition to membership relates to Article 31 of the FDRE Constitution which provides for freedom of Association.[129] In explaining the reason for Canada, New Zealand, and the United States not to criminalise membership of a terrorist organisation, Roach has noted that in these countries freedom of association is protected by bills of rights. Without prejudice to differences in enforcement, by recognising

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[123] Section 102.3 Criminal Code.
[124] Terrorism Act 2000 (UK0 s 11.
[125]Terrorism Suppression Act 2002 (NZ) Section 13.
[126] Criminal Code, RS 1985, c C-46, s 83.18.
[127] MacDonald and Williams, above n 99, 39.
[128] Similarly, while Germany criminalises membership of a terrorist organisation, to be considered as a member one has to engage in activities towards the terrorist objectives of the organisation after joining it. Merely joining a terrorist organisation does not satisfy the requirement of membership. Levanon, above n 92, 243-44.
[129] "Article 31: Freedom of Association
Every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited." By virtue of Article 13 (2) of the FDRE Constitution, this provision is to be construed in light of Article 20 and 22 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights respectively.

freedom of association at a constitutional level, Ethiopia is comparable to these jurisdictions. Thus the same logic — constitutional recognition of freedom of Association — would make Article 7(1) of the ATP unable to capture mere membership in the face of Article 31 of the Constitution. Thus, the requirement of *participation* narrows the scope of members in a terrorist organisation that would fall under this provision by excluding passive-nominal members.

However, the phrase 'participation in *any capacity'* is so broad that there is a risk that it takes in any participation in the organisation irrespective of its relation with a terrorist act. This would be problematic when the provision is applied to participation in what are known as dual organisations, which engage in both terrorist and non-terrorist activities.[130] As Weinberg and Pedahzur have noted, under some circumstances terrorist organisations create a 'political wing' and become dual organisations. The reverse is not uncommon. [131] Once the organisations are transformed into dual purpose organisations, they engage in both violent and peaceful political activities simultaneously.[132] As Levanon has argued criminalisation of members of such organisations would be justifiable in relation to those who are involved in a terrorist wing. In dual purpose organisations, Levanon asserts, criminal liability should not be imposed as early as joining the organisation as a member. As far as such organisations are concerned, criminalisation of membership is 'justifiable only in later stages of activity'[133] where there is tangible evidence indicating the member's inclination to the terrorist side of the organisation.[134]

In *Scales v. the United States*, the US Supreme Court deals with membership in organisations having both legal and illegal objectives. The court contrasted these organisations with pure criminal conspiracies

[130] Levanon, above n 92; VanLandingham, above n 100, 84.
[131] Leonard Weinberg and Ami Pedahzur, *Political Parties and Terrorist Groups* (Routledge, 2003) 37.
[132] Ibid 61.
[133] Levanon, above n 92, 229.
[134] If mere membership is to be criminalised, Levanon argues, it should be in relation to organisations that have as their entire purpose the commission of a terrorist act. Levanon, above n 92, 229.

which have only criminal purposes.[135] According to the court, criminalising 'all knowing association' with the latter, as opposed to organisations with dual purpose, would not harm legitimate political expression or association. Subsequent court cases confirm this.[136] For example in *Elfbrandt v. Russell*, the Supreme Court held that '[t]o presume conclusively that those who join a "subversive" organisation share its unlawful aims is forbidden by the principle that a State may not compel a citizen to prove that he has not engaged in criminal advocacy.'[137] Furthermore the court held '[t]hose who join an organisation without sharing in its unlawful purposes pose no threat to constitutional government.'[138]

Article 7(1) does not make such distinction between participations in terrorist and non-terrorist sides of a dual purpose organisation. Because it does not confine its scope to an organisation's terrorist activity, it seems to capture participation in non-terrorist activities of a dual purpose terrorist organisation.

4.5 Conclusion

There are sound reasons for adopting a proactive approach to counterterrorism. While the criminal law's proactive approach has been in place in contexts other than countering terrorism, it has been a predominant strategy in the context of the latter. Because the approach involves prediction of future behaviours based on limited information, there is a high risk that the approach may result in false positives, which calls for maximum care in its implementation. The requirement that one's intention to commit a principal terrorist act, which can be established through proving a terrorist act as a foretold crime, be established in anticipatory prosecutions is proposed as a mechanism to mitigate the human rights casualty.

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[135] Van Landinghamt, above n 100, 84.
[136] Ibid. Compare *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010), 130 S.Ct. 2705 where the Supreme Court held that provision of otherwise a lawful service, such as legal advice, to a terrorist organisation is prohibited under Section 2339 B.
[137] *Elfbrandt v. Russell* 384 U. S. 17-18 (1966).
[138] *Elfbrandt v. Russell* 384 U. S. 17 (1966).

The ATP incorporates a precautionary approach to countering terrorism. While provisions of the ATP relating to preparatory offences and membership offences are by and large vague as to whether safeguard mechanisms are included, a close reading of the provisions indicate that they do. By tying conduct that constitutes a precursor crime to the intention to commit any one of the six terrorist acts listed under Article 3, the ATP ensures that one would not be caught for a seemingly, but only for a truly, precursor crime. By conditioning criminal responsibility arising from membership of a terrorist organisation upon actual participation in a terrorist organisation, as contrasted to mere membership, the ATP narrows the scope of conduct that the membership offence captures. However, while requiring *actual participation* in a terrorist organisation or terrorist act precludes passive members, that the membership offence encompasses *any participation* makes it broad enough to capture those who do not have the true intention to be involved in terrorist activities or in terrorism-related functions of a dual organisation.

CHAPTER FIVE: TERRORISM CRIMINAL CHARGES

5.1 Introduction

The scope of the definition of a terrorist act and precautionary approach to counterterrorism under the ATP have been discussed in chapters three and four respectively. This and subsequent chapters examine the different aspects of the practical application of these provisions based on two terrorism prosecutions— *Federal Public Prosecutor (FPP) v. Elias Kifle et al*[1] and *Federal Public Prosecutor (FPP) v Andualem Arage et al.*[2] Both prosecutions relate to precursor terrorism crimes.

This chapter examines contents of terrorism criminal charges in the two cases. First, a brief note on the requirements pertaining to the contents of a criminal charge under Ethiopian law will be provided. Then comes a summary of the alleged offences in the two terrorism prosecutions followed by a description of statement and particulars of the offence.[3] Next, preliminary objections which centre on the relationship between provisions of the ATP dealing with pre-crime terrorist activities and principal terrorist acts and rulings of the court thereon are discussed. Finally, the contents of the charge are critically analysed with a view to examining if each and every element of the alleged offence has been pleaded as required by law.

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[1] A criminal charge in relation to this case was initially filed before the trial court, Federal High Court of Ethiopia, on 5 September 2011 under Federal Public Prosecutor File No. 039/04. This was amended on 24 October 2011. The latter was further amended on 25 October 2011. The information provided in the criminal charge sheet, as prepared on 25 October 2011, has been used for this chapter.

[2] A criminal charge relating to this case was initially filed before the trial court, Federal High Court of Ethiopia, on 10 November 2011 under Federal Public Prosecutor File No. 00180/04, which was later amended upon court order. The information provided in the later charge sheet, as amended on 29 November 2011, has been used for this chapter.

[3] Of the several counts in the charge sheets, the first counts in both prosecutions are chosen for in depth investigation for three reasons. First, their content has been more controversial than others. Second, these counts are the basis for other counts. Third, they relate to precursor offences.

5.2 Legal requirements pertaining to the content of a criminal charge

Both national and international law entitle the accused to be informed with sufficient particulars of the charge brought against them.[4] The 1961 Cr. Pro. Code regulates the form and content of a criminal charge. As the Code provides, a criminal charge has two major parts: statement of the offence and the particulars of the offence.[5] The former states the criminal law provision(s) that the accused has allegedly violated. The latter provides detailed facts upon which the accusation is based. Article 112 of the Code requires that each charge describes the offence and its circumstances so as to enable the accused to know exactly what charge is to be answered. While the statement of the offence part is an abridged version of the charge, the particulars section is supposed to provide facts that are detailed and clear enough to enable the accused to know what to defend.

5.3 The alleged offences

FPP v. Elias Kifle et al involves five defendants: Elias Kifle, Zeryehun G/Egzabhair, Woubeshet Taye, Hirut Kifle and Reeyot Alemu. The prosecution charges the accused with six counts of which five are terrorism related.[6] In the first count in which all the five defendants are charged, the prosecution alleges violation of Articles 32(1) (a) and 38(1) of the Cr. Code and Article 3(6) *and/or* Article 4 of the ATP. In the second count three of the defendants, Elias Kifle, Zeryehun G/Egzabhair, and Woubeshet Taye, are charged with being leaders of a terrorist organisation.[7] In the third count the prosecution charges the other two defendants, Hirut Kifle and Reeyot Alemu, with being members of and

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[4] FDRE Constitution (Ethiopia), art 20 (1); *International Covenant on Civil and Political Rights,* Opened for signature 16 December 1966*,* 999 UNTS 171 (entered into force 23 March 1976) art 14 (3) (a).

[5] Criminal Procedure Code (Ethiopia), art 111 and Second Schedule.

[6] Filed as an alternative to one of the terrorism charges, the other count relates to violation of ordinary criminal law provision. Under this count all the five defendants are charged with money laundering in violation of Articles 32 (1) (a), 38(1) and 684 (1) and (2) of the Cr. Code.

[7] The charge is based on Article 32(1) (a), (b) and Article 38(1) of the Cr. C. and Article 7(2) of the ATP.

recruiting members to a terrorist organisation.[8] The fourth and fifth counts are prepared as alternative charges against all the defendants. Under the fourth count the prosecution charges the defendants with receiving money from Ginbot 7 and other terrorist organisations and from the Government of Eritrea.[9] The fifth count accuses the defendants of money laundering.[10] The last count which relates only to the first defendant accuses that defendant of providing financial support to a terrorist group.[11]

FPP v. Andualem Arage et al involves 24 defendants and six counts, two of which are not related to terrorism. The first and fourth counts relate to 22 of the 24 defendants. In the first count they are charged with conspiracy, preparation, planning and incitement of commission of a terrorist act under Articles 32(1) (a) and 38(1) of the 2004 Cr. Code[12] and Article 3[13] sub articles 1-4 and 6 and Article 4[14] of the ATP. In the fourth count they are charged with committing high treason in violation of Articles 32(1) (a) and 248 (b) of the Cr. Code. The second and third counts relate to participation in a terrorist organisation. In the second count, 20 of the 24 defendants are charged under Article 32 (1) (a) of the Cr. Code and Article 7(2) of the ATP for participation as leaders in a

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[8] The prosecution invokes Article 32(1) (a) (b) and Article 38(1) of the Cr. C. and Article 7(1) of the ATP.

[9] The prosecution cites Article 32 (1) (a) (b) and Article 38 (1) of the Cr. C. and Article 9 of the ATP.

[10] The charge is based on Articles 32 (1) (a), 38(1) and 684 (1) and (2) of the Cr. C.

[11] Anti-Terrorism Proclamation No.652/2009 (Ethiopia), art 5(1) (d).

[12] In both prosecutions the provisions of the Cr. Code, in terrorism related counts, relate to the type and degree of participation of the defendants in the commission of the alleged offences.

[13] 'Article 3: Terrorist acts

Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:

1/ causes a person's death or serious bodily injury;
2/ creates serious risk to the safety or health of the public or section of the public;
3/ commits kidnapping or hostage taking;
4/ causes serious damage to property;
6/ endangers, seizes or puts under control, causes serious interference or disruption of any public service;

is punishable with rigorous imprisonment from 15 years to life or with death.'

[14] 'Article 4. Planning, Preparation, Conspiracy, Incitement and Attempt of Terrorist Act: [w]hosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article.'

terrorist organisation. In the third count two defendants are charged under Article 32 (1) (a) of the Cr. Code and Article 7(1) of the ATP with participation as members in a terrorist organisation. In the fifth count, which relates to espionage, all the 24 defendants are charged under Articles 32(1) (a), 38 (1) and 252 (1) (a) of the Cr. Code. Only two of the defendants are charged with the sixth count of providing support to a terrorist organisation in violation of Article 32 (1) (a) of the Cr. Code and Article 5(1) of the ATP.

5.4 Contents of the charge relating to pre-crime terrorist acts

Of the several counts, in both prosecutions, it is the first count which relates to pre-crime terrorist activities that will be focused on. The statement and particulars of the offence in the two prosecutions are as follows.

5.4.1 FPP v Elias Kifle et al

(a) statement of the offence: Planning, preparation, conspiracy and incitement of commission of terrorist acts (violation of Article 3 (6) *and/or* Article 4 of the ATP).

Article 3(6) refers to endangering, seizing or putting under control, causing serious interference to or disruption of any public service with an intention 'to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country.' Article 4 prohibits preliminary activities leading to the commission of a terrorist act. It criminalises planning, preparation, conspiracy, incitement or attempt to commit any of the terrorist acts stipulated under subarticles (1) to (6) of Article 3 of the ATP.

(b) Particulars of the offence

This section of the charge constitutes two parts: the circumstances of the alleged offence in general and the respective roles of the five defendants. Its first part states that:

> the defendants have established since June 2008, through Elias Kifle and the Eritrean Government, a secret coalition and cooperation agreement with Ginbot 7, OLF, ONLF and Patriots Front, that would conduct a comprehensive struggle supported by terrorism to overthrow the constitution and the constitutional order through organized terrorist act.

In addition, it indicates:

> the defendants have established, since 2010/2011, a secret terrorist group, through Elias Kifle, which had established secret relation with an overseas group, discussed and designed common terrorist strategy, made a division of labour and have:
>
> - agreed to disrupt electricity, telephone, and fibre optic lines stretching from Addis Ababa to different selected parts of the country (Desse, Woldya, Hawassa, Assosa, Wollega, Jigjiga and Gondar)
> - got financial support in secret from the terrorist group through Elias Kifle to enable them to strengthen their terrorist plan
> - committed and let others commit an act of instigation and agitation by posting illegal papers and writings in Addis Ababa and different parts of the country.

Furthermore, it states:

> in addition to providing information to and letting the terrorist groups that aim to overthrow the constitutional order and the enemy state of Eritrea to propagate it, they formed a criminal conspiracy accepting its purpose, objective and result as their own and they had been participating, until they were arrested, as leaders, executors and facilitators of execution of a terrorist act.

In its second part, the charge provides the respective roles of the five defendants. The roles of the first defendant are the following:

- facilitating agreements among Ginbot 7, OLF and ONLF, the Patriots Front and the Eritrean Government
- identifying targets for terrorist acts, terrorist methods, and alternative terrorist approaches
- designing terrorist plans

- facilitating the establishment of the covert terrorist group of which the defendants are members
- recruiting members for the group in consultation with the Eritrean government
- coordinating disruption of public services
- distributing illegal and provocative writings
- providing finance for terrorist purposes
- calling for and chairing meetings having terrorist purposes
- passing decisions on different terrorist acts.

The role of the second defendant is stated as having:

- established, since 2010/11, a direct and indirect contact with the first defendant aimed at overthrowing the constitution and the constitutional order through organised terrorism, and receiving terrorist missions from the first defendant
- received and distributed writings that provoke terrorist acts and disobedience
- caused production and distribution of writings that call for commission of a terrorist act
- recruited members of a terrorist group and assigned them to different directions to cause disruption of the electricity, telephone and fibre optic lines
- received money at different times from a terrorist group
- organised and chaired covert meetings having terrorist missions
- passed decisions having a terrorist character (authorising commission of terrorist acts)

The charge makes several claims linking the third defendant to different terrorist conduct. However, the only claim relating to the offence in that particular count of the charge is the taking of responsibility to recruit members of a terrorist group to destroy electricity, telephone and fibre network lines. The facts stated in respect to the fourth defendant, Hirut Kifle, indicate that she had a covert relation with the first defendant and received terrorist missions from the same, recruited persons who would help in the commission of terrorist acts, received finance from overseas, and paid those involved in terrorist acts.

No relevant fact is stated under Reyot Alemu's name, the fifth defendant. The charge simply indicates that she had covert relation with the first defendant and that she had received a terrorist mission from him to abolish the constitution and the constitutional order, that she collected and provided information to the first defendant and to other terrorist groups that is useful to commit terrorist acts, and that she received money that was sent from overseas for terrorist purposes.

The first count of the charge concludes stating that all the defendants are charged as principal offenders for their participation to abolish the constitution and constitutional order through violence and terrorist act.

5.4.2 FPP v Andualem Arage et al

(a) statement of the offence: planning, preparation, conspiracy and incitement of commission of terrorist acts (Violation of Article 3 (1-4), (6) and Article 4 of the ATP)

The statement of the offence part of the first count asserts violation of Article 3 subarticles 1-4 and 6 and Article 4 of the ATP. It is an allegation that the defendants have been engaged in planning, preparation, conspiracy, incitement (Article 4) to: cause a person's death or serious bodily injury (Article 3(1)); create serious risk to the safety or health of the public or a section of the public (Article 3(2)); commit kidnapping or hostage-taking (Article 3(3)); cause serious damage to property (Article 3(4)); endanger, seize or put under control, cause serious interference or disruption to any public service (Article 3(6)).

(b) particulars of the offence

The particulars of the offence state the following in relation to all the defendants:

The defendants;

> by being leaders and members in Ginbot 7, which has been receiving terrorist missions, and logistical, military and financial support from the Eritrean Government and which, in coalition with other terrorist organizations (OLF, ONLF), advocates destroying the constitutional order as an option and which assigns them to instigate rebellion, kill public officials, loot financial institutions, and destroy public institutions beginning from 2010/11,
>
> by using their constitutional right to freedom of expression and association, have been recruiting and training members, creating secret chain of network, preparing travel and communication guides, organizing urban assassination squad with a view to influence the government by destabilizing the political, social, economic and constitutional institutions,
>
> have entered into criminal conspiracy entirely accepting the objective, goals and outcomes of the crime of planning, instigation and preparation to commit terrorist acts.

These being the particulars relating to all the defendants, additional allegations are made with respect to each of the defendants. As an example claims against three defendants are briefly summarised below.

In relation to Andualem Arage, the first defendant, the charge sheet states that under the guise of the constitutional freedom of association and in order to overthrow the constitutional system through an organised terrorist act, he has:

- served as leader of Ginbot 7's clandestinely established youth organisation
- established clandestine relations with the agents of the terrorist group in Eritrea and leaders of the group in different countries
- accepted terrorist missions

- coordinated the clandestinely organised terrorist group in the country
- facilitated an agreement and creation of a coalition for an all-inclusive struggle supported through terrorism
- developed terrorist plans
- secretly structured youth organisation in the country
- directly led the planned terrorist act
- assigned people for a terrorist mission
- received and disseminated materials advocating uprising and terrorism
- led meetings that had terrorist missions
- undertaken different mobilising activities for terrorist ends

Similarly the particulars of the charge relating to Nathenael Mekonnen, the second defendant, are allegations relating to his clandestine relation with Ginbot 7. Other allegations relate to his participation in terrorism-related activities through identifying terrorist methods and alternatives, designing terrorist plans, and presiding over meetings with terrorist missions/objectives.

The facts which are provided under the seventh defendant, Eskinder Nega, state that using his constitutional right to freedom of expression as a cover, Eskinder:

- has established clandestine contacts with the top leadership of Ginbot 7 and has agreed to provide financial support to destabilise Ethiopia by riot and disturbance in 2011/2012 in accordance with a terrorist direction he received from the terrorist organisation
- participated in a two-day meeting which was conducted at a certain Taytu Hotel in September 2011

- has provided helpful information concerning terrorist missions/aims to Ethiopian Satellite Television (ESAT) which serves as mouthpiece for the terrorist organisation

- writes and distributes different works that provoke the public to create uprising and disturbance

5.5 Preliminary objections relating to content of the charge

Preliminary objections are points of law or fact not related to the merit of the case. Listed under Article 130 of the Cr. P. C., these objections are normally raised at the beginning of the trial by the defence. One of such objections relate to content of the charge.[15] In both *FPP v Elias Kifle et al* and *FPP v. Andualem Arage et al,* defence lawyers raise objections pertaining to the content of the charge.

In *FPP v Elias Kifle et al*, where the accused are charged with violating Article 3(6) *and/or* Article 4 of the ATP, the defence objected the charge on the ground that linking two offences using the connector *and/or* is not allowed under the law. According to the defence, this makes the prosecution's allegation unclear as to what the accused is charged for which, in turn, impacts on their ability to defend.[16] In response, the prosecution invokes Article 113 of the Cr. Pro. C.[17], which authorises alternative charges, and argues that the charge is prepared in accordance with the law. [18]

The content of the charge is so controversial that the trial court adjourned the trial twice, ordering the prosecution to amend its charge. Even when the court finally ordered the hearing to continue,[19] defence lawyers were

[15] *Criminal Procedure Code 1961* (Ethiopia), art 130(1).
[16] *FPP v Elias Kifle et al* (Fed. H. Ct., Cr. F. No. 112199, 20 October 2011) 6.
[17] '*Art.* 113. - *Where it is doubtful what offence has been committed.*
(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed the offence which appears the more probable to have been committed and he may be charged in the alternative with having committed all other offences which the facts which can be proved might constitute.'
[18] *FPP v Elias Kifle et al (*Fed. H. Ct., Cr. F. No. 112199, 20 October 2011*)* 10-11.
[19] The court rejected the objection relating to this on the ground that the law allows the prosecution to prepare such charges and further indicating that which of the offences referred under these articles is to be proved is to be seen from the prosecution's

not satisfied with the content of the charge which continued to be an issue in the appeal and cassation proceedings.[20] Most of the disagreement pertains to the first count, upon which the other four of the five terrorism related counts are based.

The charge cites provisions referring to precursor crimes (Article 4) and the principal terrorist act (Article 3(6)). Using the connector *and/or* makes the prosecution's allegation unclear as to what terrorism-related crime the prosecution asserts against the defendants. Linking two offences by *and/or,* in the statement of the offence part, is strange, and is not known to the Cr. Pro. C. Were the provisions connected with *and* it would mean that the defendants have been involved in planning, preparation, conspiracy, and incitement (Article 4) to endanger, seize or put under control, cause serious interference to or disruption of any public service with any of the purposes and motives listed in the definition of a terrorist act (Article 3(6)).

The inclusion of *or* makes the charge anomalous rendering the charge to be neither alternative under Article 113, as claimed by the prosecutor, nor concurrent as provided under Article 116 of the Cr. Pro. C. While the former regulates instances where the prosecution is doubtful as to which offence has been committed, the latter deals with cases where a defendant is charged with more than one offence.[21] Where it is doubtful which offence has been committed, as illustrated in Schedule II to the Cr. Pro. C., the prosecution is supposed to frame two different counts with their own statements and particulars of the offence.[22] However, in this count two provisions are connected by *and/or* in the statement of the offence part and there is only one particular of the offence. This is compatible with neither alternative nor concurrent charges.[23] Indeed, a

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evidence. *FPP v Elias Kifle et al (*Fed. H. Ct., Cr. F. No. 112546, 20 October 2011*)* 5-15.

[20] *Reeyot Alemu v FPP* (Fed. S. Ct., Cr. A. F. No. 77654, 9 March 2012).

[21] '*Art.* 116. - *More than one charge.*

(1) A charge may contain several different counts relating to the same accused and each offence so charged shall be described separately.'

[22] While in alternative charges, the defendant can only be convicted for one of the two; in concurrent charges, they may be convicted for both.

[23] Both the prosecution and the court should have been aware of the mismatch between the way the first count is framed and what Article 113 of the Cr. Pro. C. provides. The prosecution has prepared the third count (in the original charge) or the fifth count

judge and two defence lawyers describe the charge as alarming.[24] Despite this oddity, the court overruled the preliminary objection that the defence raised.[25]

Objection pertaining to the content of charge is raised in *FPP v Andualem Arage et al.* As indicated earlier, the prosecution's first count alleges violation of Article 3 subarticles 1-4 and 6 and Article 4 of the ATP. As noted under Section 5.3 above, this charge relates to engaging in pre-crime terrorist activities (Article 4) with a view to committing principal terrorist acts listed under Article 3(1-4) and (6). Defence lawyers objected to this count on the grounds that the particulars of the offence do not include the necessary elements of the offences alleged in the statement of the offence part.[26] They point to the discrepancy between elements of the provisions cited to have been violated (Articles 4 and 3(1-4) and (6) of the ATP) and the facts alleged in the details of the count.[27]

It is true that an examination of the original charge shows that the particulars of the offence do not include facts relating to: causing death or serious bodily injury (Article 3(1)); creating serious risk to the safety or health of the public or section of the public (Article 3(2)); kidnapping or hostage-taking (Article 3(3)); causing serious damage to property (Article 3(4)); endangering, seizing or putting under control, causing serious interference to or disruption of any public service (Article 3(6)). Rather the prosecution uses the terms '*terrorism'* or '*terrorist'* 44 times, on average 11 times per page, instead of providing specific facts signifying that the defendants intended to commit any of the acts to which the cited

(in the amended charge) following the requirements of Article 113. Similarly the court has made reference to this charge. *FPP v Elias Kifle et al (*Fed. H. Ct., Cr. F. No. 112199, 20 October 2011*)* 14.

[24] R 5, R 8 and R 9.

[25] The court rejected the objection relating to this count on the ground that the law allows the prosecution to prepare such charges and further indicating that which of the offences referred under these articles is to be proved is to be seen from the prosecution's evidence. *FPP v Elias Kifle et al (*Fed. H. Ct., Cr. F. No. 112199, 20 October 2011*)* 13-14.

[26] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F.No. 112546, 23 November 2011) 20.

[27] Unlike in *FPP v Elias Kifle et al*, in this case the defence do not have issue in relation to the way the prosecution pleads commission of precursor offences in violation of Article 4. The charge links precursor offences under Article 4 with principal terrorist acts under Article 3 with the connector 'and'. Federal Public Prosecutor File No. 00180/04 as amended on 29 November 2011.

subarticles of Article 3 refer. As the term 'terrorist act' has been defined in terms of act, motive and purpose of the act, the charge is supposed to provide facts that indicate these elements of the definition are fulfilled. That is, as the defence rightly argues, the charge, far from providing facts that constitute the offence alleged in the first count, includes facts that relate to participation of the defendants in a proscribed organisation for which they are specifically charged under the second and third counts.

Thus, the court sustained the objection and ordered the prosecution to make the necessary amendment to that particular count. [28] The prosecution amended the charge. The amended charge includes allegations that the defendants received missions from Ginbot 7 to kill public officials, to loot financial institutions, and to destroy public institutions, which are related to subarticles 1, 4 and 6 of Article 3 of the ATP respectively.[29] Defence lawyers expressed their objection that the new charge still fails to include facts relating to creating serious risk to the safety or health of the public or section of the public (Article 3(2)) and hostage-taking or kidnapping (Article 3(3)), which the first count alleges to have been committed. Thus, they requested the court to order further amendment.[30] This time the court overruled the objection to the charge and ordered the hearing to continue.[31] While upholding that a charge relating to violation of Article 4 should clearly be plead in terms of which of the terrorist acts listed under Article 3 the defendant plans, prepares, conspires or incites, the court maintains that the charge, as amended, satisfies this requirement.[32]

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[28] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F.No. 112546, 23 November 2011).

[29] As amended on 29 November 2011.

[30] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, 29 November 2011) 6. While the prosecution still cites Article 4 and Article 3(1-4, 6) of the ATP, it does not include any allegation related to sub articles 2 and 3 of Article 3.

[31] The record shows that the court gave the ruling before the defense lawyers exhausted their grounds of objection. The court rushed into asking the defendants to enter into their plea. *FPP v Andualem Arage et al (*F. H. Ct., Cr. F. No. 112546*,* 30 November 2011).

[32] *FPP v Andualem Arage et al* (Cr. F. No. 112546, 30 November 2011) 7-8. However, though the prosecution cites Article 4 and Article 3(1-4, 6) of the ATP, it does not still include any allegation related to sub articles 2 and 3 of Article 3. Federal Public Prosecutor File No. 00180/04, as amended on 29 November 2011.

5.6 Evaluating the charges

In both *FPP v. Elias Kifle et al* and *FPP v. Andualem Arage et al,* the prosecution's principal allegation is that the defendants have committed pre-crime terrorist activities in violation of Article 4 of the ATP. As Hon. Charles E. Clark notes 'our attitude towards pleading formalities will be largely determined by what we expect of the pleadings.' [33] It is argued in Chapter 4 that elements of Article 3 are vital to establish a crime under Article 4. Thus, a prosecution based on violation of Article 4 has to state certain conduct that a defendant has been involved in and link the alleged conduct with purposes, motives and the intention to commit any of the acts to which Article 3 refers.

Furthermore, in view of the incorporation of five different inchoate and pre-inchoate terrorist activities under Article 4 of the ATP (planning, preparation, conspiracy, incitement and attempt to commit a terrorist act), the particulars of the charge have to describe the alleged conduct in such a manner that can indicate which of the five terrorist activities is/are being pleaded. Conspiracy and incitement can co-exist with each other and with any of the other pre-crime terrorist activities that Article 4 of the ATP refers to, planning, preparation and attempt. The last three are mutually exclusive simply because one comes after the other in the process of contemplation and execution of a criminal act. Particulars of the offence part of a charge are critical in clarifying for which of the offences listed under Article 4 of the ATP the defendants are charged.

This part analyses the contents of the charges with a view to examining whether or not the charges clearly and specifically plead:

1) the relationship between the alleged precursor crime and the foretold principal terrorist act

[33] Charles E. Clark, Simplified Pleading (1943) 2 F.R.D. 456 quoted in Alexander A. Reinert 'the Burdens of Pleading' (2013-2014) 162 *University of Pennsylvania Law Review* 1767, 1767.

2) facts indicating which of the inchoate or pre-inchoate acts to which Article 4 refers is/are alleged to have been committed

5.6.1 FPP v. Elias Kifle et al

Referring to the charge sheet in *FPP v. Elias Kifle et al,* R 8,one of the defence lawyers, states that 'the case does not even seem that professional lawyers have spent time on it…it looks the case was framed in a rush.' Human Rights Watch makes a similar observation: 'the descriptions of the charges in the initial charge sheet did not contain even the basic elements of the crimes of which the defendants are accused.'[34]

Of the different pre-crime activities that Article 4 criminalises, the particulars of the offence refers to conspiracy among the defendants to disrupt electric, telephone, and fibre optic lines to which Article 3(6) of the ATP refers.[35] For the alleged act to be a conspiracy to commit a terrorist act, it should be accompanied by the purpose and motive elements that Article 3 envisions. Facts provided on the charge do not indicate that the defendants conspire in order to 'coerce the government', or to 'intimidate the public or section of the public.' Of the allegations stated on the charge, overthrowing the constitution and constitutional order, which appears several times, seems to relate to the third possible purpose of a terrorist act under Article 3, namely, destabilising or destroying the fundamental political, constitutional, economic, or social institutions of the country.

Parts of the charge that describe the role of each defendant refer to discussions between the first defendant and each of the other defendants about overthrowing the constitution and the constitutional order. But it is

[34] Human Rights Watch, 'Ethiopia: Terrorism Verdict Quashes Free Speech: Drop Case and Free Four Convicted after Unfair Trial' 19 January 2012 <https://www.hrw.org/news/2012/01/19/ethiopia-terrorism-verdict-quashes-free-speech>

[35] Though an act of *instigation* is also alleged against the defendants, the charge does not indicate the commission of which of the terrorist acts listed under Article 3 they did indeed instigate. While there are allegations related to terrorist activities such as obtaining financial support from and provision of information to terrorist organisations, these allegations do not have much relevance to the terrorist act to which the statement of the offence refers. As such they constitute separate counts (fourth and sixth counts). Criminal charge sheet, Federal Public Prosecutor File No. 039/04, as amended, 25 October 2011.

doubtful if the purpose element, as required under Article 3 of the ATP, has been fulfilled. While Article 3 of the ATP requires co-existence of conduct and purpose for the conduct to constitute a terrorist act, the failure of the charge to specify precisely when the criminal agreement was reached[36] and that such discussions were made,[37] all indicate that the prosecution does not plead simultaneity between the discussions relating to overthrowing the constitution and the constitutional order and the alleged conspiracy to disrupt public services. Apart from asserting both conspiracy to cause damage to the public services and individual communications between Elias Kifle and each of the other four co-defendants concerning overthrowing the constitution and the constitutional order, the prosecution does not explicitly plead that the defendants agree to cause damage to public services with intent to abolish the constitution and the constitutional order.

Furthermore, one would not find the motive element of the alleged offence from the charge.[38] The charge does not indicate that the conspiracy was reached with an intention 'to advance a political, religious or ideological cause.' Thus, even if co-existence of the agreement to disrupt public services and overthrow the constitution and the constitutional order was to be established, the alleged conspiracy would still not be a conspiracy to commit a terrorist act for lack of motive, which is not pleaded on the criminal charge. While there is agreement that

[36] Apart from indicating that the defendants conspire to cause damage to the electric, telephone and fibre optic lines, the charge does not state a specific date that the agreement was made.

[37] The first count of the charge in *FPP v Elias Kifle et al* explicitly states that the communication between Elias Kifle and each of the other defendants regarding the overthrowing of the constitution and the constitutional order was made on an unknown date and month in 2010/11.

[38] Though the inclusion of the word terrorist to describe almost all conduct alleged in the criminal charge makes the prosecution's claim to appear to relate to terrorism, most of the facts stated thereunder have no relevance to the offence to which this particular count refers. While some are related to terrorism in general, they are not related to the element that constitutes conspiracy to commit a terrorist act to which Article 3(6) of the ATP refers. For example, it refers to provision of finance for the commission of a terrorist act, which is separately criminalised under Article 5(1) (d) of the ATP. Similarly recruiting members for a terrorist group and being a decision-maker in a terrorist organisation, both of which are criminalised under Article 7(1) and (2) respectively, are among facts that are generally related to terrorism but not to the offence to which the charge refers. Because these acts do not constitute any of the elements under Article 3 of the ATP, the defendants are charged for such acts in separate counts.

proving motive is a very complicated and laborious task, there is also consensus that where it forms an element of a definition of a terrorist act, establishing its existence is a necessary condition in order to prove that a terrorist act has been committed.[39] McSherry rightly observes that where a definition incorporates a motive element, 'the prosecution has to prove the motive behind the act in order to distinguish the offence of engaging in a terrorist act from other existing crimes.'[40] In highlighting the significance of motive where a definition of a terrorist act incorporates it as an element, Cassese notes that if it is not proved that a criminal action (for example, blowing up an airplane) has been motivated by ideological or political or religious considerations, the act can no longer be a terrorist act.[41] Similarly, the need to prove it is emphasised in view of the fact that 'terrorist organizations "inevitably attract into their ranks ordinary criminals whose motivations for particular acts may be private or personal revenge"'[42] as opposed to political, ideological or religious causes.

As noted above, the defendants could not be at the stage of planning and preparation simultaneously in relation to a single terrorist act. They could only be at either stage at a time which means they should be prosecuted and convicted only for either. They can be charged for preparation only if they have passed the planning stage in which case they should not be charged and convicted with planning. Thus, it is awkward that the prosecution charges the defendants with planning, preparation, and conspiracy to commit a terrorist act provided under Article 3(6) of the ATP. Moreover charging the defendants for two or more of these

[39] Antonio Cassese, The Multifaceted Criminal Notion of Terrorism in International Law (2006) 4 *Journal of International Criminal Justice,* 935; Lord Diplock (chair) Report of the Commission to Consider Legal Procedures to Deal With Terrorist Activity in Northern Ireland, Cmnd 5185 (1972) in Bernadette McSherry, 'Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws' (2004) 27 (2) University of New South Wales Law Journal 354, 363; Ben Saul, 'The Curious Element of Motive in definitions of Terrorism: Essential Ingredient or Criminalizing Thought?' In Andrew Lynch, Edwina MacDonald and George Williams (eds.) *Law and Liberty in the war on terror* (The Federation Press, 2007) 28; Edwina MacDonald & George Williams, 'Combating Terrorism' (2007) 16(1) *Griffith Law Review* 27.

[40] McSherry, above n 39, 361.

[41] Cassese, above n 39, 940.

[42] Diplock, above n 39, 363.

activities in one charge would make the charge duplicitous and uncertain.[43]

5.6.2 FPP v Andualem Arage et al

The defendants are charged under Articles 4 and 3(1-4) and (6) of the ATP. Most of the facts alleged in the charge are descriptions of Ginbot 7 and the defendants' involvement in Ginbot 7 as leaders/decision-makers, members, planners and executors of a terrorist act, and recruiters of members.[44]

In the original charge[45] only the allegation that defendants have formed an 'assassination squad' relates to preparatory activity to cause a person's death or serious bodily injury, a terrorist act listed under Article 3(1) of the ATP. No conduct that suggests defendants' intention to commit acts listed under Article 3 sub articles 2, 3, 4, and 6 was pleaded. This problem is highlighted in the UN Human Rights Council Working Group on Arbitrary Detention.[46] In the amended charge, however, allegations that Ginbot 7 gives defendants a mission to 'kill public officials,' 'loot financial institutions,' and 'damage public service institutions' which relate to Article 3(1), (4) and (6) respectively were included.[47]

As noted above, for any conduct to be a pre-crime terrorist activity in accordance with Article 4, it needs to be accompanied by any one of the three purposes and to have been motivated by a desire to advance political, religious or ideological cause. It is alleged on the charge that the

[43] See below Chapter Seven; Jill Hunter, 'Prosecutors' Pleadings and the Rule Against Duplicity (1980) 3 *University of New South Wales Law Journal* 248, 249-252.

[44] Participation in a terrorist organisation be it as a member or as a decision-maker/leader is governed under Article 7 of the ATP for which the defendants are charged in the second count.

[45] See: Federal Public Prosecutor File No. 00180/04, criminal charge sheet as prepared on 10 November 2011.

[46] Human Rights Council Working Group on Arbitrary Detention, *Eskinder Nega v. Ethiopia*, Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty Fifth Session, 14-23 Nov 2012 No. 62/2012, U.N. Doc. A/HRC/WGAD/2012/62 (2012) Para. 11.

[47] The amended charge still does not include facts relating to creation of serious risk to the safety or health of the public or section of the public or commission of kidnapping or hostage-taking to which Article 3 (2) and (3) of the ATP respectively refers. The prosecution simply alleges violation of these sub articles without supporting the allegation with relevant facts.

defendants intended to influence the government through the destabilisation or destruction of the country's political, economic and constitutional institutions. This allegation satisfies the purpose element.[48] While the definition requires that the coercion be exerted to advance political, religious, or ideological causes, the charge fails to specify that. Like in *FPP v Elias Kifle et al,* the charge in *FPP v Andualem Arage et al* does not state the motive element.

In the statement of the offence part, by claiming violation of Article 4 and some of the subarticles of Article 3 of the ATP, the prosecution accuses the defendants of having committed acts that indicate their intention to commit five different terrorist acts: causing a person's death or serious bodily injury; creating serious risk to the safety or health of the public or section of the public; commission of kidnapping or hostage-taking; causing serious damage to property; and endangering, seizing or putting under control, causing serious interference to or disruption of any public service. However, the particulars of the offence part do not state facts from which that intention can be inferred. Both the original and amended charges simply assert the defendants' involvement in the planning, preparation, conspiracy and incitement of committing *a terrorist act.* The charges do not specifically indicate which of *the five terrorist acts* were intended. Moreover, apart from asserting the involvement of the defendants in these pre-crime terrorist activities, the charges do not provide information as to steps the defendants have taken that constitute the alleged plan, preparation, conspiracy and incitement.

As noted above, a certain terrorist act cannot be at planning and preparation stages simultaneously. The charge's failure to provide information pertaining to the aforementioned matter triggers the following questions: Of the alleged offences, which ones were at the stage of planning and which others at the stage of preparation? In connection with

[48] There is no indication as to what the defendants would like the government to do. The charge simply states that the defendants intended to 'coerce the government' without specifying what they wanted the government 'to do' or 'not to do'.

which of the alleged offences are the defendants charged for incitement and conspiracy?

In sum, in both *FPP v Elias Kifle et al* and *FPP v. Andualem Arage et al*, the counts relating to pre-crime terrorist activities suffer from two major shortcomings. First, the charges do not plead motive. Neither directly nor indirectly do the charges state that the defendants committed the alleged act/conduct in order to *advance political, religious or ideological cause.* As motive is an integral element of a terrorist act, its absence in the charge means the defendants are wrongly prosecuted for terrorism-related offences. Because the other counts[49] in both prosecutions are derivative of the first count, the defectiveness of the latter affects the validity of the former.[50]

Second, the charges do not incorporate adequate facts/information pertaining to the alleged pre-crime activity. The charges, apart from asserting that the defendants have conspired, planned, incited and prepared for commission of a terrorist act(s), do not incorporate facts which indicate plan, preparation, conspiracy and incitement. No fact indicating the degree of progress towards commission of the terrorist acts

[49] While the second count accuses the first three defendants under Article 7(2) of the ATP for participating as leaders, the third count accuses the other two defendants under Article 7(1) of the ATP for partaking as members, in the terrorist organisation established to commit the terrorist act referred under the first count. The sixth one charges the first defendant with providing financial support for the commission of the terrorist act referred to under the first count.

[50] The fourth and fifth counts are alternative charges. The fourth count alleges that the defendants, in violation of Article 9 of the Proclamation, have used or transferred the money that has been sent from Eritrean government, Ginbot 7 and other terrorist groups concealing its source. The fifth count is an accusation against all the defendants for their alleged involvement in money laundering. The particulars of the offence under this count are exactly the same as that under the fourth count. The only difference between the two counts is that the first cites provision of the ATP but the second cites a provision from the Cr. C. The crime under the Cr. C. does not require that the doer acquire, possess, own, deal, convert, conceal or disguise the property 'knowingly or having reason to know that a property is a proceed of terrorist act', this is central in the ATP. However, the facts under this count do not indicate that the money that the defendants are alleged to have used, circulated or transferred is a 'proceed of terrorist act'. It merely states that the money was sent from the Eritrean government, Ginbot 7, and other terrorist organisations. The article invoked against the defendants criminalises acquiring, possessing or owning, dealing with, converting, concealing or disguising a property that the defendants know or have reason to know is a proceed of a terrorist act. The provision does not capture all the property that someone receives from a terrorist organisation. It covers only a part of it— proceed of a terrorist act. This count therefore does not satisfy the requirement of the law alleged to have been violated.

is pleaded. The charges do not provide facts indicating the steps that the defendants have taken towards committing the alleged terrorist act(s).

As noted above in both *FPP V Elias Kifle et al* and *FPP v Andualem Arage et al*, the facts provided on the charge do not indicate at what stage in the process the accused were at the time of the arrest. The charge simply claims that the defendants were planning and preparing to commit a terrorist act. On the other hand, if defendants were planning to commit one terrorist act and preparing to commit another, this has to be clearly spelt out, such as, through preparing separate counts. The charges, as they stand, simply assert that the defendants were preparing and planning to commit a terrorist act without providing facts indicating that they were preparing or planning. Next the implications and repercussions of these two defects in the charge are examined.

5.7 Implication of failure to plead motive

In the preceding section it is noted that the prosecution's charges do not indicate, inter alia, the *motive* behind the alleged conduct which constitutes an integral element of the definition of a terrorist act under the ATP. That leads one to conclude that the prosecution alleges a terrorism charge against the defendants without pleading facts that constitute the elements of a terrorist act.

As indicated in Chapter three, definition of a terrorist act under the UN legal instruments does not include motive as element of a terrorist act. In view of that, whether or not the prosecution's allegations constitute a terrorist act under the international definition of a terrorist act is worthy of discussion. In both *Elias Kifle et al* and *Andualem Arage et al*, the prosecution simply alleges that the defendants intended to overthrow the constitution and the constitutional order. The charges do not plead any of the three purposes of a violent act that the international definition recognises: intimidating a population; or compelling a government[51] to do

[51] Compelling a government, a purpose the international definition refers to, is different from overthrowing a constitution and a constitutional order. In the latter, the government is removed but not forced to do or abstain from doing something, which the former connotes.

or to abstain from doing an act; or compelling an international organisation to do or to abstain from doing any act.

Moreover, among the seven acts listed under Article 3 of the ATP, the international definition recognises only causing 'a person's death or serious bodily injury' and committing 'kidnapping and hostage taking.' In *Elias Kifle et al* the conduct alleged to have been intended to be committed — obstructing telephone, electricity and fibre optic lines — does not fall within the scope of the base offence that the international definition envisions. Similarly in *Andualem Arage et al*, three of the five allegedly intended terrorist acts —causing serious damage to property, damage on or interference with a public service, and creating serious risk to the safety or health of the public or section of the public — do not fall within the scope of the base offence element of the international definition.

Thus, it is not only under the domestic but also under the international definition that acts alleged within the prosecution's charges do not constitute a terrorist act. While the charge fails to satisfy the domestic definition mainly owing to its failure to plead the motive element, its shortcomings when evaluated in light of the international definition result from the domestic definition's inconsistency with the international definition relating to the conduct and purpose elements.

Because the charge states the alleged acts to have been committed with a view to overthrowing the constitution and the constitutional order through violent conduct, the allegations are more related to conspiracy, preparation, planning, and inciting commission of 'outrages against the Constitution or the Constitutional Order", which do not require motive. While conspiracy to commit outrages against the constitution and the constitutional order is criminalised under Article 238,[52] preparation,

[52] 'Article 238. - Outrages against the Constitution or the Constitutional Order.
(1) Whoever, intentionally, by violence, threats, conspiracy or any other unlawful means:
(a) overthrows, modifies or suspends the Federal or State Constitution; or
(b) overthrows or changes the order established by the Federal or State Constitution, is punishable with rigorous imprisonment from three years to twenty-five years.
(2) Where the crime has entailed serious crisis against public security or life, the punishment shall be life imprisonment or death.'

planning and incitement to commit this crime are proscribed under Articles 256, 257(b), and 255 of the 2004 Cr. C. respectively. In the absence of the motive element, the alleged conduct would be a criminal offence that Article 238 of the Cr. C. relates to. Thus, under the assumption that the charge pleaded conspiracy to endanger or to cause serious interference or disruption of electric, telephone or fibre optic lines to overthrow the constitution and the constitutional order, in the absence of the motive element, what has been alleged on the charge is a crime that should be prosecuted under Articles 38 and 238 of the Cr. C. In connection with Article 4, apart from asserting that the defendants were conspiring to commit a terrorist act, no fact pertaining to the time and place of the conspiracy is included in the charge.

Without prejudice to subsequent sections relating to evidence, in view of the alleged facts a charge based on these Cr. C. provisions would have been clearer and more logical than the charges based on the ATP. The charge would have been clearer because it would have cited specific articles for different pre-crime acts (planning, preparation, conspiracy, incitement and attempt) unlike in the ATP where all of these acts are merged under Article 4. This, in turn, would have avoided the issues raised in connection with the scope of Article 4 and would have also enhanced the charge's ability to inform the accused about what they have to defend.[53]

Moreover, this would have prevented the dispute between the prosecution and the defence regarding the content of the charge which boils down to the mismatch between the alleged facts and the alleged offence of terrorism. Most importantly, in the event that the alleged facts are proved the defendants would have been subject to a punishment that their conduct deserves. In the absence of the prerequisite motive, commission of any of the acts that Articles 4 and 3 of the ATP refer to with a view to overthrowing the constitution and constitutional order would

[53] Respecting the right of the accused to be informed of the charges is one of the constituent elements of due process that gives legitimacy to the criminal justice model of counterterrorism. Ronald Crelinsten, *Counterterrorism* (Polity press, 2009) 48-49.

constitute the offences provided under Articles 255-256 of the Cr. C. The punishment prescribed for these offences ranges from one month simple imprisonment to 15 years rigorous imprisonment, significantly lower than the punishment the ATP provides.

5.8 Conclusion

A critical evaluation of the criminal charges indicates that while the prosecution alleges involvement of the defendants in pre-crime terrorist activities, not all the elements of 'planning, preparation, conspiracy, incitement to commit a terrorist act', as defined under Article 4, are pleaded on the charges. Thus, the allegations, as they stand, do not relate to a conduct that the ATP criminalizes. Moreover, the prosecution's charge alleges that the defendants have committed precursor crimes that cannot be simultaneously committed such as planning and attempting to commit a terrorist act. Despite the flawed nature of the criminal charges, objections relating to both deficiencies were overruled by the court.

CHAPTER SIX: EVIDENTIAL MATTERS

6.1 Introduction

Defence lawyers express the weakness of the prosecution's cases vehemently. According to R 9 'it is without evidence that the defendants were prosecuted, convicted and sentenced for long prison sentences including life imprisonment.' Similarly R 8 notes 'it is without evidence or argument supporting the allegation that my client was prosecuted, convicted and sentenced with 14 years rigorous imprisonment and about $ 2,000.'

The judges do not accept this accusation. For them, such an allegation is commonly made whenever a politician or a journalist is prosecuted in Ethiopia. For example, R 4 states:

> The defendants argue that their prosecution is motivated by their difference in their political outlook. When politicians are prosecuted there is a trend to assume that the prosecution is because of their political views. Such categorisation is common. In our understanding so far no one has been prosecuted and convicted under the anti-terrorism proclamation due to their political opinion. When we see these cases practically it is different. The judge is here not to support the government but to do his job independently. As far as I know no one has been prosecuted exclusively because he has a difference of opinion from the government. The judge decides based on law and evidence.

These are contradictory claims on how far the prosecutions were substantiated by evidence. While the defence lawyers complain that there was no evidence that warrants the convictions, the judges contend otherwise. This chapter examines the court decisions related to matters of evidence.

In both *FPP v Andualem Arage et al* and *FPP v Elias Kifle et al* the evidence of the prosecution predominantly constitutes expressions that the defendants have or caused to be written or uttered. The prosecution's oral evidence merely proves that the defendants made the written or verbal statements. Thus, the first and second sections of this chapter deal

with compatibility with freedom of expression of using as evidence the written or oral expressions against the defendants. Both the trial and appellate courts disregard the standard of proof beyond reasonable doubt while weighing the evidence of the parties. Instead the courts uphold that the acquittal of the defendants is predicated on proving their innocence. The third section of the chapter examines the reversal of proof and its repercussions.

6.2 Using written and verbal communications and expressions as evidence against the accused

In both terrorism prosecutions, *FPP v Andualem Arage* and *FPP v Elias Kifle et al*, no evidence related to explosives is introduced. The vast majority of the evidence that the prosecution produces constitutes expressions the defendants have uttered or written. [1] Different human rights institutions confirm this. The Working Group on Arbitrary Detention, referring to evidence produced against Eskinder Nega, one of the defendants in *FPP v. Andualem Arage et al*, indicates that the prosecution produces 'a series of Mr. Nega's writings and interviews as evidence of his guilt. During the proceedings, prosecutors showed video evidence that Mr. Nega had spoken at events sponsored by different opposition parties in Ethiopia.'[2] The Working Group's source has provided convincing facts that the judgment is a consequence of Mr. Nega's use of his right to freedom of expression and his activities as a human rights defender, which the Government has not rebutted.[3] The African Commission on Human and People's Rights, expressing its grave alarm by the arrests and prosecutions of journalists and political opposition members, indicates that the charges are related to 'exercising their peaceful and legitimate rights to freedom of expression and freedom of association.'[4] Similarly, citing evidence of what it calls high level

[1] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, 27 June 2012) Judgment 61.

[2] Human Rights Council Working Group on Arbitrary Detention, *Eskinder Nega v. Ethiopia*, 65th sess. Opinion No. 62/2012, U.N. Doc. A/HRC/WGAD/2012/62 (28 December 2012) Para 13.

[3] Human Rights Council Working Group on Arbitrary Detention, *Eskinder Nega v. Ethiopia*, 65th sess. Opinion No. 62/2012, U.N. Doc. A/HRC/WGAD/2012/62 (28 December 2012) Para 40.

[4] African Commission on Human and Peoples Rights, Resolution No 218, *Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia*, 51st ord. sess.

political interest in these cases, Amnesty International observes that 'those arrested are political targets of the government, and that their arrests and prosecutions are based on their peaceful and legitimate expressions of dissent'[5] and 'their criticism of government policy and practice.'[6] The United States joined the criticism as follows:

> The Ethiopian government has used the Anti-Terrorism Proclamation to jail journalists and opposition party members for peacefully exercising their freedoms of expression and association. This practice raises serious concerns about the extent to which Ethiopians can rely upon their constitutionally guaranteed rights to afford the protection that is a fundamental element of a democratic society. We reiterate our call for the Government of Ethiopia to stop stifling freedom of expression and we urge the release of those who have been imprisoned for exercising their human rights and fundamental freedoms.[7]

The writings of the defendants and their interviews in which they relate the uprising in North Africa and the Arab world to Ethiopia are introduced by both parties to substantiate their respective arguments. The prosecution uses the materials as evidence to prove the defendants' preparation to commit a terrorist act. On the other hand, the defendants present the same documentary and audio/video evidence to show that their activities are confined to mobilising the public to reclaim its rights guaranteed under the constitution but not as a call for a terrorist act. In particular, Andualem[8] and Eskinder[9] expressly affirm that the interviews they gave and their writings, which the prosecution uses as evidence against them, reflect their views that they still hold.

Thus, the issue between the prosecution and the defence in relation to this documentary and audio/video evidence is whether or not their

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(2 May 2012) Preamble para 4 <http://www.achpr.org/sessions/51st/resolutions/218/>.

5 Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia*, (2011) 23 <http://www.amnestyusa.org/sites/default/files/afr250112011en.pdf>.

6 Ibid 31.

7 Victoria Nuland, *Ethiopian Court's Sentencing in Anti-Terrorism Trial* (14 July 2012) <http://www.state.gov/r/pa/prs/ps/2012/07/195022.htm>.

8 *FPP v Andualem Arage et al* (F. H. Ct., Cr. F.No. 112546, judgment, 27 June 2012) 41.

9 Ibid 54.

contents are protected under freedom of expression. If not protected, is it possible to use them as evidence to prove the defendants' involvement in the planning, preparation, conspiracy and attempt to commit a terrorist act?

The court refers to several freedom of expression related items as evidence proving Andualem Arage's involvement in pre-crime terrorist activity. First, the court points out that Andualem Arage, in his capacity as the public relations head of the Unity for Democracy and Justice (UDJ) Party, had been inviting guest speakers who support Ginbot 7's goals.[10] For example, according to the court, the conference at which Dr Kassa Ayalew spoke discussed how and when to bring the methods, strategies and tactics to Ethiopia that are used in North Africa and the Arab world to remove governments from power in 2011/12.[11] The court indicates that this was similar to Eskinder's presentation at a town hall meeting that the party organised for its members and supporters. At that meeting, Eskinder spoke on the feasibility of the North Africa type of uprising in Ethiopia.

Second, in interviews which Andualem gave to *Fortune* and *Fitehe* newspapers, the court notes he stated that since the public grievance against the government in Ethiopia was much more deep-seated than in North Africa and the Arab world, which give rise to the Arab Spring, Ethiopia was ripe for a similar uprising.[12] In addition, the court refers to an interview he gave to Ethiopian Satellite Television (ESAT) on 19 April 2011 in which he, citing the Arab world experience, stated 'we are tired of living without freedom and are ready to make any sacrifice' to bring change.[13] In another interview with the same media, on 18 August 2011, he indicated that as peaceful demonstrations and democratic elections are impossible in Ethiopia, the people have to do something to get its natural rights respected.[14]

[10] Ibid 42.
[11] Ibid
[12] Ibid 43
[13] Ibid.
[14] Ibid.

Third, the court refers to a Paltalk discussion forum called '*Kale'*[15] conducted on 24 July 2011 and notes that Andualem: expressed his wish to see change in the country; advised that the people should be ready for the sacrifice necessary to bring the change; and expressed his support to the movement by proscribed organisations to form a coalition. Referring to another Paltalk show conducted on the 25th of August 2011, the court notes that the defendant stated that 'while we will do everything we can to mobilize public uprising, the diaspora community has to provide the necessary support and contribution.'[16] Referring to writings alleged to have been sent from Obang Metho, the public relations head of Ginbot 7, the court notes that the document calls for bringing the uprising in North Africa and in the Arab world to Ethiopia and advises on the steps to be followed.[17] These pieces of evidence, the court concludes, prove 'the defendant's relation with Ginbot 7 and his effort to implement Ginbot 7's goals by bringing the Arab uprising to Ethiopia and causing changes in government.' [18]

The only document that relates to Nathanael Mekonnen is the three-page flyer that he is alleged to have duplicated and distributed. The document lists fifteen points relating to public grievances and calls for great public demonstration. While the prosecution introduces the document as evidence of Nathanael's involvement in illegal and terrorist activities, the accused argues that photocopying and distributing the document is a right recognised under freedom of expression provisions of the FDRE constitution.[19] Nathanael argues that duplicating and distributing a flyer

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[15] This is an Amharic term which may be translated as *'my word'*.

[16] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 43.

[17] Ibid 42. Commenting on using the document which is said to have been sent from the public relations head of Ginbot 7 as evidence, R 11, a long-time opposition leader states 'I am shocked that such evidence where the defendant is only recipient, but not sender and did not even respond to the e-mail, of a document be used as evidence to prove his involvement in a terrorist act. As a popular politician it is likely that his e-mail address can be known by many, including members of the organisation proscribed as terrorist, which means he is exposed to receive different e-mails without any pre-existing relation with the sender.'

[18] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 43. The Federal Supreme court advances similar analysis in general and reiterates this point in particular. Andualem Arage v FPP (F. Sup. Ct., Cr. App. No. 83593 Judgment 2 May 2013) 8-9.

[19] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 47.

in which public anger is expressed and which was meant to be distributed during a peaceful demonstration that was planned to be called by two opposition political parties, should not be seen as a terrorist act or evidence of a terrorist act.[20] The court dismissed Nathanael's argument stating that the defendant had not proven his right to duplicate and distribute the document and that permission for the peaceful demonstration that he referred to had been granted.[21] In addition, the court noted, 'the *content* of the document and the *secrecy* of its distribution and duplication indicate that he has been working for Ginbot 7 and his source of finance for so doing, as testified by witnesses, is Fasil Yenealem, a member of Ginbot 7's leadership.'[22]

The court listed and summarised contents of eight documents[23] produced against Eskinder. These documents are critical of the government and the then prime Minster Meles Zenawi. Most of them include analysis of the uprisings in North Africa and in the Arab world and the feasibility of these being realised in Ethiopia.[24] In these documents, Eskinder expresses his view that the existing conditions in Ethiopia are the same as, if not worse than, in those places where the uprisings took place and states his confidence in the fact that such uprisings are inevitable in Ethiopia. For example, in the piece on 'Gadhafi's Failure and Meles Zenawi', Eskinder discussed how Gadhafi's brutal administration had been overthrown and the lesson that Meles Zenawi had to learn from Gadhafi's catastrophic end; compared Egypt's place in the Arab world with Ethiopia's place in Sub-Saharan Africa; and noted how the events in Tunisia changed the impossible to the possible. The piece on 'Syria, America, Europe and Ethiopia' calls for uprising in Ethiopia and

[20] Ibid.
[21] Ibid.
[22] Ibid 47-48, emphasis mine.
[23] These are 'Ethiopia, Public opposition and Question of Military Government', 'Gadhafi's Failure and Meles Zenawi', 'implications of strikes by taxi drivers', 'Syria, America, Europe and Ethiopia', 'the people wants change and now is the time' 'Syria and Ethiopia' 'Ignoring Democratic Responsibility and Dictatorship' and a paper he presents in the public meeting hosted by Unity for Democracy and Justice Party**.** Ibid 58-61.
[24] Ibid.

anticipates that an uprising in Ethiopia would result in a Sub-Sahara African Spring as Tunisia's resulted in the Arab Spring.

During his presentation at the town hall meeting organized by the UDJ party, the accused discussed the 1974 and the 1991 historical revolutions in Ethiopia and asserted that Ethiopia was ready for another revolution. He analysed Ethiopian reality in light of the Arab Spring. He told the audience that the experiences in Tunis, Egypt, and Libya indicated that military and security forces could not stop the people from achieving what it wants. He advised that the uprising had to be led by political parties and that the oppression in Ethiopia was so deep rooted that there was no reason for the revolution not to be successful. The peaceful and lawful opposition had to be transferred from words to practice and advised this to be implemented in 2011/2012.[25] The court, in general terms, referred to other documents which were obtained from the e-mail accounts of the accused, intercepted telephone communications and interviews with different media and his opinions at a paltalk forum, and noted that they were similar in content as the eight documents.[26]

The court gives high probative value to the expressions that the defendants made to prove the prosecution's allegation. In relation to the documentary and audio-video evidence the prosecution produced against Eskinder, the court noted that his written and verbal expressions were to be examined in light of Articles 29(6) and (7) of the FDRE Constitution.[27] However, it did not examine the expressions in the light of the standard it set to test the lawfulness or legitimacy of the expressions. Instead, it simply summarised the contents of the expressions and concluded:

> the pieces of evidence the defendant [Eskinder] has admitted to be expressions of his opinion/view indicate that he, accepting Ginbot 7's program and objective, has been using different forums to present different provocative writings to advocate for bringing to Ethiopia of the uprising in the Arab world and North Africa and its

[25] Ibid 58.
[26] Ibid 60.
[27] Ibid 58.

> results where he exceeds his constitutional right to freedom of opinion and expression.[28]

The court reiterates its position relating to exceeding constitutional rights in the last paragraph of the judgment in which it summarises its analysis relating to all the defendants convicted under the first count as follows.

> The defendants, intending to assume political power unconstitutionally, in particular by disseminating writings and audio video relating to practicing in Ethiopia of the kind of uprising that took place in North Africa and the Arab world through exercising [by passing the limit of] their constitutionally guaranteed freedom of association and freedom of expression have been inciting and conspiring and for being members and exercising leadership role in Ginbot 7, have been convicted under Article 4 of the ATP.[29]

6.3 Examining the court's approach

Article 29 of the FDRE constitution which guarantees right of thought, opinion and expression recognises possibility of setting a limit on freedom of expression.[30] Of the seven subarticles under Article 29, the first five refer to and guarantee different aspects of freedom of thought, opinion and expression. The other two relate to limitations on the freedoms. While

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[28] Ibid 61.

[29] Ibid 64-65.

[30] Article 29. Right of Thought, Opinion and Expression:

1. Everyone has the right to hold opinions without interference.
2. Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice;
3. Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:
   a. Prohibition of any form of censorship.
   b. Access to information of public interest.
4. In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.
5. Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion.
6. These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.
7. Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.

subarticle 6 envisions a legislation that limits freedom of expression, subarticle 7 states that infringement of these limitations would result in legal responsibility.

As provided under Article 13(2) of the FDRE Constitution,[31] the rights under Article 29 of the Constitution are to be interpreted in the light of freedom of expression as recognised under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). While paragraphs 1 and 2 of Article 19 of the ICCPR recognise the right to freedom of opinion and expression, its paragraph 3 provides under what conditions these rights can be legitimately restricted. The Human Rights Committee, interpreting Article 19 of the ICCPR, notes that for a restriction on freedom of expression to be compatible with Article 19 of the Covenant, it 'must cumulatively meet several conditions set out in paragraph 3.'[32] That is, the restriction must be provided by law, it must relate to one of the aims set out in paragraph 3 (a)[33] and (b)[34] and it must be necessary to achieve a legitimate purpose. The Human Rights Committee underscored that restrictions on the right may be imposed 'only subject to these conditions'[35] thereby implying that expressions would not be considered as transgression of the limit set on freedom of expression in so far as there is no limitation imposed on the freedom that satisfy these prerequisites.

As the right to freedom of expression provided under Article 29 of the FDRE Constitution is to be interpreted in accordance with Article 19 of

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[31] Article 13(2) of the FDRE Constitution states: 'The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.' Right to thought, opinion and expression recognised under Article 29 of the FDRE Constitution is one of the rights under Chapter three of the Constitution. Ethiopia acceded to the ICCPR on 11 June 1993. United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>.

[32] United Nations Human Rights Committee, *Malcolm Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 Views adopted on 18 October 2000. <http://www.concernedhistorians.org/content_files/file/LE/195.pdf>.

[33] It refers to 'respect of the rights and reputation of others.'

[34] It refers to 'protection of national security or of public order, or of public health or morals.'

[35] UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 <http://www.refworld.org/docid/4ed34b562.html> ('*General Comment No. 34')*.

the ICCPR, it follows that in order to decide whether or not the expressions that defendants allegedly made are protected by Article 29, the court should consider whether or not these expressions violate a law which meets the conditions set out in Article 19(3) of the ICCPR. It is only after ascertaining that the expressions are not protected by the constitutional provision that the court may proceed to consider their relevance and probative value to the prosecution's allegation—the defendants' participation in the planning, preparation, conspiracy and attempt to commit a terrorist act.

In *FPP v Andualem Arage et al,* the court refers to Article 29 of the FDRE Constitution as its authority to pronounce the expressions that the defendants made violate the law. By so doing, the court has acknowledged that the conduct the defendants have allegedly committed is '*expression*.' On limitation of freedom of expression, Article 29(6) states:

> These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.

The constitution makes it clear that it is only 'in order to protect the well-being of the youth, and the honour and reputation of individuals,' to prohibit 'any propaganda for war,' and 'public expression of opinion intended to injure human dignity' that expression would be suppressed.[36] However, the court declares the expressions that the defendants made as those in violation of Article 29 of the Constitution without verifying the existence of any of these conditions. The court, apart from citing Article

[36] Referring to the rights in the preceding sub articles, Article 29(6) states:

> These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.

29, does not refer to a specific law passed in pursuance thereof, without which expression cannot be considered as being incompatible with the right to freedom of expression that Article 29 recognises. The constitutional provision is not equivalent to the law that Article 19(3) of the ICCPR envisions. Any restrictions on freedom of expression 'to be characterised as a "law", under the ICCPR, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.'[37]

Article 29(6) of the Constitution, like Article 19(3) of the ICCPR, provides permission for a legislation that limits freedom of expression to be passed under some conditions but does not directly limit freedom of expression. While it requires the limitation be specifically provided by law, as does Article 19(3) of the ICCPR, it even provides for a narrower ground to limit the right.[38] As can be implied from Article 29(6), in order to pronounce that the expressions the defendants made exceeded the limit of the right, the court is supposed to cite a subsidiary law that has been passed in conformity with Article 29(6) and to show that the expressions violate this law. The court does not. Simply relying on the fact that the right can be limited, the court concludes, without even referring to a legislation that sets the limitation, that the defendants made the statements and expressions in excess of their freedom of expression.[39] In upholding that the defendants have passed the limit for their freedom of expression, the court emphasised that they made different provocative written and verbal statements intended to advocate the bringing to Ethiopia of the uprising in the Arab world and North Africa which resulted in loss of many lives, destruction of property and bodily injury.[40]

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[37] *General comment no. 34,* para. 25.

[38] Thus, the FDRE Constitution provides a wider protection to freedom of expression. While Article 19 of the ICCPR recognises two grounds to restrict freedom of expression, the FDRE Constitution recognises only one of them —protection of the well-being of the youth, and the honour and reputation of individuals. Be the usefulness of such approach as it may, Article 29(6) of the FDRE Constitution does not recognise 'protection of national security or of public order (ordre public), or of public health' as a reason to limit freedom of expression.

[39] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 61, 64-65

[40] Ibid 61.

Justice Robert Jackson's statement in connection with the reach of freedom of expression as recognised under the First Amendment to the US Constitution is in order:

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of is substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...[41]

Furthermore, emphasising the inevitability and desirability of opposing views in one's freedom of expression, Justice William Douglas states the following: '[A] function of free speech under our system of government is to invite dispute,' and that speech 'may indeed best serve its high purposes when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'[42]

The UN Human Rights Committee supports this view. In the absence of a specific law, the UN Human Rights Committee asserts, 'even expression that may be regarded as deeply offensive'[43] is protected by freedom of expression. It follows that in the absence of a specific law that prohibits the expression stated in the document that Nathanael duplicated and distributed, the court's reference to the activity being conducted in secret, the demonstration not being supported by the party to which the defendant is a member, and permission for the demonstration not being granted[44] do not seem relevant to conclude that the defendant has exceeded his freedom of expression. As provided under Article 29 (2) of the FDRE Constitution, one's right to freedom of expression includes 'freedom to ... impart information and ideas of *all*

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[41] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) in Nancy Chang, *Silencing Political Dissent* (Seven Stories Press, 2002) 93.

[42] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) in Nancy Chang, *Silencing Political Dissent* (Seven Stories Press, 2002) 101.

[43] *General comment no. 34,* pare 11; United Nations Human Rights Committee, *Malcolm Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 Views adopted on 18 October 2000. <http://www.concernedhistorians.org/content_files/file/LE/195.pdf>.

[44] While appropriate regulations may be made in the interest of public convenience relating to the location of open-air meetings and the route of movement of demonstrators, the law does not require that permission be obtained for a peaceful demonstration. Constitution (Ethiopia) Art 30 (1).

kinds, regardless of frontiers, either orally, in writing or in print ...'[45] In particular, the aptness of the court's reference to the content of the document to infer the defendant's criminal association with Ginbot 7 and to conclude that his activity is illegal are unacceptable in view of Article 29(6) of the Constitution which explicitly prohibits limiting freedom of expression and information 'on account of the content … of the point of view expressed.' Ronen relates prohibition of restriction of expression solely based on its content to John Stuart Mill's argument on the importance of a free market of ideas in society's pursuit of the truth and that there is no guarantee that a certain opinion is a priori false (or true).[46]

Defending the finding of the court, one of the judges, R 2, states 'the defendants based their argument on their constitutional right to freedom of expression. We do not think their right is restricted by the Anti-terrorism law and the prosecution. But we found that they have passed the limit of their right.' By declaring that the expressions are outside of what is protected by freedom of expression, without verifying the fulfilment of the necessary conditions to make such declaration, the court limits freedom of expression beyond what is allowed under article 19(3) of the ICCPR. That is the risk Article 5 of the ICCPR is meant to avert when it prohibits doing anything that limits rights and freedoms recognised in the Covenant 'to a greater extent than is provided for' therein.

An expression can be challenged for exceeding the proper limits of the right only where there is specific law that prohibits the expression. As can be implied from General Comment No. 34, the court is supposed to 'demonstrate the legal basis for any restrictions imposed on freedom of expression.'[47] To conclude that a particular restriction is imposed by law, the court has to provide the details of the law and analyse how the expressions in question fall within the scope of the law that prohibits the expression on valid grounds. In the absence of such law any expression,

[45] Emphasis added.

[46] Yael Ronen, 'Terrorism and freedom of Expression in international law' in Ben Saul (ed.), *Research Handbook on International Law and Terrorism* (Edward Elgar, 2014) 437, 444.

[47] *General comment no. 34,* para 27; United Nations Human Rights Committee, *Mr. Viktor Korneenko v Belarus*, UN Doc CCPR/C/95/D/1553/2007 Communication No. 1553/2007, Views adopted on 31 October 2006.

including an offensive one, is protected under the ICCPR and is, therefore, under the FDRE Constitution. [48]

Stating that the defendants' expressions called for uprisings that would result in a change of government, the court reasoned that the defendants have been involved in an activity that contravenes Article 9(3) of the Constitution, which prohibits assuming 'state power in any manner other than that provided under the Constitution' —election by a ballot box.[49] This reasoning is problematic for two reasons. First, by requiring that the limitation on freedom of expression be provided by law, Article 19(3) of the Convention and Article 29(6) of the FDRE Constitution do not envision constitutional provisions. The law that Article 19(3) refers to is supposed to be 'formulated with sufficient precision'[50] which is not in the nature of constitutional provisions in general and Article 9(3) of the FDRE Constitution in particular, which prohibits assumption of 'state power in any manner other than that provided under the Constitution.'[51] By providing that the freedom of expression 'can be limited only *through laws which are guided by* the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed', Article 29(6) of the Constitution would not be referring to other provisions of the Constitution, such as Article 9(3). It should refer to subsidiary laws to be passed in accordance with the guideline that this particular provision sets.

Second, even if a constitutional provision were said to fall under the ambit of 'law' envisaged under Article 19(3) of the Convention and Article 29(6)

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[48] The only expression that both the constitution and ICCPR require to be prohibited relates to propaganda for war and the public expression of opinion intended to injure human dignity.

[49] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 43, 55, 61.

[50] *General Comment no.* 34, Para 25.

[51] One evidence indicating that the provision is not specific enough is the dispute between the parties in *FPP v Andualem Arage et al.* While the defendants are prosecuted on the ground that their activity has allegedly risked the constitution and the constitutional order and that they conspiracy to assume state power unconstitutionally, they contend that their opposition arises from the fact that the government seizes power not in a manner provided under the Constitution. This constitutional provision is so broad that it is open to interpretation so much so that the two parties accuse each other as violating the same provision. *Andualem Aage et al v FPP (* F. S. Ct., Cr. App. Nos. 83593, oral argument, 19 December 2012) 10, 30-31

of the Constitution, there are two additional requirements that need to be fulfilled for the restriction to be justified: legitimacy and necessity about which the court says nothing. As noted by the Human Rights Committee, 'restrictions [on freedom of expression] are not allowed on grounds *not specified in paragraph 3.*'[52] No reasonable interpretation of the statements that Eskinder and Andualem made and the flyer that Nathanael duplicated and distributed would indicate their impact on wellbeing of the youth, and honour and reputation of others, the only reasons that the FDRE Constitution recognises as a valid ground to limit freedom of expression. Protection of state power is not among the legitimate grounds to limit freedom of expression in both instruments. This renders the court's reference to Article 9(3) of the Constitution, which prohibits assumption of state power other than that the constitution provides for, as a law that sets a limit on freedom of expression, unacceptable.[53]

In short, in the absence of specific law that subarticle 6 envisions, Article 29 of the FDRE Constitution supports the defendants' claim that their expressions are protected. Thus, the court's reference to Article 29, in the absence of a specific law that the constitutional provision envisions, to conclude that the defendants have exceeded the limit of their freedom of expression recognised under Article 29 is consistent neither with the plain meaning nor with the spirit of freedom of expression as provided under Article 29 of the FDRE Constitution.

6.4 Burden and standard of proof

6.4.1 Reversal of onus of proof and its repercussion on the defence

The right to presumption of innocence is recognised under Article 20(3) of the FDRE Constitution, Article 14(2) of the ICCPR[54] and Article 11(1)

[52] *General Comment No 34*, emphasis mine.

[53] Because the requirements that a limitation be provided by law and legitimate are not satisfied, the question of whether the 'necessity' test in such situations is met does not arise. But on how to analyse whether or not a law passed in order to limit freedom of expression is compatible with the International Convention on Civil and Political Rights see *General Comment No. 34*.

[54] It states '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'

of the Universal Declaration of Human Rights.[55] According to Article 20(3) of the constitution '[d]uring [criminal] proceedings accused persons have the right to be presumed innocent until proved guilty according to law …' As noted above, by virtue of Article 13 (2) of the Constitution, this right is to be interpreted in light of parallel provisions of the ICCPR and UDHR. The Human Rights Committee interprets Article 14(2) of the ICCPR as imposing on the prosecution the burden of proving the charge, guaranteeing that no guilt can be presumed until the charge has been proved beyond reasonable doubt.[56] The Human Rights Committee clarified the expected standard and burden of proof for parties to the ICCPR by specifying that:

> The presumption of innocence, which is fundamental to the protection of human rights, *imposes on the prosecution the burden of proving the charge*, guarantees that *no guilt can be presumed until the charge has been proved beyond reasonable doubt*, ensures that *the accused has the benefit of doubt,* and requires that persons accused of a criminal act must be treated in accordance with this principle. [57]

Thus, the FDRE Constitution, by recognising presumption of innocence, implies the prosecution's obligation to prove its case beyond reasonable doubt. Unlike anti-terrorism laws in some other jurisdictions,[58] the ATP does not provide an exception to this principle.[59] Despite that, in the case of *FPP v. Andualem Arage et al* the trial court requires the accused to prove their innocence in the following terms, 'for the defendants to

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[55] It states "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

[56] Human Rights Committee, UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 <http://www.refworld.org/docid/478b2b2f2.html>.

[57] Ibid Para. 30, emphasis added.

[58] For example see Criminal Code (Australia) s 102.3(2).

[59] The Federal Criminal Justice Policy of Ethiopia envisions laws that may reverse the onus of proof. While the policy refers to terrorism as among the crimes where the defendant may be required to prove their innocence, the ATP does not incorporate this idea. However, in so far as it is not translated into legislation, a policy would not have a force of law. Even if there were a specific provision reversing the onus of proof in terrorism prosecutions, their validity would still be questionable in light of Article 20(3) of the FDRE Constitution which recognizes the right to presumption of innocence. As provided under Article 9(1) of the FDRE Constitution '[t]he Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.'

successfully rebut the prosecution's case and be acquitted, they need to *prove* that they: did not plan, prepare, conspire, incite and attempt[60] commission of a terrorist act listed under Article 3; and have never had connection with Ginbot 7.'[61]

By setting proof of innocence as a prerequisite for acquittal, the court reverses the onus of proof. Both the trial and appellate courts reject evidence of the defence on the grounds that 'the evidence *does not prove innocence* of the defendants.'[62]

In *FPP v Andualem Arage et al* facts that the prosecution alleged as central were admitted. The defendants did not deny their involvement in activities intended to mobilise the public for the Arab Spring type of opposition and resistance. They only contend that they did not have the intention to commit a terrorist act while carrying out these activities. Arguing that conduct not accompanied by terrorist intent would not constitute a breach of Article 4, they introduce evidence that would make the existence of intent to commit a terrorist act doubtful. For example, Andualem introduces six witnesses who told the court uniformly that he was known for his unwavering stand for a peaceful struggle and that he facilitated and coordinated all the discussion forums representing the UDJ, a legally registered opposition political party in his capacity as its public relations head. Similarly, Nathanael produced four witnesses, who consistently testified that he had been struggling peacefully within the UDJ party and was known for his faith in a peaceful struggle. A senior opposition leader, R 10, still insisted 'Andualem is a real deacon for peaceful struggle. Never can you imagine him as a terrorist.'

However, the court disregarded these testimonies on the ground that the witnesses were not capable of knowing everything that the accused might

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[60] Though the prosecution does not charge the defendants for attempt to commit a terrorist act, the court throughout its judgment reasons as if they were charged for attempt in addition to planning, preparation, incitement and conspiracy to commit a terrorist act. See *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 41 and 42. By so doing the court applies the evidence presented to prove a pre-inchoate act to infer inchoate act.

[61] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 41 (emphasis added).

[62] *Andualem Arage et al v FPP* (F. Sup. Ct. Cr. App. No. 83593, judgment, 2 May 2013) 1; emphasis added.

have done.[63] The court reasoned that because the witnesses knew only what the defendants told them, their knowledge about the defendants could not be complete.[64] 'Other than the accused themselves', the court maintains, 'only God knows everything the accused does.'[65] Thus, the court disregarded the testimonies relating to good their behaviours, faith and trust in peaceful struggle, and that some of the acts had been conducted in the name and on behalf of a legally registered opposition political party stating that all these do not rule out that the accused did engage in a terrorist act covertly.[66]

Although the court in *FPP v Elias Kifle et al* does not require the defence to prove their innocence as explicitly as in *FPP v Andualem Arage et al,* it adopts a similar position as can be implied from its evaluation of the evidence of the defence.[67] In this case, too, the involvement of the defendants in the alleged conduct — writing, distribution, and taking pictures of the slogans '*Meles Beka'* and *'EPRDF Beka'* — is not denied. The defendants only argue that these acts were not accompanied by an intention to commit a terrorist act. For example, one of the defendants, Reeyot, admitted that she took pictures of the slogans and sent them to the first defendant, Elias Kifle, but argues that it was a purely journalistic activity. One of Reeyot's witnesses, who introduced Reeyot to Elias Kifle, testified how the relationship between the two defendants began and explained the terms and conditions of their agreement. The witness told the court that he initiated Reyot's relation with Elias and their relationship, as he initiated, is that she reports news covering newsworthy activities in Ethiopia to Elias and the latter pays her for the services. E-mail conversations between Reeyot and Elias confirm this testimony. The witness told the court that she agreed to provide journalistic work for remuneration. In the absence of evidence indicating that this relation

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[63] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 42, 44, 46-47.

[64] Ibid 44, 46-47.

[65] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 44.

[66] Ibid 44, 47. By so stating, the court has taken a position that no matter what is testified on behalf of the accused, the court would not admit the testimony into evidence.

[67] *FPP v Elias Kifle et al* (Fed. H. Ct., Cr. F. No. 112199, Judgment, 19 January 2012) 14, 16.

changed to a terrorist relation, it seems this testimony was relevant to cast a doubt on her terrorist intent in providing the services to Elias. This testimony is consistent with the documentary evidence the prosecution produced against her, which simply indicates that she took photographs of the slogans written in different parts of Addis Ababa and sent them to the first defendant, an activity that journalists carry out.

In another terrorism prosecution, *FPP v Abdiwole Mohamed et al,*[68] the third and fourth defendants, Swedish journalists, were charged with entering Ethiopia illegally to provide support to ONLF, one of the proscribed terrorist organisations in Ethiopia. The journalists admitted that they crossed the country's border illegally (the conduct) but denied that they did it to provide support to ONLF. They introduced expert witnesses who testified on the compatibility of crossing borders illegally to obtain news with the ethics of journalism. The witnesses consistently testified that journalists, including themselves, do cross borders routinely without getting permission from authorities and that such conduct has been accepted practice in the profession. While these testimonies are relevant to cast doubt on the terrorist intent of the journalists, the court dismissed their probative value by indicating that the witnesses do not know everything about the defendants which is once again the 'only God knows' reasoning. The court relied on the admitted fact of crossing the border illegally to convict them of supporting a terrorist organisation reasoning that had they not had the intention to support the ONLF, they would have entered the country lawfully disregarding the expert testimony relating to the practice in journalism.[69]

In both cases, the defendants produced evidence that challenge the core of the alleged offence — their state of mind while committing the alleged conduct. Because proving a negative is next to impossible, the evidence

[68] *FPP v Abdiwole Mohamed et al* (F.H. Ct., Cr. F. No. 112198, judgment 21 December 2011) 17

[69] *FPP v Abdiwole Mohamed et al* (F.H. Ct., Cr. F. No. 112198, Judgment 21 December 2011) 15. However, sources show that the region is not open to local and foreign journalists. There were cases where foreign journalists were detained while attempting to go into the region after entering the country legally. 'Ethiopia Detains Times Journalists for Five Days', *The New York Times (*online), 22 May 2007 <http://www.nytimes.com/2007/05/22/world/africa/22cnd-ethiopia.html?_r=0>.

can only cast doubt that the admitted conduct was accompanied by an intention to commit a terrorist act. That is more so in view of the fact that in both cases the prosecution does not introduce evidence relating to the fault element under Article 4.[70] However because the court sets a requirement that the defendants' acquittal is predicated on proving their innocence[71] and that only the defendants themselves and God know if they did not commit the alleged crime covertly, these testimonies were rejected as irrelevant.

On the challenging nature of proving innocence, Justice Zinn of Canada states:

> it is difficult to see what information any petitioner could provide to prove a negative, i.e. to prove that he or she is not associated with Al-Qaida. One cannot prove that fairies and goblins do not exist anymore than … any … person can prove that they are not an Al-Qaida associate.[72]

Similarly, the House of Lord's decision points to the difficulty of proving innocence. Under the UK Terrorism Act 2000 on charges of being or professing to be a member of a proscribed organisation, it was a defence to prove that the defendant had not joined, professed membership, or been active in the organisation while it was proscribed. Disapproving this burden on the defendant, Lord Bingham, for the majority, indicated that 'it might be all but impossible for him to show that he had not taken part in the activities of the organisation at any time while it was proscribed.'[73]

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[70] However, indicating that rebuttal requires that defence produces evidence relating to the very (physical) alleged act and suggesting that the testimonies do not meet this requirement, the court states that 'these testimonies do not rebut what has been established by the prosecution's evidence' as if testimonies relating to the fault element are irrelevant. *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 47.

[71] While the court expressly and tacitly requires the defendant to prove innocence it does not specify the standard of proof that they would have to meet in order to discharge the burden and to be acquitted, which exacerbates the problem. As the court dismissed the evidence on relevancy grounds it did not go to weighting the evidence.

[72] *Abdelrazik v. Canada* 2009 FC 580 para 11 in Kent Roach, *the Eroding Distinction between Intelligence and Evidence in Terrorism Investigations (2010)* 21 <http://ssrn.com/abstract=1884999>.

[73] [2004] UKHL 43, [2005] 1 A.C. 264, at [51] quoted in David Hamer, 'The presumption of innocence and reverse of burdens: A balancing Act' (2007) 66(1) *The Cambridge Law Journal* 142, 164-65.

It is intriguing that the court rejected evidence of the defence for the very reason that the burden of proving innocence should not be imposed on the defendant. The court rejects defence evidence mainly on the ground that no witness can testify if they have not committed the alleged crime as only God knows if they did not commit the crime. By so stating the court has impliedly acknowledged that proving innocence is a daunting, perhaps impossible, task. The court requires the defendants to prove their innocence. When they produce evidence the court turns around and tells them that they cannot prove their innocence as only God knows if they did not commit the alleged crime thereby foreclosing the chance of acquittal — their conviction being a foregone conclusion.

6.4.2 The Standard of proof

That the trial court convicted them on the grounds they did not prove their innocence makes *Andualem Arage et al* appeal against the judgment arguing, inter alia, that the trial court convicted the appellants without their guilt being proved *beyond reasonable doubt*.[74] The prosecution, on its part, argues this standard is not known to Ethiopian law.[75] According to the prosecution, the defence argument is based on a standard applicable in other jurisdictions.[76]

The appellate court –the Federal Supreme Court– does not specifically address these grounds of appeal. However, its endorsement of the judgment of the trial court indicates that the court does not evaluate the prosecution's case in light of the beyond reasonable doubt standard. The Federal Supreme Court, in upholding the lower court's decision, replicates the reasoning of the lower court. In relation to Andualem, the court upholds that the evidence he produced including the oral evidence does not establish that 'he *has not committed* the crime.'[77] Moreover, the court in rejecting the appeal reasons that 'the defence witnesses *do not prove* that the defendant does not establish a clandestine group within

[74] *Andualem Arage et al v FPP* (Fed. S. Ct., Cr. App. No. 83593 Judgment, 2 May 2013) 8.
[75] *Andualem Arage et al v FPP* (Fed. S. Ct., Cr. App. No. 83593/82675, oral hearing transcript, 19 December 2012) 15-16.
[76] *Andualem Arage et al v FPP* (Fed. S. Ct., Cr. App. No. 83593 Judgment, 2 May 2013) 8.
[77] Ibid 31; emphasis added.

the UDJ party and does not have a covert relation with the leadership of Ginbot 7.' [78]

Similarly, in an appeal that Reyot lodged against the judgment in *FPP v Elias et al,* the appellate court did not evaluate the prosecution's case in light of the beyond reasonable doubt standard. Rather, the appellate court focused on her involvement in providing information to Elias, an activity that a terrorist or a journalist can engage in, instead of inquiring into whether or not the fault element that needed to accompany the conduct, which separates a terrorist from a journalist, had been established. Noting that '*Solidarity Movement for New Ethiopia*', a document said to reflect the position of an outlawed organisation, had been found in her e-mail account, the appellate court reasoned that where this fact is added to her role as a source of information to Elias it becomes clear that her relation with him was not journalistic.[79] According to R 8, the court reached this conclusion without even ascertaining Reyot's knowledge of the group that the court 'assumed' to have been established among the other defendants let alone her knowledge that the group is a terrorist organisation. Moreover, it was not established if Reeyot was aware of Elias' involvement in terrorist activities.[80]

Judges and prosecutors were asked a question relating to the applicable burden and standard of proof in criminal cases in Ethiopia. They had different views. One of the judges, R 1, confirming the court's approach in *FPP v Andualem Arage et al*, responded 'are not the accused supposed to prove that they did not commit the alleged crime?' Four other judges (two from the Federal High Court and the other two from Federal Supreme Court), without explaining why they reject evidence of the defence on the ground that it does not prove innocence, responded that the accused should not be expected to prove their innocence. R 1 and R 2 indicated that 'though courts traditionally use beyond reasonable doubt

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[78] Ibid emphasis added.

[79] *Reeyot Alemu v FPP* (Fed. Sup. Ct., Cr. App. No. 77654, Judgment, 31 July 2012) 8-9.

[80] The fact that the ATP, unlike the United Kingdom's Terrorism Act 2000, does not confine participation/membership only to proscribed terrorist organisations opens this loophole.

standard, the Cr. Pro. C. does not seem to suggest that. So, we apply sufficient evidence standard.' R 3 responded 'sufficient evidence implies beyond reasonable doubt standard. Though there might be theoretical differences, I do not see much difference in practice between the two standards.' R 5, one of the judges at the High Court responded 'it is clear that our law does not adopt the beyond reasonable doubt standard. It is sufficient evidence. The prosecutors base their argument on this. But in practice the court usually applies the beyond reasonable doubt standard.' R 4, another High Court judge stated 'beyond reasonable doubt is not part of Ethiopian law.'

The prosecution strongly argues that Ethiopia does not have a specific law requiring the prosecution to prove its allegation beyond reasonable doubt. Acknowledging that law schools teach the applicability of the beyond reasonable doubt standard in Ethiopia, one of the prosecutors (PP2) responded:

> we even wonder from where our teachers at the law schools and some practitioners bring this notion of *beyond reasonable doubt* standard in the Ethiopian context. I do not think that it is appropriate to argue that this standard is applicable in Ethiopia based on legal jurisprudence and probably the legal systems in other countries; though we were told at the law schools that prosecution has to prove its case by a beyond reasonable doubt standard there is no such law in Ethiopia"

On the other hand when R 6, who advanced a similar argument as R 7 before the Federal Supreme Court in *Andualem Arage et al v FPP*, was asked to comment on the applicable standard of proof in Ethiopia they responded, 'is there such a problem, on record? We might be discussing the question theoretically. But in my view it should be beyond reasonable doubt standard.'

It is undeniable that due to the lack of law of evidence in Ethiopia, specific provisions relating to this matter cannot be found.[81] However, this does not mean that there are no statutory and constitutional provisions

[81] Hanna Arayaselassie Zemichael, 'The Standard of Proof in Criminal Proceedings: the threshold to Prove Guilt under Ethiopian Law' (2014) 8(1) *Mizan Law Review* 84, 85, 91, 102.

pertaining to the burden and standard of proof in criminal cases. Once a criminal charge is filed there are two stages during trial where the prosecution's evidence shall be weighed. The first is immediately after the prosecution has exhausted its evidence. At this stage the prosecution's evidence is assessed to decide whether the accused should be ordered to introduce their defence or acquitted without introducing defence on the 'no case to answer' ground. Weighing evidence at this stage is regulated by Articles 141 and 142 of the Cr. Pro. C.

Article 141__Acquittal of the accused when no case for prosecution

'When the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made [out] which, if unrebutted, would warrant his conviction, shall record an order of acquittal.'

Article 142__Opening of case for defence

'Where the court finds that a case against the accused has been made … it shall call on the accused to enter upon [his] defence and shall inform him that [he] may make a statement in answer to the charge and may call witnesses in [his] defence.'

According to these provisions, in order to decide whether or not the accused should enter into their defence, the court shall determine whether or not the prosecution has made a case against the accused. A case against the accused is said to have been made where the prosecution's case is such that 'if unrebutted, would warrant [the defendant's] conviction.' These provisions do not reveal more about what *standard* is to be applied at this stage to decide whether to order the accused to enter into their defence or to acquit.[82] Because these provisions indicate the prosecution's case has to be so strong that the defendant's failure to rebut would result in the latter's conviction, the court

[82] Cf Lewis Gordon, Sean Sullivan, and Sonal Mittal, *Ethiopia's Anti-Terrorism Law a Tool to Stifle Dissent* (2015) 18 <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf>. In their study they note that Article 142 'dramatically and drastically departs from the rule that requires the state to prove its case beyond a reasonable doubt.' The study attributes the burden shifting to this provision.

has to apply the standard applicable for conviction. Article 149 of the Cr. Pro. C.,[83] under which the court decides whether the accused is to be acquitted or convicted, does not deal with the applicable standard of proof. Its subarticles 2 and 3 simply provide what the court has to do 'where the accused is found not guilty' and 'where the accused is found guilty' respectively without indicating the standard to decide whether or not the accused is found guilty.

Stanley Fisher, tracing the source of Articles 141 and 142 of the Cr. Pro. Code to parallel provisions of the Criminal Procedure Code of Malaysia, which require the prosecution to prove its case *beyond reasonable doubt*, concludes that these provisions impose an obligation on the prosecution to prove its case beyond reasonable doubt.[84] Similarly, Hanna argues the Criminal Procedure Code implies the beyond reasonable doubt standard.[85] As Worku argues the accused need only produce evidence that would make the prosecution's evidence doubtful; they are not required to prove more.[86]

6.4.3 Lightening the prosecution's burden

The court's position that the beyond reasonable doubt standard is not applicable to the prosecution has resulted in lightening the prosecution's burden so much so that marginally or tangentially related or facts that are

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[83] In its relevant part this provision provides the following
Art. 149. - *Judgment and sentence.*
(1) When the final addresses including the addresses under Art. 156, if any, have been concluded, the court shall give judgment. The judgment shall be dated and signed by the judge delivering it. The judgment shall contain a summary of the evidence, shall give reasons for accepting or rejecting evidence and shall contain the provisions of the law on which it is based and, in the case of a conviction, the article of the law under which the conviction is made.
(2) Where the accused is found not guilty, the judgment shall contain an order of acquittal and, where appropriate, an order that the accused be released from custody.
(3) Where the accused is found guilty, the court shall ask the prosecutor whether he has anything to say as regards sentence by way of aggravation or mitigation. The prosecutor may call witnesses as to the character of the accused.

[84] Stanley Z Fisher, *Ethiopian Criminal Procedure, A Sourcebook* (Haile Selassie I University Press, 1969) 311.

[85] Zemichael, above n 81, 94.

[86] Worku Yaze Wodage, 'Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law' in Wondwossen Demissie (ed), *Human Rights in Criminal Proceedings: Normative and Practical Aspects, Ethiopian Human Rights Law Series*, Vol. III, (Addis Ababa University Press, 2010) 130.

not related at all have been used as evidence in support of the prosecution's case. Three of these are discussed below as a manifestation of the lightening effect.

(a) membership as evidence to prove a pre-crime terrorist activity

As noted above the court, in its judgment in *FPP v Andualem Arage et al*, states that if the defendants are to be acquitted, one of the points that the court needs to be satisfied with is that they never had contact with Ginbot 7.[87] Indeed the defendants' relation with Ginbot 7 is the prosecution's prominent allegation in all of the counts, including pre-crime terrorist activities. From the way the court frames the issues, it is clear that the court treats this matter as the central element of the alleged offence so much so that even if the accused *proves* that they did not 'plan, prepare, conspire, incite, and attempt' commission of a terrorist act, they would still be guilty, if they cannot *prove* that they had not worked with Ginbot 7.

The court's approach seems to have been influenced by the prosecution's argument. Though unclear from the charge, the prosecution acknowledges that it has relied on the aims, purposes, and strategies of Ginbot 7 of which the defendants are alleged to be members or leaders, rather than on what the defendants have actually done, to charge the defendants for preparation, planning, inciting and conspiracy to commit a terrorist act.[88] When challenged by the defence to specify in relation to which of the terrorist acts listed under Article 3 the defendants are charged to have planned, prepared, conspired, or incited, the prosecution responds as follows. As Ginbot 7 has as its aims/purposes killing government officials, looting financial institutions and destroying public institutions which relate to terrorist acts listed under Article 3 of the ATP, by being its members or leaders they have a dedication to commit these crimes. The prosecution forcefully argues that 'in so far as one joins a terrorist organisation it is inevitable that they would assume some

[87] See above n 61 and the accompanying text.
[88] *FPP v Andualem Arage et al* (Fed. Sup. Ct., Cr. F. No. 112546, ruling, 30 November 2011) 7.

responsibility for the accomplishment of the organisation's plans and objectives.'[89] According to the prosecution this logic justifies charging members and leaders of a terrorist organisation for planning, preparing and conspiring to commit any of the acts that the organisation professes as its means of achieving its end. The implication is that to prove conspiracy the prosecution does not need to show particular agreement among members to commit a terrorist act. Similarly, to prove planning and preparation there is no need to show steps that members have taken with a view to committing a terrorist act. The prosecution's tacit argument is that because the defendants are members or leaders of Ginbot 7, the aims and purposes of which are listed under Article 3 of the ATP, they are charged with preparation, planning, conspiracy, and instigation of a terrorist act. However, an offence under Article 4, as opposed to an offence under Article 7 of the ATP, is predicated upon carrying out certain conduct with an intention to commit a terrorist act.[90]

Thus, while no evidence relating to planning, preparation, incitement and conspiracy to kill public officials, loot financial institutions, or to destroy public institutions, which are directly related to the acts listed under Article 3(1) (4) and (6) of the ATP is produced, the court convicted the accused for this offence. The conviction is based on evidence that the court deemed to have proved their connection with Ginbot 7 which was not rebutted through establishing that the defendants did not work with Ginbot 7. The Federal Supreme Court, in upholding the trial court's decision, reasons 'the defence witnesses *do not prove* that the defendant … does not have a covert relation with the leadership of Ginbot 7.' [91]

However, membership is criminalised because the 'prohibited relationship is directed toward illegitimate future conduct and this conduct should be prevented by way of early intervention.'[92] Its preparatory nature justifies its criminalisation. While membership of a terrorist organisation

[89] Ibid 8.
[90] G L Rose and D Nestorovska, Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms (2007) 31(1) *Criminal Law Journal* 20, 32.
[91] *Andualem Arage et al v FPP* (Fed. Sup. Ct., Cr. App. No. 83593, judgment 2 May 2013) 31.
[92] Liat Levanon, 'Criminal Prohibitions of Membership in Terrorist Organizations' (2012) 15(2) *New Criminal Law Review* 224, 248.

is criminalised to prevent future terrorist acts, one's status as a member in and by itself does not prove that he/she is actually involved in planning, preparation for, attempt or inciting commission of a terrorist act. Thus, there is no reason to prosecute and punish one for being a member of a terrorist organisation and for being involved in preparation for or planning of a terrorist act based on their being a member of a terrorist organisation.

As Levanon succinctly argues:

> … it should be kept in mind that the mens rea of most membership offences distances these offences from the realm of criminal attempts, which … are characterized by an intention to commit the offense. Most membership offences do not require even knowledge of a specific planned offense, let alone the intention to participate in its commission. All that membership offenses require is that the perpetrator knows that the organization has the general aim of committing a grave offense.[93]

Thus, one's membership should not be confused with and used as evidence to prove one's involvement in a precursor crime that actually requires a different intention than being a mere member. Proving violation of Article 4 of the ATP requires establishing one's actual involvement in preparation for or planning a terrorist act that Article 4 envisions. Membership is merely a 'declaration of willingness to move forward and commit, or take part in the commission of a terrorist attack.'[94] While there is a potential that members of a terrorist organisation may be involved in terrorist acts in the future, this does not suffice to convict them as guilty of preparation for or planning of a terrorist act that Article 4 envisions.

Convicting someone of committing a preparatory act to perpetrate a terrorist act on the ground that by being a member of a terrorist organisation they intend to commit a terrorist act in the future is not supported under the ATP. This is more so in view of the Supreme Court's description of Ginbot 7 as a 'dual-purpose organisation.'[95] According to

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[93] Ibid 252-53.
[94] Ibid.
[95] *Andualem Arage et al v FPP* (Fed. Sup. Ct., Cr. App. No. 83593, Judgment, 2 May 2013) 15-16.

the Court, Ginbot 7, which has been proscribed as a terrorist organisation by the legislative body, has two approaches to opposing the government. The first is engaging in terrorist acts. The other is what the court refers to as 'mobilizing public resistance' against the government, which is apparently a non-terrorist method.[96] The Court has noted that Andualem, Eskinder and Nathanael were involved in the former strategy of the organisation. Despite this, the court convicted them as charged of different terrorism-related counts including being leaders of a terrorist organisation, and preparation for and planning of a terrorist act.

By convicting them as leaders while acknowledging their role as being in the non-terrorist strategy of Ginbot 7, the court interprets Article 7 as applicable to any member irrespective of participation.

Following Levanon's argument the mere fact of membership in such organization does not automatically indicate an intention to commit a criminal offence.[97] As argued in Chapter four, Article 7 of the ATP requires some kind of participation in support of the terrorist organisation in the commission of a terrorist act in addition to being a member. Thus, instead of inferring 'preparation for or plan' to commit a terrorist act from one's membership in a terrorist organisation, their actual participation being in the non-terrorist side of the organization should be used as evidence to treat them as 'non-members' of the organisation for the purpose of commission of a terrorist act.

Moreover, linking the defendants' connection with Ginbot 7 to whether or not the defendants have committed a pre-crime terrorist act is problematic in two respects. First, convicting the defendants of planning, preparing, inciting, conspiring or attempting to commit a terrorist act based on their contact with Ginbot 7 does not seem consistent with the spirit of the ATP which criminalises pre-crime terrorist activities and participation in a terrorist organisation in separate provisions and with significantly different punishments.[98] If mere membership means any or

[96] Ibid.
[97] Levanon, above n 92, 252.
[98] While being involved in pre-crime terrorist activity in violation of Article 4 of the ATP is punishable up to death, being a member, a leader, or supporter would only result

all of the pre-crime terrorist activities under Article 4, one would wonder as to why there is Article 7 that criminalises involvement as a member or leader of a terrorist organisation.

The second problem with the court's approach in inferring pre-crime terrorist acts from membership in a terrorist organisation relates to the principle of prohibition of double jeopardy. In *FPP v Andualem Arage et al*, the defendants' relation with Ginbot 7 is central to the second and third counts, which respectively relate to the leadership and membership roles of the defendants in Ginbot 7, both of which are criminalised under Article 7 of the ATP. Thus, convicting the defendants and subjecting them to punishment for planning, preparing, inciting and conspiring to commit a terrorist act under Article 4 based on their roles in Ginbot 7 would subject them to double punishment for the same act. As the defendants are already convicted under Article 7, convicting them again under Articles 4 and 3 exclusively based on their membership or leadership role in Ginbot 7, would render their conviction under Article 7 for their participation as leaders and members of a terrorist organisation as subjecting them to two punishments for the same act, which the principle of double jeopardy prohibits.[99]

Thus, if what is proved is the defendant's involvement in Ginbot 7 as a leader or member, they have to be charged under the provisions that specifically criminalise this conduct. A recent Federal High Court decision on the issue is in order. In *FPP v Zelalem Workagegnehu et al*,[100] the prosecution charged the defendants, inter alia, under Article 4 of the ATP. In a ruling given after the prosecution's evidence was concluded, the

in up to a ten, twenty and fifteen year jail terms under Articles 7 (1), 7 (2) and 5 of the ATP respectively.

[99] It subjects the defendants to multiple punishment for a single conduct which constitutes a double jeopardy. Charles L. Cantrell, 'Double jeopardy and multiple punishment: An Historical and Constitutional Analysis' (1983) 24 *South Texas Law Journal* 735. As provided under Article 23 of the Ethiopian Constitution '[n]o person shall be liable to be tried or *punished* again for an offense for which he has already been finally convicted or acquitted …' Furthermore Article 61 (1) of the 2004 Criminal Code of Ethiopia states '[t]he same criminal act or a combination of criminal acts against the same legally protected right flowing from a single criminal intention or negligence, cannot be *punished* under two or more concurrent provisions of the same nature if one legal provision fully covers the criminal acts.' (emphasis added).

[100] *FPP v Zelalem Workagegnehu* (Fed. H. Ct., Cr. F. No. 158194 ruling 22 August 2015) 39

court upheld that the prosecution's evidence established Zelalem Workagegnehu's relation with Ginbot 7. However, the court did not consider the defendant's contact with Ginbot 7 as relevant in deciding whether the defendant has committed a pre-crime terrorist activity. Instead, the court opined that the contact, in and by itself, does not prove the defendant's involvement in pre-crime terrorist activities criminalised under Article 4 of the ATP. Thus, the Federal High Court changes the prosecution's charge from Article 4 to Article 7(1) of the ATP on the ground that the prosecution's evidence established only the defendant's contact with Ginbot 7, but not his involvement in the pre-crime activities that Article 4 envisages.[101]

(b) Giving interviews to media that a terrorist organisation uses to express its views admitted as vital evidence

One of the pieces of evidence that both the trial and appellate courts consider as key against Eskinder is the interview he gave to ESAT, a media outlet that gives air time to reporting the views and political statements of Ginbot 7. To prove that the media works for Ginbot 7, the prosecution introduced oral testimony and a resignation letter in which a witness, former employee of ESAT, indicates that he has resigned from his position in the media on the ground that the media are not impartial but working as a mouthpiece of one party (Ginbot 7). On the other hand, Eskinder produces oral and documentary evidence to show that the media are independent of any third party, including Ginbot 7. His evidence includes the editorial policy of the media which indicates that the media organisation is registered both in Europe and US and that it is owned by a certain Ambassador Commercial Council,[102] but not by Ginbot 7.

The High Court recognises that the prosecution's evidence is not adequate to conclude that the media are not independent or owned by Ginbot 7.[103] However indicating that the prosecution does not accuse the defendant of providing information or interview to the media but based on

[101] Ibid.
[102] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 56.
[103] Ibid.

the *content* of the information,[104] the court did not give effect to the defendant's evidence and argument relating to the independence of the media.[105] On the other hand, the Federal Supreme Court notes that the evidence that Eskinder produces to show the independence of the media is not to be given weight as the prosecution has already produced convincing evidence that the media works for Ginbot 7.[106] The evidence that the Supreme Court considered as convincing is the prosecution's evidence that the High Court dismissed as inadequate to prove the media's attachment to Ginbot 7. Thus, the Supreme Court, as opposed to the trial Court, considered the fact that Eskinder gave interview to ESAT radio and television as relevant in establishing his association with Ginbot 7.

However, as can be seen from the judgment what is known about ESAT is that it is independent from any political party including Ginbot 7 though it covers news relating to the latter. Its editorial policy confirms this fact. Despite this, the Federal Supreme Court attributes knowledge to Eskinder that these media work for Ginbot 7 and from that infers that Eskinder has been working for Ginbot 7. Both the High Court and the Supreme Court capitalise on what each considers as relevant to indicate the defendant's guilt ignoring the facts that would exonerate the defendant.

(c) Sharing views with terrorist organisations as evidence of relations/links

The similarity between what Eskinder and Ginbot 7 have been advocating regarding practising the Arab Spring type of uprising in Ethiopia is the other evidence the court relied on to convict Eskinder. The court compares what Eskinder presented for discussion in the town hall

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[104] Article 29(6) of the FDRE constitution prohibits limiting freedom of opinion and expression on account of the content of the point of view expressed. See Section 6.1 above.

[105] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 56.The information relates to his view on the feasibility of practising an uprising similar to that, which took place in North Africa.

[106] *Andualem Arage et al v FPP* (Fed. Sup. Ct., Cr. App. No. 83593, judgment, 2 May 2013) 34.The trial and appellate courts have different positions not only on the weight of the prosecution's evidence to show ESAT's relation with Ginbot 7, but also on the relevance of giving interviews to these media to show that the defendant had associations with Ginbot 7.

meeting that UDJ organised and what *Ene Ginbot 7*, Ginbot 7's newspaper, publishes. The court noted that *Ene Ginbot 7*, on May 15, 2011 reported that:

> Ginbot 7 is consulting political parties, civil society organisations, and liberation fronts relating to mobilizing the public for uprising, different activities are being undertaken to ensure the success of the uprising, and that efforts are being made to ensure that all political parties reach a consensus on mobilizing the public to uprising.[107]

The court indicates that the accused has advanced a similar position by telling the audience at the town hall meeting, on the 4th of September 2011, that 'as the Muslim Brotherhood was behind the Egyptian uprising, political parties in Ethiopia need to play critical role in mobilizing the public.'[108] To support the relation that Eskinder's activities have with Ginbot 7, the court cited another edition of the organisation's newspaper published on September 15, 2011, following the public meeting in which it was reported that a great demonstration was arranged in Addis Ababa and called for everyone to participate in it.[109]

What Eskinder has said and what Ginbot 7's newspaper has reported are known to the court. While, apart from their similarities, there is no evidence that links the two, the court infers from the similarity that Eskinder must have been doing what he was doing in consultation with and in support of Ginbot 7. Eskinder argues before the Federal Supreme Court that it is wrong to attribute copyright to Ginbot 7 over this strategy and to assume that he got the idea from Ginbot 7.[110] Indeed, in the absence of evidence that links the two and where there is ample chance of the similarity occurring without any consultation between them, the court's inference of Eskinder's relations with Ginbot 7, through construing Eskinder's activities as being done as part of Ginbot 7's effort to mobilise

[107] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 57.
[108] Ibid.
[109] Ibid.
[110] *Eskinder Nega v FPP*, statement of appeal, 22 August 2012) 8.

the public for an uprising,[111] is jumping to a conclusion in what R 8 describes as 'filling gaps by assumption.'

Of the several flaws and irregularities of the Irish terrorism prosecutions, one is attributing guilt to defendants for sharing views and political belief with terrorists. Commenting on the wrongfulness of this approach, Roach and Trotter observe that the convictions would send a counterproductive message that the criminal justice system discriminates against those who share political views with terrorists.[112]

6.5 Conclusion

No evidence relating to actual or intended use of guns or explosives is produced against the defendants. All the evidence that the prosecution relied upon relates to written or verbal expressions that the defendants have made. The court accepted these items of evidence as adequate to convict the defendants of a terrorism charge. The court simply concluded that the defendants had exceeded the limit of their constitutional rights by engaging in such expressions. The court reached this conclusion without conducting the necessary and proper analysis that is required before an expression is declared to be in breach of the limit set on freedom of expression.

Furthermore, the court ignored provisions under the FDRE Constitution and the ICCPR, which provide for the right to the presumption of innocence in criminal proceedings. Instead, the court reversed the onus of proof and required defendants to prove their innocence. As such, the court pursued a confirmatory strategy in that it overvalued seemingly inculpatory evidence while it overlooked the exculpatory. The court did not allow the evidence to lead it to decisions concerning the defendants' guilt or non-guilt. Both the burden and standard of proof were interpreted such that the defendants shall be convicted.

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[111] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 57.

[112] Kent Roach and Gary Trotter, 'Miscarriages of Justice in the War Against Terror' (2004-2005) 109(4) *Pennsylvania State law Review* 967, 969

CHAPTER SEVEN: RULINGS AND JUDGMENTS OF THE COURT

7.1 Introduction

This chapter scrutinises some of the decisions of the court and the reasoning thereof in the two terrorism prosecutions. The first section is concerned with the court's position on the relationship between precursor terrorist acts criminalised under Article 4 and the principal terrorist acts listed under Article 3 of the ATP. It deals with the court's approach to dealing with the issue of whether or not a precursor crime can be established without linking one's conduct to a foretold terrorist act. Section two examines some of the conduct that the court treated as precursor terrorist acts. Section three relates to the court's inference of the commission of a precursor terrorist act from its conclusion that acts of the defendants are unconstitutional. The final section addresses the court's approach to the issue of media intervention in a court proceeding.

7.2 Relationship between preparatory offences and principal terrorist acts

Referring to the difficult nature of Article 4 of the ATP that creates pre crime offences, R 5 states:

> Article 4 should be seen very carefully. Proper application of this provision presupposes a competent judge and to make the judge competent to apply these provisions there is a need for training. The purpose of the law is to prevent commission of a terrorist act unlike in the ordinary criminal cases where the law comes into picture after the commission of the crime. I think incorporating such provision acknowledges the possibility of narrowing down the scope of protection of human rights.

Article 4 states that 'Whosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article.'

As discussed in Chapter five, the relationship between the precursor offences criminalised under Article 4 and the principal terrorist acts listed

under Article 3 of the ATP has been the central and most debated issue in both prosecutions. The defence firmly argues that Article 4 offences are not stand-alone offences. For an act to constitute any of the offences under Article 4, it should be committed with a view to perpetrating any one or combination of the six terrorist acts listed under Article 3. The position of the prosecution is not that clear. In *FPP v Andualem Arage et al,* Article 4 is cited in conjunction with Article 3, which implies the prosecution's acceptance that a crime under Article 4 does not have an independent existence but needs to be accompanied by a principal terrorist act as a foretold crime. On the other hand, in *FPP v Elias Kifle et al,* the prosecution linked Articles 4 and 3 with '*and/or'* indicating the prosecution's blurred position on the matter. The prosecution, in its oral argument,[1] points out that by using the connecter *'and/or'* it prepares *alternative charges* thereby advancing the view that violation of Article 4 can be pleaded independently from Article 3. When asked regarding the prosecution's view on the relation between the two provisions, R7, admitting the difference in opinion among the prosecution's team, states as follows:

> in relation to this issue there is a difference among the prosecution team working on terrorism prosecutions. While some of us think that Article 4 should always be cited together with the specific act among those listed under Article 3, others think that the provision can stand in itself.

The court has displayed conflicting positions on this issue. As noted in Chapter Five, in *FPP v Andualem Arage et al*, upholding the prosecution's charge that cites both Article 4 and Article 3 in a count relating to a precursor crime, the court initially ruled the precursor offences that Article 4 establishes are not stand-alone offences. Any one or combination of the six principal terrorist acts listed under Article 3 need to be pleaded as having been intended to be committed, the court noted.[2]

Following the conclusion of the prosecution's evidence, the court gives a ruling that contradicts its earlier position on that same issue. Citing Article

[1] *FPP v Elias Kifle et al* (F. H. Ct. Cr. F. No. 112199, ruling, 20 October 2011).
[2] *FPP v Andualem Arage et al* (F. H. Ct. Cr. F. No. 112546, ruling, 30 November 2011) 7-8.

113 of the Cr. Pro. C.,[3] the court ordered the accused to enter into their defence under Article 4 (proved offence) *instead* of Articles 4 and 3(1-4) and (6) (charged offence).[4] This ruling implies that the prosecution's evidence does not prove those elements of Article 3 that the court, in its earlier ruling, considered as necessary to establish violation of Article 4. Also, the ruling means that the prosecution's evidence still proves violation of Article 4 despite its failure to prove these elements of Article 3. By ordering the defendants to enter into their defence under Article 4, without tying it to any of the acts listed under Article 3, the court disregarded its previous ruling.[5] Moreover, the court's reliance on Article 113 of the Cr. Pro. C. indicates that it upholds the proved offence and the charged offence could have been charged alternatively.

In the final judgment, the court reiterated both positions regarding the relation between precursor offences under Article 4 and principal terrorist acts under Article 3 of the ATP. Where weighing the evidence of the defence, the court, going back to its initial position, reasoned as follows. Because 'in order to say that Article 4 has been violated one has to plan, prepare for, conspire, incite or attempt to commit any of the acts listed under Article 3(1-6) of the ATP,' the defence has to defend 'not only that they did not commit any of the acts listed under Article 3 but also that they did not plan, prepare for, conspire, incite or attempt to commit these acts.'[6] On the other hand, the court convicts the defendants for planning, preparation, inciting and conspiring to commit a terrorist act under Article 4 of the ATP, in the absence of prosecutorial evidence linking the planning, preparation, incitement and conspiracy with any of the terrorist acts listed under Article 3. As noted in Chapter Five, in *FPP v. Elias Kifle et al*, the court by accepting the prosecution's argument that it uses the connector *'and/or'* to plead alternative charges, endorses the

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[3] 'Art. 113. - Where it is doubtful what offence has been committed.
(2) Where the evidence shows that the accused committed an offence with which he might have been charged in the alternative and the offence is within the jurisdiction of the court, he may be convicted of such an offence notwithstanding that he was not charged with it, where such offence is of lesser gravity than the offence charged.'

[4] *FPP v Andualem Arage et al* (F. H. Ct. Cr. F. No. 112546, ruling, 24 January 2012) 4.

[5] *FPP v Andualem Arage et al* (F. H. Ct. Cr. F. No. 112546, ruling, 30 November 2011) 7-8.

[6] *FPP v Andualem Arage* (F. H. Ct. Cr. F. No. 112546, judgment, 27 June 2012) 41. For the discussion on reversing the burden of proof see above chapter six.

prosecution's view that violation of Article 4 can be proved without linking the alleged conduct to the terrorist acts listed under Article 3 as a foretold offence. In both cases, the Federal Supreme Court, the appellate court, does not accept the defendant's appeal on this issue.[7]

In private, judges admit that Article 4 does not stand independently from Article 3 indicating that the principal terrorist acts listed under the latter should be included in the charge relating to a precursor terrorist act. When asked on the relation between Articles 4 and 3 of the ATP, R5, one of the judges, responded:

> Some prosecution charges read "Article 3 *or* 4 …" There is no such charge. You cannot link two criminal provisions by OR. This does not follow the proper form. We rejected such charge and asked its amendment. Sometimes the prosecution frames a charge stating "and/or" which is not allowed. This makes defending oneself difficult. Where they [the prosecution] frame such charge we order them to choose either Article 3 or 4. If the terrorist act is not specified, it will be difficult for the defendant to defend; therefore, it has to be clearly stipulated. The fact that the law and concept are new might have contributed to some of the problems. The court's interest in expeditiously resolving the cases together with the work load may have had its own impact in making the court give a ruling with shortcomings.

So, should one of the acts under Article 3 be cited as a foretold crime? 'Yes it is a must under the law,' R5 replied.

Similarly, R3, another judge, emphasises the need to include in the charge facts that tie the alleged conduct to the allegedly intended terrorist act though citing a specific subarticle from Article 3 might not be needed. R 3 states:

> Because Article 4 cross-refers to Article 3, it can exist independently. The prosecution may have to include in the charge which of the terrorist acts listed under Article 3 was intended. Such references should be included. However, there is no need to cite a specific subarticle under Article 3, but only the acts that the subarticles represent. The facts constituting any one of those listed under Article 4 should be provided in the charge. I think as far as I remember the charge includes many

[7] *Reeyot Alemu v FPP* (Fed. Sup. Ct. Cr. App. No. 77654); *Andualem Arage et al v FPP* (F. S. Ct. Cr. App. No. 83593).

> facts/things including references to the acts listed under Article 3.

Legislation is to be interpreted in light of its wording and the aims behind it.[8] When the court rules on the meaning of Article 4, it has no higher guidance than the words of the provision itself.[9] When a provision is clear, the court is supposed to apply it as it is, unless it concludes that literal application of the law would bring about an absurd result. In the latter case, construction of a legal provision would be warranted.

According to its plain meaning, Article 4 does not create stand-alone offences. As argued in Chapter four it is too plain to be denied that commission of a crime under Article 4 is predicated on the existence of intention to commit one or a combination of principal terrorist acts listed under Article 3. By providing '[w]hosoever plans, prepares, conspires, incites or attempts *to commit any of the terrorist acts* stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation,' Article 4 requires proof of a link between conduct alleged to be in breach of it and one of the six 'terrorist acts' listed under Article 3 of the ATP. That is, any one or a combination of the six terrorist acts listed under Article 3 needs to be established as a foretold crime. Thus, where one is suspected of being involved in conduct that breaches Article 4 of the ATP, the prosecution is supposed to plead and prove 'beyond reasonable doubt' that the prospective action or threat of action to which the planning, preparation, conspiracy and incitement were directed had all of the characteristics of any one of the six 'terrorist acts' listed under Article 3.

Where the court interprets Article 4 not to require proof of any of the elements of Article 3, it deviates from the plain meaning of the provision. A legal provision may be given a different meaning than what it literally provides only where applying it, as it stands, would bring about absurd

[8] Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack*, (Springer-Verlag Berlin Heidelberg, 2015) 16.

[9] As noted in *Sussex Peerage Case* 'the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.' (1844) 1 CI & Fin 85 in Emily Finch & Stefan Fafinski, *Legal Skills (*Oxford University press, 4th ed., 2013) 75-76.

result.[10] The court does not refer to this justification for deviation from the plain meaning of Article 4. Indeed, its plain meaning would not render the provision absurd. As discussed in Chapter Four, the purpose of criminalising preparatory offences is to prevent the commission of a terrorist act. Thus, it is only logical for Article 4 to capture conduct that is related to committing a terrorist act as defined under Article 3 of the ATP.

Furthermore, by confining the reach of Article 4 only to conduct that is related to a future terrorist act, the plain meaning of Article 4 which ties it to Article 3, would be compatible with the principle of strict interpretation of criminal statutes.[11] Furthermore, according to the positive interpretation, another rule of interpretation, that which gives meaning to the phrase 'any of the terrorist acts stipulated under sub articles (1) to (6) of Article 3 of this Proclamation' is preferred over the court's interpretation that does not give effect to the phrase.

Furthermore, the court's interpretation is compatible with neither the plain meaning nor the purpose of the provision.[12] By dissociating Article 4 from Article 3 the court's approach disregards the requirement of the intention to commit a terrorist act which is believed to serve as a bulwark against misuse of provisions that establish precursor offences. Indeed this approach opens a space for Article 4 to capture conduct even if not linked to a foretold terrorist act resulting in unwarranted broader scope to Article 4 with which the following section is concerned.

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[10] As noted in Grey v Pearson '[t]he grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but not further.' (1584) 3 Co Rep 7a in ibid 77.

[11] Article 2(2) of the Cr. C. states 'the Court may not treat as a crime and punish any act or omission which is not prohibited by law. The Court may not impose penalties or measures other than those prescribed by law.'

[12] Nor does the experience in other jurisdictions support the court's approach. For example, in *R v Zafar*, a UK terrorism case, the defendants 'were convicted of possession of computer disks and hard drives containing extremist propaganda, the purpose of which according to the prosecution … was to incite persons to travel to Pakistan to take part in "jihad".' *R v Zafar* (Aitzaz) [2008] EWCA Crim. 184 in Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press, 2nd ed., 2015) 201. Upon appeal the appellate court freed the defendants on the ground that no evidence was produced to establish a direct connection between the item possessed and the alleged terrorist act. *R v Zafar* (Aitzaz) [2008] EWCA Crim. 184: at 201.

7.3 Conviction under Article 4 for different precursor crimes

As noted in Chapter five, Article 4 creates both inchoate (attempt and conspiracy) and pre-inchoate (planning, preparation and incitement) crimes. Of these, conspiracy and incitement can co-exist and co-exist with any of the other three. Planning, preparation and attempt to commit a crime are unable to exist concurrently. As one comes after the other in the process of the commission of a principal criminal act, these are mutually exclusive steps.

The rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single count on a charge sheet.[13] Invoking Article 4 without specifying the inchoate or pre-inchoate terrorist activity or pleading two or more of them in a single count would make the charge bad for duplicitous and would be confusing to the accused as to which one they have to defend.[14] Furthermore, this has allowed the court to pass incoherent decisions as discussed below.

7.3.1 FPP v. Elias Kifle et al

In *FPP v. Elias Kifle et al,* the prosecution charges all five co-defendants under Article 4 *and/or* Article 3(6) of the ATP. Article 3(6) refers to a terrorist act of 'seizing, or putting under control, causing serious interference or disruption of any public service.' Article 4 stipulates five different precursor crimes in relation to this act: planning, preparation, conspiracy, incitement and attempt. The particulars of the charge refer only to *'conspiracy'* among the defendants. Following the conclusion of the prosecution's evidence, the court ruled 'as the prosecution's evidence has proved that all the defendants have committed the crime referred under the first count, they are hereby ordered to enter into their defence in relation to the the first count.'[15] Because the first count refers only to conspiracy among the defendants in violation of Articles 4 or/and 3(6) of

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[13] Jill Hunter, 'Prosecutors' Pleadings and the Rule Against Duplicity (1980) 3 *University of New South Wales Law Journal* 248, 249-250.

[14] Ibid.

[15] *FPP v Elais Kifle et al* (Cr. F. No. 112199, ruling, 28 November 2011) 2. As the first count refers only to conspiracy, by referring to the charge, the court confirms that the prosecution's evidence proves defendants' conspiracy to commit the act referred under Article 3(6) of the ATP.

the ATP, the plausible inference from the ruling of the court would be that without prejudice to potential rebuttal the prosecution's evidence has proven what has been alleged — that the defendants have *conspired* to cause serious interference or disruption of electricity, telephone and fibre optic lines.

In the final judgment of *FPP v Elias Kifle et al*, the court convicts the co-defendants for specific pre-crime activities. This time the court convicts the co-defendants for different pre-crime activities. The first defendant is convicted for '*conspiring* **or** *attempting* to commit a terrorist act through *planning* a destruction of electricity and telephone lines.'[16] The second defendant is convicted for '*planning, preparation and conspiracy*.'[17] The third defendant is convicted with '*conspiracy* **or** *attempt'*[18] and the fourth defendant with '*conspiracy* **and** *preparation'*.[19] Although the court convicted the fifth defendant, unlike in the case of the four defendants, it does not specify for which of the five pre-crime activities. It simply states that 'as the evidence establishes that she has co-operated with the first defendant and other partners by providing information it has been proved that she has committed a crime in violation of Article 4 of the ATP, as charged.'[20]

Reading of the ruling and the judgment in the two cases reveal multiple problems. Four problems can be identified in *FPP v Elias Kifle et al.* The first relates to the court's failure to inform the accused of the provision under which he is ordered to defend and eventually be convicted. The other three relate to the discrepancies between the decisions of the court at different stages of the trial.

As noted above, the first count, the content and form of which have been controversial, alleges violation of Article 3(6) *and/or* Article 4 of the ATP.

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[16] *FPP v Elias Kifle et al* (Cr. F. No. 112199, judgment, 19 January 2012) 12 (emphasis added).
[17] Ibid 13.
[18] Ibid 14.
[19] Ibid 15.
[20] Ibid 17. By so stating technically, the court is referring to the '*conspiracy*' charge. On the other hand, in relation to every one of the five defendants, the judgment indicates that they were unable to rebut the case the prosecution establishes under the first count, which seems to refer to the ruling in which the defendants are ordered to enter into their defence.

While the defence objected to joining Article 3(6) and Article 4 by *and/or,* the prosecution defended the charge citing Article 113 of the Cr. P.C. and arguing that by so doing it has prepared an alternative charge. Accepting the latter's argument, the court ordered the trial to proceed and the prosecution to introduce its evidence.[21] In the ruling that the court gives, following the conclusion of the prosecution's case, it simply states that the prosecution's evidence *proves the offence alleged in the first count,* without specifying which of the alternative charges.

Where the court accepted the charge as alternative and allowed the trial to continue on that basis and, in the event that the prosecution is found to have established a case, the ruling that comes following the conclusion of the prosecution's case is supposed to indicate which one of the alternatively pleaded offences has been proved. At this stage the court has everything it needs to pass decision on the matter. This is the time when the prosecution's evidence establishes either one or the other of the alternatively alleged offences.

Thus, by simply stating that the prosecution's evidence proves *the offence alleged in the first count,* which is said to plead alternative charges, and ordering the defendants to enter into their defence, it is unknown as to which one of the alternative offences the court refers. Even in the final judgment the court does not pass a decision determining under which of the alternative charges the defendants are convicted. By so doing the court has abdicated its responsibility to ensure that the defendants know what to defend which would, in turn, have enormous impact on their right to present their defence.

Second, there is a discrepancy between the ruling and the judgment of the court. The co-defendants are convicted of a crime different from that which they were ordered to defend against. As noted above, the court ordered all the defendants to enter into their defence noting that the prosecution has established their *conspiracy* to disrupt electricity, telephone and optical fibre lines. In the judgment, the court convicted all,

[21] For the discussion on the incompatibility of such charges with Article 113, see above Chapter five.

except the fifth defendant, for additional pre-crime terrorist activity. By so doing the judgment goes beyond what the prosecution has asked in its final address.[22]

Because the first defendant was tried in absentia, he did not introduce any defence which means normally his conviction in the judgment would be a reiteration of the court's ruling. It follows that the court is supposed to convict the defendant for having 'conspired with others' to cause serious interference or disruption of electric, telephone and optical fibre lines for which he is charged and ordered to defend. However, in the judgment, while stating that the defendant was unable to rebut the prosecution's case, the court convicted the defendant with 'planning, attempt *or* conspiracy'[23] to commit a terrorist act.[24] For a defendant tried in absentia, a difference in the holdings of the court at the ruling and judgment stages of the trial is inexplicable.[25]

The conviction of the other defendants of a crime which is different from the one they were ordered to defend is equally perplexing. This can only be attributed to the unlikely scenario where the evidence they introduced as a defence counts against them. The judgment does not refer to their evidence as having caused this result. The judgment consistently states that the co-defendants were unable to rebut the case that the prosecution established against them suggesting that the evidence the defence introduced did not make any difference to what the prosecution is said to have established. [26] It is far from indicating that their own evidence proves a different crime against them than what the prosecution's evidence has

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[22] The prosecution requested the court to convict the defendants of the offence they are ordered to defend, which refers to conspiracy to commit a terrorist act. Prosecution's Final address in *FPP v Elias Kifle et al*, (Ministry of Justice/09/165/2004, 5 January 2012) 9.

[23] It is not clear why the conjunction 'or' is used as attempt and conspiracy are two different crimes for which a defendant cannot be charged or convicted alternatively.

[24] The judgment does not even refer to 'disruption of electricity, telephone and fibre optic lines' as the intended terrorist act. Rather it refers to an unspecified terrorist act.

[25] As provided under Article 163(3) of the Cr. Pro. Code where a person is tried in absentia, the court shall pass judgment following the conclusion of the prosecution's case which rules out the possibility of what happened in this case —passing two inconsistent decisions regarding to the person who was tried in absentia.

[26] *FPP v Elias Kifle et al* (Cr. F. No. 112199, judgment, 19 January 2012) 13, 14, 15, 17.

proved.[27] Under this circumstance there is no reason for the court to convict them for crimes different from those they were ordered to defend.

As stated in the judgment while all five defendants are convicted with conspiracy, each, except the fifth defendant,[28] is said to be at different stages towards the completion of a terrorist act to which the third paradox relates. In so far as the court upholds the prosecution's conspiracy allegation, all the defendants should be convicted of a similar offence because 'once the conspiracy is established, each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof.'[29] According to a conspiracy theory of liability, 'conspirators should be liable for all crimes committed in execution of a "common plan or conspiracy."'[30] Thus, to conclude that all the defendants have conspired to commit a terrorist act, but convict one for preparation, another for attempt and still another for planning and preparation to commit that terrorist act, is contrary to the fundamental notion of conspiracy.[31]

The fourth fallacy, which is extreme, is a follow up of convicting conspirators of different offences. While the first defendant, who was not in Ethiopia at the time when the alleged offence is said to have been committed, is convicted to have 'attempted' to commit a terrorist act, three of the other four co-defendants who were in Ethiopia were not found to have reached at attempt stage. While no reason is provided in the judgment to warrant the conviction of the other one co-defendant for attempt, more importantly the conviction of attempt of the first defendant

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[27] Despite extensive investigation of the evidence of the defence, I could not find it to specifically rebut the attempt charge while suggesting that they committed an act that would constitute a preparation to commit a terrorist act.

[28] The fifth defendant is convicted only of conspiracy.

[29] Colonel Murray C. Bernays, G- 1, 'Subject: Trial of European War Criminals' quoted in Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 114.

[30] Stanislaw Pomorski, 'Conspiracy and Criminal Organizations' in Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 115.

[31] There is no reason for one to be convicted for *preparation* and the other for *attempt* unless the former did exit from the conspiracy at earlier stage (preparation) in the course of the commission of the terrorist act, which is not so in the case at hand.

without his Ethiopian-based co-conspirators being convicted for the same offence is hardly understandable. Normally, it is where the latter commits an act that constitutes an attempt to commit a terrorist act that the former, by being a conspirator, would be convicted of attempt. It is neither practically nor logically possible for an overseas conspirator to attempt a terrorist act in Ethiopia while their Ethiopian-based co-defendants are at the preparation or planning stage. It is not clear either from the charge or the evidence as to what makes the first defendant, as opposed to his co-defendants, considered to have been closer to the completion of the offence so as to be convicted for having reached the point of no return. Nor does the judgment make this point clear.

7.3.2 FPP v. Andualem Arage et al

In *FPP v Andualem Arage et al,* where Articles 4 and 3(1-4) and (6) of the ATP are invoked against the defendants, the prosecution asserts 'in general all the defendants are charged for conspiracy, planning, incitement and preparation to commit terrorist acts.'[32] Following the conclusion of the prosecution's evidence, the court states while the prosecution alleges '*conspiracy, planning and preparation*'[33] against the defendants 'the prosecution's oral, documentary and Audio-Video evidence prove that the defendants did *conspire*,… and *prepare* as alleged in the first charge'[34] to commit terrorist acts. As noted in Chapter Four, because the court orders the defendants to enter into defence under Article 4 *instead* of Articles 4 and 3(1-4) (6), it does not specify the terrorist act which the defendants have prepared and conspired to commit.[35]

By ordering the defendants to enter into their defence for *conspiracy* and *preparation*, the ruling in *FPP v Andualem Arage et al* narrows down the

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[32] Criminal charge sheet against Andualem Arage et al, as prepared on 29 November 2011, FPP File No. 00180/04.

[33] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, ruling, 24 January 2012) 2.

[34] On the other hand, in the part of the ruling acquitting the 17th defendant, the court indicates that 'there is no evidence, unlike in the case of the other defendants, which prove his involvement in the conspiracy/attempt to commit the terrorist act referred in the first charge.' *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, ruling, 24 January 2012) 4.

[35] Ibid.

prosecution's allegation which, in addition to the two conduct, includes *incitement* and *planning* to commit terrorist acts. However, once the defence introduced its evidence, the court evaluated evidence of the defence with the requirement that to be acquitted the defendants need to prove that they were not involved in 'planning, preparation, conspiracy, incitement and attempt to commit any of the terrorist acts listed under Article 3.'[36] While the court is supposed to evaluate the evidence of the defence in view of whether or not it has rebutted the prosecution's case, the court has made the criminal charge its point of reference in evaluating the evidence of the defence.[37]

On the other hand, after having weighed the evidence of the defence with this measure, the court indicates that the evidence does not rebut 'the prosecution's *charge* and *evidence*'[38] and concludes that the defendants have been found guilty of 'planning, preparing, conspiring and inciting commission of a terrorist act.'[39] In view of the difference between what has been alleged on the charge (planning, preparation, conspiracy and incitement) and what has been said to have been proved by the prosecution's evidence (preparation and conspiracy), the court's statement is vague. In concluding the weighing of the evidence of the defence, the court states that because the *prosecution's evidence proved the alleged facts* and that has not been rebutted by the defendants, they have been found 'guilty of planning, preparation, conspiracy and incitement to commit a terrorist act in violation of Article 4 of the ATP.' In the judgment the court, contrary to its ruling in which the defendants were ordered to enter into their defence, upholds that the charge has been proved by the prosecution but not rebutted by the defence.

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[36] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 41, 42.

[37] While the prosecution's evidence is to be evaluated vis-à-vis its charge, evidence of the defence is to be examined in view of the ruling in which the court tells the defendant which of the allegations on the charge the prosecution's evidence has proved and, therefore, has to be defended against.

[38] FPP v Andualem Arage et al (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 46, 48, 61 (emphasis added).

[39] Ibid 65. This judgment simply refers to 'a terrorist act' despite the fact that the prosecution's charge is framed in reference to five different terrorist acts.

Like in *FPP v Elias Kifle et al*, in this case, too, the defendants are convicted for a precursor crime that they have not been ordered to defend against. The judgment convicted them of planning and incitement in addition to conspiracy and preparation. In addition to the inconsistency between the ruling and the judgment, in both cases the court convicts the defendants of having been responsible for precursor crimes that cannot co-exist. In *FPP v Elias Kifle et al*, the second defendant is said to have been found guilty of both 'planning' and 'preparation'. Similarly, in *FPP v Andualem Arage et al,* the defendants are convicted of 'planning' and 'preparation'. As noted earlier the defendants could not be at the stage of planning and preparation simultaneously in relation to a single terrorist act. They can only be at either stage at one time which means they should be prosecuted and convicted only for one or the other. They can be charged with preparation only if they have passed the planning stage in which case they should not be charged and convicted with planning.

Article 61 of the Cr. C.[40] prohibits treating criminal acts which are united by purpose and intention as different types of criminal conduct and punishing them accordingly. In the two prosecutions, while the court does not impose different punishments for different pre-crime activities, the prosecution pleads these activities to have been committed and the court upholds that plea. To the extent the defendants are convicted for successive steps towards the commission of the principal terrorist act, where there is unity of guilt there is a deviation from Article 61.

7.4 Conduct treated as precursor crimes

A close examination of activities based on which the defendants are convicted for committing precursor offences indicates that the activities are either not related to terrorism at all as regulated under the ATP or when related, are not so to precursor offences under Article 4 but to other

[40] 'Article 61. - Unity of Guilt and Penalty.
1. The same criminal act or a combination of criminal acts against the same legally protected right flowing from a single criminal intention or negligence, cannot be punished under two or more concurrent provisions of the same nature if one provision fully covers the criminal acts.'

provisions of the ATP. Two such types of conduct are treated hereunder: association in different ways with proscribed terrorist organisations and involvement in preparation for the Arab Spring type of opposition.

7.4.1 Association with a terrorist group

In *FPP v Andualem Arage et al,* the court ordered Eskinder Nega, the seventh defendant, to enter into his defence stating the prosecution's oral and documentary evidence prove that

> he has several meetings with leaders of domestic opposition political parties who have been working to instigate uprisings, he has provided different information to the newsletter believed to be the mouthpiece of Ginbot 7, and he has written and distributed writings provoking chaos.[41]

As discussed in Chapter Four, neither holding meetings with those who are involved in mobilising the public to uprising nor producing works having a potential to instigate uprising, in and by itself, constitute planning, preparation, conspiracy, or incitement for commission of any of the terrorist acts stipulated under subarticles (1) to (6) of Article 3 of the ATP. Similarly provision of information to a media that is *believed* to be run by a terrorist organisation, in and by itself, does not indicate that the information provider has been planning, preparing, inciting, or conspiring to commit a terrorist act listed under Article 3.[42]

Even in relation to the first and second defendants, whose contact with Ginbot 7 is said to have been established, nothing that constitutes planning, preparation, conspiracy, or incitement for commission of any of

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[41] *FPP v Andualem Arage et al (*F. H. Ct., Cr. F. No. 112546, ruling, 24 January 2012) 2-3.

[42] It is not even among the six activities, which are listed under Article 5 of the ATP as constituting provision of support for the commission of a terrorist act or to a terrorist organisation.

> 'Article 5. Rendering Support to Terrorism
> 1/ Whosoever, knowingly or having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organization:
> a) provides, prepares or gives forged or falsified document;
> b) provides a skill, expertise or moral support or gives advice;
> c) provides, collects or makes available any property in any manner;
> d) provides or makes available monetary, financial or other related services;
> e) provides or makes available any explosive, dynamite, inflammable substances, firearms or other lethal weapons or poisonous substances; or
> f) provides any training or instruction or directive;
> is punishable with rigorous imprisonment from 10 to 15 years.'

the terrorist acts stipulated under subarticles (1) to (6) of Article 3 of the ATP has been established. The court's ruling pertaining to Andualem Arage, the first defendant in *FPP v Andualem Arage et al*, states that the prosecution's evidence proves that

> while the first defendant is in the leadership of a legally registered opposition political party, he has been establishing, within the party, his own group that supports the objectives of Ginbot 7; he has been providing moral support to the members of the group; accepting the goals of Ginbot 7, he has been in contact with leadership of Ginbot 7. [43]

In relation to Nathanael, the court indicates the prosecution's evidence proves that he 'has established contact with Ginbot 7; has been, in consultation with the first defendant, working to organize and mobilize the youth for uprising or terrorist act.'[44]

To have contact with leaders of a terrorist organisation, simpliciter, is not a crime under the ATP. Strictly speaking the ATP does not even criminalise 'recruiting and organizing *supporters*'[45], said to have been proved against the first and second defendants, as opposed to recruiting members, of a terrorist organisation criminalized under Article 7(1) of the ATP. This is consistent with paragraph 2(a) of the Security Council Resolution 1373, which specifically requires states to criminalise the latter but not the former. While providing moral support to a terrorist organisation is criminalised under Article 5(b) of the ATP, provision of moral support to supporters of a terrorist organisation, which is said to have been established against the first defendant, is not criminalised at all. Another point that the prosecution's evidence is said to have established against the first defendant is his acceptance of Ginbot 7's goal. Accepting or believing in a terrorist organisation's goal or objective is not criminalised under the ATP. The inherent problem with terrorism relates to the means employed to achieve a certain objective but not

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[43] *FPP v Andualem Arage et al (F. H. Ct.,* Cr. F. No. 112546, ruling 24 January 2012) 2.

[44] Ibid.

[45] Article 5 of the ATP criminalizes supporting a terrorist organization or a terrorist act in any one of the six ways listed thereunder which do not include recruiting supporters. See above n 42.

necessarily to the objective itself. As R 9 rightly pointed out as a leader of an opposition political party, his desire to see in change of government is normal.

The court in passing notes that the prosecution's evidence indicates that Nathanael, together with the first defendant, has instigated the youth for uprising or a terrorist act. Apart from making the declaration, the court does not specify which one of the terrorist acts listed under Article 3 the defendants did instigate and how. Nor does it specifically refer to the evidence that it relies on to conclude that the two have been involved in instigating a terrorist act.[46]

In *FPP v Elias Kifle et al,* the ruling of the court does not show how the facts said to have been proved constitute the pre-crime terrorist activities prohibited under Article 4 of the ATP. According to the ruling of the court in which it orders the defendants to enter into their defence the activities that the prosecution's evidence prove against the defendants are: establishing a secret terrorist group and creating a coalition with different terrorist groups; designing a common strategy, plan, and division of responsibility; getting financial support from the first defendant in secret; providing information to other terrorist groups relating to the terrorist activity, and organising others who distribute and posted different provocative writings.[47]

The acts of creating a terrorist group and arranging a coalition with another terrorist group are different from an act committed as a pre-crime terrorist activity with which Article 4 is concerned. By referring to someone who 'plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under subarticles (1) to (6) of Article 3 of the ATP,' Article 4 envisions instances where someone is engaged in a certain activity with a view to committing any of the terrorist acts listed under Article 3. Activities which are confined to the formation of a terrorist

[46] Examination of the evidence produced against the two that the court refers as relevant and probative of their involvement in instigating uprising and terrorist acts only indicates their involvement in a preparation to mobilise the public for an Arab Spring type of resistance. The evidence is far from suggesting that they instigated any one of the acts that is listed under Article 3. See below Section 7.3.2.

[47] *FPP v Elias Kifle et al* (F. H. Ct., Cr. F. No. 112199, ruling, 28 November 2011) 1-2.

group or coalition of terrorist groups are not yet at the pre-crime stage to which Article 4 refers. Even if, broadly speaking, these activities were to be considered as forming a foundation for committing terrorist acts in the future, they do not fall under Article 4. Article 7 of the ATP, which criminalises being a member or a leader of a terrorist organisation, would be more relevant for those defendants who are charged in a separate count.[48] Similarly under the ATP, to get financial support from a terrorist organisation or from its member is not criminalised.[49] It is only where the finance provided to the group is a proceed of a terrorist act that receiving would constitute a crime under Article 9, still not under Article 4,[50] of the ATP for which the defendants are separately charged on a different count.[51] As noted above providing information to other terrorist groups has nothing to do with the pre-crime activities that Article 4 criminalises. Finally, the irrelevance of organising others who distributed and posted different provocative slogans to a pre-crime activity provided under Article 4 is clear from the content of the writing that the court describes as provocative. The prosecution's evidence indicates that some of the defendants were involved in the distribution and painting of slogans, '*Meles beka' and* '*EPRDF beka'* which respectively refer to a call for the ruling party and the then Prime Minster to step down, a purely political activity. Both R 8 and R 9 have been alarmed that such slogans are considered as critical evidence to convict the defendants in *FPP v Elias Kifle et al* for committing pre-crime terrorist activity. R 8 has stated that they 'were unable to know what exactly the charge was from the beginning to the end. Is it even an ordinary crime to say '*Meles Beka'*, let alone to be a terrorist act? We could not believe that.'

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[48] Criminal charge against *Elias Kifle et al*, FPP File No. 039/04, as filed on 25 October 2011, 2nd and 3rd counts.

[49] Article 9 of the ATP states '[w]hosoever knowingly or having reason to know that a property is *a proceed of terrorist act* acquires or possesses or owns or deals or converts or conceals or disguises the property is punishable, subject to the property being forfeited, with rigorous imprisonment from 5to 15 years' (emphasis added).

[50] *Reyot Alemu v FPP* (F. Sup. Ct., Cr. App. No. 77654, judgment 31 July 2012) 10-11.

[51] Criminal charges against Elias Kifle et al, FPP File No. 039/04, 25 October 2011, 4th count. It is interesting to note that the first defendant is charged for both providing and receiving financial support for a terrorist act. For receiving he is charged with another defendant. For providing financial support to a terrorist group that he is accused of leading, he is charged alone. Criminal charges against *Elias Kifle et al,* FPP File No. 039/04, 25 October 2011, 4th and 6th counts.

7.4.2 Advocacy for mobilising Arab Spring Type of opposition

The reasoning of the court in *FPP v Andualem Arage et al* to convict the defendants for committing pre-crime terrorist activities in violation of Article 4 of the ATP can be summarised as follows. The defendants' involvement in advocating for the type of uprising that took place in North Africa and the Arab world to be practiced in Ethiopia has been established. The uprisings in North Africa have resulted in loss of life, bodily injury, damage in property and eventually a change of government. By advocating such an uprising to take place in Ethiopia, the defendants have exceeded their freedom of expression and involved themselves in pre-crime terrorist activities. This section deals with the court's interpretation of the uprisings in North Africa and the Arab world as a terrorist act and the call for this type of uprising in Ethiopia as a precursor crime under Article 4 of the ATP.

In *FPP v. Andualem Arage et al* the court states:

> Though there is no wrong with researching and discussing the uprisings in North Africa and the Arab world, activities and efforts aimed at bringing to and implementing such type of uprising in Ethiopia and to conspire to instigate the people to the uprising with a view to assume state power is unconstitutional. [52]

This paragraph captures the court's understanding of the North Africa type of uprising**.** Describing the Arab Spring as having resulted in loss of life, bodily injury, damage to public and private property, and to public institutions, disruption in public services and eventually resulting in change of government, the court, in its reasoning, states that the North Africa type of uprising is neither lawful nor peaceful. Furthermore, the court indicates that an attempt to bring such an uprising to Ethiopia indicates one's intention to seize power unconstitutionally.[53] The court does not see merit in the argument of the defence that discussions and writings on the relevance of the uprisings to Ethiopia are peaceful and lawful ways of exercising freedom of expression and one's right to

[52] *FPP v Andualem Arage* (F. H. Ct. Cr. F. No. 112546, judgment, 27 June 2012) 55-56.
[53] Ibid 43-44, 46.

participate in the politics of one's own country.[54] The court dismisses this point indicating "though the defendant and his witnesses described this activity as peaceful, being lawful is a prerequisite for being peaceful. Thus, we have not accepted the defendant's description of his activities as peaceful.[55]

The court is not alone in interpreting popular uprisings as illegitimate and unconstitutional. A Few share its view. For example, Sturman notes 'taking to the streets to remove a head of state from power is clearly an unconstitutional change of government since constitutional democracy only allows for the removal from power by elections.'[56] Furthermore, based on her observation of a meeting of the Peace and Security Committee of the Pan African Parliament, Sturman asserts that some within the Africa Union (AU) interpret popular uprisings to remove heads of state from power as an unconstitutional change of government.[57] In a deliberation by the AU's Peace and Security Council on recognising revolutions as extra-constitutional but not unconstitutional events, Zimbabwe's Justice and Legal Affairs Minister, expressing objection to the move, called for criminalisation of popular uprisings with harsh punishment.[58]

On the other hand the popular uprisings in North Africa have received overwhelming support from the international community, including the AU and African states. For example, the UN General Assembly voted to

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[54] Ibid 56. Though the defendants' belief that the government in power is undemocratic and repressive animated their movement, they have been careful not to raise this point as a defence before the court. In *R v. F* [2007] the UK Court has concluded that based on the definition of terrorism under the relevant UK law protects not only representative governments. The court excluded what is referred to as 'terrorism in a just cause.' Paras. 27-28. Similarly, the ATP does not confine the definition of terrorism so as to cover only violent acts against democratic governments.

[55] *FPP v Andualem Arage* (F. H. Ct. Cr. F. No. 112546, judgment, 27 June 2012) 55-56.

[56] Kathryn Sturman, *Unconstitutional Changes of Government: The Democrat's Dilemma in Africa,* Governance of Africa's Resources Programme, Policy Briefing 30**,** (March 2011) 3. <http://www.saiia.org.za/policy-briefings/204-unconstitutional-changes-of-government-the-democrat-s-dilemma-in-africa/file>.

[57] Kathryn Sturman, *The African Union and the "Arab Spring": An exception to new principles or return to old rules?* ISPI Analysis No. 108 (10 May 2012) 3 <http://www.saiia.org.za/opinion-analysis/the-african-union-and-the-arab-spring-an-exception-to-new-principles-or-return-to-old-rules>.

[58] *Zimbabwe wants 'popular uprisings' criminalized* (2 June 2014) <http://www.zimbabwesituation.com/news/zimsit_zimbabwe-wants-popular-uprisings-criminalised/>.

recognise the National Transitional Council as holding Libya's seat at the United Nations on 16 September 2011.[59] On 20 September 2011, the African Union officially recognised the National Transitional Council as the legitimate representative of Libya.[60] In relation to the recognition given to and the potential benefits of the uprisings, Jean Ping, the then AU Chairperson, states:

> Notably the African leaders welcomed the developments in Tunisia and Egypt, stressing that they provided an opportunity for Member States to renew their commitment to the AU agenda for democracy and governance, to inject additional momentum to efforts being exerted in this regard and to implement socio-economic reforms adapted to each national situation.[61]

The uprising in Libya has been described as 'democratic' in which 'the aspirations of the Libyan people to democracy and respect for human rights' has been expressed.[62] While Sturman describes the changes of government resulting from the uprisings as unconstitutional, she acknowledges the North Africa popular uprisings as 'direct democracy in action.'[63]

The AU has a strong institutional regional norm against unconstitutional changes of governments in Africa.[64] Article 30 of the Constitutive Act of the AU provides for suspension of a state, in which unconstitutional

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[59] 'United Nations approves Libya seat for former rebels, officially recognizes transitional council', Associated Press (online) 16 September 2011 <http://www.nydailynews.com/news/world/united-nations-approves-libya-seat-rebels-officially-recognizes-transitional-council-article-1.957204>.

[60] Khadija Patel, 'AU - and SA - finally recognise Libya's new government', Daily Maverick (online) 20 Sep 2011 <http://www.dailymaverick.co.za/article/2011-09-20-au-and-sa-finally-recognise-libyas-new-government/#.V8d2D8kdkgI>.

[61] Jean Ping, *The African Union and the Libyan crisis: Putting the records straight, Letter from the Chairperson,* Issue 1 (November 2011) <www.nepad.org/system/files/Letter%20From%20the%20AUC%20Chairperson%20-%20English%20_2_1.pdf>.

[62] Alex Dewaal, *The African Union and the Libya Conflict of 2011* (19 December 2012) <https://sites.tufts.edu/reinventingpeace/2012/12/19/the-african-union-and-the-libya-conflict-of-2011/>

[63] Sturman, *The African Union and the "Arab Spring", above n 57,* 3.

[64] Kalkidan N. Obse, "The 'African Spring' and the Question of Legitimacy of Democratic Revolutions in Theory and Practice" (2014) 1 *Human Security Perspectives* 232 ; Abadir M. Ibrahim, 'Evaluating a Decade of the African Union's Protection of Human Rights and Democracy: A Post-Tahrir Assessment' (2012) 12(1) *African Human Rights Law Journal* 30; For criminalization of the unconstitutional change of government under the Malabo Protocol see: Gerhard Kemp and Selemani Kinyunyu, "The Crime of Unconstitutional Change of Government (Art. 28E)" (2016) 10 International Criminal Justice Series, 57.

change of government took place, from participation in the activities of the Union. The Lomé Declaration on Unconstitutional Changes of Government 2000 and the African Charter on Democracy, Elections and Governance stipulate a range of measures to be taken against a government that comes to power unconstitutionally. The Lomé Declaration authorises the AU to condemn unconstitutional changes; a call on those responsible for unconstitutional change of government to effect a speedy return to constitutional order within six months to be followed by a variety of targeted sanctions in case of failure to comply with this call including visa denials, restrictions of government-to-government contacts and trade relations.[65] The African Charter on Democracy, Elections and Governance provides, inter alia, for prohibition of perpetrators from taking part in the elections to be held to restore the constitutional order, their trial before the competent court of the Union and imposition of sanctions on any member state that has been involved in the unconstitutional change of government.[66] The AU has been consistent in enforcing these instruments where unconstitutional change of government takes place.[67] Both in practice[68] and normatively,[69] unconstitutional change of government is understood to include the use of five illegal means to access or maintain power.[70]

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[65] Organization of African Unity (OAU), Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (AHG/Decl.5 (XXXVI) (July 2000).

[66] African Union (AU), African Charter on Democracy, Elections and Governance, adopted by the eighth ordinary session of the Assembly, Addis Ababa, Ethiopia, 30 January 2007 (entered into force 15 February 2012).

[67] Dirk Kotzé, *Legitimate democratisation: Unconstitutional uprisings vs mass demonstrations for regime changes in Africa*, <http://paperroom.ipsa.org/papers/paper_9688.pdf>; Eight member states of the AU have been suspended and/or faced sanctions by the PSC for unconstitutional changes of government: Madagascar, Togo, Central African Republic, Mauritania, Guinea, Niger, Guinea-Bissau and Côte d'Ivoire. Sturman, *Unconstitutional Changes of Government,* above n 56.

[68] Sturman, *Unconstitutional Changes of Government,* above n 56.

[69] African Union (AU), African Charter on Democracy, Elections and Governance, adopted by the eighth ordinary session of the Assembly, Addis Ababa, Ethiopia, 30 January 2007 (entered into force 15 February 2012) Article 23.

[70] While the first four are incorporated in the Lomé Declaration of 2000, the fifth element was added to the definition in the African Charter on Democracy, Elections and Governance.

These are:

1. A coup d'etat against a democratically elected government.
2. An intervention by mercenaries to replace a democratically elected government.
3. A replacement of a democratically elected government by armed dissidents or rebels.
4. A refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. An amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

Referring to the change of government resulting from popular uprisings in North Africa, Ping admitted 'the popular uprisings that occurred in Tunisia and in Egypt … do not correspond to any of the cases envisaged by the 2000 *Lomé Declaration on Unconstitutional Change of Government*.'[71] Similarly, Mehari T. Maru argues 'generally speaking, there is no tension between the events in North Africa and the AU normative frameworks. On the contrary, the spirit of the laws of the AU normative frameworks supports public demands to assert the general will of the people.'[72]

Thus, unlike in instances of unconstitutional change of government where the aforementioned measures have been imposed consistently, neither of the instruments to deal with unconstitutional changes of government was invoked and none of the measures provided thereunder was even thought about in relation to a change of government resulting from the uprisings in North Africa. To the contrary, the AU Peace and Security Council consistently expressed its support for the uprisings and called for restraint from the government in power. The AU Peace and Security Council issued statements relating to the uprisings in Egypt and Libya in which it recognises as legitimate and expressed its strong

[71] Ping, above n 61.
[72] Mehari Taddele Maru, 'On unconstitutional changes of government, (2012) 21(1) *African Security Review* 67, 68.

support of the popular movements. The Peace and Security Council, in the communiqué in which it judges the Egyptian uprising,

> notes the deep aspirations of the Egyptian people, especially its youth, to change and the opening of the political space in order to be able to democratically designate institutions that are truly representative and respectful of freedoms and human rights; [and] expresses AU solidarity with the Egyptian people whose desire for democracy is consistent with the relevant instruments of the AU and the continent's commitment to promote democratization, good governance and respect for human rights.[73]

In the communiqué relating to the uprising in Libya, the Peace and Security Council, apart from describing the protest as peaceful and legitimate, condemns brutal governmental responses to the uprisings in the following terms:

> strongly condemns the indiscriminate and excessive use of force and lethal weapons against peaceful protestors, in violation of human rights and International Humanitarian Law... [and] underscores that the aspirations of the people of Libya for democracy, political reform, justice and socioeconomic development are legitimate...[74]

Furthermore, the AU Peace and Security Council, noting that 'popular uprisings were deeply rooted in governance deficiencies,'[75] has recognised the right of the people to peacefully express their will against oppressive systems.[76] More importantly by noting that 'the popular uprisings which took place in North Africa, in 2010-2011, represented the expression of the free will of the people of the concerned countries,'[77] the Council has bestowed legitimacy to the uprisings in North Africa. By so

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[73] African Union Peace and Security Council, Communiqué, 260th Meeting, Addis Ababa, Ethiopia (16 February 2011) PSCPR/COMM (CCLX) <http://www.peaceau.org/uploads/psc-384-com-egypt-05-07-2013.pdf>.

[74] Ibid.

[75] AU Peace and Security Council, '432nd Meeting on 'Unconstitutional changes of Governments and popular uprisings in Africa — Challenges and Lessons Learnt', Addis Ababa, Ethiopia, (press statement, PSC/PR/BR (CDXXXII), 29 April 2014) para. 5 <http://www.peaceau.org/uploads/ps-432-psc-29-4-2014.pdf>.

[76] Ibid para. 6.

[77] AU Peace and Security Council, '432nd Meeting on 'Unconstitutional changes of Governments and popular uprisings in Africa — Challenges and Lessons Learnt', Addis Ababa, Ethiopia, (press statement, PSC/PR/BR (CDXXXII), 29 April 2014) para. 8 <http://www.peaceau.org/uploads/ps-432-psc-29-4-2014.pdf>.

doing, the AU Peace and Security Council makes it clear that change of government through popular uprising is different from unconstitutional change of government that the normative framework envisages as unacceptable and prescribes range of punitive measures.[78]

What makes the court's interpretation of the uprisings in North Africa as illegal, unacceptable, and unconstitutional questionable is not only its deviation from the mainstream understanding of the uprisings. More importantly what makes the court's approach problematic is its nonconformity with the position of the Ethiopian government on the matter. The government of Ethiopian is one of the first two African governments to recognise the uprising in Libya and the Transitional National Council, which leads to the uprising, as legitimate.[79] Ethiopia has gone to the extent of calling on the African Union to follow the path.[80] Asking the Federal Supreme Court 'how can I be treated as a terrorist for supporting and using as a model the uprising that my government has publicly acknowledged as proper and legitimate?'[81] Eskinder has succinctly made this point clear.

Indeed it is alarming that the prosecution charges citizens as terrorists for advocating the North Africa type of uprising in Ethiopia while the government recognises the movements and their results in other countries. Similarly, the court's position is hardly understandable as it treats calls by the defendants to follow the North Africa experience, which the Ethiopian government acknowledges as legitimate, as evidence to prove their guilt as terrorists. The court's construction of the popular uprisings in North Africa would make Ethiopia among 'the undemocratic regimes … who felt threatened by the North African popular protests for democracy.'[82] Furthermore, in view of the overwhelming support and recognition of the popular uprisings in North Africa, including by Ethiopia, the court's interpretation of these uprisings as, illegal and

[78] Kotzé, above n 67.
[79] Dewaal, above n 62.
[80] Ibid.
[81] Eskinder Nega's statement of appeal, Application File No. 02075/04, 22 August 2012, in *Andualem Arage et al v FPP* (Fed. S. Ct. Cr. App. No. 83593) 6.
[82] Sturman, *The African Union and the "Arab Spring"*, above n 57, 5.

unconstitutional, is arguably an approach 'in defence of the incumbent government rather than the true democracy and constitutional order.'[83]

7.5 Unconstitutionality likened to a terrorist act

Citing Article 9 of the FDRE Constitution, which prohibits seizing state power other than in the manner provided under the Constitution, the court asserts that political power, in Ethiopia, is to be obtained only through the ballot box. Thus, the court noted, an attempt to seize political power other than through a ballot box is unconstitutional.[84] The court opines that 'an attempt to seize a political power, be it through an uprising similar to that which took place in North Africa and the Arab world or in other ways is unconstitutional.'[85]

As noted above although there are few who share the court's view that change of government through popular uprising is *unconstitutional*, none of them has argued that such uprising constitutes *a terrorist act*. Because the defendants are charged specifically with their involvement in pre-crime terrorist activities, as opposed to a crime against the constitution, it is worthwhile asking: were the acts the defendants committed unconstitutional; would they necessarily be terrorist acts?

As stated by the court, the prosecution proves the first and the seventh defendants had been working to bring the Arab Spring type of opposition to Ethiopia. The court continued to reason that what Eskinder wrote and spoke about bringing the Arab Spring to Ethiopia has been excessive use of the freedom of expression which passes the limit set under Article 29 of the FDRE Constitution relating to the right of thought, opinion and expression.[86] The court recounts what Eskinder presented to the audience in the public meeting organised by the UDJ Party. Referring to the accused's analysis of the reality in Ethiopia and the feasibility of bringing the revolutions in North Africa and the Arab world to Ethiopia, the court affirmed that the accused has actually called on the public to

[83] Ibid.
[84] *FPP v Andualem Arage* (F. H. Ct. Cr. F. No. 112546, judgment, 27 June 2012) 43-44, 55, 61
[85] Ibid 44.
[86] Ibid 61.

rise up against and change the government in the same way as happened in North Africa and the Arab world.[87] As noted above, the court has taken the position that an uprising similar to that which took place in North Africa and the Arab world is an unconstitutional means of taking state power.

However, neither the prosecution establishes nor the court ascertains that this movement, pronounced as unconstitutional by the court, is a pre-crime terrorist activity envisaged by Article 4 of the ATP. Whether or not the prosecution's evidence proves the defendants' intention to seize state power[88] as it may, the court jumps to a conclusion that equates the unconstitutionality of an act of attempting to obtain political power with an act of terrorism.

Article 3 does not seem to include the Arab Spring type of public uprising as a terrorist act.[89] Though such uprisings might potentially result in loss of life and property, these are not inevitable. As witnessed in the uprisings in North Africa, the public went to the street in a peaceful manner simply demanding good governance and a call for a change of government. The uprisings were not meant to cause loss of life, property, or bodily injury. It was the government's reaction, the attempt to brutally repress the uprising which caused the loss of life and property in terms of which the court describes the uprisings. For example, by advising the Ethiopian government and the then Prime Minster to learn lessons from Muammar Gaddafi, Eskinder was asking the government to respond to the would-

[87] Ibid 55

[88] In explaining his intention in supporting the North Africa type of uprising in Ethiopia, Eskinder Nega argues, before the Federal Supreme Court, that the Federal High Court erred in treating the Arab Spring as a movement to seize government power. The appellant noted that while the movement was for a change of government, it was not necessarily to seize government power. It was rather to create conducive conditions under which democratic elections can be conducted.

[89] Not all unconstitutional acts are terrorist acts. Nor are all acts directed against the constitution and the constitutional order terrorist. For example, Articles 238-241 of the Cr. C. specifically criminalise acts directed against the constitution and the constitutional order. An act that falls under Article 4 of the ATP is different from acts that these provisions capture. The court's reasoning, apart from stating that advocating a North Africa type of uprising amounts to trying to assume state power through violence and that amounts to violation of Article 4, does not show, for example, what makes the act fall under the ATP instead of under the Criminal Code. The court's reasoning is short of showing the purpose and/or motive elements under Article 3 and 4 of the ATP.

be public demand without bloodshed. Thus, by calling for the North Africa type of uprising to express opposition, the defendants are not inciting any of the acts listed under Article 3 of the ATP without which their expression relating to bringing the North Africa type of uprising to Ethiopia cannot be linked to inciting a terrorist act. It all relates to going onto the streets demanding that the government of the day respect human rights, change its policies, or step down. Even if the intended uprising had taken place and resulted in loss of life or property damage, these actions would not have been captured by Article 3 of the ATP in the absence of the purpose and motive elements.

While supporting the North Africa type of uprising both Eskinder and Andualem had been describing the movement they are calling for as lawful and peaceful which confirms their careful move towards a purely North African type of uprising, which is not related to a terrorist act as defined under Article 3. Eskinder's consistent reference to a peaceful struggle in the oral and written evidence the prosecution produced against him is one of the many reasons that the Special Rapporteur on the situation of human rights defenders raised to express her concern over Eskinder's prosecution and conviction.[90] Similarly the UN Human Rights Council Working Group on Arbitrary Detention, citing Eskinder's reference to a *lawful* and *peaceful* struggle both before and during his trial and his express rejection of violence, conveyed its dismay at his prosecution and conviction.[91] So did the European Parliament. In their letter to the Prime Minster of Ethiopia, sixteen members of the European Parliament indicated that Eskinder's arrest and prosecution came after 'he wrote and spoke publicly about the Arab Spring movements then unfolding across the Middle East and North Africa. Although clearly

[90] OHCHR, 'Ethiopia: UN experts disturbed at persistent misuse of terrorism law to curb freedom of expression' (Press release, 2 February 2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11793&LangID=E#sthash.Co1c9Ihf.dpuf>.

[91] UN Human Rights Council Working Group on Arbitrary Detention, *Eskinder Nega v. Ethiopia*, Opinion No. 62/2012, U.N. Doc. A/HRC/WGAD/2012/62 (2012) emphasis added.

sympathetic Mr [Eskinder] Nega consistently emphasised that any similar movements in Ethiopia must remain peaceful.'[92]

However the court disregarded the defendants' description of the uprising they call for as peaceful and lawful on the grounds that 'what makes an activity peaceful is the peacefulness of the activity not the description of the activity as peaceful. An activity would be peaceful where it is conducted in accordance with the law of the country.'[93] The court further reasons that the defendants call for an uprising similar to that which took place in North Africa, which is not lawful and peaceful. Therefore, even if they qualify the struggle as lawful and peaceful, the court notes, it is not.[94]

7.6 Trial by media and the court's deference

In the two prosecutions, government media have provided wide coverage of the prosecutions in a manner detrimental to the defendants including but not limited to undermining their right to the presumption of innocence and influencing the court's impartiality thereby opening a space for impacting on the fairness of the trial. The state media do that in two ways. First, the media air statements made by public officials in connection with the defendants. Second, they hosted a documentary that included footage of 'confessions' that some of the accused are said to have made, and comments by the host journalist that proclaimed the defendants as criminals.

Amnesty International documented prejudicial statements that senior members of the government, including the then Prime Minister Meles Zenawi, made relating to these and other terrorism-related cases.[95] In June 2011, following the arrests of the defendants in *FPP v Elias Kifle et al*, a government spokesperson blatantly stated that 'they had been

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[92] European Parliament, Letter to Prime Minster Haile Mariam Desalegn from the Members of the European Parliament (17 December 2012) <http://www.freedom-now.org/wp-content/uploads/2012/12/Nega-MEP-Letter-12.18.12.pdf>.

[93] *FPP v Andualem Arage* (F. H. Ct. Cr. F. No. 112546, judgment, 27 June 2012) 44-45.

[94] *FPP v Andualem Arage* (F. H. Ct. Cr. F. No. 112546, judgment, 27 June 2012) 44-45.

[95] Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (2011) <http://www.amnestyusa.org/sites/default/files/afr250112011en.pdf>.

arrested because they were found to be involved in terrorist acts.'[96] The spokesperson went as far as claiming that 'the government would produce "concrete evidence" of their guilt to the public and to a court of law."[97]

Deputy Federal Police Commissioner and Communications State Minster give press conference following arrest of defendants in *FPP v Andualem Arage et al.* In the conference both declare that the arrested persons were caught while preparing and planning a terrorist act; that the police have ample evidence to prove their involvement in terrorism-related activities; that there is evidence about their relation with a terrorist organisation, and about the magnitude of the intended terrorist act that the police foiled.[98]

Pending the court proceedings relating to *FPP v Andualem Arage et al, FPP v Elias Kifle et al* and *FPP v Abdiwole Mohamed et al,* the then Prime Minster made problematic statements. In October 2011, concerning the defendants in these cases, he told the parliament that 'we did not take actions before gathering enough evidence that can prove their guilt before the court of justice. We waited until we made sure we have everything we need to convince the court they are terrorists.'[99] The statement implies that because the government arrests only in cases where it has adequate evidence, the arrested ones are guilty. Thus, by so stating, the Prime Minster declared all the arrested journalists and opposition political party members guilty of terrorism.[100]

The Prime Minster made comments about others he describes as terrorists and against whom the government does not have adequate evidence to be produced before a court of law to prove their involvement in terrorism. He declared 'we know in our hearts that they are involved in terrorism acts. However, we are aware that this is not enough before a

[96] Ibid 23.
[97] Ibid.
[98] Mereja.com, *Ethiopia: Federal Police Say Have Ample Evidence On Terror Suspects*, <http://www.mereja.com/video/watch.php?vid=048f3c720>.
[99] Amnesty International, above n 96.
[100] Ibid 22-23.

court of law.'[101] By stating this, he indicated that his government knew of their involvement in terrorist activity and was only waiting to gain additional evidence. Similarly, in an interview with Norwegian newspaper *Aftenposten*, the Prime Minister declared that Swedish journalists, Schibbye and Persson, were supporters of terrorists, saying 'They are, at the very least, messenger boys of a terrorist organization. They are not journalists.'[102]

Many have expressed concern regarding the impact of these statements on the fairness of the trial and its outcome. According to Amnesty International, such political statements are indicative of the political nature of the arrests and prosecutions and the organisation expresses its concern about the bearing of the statement on the fairness of the trials. It notes that these comments could exert political pressure on the courts and this 'increases the possibility of influence in the outcomes of the trials.'[103] Furthermore, Amnesty International notes the impact of these comments on the principle of presumption of innocence.[104] The United Nations High Commissioner for Human Rights[105] and Human Rights Watch[106] also raise similar concerns. [107]

Another major campaign against the defendants is televised alongside the trial in *FPP v Andualem Arage et al* by state-owned media. A ninety minute documentary titled '*Akeldama*'[108] was aired in three parts

[101] Ibid 23.
[102] Ibid 22.
[103] Ibid 31.
[104] Ibid 5.
[105] Office of the United Nations High Commissioner for Human Rights Special Procedure of the Human Rights Council, Reference: UA G/SO 214 (67-17) G/SO 214 (107-9) G/SO 214 (3-3-16) Terrorism (2005-4) G/SO 214 (53-24) ETH 7/2011 (19 December, 2011) 5 <https://spdb.ohchr.org/hrdb/20th/UA_Ethiopia_19.12.2011_%287.2011%29.pdf>.
[106] Human Rights Watch, *Ethiopia: Terrorism Verdict Quashes Free Speech: Drop Case and Free Four Convicted after Unfair Trial* (12 January 2012) <https://www.hrw.org/news/2012/01/19/ethiopia-terrorism-verdict-quashes-free-speech>.
[107] Office of the United Nations High Commissioner for Human Rights Special Procedure of the Human Rights Council, Reference: UA G/SO 214 (67-17) G/SO 214 (107-9) G/SO 214 (3-3-16) Terrorism (2005-4) G/SO 214 (53-24) ETH 7/2011 (19 December, 2011) 5 <https://spdb.ohchr.org/hrdb/20th/UA_Ethiopia_19.12.2011_%287.2011%29.pdf>.
[108] Akeldama, as interpreted at the beginning of the documentary, refers to 'a land of blood.' Ethiopian Television, *Akeldama,* part 1 <https://www.youtube.com/watch?v=jh1tXoHZzlg>.

beginning in late November 2011 when the trials *FPP v Elias Kifle et al* and *FPP v Andualem Arage et al* got under way. The first part of the documentary displays horrible acts of killing committed in the 1990s allegedly by one of the proscribed domestic terrorist organisations. It draws a comparison with the tragic incident that occurred in New York on 11 September 2001. This part concludes by stating that Ethiopia has been victim of terrorism since before 9/11. In its second part, the documentary reports about the proscribed terrorist organisations, their relation with the Eritrean Government, and several terrorism plots that did not materialise.

The third part focuses on those defendants who were being tried on suspicion of involvement in a terrorism plot in *FPP v Andualem Arage et al*.[109] After informing viewers that a criminal prosecution has been filed before the court of law, the journalist starts to explain the nature of the terrorist plot for which the defendants are being tried. The documentary indicates that Ginbot 7 consulted members and leaders of legally registered political parties, who had accepted the organisation's call for their involvement in a terrorist activity. The journalist tells that these people have been recently arrested.

While the journalist refers to them as 'suspects' he announces that 'there is concrete evidence (oral, documentary, audio/video and exhibit) that proves their involvement in a terrorist plot.' The journalist indicates that the defendants are nervous due to this overwhelming evidence. He continues to outline the details of the alleged terrorist plot and the involvement of the defendants in which he recaps the allegations of the prosecution and the charge. He supports the validity of what he is stating by presenting confessions made by some of the defendants and their testimonies against each other. The journalist announces that every defendant is guilty of the alleged crime. For example, he refers to Andualem Arage and Nathanael Mekonnen as 'executors of Ginbot 7's comprehensive terrorist and riot operations.' Furthermore, he indicates that 'Andualem Arage has established a secret organization with in UDJ,

[109] Ibid.

legally registered opposition party in which he is head of the public relations department,' and that 'he has communicated with the terrorists by e-mail and he has been in contact with those in the leadership of Ginbot 7.' Essentially the documentary presents as if what has been alleged in the charge is true.[110]

Towards its end, the documentary incorporates what the then Prime Minster stated some time before the defendants were arrested. The Prime Minster declared in parliament

> the Ethiopian government would like to pass a message to members of the UDJ. The Ethiopian government does not have visual and hearing impairment. It can hear and see. The government knows that terrorism and uprising plot is going on and everyone involved in this plot will pay a price very soon. This has to be clear.

Lack of independence of the court means it can easily be influenced by out of court happenings thereby jeopardising the right of the accused to a fair hearing guaranteed under Article 14 of the ICCPR and Article 20 of the FDRE Constitution. The statements by public officials were made and the documentary televised despite the UN Human Rights Committee's warning that all public authorities should 'refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.'[111] Indeed, concerned by the impacts of the statements made by public officials on the independence of the judiciary and, thus, on the fairness of the trial, the UN High Commissioner for Human Rights went as far as to remind the government of Ethiopia of

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[110] Ayten Girma in the Feb. 09, 2013 edition of reporter argues that media documentary showing that accused persons have committed the crime that they are being tried with is unconstitutional on several grounds. http://www.thereporterethiopia.com/Opinion/trial-by-media-and-its-constitutional-implications.html

[111] UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 para 32 <http://www.refworld.org/docid/478b2b2f2.html>; UN Human Rights Committee (HRC) *General Comment No 13 on article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* 13 April 1984, <http://www.refworld.org/docid/453883f90.html>; Human Rights Committee 69th session, *Mr. Dimitry L Gridin v Russian Federation,* Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997 (2000) para 8.3 <https://www1.umn.edu/humanrts/undocs/session69/view770.htm>.

some of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions 40/32 and 40/146.[112]

Indeed, the notion of fair trial recognized under both the ICCPR and the FDRE Constitution includes the guarantee of a fair hearing.[113] As interpreted by the International Human Rights Committee 'fairness of proceedings entails the absence of any direct or indirect influence, pressure … from whatever side and for whatever motive.'[114] Furthermore it is in conflict with presumption of innocence which, as provided under Article 14 of the ICCPR and Article 20 of the FDRE Constitution, "requires that persons accused of a criminal act must be treated in accordance with this principle."[115]

In relation to the documentary, Human Rights Watch observes:

> In late November state-run Ethiopian Radio and Television Agency (ERTA) broadcast a three-part program called "Akeldama" ("Land of Blood") in which several of the defendants, including Andualem Arage and Nathnael Mekonnen, were filmed in detention, seemingly under duress, describing their alleged involvement in what the documentary brands a "terrorist

[112] The principles include:
'Principle 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
'Principle 4. There shall not be any inappropriate or unwarranted interference with the judicial process [….].
'Principle 6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.' Office of the United Nations High Commissioner for Human Rights Special Procedures of the Human Rights Council, UA G/SO 214 (67-17) G/SO 214 (107-9) G/SO 214 (3-3-16) Terrorism (2005-4) G/SO 214 (53-24) ETH 7/2011, (19 December, 2011) 5-6 <https://spdb.ohchr.org/hrdb/20th/UA_Ethiopia_19.12.2011_%287.2011%29.pdf>.

[113] Article 14 of the ICCPR and Article 20 of the FDRE Constitution.

[114] Human Rights Committee, General Comment No. 32, Article 14:Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, Para 25 <http://www.refworld.org/docid/478b2b2f2.html>. As provided under Article 13 of the FDRE Constitution, human rights provisions are to be interpreted in light of international human rights instruments to which Ethiopia is a party. ICCPR is one of these instruments.

[115] UN Human Rights Committee (HRC), General Comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32 para. 30 <http://www.refworld.org/docid/478b2b2f2.html>.

> plot." Allegations were also made against Eskinder Nega.[116]

It is despite the requirement of presumption of innocence of the accused until proven guilty according to law that public statements were made and the documentary broadcasted.[117]

R 9 asks 'why is the trial needed if the media publicly declare that the defendants are terrorists/criminals? Its influence on the judges would be significant. In particular when their independence is doubted, the program would definitely influence the judges.' Although the defendants challenged the transmission of the documentary 'the court reportedly dismissed the complaints of due process violations against the defendants on the grounds that the video footage was not produced as evidence by the prosecutor.'[118] According to R 9, their application to the court to order the Ethiopian Television not to air the film/documentary was ignored. The court told the defence lawyers, R 9 states, that 'in transmitting the film Ethiopian Television is doing its own business in which we cannot intervene. As we have our own way of doing things they do have their own way.'[119]

On the other hand, a private media source's coverage of the trial proceedings in *FPP v Andualem Arage et al* was considered as intervention in the court proceedings and resulted in a jail terms and fine. The UN Working Group on Arbitrary Detention puts it as follows:

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[116] Human Rights Watch, *Ethiopia: Terrorism Law Used to Crush Free Speech Donors Should Condemn Verdicts, Demand Legal Reforms* (27 June 2012) <https://www.hrw.org/news/2012/06/27/ethiopia-terrorism-law-used-crush-free-speech>.

[117] Article 14(1) of the ICCPR requires the media to avoid news coverage undermining the presumption of innocence. Human Rights Committee, General Comment No. 32, Article 14:Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, Para 30 <http://www.refworld.org/docid/478b2b2f2.html>

[118] Human Rights Watch, *Ethiopia: Terrorism Law*, above n 116.

[119] The documentary was a cause of a civil action against the Ethiopian Radio and Television Agency (ERTA). The UDJ party successfully sued ERTA for defaming the party, among others, by presenting some people who were no more members of the party as having committed a terrorist act. The Civil bench of the Federal First Instance Court decides that the ERTA has intentionally defamed the party by broadcasting the documentary in which false information are found. The court in its verdict ordered 'ERTA to broadcast a program to correct the defamatory remark of the 'Akeldama' documentary and air a disclaimer.' Tamiru Tsige, State-owned broadcaster found guilty of defamation (5 April 2014) <http://allafrica.com/stories/201404070761.html>.

> In April 2012, the court held a "trial within a trial" after prosecutors complained that local independent media coverage by the *Fareh* and *Negradas* newspapers portrayed the proceedings as politically motivated and the defendants as falsely accused. Prosecution requested the court to find that the coverage was unbalanced and order the papers to publish a correction. On 22 April 2012, the court convicted journalist, Mr. Temesgen Desalegn, of interfering with the proceedings and sentenced him to four months in prison or a fine of 2,000 birr (approximately equivalent to US$ 114).[120]

Human Rights Watch describes the contradiction as follows:

> The same court later charged the editor of the independent weekly newspaper *Feteh*, Temesghen Desalegn, of contempt of court for having among other things reproduced verbatim statements made by a defendant. The courts in Ethiopia have little independence from the government.[121]

7.7 Conclusion

This chapter examined the decisions of the court regarding three major issues. Concerning the relationship between precursor crime and principal terrorist acts, the court advanced conflicting stances during the trial but eventually took the position that the former can be established without proving an intention to commit a terrorist act. By so doing, the court dissociated a pre-crime terrorist act from a principal terrorist act and treated it as a stand-alone offence. Following this position, the court considered the advocacy of the public uprising of the Arab Spring kind and the call for the stepping down of the then Prime Minster, in and of themselves, as constituting pre-crime terrorist acts. The court's reasoning was that because seizing power through a public uprising is unconstitutional, involvement in supporting a public uprising against the government amounts to engaging in a pre-crime terrorist activity. The court did not indicate how the unconstitutionality of an act transforms that act into a pre-crime terrorist activity. Another decision relates to the extent of media freedom in reporting a criminal case pending trial. While the court ignored the application from the defence that the state-owned

[120] UN Human Rights Council Working Group on Arbitrary Detention, *Eskinder Nega v. Ethiopia*, Opinion No. 62/2012, U.N. Doc. A/HRC/WGAD/2012/62 (2012) Para 15
[121] Human Rights Watch, above n 116.

media be ordered not to broadcast a documentary in which the defendants are represented as guilty of a terrorist act, it penalised the editor-in-chief of a private newspaper for reporting what transpired in a court room during the trial. The following chapter critically evaluates the merit of these and other decisions of the court.

CHAPTER EIGHT: APPRAISAL OF THE COURTS' DECISIONS

8.1 Introduction

How the court administers the law is of crucial interest in examining a court decision.[1] In his article on *Principled Decision Making and the Supreme Court*, Golding notes 'the process or procedure of judicial decision making'[2] is the key to appraising the quality of a court judgment. Easterbrook's article *Ways of Criticising the Court* identifies two methods of criticising the U.S. Supreme Court.[3] First, the criticism may be based on some fundamental principles and determines the court's decision as being inconsistent with these. Second, the criticism challenges the decision of the court as an institution. The latter includes criticisms relating to inconsistencies between and within judgments of the court and the court's failure to explain its decisions.[4] While the sources for the first method of criticism are standards external to the court, those of the second are the court's own judgments. In the first method, the court is criticised for its failure to comply with rules or principles that it ought to follow. In the second, the court's judgment is evaluated for its own internal consistency and its consistency with other judgments passed on similar issues.

Golding argues that a court of law ought to follow principled decision-making.[5] Drawing on Kant's moral theory,[6] Golding argues that 'a decision or judgment is principled only when it is guided by some "external consideration," i.e., a guiding principle that contributes to the deliberation on the case.'[7] A guiding principle is something that is used

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[1] Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 79 *Harvard Law Review* 1; M. P. Golding, 'Principled Decision-Making and the Supreme Court' (1963) 63 *Colombia Law Review* 35.

[2] Golding, above n 1, 37.

[3] Frank H. Easterbrook, 'Ways of Criticizing the Court' (1981-1982) 95 *Harvard Law Review* 802, 802.

[4] Ibid.

[5] Golding, above n 1, 37.

[6] According to Kant's theory, for an act to be morally right it has to be done on principle and in conformity with the principle. Immanuel Kant, *Critique of practical Reason* in ibid, 38.

[7] Golding, above n 1, 40.

as 'a reason … for the decision.'[8] A principle is said to be a reason where it determines at least partly the result of the process of deliberation so much so that it cannot be so malleable as to tolerate free-wheeling discretion.[9] According to Wechsler the 'virtue or demerit of a judgment turns... entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees.'[10]

While these articles are primarily written in the context of the US system, as Golding notes the arguments are relevant to other systems including authoritarian ones.[11] In the first section Golding and Easterbrook are drawn upon to examine the decisions of the court in the two prosecutions and demonstrate that the court failed in both. This is followed by the second section that argues the court, by so failing, contributes to the occurrence of miscarriage of justice. The third section attributes the court's misguided approach and resulting miscarriage of justice to its lack of independence that sees it immersed in tunnel vision. The approach followed to evaluate the courts' decisions is a doctrinal analysis type which, as Posner notes, involves careful reading and comparison of judicial opinions with a view to detect ambiguities, uncover inconsistencies with the law and within the judicial decision.[12] Thus, the evaluation is, to use Posner's terms, 'largely autonomous' in the sense that it does not use the 'theories or methods of the social sciences or of philosophy.'[13] Instead the evaluation of the courts' decisions is related to their clarity, being well-reasoned, consistency with the constitution and other relevant legislation.

8.2 Misapplication of the law

While Article 79 of the FDRE Constitution requires the court to be directed solely by the law, the rulings and judgments in both prosecutions exhibit

[8] Ibid 40.
[9] Ibid.
[10] Wechsler quoted in Arthur S. Miller, 'A Note on the Criticism of Supreme Court Decisions' (1961) 10 *Journal of Public Law* 139, 143.
[11] Golding, above n 1, 42-43.
[12] Richard A. Posner, 'The Present Situation of Legal Scholarship' (1980-1981) 90 *Yale Law Review,* 1113.
[13] Ibid, 1114.

the court's failure to apply constitutional principles and statutory provisions abdicating this constitutional obligation.

By providing '[w]hosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation …' Article 4 of the ATP requires that alleged conduct be linked to a principal terrorist act under Article 3 as a foretold crime for the conduct to constitute a precursor crime that it envisions. Its plain meaning, purposive interpretation, and the rule of strict interpretation of criminal provisions point to this meaning. Contrary to this, the court ignored the requirement that an alleged act be tied with any one of the six principal terrorist acts listed under Article 3. By so doing the court circumvented the safeguard against abuse of provisions that criminalise precursor offences—the intention to commit a principal terrorist act.

Moreover, the prosecutions have been conducted and resulted in conviction of the defendants in a process where several rights of the defendants have been curtailed. For example, the FDRE Constitution and international human rights instruments provide for several preconditions, including a specific law that prohibits an expression, that need to be fulfilled for a limitation on freedom of expression to be lawful. However, the court admits into evidence expressions by and communications between the defendants indicating that these expressions and communications are in excess of the defendant's freedom of expression. The court does so in the absence of a specific law that prohibits these expressions and without inquiring into whether or not other necessary preconditions for limiting one's freedom of expression are fulfilled. By doing so, the court admitted into evidence expressions protected under the FDRE Constitution and human rights instruments, which are integral parts of Ethiopian law.[14] Furthermore, the court reverses the onus of proof and explicitly requires defendants to prove their innocence contrary to the right of the accused to be presumed innocent provided under the FDRE Constitution and international human

[14] Constitution (Ethiopia) Article 9(4).

rights instruments, and in the absence of any law providing for an exception to this principle.

This approach has allowed the court to convict defendants without the offence for which they are charged being proved as required by law. As discussed in chapter seven defendants are convicted for involvement in preparation, planning, and conspiracy to commit a terrorist act even though their intention to commit any of the terrorist acts listed under Article 3 is not established. Instead, their involvement in calling for the stepping down of the then Prime Minster and the ruling party, and their preparation for calling a North African type of opposition in Ethiopia have been adequate to convict them as charged. As Walker rightly noted, the accused 'should be convicted on the basis of the law as it is and not as some foolish judge says it is.'[15] However, in the two terrorism prosecutions conduct that does not constitute a precursor crime under the ATP is construed as such and results in conviction and punishment of those who do not commit the offences.

By not criminalising recruiting supporters of a terrorist organisation, having contact with a terrorist organisation, and getting financial support from a terrorist organisation, the ATP appears to be compatible with Security Council Resolution 1373 and more liberal even compared to anti-terror laws in democratic countries.[16] However, the court concludes that the defendants are guilty of precursor crimes with which they are charged based on their involvement in these very acts that do not constitute a crime under the ATP.

8.3 Inconsistency

Another set of problems that the judgments and rulings in the two terrorism prosecutions revealed relates to the court's inconsistency, the

[15] Clive Walker, 'Miscarriages of Justice in Principle and Practice' in Clive Walker and Keir Starmer (eds), *Miscarriage of Justice: A Review of Justice in Error (*Oxford University Press, 1999*) 31,* 34, note 20.

[16] See, for example, sections 102.4 and 102.6 of the Australian Criminal Code which respectively criminalise recruiting for a terrorist organization and getting funds to, from or for a terrorist organization.

avoidance of arguments raised by the defendants, and paradoxical decisions made by the courts.

In *FPP v Andualem Arage et al*, the court has taken conflicting positions on the relation between precursor offences under Article 4 and principal terrorist acts under Article 3 of the ATP. As discussed in chapters five and seven, initially the court told the parties that a precursor crime does not stand independently from an intention to commit a principal terrorist act. Later in the proceedings, the court changed its previous position and ruled that a precursor offence can exist independently from an intention to commit a principal terrorist act. This very legal issue has been addressed differently in a subsequently filed case. In *FPP v Zelalem Workagegnehu et al*,[17] the prosecution's failure to prove a link between the conduct it alleges to be in violation of Article 4 to an intention to commit any of the principal terrorist acts listed under Article 3 resulted in acquittal of the defendants unlike in *FPP v Andualem Arage et al* where the defendants were convicted despite lack of this link. To use Golding's argument on principled decision-making, such inconsistency is possible owing to the undesirable malleability of the principle that the court uses to decide the issues, which bestows upon it a 'free-wheeling discretion.'

Similarly in *FPP v Elias Kifle et al* there is a discrepancy between the ruling and the judgment of the court. In the latter the court convicts the co-defendants of a crime different from that against which it ordered them to defend by its ruling. The prosecution's first count accuses all five defendants of conspiring to commit a terrorist act. Following the conclusion of the prosecution's evidence, the court ordered all the defendants to enter into their defence telling them that the prosecution has established their *conspiracy* to commit a terrorist act.[18] However in the judgment that the court delivered following the evidence of the

[17] *FPP v Zelalem Workagegnehu et al (Fed. H. Ct., Cr. F. no. 158194, ruling, 22 August 2015)*

[18] *FPP v Elais Kifle et al* (F.H. Ct., Cr. F. No. 112199, ruling, 28 November 2011) 2. As the first count refers only to conspiracy to commit a terrorist act, by referring to the charge, the court confirms that the prosecution's evidence proves defendants' conspiracy to commit the act referred under Article 3(6) of the ATP.

defence, the court convicted all but the fifth defendant,[19] for an additional pre-crime terrorist activity. The first[20] and third[21] were convicted for *attempt;* the second for *planning* and *preparation;*[22] and the fourth for *preparation*[23] to commit a terrorist act.

These fallacies represent what Easterbrook refers to as 'inconsistency between and within judgments.'[24] In so far as a court decides based on law, it will deliver consistent decisions.[25] On the other hand, inconsistency, Easterbrook argues, opens a space to question if 'the [c]ourt is following the law rather than its members' whims.'[26] As such, Easterbrook observes inconsistency is 'the most powerful challenge to the court as institution.'[27] Golding argues that a court of law ought to follow principled decision-making.[28] For a court's judgment to be principled the court is supposed to 'formulate a general criterion that shall serve as a principle of decision in cases of its type' in the future.[29] Where a decision is principled (based on reason) we are 'morally and intellectually obligated to support'[30] it. On the contrary, inconsistency, as Golding notes, renders a decision to lose its moral force.[31] If a court is to be principled, it must anticipate criticisms that might be made of its decision, in particular, 'the more apparent inconsistencies', and give an explanation.[32]

Although the inconsistencies of the court's decisions within *FPP v Andualem Arage et al* and between its judgments in *FPP v Andualem Arage et al* and *FPP v Zelalem Workagegnehu* are vivid, the court does not explain this inconsistency, which is another major shortcoming.

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[19] *FPP v Elias Kifle et al* (F.H. Ct., Cr. F. No. 112199, judgment, 10 January, 2012) 17.
[20] *FPP v Elais Kifle et al (F.H. Ct. Cr. F. No. 112199, 19* January 2012) judgment, 12.
[21] Ibid 14.
[22] Ibid 13.
[23] Ibid 15
[24] Easterbrook, above n 3, 802-832.
[25] Ibid 811.
[26] Easterbrook, above n 3, 803.
[27] Ibid.
[28] Golding, above n 1, 37. What is referred to as a principle is something that the court uses as "a reason … for the decision" at: 50.
[29] Ibid.
[30] Wechsler, above n 1, 16.
[31] Golding, above n 1, 42.
[32] Ibid 50.

According to Golding a court's failure to explain its inconsistency is a central problem that indicates that the court's judgment is not principled.[33] Thus, Easterbrook advises that a court has to explain its inconsistency as otherwise it will be exposed to a major criticism. [34] In both prosecutions the court does not explain the inconsistent interpretations noted above. By giving inconsistent interpretation to a legal provision without explanation, the court engages in what Wechsler called 'ad hoc evaluation'[35] as opposed to a principled decision-making. As Wechsler observes:

> [t]he man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a *naked power organ*, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law.[36]

Two extreme cases of the court's misguided approach call for special mention. First, as noted above in *FPP v Elias Kifle et al*, the court convicts the defendants for an offence they are not charged with. The prosecution charged all five defendants with *conspiracy* to commit a terrorist act. Moreover, in its final address the prosecution requested the court to convict them 'as charged.'[37] However, the court convicts four of the five defendants for different precursor offences in addition to conspiracy to commit a terrorist act. By so doing, the judgment goes beyond what the prosecution has asked for without providing any reason.

Second, the court accepts the charge that alleges the defendants' involvement in preparatory activities that were intended to call for the Arab Spring type of opposition in Ethiopia. The court admitted into evidence oral, documentary, and audio-visual evidence relating to the defendants' involvement to prove that the defendants had committed an act in preparation for a terrorist act. The court reaches this conclusion

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[33] Ibid 42.
[34] Easterbrook, above n 3, 802-803.
[35] Wechsler, above n 1, 12.
[36] Ibid.
[37] The prosecution requested the court to convict the defendants for the offence they are ordered to defend, which refers to conspiracy to commit a terrorist act. Prosecution's Final address, *FPP v Elias Kifle et al*, Ministry of Justice /09/165/2004, 5 January 2012, 9.

contrary to the official position of the Ethiopian government relating to the Arab Spring. Ethiopia is one of the first two African countries to recognise the Arab Spring and the legitimacy of the resulting change of government. These decisions represent a situation where **'**courts … contribute to repression in ways that go beyond mere compliance with the demands of the rulers' which permits 'the repression [to be] more extensive and efficient.'[38]

Another problem relates to the Federal Supreme Court's avoidance of arguments that the defendant-appellants raised. As noted above, the trial court convicted the defendants on the grounds that they did not prove their innocence. In *Andualem Arage et al v FPP*, one of the grounds of appeal is that the prosecution did not prove its case beyond reasonable doubt. Another argument which Eskinder Nega advanced before the appellate court is that because the Arab Spring had been supported by the international community in general and by the Ethiopian government in particular, they should not be prosecuted and convicted for advocating the same type of opposition in Ethiopia. The appellate court upheld the decision of the lower court without addressing these two arguments.

Graver's analysis of a situation where 'liberal legal institutions have been used as a means of repression' where 'a regime operates in opposition to a functioning legal order based on rule of law' is useful to understand judgments rendered by court's functioning under a system where there is constitution without constitutionalism. Graver analyses cases where there is a transition from a state of rule of law to an authoritarian state in which the newly established system allows the pre-existing liberal legal system to continue.[39] These authoritative systems did not abolish the liberal institutions but used them as a means of repression. They operate under the pretence of legality through legal measures. While there is a functioning legal order based on rule of law, the courts deal with the

[38] Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Springer-Verlag Berlin Heidelberg, 2015) 33.

[39] These cases include the transition from the liberal Weimar Republic of Germany to the totalitarian state of the Nazi party, introduction of apartheid in South Africa after the National Party came to power in 1948, and the military dictatorships in several Latin American countries in the 1970s and 1980s. Ibid.

cases in opposition to the normative legal order. According to Graver, the experiences in these jurisdictions demonstrate how a dictatorship can transform legal norms by legal reinterpretation or through reshaping of the law.[40] That liberal laws can serve authoritarian regimes in so far as the judges are willing to disregard the law through departing from any reasonable statutory interpretation is implied from a statement made by the infamous president of the people's court of Germany. The president stated 'not a reform of the law, but a reform of the lawyers is what is needed'[41] indicating that there is no need to amend the liberal laws that were in place during the Weimar Republic.

In relation to courts in authoritarian regimes with liberal laws, Graver notes 'those in power over legislation use legal means to systematically undermine democracy, liberty, and the rule of law.'[42] In view of the politico-legal culture of having a constitution without constitutionalism, the courts' inconsistency, evasion, departure from the constitution, international human rights instruments and statutes is not surprising. This is another manifestation of the disjuncture between norms and practice. However, described as a 'prostitution of a judicial system for the accomplishment of criminal ends [which] involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes,'[43] the court's cooperation with other organs of the government in such malpractices is particularly painful to a sense of justice. As the Chilean National Commission on Truth and Reconciliation notes, the courts are most needed where the other organs of the government systematically undermine the rule of law.[44] The Nuremberg Court's statement on the heightened responsibility of justice institutions in settings where other institutions fail, while convicting Oswald Rothaug, the Chief Justice of the Special Court in Nuremberg, is illuminating. The

[40] Ibid.
[41] Schmitt (1933) 43 quoted in ibid 30.
[42] Graver, above n 38, 18.
[43] The Justice Case (1951) 1086 quoted in Ibid.
[44] Report of the Chilean National Commission on Truth and Reconciliation (University of Notre Dame Press: 1993) 143.

US Military Tribunal contrasted his actions with those of the Nazi leaders as follows:

> That the number the defendant could wipe out within his competency was smaller than the number involved in the mass persecutions and exterminations by the leaders whom he served, does not mitigate his contribution to the program of those leaders. His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.[45]

It is intriguing that the trial court does not provide a reason for its shift in the interpretation of preparatory acts under Article 4 and why it requires the defendants to prove their innocence in the face of the provisions from the FDRE Constitution and international human rights instruments. That is despite its constitutional responsibility to respect and enforce rights of the accused, and also despite the concern that human rights organisations (both governmental and non-governmental) have been expressing regarding the misapplication of the law and the injustice that the court endorses. This is akin to how the Chilean judiciary betrayed the people and sided with the military dictatorship of Augusto Pinochet. As the Chilean Truth and Reconciliation Committee noted, 'it is despite their responsibility as provided under the Constitution and the law and despite petitions from lawyers, the victim's relatives and international human rights agencies that the courts failed to act in accordance with the law.'[46]

The appellate court is no different. It rubberstamps the decision of the lower court even without addressing the objections that the defence council raised. In *In defense of judicial candor,* Shapiro argues that 'the nature of the judicial process' calls for 'candor in the crafting of judicial opinions and in other judicial acts.' [47] Although the arguments the parties raised go to the core of the prosecution's case, the court avoids addressing the issues. By not responding to the appellants' central arguments, the Supreme Court's judgment is short of providing 'reasoned

[45] The Justice Case (1951) 1155-56 quoted in Graver, above n 38, 19.
[46] Report of the Chilean National Commission on Truth and Reconciliation, above n 44, 141.
[47] David L. Shapiro, 'In Defence of Judicial Candor' (1986-1987) 100 *Harvard Law Review* 731, 737.

response to reasoned argument', which Shapiro describes as 'an essential aspect' of the judicial process.[48]

As briefly noted above, the court also fails to explain its inconsistency on several issues. As such, the court fails to meet the 'requirement that judges give reasons for their decisions - grounds of decision that can be debated, attacked, and defended' which 'serves a vital function in constraining the judiciary's exercise of power.'[49]

'Candor,' as Shapiro argues, 'is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another.'[50] Moreover, when lack of candor is detected, it 'increase[s] the level of cynicism about the nature of judging and of judges,'[51] which has been identified in the Ethiopian public.

By not providing reasons for inconsistency and by avoiding addressing the grounds of challenging the lower court's judgment, the judges 'avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail.'[52] Normally, the court resorts to deception where there is a conflict between what the law says and the judge's morality,[53] which is a common characteristic of an authoritarian system as 'in a society that aspires to be just, the situation in which a judge might reasonably feel compelled to lie should be extremely rare.'[54]

8.4 Miscarriage of Justice

The court's rulings and judgments display a problem of non-compliance with legal provisions and principles, incoherence within a judgment, and inconsistency between judgments, failing in Easterbrook's two measures of a court judgment. As noted above, the prosecution was conducted and resulted in conviction of the defendants in a process where several rights

[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Ibid 749-750.
[54] Ibid 750.

of the defendants had been abridged. They were prosecuted for exercising their freedom of expression and convicted as terrorists by a flawed process and without the prerequisite elements under the law established. The court has been consistently inconsistent, predisposed to endorse the prosecution's viewpoint and evidence, and ready to dismiss or ignore arguments and evidence presented by the defence. Eventually the court weighed the evidence produced by the parties deviating from established rules of evidence where it shifts the onus of proof from the prosecution onto the defence, thereby lightening the prosecution's burden and paving the way for marginally related facts used as adequate to prove prosecution's allegation.

Walker, in his rights-based approach to miscarriage of justice, identifies six circumstances where those subject to criminal justice system are treated by the state in breach of their rights thereby resulting in a miscarriage of justice:

> A miscarriage of justice occurs … whenever suspects or defendants or convicts are treated by the state in breach of their rights, whether because of first, deficient processes or, second, the laws which are applied to them or, third because there is no factual justifications for the applied treatment or punishment; fourth whenever suspects or defendants or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers or, sixth, by State law itself.[55]

As Walker has noted, miscarriages may result from a multiplicity of causes.[56] The transgressions that the two prosecutions display represent typical features of the first and third types of miscarriages of justice.[57] The

[55] Walker, above n 15, 33. For criticism on this approach of defining miscarriage of justice, see: David Schiff and Richard Nobles, 'Book Review' (1994) 34 *British Journal of Criminology*, 383. For Walker's response see: Clive Walker, 'Response to a Review' (1994) 35(4) *British Journal of Criminology* 661.

[56] Walker, above n 15, 52.

[57] For those who dismissed the ATP as draconian, the prosecution and conviction of the defendants under this law would constitute the second type of miscarriage of justice. See: Angus Stickler, 'UN officer jailed under draconian Ethiopian anti-terror laws', *the bureau of investigative journalism (*online*)*, 22 June 2012 <https://www.thebureauinvestigates.com/2012/06/22/un-officer-jailed-under-draconian-ethiopian-anti-terror-laws/>. Walker describes laws the application of

first type of miscarriage of justice broadly refers to breach of due process which includes a range of unfair treatments of individuals at different stages of a criminal proceeding including trial.[58]

The third type of miscarriage of justice occurs where a certain treatment or punishment is applied without due cause. While several reasons contribute to this,[59] the one that relates to the prosecutions is what Killias and Huff call an 'error of misinterpretation of substantive criminal law'[60] and Walker refers to 'dysfunctions in the application of laws.'[61] Roach and Trotter observe that the substantive anti-terrorism law on conspiracy and other ancillary offences is prone to misapplication.[62] Similarly Walker observes that a 'miscarriage can … ensue from failures in the application of laws.'[63] Such error, inter alia, results in the conviction of an innocent person for doing an act that does not constitute an offence.[64]

Behaviours that would be construed as anti-government and criminalised inappropriately include 'organizing protests; publishing materials or making public comments that are critical of the repressive government; engaging in behaviour that is perceived as threatening the existing economic or social order...'[65] As Roach and Trotter note people with a

which would result in a miscarriage of justice as 'inherently unjust' laws. Walker, above n 15, 34. Huff refers to this type of miscarriage of justice as 'convictions based on political repression,' where defendants are 'convicted of "crimes" that were crimes only because they were defined as such by politically repressive government.' C Ronald Huff, 'Wrongful Convictions, Miscarriages of Justice, and Political Repression: Challenges for Transitional Justice' in C Ronald Huff and Martin Killias (eds), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge, 2013) 357, 359. Signifying their close tie with repressive regimes, Walker notes such miscarriages are uncommon in liberal democracies. Walker, above n 15, 34.

58 Walker, above n 15, 33.

59 Ibid 35.

60 Martin Killias and C Ronald Huff, 'Worngful Convictions and Miscarriages of Justice – What did we Learn?' in C Ronald Huff and Martin Killias (eds), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge, 2013) 373,375.

61 Walker, above n 15, 34.

62 Kent Roach and Gary Trotter, 'Miscarriages of Justice in the War Against Terror' (2004-2005) 109(4) *Pennsylvania State law Review* 967, 993-996.

63 Walker, above n 15, 37.

64 Killias and Huff, above n 60, 375.

65 Huff, above n 57, 360

'radical political view' are among the groups vulnerable to the risk of wrongful conviction in counter-terrorism.[66]

The activities that the defendants are charged with in the two terrorism prosecutions are related to this conduct. The major reason for the prosecution in *FPP v Elias Kifle et al,* was due to the defendants' involvement in the writing and posting of slogans calling for the ruling party and the then Prime Minster to step down. While this is a mere exercise of freedom of expression and participation in the politics of one's country, it has been construed as inciting commission of a terrorist act, a clear case of misapplication of provision of the ATP that criminalises incitement of a terrorist act. The same is true in *FPP v Andualem Arage et al* in which Andualem and Eskinder are prosecuted for their verbal and written statements calling for the North Africa type of uprising in Ethiopia. Nathanael's charge relates to duplicating and distributing written statements in which public grievances and opposition to the government have been expressed. While these activities are purely cases of freedom of expression and political participation activities, the prosecution presented them as terrorism-related activities, which was upheld by the court.

In both cases, as a consequence of misapplication of the law, the defendants are convicted of an act that does not constitute a terrorism-related crime. When the conviction is based not on what the law, but a 'foolish judge,'[67] says it would result in the third type of miscarriage of justice — imposing punishment without factual justifications.

With these features, the trials are akin to Campbell's observation on the manner terrorism suspects are treated in other jurisdictions as 'it would seem that the presumption of innocence … has been transformed into a presumption of guilt.'[68] Indeed, in *FPP v Andualem Arage et al*, the court

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[66] Roach and Trotter use wrongful conviction interchangeably with miscarriage of justice. Roach and Trotter, above n 62, 968.

[67] Walker, above n 15, 34, note 20.

[68] Kathryn M Campbell, "the Changing Face of Miscarriage of Justice: Preventive Detention Strategies in Canada and the United States" in C Ronald Huff and Martin Killias (eds), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge, 2013) 209, 210.

had expressly required defendants to prove their innocence in order to be acquitted. One of the principles that Campbell questions, if fully respected in counterterrorism prosecutions, is the 'prosecutorial burden of proof beyond a reasonable doubt.'[69] The two prosecutions demonstrated that the court disregards the principle of beyond reasonable doubt, the most fundamental safeguard against wrongful conviction.[70] Additionally, as discussed in chapter seven, the media has also played a significant role in undermining the right of the defendants to be presumed innocent.

These irregularities indicate that the defendants were not accorded treatment that respects due process constituting a breach of rights resulting from 'deficient process', the first type of miscarriage of justice under Walker's approach.[71] A conviction resulting from such failures would still be 'a miscarriage of justice, even in respect of a person who has committed the elements of a crime.'[72]

8.5 Executive Driven Tunnel Vision

The court's inexplicable inconsistency, deviation from plain meanings of legal provisions and established principles, predisposition to endorse the prosecution's viewpoint and evidence, inclination to dismiss or ignore arguments and evidence presented by the defence, and its unwillingness to safeguard the interests of defendants against media trial are all features of what is known as a tunnel vision.

As a medical term, tunnel vision refers to a situation where 'a person can no longer see to the side, so that the field of vision becomes circular and

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[69] Ibid.

[70] Brian Frost, 'Wrongful Convictions in a World of Miscarriages of Justice' in C Ronald Huff and Martin Killias (eds), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge, 2013) 15, 21.

[71] A conviction resulting from such failures would still be 'a miscarriage of justice, even in respect of a person who has committed the elements of a crime.' Walker, above n 15, 33-34.

[72] Ibid.

tunnel-like.'[73] The term has been used in the criminal justice process to refer to a:

> Compendium of common heuristics and logical fallacies,…that lead actors in the criminal justice system to "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt."[74]

Tunnel vision is one of the most common causes of miscarriage of justice.[75] For example, Findley and Scott, referring to hundreds of people who were exonerated by post-conviction DNA testing, describe tunnel vision as relevant in 'almost every case.'[76] Similarly, Roach and Trotter consider it as 'an element that binds many of the causes of wrongful convictions together."[77]

As Findley and Scott note, tunnel vision leads criminal justice actors including judges 'to focus on a particular conclusion and then filter all evidence through the lens provided by that conclusion.'[78] Findley and Scott observe:

> Through that filter all information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable.[79]

In both prosecutions the court has given high probative value to evidence that is only slightly, or not at all, related to the prosecution's case. For example, membership of a terrorist organisation, simpliciter, has been accepted as conclusive evidence to prove planning and preparation of a

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[73] Chrisje Brants, 'Tunnel Vision, Belief Perseverance and Bias Confirmation only Human?' In C Ronald Huff and Martin Killias (eds.), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems* (Routledge, 2013) 161, 163.

[74] Keith A Findley and Michael S Scott, 'The Multiple Dimensions of Tunnel Vision in Criminal Cases' (2006) 2 *Wisconsin Law Review* 291, 292.

[75] Ibid.

[76] Ibid.

[77] Roach and Trotter, above n 62, 982.

[78] Findley and Scott, above n 74, 292.

[79] Ibid.

terrorist act; giving interviews to a media outlet that a terrorist organisation has been using to express its views has been admitted as vital evidence to prove one's connection with the terrorist organisation. On the other hand, evidence that is presented by the defence has been ignored although it is relevant. For example, the court dismissed testimonies of witnesses of Andualem and Nathanael who told the court that the defendants were committed to the peaceful struggle indicating that 'other than the actor himself, only God knows everything the accused did.'[80] Similarly, though the fact that Eskinder has expressly stated that the North Africa type of uprising he intended to mobilise in Ethiopia should be conducted in a lawful and peaceful manner has been established, the court disregarded these qualifying terms indicating that the defendant did not use these words genuinely. This can be likened to the description by the South African Truth and Reconciliation Commission of the apartheid period South African judges' involvement 'in the greatest injustices of all, [where] judges … too easily made sense of the illogical and the unjust in legislative language, and who too quickly accepted the word of the police or official witnesses in preference to that of the accused.'[81] The problem of the judge being 'prone to favour the prosecution evidence rather than acting as impartial umpire'[82] and the judge's 'failure to appreciate the defence's submissions either in law or fact'[83] has been identified as one major cause of miscarriage of justice.

As Brants rightly notes, tunnel vision is problematic because 'it affects the type of professional decision-making that requires that all information be taken into account, perhaps especially information that seems contradictory to any preliminary conclusion.'[84] It is true that the predisposition to accept the prosecution as valid does not permit the court to decide judiciously. The miscarriage of justice resulting from tunnel vision in the context of counterterrorism is not new. It has been well

[80] *FPP v Andualem Arage et al* (F. H. Ct., Cr. F. No. 112546, judgment, 27 June 2012) 44.
[81] Report of the Truth and Reconciliation Commission of South Africa, vol 4, 103 in Graver, above n 38, 21-22.
[82] Walker, above n 15, 54.
[83] Ibid.
[84] Brants, above n 73, 165.

documented in Irish counterterrorism prosecutions.[85] Among the truths that these prosecutions reveal is the effect of tunnel vision on judges while adjudicating cases.[86] The risk of tunnel vision is only exacerbated in the post-9/11 context.[87]

While the impact of tunnel vision in distorting 'normal decision making processes'[88] is acknowledged, many do not consider it as being adopted deliberately. Findley and Scott describe it as 'a natural human tendency.'[89] They consider tunnel vision as primarily 'the product of human condition as well as institutional and cultural pressures than of maliciousness or indifference.'[90] Similarly, for Brants, 'it is an inevitable element of human fallibility in criminal justice.'[91] Because tunnel vision 'is not always, …, a conscious process of deliberately ignoring information that does not fit preconceived ideas,' Brants notes, 'it is not, per definition, a bad thing.'[92] According to Brants, 'few policemen or prosecutors would intentionally "pin guilt" on an innocent suspect and probably even fewer judges … would deliberately convict an innocent person.'[93]

Findley and Scot, and Brants advance this view — that tunnel vision is not a deliberate action — based on criminal justice systems of the U.S. and the Netherlands respectively, both liberal democracies. The situation in authoritarian regimes, where courts are not free to determine cases independently, is different. [94] Solomon identifies four models through

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[85] David Langwallner, 'Miscarriage of Justice in Ireland: A survey of the Jurisprudence with Suggestions for the Future' (2011) 2(1) *Irish Journal of Legal Studies*; Clive Walker and Keir Starmer, *Justice in Error* (Blackstone Press, 1993); Roach and Trotter, above n 62; Marny A Requa, 'Considering Just-World Thinking in Counterterrorism Cases: Miscarriages of Justice in Northern Ireland' (2014) 27 *Harvard Human Rights Journal* 7.

[86] Roach and Trotter, above n 62, 969.

[87] However, they note that they are yet to identify a wrongful conviction case in post-9/11 counterterrorism. Ibid 983.

[88] Bruce A MacFarlane, *Wrongful convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System* (2010) 44 <www.attorneygeneral.jus.gov.on.ca>.

[89] Findley and Scott, above n 74, 292

[90] Ibid. The institutional and cultural pressure to which they refer relates to pressure on the police and the prosecution arising from 'biasing pressures' imbedded in adversarial system: at 322-33.

[91] Brants, above n 73, 165.

[92] Ibid 164.

[93] Ibid 165.

[94] Peter H Solomon, Jr., "Courts in Russia: Independence, Power, and Accountability," in Andras Sajo (ed), *Judicial Integrity* (Martinus Nijhoff, 2004) 225.

which authoritarian regimes deal with the problem of judicial independence and power.[95] Of these 'authoritarian solutions' for the problem of judicial independence, the model relating to authoritarian regimes where there are 'courts that are formally independent and empowered, but where informal practices ensure that judges do not rule against the interests of the regime'[96] is relevant to Ethiopia, where there is constitution without constitutionalism. In this model, legally the courts have 'considerable independence and power.'[97] Despite the theoretical independence of the courts, under this model 'regime interests are regularly accommodated by judges.'[98]

As noted in chapter two, the FDRE constitution vests exclusive jurisdiction over judicial matters in courts, recognises their independence, and provides for mechanisms of ensuring the independence. Normally, the independence of the judiciary empowers and requires the court 'to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.'[99] However, in reality, the government's intervention leads to an 'abrogation of the judicial process'[100] so that 'independent operation of the judiciary [is] not allowed in current conditions if the existing network is threatened.'[101]

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[95] Peter H Solomon Jr., 'Courts and Judges in Authoritarian Regimes' Review (2007) 60(1) *World Politics* 122, 125-29.

[96] Ibid 126.

[97] Ibid 127.

[98] Ibid 126.

[99] UN Basic Principles on the Independence of the Judiciary (1985) Article 6.

[100] Jon Abbink, 'The Ethiopian Second Republic and the Fragile "Social Contract"' (2009) 44 (2) *Africa Spectrum* 9, 13.

[101] Jon Abbink, 'Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath' (2006) 105 *African Affairs* 173, 196-197. A statement from the Chairman of one of the opposition political parties, the Oromo Federalist Congress, Merera Gudina, indicates that the problem of lack of independence of courts still persists. In an interview with the VOA weeks before the 2015 Ethiopian national election Merera, commenting on the then upcoming election, stated 'institutions that are needed to level the playing field, such as independent media and independent judiciary do not exist; in Ethiopia EPRDF [the ruling party] acts as a player and as a referee which guarantees whatever number of seats it would like to have.' 'Semayawi Party Chairman responds to PM Hailemariam Desalegn's accusation' <http://www.mereja.com/video/watch.php?vid=b036f7f29>. In this election, the ruling party won all the 547 seats of the parliament. BBC, *Ethiopia election: EPRDF wins every seat in parliament*, (22 June 2015) <http://www.bbc.com/news/world-africa-33228207>.

As noted in Chapter two, several studies including by the World Bank and the National Judicial Institute for the Canadian International Development Agency indicate a discrepancy between the court's normative and practical power. Abbink observes that in Ethiopia 'political-judicial institutions are still precarious, and their operation is dependent on the current political elite and caught in the politics of the dominant (ruling) party.'[102] Yearly reports on Ethiopia by Freedom House between 2004 and 2015 confirm this. The reports consistently indicate either 'there are no' or 'there have been few' significant examples of decisions at variance with government policy[103] signalling that court decisions are consistent with government interests. Human Rights Watch in its report specifically related to how the ATP has been used to crush free speech observes 'Ethiopian courts have little independence from the government.'[104]

Consequently, the public's consistent complaint relating to the court's lack of independence in practice has been documented.[105] As Solomon observes, such a 'gap between formal institutions and reality, which may engender public cynicism and mistrust of the courts' is the main feature of this model of disempowering courts.[106]

As Solomon observes 'in authoritarian states, the more sensitive jurisdiction courts have, the greater the likelihood that they will face pressure to deliver results that please the authorities.'[107] In the two prosecutions, the pressure on the court has been visible. Pending both, in addition to judgmental statements by the public officials affirming the guilt of the defendants, the state-owned media goes so far as making a documentary specifically concerning the defendants in the case of *FPP v Andualem Arage et al*.[108] The documentary consistently labels the

[102] Abbink, above n 101, 173.
[103] Freedom House reports 2004-2015.
[104] Human Rights Watch, *Ethiopia: Terrorism Law Used to Crush Free Speech. Donors Should Condemn Verdicts, Demand Legal Reforms* (27 June 2012) <https://www.hrw.org/news/2012/06/27/ethiopia-terrorism-law-used-crush-free-speech>.
[105] Abbink, above n 100, 13.
[106] Solomon, above n 95, 126.
[107] Ibid 125.
[108] See above Chapter seven.

accused as ‘terrorists.’ Also, it includes derogatory statements made at different times by senior public officials including the then Prime Minster.

While the manner in which the court conducts the trials exhibits features of a tunnel vision to which Brants and others refer, the cause that makes the court adopt it is different from the cause(s) of the tunnel vision to which Brants and others refer. Unlike the tunnel vision that normally results from bias arising from human nature or inherent imperfections of the criminal justice system that Brants, and Findley and Scott mentioned, the adoption of the above referred authoritarian model of disempowering courts in Ethiopia means that the tunnel vision exhibited in the two prosecutions could be related to the lack of independence of courts.

In view of the authoritarian nature of the regime, the media transmissions would have had a significant influence on the court to take a stand against the defendants’ innocence. Through the instrumentality of statements by public officials and the documentary where the defendants are branded guilty of the offence, what the government does is akin to what Stockmann and Gallagher refer to as ‘remote control’ over the outcome of the cases.[109] In a comment Human Rights Watch makes in connection with the court judgment in *FPP v Andualem Arage et al*, it states ‘judicial independence has all but vanished in any politically sensitive case in Ethiopia.’[110]

As Walker notes pejorative labelling of the defendants as ‘terrorists’, would present them in a prejudicial manner opening a space for miscarriage of justice to occur.[111] Indeed, where the court is not free to take a stance different from that of the government, these media activities would send a strong message to the judges that the government is keen to secure conviction of the defendants thereby signalling to the court to decide accordingly. That would lead the court to adopt what Requa refers to as a ‘deferential approach in counterterrorism jurisprudence.’[112] The

[109] Daniela Stockmann and Mary E Gallagher, ‘Remote Control: How the Media Sustain Authoritarian Rule in China’ (2011) *44(4) Comparative Political Studies* 436.
[110] Human Rights Watch, above n 104.
[111] Walker, above n 15, 54.
[112] Requa, above n 85, 45.

consequence of having tunnel vision is judicial deference, which has been identified as one of the major causes of miscarriage of justice in the Irish terrorism prosecutions.[113] As Saks and Risinger note, if the court adopts a stand in a case to convict the accused, that means the court functions based on a 'presumption of guilt.'[114] Indeed, in the two prosecutions the court has explicitly required the defendants to prove their innocence and convicted them on the grounds that they did not discharge this burden.

When asked if the *Akeldama* documentary and statements from public officials have affected their judgment in the two prosecutions, the judges, as noted in chapter seven, only admit the potential impact of media trial on fairness of court proceedings in general terms[115] but denied that their decision was influenced.[116] However, it is noteworthy that both the narrator of the documentary and the court use similar reasoning to conclude that the defendants have committed precursor terrorist offences. In connection with Eskinder, in the documentary, the narrator having stated Eskinder's presentation at a public meeting organised by UDJ and his contact with members and leaders in other political parties,

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[113] Aileen McColgan, 'Lessons from the past? Northern Ireland, Terrorism Now and then, and the Human Rights Act' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 177, 196-200.

[114] Michael J Saks & D Michael Risinger, '*Baserates, The Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions' (*2003) 4 *Michigan State DCL Law Review 1051,* 1056-57.

[115] Despite this, as discussed in chapter seven, the court refused the defendant's application for an injunction to order the documentary not to be broadcasted.

[116] However, on the irrelevance of whether or not the media publication has caused actual effect on outcome of the trial, Lord Diplock of the United Kingdom observes 'trial by media is not to be permitted … That the risk that was created by the publication when it was actually published does not ultimately affect the outcome of the proceedings is, …, "neither here nor there …"' *Attorney-General v English* [1983] 1 AC 116 in Kaniye S A Ebeku, 'Revisiting the acquittal of 10 Policemen: Issues of judicial Independence, Trial by Media and Fair Trial in Cyprus' (2008) 20(2) *Sri Lanka Journal of International Law* 139, 155. On the other hand, it is true that compared to its influence on jury the media's influence on judges is less. The European Court of Human Rights upholds that 'in the cases of professional judges (with no jury) the issue of media influence does not arise.' Stefanos Evripidou 'Former ECHR Judge say cops' acquittal "stupid and absurd"', CyprusMail (online) 22 March 2009 <https://www.highbeam.com/doc/1G1-196064406.html>. While Justice Alabi of Nigeria recognises the rarity of the impact of publication in influencing the judge's judicial mind he noted 'but a campaign of pressure might be so great that even a judge could not be safely assumed to be unaffected by it.' A A Alabi 'Contempt of Court and the Sub-Judice Rule' in T A Oyeyipo, L H Gummi and I A Umezulike (eds) *Judicial Integrity, Independence and Reforms: Essays in Honour of Hon. Justice M.L. Uwais* (Snap Press, 2006) 181, 183.

questions: ‘if not for a terrorist plot, why did Eskinder have a meeting and contact with political party leaders and members while he is claiming not being a political party member?’ The Supreme Court uses this ‘(il)logic’ to support its judgment that dismisses Eskinder’s appeal.[117] Similarly, in connection with other defendants who have secretly distributed papers that express public grievances, the narrator questions ‘being members of legally registered opposition political party, why would they duplicate and distribute papers in secret where they could have done this publicly if not for having a clandestine mission?’ The court uses this same logic to dismiss Nathanael’s defence that the papers are expressions of public grievances that do not have anything to do with committing or inciting a terrorist act.[118]

The similarity between the reasoning that the narrator of the documentary uses to indicate the involvement of defendants in the alleged terrorist plot and the reasoning of the court in convicting the defendants may not in itself suggest the actual influence. What is remarkable about the similarities between the court’s reasoning and the narrator’s story, which perhaps suggests the influence, is the fact that the arguments are fallacious. Both the court and the narrator use exactly the same erroneous logic to conclude that the defendants have committed a precursor terrorist offence.

8.6 Conclusion

This chapter evaluates some of the decisions of the court in *FPP vs. Andualem Arage et al* and *FPP vs. Elias Kifle et al* that were discussed in chapters five to seven. The chapter draws on Easterbrook’s two criteria for evaluating a court decision: the compatibility of the court’s decisions with applicable legal provisions and principles; and the consistencies between and within judgments of the court and its ability to explain its decisions. A critical examination of the decisions indicates that the court has failed in both. This failure, in turn, contributes to the occurrence of miscarriages of justice. Lack of independence of the court, which has created an executive serving tunnel vision, is the root cause of this problem.

[117] *Andualem Arage et al v FPP (F. Sup. Ct., Cr App. No. 83593*, judgment, 2 May 2013) 35
[118] Ibid.

CHAPTER NINE: RETHINKING THE JUSTIFICATIONS FOR THE ATP

9.1 Introduction

The preamble of the ATP indicates that domestic realities— threat of terrorism and the lack of appropriate law to cope up with that threat— and obligation under international instruments, most important of which is resolution 1373, necessitate the promulgation of the ATP.[1] The government and the ruling party replicate these justifications in public discussions and debates.[2] Public and party officials argue that the existence of the clear and present danger of terrorism in Ethiopia coupled with the inadequacy of ordinary laws to deal with this reality called for special anti-terrorism legislation.

This chapter scrutinises the validity of these justifications. Its first part examines the claim that the existence of clear and present danger of terrorism in Ethiopia coupled with the inadequacy of the law to cope with the threat justifies the ATP. Having evaluated the government's evidence to show the existence of threat and lack of adequate law in light of Ethiopia's reports to Security Council Counter Terrorism Committee (CTC) the first section concludes that this justification is not plausible. It then examines whether or not resolution 1373 obliges states to pass special anti-terrorism laws and concludes in the negative. Finally, an

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1 Anti-Terrorism Proclamation No. 652/2009 (Ethiopia), preamble paragraphs 3 & 5.

2 For example, in August 2013, the Ethiopian Television and Radio Agency hosted a debate among political parties on range of issues relating to the Ethiopian anti-terrorism law and its application. The Ethiopian Peoples' Revolutionary Democratic Front, the ruling party, and four opposition parties participated in the debate. The ruling party was represented by Mr Shimeles Kemal, the then Communication Minister, and Mr Getachew Reda, the then Spokesman for the Ethiopian Prime Minister, and the current Minster of Information. The Ethiopian Democratic Party and the Semayawi (Blue) Party were represented by their presidents Mushe Semu and Engineer YelekalGetnet respectively. The Unity for Democracy and Justice Party was represented by Mr Habtamu Ayalew, Deputy Head of the External Relations Department. Mr Bekele Nega represented Ethiopian Federal Democratic Unity Forum (MEDREK). Ethiopian Political Parties Position on the Anti-terrorism law Part one: <https://www.youtube.com/watch?v=sABjG94eT3E>; Ethiopian Political parties Position on the Anti-terrorism law part two <https://www.youtube.com/watch?v=-g5JhwpAt4U>;Ethiopian political parties position on the Anti-terrorism law part three <https://www.youtube.com/watch?v=boeUIk1d4Zo>. Hereafter this debate is referred as 'Ethiopian Political parties' position on the Anti-terrorism law.'

alternative, perhaps implicit, justification for the law is considered. Ample evidence including counterterrorism prosecutions and criticisms surrounding these prosecutions would lead to the conclusion that in practice the ATP has been used to prosecute journalists and politicians, who are critical of the government thereby serving as an instrument to stifle dissent.

9.2 Official justifications

9.2.1 Threat of Terrorism and Inadequate Law As A Justification

Resolution 1373, which provides for a series of obligations on states, establishes the Counter Terrorism Committee (CTC) to follow up progress in the implementation of the resolution by member states. Paragraph six of the resolution calls upon states to report to the CTC the steps they took to discharge their obligation in the Resolution. Ethiopia mentions a threat of terrorism in its publicly accessible reports to the CTC. Ethiopia's initial report focuses on statelessness in Somalia to show its vulnerability to terrorism and to prove its special interest in counterterrorism.[3] The report indicates that Ethiopia has been the victim of terrorist attacks sponsored by international terrorist groups such as Al-Queda and carried out by a Somalia-based group named Al-Ittihad Al-Islamia. Addressing the Ethiopian parliament on the matter, Girma Woldegiorgis, former president of Ethiopia, reiterates that 'our country has been a victim [of terrorism] on many occasions.'[4] To show the gravity of the problem, public officials went as far as to assert that Ethiopia is much more exposed to terrorism than are Afghanistan and the United States.[5]

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[3] Letter dated 31 January 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/137, Annex (Report of the Government of the Federal Democratic Republic of Ethiopia on the implementation of Security Council Resolution 1373 (2001)).

[4] IGAD Capacity Building Program Against Terrorism, *Ethiopian parliament to discuss anti-terrorism legislation* (07 October 2008) <http://www.icpat.org/index.php/events-archive-mainmenu-81/144-ethiopian-parliament-to-discuss-anti-terrorism-legislation>.

[5] Ethiopian Political parties position on the Anti-terrorism law, above n 2. According to the Global Terrorism Index 2011, Afghanistan ranked 3rd next to Iraq and Pakistan, Ethiopia ranked 37th and United States ranked 41st in terms of the impact terrorism caused on countries. According to this source, Ethiopia is the least affected by

Other sources support the realness of the terrorism threat in East Africa, where Ethiopia is located. Confirming the governments' claim of the terrorism threat, Okumu indicates that the actual and potential terrorist attacks in the region have encouraged Eastern African countries to take several counterterrorism steps including the enactment of anti-terrorism bills.[6] East Africa, he asserts, has been a soft and direct target of international terrorism since the 1970s. While he praises the post-2001 threat assessment of the countries in East Africa, he criticises them for having taken a long time to realise that they are easy targets, breeding grounds and havens for local and international terrorists.[7] The Executive Secretary of Inter Government Authority for Development (IGAD), an East African organisation of which Ethiopia is a member, points out that for several reasons 'the IGAD region is considered to be the most vulnerable to terrorism of all regions in sub-Saharan Africa.'[8] According

terrorism next to Djibouti compared with neighbouring countries. Somalia, Sudan, Kenya, Uganda and Eritrea respectively ranked 6th, 11th, 18th, 30th and 35th. The Global Terrorism Index measures the impact of terrorism in 158 countries since 2001 by aggregating four indicators: the number of terrorist incidents, fatalities, injuries and property damage. The index is based on data from the Global Terrorism Database, which is collected and collated by the National Consortium for the Study of Terrorism and Responses to Terrorism (START), headquartered at the University of Maryland. The Institute for Economics and Peace, *Global Terrorism Index* (2012). <http://visionofhumanity.org/sites/default/files/2012_Global_Terrorism_Index_Report.pdf>.

[6] Wafula Okumu, 'Gaps and Challenges in Preventing and Combating Terrorism in East Africa' in Wafula Okumu and Anneli Botha (eds.) *Understanding Terrorism in Africa Building Bridges and Overcoming the Gaps* (Institute for Security Studies, 2008) 62, 64.

[7] Ibid.

[8] A H Bashir, Meeting of Ministers of Justice of IGAD member states on legal cooperation against terrorism, 20 September 2007 quoted in Eric Rosand, Alistair Millar and Jason Ipe, 'Enhancing counterterrorism cooperation in eastern Africa' (2009) 18(2) *African Security Review* 93, 93. On the other hand, there are sources which indicate that East Africa does not provide a convenient environment for international terrorists. The Combating Terrorism Centre at West Point, having reviewed 27 declassified internal al-Qaida documents related to the region, concludes that despite al-Qaida's strong desire to make East Africa a new front for jihadist, it has been unsuccessful in establishing a strong foothold in the region. The Centre's finding attributes al-Qaida's failure to operational challenges that the organisation has faced while functioning in the region. The study emphatically asserts that the 'common assumptions about the Horn as an operational environment and base of support are largely mistaken.' Combating Terrorism Centre at West Point, Harmony Project 'Al-Qaida's (mis)adventures in the Horn of Africa' (2006)1-2. <https://www.ctc.usma.edu/wp-content/uploads/2010/06/Al-Qaidas-MisAdventures-in-the-Horn-of-Africa.pdf>.Furthermore, the Centre, having made an exhaustive inquiry of al-Qaeda's actions since the early 1990s, confirms that the country has not been more friendly to al-Qaeda than to others. The Centre's report notes:

In Somalia, al-Qa'ida's members fell victim to many of the same challenges that

to the Secretary, all countries in East Africa have been victimised by terrorist acts.[9] Though generally speaking ideologically motivated 'peace time' attacks on civilians are uncommon in Africa,[10] Oloo asserts that its Eastern part has suffered terror attacks.[11] The CTC, in its 2011 Report to the Security Council, endorses that the terrorist threat to the East Africa subregion remains high.[12]

It is true that the region's geopolitical location increases its vulnerability to terrorist attacks. First, it is proximate to the 'failed' state of Somalia where Islamic al-Shabab, which has joined al-Qaeda, operates.[13] Second, large communities of ethnic Somalis live in parts of Ethiopia and Kenya, which facilitates infiltration by al-Shabab.[14] Uganda has been used as a transit place for extremists travelling between the Horn of Africa and North Africa and Europe[15] making its borders vulnerable to

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plague Western interventions in the Horn. They were prone to extortion and betrayal, found themselves trapped in the middle of incomprehensible (to them) clan conflicts, faced suspicion from the indigenous population, had to overcome significant logistical constraints and were subject to the constant risk of Western military interdiction. In the past, al-Qa'ida has sought to draw the U.S. into entanglements where it can bleed the U.S.'s military economic resources. In Somalia, al-Qa'ida encountered an entanglement of its own: at iii.

Indicating that Somalia has not been proved to be a fertile haven for transnational Islamist terrorists, Stevenson notes that 'even Bin Laden, when pondering his next stop after Sudan in 1996,' had been told that 'the clans were too untrustworthy and hostile to outsiders to provide reliable security in an otherwise ungoverned country.' Johnathan Stevenson, 'The Somali Model?' *The National Interest* (Jul/Aug 2007) 42, 42. <http://faculty.maxwell.syr.edu/rdenever/USNatSecandForeignPol/Stevenson_SomaliModel.pdf>.

[9] Bashir, above n 8.

[10] Chris Oxtoby and C.H. Powell, 'Terrorism and Governance in South Africa and Eastern Africa' in Victor V. Ramraj et al (eds.) *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed., 2012) 573, 584.

[11] Adamis Oloo, 'Domestic terrorism in Kenya', in W. Okumu and A. Botha (eds.) *Domestic Terrorism in Africa: Defining, Addressing and Understanding its Impact on Human Security* (Institute for Security Studies, 2007) 85.

[12] Letter dated 17 August 2011 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the Secretary-General, S/2011/463 (1 September 2011), Annex (Global survey of the implementation of Security Council resolution 1373 (2001) by Member States, 12.

[13] BBC, Somalia's al-Shabab join al-Qaeda, 10 February 2012 <http://www.bbc.com/news/world-africa-16979440>; Aljazeera, Al-Shabab 'join ranks' with al-Qaeda (11 February 2012). <http://www.aljazeera.com/news/africa/2012/02/201221054649118317.html>

[14] US Department of State, Country Reports on Terrorism, Chapter 2- Country reports: African Overview (2007) <http://www.state.gov/j/ct/rls/crt/2007/>.

[15] US Department of State, Country reports (2007) and (2008) in Oxtoby and Powell, above n 10, 586.

infiltration. Three, rebel forces, which the respective governments proscribed as terrorist organisations, operate both in Ethiopia and Uganda. Though none of them occurred in Ethiopia, there have been major terrorist attacks in the region.[16] A related explanation that the government puts forward to justify the ATP is inadequacy of ordinary laws to cope with the claimed increasing threat of terrorism.[17]

As pointed out above, in its first report to the CTC in January 2002, the Ethiopian government indicated Ethiopia's vulnerability and actual exposure to terrorist attacks launched by al-Qaeda and the Somalia-based Islamic group Al-Ittihad Al-Islamia.[18] While asserting its vulnerability to terrorist attacks, Ethiopia had not mentioned passing a special anti-terrorism legislation as necessary in any of its reports up until May 2006 when its last publicly available report was submitted to the CTC.[19] Instead, referring to different domestic legal instruments including the 1957 Penal Code and the 1974 Special Penal Code, in its report of January 2002, Ethiopia expressed its position that existing laws were adequate to discharge its counterterrorism responsibilities in general and to prosecute perpetrators of terrorist attacks that had occurred hitherto in

[16] The 1998 bombings of the US embassies in Kenya and Tanzania, the 2002 attack on the Israeli-owned paradise hotel in Mombasa, Kenya and the 2010 twin bomb blast in Kampala are concrete examples indicating that al-Qaida has been active in East Africa.

[17] Ethiopian Political parties position on the Anti-terrorism law, above n 2.

[18] Letter dated 31 January 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/137, Annex (Report of the Government of the Federal Democratic Republic of Ethiopia on the implementation of Security Council Resolution 1373 (2001)) 3.

[19] Letter dated 31 January 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/137, Annex (Report of the Government of the Federal Democratic Republic of Ethiopia on the implementation of Security Council Resolution 1373 (2001)); Letter dated 7 November 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/1234, (8 November 2002) Annex (Letter dated 31 October 2002 from the Permanent Representative of Ethiopia to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism; Letter dated 31 May 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council S/2006/ 352 (31 May 2006) Annex (Note verbale dated 30 May 2006 from the Permanent Mission of Ethiopia to the United Nations addressed to the Chairman of the Counter-Terrorism Committee).

particular.[20] In its 13 page supplementary report of 31 October 2002, the Ethiopian government reaffirmed its position and confidently explained how the different provisions of its domestic laws could be used to fight terrorism.[21] As evidence of the competence of its law to deal with terrorism, Ethiopia cited practical anti-terrorism measures that it took based on these laws. These include what Ethiopia claims as a successful prosecution of those who were involved in the 1995 attempted assassination of former Egyptian president Hosni Mubarak, and the prosecution of Al-Ittihad Al-Islamia terrorists, who attempted to assassinate Dr Abdulmejid Hussein, former Ethiopian Minster of Transport and Communications. [22] Addressing the concern of the CTC on the absence of a clear provision criminalising terrorism, Ethiopia indicated that a provision that expressly criminalises a terrorist act had been incorporated in the then draft Criminal Code.[23]

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[20]Letter dated 31 January 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/137, Annex (Report of the Government of the Federal Democratic Republic of Ethiopia on the implementation of Security Council Resolution 1373 (2001)).

[21] Letter dated 7 November 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/1234, (8 November 2002) Annex (Letter dated 31 October 2002 from the Permanent Representative of Ethiopia to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism.

[22] Letter dated 31 January 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/137, Annex (Report of the Government of the Federal Democratic Republic of Ethiopia on the implementation of Security Council Resolution 1373 (2001)) 6.

[23] *Ibid*, 4. This was more explicitly stated in the October 2002 report where the said provision was reproduced as follows:

> Article 252. Terrorist Act 1. Whosoever commits a terrorist act which may endanger the life, physical integrity or freedom of, or causes serious injury or death to, any person, any number or group of persons, or causes or may cause damage to public or private property, natural resources, environment or cultural heritage and is calculated or intended to:
>
> (a) Intimidate, put in fear, force, coerce or seduce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or

Despite this Ethiopia passed the ATP in 2009 claiming that there was a 'clear and present damage' of terrorism in Ethiopia which the ordinary substantive and procedural laws were not capable of addressing.[24] In view of Ethiopia's report to the CTC, for the seriousness of the threat of terrorism to be a good reason to promulgate a special law on terrorism, the threat must have increased since the reports and the laws, which were said to be adequate to deal with terrorist attacks and threats at the time, are no more sufficient to cope up with the increasing threat. However, no evidence has been produced to warrant this conclusion. The incidents usually referred to as evidence to substantiate the claim of the existence of 'clear and present danger' were committed before 2000. For example, the acts depicted in the footage that Ethiopian Television usually displays to support the claim include the 1995 bombing of Dire Dawa Ras Hotel, the 1997 bombing of the Blue Tops, and the 1996 bombings of the Wabe Shebelle Hotel and the Ghion Hotel.[25]

What makes this claim difficult to understand is that the reports to the CTC in which the government in clear terms states the adequacy of the then existing laws were prepared after the commission of these terrorist

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(b) Disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or

(c) Create general insurrection in a state;

is punishable with rigorous imprisonment from ten to twenty five years; or in grave cases, with rigorous imprisonment for life or death.

2. Any *promotion, sponsoring, contribution to*, command, aid incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with intent to commit any of the acts referred to in Sub-article (1) of this Article shall be punished in accordance with Sub-Article (1) hereof (*emphasis added).*

Letter dated 7 November 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/1234, (8 November 2002) Annex (Letter dated 31 October 2002 from the Permanent Representative of Ethiopia to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, 4.

[24] Ethiopian Political parties position on the Anti-terrorism law, above n 2.

[25] Ibid; Ethiopia: Alleged Terrorists Arrested for Bombing *Addis Tribune* (7 November 1997) <http://allafrica.com/stories/199711070056.html>; Bomb Kills One at Bar in Ethiopian Hotel *Associated press*, (6 August 1996) <http://www.apnewsarchive.com/1996/Bomb-Kills-One-at-Bar-in-Ethiopian-Hotel/id-0185c39eb8ab760d5b18e15127867d61>.

acts. The logical oddity of the government's reference to terrorist attacks that took place before its reports to the CTC to justify the promulgation of the ATP would be apparent where one realises how the incident of the attempted assassination of former Egyptian president Hosni Mubarak is presented.[26] As stated above, in its 2002 report to the CTC, Ethiopia cited the prosecution of those involved in the attempted assassination as evidence to show how successful the government had been in fighting terrorism with the existing ordinary substantive and procedural criminal laws. However, this same incident is referred to support the government's claim that the inadequacy of the ordinary laws renders passing the ATP necessary. In an effort to vindicate the promulgation of the ATP, apart from indicating that the new law has made it possible for the Ethiopian security forces to foil a good number of terrorist plots and to investigate and prosecute terrorist acts, no point is made, for example, to show that this would not have been possible under the ordinary laws. Nor is a mention of terrorist acts which escaped investigation and prosecution due to the shortcomings of ordinary criminal laws made.

Thus, in view of the fact that the incidents cited to justify the law are predominantly pre-2002, there seems to be no convincing evidence to show that there has been an increase in terrorism threats after 2002. In the absence of evidence indicating change in the level of threat, reference to the terrorist attacks that took place prior to 2002, which up until 2006 were not considered as too difficult to be addressed by the ordinary laws to justify the ATP passed in 2009, does not sound logical or convincing.

9.2.2 Security Council Resolution 1373

Ethiopia's obligation under regional and international counterterrorism instruments to pass anti-terrorism legislation is another reason given to justify the ATP.[27] Many agree that Security Council Resolution 1373 is a significant factor contributing to states' decision to criminalise terrorism.[28]

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[26] Ethiopian Political parties position on the Anti-terrorism law, above n 2.
[27] Ibid; Anti-Terrorism Proclamation No. 652/2009 (Ethiopia), preamble.
[28] Curtis A. Ward, 'Building Capacity to combat International Terrorism: the Role of the United Nations Security Council' (2003) 8(2) Journal *of Conflict & Security Law* 289; Clementine Oliver, 'Human Rights Law and the International Fight Against Terrorism:

Oliver argues that 'states are required to draft and implement domestic legislation to ensure that any person who participated in a terrorist act is brought to justice, and that the punishment duly reflects the seriousness of such a terrorist act.'[29] Indeed, paragraph 2 (b) of the resolution 1373 urges states to take legislative measures against terrorism.[30] Furthermore, the requirement under paragraph 6 of the resolution that states should submit reports on their progress in the enforcement of the resolution and a follow up from the CTC constantly reminds the states to take the required counterterrorism measures.

However, as Rosand argues, the resolution imposes only a general obligation that allows flexibility for the states while trying to implement their obligation.[31] Relatedly, Bianchi observes that none of the relevant SC resolutions strictly requires criminalisation of terrorism as such.[32] Of the 11 operative paragraphs in Resolution 1373, it is only paragraph 1(b) of the resolution which expressly imposes an obligation to criminalise the financing of terrorism. The other ten are phrased in a general direction-setting manner. For example, paragraph 2(b), the most relevant provision relating to obligation to criminalise terrorism, merely requires states to 'take the necessary steps to prevent the commission of terrorist acts.' Similarly, paragraph 2(e) requires states to ensure criminalization of "financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts" and prosecution of those involved in those criminal activities.

How Do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373)' (2004) 73 *Nordic Journal of International Law* 399, 401.

[29] Oliver, above n 28, 401.

[30] Furthermore, the Algiers Convention on Prevention of Terrorism urges African States to revise their domestic legislation to make it capable of dealing with terrorism. It requires states to domesticate the convention provisions within one year. *OAU Convention on the Prevention and Combating of Terrorism*, opened for signature 14 June 1999 (entered into force 6 December 2002), Article 2(d).

[31] Eric Rosand, 'The Security Council as "Global Legislature": ultra vires or ultra-innovative' (2004-2005) 28 *Fordham International Law Journal* 542, 584-85.

[32] Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States' (2006) 4 *Journal of International Criminal Justice* 1044, 1051-52.

Moreover, the CTC's comments on and questions relating to state reports do not indicate that states need to pass special anti-terrorism law to comply with Resolution 1373. The Committee seems to be interested in verifying that a state's legal framework sets enabling environment to fight international terrorism. Thus, not all states pass special anti-terrorism legislation. For example, Austria, Niger, Slovakia and Thailand criminalise terrorism within their Penal Codes.[33] When Costa Rica reported to the CTC that provisions of its existing Penal Code were adequate to deal with terrorism, apart from asking for clarification on how sufficient the provisions are, the CTC did not suggest that the state needs to pass a special anti-terrorism law.[34] Nor did it propose that Ethiopia passes special anti-terrorism laws when Ethiopia reported that its ordinary laws are adequate to comply with the resolution.[35]

Thus, the general nature of the obligations in the resolution, the CTC's approach, and the experience of states that criminalise terrorism within their ordinary criminal codes indicate that claiming that resolution 1373 obliges states to pass special anti-terror laws to justify the ATP is hardly defensible. Overall the above discussion indicates that the officially proclaimed purposes of the ATP are not substantiated by evidence. On

[33] Elena Pokalova, 'Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?' (2015) 27 *Terrorism and political violence* 474.

[34] Letter dated 2 September 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council S/2004/726 (10 September 2004), Annex (Letter dated 31 August 2004 from the Permanent Representative of Costa Rica to the United Nations addressed to the Chairman of the Counter-Terrorism Committee ; Letter dated 21 April 2003 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2003/453 (25 April 2003), Annex (Letter dated 31 March 2003 from the Permanent Representative of Costa Rica to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism.

[35] Letter dated 7 November 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2002/1234, (8 November 2002) Annex (Letter dated 31 October 2002 from the Permanent Representative of Ethiopia to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism; Letter dated 31 May 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council S/2006/ 352 (31 May 2006) Annex (Note verbale dated 30 May 2006 from the Permanent Mission of Ethiopia to the United Nations addressed to the Chairman of the Counter-Terrorism Committee).

the other hand, there is plenty of evidence to suggest that the law has a hidden purpose — disciplining dissent — to which the argument now turns.

9.3 Implicit Justification for the ATP

As discussed in Chapter one, owing to the rulers' tendency to use the anti-terrorism laws to stifle dissent, many have expressed their concern on Africa's vulnerability to abuse of counterterrorism. Thus, the ATP has been criticised for being driven by the government's desire to suppress dissenting views. The law's critics call it 'an effective tool for silencing dissent.'[36] In the televised debate that took place in August 2013 between representatives of opposition parties and the ruling party relating to the ATP and its practical application [37] the former capitalised on the sinister motive of the law and vented that it was intended to suppress opposition and silence critics.[38] They asserted that the anti-terrorism law has been used as a smokescreen to cover the government's intention to frighten and intimidate the Opposition.

Citing the timing of the law as evidence, interviewees confirm the menacing purpose of the law. Senior opposition figures assert that the government's threat perception (from legitimate political opponents) plays a major role in triggering enactment of the ATP. They uniformly relate the promulgation of the ATP to the post-2005 national and regional election political climate. In their view the government has learnt a lesson from the result of the 2005 election that its political opponents are stronger than ever and that it cannot maintain power in a democratic election. According to the opposition politicians, the government and the ruling party, having learnt the potential of the Opposition in view of its popular support as demonstrated in the 2005 election, decided to control the Opposition through different illegitimate legislative means including

[36] Ethiopian PM Defends Anti-Terror Law, Condemns Critics, *Voice of America*, (7 February 2012) <http://www.voanews.com/content/ethiopian-pm-defends-anti-terror-law-condemns-critics-138976759/159572.html>.
[37] Ethiopian Political Parties Position on the Anti-terrorism Law, above n 2.
[38] Ibid.

the anti-terrorism law.[39] R 11, a senior leader of one of the opposition parties, notes 'having suffered from the consequence of the provisionally available pre-election freedom of expression and association, the government decides to take steps that would ensure strong opposition views will not be tolerated.' Referring to the ATP, R 11 further states:

> The idea behind the law is basically never again would EPRDF [the ruling party] open up in the manner it did in the 2005 election. That is it period. Civil society did a big job in teaching civic education to the people and by being observers in the 2005 election. All that costed EPRDF. There is a decision that no party that would challenge EPRDF in election should function in Ethiopia. Laws were designed to ensure that. Counterterrorism legislation is an instrument to ensure this plan.

R 10, another senior opposition leader, states:

> EPRDF got a lesson from the result of the 2005 election and started to take measures to reverse the progress in democracy, including the prohibition of demonstrations in Addis Ababa which the Prime Minster declared on the evening of the election; 200 people were killed and [EPRDF] has become more repressive. To stay in power… EPRDF has to take measures that would not allow the opposition to win. And instead of taking emotional measures as it did in 2005 to provide legitimacy to repressive measures different legislation need to be passed. Then it started to pass legislation in a systematic way such as media law, party law, civil society law and election and political parties' registration law and finally the Anti-terrorism law---.

Indeed the late Prime Minster Meles Zenawi, who had run the country for over 20 years, following the aftermath of the 2005 election, designed a strategy known as 'wait for the opposition to grow legs and then cut them off.'[40] Merera Gudina, chairman of an opposition party — Oromo Federalist Congress—who describes himself as a '"floating head" while

[39] On the effect of various legislative measures on human rights, Amnesty International states '[t]he Charities and Societies Proclamation, together with the Anti-Terrorism Proclamation and the Mass Media Proclamation have all severely limited Ethiopian individuals' freedom of expression and, specifically, their ability to criticize their government.' Amnesty international, *Ethiopia: Human rights work crippled by restrictive law* (12 March 2012) <http://www.amnesty.org/en/news/ethiopia-human-rights-work-crippled-restrictive-law-2012-03-12 the mass media law>.

[40] Gregory Warner, Ethiopia Stifles Dissent, While Giving Impression Of Tolerance, Critics Say, *npr* (8 June 2016) <http://www.npr.org/sections/parallels/2016/06/08/481266410/ethiopia-stifles-dissent-while-giving-impression-of-tolerance-critics-say>.

the legs of his party —all his deputies, his candidates, his organisers — are either imprisoned or threatened' states that the anti-terrorism legislation is used to implement the strategy of cutting legs.[41] Similarly R 11 relates the ATP to this strategy as follows:

> Opposition can exist nominally but not to challenge the government. This has been written in their papers. It is a party line document. It is Meles' [former Prime Minster] document. Counterterrorism legislation is an instrument to ensure this plan. Exercising constitutionally provided right is criminalised by the ATP. They have been using this effectively. As a result strong opposition politicians have been imprisoned. Andualem Arage and others have been imprisoned, the young leadership. The party is cutting the potentially challenging.

This is not simply the view of local journalists and opposition leaders. The ATP prompted a severe criticism from different corners. Scholars argue that the government, after taking brutal physical measures to control the post-2005 election protest, continued to introduce legislative measures — the anti-terrorism law being one — that would allow it to stay in power.[42] For example, Abbink shares the view that the law is meant to control dissenting views. While noting the relevance to Ethiopia of Van de Walle's remark that the multiparty system in Africa 'is being constructed in such a way that it does not threaten that control', Abbink suggests that it is even worse in the former.[43] 'As events in the post-[2005] election period suggest', Abbink argues, 'perhaps more than in other African countries …, the executive in Ethiopia is prepared to use coercive force to prevent change.'[44]

Furthermore, different regional and international governmental and non-governmental institutions have expressed their concern that the ATP might be used to suppress legitimate opposition. The African

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[41] Ibid.

[42] John Abbink, 'Discomfiture of democracy? The 2005 Election Crisis in Ethiopia and its Aftermath' (206) 105 *African Affairs* 173; Lovise Aalen & Kjetil Tronvoll 'The End of Democracy? Curtailing Political and Civil Rights in Ethiopia' (2009) 36 (120) *Review of African Political Economy,* 193.

[43] Nicolas Van de Walle, 'Presidentialism and clientelism in Africa's emerging party systems' (2003) 41(2) *Journal of Modern African Studies* 315 quoted in Ibid, 195.

[44] Abbink, above n 42, 195.

Commission on Human and Peoples' Rights,[45] Human Rights Watch[46] and Amnesty International[47] have gone as far as calling for the government to amend the ATP. Commenting on the draft version of the ATP, which has been passed with no significant change, Joanne Mariner, Terrorism and Counterterrorism Program Director at Human Rights Watch, stated 'Ethiopia may well need a fair and effective law to combat terrorism, but this is not it, as drafted, this law could encourage serious abuses against political protesters and provide legal cover for repression of free speech and due-process rights.'[48]

As noted above, the government of Ethiopia had consistently declared its intention not to pass special anti-terrorism laws on the grounds that it can fight terrorism with its existing laws and comply with the requirements of Resolution 1373. To substantiate its report the government had cited high profile terrorism cases which it claimed to have been successfully prosecuted in accordance with ordinary laws. Public records show that the Ethiopian government changed its position on the need for a special law in 2006.[49] The US Country Report for the year 2006 indicates that Ethiopia had been in the process of drafting anti-terrorism legislation[50] confirming that the drafting began following the disputed 2005 election. Moreover, the former Ethiopian president indicated that the anti-terrorism

[45] African Commission on Human and Peoples Rights, *Resolution No 218*, Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, 51st ord. sess. (2 May 2012).

[46] Human Rights Watch, 'Ethiopia: Amend Draft Terror Law Proposed Counterterrorism Legislation Violates Human Rights' (30 June 2009) <https://www.hrw.org/news/2009/06/30/ethiopia-amend-draft-terror-law>.

[47] Human Rights Watch, 'Ethiopia: Stop Using Anti-Terror Law to Stifle Peaceful Dissent: Diplomats Should Systematically Monitor Terrorism Trials' (21 November 2011) <https://www.hrw.org/news/2011/11/21/ethiopia-stop-using-anti-terror-law-stifle-peaceful-dissent>.

[48] Human Rights Watch, 'Ethiopia: Amend Draft Terror Law', above n 46.

[49] Had the government's decision to pass special anti-terrorism laws been prompted by its genuine concern about terrorism, inadequacy of its law, and its obligation arising from the Security Council resolution 1373, this measure would have been taken earlier than 2006.

[50] In 2006, the US government's Country Report on Terrorism noted that 'draft counterterrorism legislation is currently before [the Ethiopian] Parliament for approval.' US Country Reports on Terrorism, 'Africa Overview' (28 April 2006) <http://www.state.gov/s/ct/rls/crt/2005/64335.htm>.

law was expected to be passed in 2007 but later, in 2008, said that the law was not yet in preparation.[51]

In view of the fact that the government had been reluctant in drafting a special anti-terrorism law on the grounds that the ordinary criminal law adequately addressed terrorism problems, its shift in position on the need to have a separate legislation is indeed suspicious. It is more so when one realises that the government refers to terrorist acts, which were committed long ago but were not considered as serious enough to call for the enactment of special laws in previous years, as evidence to justify that there was a need to pass a special anti-terrorism law.

Previously, the government of Ethiopia had out-rightly rejected the need to introduce a special anti-terrorism law. In view of its former stance and in the absence of evidence of a change of circumstances such as an increase in the threat of terrorism or that laws which had been praised as being capable of fighting terrorism in the past were no longer so, it is increasingly difficult to see a legitimate explanation for the government's decision to pass the ATP following the contested 2005 election.

As Whitaker notes, fear of political opposition by rulers of weak African states prompts them to adopt counterterrorism measures.[52] She observes that leaders who have no popularity or have angered dissidents are more likely to adopt counterterrorism measures to justify their portrayal of 'rebels, opposition politicians, lawyers, and even journalists as terrorist threats.'[53] Thus, the promulgation of the ATP following the 2005 election and post-election dispute might mean that the government, aware of its own mismanagement of election results, post-election protests, and the public grievances that these acts caused, anticipates

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[51] In his 2008 opening speech before the joint parliamentary session President Girma Woldegiorgis announced that a counterterrorism bill would be submitted to parliament. 'Speech by President Girma Wolde-Giorgis of Ethiopia' 9 October 2008, <http://www.ethioembassy.org.uk/Archive/Speech%20by%20President%20Girma%20at%20the%20Opening%20of%20Ethiopian%20Parliament%20Monday%209th%20October%202006.htm>; "Ethiopian Parliament to discuss anti-terrorism legislation," Agence France-Presse in Human Rights Watch, 'Ethiopia: Amend Draft terror Law', above n 46.

[52] Beth Elise Whitaker, 'Compliance among weak states: Africa and the counter-terrorism regime' (2010) 36 *Review of International Studies* 639, 645-46.

[53] Ibid 646.

strong opposition to continue and wants to use the ATP to marginalise and disenfranchise the opposition from the political process.[54] Indeed, Ginbot 7, one of the banned organisations in connection with many of the terrorism prosecutions, had been established by the mayor-elect of Ethiopia's capital, Addis Ababa city, in the 2005 election. The mayor-elect was prosecuted, received a long jail sentence in connection with post-election violence, and went on to be pardoned thereafter.[55] He is among the defendants in *FPP v Andualem arage et al* who was tried in absentia and sentenced to life imprisonment.[56]

The scope of the definition of a terrorist act gives credence to the claim that the anti-terror law has a hidden purpose. As noted in Chapter three, the definition of a terrorist act under the ATP is broad enough to capture conduct that the definition resolution 1373 endorses does not capture but is, at times, narrow enough not to include all conduct that comes under the scope of the latter. Had the ATP been passed, as officially claimed, to discharge Ethiopia's obligation under the international and regional counterterrorism legal instruments, the definition therein would not have captured conduct not included in these instruments without encompassing every type of conduct that these instruments refer to. It is only if the law has been passed for domestic purposes, that this aspect

[54] The criminal charges state that defendants resorted to terrorism out of their erroneous belief that the 2005 election result and post-election dispute were wrongly handled and on the pretext that the government in power could not be changed in a democratic process. Federal Public Prosecutor File No. 039/04; Federal Public Prosecutor File No. 00180/04.

As Botha observes:

Draconian or closed political systems have failed to establish institutions to mediate between state and society. Restrictions on basic human rights, including freedom of expression, speech and association, contribute to frustrations and deprive people of the opportunity to change their governments democratically. None of the organisations implicated in acts of terrorism in the past recognised their governments as legitimate.

Anneli Botha, 'Challenges in Understanding Terrorism in Africa' in Wafula Okumu and Anneli Botha (eds.) *Understanding Terrorism in Africa Building Bridges and Overcoming the Gaps (*Institute for Security Studies, 2008) 14.

[55] Anita Power, 'Ethiopia Pardons 38 Opposition Members' *The Washington post* (20 July 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072000399_pf.html>.

[56] Solomon Bekele, 'Court's verdict on terrorism charges read out' *capital* (19 July 2012), <http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=1404:courts-verdict-on-terrorism-charges-read-out&catid=35:capital&Itemid=27>

of the definition would give meaning.[57] All this would have left the government's desire to deploy the law to control legitimate opposition, as the critics claim and consistent with Whitaker's view, as the plausible explanation for the government's otherwise inexplicable move to promulgate the ATP following the disputed 2005 election. The counterterrorism prosecutions, as argued below, support this conclusion.

9.4 Lessons from the prosecutions

9.4.1 Profile of the defendants

There has been a proliferation of counterterrorism prosecutions during the seven years since the enactment of the law where people from all walks of life, most importantly journalists and opposition political party members and leaders, have been prosecuted as 'terrorists.'[58] The profile of the defendants in the two prosecutions reveals the people who are targeted in terrorism prosecutions in Ethiopia. *FPP v Andualem Arage et al* involves two leaders of the lawfully registered opposition Unity for Democracy and Justice (UDJ) party and six journalists. Of the five defendants in *FPP v Elias Kifle et al*, two are opposition politicians, [59] and the other three are journalists. Some of the defendants who have been

[57] While the broadness of definition of a terrorist act in jurisdictions that passed their anti-terrorism legislation immediately after resolution 1373 was passed could be related to the claimed lack of guidance under the resolution, this justification would not be applicable to that of the broadness of the definition under the ATP. This is because the ATP was passed after the claimed flaws of Resolution 1373, which are believed to be the causes for divergent and broad definitions in domestic legislation across the globe, were addressed in 2004 through Resolution 1566. As noted in Chapter three there is consensus that through this resolution the Security Council has attempted to define terrorism and fill the claimed gap in resolution 1373. Luis Misguel Hinojosa-Martinez, 'A Critical Assessment of United Nations Security Council Resolution 1373' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar: 2014), 626, 647

[58] Lewis Gordon, Sean Sullivan, and Sonal Mittal, The Oakland Institute and Environmental Defender Law Center, *Ethiopia's Anti-Terrorism Law A tool to Stifle Dissent* (2015); ARTICLE 19, *Ethiopia: Terrorism charges against Zone 9 Bloggers and journalists must be dropped*, Press release, (18 July 2014) <https://www.article19.org/resources.php/resource/37625/en/ethiopia:-terrorism-charges-against-zone-9-bloggers-and-journalists-must-be-dropped>; Amnesty International, *Ethiopia: End the onslaught on dissent as arrests continue* (10 July 2014) <https://www.amnesty.org/en/latest/news/2014/07/ethiopia-end-onslaught-dissent-arrests-continue/> ; Menachem Rephun, 'US State Department Expresses Concern Over Terrorism Charges Against Ethiopian Activist', *jpupdates* (online) 5 February 2016 <http://jpupdates.com/2016/05/02/us-state-department-expresses-concern-over-terrorism-charges-against-ethiopian-activist/>

[59] While one is the chairman of opposition political Party — the Ethiopian National Democratic Party (ENDP), the other is a member of yet another opposition political party.

prosecuted and convicted in these cases have won prizes from international organisations including UNESCO, a specialised agency of the United Nations. Eskinder Nega has received prestigious international awards: PEN America's 'Freedom to Write' prize[60] and the World Association of Newspapers and News Publishers 'Golden Pen of Freedom.'[61] Both awards commend his bravery and commitment to truth. Peter Godwin, president of the Pen American Centre, said Eskinder is 'that bravest and most admirable of writers, one who picked up his pen to write things that he knew would surely put him at grave risk.'[62] Mr Godwin added 'yet he did so nonetheless. And indeed he fell victim to exactly the measures he was highlighting.'[63] In relation to his PEN America award, the New York Times writes:

> A prominent journalist, Mr. Nega challenged the prosecution of fellow reporters and editors under terrorism laws in reports that ran afoul of those very same laws in the eyes of the government. Mr. Nega has stood by his writing and maintained his right to publish. His defiant stance in defense of human rights in Ethiopia earned him a prestigious press freedom award from PEN America in what the literary non-profit organisation said was both recognition of his past work and an attempt to pressure the Ethiopian government into halting its prosecution of journalists.[64]

In presenting the 'Golden Pen of Freedom' award, World Editors Forum President Erik Bjerager stated:

> the Ethiopian government has tried to present Eskinder Nega as a rabble-rouser bent on fomenting violent revolution. However, accounts from other journalists, backed by court documents and the hundreds of articles

[60] 'Jailed Ethiopian journalist Eskinder Nega honoured,' *BBC* News, 2 May 2012 <http://www.bbc.com/news/world-africa-17921950>.

[61] World Association of Newspapers and News Publishers, *2014 Golden Pen of Freedom Awarded to Eskinder Nega of Ethiopia* (9 June 2014) <http://www.wan-ifra.org/press-releases/2014/06/09/2014-golden-pen-of-freedom-awarded-to-eskinder-nega-of-ethiopia>.

[62] Jailed Ethiopian journalist Eskinder Nega honoured, above n 60.

[63] In the days before his arrest Eskinder wrote criticizing the government's action relating to using the ATP against journalists. Ibid.

[64] J. David Goodman, *Imprisoned Ethiopian Journalist Is Honoured With PEN Award* (2 may 2012) <http://www.nytimes.com/2012/05/03/world/africa/eskinder-nega-ethiopian-journalist-honored-by-pen.html?_r=0>

> he has written, portray a tenacious writer who has called only for peaceful change and reconciliation.[65]

Reeyot Alemu, one of the three journalists charged in *FPP v Elias Kifle*, won the 2013 *UNESCO-Guillermo Cano World Press Freedom Prize*[66] and the 2012 *International Women's Media Foundation (IWMF) Courage in Journalism Award.*[67] Created by UNESCO's Executive Board, the UNESCO Guillermo Cano World Press Freedom Prize is awarded annually in recognition of one's notable role 'to the defence and /or promotion of freedom of expression anywhere in the world, in particular where in risky environments.'[68] Reeyot won these awards while she was serving a prison term following her conviction on a terrorism-related charge. In a press release, UNESCO indicates that she 'was recommended by an independent international jury of media professionals in recognition of her "exceptional courage, resistance and commitment to freedom of expression."'[69] Woubshet Taye, the second journalist in *FPP v Elias Kifle et al* was a winner of the 2012 Hellman-Hammett Award, administered by Human Rights Watch.[70]

Mesfin Negash, one of the journalists convicted in *FPP v. Andualem Arage et al*, was one of the co-winners of the 'Press Freedom Award 2013' of the Swedish branch of Reporters without Borders.[71] The other two, Martin Schibbye and Johan Persson, are Swedish journalists who

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[65] World Association of Newspapers and News Publishers, above n 61.

[66] UNESCO, *Ethiopian journalist Reeyot Alemu wins 2013 UNESCO-Guillermo Cano World Press Freedom Prize*, 16 April 2013 <http://www.unesco.org/new/en/media-services/single-view/news/ethiopian_journalist_reeyot_alemu_wins_2013_unesco_guillermo_cano_world_press_freedom_prize/#.V0KYXMlWon8>.

[67] 'Reeyot Alemu wins 2012 IWMF Courage in Journalism Award' (7 November 2012) <https://www.youtube.com/watch?v=FOYvwy1tUt8>

[68] UNESCO, above n 66.

[69] Ibid.

[70] Human Rights Watch, *Ethiopia: Terrorism Law Decimates Media Free Jailed Journalists*, Allow Media Freedom (3 May 2013) <https://www.hrw.org/news/2013/05/03/ethiopia-terrorism-law-decimates-media>.

[71] Daniel Berhane, 'Ethiopian Mesfin Negash, two Swedish co-awarded on Press Freedom day', *Horn Affairs English*, 4 May 2013 <http://hornaffairs.com/en/2013/05/04/ethiopian-mesfin-negash-two-swedish-co-awarded-on-press-freedom-day/>. The other two were Swedish journalists who were prosecuted and convicted for terrorism charge in *FPP v Abdiwole Mohammed et al (*Fed. H. Ct., Cr. F. No. 112198).

were similarly prosecuted and convicted for terrorism-related charges in *FPP v Abdiwole Mohammed et al*.[72]

Eskinder Nega, Reeyot Alemu, Mesfin Negash and Woubshet Taye, among the convicted in *FPP v Andualem Arage et al* and *FPP v. Elias Kifle et al*, received the prestigious Human Rights Watch Hellman/Hammett award for 2012 in recognition of their efforts to promote free expression in Ethiopia.[73] The prize is awarded annually to writers and journalists around the world "who have been targets of political persecution and human rights abuses."[74]

These prizes are significant in that the journalists received the awards for their work which the government of Ethiopia treated as a terrorist act that resulted in their prosecution and conviction of terrorism charges.[75]

What Reyot Alemu, one of the convicts in *FPP v Elias Kifle et al*, writes is in order:

> Why was the anti-terrorism decree written? One needn't look too far to realize that the ruling party, EPRDF, didn't create these anti-terrorism laws because it faced a real threat. You only need to look at the individuals who are either facing such charges, or have already been found guilty under this decree. Members of the opposition party who have denounced human rights violations and have peacefully called for the replacement of the current regime by a more democratic one, freethinkers who dared ask stern questions to officials at locally organized discussion forums, leaders of the Muslim community who refused to dilute and redraft their religious beliefs to appease the government's stance on religion, and ourselves, members of the free press who performed their duty as voices of the people have been the main victims of this anti-terrorist decree. This proves that the real purpose of this decree is to enable the current regime to comfortably rule without any criticism, opposition, or competition.[76]

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[72] Berhane, above n 71.

[73] Human Rights Watch, *Ethiopia: 4 Journalists Win Free Speech Prize: Hellman/Hammett Award Honors Jailed, Exiled Reporters* (20 December 2012) <https://www.hrw.org/news/2012/12/20/ethiopia-4-journalists-win-free-speech-prize>.

[74] Ibid.

[75] One of Reeyot's Awards is particularly notable as it is from a UN agency.

[76] Reeyot Alemu, *Anti-Terrorism Proclamation — Born from Power Thirst, (*August 2013) <http://www.iwmf.org/anti-terrorism-proclamation-born-from-power-thirst/>.

9.4.2 Rulings and judgments of the court

It is not only because journalists and politicians are targeted that the prosecutions are said to serve as evidence to indicate that the law has been used as a tool to discipline dissent. The process through which the prosecutions were conducted provides even stronger evidence to prove that the laws were not applied to terrorists. As Reeyot succinctly noted, while the ATP is a problematic law, 'those of us who are currently imprisoned would have been found "not guilty" had we been judged fairly, even under the current anti-terrorism decree."[77]

The rulings and judgments in the two prosecutions exhibit fundamental problems that are instrumental in resulting in the conviction of the defendants without the elements of the alleged offence even being pleaded, let alone proved, as required by law. Though the FDRE Constitution and international human rights instruments to which Ethiopia is a party require that a criminal charge provide adequate and clear information to the accused to allow them to defend themselves properly, the charges in both prosecutions, apart from alleging that the accused have committed a precursor crime of terrorism, state confusing allegations which render the charges ineffective in serving their purpose. Elements of the alleged offences are not pleaded on the charge that the defendants were required to defend themselves against the allegation. Despite this, their objection to the charge was not given due attention by the trial court.

The court's inconsistent position on the relationship between precursor crime as envisioned under Article 4 and a principal terrorist act as defined under Article 3 of the ATP in *FPP v. Andualem Arage et al* is in particular revealing of the fundamental shortcoming of the court's approach. At the beginning of the trial, the court rightly ruled that for conduct to constitute a precursor crime under Article 4 it needs to be tied to an intention to commit one of the six terrorist acts listed under Article 3. Once the prosecution concluded its case, apparently without proving the intention the accused to commit any of the terrorist acts listed under Article 3, the

[77] Ibid.

court set aside its previous position and ruled that the prosecution need not establish that a conduct is intended to commit any of the principal terrorist acts listed under Article 3.

This position of the court, coupled with the reversal of onus contrary to the prevalent practice, the FDRE Constitution and the human rights instruments to which Ethiopia is a party, creates an enabling environment for the prosecution where it can allege any conduct including lawful conduct as a precursor crime. The court's approach makes it possible for people who have not committed a precursor crime in violation of Article 4 of the ATP to be prosecuted and convicted. Indeed, it was not needed for the prosecution to link slogans calling for the removal of the ruling party and the stepping down of the former Prime Minster with an intention to commit a terrorist act in order to get those involved in the writing and distribution of these slogans to be convicted with terrorism. Similarly, the prosecution was not required to establish that the defendants intended to commit a terrorist act to prove its allegation that by being involved in the discussion on the feasibility and advocacy for the Arab Spring type of opposition in Ethiopia, the defendants had committed a precursor crime. The attempt by the defence to show that the defendants had not committed the alleged crime was discounted by the court dismissing their evidence on the grounds that *'only God knows*' if they had not committed the crime thereby foreclosing the possibility of a successful defence.

The prosecution's exclusive reliance on written or verbal expressions to prove its terrorism-related allegations has its own message related to the type of conduct prosecuted as terrorist. The manner in which the court examines these expressions provides even more credible evidence to the nature of the prosecutions. While the court acknowledges that the prosecution's evidence is predominantly related to written or verbal expressions of the defendants, it has not attempted to examine if these expressions are protected by the right to freedom of expression recognised under the FDRE Constitution and international human rights instruments. Apart from concluding that by making the expressions the defendants have exceeded the limit on their freedom of expression and therefore have committed the alleged terrorism crime, the court does not

identify a specific law that sets the said limit and examines the validity of the law in light of the legitimate purpose requirement, which a proper freedom of expression analysis requires.

Defence lawyers involved in the prosecution of the two cases are adamant in stating that their clients are convicted without evidence of their involvement in terrorist acts. They are of the view that the prosecution is politically motivated to incapacitate the opposition from posing any risk of losing power of the ruling party. R 9, one of the defence lawyers involved in the cases, for example states:

> The legitimate state right to fight terrorism is used as a weapon to attack political opponents. Most of those prosecuted are based on either their alleged relation with Ginbot 7, ONLF, OLF. And these allegations have never been proved. The law does not consider a political activity as a terrorist act. But it is applied to arrest political activity and this purpose has been achieved. The law is passed not to genuinely fight terrorism it is to control its own citizens involved in political activity.

In support of this, R 10, a senior politician states that 'the purpose of the law is to give cover to the attack against the opposition.'

On some issues judges and prosecutors have different views than those which they publicly express. While a prosecutor (R 6) argues before the court that the beyond reasonable doubt standard is not applicable under Ethiopian law, when asked in private he asserts that the standard should be applied in court cases. Though the defendants in *FPP v. Andualem Arage et al* challenged the judgment of the trial court on the grounds that while the prosecution is required to prove its case beyond reasonable doubt, the trial court convicted them in the absence of evidence that meets this standard, the appellate court ignores this issue and simply upholds the judgment of the lower court. The appellate court's reasoning in *Andualeme Arage et al v. FPP* implies that the appellate court endorses the lower court's position on the issue — a reversal of onus of proof instead of the requirement of proof beyond reasonable doubt. When the judges are asked about their view on the place of the standard under Ethiopian law and practice, some of them are not comfortable to confirm the aptness of the approach taken in dealing with the cases; others,

however, indicate that a reversal of the burden of proof is not allowed under Ethiopian law. Moreover, while admitting the impact of the media intervention in pending criminal cases, the judges do not acknowledge that their judgment was affected by the statements that public officials made and the documentary broadcasted pending the trial. However, as discussed in chapter seven, the judgments included verbatim copies of the fallacious arguments that the narrator in the documentary used to indicate that the defendants were terrorists.

This deception is seen in the executive circle as well. Concerning the arrest of the Deputy Chairman of the Oromo Federalist Congress, Bekele Gerba, and speaking about the terrorism-related charges, government spokesman Genenew Assefa, is reported to have said the following with a sigh: 'Ethiopian opposition tends to be extremist and then we put them in jail, and then it's vicious circle. And this is how it works. I *personally*, you know, would like to deal with this differently.'[78] Furthermore he said that 'he would like Ethiopia to counter criticism with politics, not with police.'[79] This duplicity is good evidence suggesting that in handling these cases, these actors were not free to apply the law as they understand it and in accordance with their conscience which, in turn, has its own message as to the hidden purpose of the law.

9.4.3 Outcry Against the Prosecutions

The terrorism prosecutions in Ethiopia, including *FPP v Elias Kifle et al* and *FPP v Andualem Aerage et al*, have prompted domestic and international anger. The Semayawi (Blue) Party, one of the opposition parties, organised peaceful protests in June 2013 in Addis Ababa. Around ten thousand people marched through the capital demanding, inter alia, the release of political leaders and journalists who are convicted on terrorism charges and calling for the government and the ruling party to 'respect … the constitution.'[80] On what caused the demonstration, Yilekal Getachew, the chairman of the Party, referring to those subjected

[78] Warner, above n 40.
[79] Ibid.
[80] Graham Peebles, *Ethiopian regime repression* 20 September 2013 <http://www.redressonline.com/2013/09/ethiopian-regime-repression/>.

to anti-terrorism prosecutions stated that the government did not listen though they 'have repeatedly asked the government to release political leaders, journalists.'[81] Merera Gudina, the chairman of the Oromo Federalist Congress opposition Party, openly accuses the government for using the ATP to weaken the opposition party through prosecuting members whom everybody knows not to be terrorists. He mentions names such as Andualem Arage, Woubeshet Taye, Eskinder Nega and Reeyot Alemu as clear examples of where the law has been misused to crush oppositions and the private media.[82] Yelekal Getachew, referring to the statements of the charge against Yeshewas Assefa, one of the defendants in *FPP v Andualem Arage et al*, ridicules the charge stating that 'all of us in the leadership of the opposition do these acts — we give interview to ESAT and we participate in the Paltalk video chats which were presented as evidence against him.'[83] Similarly R 11, referring to the accusations against the defendants states that:

> what they did are allowed under the constitution. We believe that the government imprisoned them because they are potentially strong opposition figures who can challenge authorities. Otherwise they have been doing what is allowed under the constitution. As an opposition is that not what they ought to do?

Referring to *Federal prosecutor v. Andualem Arage etal*, former president of the FDRE, Negasso Gidada, called the charges 'laughable.' Commenting on their purpose, he stated to AFP that 'what they [the government] have tried to do is make the people shut their mouths. Unacceptable. Unacceptable.'[84]

The outcry is not confined domestically. The prosecutions and resulting convictions prompted a long list of governmental and non-governmental institutions that have sharply criticised the Ethiopian government for the content and misuse of its anti-terrorism law. For example, the African

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[81] Ibid.

[82] 'Semayawi Party chairman responds to PM Hailemariam Desalegn's accusation' *Mereja.com* <http://www.mereja.com/video/watch.php?vid=b036f7f29>.

[83] Ibid.

[84] 'Ethiopia Charges 24 with terrorism' *News24 (*online*)* (10 November 2011) <http://www.news24.com/Africa/News/Ethiopia-charges-24-with-terrorism-20111110>.

Commission on Human and People's Rights expressed its serious alarm 'by the arrests and prosecutions of journalists and political opposition members, charged with terrorism and other offences including treason, for exercising their peaceful and legitimate rights to freedom of expression and freedom of association.'[85] Similarly, in February 2012, a group of independent United Nations human rights experts expressed their dismay at the use of anti-terrorism laws to curb freedom of expression in Ethiopia.[86] Ben Emmerson, one of the experts and the then Special Rapporteur on counterterrorism and human rights, commenting on the ongoing misuse of the ATP said 'the anti-terrorism provisions should not be abused and need to be clearly defined in Ethiopian criminal law to ensure that they do not go counter to internationally guaranteed human rights.'[87] Later in September 2014, in a statement indicating that the misuse of the law had continued, these experts stated: 'two years after we first raised the alarm, we are still receiving numerous reports on how the anti-terrorism law is being used to target journalists, bloggers, human rights defenders and opposition politicians in Ethiopia.'[88] Other critics on the misuse of the law include the governments of the United States,[89] the United Kingdom,[90] the European Union,[91] the European

[85] African Commission on Human and Peoples Rights, *Resolution No 218*, Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, 51st ord. sess. (2 May 2012).

[86] United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, *Ethiopia: UN experts disturbed at persistent misuse of terrorism law to curb freedom of expression* (02 February 2012) <http://freeassembly.net/news/ethiopia-freedom-of-expression/>.

[87] UN News Centre, *Ethiopia's anti-terrorism laws must not be misused to curb rights – UN* (2 February 2012) <http://www.un.org/apps/news/story.asp?newsid=41112#.V0QjlslWon8>.

[88] UN Human Rights Office of the High Commissioner, *UN experts urge Ethiopia to stop using anti-terrorism legislation to curb human rights* (18 September 2014) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E>.

[89] U.S. State Department, press statement, *Zone 9 Bloggers Move to Trial on Amended ATP Charges in Ethiopia* (29 January 2015) <http://www.state.gov/r/pa/prs/ps/2015/01/236963.htm>; U.S. State Department *Country Reports on Terrorism 2014* (June 2015) 25-26, <http://www.state.gov/documents/organization/239631.pdf>.

[90] Foreign and Commonwealth Office of the United Kingdom, *Ethiopia—media freedoms: A case study from the Human Rights and Democracy 2014 Report* (12 March 2015) <https://www.gov.uk/government/case-studies/ethiopia-media-freedoms>.

[91] *Local EU statement on the situation in Ethiopia*, Addis Ababa, (30 July 2014) <http://eeas.europa.eu/delegations/ethiopia/documents/press_corner/30072014_local_eu_statement_on_the_situation_in_ethiopia_en.pdf>.

parliament,[92] the International Press Institute,[93] the World Association of Newspapers and News Publishers, and the Human Rights Council Working Group on Arbitrary Detention.[94]

Referring to this long list of critics against the application of the anti-terrorism law and their own factual investigation of some of the terrorism prosecutions in Ethiopia, Lewis Gordon, Sean Sullivan, and Sonal Mittal of the Oaklands Institute conclude that the grave concerns expressed in connection with the Ethiopian anti-terrorism law 'have proven to be well founded.'[95] They further state that 'the law is a tool of repression, designed and used by the Ethiopian government to stifle its critics and political opposition, and criminalise the robust discussion of matters of enormous public interest and importance.'[96]

In a press release titled *'On Ethiopia's Charges of Terrorism Against Political Leaders,*' the US State Department expressed its deep concern regarding the trend of the Ethiopian government to use the ATP against journalists and members of the political opposition parties.[97] The State Department states that 'we again urge the Ethiopian government to discontinue its reliance on the Anti-Terrorism Proclamation law to prosecute journalists, political party members, and activists.'[98] Furthermore, the State Department urged the Ethiopian government to respect due process of detainees by, inter alia, 'distinguishing between political opposition to the government and the use or incitement of violence.'[99] The State Department reaffirms its 'call on the government to

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[92] *Letter from members of the European Parliament,* Brussels (17 December 2012) <http://www.freedom-now.org/wp-content/uploads/2012/12/Nega-MEP-Letter-12.18.12.pdf>.

[93] International press Institute and World association of Newspapers, *Press Freedom in Ethiopia IPI/WAN-IFRA Press Freedom Mission Report,* (November 2013) <http://ipi.freemedia.at/fileadmin/resources/application/Report_Ethiopia_Press_Freedom_Mission_Nov_2013.FINAL.pdf>.

[94] Human Rights Council Working Group on Arbitrary Detention, *Opinion adopted by the Working Group on Arbitrary Detention at its sixty-fifth session* A/HRC/WGAD/2012/62 (14-23 November 2012) <http://www.freedom-now.org/wp-content/uploads/2013/04/Eskinder-Nega-WGAD-Opinion.pdf>.

[95] Gordon, Sullivan, and Mittal, above n 58, 5.

[96] Ibid.

[97] John Kirby, Assistant Secretary and Department Spokesperson, Bureau of Public Affairs, *On Ethiopia's Charges of Terrorism Against Political Leaders*, (29 April 2016) <http://www.state.gov/r/pa/prs/ps/2016/04/256745.htm>.

[98] Ibid.

[99] Ibid.

protect the constitutionally enshrined rights of its citizens, including the right to participate in political parties, and we urge the Government to promptly release those imprisoned for exercising these rights.'[100]

The international community denounces the prosecutions not only by firing the prosecutions and granting awards to defendants who are convicted for terrorism and sentenced to long years of imprisonment in these prosecutions. In addition, those who were tried and convicted in absentia in these prosecutions are not treated as terrorists in their countries of residence despite their conviction. Many of the accused convicted under the ATP including most of the convicts in *FPP v Andualem Arage et al* are living safely in Europe and the United States, which is at the forefront of global counterterrorism. Following the conviction of those who were tried in absentia, the Ethiopian government could have invoked Resolution 1373 and requested foreign states, where its convicted citizens reside, to comply with their obligation under the resolution. For example, the government could have requested concerned foreign states to: 'deny safe heaven to those who are convicted for financing, planning and supporting terrorist acts' (article 2 (c)); 'prohibit convicted Ethiopians from earning funds which are assumed to facilitate terrorist acts, and to freeze their funds and other financial assets or economic resources' (Article 1(c and d)); and 'prevent those who are convicted for financing, planning, facilitating or committing terrorist acts from using their respective territories for those purposes against other States' (Article2(d)). However, the government did not avail itself of these provisions and requested concerned states to take any of these measures against the convicts.[101] In fact, some of them have

[100] Ibid.

[101] The opposition, during the televised debate with the representatives of the ruling party, points out that it is because foreign states do not regard the Ethiopian terrorism prosecution and trial process as fair that in addition to providing safe haven allow their institutions to grant awards to some of those who are convicted of terrorism. 'Ethiopian Political parties position on the Anti-terrorism law, above n 2. Even where the government of Ethiopia was able to secure the rendition/extradition of one of the convicts the international institutions and the government of the United Kingdom has been very critical of the Ethiopian government's action. Foreign and Commonwealth Office and the Rt Hon Philip Hammond MP, 'Foreign Secretary secures legal representation for Briton detained in Ethiopia' (Press release, 1 June 2016) <https://www.gov.uk/government/news/foreign-secretary-secures-legal-representation-for-briton-detained-in-ethiopia>

resided and worked in prestigious professional activities. For example, Birhanu Nega, one of the convicts in *FPP v. Andualem Arage et al* and the leader of Ginbot 7, a proscribed organisation in Ethiopia, has an academic position at Bucknell University of the United States.[102] While Elias Kifle, the first defendant in *FPP v. Elias Kifle et al,* is convicted as a terrorist by an Ethiopian court, he is a lawful resident in Washington, D.C. and works as a publisher and editor-in chief of the online *Ethiopian Review* which the court considers as a medium of a terrorist organisation.[103] Mesfin Negash is a Program Director East Africa and the Horn-Civil Rights Defenders in Stockholm.[104]

Aljazeera journalist Martine Dennis referring to the universal criticisms against the misapplication of the ATP asked Hailemariam Desalegn, Prime Minster of Ethiopia, to comment on this. The Prime Minster said the criticism arises from the fact that the critics 'do not understand the real situation of this country [Ethiopia]. They are outsiders they just want to see a democratic process of the United States in Ethiopia within one year which is absolutely not possible…'[105] The journalist challenged him by asking about the criticism from the African institutions such as Mo Ibrahim Index of Governance and the African Union. The Prime Minster dismissed the criticism from these institutions, too, stating 'that is also a misunderstanding… the thing is we believe that we are on the right track in democratising this country…' The journalist refers to the 99.6 per cent of the parliamentary seats being taken by the ruling party in the 2010 election suggesting 'that does stretch belief isn't it?' 'No!', the Prime Minster responded, 'I think if the people decide about it who is going to change it?' Finally, apparently puzzled by the adamant position of the

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[102] 'U.S. Professor Among 5 Sentenced To Die In Ethiopia' NewsOne (online) <http://newsone.com/392677/u-s-professor-among-5-sentenced-to-die-in-ethiopia/>; also see Birhanu Nega's webpage at Bucknell University: <http://www.bucknell.edu/info-about-attending-bucknell/who-we-are/bucknell-stories/faculty-stories/berhanu-nega.html>.

[103] Andualem Arage et al v FPP (F. Sup. Ct., Cr App . No. 83593).

[104] Civil Rights Defenders website <https://www.civilrightsdefenders.org/about-us/board-staff/>.

[105] Martine Dennis, interview with Hailemariam Desalegn, Prime Minster of Ethiopia, *Talk to Aljazeera* (Television interview 22 May 2015) <http://www.aljazeera.com/programmes/talktojazeera/2015/05/hailemariam-desalegn-democracy-election-150522074045193.html>.

Prime Minster, Martine Dennis asked 'then everyone is wrong? Everyone is wrong?'[106] Thus, unless every critic is said to be wrong as the Prime Minster seems to suggest, this pile-up of evidence consistently and uniformly indicates that the anti-terrorism law has not been applied for its publicly declared purposes.

9.5 Conclusion

This chapter both interrogates the reasons that the government of Ethiopia advances as justifications for promulgation of the ATP and explores other implicit purposes of the law. The government of Ethiopia refers to the increasing threat of terrorism, inadequacy of the existing law to cope with the new threat, and its obligation under international and regional counterterrorism instruments. The scrutiny of these justifications in the first part of this chapter indicates that the government's claim is untenable and the justifications not well-founded.

The implausibility of the government's explanation for passing the ATP makes the purpose of the law suspicious. Thus, the second half of this chapter explores alternative, perhaps implicit, purposes of the law. This part concludes that the law has been used against citizens who have expressed their opposition against the government and its policies without their involvement in a terrorist act being established in accordance with the law. This conclusion is strengthened by the fact that it attracts domestic and international outcry against the prosecution and conviction of defendants in these and other counterterrorism prosecutions indicating that the prosecutions are viewed as sham. A section of the public deplores the prosecutions through conducting opposition demonstrations and demanding the government to release those convicted in these prosecutions. The international community expresses its denunciation in two ways. While those who are imprisoned have received prestigious awards from esteemed international organisations, including a UN agency, those who are tried and convicted in absentia are leading a peaceful life both in Europe and the US.

[106] Ibid.

CONCLUSION

Conclusions have been provided for each chapter. Findings are discussed and analysed particularly in chapters eight and nine. Thus, this part is relatively brief.

Ethiopia has been at the forefront of the states that have been criticised for misusing their anti-terrorism legislation to stifle dissenting views on the pretext of countering terrorism. The Ethiopian government has been accused in particular of prosecuting journalists and opposition politicians under its infamous Anti-Terrorism Proclamation. The criticism comes from non-governmental human rights institutions, governments and governmental institutions including the African Human Rights Commission and the United Nations Human Rights Commission. The critics attribute the prosecutions and subsequent convictions of opposition politicians and journalists to the overly broad definition of a terrorist act under the ATP. For its part, the Ethiopian government defends the prosecutions by reasoning that journalists and politicians are prosecuted as they have been involved in terrorism-related activities on the pretext of journalism and political opposition. The government dismisses the criticisms as being made simply based on superficial knowledge of the cases and without examining the factual basis of the prosecutions.

It is true that there has not been any in-depth research on terrorism prosecutions in Africa in general and in Ethiopia in particular. The purpose of this thesis is to contribute to filling this gap. To achieve this purpose, the dissertation sought to answer three interrelated questions involving terrorism prosecutions against journalists and opposition politicians in Ethiopia. These are:

1) How broad is the definition of a terrorist act under the ATP?
2) How has the ATP been (mis)applied in prosecutions involving journalists and politicians?
3) What do these prosecutions say about the (mis)application of the ATP and might this be suggestive of its raison d'être?

Both doctrinal and empirical research methods have been used to answer these questions and advance the debate on whether or not the ATP has been used to suppress dissent.

An innovative approach has been used to examine the scope of the definition of a terrorist act under the ATP and address the first research question. One of the official justifications for The ATP is to implement Ethiopia's regional and international obligations to fight terrorism. Thus, in addition to the definition provided under the OAU Convention on the Prevention and Combating of Terrorism, the definition inferred from Resolution 1373 has been used as standard to evaluate the scope of the definition of a terrorist act that the ATP provides. While lack of an explicit and universally accepted definition of a terrorist act is acknowledged, this thesis argues that implicit meaning of a terrorist act can be inferred from Resolution 1373 — the resolution tacitly endorses the definition of a terrorist act provided under the 1999 International Convention for the Suppression of the Financing of Terrorism.

Evaluated in light of these definitions, the definition under the ATP is found to encompass too much and too little. It is too limited as it requires that the actor be motivated by religious, political or ideological causes, which is not relevant under both the regional and the international definitions. It is too broad as the definition under the ATP captures a range of conduct other than that which the regional and the international definitions envisage such as an act that causes damage to property, public safety, public services, and historical heritage. In the latter sense, as many critics suggest, the definition is potentially capable of capturing conduct that does not constitute a terrorist act under the regional and international counterterrorism legal instruments. This, coupled with its provisions that authorise precautionary prosecution, makes the ATP a tool that can be potentially deployed against those who are critical of the government's policies and practices and are perceived by the government as a threat.

Whether terrorism prosecutions which involve journalists and opposition politicians are realisations of this potential has been investigated through in-depth examination of two terrorism prosecutions — *FPP v Elias Kifle et al* and *FPP v Andualem Arage et al* — in which twenty-nine persons were prosecuted. In particular, the contents of the criminal charges, the evidence produced by both the prosecution and the defence, and the decisions of the trial and appellate courts were examined in detail with a view to addressing the second and the third research questions. Both questions relate to the (mis)application of the ATP in prosecutions involving journalists and opposition politicians. The analysis of the two prosecutions indicated that journalists and opposition politicians were prosecuted for conduct that does not constitute a terrorist act; they were convicted in the absence of evidence that proves their involvement in terrorism-related activity. This has been made possible, in the main, through a misapplication of the law.

First, a close analysis of the criminal charges revealed fundamental shortcomings of the criminal charges. Though the defendants were charged for involvement in pre-crime terrorist activities, the criminal charges did not plead all the integral elements of pre-crime terrorist activities as defined under the ATP. Furthermore, the charges alleged the commission of pre-crime terrorist activities which could not be committed simultaneously, such as planning and attempting to commit a terrorist act. Despite this, objections relating to both deficiencies were overruled by the court.

Second, the defendants were convicted of their involvement in pre-crime terrorist activities without their intention to commit a terrorist act, as defined under the ATP, being proved. In both cases, expressions of discontent with the ruling party and calls for a change of government were prosecuted as pre-crime terrorist activities. These expressions of speech are protected under the right to freedom of expression recognised by both the Ethiopian constitution and the international Covenant on Civil and Political Rights (ICCPR) to which Ethiopia is a party. In *FPP v Elias Kifle et al*, evidence proving the involvement of defendants in the writing and distribution of slogans ‘Meles beka’ and ‘EPRDF beka’ which respectively

call for the stepping down of the late Prime Minster Meles Zenawi and the ruling Party were central to prove the prosecution's case. Similarly, in *FPP v Andualem Arage et al*, evidence proving the participation of the defendants in discussions in a town hall meeting and on different social media relating to the feasibility of raising the Arab Spring type of opposition in Ethiopia was vital for their conviction. In both cases, no evidence indicating that the defendants had the intention to commit any of the terrorist acts listed under Article 3 of the ATP was produced.

Third, in response to the argument of the defence that in prosecutions relating to pre-crime terrorist activities, mens rea is so central that where it is not proved defendants should be acquitted, the court, contrary to what Article 4 of the ATP provides, ruled that conduct need not be tied to an intention to commit a principal terrorist act to be a precursor crime. By so doing, the court relieved the prosecution of its core responsibility of proving the intention of the defendants to commit a terrorist act, which is believed to be a bulwark against miscarriage of justice in precautionary prosecutions.

Fourth, the court shifted the onus of proof onto the accused and required them to prove that they did not plan, prepare, attempt and conspire to commit a terrorist act, contrary to the provisions of the Ethiopian Constitution and the ICCPR, which guarantee presumption of innocence and in the absence of a legal provision that stipulates an exception. When they introduced evidence to prove their commitment to a peaceful opposition, and thereby their distance from inclination towards terrorist methods, the court rejected their evidence on the grounds that only God, not witnesses, knows if they did not plan or prepare or conspire to commit a terrorist act; it is impossible for a witness to testify that the defendants did not commit a precursor crime, which is the very reason the onus of proof should not have been reversed in the first place. This approach permitted the court to ignore strong exculpatory evidence and give high probative value to tangentially related facts. In this way, the court made conviction of the defendants inevitable.

Thus, the two prosecutions demonstrate egregious misapplication of the ATP. They indicate that terrorism has been given even a broader meaning in its application than the already overly broad definition provided under the law. Interviews with the actors in these prosecutions confirm this. Defence lawyers are confident that their clients would have been acquitted had the law been applied properly. When several of the judges and prosecutors were asked their opinion, on condition of anonymity, it was clear that they hold different views on key issues from those professed during these prosecutions.

Prosecution of the defendants based on a charge that does not meet the requirements of the law and their conviction as terrorist without their involvement in a terrorist act being proved as required under the law is to be seen in light of the Ethiopian politico-legal environment. In a jurisdiction where there is a constitution without constitutionalism; where the politico-legal reality is defined in terms of duplicity, this finding only confirms that terrorism prosecutions are replications of the prevalent divergence between the law and the practice in the country. It is only logical that a party which aspires to stay in power no matter what and has declared a strategy to 'wait for the opposition to grow legs and then cut them off', would use every means available to remain in power including the misuse of anti-terrorism law.

As the two cases demonstrate, the government uses the state media to influence the court. Pending the trials, public officials declared, through the state-owned media that the defendants were guilty of terrorism. Following that the tunnel visioned weak court rubberstamped the prosecution's case and declared citizens, who are guilty of nothing more than free expression or other peaceful opposition to the ruling party, guilty of terrorism and sent them to jail to eliminate them from politics. In this way the court contributed to the occurrence of the miscarriage of justice. Although government officials claim and the law proclaims that the latter is intended to fight terrorism, as concluded in chapter nine, these are only covers for the implicit but true purpose of the law — controlling political opposition and criticism. Thus, the application of the ATP to punish non-violent dissent is a misuse of the law only when seen in light of its publicly

proclaimed purpose. Otherwise, by punishing critics and the Opposition in the name of terrorism prosecution, the court simply ensured that the law served its implicitly intended purpose. By so doing the court perpetuates the discrepancy between the norm and the practice: the explicit and the implicit.

In view of the authoritarian nature of the government, other traditional mechanisms of repression, such as charging with treason, could have been used to stifle dissent. Counterterrorism is preferred as it provides immunity to scrutiny and condemnation from the international community. However, its misuse has gone too far to maintain even this misguided legitimacy. The international community denounced these prosecutions as sham prosecutions. Even the US, which is criticised for not being serious on repressive regimes which misuse counterterrorism, has been critical of the Ethiopian government's approach to counterterrorism prosecutions not to mention the criticism which has come from the European Union, African Union, and the UN.

That journalists and politicians are wrongly prosecuted and convicted has already been asserted by many others. Thus, the significance of the thesis lies more in the empirical evidence that it produced based on the detailed examination of the prosecutions to support the conclusion, than it does in the conclusion itself. The finding confirms that the grave concern that counterterrorism in Ethiopia has been misused against citizens who have different views from the government is well founded.

In view of the deliberateness of the misuse of the ATP, that this finding could provoke an independent review of the terrorism prosecutions where previous convictions would be carefully re-examined with a view to reveal and remedy miscarriages of justice is unlikely. Despite that, the finding of the thesis is important in that it fills the gap in evidence that the government has been exploiting to defend itself from accusations against its misuse of counterterrorism prosecutions.

Broadly speaking, the thesis reveals the face of counterterrorism in authoritarian regimes. It adds weight to the concerns expressed by many

that the advent of terrorism and counterterrorism in Africa makes it difficult to mobilise against the state. That said, a caveat is needed. As explained in the introduction chapter, both methodological and practical reasons dictated that the case studies be confined to two terrorism prosecutions. As the two cases are not meant to represent all terrorism prosecutions, the finding does not rule out a successful terrorism prosecution in Ethiopia. This caution leads to the final point which relates to the future direction for research. The finding of this thesis, far from being conclusive, suggests lines of inquiry that further research may productively probe on a larger scale. It remains to be evaluated whether the findings based on these prosecutions hold true in other terrorism prosecutions.

Potential repercussions of counterterrorism prosecutions in Ethiopia are another area of interest for further research. As noted in chapter nine, the divergence between the law and government conduct as to whether an act relates to terrorism has made the law and the prosecutions questionable. Prosecuting those who have expressed different views from those in power, and criticised the government, as terrorists has encouraged the public to demand the unconditional release of people who have been convicted or are being prosecuted for terrorism. Furthermore, the prosecutions have provoked some of the public to call for the repeal of the ATP on the grounds that it has narrowed the political space. For those convicted of the terror charge, their conviction has been a signifier of success – a badge of honour. Thus, the potential for, or real counter productiveness of, the misguided counterterrorism prosecutions in Ethiopia is a fertile area of research.

APPENDICIES

Appendix 1

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LETTER OF INTRODUCTION

Dear Sir/Madam,

This letter is to introduce Wondwossen D. Kassa, who is a PhD student in the School of Law at Flinders University in Australia. He will produce his student card, which carries a photograph, as proof of identity.

He is undertaking research leading to the production of a thesis or other publications on the subject of "*Contextual Legal Analysis of Terrorism Prosecutions Involving Journalists and Politicians in Ethiopia."*

He would be most grateful if you would volunteer to assist in this project, by granting an interview which covers certain aspects of this topic. No more than one hour would be required. Be assured that any information provided will be treated in the strictest confidence and none of the participants will be individually identifiable in the resulting thesis, report or other publications. You are, of course, entirely free to discontinue your participation at any time or to decline to answer particular questions.

Since he intends to make a tape recording of the interview, he will seek your consent, on the attached form, to record the interview, to use the recording or a transcription in preparing the thesis, report or other publications, on condition that your name or identity is not revealed, and to make the recording available to other researchers on the same conditions.

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Any enquiries you may have concerning this project should be directed to me at the address given above or by telephone on (+61) 08 8201 3673, by fax on (+61) 8201 3630 or by email (willem.delint@flinders.edu.au).

Thank you for your attention and assistance.

Yours sincerely

Prof Willem de Lint

This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project Number 5912). For more information regarding ethical approval of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email human.researchethics@flinders.edu.au.

Appendix 2

INFORMATION SHEET

Title: Contextual Legal Analysis of Terrorism Prosecutions Involving Journalists and Politicians in Ethiopia

Investigator:
Wondwossen D. Kassa
Law School
Flinders University

Description of the study:
This study is part of the project entitled *'Contextual Legal Analysis of Terrorism Prosecutions Involving Journalists and Politicians in Ethiopia.'* This project will investigate anti-terror laws and prosecutions in Ethiopia. This project is supported by Flinders University Law School.

Purpose of the study:
This study aims to investigate if anti-terror laws have been properly applied in Ethiopia in terrorism prosecutions involving politicians and journalists.

What will I be asked to do?
You are invited to attend a one-on-one interview with a researcher who will ask you a few questions about your views about anti-terror laws and prosecutions in (insert name of one of the three countries as appropriate). The interview will take about 1hour. The interview will be recorded using a digital voice recorder to help with looking at the results. Once recorded, the interview will be transcribed (typed-up) and stored as a computer file and then destroyed once the results have been finalised. This is voluntary.

What benefit will I gain from being involved in this study?
Your experiences and views are important inputs to this study the output of which may make the concerned persons to revisit their anti-terrorism activity with a view to make it effective and compatible with human rights which is beneficial to everyone in the region.

Will I be identifiable by being involved in this study?
Your name will not be mentioned in the report. The information you provide will be used anonymously. There is still a possibility for you to be identified by those who might be aware of your view and the terrorism prosecutions.

Any identifying information will be removed and the typed-up file stored on a password protected computer that only the researcher will have access to. Your comments will not be linked directly to you.

Are there any risks or discomforts if I am involved?

Your participation does not involve any foreseeable harm. If you have any concerns regarding anticipated or actual risks or discomforts, please raise them with the researcher.

How do I agree to participate?
Participation is voluntary. You may answer 'no comment' or refuse to answer any questions and you are free to withdraw from the interview at any time without effect or consequences. A consent form accompanies this information sheet. If you agree to participate please read and sign the form.

How will I receive feedback?
Part of the research in which the information you give is included will be summarised and given to you if you would like to see them.

Contact details
If, after participating in the interview, you have concerns about the interview and if you would like to discuss your concerns and to get free support from me you may contact me using the following address.
e-mail: wondwossend@yahoo.com
tel.no. + 61 8201 13307

Thank you for taking the time to read this information sheet and we hope that you will accept our invitation to be involved.

This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project No. 5912). For more information regarding ethical approval of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email human.researchethics@flinders.edu.au

Appendix 3

CONSENT FORM FOR PARTICIPATION IN RESEARCH

(by interview)

Contextual Legal Analysis of Terrorism Prosecutions Involving Journalists and Politicians in Ethiopia

I.....

being over the age of 18 years hereby consent to participate as requested in the letter of introduction for the research project on 'Criminalizing Undefined Conduct: Lessons from Anti-Terror Laws and Prosecutions in East Africa.'

1. I have read the information provided.
2. Details of procedures and any risks have been explained to my satisfaction.
3. I agree to audio recording of my information and participation.
4. I am aware that I should retain a copy of the Information Sheet and Consent Form for future reference.
5. I understand that:

   - I may not directly benefit from taking part in this research.
   - I am free to withdraw from the project at any time and am free to decline to answer particular questions.
   - While the information gained in this study will be published as explained, I will not be identified, and individual information will remain confidential.
   - I may ask that the recording be stopped at any time, and that I may withdraw at any time from the session or the research without disadvantage.
   - There is some risk due to the sample size that I may be identified by those familiar with the prosecutions.

Participant's signature……Date……..

I certify that I have explained the study to the volunteer and consider that she/he understands what is involved and freely consents to participation.

Researcher's name…….....

Researcher's signature……..Date…….

NB: Two signed copies should be obtained. The copy retained by the researcher may then be used for authorisation of Items 8 and 9, as appropriate.

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