

**Striking the Balance between Conforming to Human Rights  
Standards and Enacting Anti-terrorism Legislation: A  
Challenge of the 21<sup>st</sup> Century  
(An Ethiopian Perspective)**

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## **Declaration**

I hereby submit my research degree thesis for examination. I take full personal responsibility for the decision to make this submission. I declare that no material contained in the thesis has been used in any other submission for an academic award at this or any other institution. I declare that the thesis is all my own original work, except where otherwise indicated.

\_\_\_\_\_  
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I confirm that, to the best of my knowledge, the research was carried out and the thesis was prepared under my direct supervision and research was conducted in accordance with the degree regulations. The contribution made to the research by me, and by other members of the supervisory team was consistent with normal supervisory practice.

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## **Abstract**

The attacks against the United States of America (US) on 11 September 2001 paved the way for the coming into effect of much counter-terrorism legislation across the world. Ethiopia is one of the countries that have introduced new legislation on terrorism, which is mainly drawn from the UK and, to a lesser extent, from the US. The aim of this thesis is to comprehensively assess Ethiopia's counter-terrorism legislation in light of the experiences of the UK and the US in dealing with terrorism. Furthermore, this thesis discusses the consequences of 'copying' Western counter-terrorism legislation into Ethiopian culture, drawing particular attention to the need for a proper balance between legitimate security interests and the protection of fundamental rights.

This thesis is organized as follows. The first chapter introduces the significance, methodology, limitation, and scope of the thesis. The second chapter discusses the development of Ethiopian legal system, human rights and counterterrorism measures.

Moving forwards, chapter three seeks to analyse two important factors encapsulated within the right to freedom of expression; that is, the content and medium of the expression and the identity of the speaker/publisher. The relevance of these factors in giving effect to the right to freedom of expression is evaluated in light of the need to protect against the incitement and/or encouragement of terrorism. The chapter then deepens its critical assessment by reviewing the difficulty of implementing these factors in Ethiopia.

Chapter four seeks to widen the debate by exploring the legal regimes governing intercept evidence - an issue of great importance in terrorism discourse. The chapter critically examines why intercept evidence obtained through a warrant is inadmissible in UK courts. Additionally, this chapter compares the position of the UK with that of the US, isolating areas of similarities and differences with a view to comparing the Ethiopian position on intercept communications.

Chapter five focuses on the arrest of individuals on suspicion of terrorism and the length of pre-charge detention under the three countries selected for this research. This chapter will then explore whether there is a need for a watered down version of 'reasonable suspicion' in terrorism cases. This chapter further considers Ethiopia's position with regard to the level of knowledge required to execute arrests, considering whether Ethiopia could and should reflect on the UK's position in attempting to facilitate a greater accordance with fundamental rights by shortening the 120 days pre-charge detention currently available to police when arresting individuals on suspicion of terrorism.

The final chapter draws on the preceding debate and provides the concluding remarks on the thesis.

## Glossary

ACLU	American Civil Liberties Union
ATCSA	Anti-terrorism, Crime and Security Act 2001
BIRW	British Irish Rights Watch
CALEA	Communications Assistance for Law Enforcement Act
CBA &LRC	Criminal Bar Association and Law Reform Committee
CPJ	Committee to Protect Journalists
CPS	Crown Service Proclamation
DPP	Director of Public Prosecution
EATP	Ethiopia's Anti-Terrorism Proclamation
ECHR <sub>s</sub>	European Human Rights Convention
ECPT	European Convention on the Prevention of Terrorism
ECtHR <sub>s</sub>	European Court of Human Rights
EHRC	The Equality and Human Rights Commission
FDRE Constitution	Federal Democratic Republic of Ethiopia Constitution
FISA	Foreign Intelligence Surveillance Act of 1978
HRA	Human Rights Act
HRW	Human Rights Watch
INA	Immigration and Nationality Act
Joint Committee on Human Rights	House of Lords, House of Commons
Kinjitt	Joint Committee on Human Rights
MCB	Opposition Political Party in Ethiopia
Mckee v CCNI	Muslim Council of Britain
ICCPR	Mckee v Chief Constable for Northern Ireland
NDAA	International Convention on Civil and Political Rights
NIA 1978	National Defense Authorization Act
NSA	Northern Ireland (Emergency Provisions) Act 1978
OSSCA	National Security Agency
O'Hara v CCRUC	Omnibus Safe Streets and Crime Control Act
Parliamentary Minutes	O'Hara v Chief Constable for Royal Ulster Constabulary
	Parliamentary Minutes on the Counter-Terrorism Bill, 17 June, 2001

PACE	Police and Criminal Evidence Act
Patriot Act 2001	Providing Appropriate Tools for Intercepting and Obstructing Terrorism Prevention of Terrorism Act
PTA	Prevention of Terrorism Act
RIPA	Regulation of Investigatory Powers Act 2000
SCPO	Serious Crime Prevention Orders
Smith Act	The Alien Registration Act of 1940
SOCPA	Serious Organised Crime and Police Act 2005
TA	Terrorism Act
TFOP	Telecom Fraud Offences Proclamation
Title III	of the Omnibus Crime Control and Safe Streets Act of 1968
U.S.A.M.	United States Attorneys' Manual
U.S.C	Code of Laws of the United States of America
VPPA	Video Privacy Protection Act



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## Chapter one: Introduction

It cannot be denied that terrorism poses an unprecedented threat to national security, indeed to the very existence of a free and democratic society. The horrific events of 9/11 were unimaginable in their devastation. But, if one positive could rise from such tragedy, it is that nations across the world awoke to the reality of global terrorism. The 9/11 attacks have irreversibly affected Sub-Saharan African nations. The sweeping approval of counter-terrorism legislation across that continent since 9/11 is testament to this fact. However, the ramifications emanating from such swift action are only now being realised.

It is not easy to rationalise why so many African countries are adopting counter-terrorism legislation at break-neck pace, for these countries do not share the same public perception of the threat. But, more than that, African legal regimes, domestic realities, international norms are different. Indeed, their entire constitutional foundation for the legitimate exercise of authority is far less developed than that of Western democracies. For some commentators, the push to adopt combat terrorism in this part of the world is a result of a carrot and stick methodology invoked by the US to force these countries into passing anti-terrorism regimes.<sup>1</sup>

Coupled with these factors, the United Nations has initiated a global project to combat terrorism, which has involved the implementation of a universal anti-terrorism framework. As a result, many African countries have ratified or acceded to universal instruments against terrorism i.e. UN resolution 1373.<sup>2</sup>

However, this push to adopt anti-terrorism laws has its own pitfalls. As many human rights organisations have pointed out, there is a fear that counter-terrorism laws are being used to suffocate political dissent. In its first reaction to the

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<sup>1</sup> Shinn, D. (2003). Terrorism in East Africa and the Horn: An Overview. xxiii (2) *Journal of Conflict Studies* 79.

<sup>2</sup> Security Council Resolution 1373 (2001) [on Threats to International Peace And Security Caused By Terrorist Acts], S/RES/1373 (2001), 28 September 2001

adoption of new anti-terrorism laws in Ethiopia, Amnesty argued that "acts of terrorism are vaguely defined and could encompass the legitimate expression of political dissent."<sup>3</sup> Moreover, Human Rights Watch (HRW) complained that the "definition of terrorism includes acts that do not involve violence or injury to people, such as property crimes and disruption of public services."<sup>4</sup>

The response of the Ethiopian government to its detractors has been bluntly unequivocal: "...our law on counter terrorism has been directly taken from the UK and the US. So what is wrong with copying a law from the most democratic countries in the world?"<sup>5</sup> However, there is a temptation from some corners of the world to dismiss the Ethiopian government's response as too superficial. Human rights organisations make a more sinister objection here. They allege that there seems to be a move towards using the West's call for international action on terrorism as a legitimate excuse for the subversion of human rights standards.

This research acknowledges that Ethiopia is right to adopt legislation on terrorism. However, it argues that a law's existence in one country does not provide *a priori* legitimacy for it to be enacted in another country. It also argues that, although there are some similarities between the current Ethiopian legislation and its Western origins, the governing principles and values which underwrite the Western approach to counter-terrorism legislation are incompatible with the Federal Democratic Republic of Ethiopia (FDRE) constitutional structure.

This research is original both in terms of its mechanics and content. It seeks to use the experiences of the UK and US in enacting, indeed, challenging counter-terrorism legislation as a template against which to measure the Ethiopian position and, if necessary, outline appropriate alternatives that would assist

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<sup>3</sup> Human Rights Watch (2009). Ethiopia: Anti-Terrorism Proclamation Jeopardizes Freedom of Expression., at <http://www.amnesty.org/en/for-media/press-releases/ethiopia-new-anti-terrorism-proclamation-jeopardizes-freedom-expression->

<sup>4</sup> Human Rights Watch (2009). *Analysis of Ethiopia's Draft anti-Terrorism Law*, at <http://www.hrw.org/node/84132>

<sup>5</sup> The late Prime Minister Zenawi's speech given to parliament in 2009.



Ethiopia in its pursuit and promotion of internationally recognized rights.<sup>6</sup> Moreover, in discussing the influence on Ethiopia of both the UK and US's approach to terrorism and human rights, this research seeks to explore to which approach Ethiopia has aligned itself. Such a debate will furnish the subsequent discussion of the desirability of following either of the two approaches adopted by the UK and US, respectively.

### **1.1.The Significance of the Research Project**

This research intends to materially assist legislative bodies, academics and other interested parties in crystallizing the approach of not only of the UK and US, but more significantly Ethiopia towards the enduring conundrum facing states across the world - the extent to which anti-terrorism legislation and human rights can co-exist as equals.

For a government, particularly for the Ethiopian government, which has a track record of transferring laws from Western countries no matter how they fit the domestic *status quo*,<sup>7</sup> the research seeks to demonstrate the extent to which current anti-terrorism legislation in Ethiopia has negatively impinged on human rights while, at the same time, providing an insight into the possible alternatives available to address the issues raised. The research intends to demonstrate that fighting terrorism is more than adopting a single proclamation.

This research argues that, concomitant with black-letter laws, there needs to be a mechanism for balancing principles which guarantee against unnecessary interference with basic rights. This research intends, therefore, to address the

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<sup>6</sup> Ethiopia has ratified and accessed into several international human rights bills. These include, *inter alia*: the International Covenant on Civil and Political Rights; International Covenant on Economic, social, and Cultural Rights; International Convention Against the Taking of Hostages; International Convention for the Suppression of Terrorist Bombing; International Convention for the Suppression of Unlawful Seizure of Aircraft. Besides to the above international conventions, Ethiopia has also signed, ratified or accessed the following African conventions: African [Banjul] Charter on Human and People's Rights; Convention Governing the Specific Aspects of Refugee Problems in Africa; Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights; AAU Convention on the Prevention and Combating of Terrorism; Protocol to the OAU Convention on the Prevention and Combating of Terrorism.

<sup>7</sup> See chapter 2 for further discussion on policy transfer in Ethiopia

critical issue of how Ethiopia should balance the need to enhance security against protecting civil liberties.

Moreover, since the Ethiopian counter-terrorism legislation was passed only in 2009, there is a notable shortage in comprehensive research on the Ethiopian legal system's approach to counter-terrorism law. There has been a wide variety of criticism levelled at the new legislative regime by human rights organisations. Unfortunately, such criticism lacks a sufficient level of detail to be of use to Ethiopian academics, judges, lawyers and students.

Incidentally, the Ethiopian government also argues that the reports by human right organisations are politically motivated and they do not reflect the reality of the situation in the country. More broadly, although terrorism has been around for quite some time, there would seem to be insufficient literature dealing with the impact on third world countries of the changing positions of the UK and US towards combating terrorism. Indeed, such is the fast pace at which the two countries modify their approach, the lack of an expansive account on the matter is understandable. Therefore, it is the aim of this thesis to produce a comprehensive and independent perspective that could be used by any person who is interested in Ethiopia's approach to terrorism.

## **1.2. Methodologies**

It is not simple to compare legislation from different jurisdictions due to the difference in legal regimes, domestic realities, international norms and constitutional foundations. Among the issues that need to be addressed in comparative legal research are: "what do we intend to compare? Why have we chosen a comparative project? And, perhaps most importantly, what methodology do we intend to use?"<sup>8</sup> To answer the first question, this research compares and contrasts counter-terrorism legislation from the UK, the US, and Ethiopia. The reason for this is that the Ethiopian government argues that the

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<sup>8</sup> Giliker, P. (2006). The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century and Methodology of Comparative Law by ÖrÜcÜ, E., reviewed in 55(1) *I.C.L.Q.* 243-246

Ethiopian anti-terrorism proclamation No. 652/2009 (EATP) is modelled on the UK and the US laws. This answers the second question.

With regard to the third question, this research combines comparative legal analysis and qualitative case analysis.<sup>9</sup> It examines anti-terrorism legislation from across the legal spectrum by collecting different laws, court decisions and other secondary data from a select group of countries. It is doctrinal in nature<sup>10</sup> by virtue of its presentation of legal analysis, comments on court decisions and opinion of different legal experts. It also makes a comprehensive comparative analysis of how Ethiopia's laws on terrorism compare and contrast to those enacted in more experienced countries such as the UK and US. Furthermore, this paper critically examines the benefits and/or any loopholes and frailties that might exist in the current Ethiopian law against internationally recognized rights.

To this effect, it will collect counter terrorism laws from the UK and the US; compare them to the Ethiopian counter-terrorism; assess relevant literatures to compile in the form of an overview what is currently known and critically evaluate the practices experienced to date; examine court rulings on counter terrorism measures in Ethiopia, Europe, the UK, and the US; suggests which balancing principles are best for Ethiopia; analyse the positions of legal scholars and others and determine which practice is best to modify Ethiopia's counter-terrorism law.

### **1.3.Data collection**

The researcher has used data from a variety of sources in Ethiopia, most of which originate from the Ethiopian federal courts and the library of the Ethiopian House of Representative, but also include other sources such as newspaper articles, commentary and documentaries.

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<sup>9</sup> Dobinson, I. and Johns, F. (2007) *Qualitative Legal Research* in McConville, M. and Chui, W. H. (editors). *Research Methods for Law*. (Edinburgh, Edinburgh University Press), p. 17 (stating that "Qualitative legal research is 'non-numerical and contrasted as such with quantitative (numerical) research.")

<sup>10</sup> McConville, M. and Chui, W. H. (2007). *Introduction and Overview* in McConville, M. and Chui, W. H., above, p. 3 (stating that 'doctrinal research relies extensively on using court judgments and statute to explain the law".)

A total of three Ethiopian research assistants were required and used for the collection of case law on terrorism.<sup>11</sup> Those researchers were charged with locating particular cases law relevant to this research. Unfortunately, Ethiopian case law on terrorism is not as readily accessible as with case law emanating out of the British Legal System, instead being mixed in with other cases such as contract, ordinary crimes, etc. The assistant researchers have contributed to the successful location of cases that were requested by the principal researcher. However, in order to check the authenticity of the cases, the principal researcher has personally participated in the collection of the documents. Moreover, the usefulness and accuracy of the case law have been counterchecked with other sources, such as the case list at the Ethiopian Federal Court registry and reports in local newspapers.

Almost all of the primary and secondary sources in this research are written in Amharic, the Ethiopian official language. Accordingly, the absence of English language sources has been one of the most difficult tasks while undertaking research in Ethiopia. Indeed, translating these documents into English has accounted for a vast amount of time and effort during the research activities. A further problem to be mentioned is that annual statistics on terrorism cases and incidents are capricious. As a result, the explanation of terrorism cases and the context in which a particular law is applied is not readily available.

#### *1.1.1. Tables of figures on Terrorism Case from Ethiopia*

The FDRE Constitution divides the Ethiopian judiciary into Federal courts and State courts, with each having their own jurisdictions.<sup>12</sup> According to article 4 of the Ethiopian Proclamation No. 25/1996,<sup>13</sup> the Ethiopian Federal Courts have jurisdiction over criminal matters relating to, *inter alia*, offences against the Constitutional order and/or against the internal security of the state. Article 8 and

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<sup>11</sup> Two at the Ethiopian Federal High Court and another at the Ethiopian Supreme court.

<sup>12</sup> Articles 79-80 of the FDRE Constitution.

<sup>13</sup> Proclamation No .25/1996 Federal Courts Proclamation

12 of the same proclamation and Article 31 of the Ethiopian Anti-terrorism Proclamation (EATP) has tasked the Federal High court to examine terrorism cases with the possibility of appeal to the Federal Supreme Court. Therefore, all the terrorism cases examined within this thesis have been collected from the two Federal courts referred to.

Table 2.3 shows the total number of terrorism cases collected for this research. The cases in this table are organised according to the year they were filed at the Federal High court. This table analyses the terrorism cases in terms of the types of charges, the weapons, if any, used, the organisations linked to the alleged offences, and the laws used against the terrorist suspects.

A printed list of terrorism cases obtained from the Federal High Court shows that there were a total of 240 cases between 1986 and 2004 Ethiopian Calendar (1994-2012 European Calendar).<sup>14</sup> However, as shown in table 2.3, only 60 cases are available to the public. The researcher has made several attempts to discover why most of the cases are withheld. However, the registry of the Federal High court refused to provide any explanation.

The terrorism cases in table 2.3 are further sub-divided into conviction rates in tables 2.4 and then again in table 4.3 based on the probability of being released conditionally or unconditionally after the initial arrest.

However, not all cases listed in table 2.3 are replicated in tables 2.4 and 4.3. This is due to the fact that some information is missing from the records of the court cases. For instance, in some cases,<sup>15</sup> the court reports show that the defendants were released on bail. But the final judgment on those cases are missing and, for this reason, the researcher is unable to determine whether these defendants were eventually convicted or not. In other cases, the problem was not determining whether the defendants were convicted or not, rather upon conviction the

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<sup>14</sup> See Appendix B

<sup>15</sup> Public Prosecutor v Yasin Shifa and Mesfin Gebere (25993/2007); Public Prosecutor v Birhanu Degu et al. (25845/2007); Public Prosecutor v Tomas Asrat Dosha et, al (26208/1999); Public Prosecutor v Eyob Tilahun (27093/2007); Public Prosecutor v Derege Kassa Bekele (27536/2007)

decisions failed to show the length of the jail term imposed and they are marked by a question mark (?) in table 2.4.

Furthermore, in some cases,<sup>16</sup> the defendants were charged and convicted but the court reports did not show if the defendants had the opportunity to be released from police custody on bail or remanded for trial before the final judgment was made.

Due to the above problems, the numbers of cases in table 2.4<sup>17</sup> and table 4.3<sup>18</sup> are less than those in table 2.3.<sup>19</sup>

### *1.1.2. Relevant Ethiopian Laws on Terrorism*

The Ethiopian Criminal Code and the Ethiopian Criminal Procedure Code have been used as the primary sources of substantive and procedural law on terrorism, respectively. However, as will be explained in the subsequent chapters, these Codes do not specifically deal with terrorism.

#### *1.1.1.1. The Ethiopian Criminal Code 2004*

The 1957 Ethiopian Penal Code<sup>20</sup> was revised in 2004 to incorporate the 'radical political, economic and social changes that have taken place in Ethiopia'; 'to properly address crimes born of advances in technology and the complexities of modern life such as the hijacking of aircraft, computer crimes and money laundering'.<sup>21</sup> The 2004 Ethiopian Criminal Code<sup>22</sup> is structured in three parts.

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<sup>16</sup> To mention few examples: Public Prosecutor v Muhammed abatiha, et al 8371 (39/1995 High court.); Public Prosecutor v Merga (94/1995) (9598 /appeal file number); Public Prosecutor v Dechasaw Abate et al. v (17511/6771/2000); Public Prosecutor v Beyane Ahmed Esmael (17722/2007); Public Prosecutor v Rabyie Mehammed Hassen et al (49303/2008); Public Prosecutor v Merga Negara et al. (34705/2000); Public Prosecutor v Mehammed Junedin Esmael and Husni Abdi-Kadir (60083/2009); Public Prosecutor v Wegari Alemu Kasa (60265/2009); Public Prosecutor v Shferaw Mokonnen and Ethiopia Aregaw (68104/2009); Public Prosecutor v Ezedin Mohammed Abdulseman, et al (69201/2009); Public Prosecutor v Assemu Mihret and Getachew Niguse (89341/2009)

<sup>17</sup> A total of 55 cases

<sup>18</sup> A total of 33 cases

<sup>19</sup> A total of 60 cases

<sup>20</sup> See chapter two for further discussion on the backgrounds to this code

<sup>21</sup> See preface to the Ethiopian Criminal Code 2004

The first part of the code deals with 'General principles of Criminal Liability'.<sup>23</sup> This part is further divided into two sections: Book I and Book II. Book I<sup>24</sup> deals with the scope of the criminal law;<sup>25</sup> crime and its commission;<sup>26</sup> and the condition of liability to punishment.<sup>27</sup>

Book II covers 'criminal punishment and its application'.<sup>28</sup> The issues covered in this book include the calculation of sentences, punishments applicable to adults and young offenders, conditional release before expiry of sentence.

Part II is a 'special' part of the Ethiopian Criminal Code.<sup>29</sup> Unlike the general part of the code which deals with principles applicable to more than one crime, this part of the Code deals with particular crimes that are defined and categorised by reason of their subject matter. This part of the Ethiopian Criminal Code is divided into four books: crimes against the state;<sup>30</sup> crimes against public interest or the community;<sup>31</sup> crimes against individuals and the family;<sup>32</sup> and crimes against property.<sup>33</sup> The Book I of part III is particularly relevant to this thesis. As will be discussed, these provisions of the Ethiopian Criminal Code have been heavily used against terrorist suspects in the absence of clear laws on terrorism.

The last part of the Code deals with 'petty offences'.<sup>34</sup> A petty offence is defined as a minor offence not punishable under the Criminal Code or an offence that

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<sup>22</sup> Came into force as of 9 May, 2005

<sup>23</sup> Articles 1-237 of the Ethiopian Criminal Code

<sup>24</sup> Articles 1-86 of the Ethiopian Criminal Code

<sup>25</sup> Deals with jurisdiction, period of limitation, repealed laws, effects of foreign sentences, etc.

<sup>26</sup> Deals with place of commission of a crime, cause and effect, degrees in the commission of an offence, incitement, etc.

<sup>27</sup> Deals with ordinary responsibility, partial responsibility, Infants and Juvenile Delinquents, etc.

<sup>28</sup> Articles 87-237 of the Ethiopian Criminal Code of Ethiopia

<sup>29</sup> Articles 238-733 of the Ethiopian Criminal

<sup>30</sup> Articles 238-374 of the Ethiopian Criminal Code (deal with issues such as Crimes against the Constitution or the State)

<sup>31</sup> Articles 375-537 of the Ethiopian Criminal Code (deal with issues such as breaches of public confidence, forgery, falsification of documents)

<sup>32</sup> Articles 538-661 of the Ethiopian Criminal Code (deal with homicide, abortion, grave wilful injury)

<sup>33</sup> Articles 662-733 of the Ethiopian Criminal Code (deal with issues such as Unlawful or Unjustifiable Enrichment, fraud, etc.)

<sup>34</sup> Articles 734 and seq. of the Ethiopian Criminal Code

infringes regulations issued by administrative authorities.<sup>35</sup> We will not go into the details of this part of the Code as our concern in this thesis is with the serious offences covered in part II of the Code.

#### 1.1.1.2. The Ethiopian Criminal Procedure Code

The Ethiopian Criminal Procedure Code sets the general principles of handling criminal matters. It was designed to facilitate the enforcement of the Ethiopian Penal Code. However, this Code is inadequate for a variety of reasons. We shall mention some of those concerns briefly here, with the intention of discussing them in further detail later. First, the Code "suffers from being overly brief (only 224 articles), and therefore from being too sparse, with too many crucial gaps".<sup>36</sup> As a result, filling the gaps by interpretation is made extremely difficult because it is hard to extrapolate legislative intent from a body of law which lacks cohesiveness.<sup>37</sup> These gaps, particularly those that are relevant to terrorist arrests and investigation, will be discussed in the subsequent chapters. Moreover, there have been inadequate changes made since its codification in 1961.<sup>38</sup> Outdated procedures in regard to traditional methods of delivering justice remain part of this Code, even though they are not practiced.<sup>39</sup>

The Ethiopian Criminal Procedure Code, dealing with the jurisdiction of courts, police investigation, preliminary inquiry and trial and appeal, is divided into five main parts. The first part deals with the jurisdiction of courts.<sup>40</sup> Criminal courts are divided into different levels of hierarchy based on the seriousness of the crime. However, as discussed above, this part of the Criminal Procedure Code is repealed.<sup>41</sup>

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<sup>35</sup> Article 734 of the Ethiopian Criminal Code

<sup>36</sup> Fisher, S. Z. (1969). *Ethiopian Criminal Procedure: A source Book*. (Ethiopian Criminal Procedures: A Sourcebook (Addis Ababa, HSIU in Association with Oxford University Press))

<sup>37</sup> Ibid

<sup>38</sup> See chapter two for discussion on the backgrounds to this code. The changes that have been made in regard to remand and bail of terrorist suspects will be discussed in chapter five.

<sup>39</sup> For instance, articles 223-224 of the Ethiopian Criminal Procedure Code deal with 'atbia dagnia' (translation: local chiefs) judicial functions of local chiefs

<sup>40</sup> Article 4-7 of the Ethiopian Criminal Procedure Code

<sup>41</sup> See discussions above on Articles 79-80 of the FDRE Constitution and the Ethiopian Proclamation No 25/1996



The second and third parts<sup>42</sup> cover police investigations and preliminary inquiries.<sup>43</sup> Entitled 'Setting Justice in Motion,' these parts sets the procedures for bringing accusations, requesting summons, making arrests, undertaking police investigations, recording confessions, preventing self-incrimination and regulating the right to counsel while in police custody. Moreover, they contain principles on remand, right to bail, and writ of habeas corpus. However, as will be discussed throughout the thesis, there remain a lot of ambiguities on the application of these criminal procedures, particularly those that apply to surveillance and interception of communications, the conditions for the immediate release of a suspect during a police investigation and length of pre-charge detention.

The fourth and the fifth parts<sup>44</sup> of the Ethiopian Criminal Procedure Code deal with criminal proceedings during a trial with the possibility of further appeals. These procedures set the type of inquisitorial system Ethiopia follows. This will be subject to further discussions in chapter two.

### 3.3.3.3. The Ethiopian Anti-Terrorism Proclamation No. 652/2009 (EATP)

The Ethiopian government established a committee composed of members from the Ethiopian House of Representatives (HOR), the police force, National Intelligence and Security Service (NISS),<sup>45</sup> the public prosecution, judges, and other high ranking government officials. However, no opposition party members and other legal scholars were included in the Committee. This committee was tasked with drafting the EATP and its draft was submitted to the HOR in 2009.<sup>46</sup> The researcher managed to obtain a copy of this report, which is written in Amharic, from the HOR library.<sup>47</sup> The HOR accepted the draft without any

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<sup>42</sup> Articles 8 -93

<sup>43</sup> For further discussion on investigation procedures and preliminary inquiry, see page 65; pages 347-3550, and page 362-363

<sup>44</sup> Article 94 et seq. of the Ethiopian Criminal Procedure Code

<sup>45</sup> See below in this chapter, chapter two and chapter four on the powers of this organ

<sup>46</sup> Entitled 'Parliamentary Minutes on the Counter-Terrorism Bill, 24 June, 2009' (parliamentary minutes from this onwards)

<sup>47</sup> The contents of the parliamentary minutes will be discussed throughout the thesis

change and it resulted in the enactment of the EATP, which is the first Ethiopian law that specifically addresses terrorism.

The EATP is organised into seven chapters. Part I contains the definitions of some terms used in the EATP. As will be discussed in the subsequent chapters, however, this part does not define all the terms in the EATP. Part II lists 'terrorism and related crimes'. This part criminalises terrorist acts such as planning, preparation, and incitement of terrorist act; rendering support to terrorism; encouraging terrorism; and participating in a terrorist organisation. Chapter three of this thesis will show that the Ethiopian legislature did not give any emphasis the effect these vaguely defined terrorist activities might have on pure political activities that has nothing to do with terrorism.

Part III consists of 'preventive and investigative measures', which include gathering of information (through interception, covert search, sudden search)<sup>48</sup> and arresting terrorist suspects.<sup>49</sup> Part IV further elaborates the probative value of evidence gathered under part III of the EATP. It explains that intelligence reports that do not disclose the sources of the information, intercept evidence, hearsay, and confession of terrorist suspects are admitted in criminal proceedings.

Part V identifies the HOR as the only organ who has the power to proscribe and de-proscribe a terrorist organisation. It also lists the measures that need to be taken following proscription: freezing, seizure, and forfeiture of terrorist properties. The problems related with proscribing terrorist organisations in Ethiopia are discussed in chapter two.

Part VI contains very brief articles that deal with 'institutions that follow up cases of terrorism'. It identifies the police, the public prosecution, and the NISS as the organs empowered to investigate terrorism cases. Moreover, it establishes the jurisdiction of the Ethiopian High Court and the Ethiopian Supreme Court over terrorist cases.

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<sup>48</sup> Discussed in chapter four

<sup>49</sup> Discussed in chapter five

Part VII entertains issues in relation with protection of witnesses, and consequences of obstructing terrorist investigation. It sets the procedures when and how a court may withhold the names, addresses and identities of witnesses in terrorism cases. It also states that any law that contravenes with any part of the EATP is inapplicable. We will discuss whether the provisions of the Ethiopian Criminal Procedure, the FDRE constitution and the Ethiopian Criminal Code that deal with bail and pre-charge detention period are made inapplicable.

#### 3.3.3.4. The Federal Democratic Republic of Ethiopia (FDRE) Constitution

The (FDRE) Constitution, which came into force in August 1995, is the supreme law of the country. The preamble of the FDRE constitution starts with a declaration that reads: "We the Nations, Nationalities and Peoples of Ethiopia". As stated under article 8 of the FDRE Constitution, this declaration refers to the sources of sovereign political power in the country. Article 8 further states that "all sovereign power resides in the nations, nationalities and peoples of Ethiopia. This Constitution is an expression of their sovereignty".

The FDRE constitution contains 106 articles divided into 11 chapters. It provides for a federal government which consists of nine regions with their respective powers.<sup>50</sup> The federal government is responsible for, *inter alia*, foreign relations, national defence, formulating the country's financial, monetary and foreign investment policies and strategies.<sup>51</sup> The federal government is composed of two houses: House of Peoples Representatives (HOR) and the House of Federation (HOF).<sup>52</sup> The power to legislate federal laws resides with the HOR while the HOF is entrusted to interpret the FDRE Constitution.<sup>53</sup> Members of the former are elected every five years while members of the latter are elected by regional states.

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<sup>50</sup> Article 45-49 of the FDRE Constitution

<sup>51</sup> Articles 50-52 of the FDRE Constitution

<sup>52</sup> Articles 53-68 of the FDRE Constitution

<sup>53</sup> See chapter two for further discussion on the power to interpret the Constitution

The Constitution establishes the President as the head of state and the prime minister as the head of government. The president, elected by the HOR every six years, does not have much political power. The prime minister, who is accountable to the HOR, exercises much of the political power in Ethiopia. Both are not directly elected by the people.

The Federal Democratic Republic is composed of nine states 'delimited on the basis of the settlement patterns, language, identity and consent of the people concerned'.<sup>54</sup> State powers include, among other things: formulating and executing economic, social, and development policies in their respective regions; and enforcing laws that are not exercised by federal government.

Chapter 3 of the FDRE Constitution contains a long list of articles that deal with 'fundamental rights and freedoms'.<sup>55</sup> These articles are organised into two main parts: human rights and democratic rights. The structure and the rationale for this division will be further discussed in chapter two.

### 3.3.3.5. Other legislation

The other Ethiopian legislation discussed in this thesis are the anti-corruption offences proclamations<sup>56</sup> and the Telecom Fraud Offences Proclamation (TFOP).<sup>57</sup> The anti-corruption offences proclamations are the only specific law before the enactment of the EATP in 2009 that deals with the admissibility of intercept evidence in criminal proceedings in Ethiopia. On the other hand, the TFOP creates offences related to the provision of telecom services, supply of communication equipment, duplication of SIM cards, credit cards, subscriber identification numbers or data, and interception of communications. The parts of these proclamations that deal with interception of communication will be discussed in chapter four.

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<sup>54</sup> Article 46 of the FDRE Constitution

<sup>55</sup> Articles 13-44 of the FDRE Constitution

<sup>56</sup> Revised Proclamation To Provide For Special Procedure And Rules Of Evidence On Anti-Corruption (Proclamation No. 434/2005); see also Revised Federal Ethics and Anti-Corruption Commission Establishment (Proclamation No.433/2005)

<sup>57</sup> Proclamation 761/2012 on Telecom Fraud Offences

### 1.1.3. Documentaries on terrorism

Three audio-visual records on terrorism were collected from Ethiopian national television. These documentaries were prepared by the Ethiopian national television in collaboration with the National Intelligence and Security Service (NISS).<sup>58</sup>

The first to be broadcast was a documentary which chronicled the history of free press in Ethiopia.<sup>59</sup> This documentary recounted free press in Ethiopia in regard to policies, politics, and terrorism. It specifically focussed on newspaper articles written before and after the 2005 controversial election in Ethiopia.<sup>60</sup> The government concluded that these newspaper articles were written to incite and encourage people to commit terrorism.<sup>61</sup> The contents of these articles are detailed in tables 2.1 and 2.2. As will be discussed in chapter three, this research has found little evidence to support the conclusion of the government.

The second and third documentaries contained information on the role of opposition parties in spreading terrorist activities in Ethiopia. Both *Akeldama*<sup>62</sup> (translation: field of blood) and *Yekeshfew YeChelemaw Guzo*<sup>63</sup> (translation: the failed terrorist conspiracies) showed meetings and other activities of some of the defendants in the case of Public Prosecutor v Tefera Mamo cherkose.<sup>64</sup> Moreover, the documentaries claimed that the NISS placed the defendants (members of *Ginbot 7*<sup>65</sup>) under surveillance, recording and spying on every aspect of the defendants' lives. These recorded video tapes and voice evidences were used as evidence against the defendants.

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<sup>58</sup> Further discussion about the powers of this organisation is provided in chapter two and chapter four that deal on interception of communication in Ethiopia

<sup>59</sup> *The Birth and Growth of Free Press in Ethiopia* (2009) [TV Broadcast] ETV, 13 December

<sup>60</sup> For further discussion on arrests and conviction of terrorists after the 2005 election, see chapter two and chapter three

<sup>61</sup> See chapter two and chapter three for further discussion on the case of Public Prosecutor v Hailu Shawul (Engineer), et al (43246/2007)

<sup>62</sup> *Akeldama* (2011) [TV Broadcast] Ethiopian Television Documentary

<sup>63</sup> *Yekeshfew YeChelemaw Guzo* (2010) [TV Broadcast] Ethiopian Television Documentary

<sup>64</sup> Public Prosecutor v Tefera Mamo Cherkos (General), et al (81406/2009). See chapter two for detail discussion

<sup>65</sup> see chapter two for discussion on the status of *Ginbot 7* as a terrorist or political organisation

However, the documentaries did not say anything about whether the NISS had obtained a warrant for the interception of the defendants' communications. These legal issues form the foundation of this thesis' discussion into the marginalised right to privacy in Ethiopia.

#### **1.4.Limitations**

This research acknowledges that terrorism is a vast legal topic. It touches financial institutions, human rights, religion, and the existence of free and democratic society, sovereignty of a country, and regional and international relations among nations of the world, to mention but a few. Therefore, the issues covered in this thesis reflect only a limited remit.

The absence of any internationally accepted definition of terrorism and the various, differing domestic definitions that exist across the world form further hurdles to any research. In addition, Ethiopia is not famed for regularly updating its legislation on terrorism. In a similar vein, the sensitive nature of the cases that come before the Ethiopian judiciary mean they are not readily accessible to the public. Due to the accessibility issues, some of the terrorism cases relevant to this research originate from domestic newspaper reporting. A corollary empirical issue has been a lack of tangible evidence demonstrating how the current anti-terrorism regime is used, particularly the extent to which it accords with fundamental rights such as right to life and prohibition of torture.

#### **1.5.Scope**

Terrorism can be analysed through several mediums: the effect of terrorism on civil and political rights and/or social, economic and cultural rights; immigration law; humanitarian law; remedies for victims of terrorism; religious extremism; sourcing and strategising the combating of terrorism. However, this thesis is concerned with the effect of anti-terror laws on freedom of expression, right to privacy and right to liberty. By comparing and contrasting legislation from the UK, US and Ethiopia, this thesis will present an analysis as to whether Ethiopia's

decision to adopt counter-terrorism law has transgressed the above three basic rights.

Due to space constraints, this thesis does not deal with the definition of terrorism, rendering support to terrorism, participation in a terrorist organisation, possessing terrorist materials, preventive detention, control orders, detention, and immigration laws. Moreover, the scope of this thesis is restricted to the period from arrest to charge. It does not deal with evidence production and other related issues at a trial.

### **1.6.Organisation of this thesis**

Chapter two introduces a chapter on the development of the Ethiopian legal system. It begins with different argument on policy transfer and then charts how the Ethiopian legal system has developed over time by presenting the different legal reforms that have taken place over the last 80 years. Moreover, it will have a separate section that deals with the problem of terrorism and the absence of specific laws that deal with terrorism in Ethiopia. This section is intended to provide the background analysis for the next chapters as to whether the enactment of the first of its kind counterterrorism legislation in Ethiopia could be justified.

Chapter three assesses the relationship between freedom of expression and counter-terrorism laws. It is preferable to begin with such a debate, for it is arguably with this right that the complexity of the relationship between terrorism and human rights began. It is widely acknowledged that this right is the base from which a civil and democratic society flourishes. It is through freedom of expression that one can expose any deviations from fundamental human right standards, judicial inconsistencies, and government arbitrariness. Most importantly, a person's actions and thoughts, when taken alone, could amount to suspicion in the eyes of many.

At worst, one's affiliation with a particular group and religious organisation could ignite deeper suspicions. Yet, affiliation with a particular group or

acting/speaking in a particular way is not ordinarily, in a democracy, grounds for suspicion. The bare essentials in some countries such as Ethiopia are that one's actions are contrary to the expectations of law enforcing bodies. Freedom of expression is a vehicle of justification in this respect. People have a right to express themselves in whatever manner they see so long as such expressions are within the boundaries of legal permissibility. Thus, freedom of expression demands that the law justify its interference with or limitation on a person's expression. It is for these compelling reasons that it is felt appropriate to start with a discussion on how terrorism and freedom of expression co-exist.

Chapter three is structured as follows. The first part deals with the constitutional arrangement of freedom of expression in the US, UK, and Ethiopia. This is followed by an analysis of the determining factors that compose the right to freedom of expression. These factors include the forms of the expression, the content of a speech, the medium of expression, and the identity and affiliation of a speaker, and the circumstances in which the speech is given. Moreover, the relevance of these factors will be evaluated in light of the scope of the incitement and/or encouragement of terrorism. This chapter expands upon the experience of the UK and US in the fight against terrorism by drawing a balance between expressions that have and those that have not obtained constitutional protection. Moving forwards, this chapter critically examines the difficulty of implementing some of those balancing principles in countries such as Ethiopia where democracy is in its infancy.

Chapter four discusses terrorism and the right to privacy. In case of terrorism, breach of privacy can be cited as the first real contact between the suspected terrorist and law enforcing bodies. The moment law enforcing bodies intercept correspondences, or stop, search and seize someone's property, there is high risk of breaching other fundamental rights.

This chapter, first, discusses the general principles on privacy in the UK, US, and Ethiopia. This is followed by a discussion on interception of communications. This analysis will cover the legal regimes on interception with an emphasis on the definition of interception, the requirements for issuing warrants and



warrantless interception. It also covers a legal analysis as to why intercept evidence obtained through a warrant is excluded under UK law. Moreover, it deals with the differing understandings and implications stemming from the interception of communication in the UK and US. This part compares and contrasts the experiences of the US with intercept evidence in criminal proceedings governed under section 17 of The Regulation of Investigatory Powers Act 2000 (RIPA) in the UK.

Furthermore, there is a separate discussion relating to the probative value of intercept evidence in terrorism cases in the UK. Some organisations are in favour of lifting the ban on intercept evidence in terrorism cases. There are, however, competing arguments for and against the use of intercept evidence in criminal proceedings. The chapter explains how these organisations differ in their reasoning. The last part deals with the use of intercept evidence in terrorism cases under Ethiopian law.

Chapter five begins with general remarks on the constitutional scope of the right to liberty. This is followed by critical analysis of the power of arrest on the basis of suspicion of terrorism and the length of pre-charge detention in terrorism cases. Moreover, this chapter explores whether there is a need for a watered down version of the standard of reasonable suspicion in terrorism cases. Furthermore, there will be a separate section that explores the quantity and quality of information required to effect arrest under Ethiopian law and the length of pre-charge detention of terrorist suspects in Ethiopia. Though the some legal materials on pre-charge detention from the US will be discussed, the focus of this section will be on the UK's pre-charge detention and any lessons Ethiopia could learn from the British legal system with a view to shortening the 120-days pre-charge detention of terrorist suspects currently available.

The last chapter provides some concluding remarks and recommendations on Ethiopia's counter-terrorism legislation.



# **Chapter two: The Comparative Aspect of the Ethiopian Legal System: From Primordial Legal System to Counterterrorism Laws**

## **1.1.Introduction**

A study of the Ethiopian legal system and counterterrorism measures requires an examination of the constitutional reform through which the country has gone in order to modernise its legal system. In this chapter we shall examine the nature of the Ethiopian legal system and the place of human rights within that system. Furthermore, we shall analyse terrorism within the context of the Ethiopian jurisdiction and, further, the justifications for the adoption of counterterrorism measures. However, it is apt first to give a brief account of what is called policy transfer.

It could be said that countries act like human beings: they learn, send, receive, interact, marry and divorce. The creation of organisations like the UN, the EU, NATO and the WHO symbolises the final and highest bond between countries who pursue of the same ends. Times gone by have seen instances in which a country closes itself off from those around it. However, the race for prosperity has led to a globalisation of State relationships. The transformation from a closed society to one that is open and receptive to international entities was made possible by the formation of organisations such as those mentioned above.<sup>66</sup> A study of the interaction between countries, therefore, requires clarification of the process through which countries learn or be forced to learn from one another, also known as 'policy transfer'.<sup>67</sup>

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<sup>66</sup> Siegel, R. L. and Wenberg, L.B (1977). *Comparing Public Policies. United States, Soviet Union and Europe* (Homewood, Dorsey Press), p. 79

<sup>67</sup> Dolowitz, D. and Marsh, D. (2000). Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making. 13 (1) *Governance* 10

'Policy transfer' involves one country borrowing, the 'borrower', policy initiatives from an acquiescent secondary country, who assumes the role of 'lender'.<sup>68</sup> The former acquires from the latter "policy goals, structure and content; policy instruments or administrative techniques; institutions; ideology; ideas; attitudes and concepts; and negative lessons."<sup>69</sup> This transfer could also entail 'detailed legislation'.<sup>70</sup> Additionally, a country could be a both 'borrower' and 'lender' at separate instances in time and the relationship between the two countries could be voluntary (in this case government institutions and officials are involved) or coercive (which might involve outside actors).<sup>71</sup> Moreover, legal intricacy might also pave the way for professionals to exert influence in the policy transfer process.<sup>72</sup>

Policy transfer is not the only mechanism for a shift in policy. A policy shift may also come about where one country has a particular desire to 'learn' from others or, alternatively, in light of one's perception of domestic needs or international realities.<sup>73</sup> Two of the ways by which a policy shift can occur are 'lesson drawing' and 'policy transfer'. While critics argue that 'lesson drawing' is indistinguishable from 'policy transfer',<sup>74</sup> the path of 'lesson drawing' takes account of "a prospective description evaluation of whether what is done elsewhere could someday become effective here".<sup>75</sup> 'Lesson drawing' neither creates 'a commitment' to implement a particular policy<sup>76</sup> nor, in the main, involves a 'rational choice'.<sup>77</sup> 'Lesson drawing' has a tendency to bow to political factionalism and 'precedents' within the political landscape rather than rationalising what is best in a given situation.<sup>78</sup> While both camps, the 'lesson

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<sup>68</sup> Ibid

<sup>69</sup> Dolowitz, D. and Marsh, D. (1996). Who Learns What from Whom: a Review of the Policy Transfer Literature. XLIV *Political Studies* 349-50

<sup>70</sup> Dolowitz D., et al (1999). Policy Transfer: Something Old, Something New, Something Borrowed, But Why Red, White And Blue? 52 (2) *Parliamentary Affairs* 719

<sup>71</sup> Dolowitz, D. and Marsh, D. (2000), supra note 67, p. 8-10

<sup>72</sup> Dunlop, C. (2009). Policy Transfer As Learning: Capturing Variation In What Diffusion-Makers Learn From Epistemic Communities. 30(3) *Policy Studies* 289

<sup>73</sup> Rose, R. (1993). *Lesson-Drawing in Public Policy*. (New Jersey, Chatham House), p. 27

<sup>74</sup> Dolowitz D., et al (1999), supra note 70

<sup>75</sup> Rose, R. (1993), supra note 73

<sup>76</sup> Rose, R. (2004). *Learning From Comparative Public Policy: A Practical Guide* (London, Routledge), p. 23

<sup>77</sup> Ibid, p.43

<sup>78</sup> Ibid, p. 43

drawing' and 'policy transfer' theorists, may criticise each other, they are also each criticised for their shortcomings.<sup>79</sup>

Another aspect of policy change is where the shift does not necessarily reach the threshold of a 'transfer'. This takes the debate into the issues of 'policy convergence'<sup>80</sup> and 'policy diffusion'.<sup>81</sup> The former refers to a tendency to solve problems through the collective; in other words, "a convergence of *policy goals*, a coming together of intent to deal with common policy problems."<sup>82</sup> A prime example is the integration of Europe.<sup>83</sup> Policies are made by transnational decision makers and then implemented by domestic jurisdictions.

'Policy diffusion', on the other hand, does not involve policy 'emulation' from another country but, instead, sees policies developed through a "pattern of successive adoptions of a policy innovation".<sup>84</sup> This is particularly reflected in the transfer of policies between States in federal systems such as the US.<sup>85</sup> For some, 'policy diffusion' pertains to "incremental changes in policy with the advancement of knowledge and awareness as well as interdependence".<sup>86</sup> But others dismiss this and argue that "policy diffusion displays punctuated dynamics inconsistent with a single process of incremental learning, but instead indicates multiple underlying decision-making processes."<sup>87</sup>

The point is that no matter how the changes occur, whether countries are learning or transferring policies, changes do happen. Moreover, while it might be conventional to 'borrow', 'lend' or 'learn' in international relations, the

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<sup>79</sup> Lodge, M. and James, O. (2003). The Limitations of 'Policy Transfer' and 'Lesson Drawing' for Public Policy Research. 1 (2) *Policy studies review* 179

<sup>80</sup> Bennett, C. J. (1991). What is Policy Convergence and What Causes It? 21(2) *British Journal of Political Science*, 215; see also Stone, D. (2001) Learning lessons, policy transfer and international diffusion of policy ideas .CSGR Working Paper No. 69/01, at <http://www2.warwick.ac.uk/fac/soc/csgr/research/workingpapers/2001/wp6901.pdf>

<sup>81</sup> Bennett, C. J. (1991), supra note 80, see also Stone, D. (2001) , supra note 80

<sup>82</sup> Note that Bennet has identified five ways to define 'convergence'. For details, see Bennett, C. J. (1991), supra note 80, p.218.

<sup>83</sup> Bennett, C. J. (1991), supra note 80, p. 215

<sup>84</sup> Eyestone, R. (1977). Confusion, Diffusion and Innovation. 71 *American Political Science Review* 441 as cited in Bennett, C. J. (1991), supra note 80, p. 20

<sup>85</sup> Stone, D. , supra note 80

<sup>86</sup> Stone, D. , supra note 80

<sup>87</sup> Boushe, G. (2010). *Policy Diffusion Dynamics in America* (Cambridge, Cambridge University Press), p.22

effectiveness of the imported legal rules or other ideas is debatable. In law, for instance, some argue that transferring a law is nothing new nor is it wrong.<sup>88</sup> These writers base their argument on the assumed success of legal rules of the "Roman law and the spread of English Common law".<sup>89</sup> Therefore, what is important is how, what and which laws to transplant. For some writers, however, a legal transplant is "impossible...given that the meaning invested into the [transplanted] rule is itself culture-specific".<sup>90</sup> For these writers, the true meaning of the transplanted rule would be 'lost in translation' because the legal thinking and the political environment under which a specific law is developed does not exist in the receiving country.

In summation, we have seen in brief the competing arguments of policy exchanges. Space precludes a detailed discussion of the commentary germane to international policy relations. Our concern here is, instead, restricted to the identification and examination of how policy changes in Ethiopia have been facilitated by Ethiopian decision makers. As will be shown below, the two most common policy change mechanisms in the Ethiopian legal system are 'policy transfer' and 'lesson drawing'.

## **2.2 Historical Developments of the Ethiopian Legal System**

The development of the Ethiopian legal system, as will be discussed shortly, is an indication of how the country has gradually transformed from a primordial society governed according to religious and customary laws into a modern State governed by laws borrowed from abroad. Different leaders within Ethiopia, spanning different political times, have achieved this transformation, by and large, through the transplanting of laws from all over the world. Given that the primary focus of this thesis is to examine Ethiopian human rights and counterterrorism measures, it is apt to provide a brief introduction to the Ethiopian legal system in this chapter. Moreover, an attempt will be made to

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<sup>88</sup> Watson, A. (1978). *Comparative Law and Legal Change*. 37 *Cambridge Law Journal* 313; see also Watson, A. (1974). *Legal Transplants: An Approach to Comparative Law* (USA, University of Georgia Press)

<sup>89</sup> Ibid

<sup>90</sup> Legrand, P (1997). The Impossibility of 'Legal Transplants'. 4 *Maastricht J. Eur. & Comp. L.* 111

provide a general picture of the legal system in order to understand more generally the development, culture, legal thinking and sources of law in Ethiopia, and to answer the question whether the Ethiopian legal system is comparable to the US and the UK.

Many scholars over the years have attempted to identify and group the legal systems of the world. The most notable pair is Zweigert and Kötz, who attempted to provide specific 'legal families' based on certain perspective elements.<sup>91</sup> They argued that legal systems can be grouped based on their 'styles' rather than based solely on their 'source of law', 'ideology and legal technique', 'geography' or 'substance'.<sup>92</sup> This is due to the fact that "one's division of the world into legal families and the inclusion of systems in a particular family are vulnerable to alternation by historical development and change. So in the theory of legal families much depends on the period of time of which one is speaking".<sup>93</sup>

For Zweigert and Kötz, there are five factors that determine the style of a legal system or legal 'family'.<sup>94</sup> The first attribute of a stylistic legal system is 'its historical background and development'.<sup>95</sup> Considering this factor, customary laws and religious laws, especially in areas of family-related matters, had been the primary source of Ethiopian law until the 1950s.<sup>96</sup> Early codification attempts of the Ethiopian legal system date back to the 15<sup>th</sup> century, under the rule of Emperor *Zara Yaqob*. This early attempt to codify the legal system came in the form of the *Fetha Nagast* (the law of the Kings).<sup>97</sup> However, the origin of the *Fetha Nagast* is still contentious with some 'Ethiopian oral tradition' and

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<sup>91</sup> Zweigert, K. and Kötz, H. (1998). *An Introduction to Comparative Law* (third edition). (Clarendon Press, Oxford)

<sup>92</sup> Ibid, p. 64-67

<sup>93</sup> Ibid, p.67

<sup>94</sup> Ibid, p. 68

<sup>95</sup> Ibid, p.68

<sup>96</sup> Beckstrom, J. H. (1973). Transplantation of Legal Systems: An Early Report on the Reception of Western laws in Ethiopia 21 *Am. J. Comp. L* 3, p. 570

<sup>97</sup> Tamrat, T. (1972). *Church and State in Ethiopia, 1270-1527* (Oxford, Clarendon Press: Oxford University Press)

writers tracing this method back to the 4<sup>th</sup> century.<sup>98</sup> This code served as a source of law until Emperor *Haileselasi* introduced the Penal Code of Ethiopia and the Emperor Constitution in the early 1930s. According to some writers, the 1930 Penal Code and the 1931 Emperor Constitution were, in any event, largely influenced by the *Fetha Nagast*.<sup>99</sup> However, for other commentators, despite these early codification attempts the "law" of Ethiopia was incomplete and unsystematic until the 1950s.<sup>100</sup> For this reason, the codification process was continued by the introduction of the Revised Penal Code of Ethiopia,<sup>101</sup> the Ethiopian Civil Code,<sup>102</sup> Ethiopian Criminal Procedure Code,<sup>103</sup> and the Ethiopian Civil Procedure Code.<sup>104</sup> This account fits with the analysis of Bennett who described the voluntary transfer of policy<sup>105</sup> as motivated by a desire to put in order the 'incomplete and unsystematic' law of the country.

The second factor considered by Zweigert and Koz is 'the predominant and characteristic mode of thought in legal matters'.<sup>106</sup> They distinguish between the 'German-Romanistic families' that 'are marked by a tendency to use abstract legal norms' and the common law legal system that is characterised by 'gradual development from decision to decision'.<sup>107</sup> If this classification is to be followed, we might conclude that the Ethiopian legal system bears little resemblance to the common law classification. For example, unlike the common law Anglo-American legal system, the Ethiopian legal system has neither a doctrine of *stare decisis* nor trials by jury. The only exception to the notion of *stare decisis* within the Ethiopian legal system is a decision of the Ethiopian court of cassation, which is binding.<sup>108</sup> However, some Ethiopian scholars contend, arguably quite accurately, that 'the Ethiopian legal system is partly French and

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<sup>98</sup> Damitie, M. (2011). Anthropocentric and Ecocentric Versions of the Ethiopian Legal Regime in Burden, P. *Exploring Wild Law: The Philosophy of Earth Jurisprudence*. (Adelaide Hyde park Press), p.159-165

<sup>99</sup> Tzadwa, P. A. (1968). *Fetha Nagast: the Book of the Kings* (Addis Ababa, HSUI)

<sup>100</sup> Beckstrom, J. H. (1973), supra note 96

<sup>101</sup> Codified in 1957

<sup>102</sup> Codified in 1960

<sup>103</sup> Codified in 1961

<sup>104</sup> Codified in 1965

<sup>105</sup> Bennett, C. J. (1991), supra note 80, p. 2000

<sup>106</sup> Zweigert, K. and Koz, H., supra note 91, p. 68

<sup>107</sup> *ibid*, p.69

<sup>108</sup> See Federal Courts Proclamation Re-amendment Proclamation No.454/2005.



partly British, while the dominant legal thinking is American.'<sup>109</sup> Typical examples of Anglo-American influence within the Ethiopian legal system are the common law institutions of cross-examination, impeachment of witnesses, objections and rulings on admissibility of evidence.<sup>110</sup> Moreover, the existence of evidence rules scattered through the Ethiopian codes mentioned above, closely connected in many instances with substantive law provisions, is a style very similar to the continental approach.<sup>111</sup> Furthermore, some Ethiopian scholars argue whether Ethiopia should adopt the common law method of judge made laws.<sup>112</sup> In addition, as will be discussed shortly, because the Ethiopian legal system is taken from different sources, it is not easy to categorise it as a common law or civil law legal system.

The third element identified by Zweigert and Koz is the existence of certain 'distinctive institutions'.<sup>113</sup> They identify several legal concepts that are peculiar to certain legal systems but are absent in others. One instance given is the 'institution of *Negotiorum gestio*, common to continental systems but so foreign to common law.'<sup>114</sup> "Negotiorum gestio is the relationship that exists between two parties when one manages, without authority, the affairs of the other".<sup>115</sup> There are some provisions within the family law of Ethiopia that incorporates *Negotiorum gestio*. One instance is to be found under article 51 of the Ethiopian Family Code which empowers one spouse to manage the affairs of the family when the other is absent, away, or incapacitated. Another example given by Zweigert and Koz is the 'doctrine of consideration in the common law', with this concept being absent in Ethiopia.<sup>116</sup> Whereas another common law practice to mention is the prohibition of antecedents of an accused. Antecedents of an

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<sup>109</sup> Dr. Menberetsehaye Tadesse, former vice president of the Ethiopian Federal Supreme Court and director for the Justice & Legal Research Institute made the above remarks in human rights conference held at Mekelle, December 10, 2011

<sup>110</sup> Melin, R.A. (1972). *Evidence in Ethiopia*. (Addis Ababa, Haileselassie I University, faculty of Law), p.13

<sup>111</sup> Ibid

<sup>112</sup> Ayalew, M. (2012). If the Doctrine of Precedent did not exist, it would have to be Invented. *Abyssinia Law*, Addis Ababa (unpublished)

<sup>113</sup> Zweigert, K. and Koz, H., supra note 91

<sup>114</sup> Ibid, p. 71

<sup>115</sup> Ayres, L. H. and Landry, R. E. (1988). The Distinction Between *Negotiorum Gestio* and Mandate 49(1) *La. L. Rev.* 111

<sup>116</sup> For details, see Ayalew, M. (2010). *Ethiopian Law of Contract* (the Netherlands, Kluwer International Law)

accused cannot be used in criminal proceedings until after conviction under Ethiopian law.<sup>117</sup> This is a typical example of common law practice.<sup>118</sup> This practice is now relaxed in the UK as a result of the Criminal Justice Act 2003.<sup>119</sup>

The fourth characteristic element identified by Zweigert and Koz is 'the kind of legal sources it acknowledges and the way it handles them'.<sup>120</sup> Considering this factor, the Ethiopian legal system has its origin in traditional law,<sup>121</sup> civil law (the Franco-German system) and common law (Angelo-American).<sup>122</sup> Thus, this fourth characteristic is troublesome in the context of Ethiopian sources of law. This is due to the fact that the relevant legal codes currently in place within Ethiopia were borrowed from countries that follow both the civil law legal system and common law legal system.<sup>123</sup>

For instance, the Ethiopian Civil Code was drafted by a French Professor, Rene David,<sup>124</sup> whereas the 1957 Ethiopian Criminal Procedure Code was drafted by a Swiss Professor, Jean Graven, but revised and amended by a British legal scholar, Sir Charles Matthew.<sup>125</sup> The final version of the Ethiopian Criminal Procedure Code, thus, reflects the influence of both common law and civil law legal traditions.<sup>126</sup> According to some writers, 'the overall flavour of the law is adversary, but the adversary system often contains fragments of "inquisitorial" procedure.'<sup>127</sup> Some examples of adversarial elements in the Ethiopian legal

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<sup>117</sup> Article 138(1) of the Ethiopian Criminal Procedure Code

<sup>118</sup> For further discussion, see Goldstein, A. S. (1960). The State and the Accused: Balance of Advantage in Criminal Procedure 69 ( 7 ) (June) *The Yale Law Journal* 1149; see also Crown Prosecution Services. Sentencing -Overview at [http://www.cps.gov.uk/legal/s\\_to\\_u/sentencing\\_-\\_general\\_principles/#a08](http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a08)

<sup>119</sup> See sections 98-108 of the Criminal Justice Act 2003

<sup>120</sup> Zweigert, K. and Koz, H., supra note 91, p. 68

<sup>121</sup> For instance, the Family Code of Ethiopia still recognises marriage conducted according to religious or customary practices. See articles 26-27 of the same code

<sup>122</sup> Van Doren, J. W. (1994). Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case study of the Ethiopian Legal System. 3 *J. Transnat'l L. & Pol'y* 165; see also Spencer, J. H. (2006). Ethiopia at Bay: A Personal Account of the Haile Selassie Years (California, Tsehai Publishers), p. 254

<sup>123</sup> Ibid

124 David, R. (1967). Sources of the Ethiopian Civil Code. 4 *Journal of Ethiopian Law* 2

<sup>125</sup> Fisher, S. Z. (1969), supra note 36

<sup>126</sup> Ibid

<sup>127</sup> Teklu, A. and Mohammed, K. (2012). History of Ethiopian Criminal Procedure. *Abyssinia Law*, Addis Ababa (unpublished)

system include a suspect's right to remain silent,<sup>128</sup> objections to and rulings on the admissibility of evidence,<sup>129</sup> the fact that the judge is considered a neutral arbiter of facts; a litigant's right to determine the sort of evidence and number of witnesses to call<sup>130</sup> and the fact that entering a plea of guilty automatically results in the conviction of a suspect.<sup>131</sup> In general, the role of a judge in Ethiopia is restricted to listening to a case as presented by prosecution and defense. However, if we then note the fact that there is no plea bargaining system in Ethiopia we find 'fragments of "inquisitorial" procedure'.

Therefore, the drastic move from "inquisitorial" procedure into adversarial procedure was arguably facilitated by the involvement of Sir Charles Matthew in the preparation of the final version of the Ethiopian Criminal Procedure Code".<sup>132</sup> For this reason, the kind of legal sources Ethiopia acknowledges and the way it handles them, as described by Zweigert and Koz is, to a large extent, adversarial. Moreover, the participation of different foreign legal scholars within the development of the Ethiopian legal system is a reflection of how importing foreign policy had paved the way for 'epistemic Communities'<sup>133</sup> to exert influence on the choice between adversarial procedure and "inquisitorial" procedure.

The last element considered by Zweigert and Koz is the 'ideology' of a legal system. This refers the influence of 'religion or political conception on how social or economic life should be organised'.<sup>134</sup> Religion has played a crucial role in the development of Ethiopian law and the Ethiopian Orthodox Church has been the official religion of the country until Emperor *Haileselassie* was deposed by the former dictator *Mengustu Haile Mariaum* in 1974.<sup>135</sup> As discussed above, the *Fethaha Neagast* was also both a spiritual and secular

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<sup>128</sup> Article 85 of the Ethiopian Criminal procedure Code

<sup>129</sup> Article 146-147 and Article 270 of the Ethiopian Criminal Procedure Code

<sup>130</sup> Articles 136 and Article 142 of the Ethiopian Criminal Procedure code

<sup>131</sup> Articles 134 of the Ethiopian Criminal Procedure Code

<sup>132</sup> Teklu, A. and Mohammed, K, supra note 57

<sup>133</sup> Dunlop, C. (2009), supra note 72; see also Dolowitz, D. and Marsh, D. (2000). , supra note 67, p.12-13

<sup>134</sup> Zweigert, K. and Koz, H., supra note 91, p. 72

<sup>135</sup> For detail discussions, see Tamrat, T., supra note 97

text.<sup>136</sup> However, with the coming in of the socialist party in 1974, the relation between the State and the church came to an end. Moreover, the current Constitution of Federal democratic Republic of Ethiopia (FDRE) has unambiguous articles on the separation of the State and religion.<sup>137</sup> For this reason, though religion has played a crucial role before the codification of Ethiopian law, its place in the current Ethiopian legal system is less effective. In addition, as will be discussed below, the transfer of constitutional principles from abroad was to some extent predisposed by the political ideology of the then rulers. Therefore, incorporation of policies into the Ethiopian legal system did not always necessarily emulate a 'rational choice'.<sup>138</sup>

Having discussed all the elements that are considered relevant to the identity of a legal system, it is impossible to draw a definitive conclusion about which legal family the Ethiopian legal system belongs to. The creation and modernisation of the Ethiopian legal system has had many contributors from a variety of different backgrounds. It comes then as no surprise that this system includes elements that transcend the traditional classifications of a legal system. However, it is not the aim of this chapter to answer such a complex question. What can be concluded from the above discussion is that Ethiopia has borrowed different laws and practices from different countries to develop its own legal system. That trend appears to have continued with the introduction of the first counterterrorism legislation in Ethiopian history, the Ethiopian Anti-Terrorism Proclamation 652/2009 (EATP), which is modelled to a large extent on UK laws, and to a lesser extent on US laws.

### **3.3.The History of Human Rights in Ethiopia and their Place Under the Ethiopian Legal System**

The first written constitution in Ethiopian history was the 1931 Emperor Constitution introduced by Emperor *Haileselassie*. This written constitution was

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<sup>136</sup> Jembere, A. (2000). *An Introduction to the Legal History of Ethiopia: 1434-1974* ( Berlin, Lit Verlag)

<sup>137</sup> See article 11 of the FDRE Constitution

<sup>138</sup> Rose, R. (2004), *supra* note 76, p. 43

a manifestation of ‘the growing interaction between Ethiopia and Western Europe’,<sup>139</sup> though the constitution itself was modelled on the Japanese Constitution.<sup>140</sup> However, the introduction of this constitution was not driven by the need to create a system of human rights protection in Ethiopia. The motivation of the Emperor was rather connected with his desire to defend the country from any attack by the colonial powers.<sup>141</sup> The most significant aspect of the 1931 Constitution was that it helped the emperor consolidate his power by making him ‘less accessible to the limiting influence of the church and the nobility’.<sup>142</sup> Thus, the adoption of the 1931 Constitution was in part facilitated by what Dolowitz and Marsh considered a ‘voluntary but driven by perceived necessity’;<sup>143</sup> policy transfer as a result of an apparent threat to the emperor's authority from domestic and international realities.

The 1931 Constitution had 55 articles that dealt mainly with the power of the monarch over the three executive branches of the State and the succession to the throne. There were only 7 articles that dealt with the basic right of the ‘subjects’ of the emperor. These were the right to movement,<sup>144</sup> right to liberty,<sup>145</sup> right to privacy,<sup>146</sup> and right to property.<sup>147</sup>

However, these rights were deficient in many ways. For instance, though article 23 of the 1931 Constitution incorporated the right to liberty, there did not exist any regulations or laws to deal with the naturally occurring rights that flow from such basic rights. For instance, the power to arrest (with or without warrant)

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<sup>139</sup> Nahum, F. (1997). *Constitution for a Nation of Nations: the Ethiopia Prospect*. (Asmara, the Red Sea Press, Inc), p. 17

<sup>140</sup> Ibid

<sup>141</sup> Ibid

<sup>142</sup> Ibid

<sup>143</sup> Dolowitz, D. and Marsh, D. (2000), *supra* note 67, p. 13

<sup>144</sup> Article 22 (Within the limits laid down by the law, Ethiopian subjects have the right to pass freely from one place to the other)

<sup>145</sup> Article 23 (No Ethiopian subject may be arrested, sentenced, or imprisoned except in pursuance of the law); article 24 (No Ethiopian subject may, against his will, be deprived of his right to be tried by a legally established court); and article 28 (All Ethiopian subjects have the right to present to the Government petitions in legal form)

<sup>146</sup> Article 25 (Except in cases provided for by law, no domiciliary searches may be made) and article 26 (Except in cases provided by the law, no one shall have the right to violate the secrecy of the correspondence of Ethiopian subjects)

<sup>147</sup> Article 27 (Except in cases of public necessity determined by the law, no one shall have the right to deprive an Ethiopian subject of any movable or landed property which he owns)

was not prescribed by law. The right to be brought before a court within a certain time limit was not written into law. Similarly, the articles that dealt with right to privacy were also hollow in sense that they did not provide the necessary procedural safeguards for lawful search or interception of communications that would protect privacy.

Furthermore, this early constitution did not contain provisions on right to life, prevention from torture, and many other fundamental rights. But the notable omission from the 1931 constitution that is relevant for our discussion in chapter three is the right to freedom of expression. Moreover, despite these early instances of human rights, the emperor was the 'law' of the land and he could override these rights at will as the 'supreme power rests in the hands of the Emperor'.<sup>148</sup>

Emperor *Haileselassie* introduced another constitution in 1955. Yet, this constitution was no different from the 1931 constitution in that the majority of the articles in the 1955 Constitution dealt with the power of the monarch and the succession to the throne. Moreover, according to historical accounts, the emperor was scarcely concerned with enhancing basic fundamental rights. Rather, the primary purpose for revision was to solidify his power 'against mounting pressure for liberalisation'.<sup>149</sup>

However, the revision also contained some limited elements in terms of the fundamental rights enshrined within it. Not only did the 1955 Constitution add more substantive human rights, Chapter III also clarified the vague human rights articles mentioned in the 1931 constitution. For instance, article 51 of the 1955 Constitution necessitated the issuance of a warrant by a court before arrest and guaranteed right to be brought before a court within 48 hours after arrest. Moreover, it specifically dealt with the right to a speedy trial; right of cross-examination;<sup>150</sup> right to be presumed innocence;<sup>151</sup> right not to be deprived of

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<sup>148</sup> Article 6 of the 1931 constitution

<sup>149</sup> Spencer, J. H. (2006), *supra* note 122

<sup>150</sup> Article 52 of the 1955 constitution

<sup>151</sup> Article 53 of the 1955 constitution

one's liberty, life or property arbitrarily,<sup>152</sup> and non-retrospective application of criminal offences.<sup>153</sup> Furthermore, unlike the 1931 constitution, the 1955 constitution also contained noble provisions such as right to equality before the law, right to non-discrimination, right to peaceful assembly and right to association<sup>154</sup> and right to religious freedom.<sup>155</sup> We can see that the 1955 constitutional revision contained many of the basic rights that are synonymous with modern western human rights documents.

More relevant for this thesis, though, is the provisions of the 1955 Ethiopian Constitution on freedom of expression and the rights of the press.<sup>156</sup> The constitution declared that there should not be any limit on freedom of expression and of the press except in times of national emergency. The 1955 constitution was modelled on 'the U.S. and European constitutions and the Universal Declaration of Human rights'.<sup>157</sup> The following provisions were specifically taken from the U.S. constitution:<sup>158</sup> right to habeas corpus Prohibition on *ex post facto* legislation; freedom of the press and assembly; protection against searches and seizures; the right to be confronted with witnesses and assistance in obtaining witnesses

However, these rights were arguably superficial in light of further provisions within the 1955 Constitution. The monarch was not on an equal footing with his 'subjects'; indeed, no one could 'bring suit against the Emperor'.<sup>159</sup> In addition, the emperor turned a blind eye to the various violation of fundamental rights during his reign.<sup>160</sup> Apart from these accounts by foreign scholars and visitors, the systemic violation of human rights during the reign of emperor *Haileselassie* was rarely reported and documented domestically.<sup>161</sup> This by

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<sup>152</sup> Article 43 of the 1955 constitution

<sup>153</sup> Article 55 of the 1955 constitution

<sup>154</sup> Articles 45 and 47 of the 1955 constitution

<sup>155</sup> See articles 37-40 of the 1955 constitution

<sup>156</sup> Article 41-42 of the 1955 constitution

<sup>157</sup> Spencer, J. H. (2006), *supra* note 122, p. 258

<sup>158</sup> *Ibid*

<sup>159</sup> Article 62 of the 1955 constitution

<sup>160</sup> Human Rights Watch. *Evil Days: Thirty Years of War and Famine in Ethiopia* (New York, Human Rights Watch), p21; see also Markakis, J. (1974). *Ethiopia: Anatomy of a Traditional Polity* (Oxford, Oxford University Press)

<sup>161</sup> This researcher could not find any documents written by Ethiopian scholars

itself is an indication of why the mere existence of a progressive constitution was insufficient to encourage the 'subjects' to speak out, write and express their feelings, instances of which are considered democratic fundamentals.

The coming into power of the *Derg*<sup>162</sup> regime in 1974 ended the 1955 Emperor Constitution. With no constitution in place between 1974 and 1987, the *Derg* regime ruled the country with an iron fist.<sup>163</sup> However, due to growing civil unrest, the regime was forced to bring in a Constitution, which was based on a Marxist ideology,<sup>164</sup> Thus, political factors, not 'rational choice,'<sup>165</sup> such as a need to introduce fundamental rights, were the main reason behind the introduction of the *Derg* constitution. Some claim that the 1987 Constitution was a direct copy of the 1977 Soviet Constitution.<sup>166</sup> The *Derg* constitution had given the president unlimited powers and it did not create any institutional mechanisms for checks and balances.<sup>167</sup>

With regard to human rights, the 1987 *Derg* constitution contained similar articles to that of the 1955 Emperor Constitution. However, Ethiopia had witnessed a rampant violation of human rights during the *Derg* regime.<sup>168</sup>

After the current ruling party<sup>169</sup> came to power in 1991, it needed "international experience to legitimise its new aims"<sup>170</sup> and did so by designing a new constitution based on international instruments such as the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights as well as other Western laws.<sup>171</sup>

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<sup>162</sup> A military junta led by dictator Mengistu Hailemariam that came to power in 1974 by deposing emperor Haile Selassie (1974-1991)

<sup>163</sup> Adejumob, S. A. (2007). *The History of Ethiopia* (USA, Greenwood)

<sup>164</sup> Clapham, C. (1987). The Constitution of the People's Democratic Republic of Ethiopia. 3 (2) *Journal of Communist Studies* 192; see also Haile-Selassie, T. (1997). *The Ethiopian Revolution, 1974-1991: From a Monarchical Autocracy to a Military Oligarchy* (London, Kegan Paul International for the International African Institute), p. 106; see also Heinrich Scholler (2006). *Ethiopian Constitutional and Legal Development* (Germany, Rüdiger Köppe Verlag)

<sup>165</sup> Rose, R. (2004), supra note 76, p. 43

<sup>166</sup> Ofcansky, T. P. and Berry, L (editors) (2004). *Ethiopia: A Country Study*. (USA, Kessinger Publishing, LLC), p. 277

<sup>167</sup> Clapham, C. (1987, supra note 164

<sup>168</sup> Ofcansky, T. P. and Berry, L, supra note 166, p. 326

<sup>169</sup> Please see below for a discussion about the current ruling party in Ethiopia

<sup>170</sup> Dolowitz, D. and Marsh, D. (1996) , supra note 69, p. 347

<sup>171</sup> Minutes of the Constitutional Assembly, November 1994. Addis Ababa, Ethiopia



Thus, the fourth constitution in Ethiopian history, Federal Democratic Republic of Ethiopia (FDRE) constitution, was born in 1995. Chapter three of the FDRE constitution contains a long list of articles, divided into two parts, devoted to human rights: they are 'human rights' and 'democratic rights'. The 'human rights' part of the constitution contains right to life, right to security, right to liberty, prohibition against inhumane treatment, right of persons arrested, right of persons accused, right to privacy, etc.<sup>172</sup> The 'democratic rights' part of the constitution lists rights ranging from the right to freedom of expression, right of assembly, demonstration and petition, freedom of movement all the way through to environmental rights.<sup>173</sup> However, the drafters of the FDRE constitution explain that 'human rights' are rights that cannot be denied or given by the government whereas 'democratic rights' are rights that could be exercised only by citizens.<sup>174</sup> Putting aside the justifications for the distinctions, what is important is how the constitutional rights are implemented.

Unlike the previous constitutions, Article 9 of the FDRE constitution declares the supremacy of the constitution. Moreover, the FDRE constitution, under Article 10, recognises the inviolability and inalienability of human rights. This was in direct contrast to the 'supremacy' of the monarch in the previous constitutions.

Furthermore, Article 13 of the FDRE constitution states that the fundamental rights enshrined in the constitution are to be interpreted in accordance with the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia. Ethiopia has signed, acceded and ratified many international human rights instruments in this regard.<sup>175</sup>

However, despite its remarkable lists of human rights provisions, some argues that the FDRE constitution has failed to clarify some issues. The first problem

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<sup>172</sup> See articles 15-28 of the FDRE constitution

<sup>173</sup> See articles 29-44 of the FDRE constitution

<sup>174</sup> See Minutes of the Constitutional Assembly, November 1994

<sup>175</sup> See supra note 6 for the list

with the FDRE constitution, according to some scholars, is that the power to interpret the basic rights within is given to a political organ, the House of Federation (HOF), which is composed of representatives elected by the legislative organs of regional governments.<sup>176</sup>

According to article 53 of the FDRE constitution, the Ethiopian legislature is composed of two houses: the House of People's Representatives (HPR) and HOF. Members to the HPR are directly elected by the people every five years.<sup>177</sup> Currently, the government holds 99% of the HPR seats, with just one opposition party member. However, article 61 of the FDRE constitution provides that members to the HOF could be elected through election or directly by regional councils, i.e. by legislative organs of regional governments. At the same time, there are no opposition members within the State councils. That means representatives to the HOF are directly elected by the party in power. This brings the independence of the HOF into question.

Ethiopian constitutional scholars, citing Minutes of the Constitutional Assembly,<sup>178</sup> November 1994, explained that the justification for entrusting the HOF with the power to interpret the constitution 'was a policy choice'.<sup>179</sup> They explain that:<sup>180</sup>

*the Constitution is considered as the reflection of the 'free will and consent' of the nationalities. It is, in the words of the framers, 'a political contract' and therefore only the authors that are the nationalities should be the ones to be vested with the power of interpreting the constitution. To this effect, the House of Federation that is composed of the representatives of the various nationalities is expressly granted the power to review the constitutionality of laws and of course other essential powers as well.*

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<sup>176</sup> See Articles 61-62 and articles 82-84 of the FDE Constitution.

<sup>177</sup> Article 54 of the FDRE constitution

<sup>178</sup> the Constitutional Assembly was an organ tasked with drafting the FDRE Constitution

<sup>179</sup> Fiseha, A. (2005). *Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience*, 52 (1) Netherlands International Law Review 1

<sup>180</sup> Ibid

Thus, because the constitution is a political contract,<sup>181</sup> the judiciary is excluded from entertaining constitutional disputes. Some Ethiopian scholars argued that the decision to take away this important power of interpretation from the judiciary has negatively impacted the implementation of human rights in Ethiopia.<sup>182</sup>

Moreover, they argue that the above justification of the Ethiopian government to exclude the judiciary from interpreting the constitution is arguably weak compared to other countries that have made similar declarations in the preamble to their constitutions. There are many countries with written constitutions that specifically declare that their constitutions are based on a political contract. The typical example for this is the preamble to the United States constitution which states that:

*We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and posterity, do ordain and establish this Constitution for the United States of America.*

Though some dispute that the US constitution is based on the 'original contract,' not a political contract,<sup>183</sup> the political contractual aspect of the US constitution was acknowledged by US Supreme Court decisions.<sup>184</sup> The judiciary in the US is the primary mechanisms for resolving constitutional disputes and interpreting the fundamental rights enshrined in the US constitution. This is due to the fact

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<sup>181</sup> For details on what constitutes a social contract, see Barker, E, (1969). *Social contract : essays by Locke, Hume and Rousseau*. (London, Oxford University Press); see also Morris, C. W. (1999). *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau* (USA, Rowman & Littlefield Publishers, Inc); see also Locke, D. et al. (1980). *Social Contract: Essays*. (Oxford, Oxford University Press)

<sup>182</sup> Haile, M. (2005). Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's" *Cucullus Non Facit Monachum*, 13 (1) *Cardozo J. Int'l & Comp. L.* 30

<sup>183</sup> For details see Reid, J. P. (1995). *Constitutional History of the American Revolution* (Wisconsin, the University of Wisconsin Press), p. 18 and seq.

<sup>184</sup> See for example *Calder v. Bull* 3 U.S. 386, 388, 397 (1798). ("The purposes for which men enter into society will determine the nature and terms of their social compact"). For detail discussions on *Calder* and other US Supreme court cases, see Lott, T. L. and Pittman, J. P. (editors). (2003). *A Companion to African-American Philosophy* (USA, Blackwell Publishing Ltd), p.127 and seq.

that "in a constitutional system, the legislature is expected to play an active role in formulating policy, and courts are expected to play an active role in protecting individual rights".<sup>185</sup> One can see how the US judiciary has differed in its interpretation of the political contract, as compared with the Ethiopian position.

In fact, Ethiopia is not the only country that excludes the judiciary from resolving constitutional matters.<sup>186</sup> The concern here is the lack of an independent adjudicator in Ethiopia that could strike down legislation that erodes the fundamental rights enshrined in the FDRE constitution.

For some, the other problem that hampers the implementation of human rights in Ethiopia is lack of independence judiciary. The fact that judges themselves are appointed based on their political affiliation and their loyalty to the government is also another obstacle.<sup>187</sup> Article 11(1) (d) of the Amended Federal Judicial Administration Council Establishment Proclamation (Proclamation No. 684/2010) states that the Judicial Administration Council could appoint as a person with a legal background as a judge anyone who, among other things, is "loyal to the Constitution; confirms in writing that he is loyal to the Constitution and has never participated directly or indirectly in activities that violate the Constitution."

According to a report commissioned by the World Bank, this loyalty to the 'constitution' has a negative connotation.<sup>188</sup> Moreover, the composition of the Judicial Administration Council is another problematic feature of the Ethiopian judiciary. The above report indicated that:<sup>189</sup>

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<sup>185</sup> See Schulhofer, S. (2013). Oversight of National Security Secrecy in the United States In Cole, D., et al (editors). *Secrecy, National Security and the Vindication of Constitutional Law* (UK, Edward Elgar Publishing Limited), p. 22

<sup>186</sup> See for example the case of the Constitutional council of France. For a comparative analysis on the Constitutional Council of France and the US Supreme Court, see Davis, M. H. (1986). The Law/Politics Distinction, the French Conseil Constitutionnel, and the U. S. Supreme Court. 34(1) (Winter) *the American Journal of Comparative Law* 45

<sup>187</sup> See World Bank (2004). Ethiopia Legal and Judicial Sector Assessment, pp. 5-24

<sup>188</sup> Ibid

<sup>189</sup> Ibid

*Membership of Judicial Administration Commissions at both federal and state levels includes several representatives from the legislative branch, although judges are in the majority. These entities exercise a great deal of power over the judiciary, and objections have been raised to the inclusion of legislative members as violating the separation of powers and threatening independence. Currently, one of the House members sitting on the Federal Commission is also a government minister. The presence of the executive on this Commission was argued to have a chilling effect on its ability to act independently.*

Due to the above reasons, critics<sup>190</sup> argue that the implementation of the comprehensive human rights provisions provided for by the FDRE constitution remains as controversial as ever.<sup>191</sup>

#### **4.4.Terrorism and Human Rights: The Question of Balancing National Security and Human Rights from an Ethiopian perspective**

"Bush's glib aphorism"<sup>192</sup> 'war on terror', has forced countries into showing the US that they are not on the side of the terrorists. The response to the US's 'call to arms' vary from the enactment of new counterterrorism legislation to adopting UN resolutions.<sup>193</sup> However, not all countries 'immediately responded' by enacting new legislation.<sup>194</sup>

As will be discussed shortly, Ethiopia is one of the countries that has not reacted 'immediately'. However, this does not mean that Ethiopia has not played a role in the 'global war' on terrorism. Due to its geographic location, situated in one of the most volatile regions in the world, the country is considered an important ally for the West in the 'war on terror', especially for the US and the UK.

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<sup>190</sup> Mostly international human rights organisations

<sup>191</sup> Regassa, T. (2010). The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice 23 (1) *Africa Focus* 85

<sup>192</sup> See Walker, C. (2011). Militant Speech About Terrorism in a Smart Militant Democracy 80 *Mississippi Law Journal* 1395, p.1405

<sup>193</sup> For detail analysis on how countries around the world responded to the US call, see Roach, K. (2012). *The 9/11 Effect: Comparative Counter-Terrorism*. (Cambridge, Cambridge University Press)

<sup>194</sup> Ibid

Ethiopia's participation in the global war against terrorism comprises facilitating secret detention centres for terrorist suspects;<sup>195</sup> providing air bases to the US that could be used to strike terrorist suspects and their training facilities in the East of Africa;<sup>196</sup> detaining terrorist suspects that cause a threat to the West;<sup>197</sup> and waging two costly wars against Somalia.<sup>198</sup> Some claimed that this has helped the Ethiopian government to evade scrutiny and the West has turned a 'blind eye' to various crack-downs on journalists and legitimate political organisations.<sup>199</sup>

The debate on creating a balance between human rights and national security is not a new topic in the West.<sup>200</sup> As will be discussed in the subsequent chapters, both the ECtHR and the US Supreme Court have dealt with this issue extensively. However, this debate has been in the ascent since the 9/11 attack. No wonder that a fair share of the American public seemed willing to sacrifice their civil liberties in lieu of security<sup>201</sup> and governments have been using this public opinion to introduce an array of counter-terrorism measures.<sup>202</sup> These measures included, *inter alia*, weakening the prohibition on torture and other inhumane treatment of terrorist suspects by some Western governments;<sup>203</sup> the

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<sup>195</sup> Henshaw, A. (2007). *Ethiopia Admits Terror Detentions*, BBC 10 April

<sup>196</sup> Gordon, M. R. and Mazzetti, M. (2007). *U.S. Used Base in Ethiopia to Hunt Al-Qaeda*. 23 February, the New York Times; see also Whtilock, C. (2011). *U.S. Cronos Base in Ethiopia is Operational*. 27 October, the Washington Post

<sup>197</sup> AP v Secretary of State for the Home Department [ 2010] UKSC 24; see also XX v Secretary of the State for the Home Department (SC/61/2007, 2010). Both AP and XX, Ethiopian nationals who had received indefinite leave to remain in the UK, were detained in Ethiopia for their links to terrorism. However, none of them had caused any threat to Ethiopia.

<sup>198</sup> Lyman, P.L. (2009). *The War on Terrorism in Africa*. In Harbeson, J. W. and Rothschild, D. (editors). *Africa in World Politics*. (USA, Westview Press), p. 276 (stating that "the United States gave at least tacit backing and intelligence and material support to an Ethiopian invasion of Somalia to dislodge a radical Islamic government.")

<sup>199</sup> These sorts of allegations mostly come from human rights organisations

<sup>200</sup> For debates and the US government responses to terrorist attacks before 9/11, see Ball, H. (2004). *The USA Patriot Act of 2001: (USA, ABC-CLIO)*, p. 1-25; see also Zedner, L. (2003). *Securing Liberty in the Face of Terror*. 32 *Journal of Law and Society* 507

<sup>201</sup> See recent polls conducted by CNN in 2013 that shows almost 40% of Americans tolerates government intrusive measures, at <http://i2.cdn.turner.com/cnn/2013/images/05/01/top5.pdf>;

<sup>202</sup> Dworkin, R. (2003). *Terror and the Attack on Civil Liberties*. 50 (17) *The New York Review of Books* 1

<sup>203</sup> For details see the Economist (2007). *Terrorism and Civil Liberty: Is Torture Ever Justified*, 20 September 2007 (arguing that: 'the September 11th attacks have not driven any rich democracy to reverse itself and make torture legal. But they have encouraged the bending of definitions and the turning of blind eyes'); see also Donohue, L.K. (2008). *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge, Cambridge University Press), pp. 91-103 (arguing that America's approach to 9/11 terrorist attack was gradually transformed from 'initial conservatism' into 'a steady erosion of detention and interrogation standards')

USA PATRIOT Act and the power it has given to law enforcement organs;<sup>204</sup> and indefinite detention of terrorist suspects at Guantanamo Bay by the US.<sup>205</sup> Moreover, the sweeping counter-terrorism measures such as control orders and the detention of terrorist suspects introduced via the TA 2000 and TA 2006 could be mentioned from the UK.<sup>206</sup>

Political leaders would like to convince us that it is necessary to forgo our human rights for the sake of our security and the security of the state. Thus, they argue for a new approach to the issue of human rights/national security.<sup>207</sup> But legal scholars take political leaders arguments with a pinch of salt.<sup>208</sup> Some scholars rather argue in favour of introducing 'administrative' measures and 'increased independent review of national security activities' to 'tougher and broader'<sup>209</sup> counter-terrorism measures to offset the threat of terrorism.<sup>210</sup> These 'administrative' measures include, *inter alia*, preventing 'access to substances

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<sup>204</sup> For detail analysis on how the Patriot Act has weakened civil liberties in America, see Ball, H., supra note 200; see also Vervaele, J. A. E. (2005) Terrorism and Information Sharing between the Intelligence and Law Enforcement Communities in the US and the Netherlands: Emergency Criminal Law? in Hol, A. M. and Vervaele, J. A. E. (editors) *Security and Civil Liberties: The Case of Terrorism* (Antwerpen, Intersentia) p. 131 and seq. (Arguing that the USA Patriot Act has 'expanded regular powers of investigation,' and 'weakened judicial control'); see also Zedner, L. (2009). *Security* (Routledge Key Ideas in Criminology Series)

<sup>205</sup> For detailed analysis, see Cole, D. (2013). Legal Affairs: Dreyfus, Guantánamo, and the Foundation of the Rule of Law 29 *Touro L. Rev.* 43-57

<sup>206</sup> For detail analysis on counter-terrorism measures in the UK and their effect on right to liberty, see chapter five of this thesis

<sup>207</sup> See a compilation of arguments by well-known politicians in the UK in Dworkin, R. (2006). *It is Absurd to Calculate Human Rights according to a Cost-Benefit Analysis*, 24 May the Guardian; see also the following book that has compiled extensive arguments in by US politicians: Bordogna-Weeks, M. A. (2008). *Justifying an Attack on Civil Liberties: The 2006 USA Patriot Act Reauthorisation Senate Debates* (Cambridge, Cambridge University Press), p. 106- 131

<sup>208</sup> See Walker, C. (2011). Militant Speech, supra note 192 (arguing that "When faced with terrorism, the state should be "militant" but, state action must recognize that terrorism often represents endemic reactions to modernity and late modernity. The "smart militant state" must therefore work out forms of militant reaction that become more or less permanent and must adopt forms that can be accommodated within fundamental values rather than displacing them even during a temporary period of "emergency.": see also Gearty, C. (2012) *Escaping Hobbes: Liberty and Security for our Democratic (not Anti-terrorist) Age* in E. D. Reed, and Dumper, M. (editors). *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical, and Religious Perspectives* (Cambridge, Cambridge University Press); See also Zedner, L. (2003), supra note 200; see also Waldon, J. (2003). Security and Liberty: the Image of Balance. 11 *Journal of Political Philosophy* 19; see also Thiel, M (2009), *The 'Militant Democracy' Principle in Modern Democracies* (Aldershot, Ashgate), chapter 13

<sup>209</sup> Roach, K. (2004). Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses. in Sajo, A. (ed). *Militant Democracy*. (Utrecht, Eleven International Publishing), p. 172

<sup>210</sup> See Roach, K. (2006). Must We Trade Rights for Security? 27 *Cardozo law Review* 2157

and sites that can be used for terrorism.<sup>211</sup> This argument is gaining ground even in other social matters unrelated to terrorism.<sup>212</sup>

The arguments for or against 'a new level of vigilance'<sup>213</sup> between security and human rights is just one side of the argument. Finding what we mean by 'security' is another related issue that has to be addressed to understand the delicate issue of balance<sup>214</sup> because "rights and security are far more complex than the customary trade-off implies".<sup>215</sup> Accordingly, most arguments on security and human rights suffer from a 'misconstruction' of the term security, taking the term to as a 'pure safety conception'<sup>216</sup> without making a clear distinction between national security and human security.<sup>217</sup> 'Human security', 'though slippery by design',<sup>218</sup> is a concept that encompasses, *inter alia*, "personal security (e.g. physical safety from such things as torture, war, criminal attacks, domestic violence, etc.) and political security (e.g. enjoyment of civil and political rights, and freedom from political oppression)".<sup>219</sup>

National security, on the other hand, could be construed to mean State security that primarily aims to protect a State as an institution and, as such, this narrow meaning of national security has arguably nothing to do with human rights.<sup>220</sup>

This narrow definition finds its way into the domestic legislation of some countries. For instance, while national security is not clearly defined, the 1989 Security Services Act, as amended by the 1996 Security Services Act<sup>221</sup>, in the

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<sup>211</sup> Ibid

<sup>212</sup> See the announcement by Google to introduce a new technology that wipes child porn sites to prevent child abuse. See Barrett, D. (2013). Google Builds New System to Eradicate Child Porn Images, *Daily Telegraph* 15 June

<sup>213</sup> Lord Justice Sedley, S. (2013). *Terrorism and Security: Back to the future?* In Cole, D., et al supra note 185, p.13

<sup>214</sup> Waldron, J. (2006). Safety and Security. 85 (2) *Nebraska Law Review* 455

<sup>215</sup> Donohue, L.K (2008)., supra note 203, p. 29

<sup>216</sup> Waldron, J. (2006)., supra note 214, pp.456, 461

<sup>217</sup> Ibid, pp. 459-461

<sup>218</sup> Paris, R. (2001). Human Security: Paradigm Shift or Hot Air? 26(2) *International Security* 88

<sup>219</sup> United Nations development Programme (1994). Human Development Report (New York, Oxford University Press) as cited in Paris, R. (2001), supra note 218, p. 89-91

<sup>220</sup> Waldron, J. (2006), supra note 214

<sup>221</sup> For details, see Fenwick, H. (2002). *Civil Liberties and Human Rights* (London, Cavendish Publishing Ltd), p 651-654



UK, authorises the Security Services to act in the name of 'national security' if there are "threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means ..."<sup>222</sup>

The above definition does not seem to have a broader implication as it is concerned with "a risk to the security of the state."<sup>223</sup> However, this narrow interpretation of 'national security' has been re-strategised in the UK as result of the 'the National Security Strategy'<sup>224</sup> and the 'Counter-Terrorism Strategy' (CONTEST).<sup>225</sup>

Therefore, while there might be competing alternatives to the definition of national security,<sup>226</sup> the term can have a broader definition so as to imply not only the interest of the State as an institution, but also human security, national interests and the ability of a State to avert any threat including terrorism because 'definitions of insecurity and threat can no longer only be conceived at the level of the state and in the relationship between states'.<sup>227</sup>

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<sup>222</sup> Section 1(2) of the Security Service Act 1989

<sup>223</sup> See Walker, C. (1992). *The Prevention of Terrorism in British Law*. (Manchester, Manchester University Press), p. 6-7; see also Fenwick, H. (2002), supra note 221, p. 652; see also McGhee, D. (2012) Building a Consensus on 'National Security' in Britain: Terrorism, Human Rights and 'Core Values' in E. D. Reed, and Dumper, M. (editors). *Civil Liberties, National Security and Prospects for Consensus: Legal, philosophical, and religious perspectives* (Cambridge, Cambridge University Press) p.155

<sup>224</sup> Cabinet Office (2008). *The National security Strategy of the United Kingdom* (cm 7291, London); see also Cabinet office (2010) *A Strong Britain in an Age of Uncertainty: the National Security Strategy* (cm 7953, London). For detail discussion, see McGhee, D, supra note 223, p.129 and seq.; see also Roach, K. (2012), supra note 193, pp. 303 and seq. (analyses the UK's "correction in favour of Liberty"); see also Walker, C. (2011). *Terrorism and the Law*. (Oxford, Oxford University Press), pp.7 and seq.

<sup>225</sup> Home office (2009). *Pursue Prevent Protect Prepare The United Kingdom's Strategy for Countering International Terrorism: The United Kingdom's Strategy for Countering International Terrorism*. (cm 7547, London). For details discussion on CONTEST, see Roach, K (2012), supra note 193, p. 303 and seq.; see also Walker, C. (2011), supra note 224, p. 7 and seq. (arguing that "the ultimate test of success or failure of strategies against terrorism is the maintenance of public support while at the same time respecting the fundamental values on which legitimacy and consensus cohere".)

<sup>226</sup> Wolfers, A. (1952). "National Security" as an Ambiguous Symbol. 67 (4) *Political Science Quarterly* 481

<sup>227</sup> McGhee, D, supra note 223, p.129

Moreover, the inference of national security in broader terms has been accepted by some regional organisations in Africa.<sup>228</sup> They accept the fact that ‘security, development and democratisation are interdependent and mutually reinforce each other. A broad human security approach is more apt to tackle current threats characterised by trans-border crime, terrorist activities and an internationalisation of agents of insecurity’.<sup>229</sup> Similar declaration could be found under the Council of Europe Guidelines,<sup>230</sup> which states that “it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law”. The derogation test of international instruments such as the ICCPR<sup>231</sup> and regional instruments such as the ECHR<sup>232</sup> also set substantive and procedural requirements on suspending rights under exceptional circumstances. These requirements help scrutinising whether the suspension of rights is strictly required and proportional,<sup>233</sup> which in effect help keeping the balance between addressing national security threats and promoting human security. Other balancing tests on freedom of expression, right to privacy and right to liberty will be discussed in the subsequent chapters.

However, there are certain crucial points that need clarification when we talk of balancing human rights and national security from an Ethiopian perspective. The question of balance in Ethiopia does not work in the same political environment as in the UK and in the US.

First, Ethiopia is a ‘developmental state’.<sup>234</sup> National security in a developmental state such as Ethiopia is primarily driven by economic factors.<sup>235</sup>

Ethiopia's Policy and Strategy on Foreign Affairs and National Security

<sup>228</sup> Genève Center for the Democratic Control of Armed Forces (DCAF) (2010). Integrating Human Security into National Security Polices in North-West Africa. Rabat, Morocco, 23-24 November

<sup>229</sup> Ibid; see also UN Commission on Human Security (2003). *Human security now: protecting and empowering people*. (New York: Commission on Human Security). (ISBN 0-9741108-0-9)

<sup>230</sup> Council of Europe (2002). Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, 11 July.

<sup>231</sup> See for instance, Article 4 of the ICCPR

<sup>232</sup> See article 15 of the ECHR

<sup>233</sup> See for example A and others v United Kingdom (Application no. 3455/05).

<sup>234</sup> UNDP (2012). *Democratization in a Developmental State: the Case of Ethiopia, Issues, Challenges, and Prospects*. (UNDP Ethiopia No. 1/2012)

<sup>235</sup> Ibid; see also Worku, I. (2011). *Evaluating the Beginning of Developmental State in Ethiopia: the Case of ‘Project Hegemony’ and ‘Good Institutional Framework’* (LAP LAMBERT Academic Publishing)

(FANSPS) specifically states that "national security policy must first ensure national existence or survival. Ensuring national security means protecting the population from strife, war and disintegration."<sup>236</sup> But it says little on human rights. Therefore, issues of promoting human rights in such a political environment are implicitly relegated to a secondary place.<sup>237</sup>

Second, there are some reports that appear to implicate the Ethiopian government in State sponsored terrorism.<sup>238</sup> According to one report from Wikileaks, the three successive bombs that went off in 2006 in the capital Addis Ababa were planted by the Ethiopian National Intelligence and Security Service (NISS).<sup>239</sup> But it has to be stressed that there is nothing conclusive evidence that directly link the government to those incidents. Moreover, as will be discussed in chapter 4, the NISS is arguably given some controversial powers to investigate terrorist suspects and intercept communications.<sup>240</sup> These powers have the potential to infringe some fundamental rights<sup>241</sup> Therefore, in Ethiopia the NISS is, on the one hand, a legitimate government institution that aims to protect the country from terrorist attack but, on the other hand, its powers have yet to be clearly defined. These facts could tilt the balance towards augmenting the security of the party in power with little concern to human rights. The UN has come to realise this paradox in such political environments.<sup>242</sup>

Fourth, creating a balance between national security and human rights has been intensifying in the West since 9/11. However, there is a gap in literature on how third world countries such as Ethiopia are jumping into the fray to catch up with the West without giving much thought to the debate. It has to be a positive that Ethiopia has enacted the EATP and that the EATP is modelled on countries

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<sup>236</sup> Ministry of Information Press and Audiovisual Department (2009). *Ethiopia's Policy and Strategy on Foreign Affairs and National Security* (FANSPS). 10 November, Addis Ababa, p.7

<sup>237</sup> Fentaw, A. (2009). A Critique of the National Security Policy: Towards 'Human Security' in Ethiopia. 21 (11) *Horn of Africa Bulletin*; see also Thirvengadam, A. and Hessenbon, G. T. (2012). Constitutionalism and Impoverishment: A complex Dynamic in Rosenfeld, M. and Sajo, A (editors). *The Oxford Handbook of Comparative Constitutional Law*. (Oxford, Oxford University Press), p. 157

<sup>238</sup> Jalata, A. (2005). State Terrorism and Globalisation: the Case of Ethiopia and Sudan. *Sociology Publications and Other Works*, at [http://trace.tennessee.edu/utk\\_socopubs/86](http://trace.tennessee.edu/utk_socopubs/86)

<sup>239</sup> Cable 06ADDISABABA2708, Ethiopia: Recent Bombings Blamed on Oromos

<sup>240</sup> See chapter 4 for further discussions

<sup>241</sup> Right to privacy will be discussed in chapter 4

<sup>242</sup> UN Commission on Human Security (2003), supra note 229, p. 23

such as the UK and the US who have a wealth of experience on counter-terrorism legislation. However, as will be shown in the subsequent chapters, the design of some provisions of the EATP has the potential to erode the very rights recognised by the FDRE constitution.

Finally, the FDRE constitution lacks some essential principles such 'proportionality'. This test has different meanings within different contexts. In general proportionality test will be met if the means is not more than the objective.<sup>243</sup> There are also arguments in the US as to how 'proportionality' should be defined within the ambit of the US Constitution.<sup>244</sup>

In the absence of proportionality principle, the issue of balance between the need to fight terrorism and the need to promote human rights will be based on an 'open ended' balancing of measures that have little effect to addressing the main concern.<sup>245</sup>

Therefore, the question of balance from an Ethiopian perspective has to be seen in light of the above political environment.

### *1.1.1. Terrorism in Ethiopia: the Legal Gap and the Need for the EATP*

#### 1.1.1.1. Introduction: the Peculiar Features of Terrorism

This section is only intended to provide a cursory overview of the definition of terrorism as the concept that has no settled definition in international level. As will be discussed below, there are also plenty of proposals and counter-proposals. Despite several attempts to define the concept in the past, the diverging views of

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<sup>243</sup> Arai-Takahashi, Y. (2002). *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen, Intersentia); for proportionality debate in the UK, see Blake, C (2012). Legislative Development. In: Blake, C. et al. *Policing Terrorism*. (London, SAGE), pp. 111 et seq.

<sup>244</sup> Christopher, S. (2010). Proportionality, Privacy and Public Opinion: A Reply to Kerr and Swire. *Minnesota Law Review*, Research Paper No. 10-21. (Arguing that 'proportionality' should be gauged empirically. While others counter argue that it should be gauged normatively); see also Brennan, C. R. (2012) Katz Cradle: Holding onto Fourth Amendment Parity in an Age of Evolving Electronic Communication. *53 wm. & mary l. Rev.* 1797

<sup>245</sup> Roach, K. (2006), supra note 210

sovereign States at the UN have made it hard to reach a consensus.<sup>246</sup> There are more than a dozen UN legal instruments on terrorism.<sup>247</sup> But none of them specifically defines terrorism. Some argue that "the most powerful States, who in most cases dictate the intentional agenda, have found greater benefit in not defining terrorism, since this provides them with more freedom in drafting their policies."<sup>248</sup> The problematic nature of terrorism is not restricted to the absence of a definition. But the argument goes further, concerning at what point terrorist acts constitute crimes under international criminal law.<sup>249</sup> So far, only three types of terrorist acts are given the status of international crimes: aircraft hijacking, threat and use of force against international protected persons and taking of civilian hostages.<sup>250</sup>

There are countless scholarly approaches and arguments on how terrorism should be defined.<sup>251</sup> However, a definition could perhaps be found by reference to the seriousness of the terrorist acts, the targets and motives of terrorist attacks.<sup>252</sup> The next sections will analyse the relevance of these elements in the definition of terrorism.

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<sup>246</sup> Koechler, H. (2003). *the United Nations, the International Rule of Law and Terrorism*. in Koechler, H. *Global Justice or Global Revenge? International Criminal Justice at the Crossroads* (Vienna, Springer), pp.319-349

<sup>247</sup> To mention some: 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; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on 13 April 2005, etc

<sup>248</sup> Ginkel, B. V. (2008). *Combating Terrorism: Proposals for Improving the International Legal Framework*. in Cassese, A. (editor). *Realizing Utopia: The Future of International Law*. (Oxford, Oxford University Press), p. 467

<sup>249</sup> Cassese, A. (2008). *International Criminal Law*. (Oxford, Oxford University Press)

<sup>250</sup> Bassouuni, M. C. (1986). *International Criminal Law* (New York, Transnational Publishers Inc), p135

<sup>251</sup> Schmid, A. P. and Jongman, A. J. (2005). *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (Transaction Publishers); see also Hoffman, B. (2006). *Inside Terrorism: Revised and Expanded Edition* (New York, Columbia University Press), p. 1 and seq.

<sup>252</sup> For a comprehensive list of authors that forge a definition based on motive, targets, and the level of violence, see Vallis, R, et al. *Disciplinary Approaches to Terrorism: A Survey*. Defence and Security Applications Research Centre (DSA), Australian Defence Force Academy, Canberra (unpublished)

The first factor, not necessarily in terms of relevance but for the sake of convenience, that needs consideration in the definition of terrorism, is the motives behind a specific terrorist attack. The relevance of motive in establishing criminal liability, though it is often considered at the sentencing stage, is a new phenomenon.<sup>253</sup> Although "references to purposes and especially to motives have been challenged,"<sup>254</sup> it is argued that motive provides the mechanism through which regular criminals are distinguished from terrorists. According to this aphorism, the degree to which an act is classed as terrorism, as distinct from criminal enterprise, rests on the motives.<sup>255</sup> In both cases, there is criminal culpability based on intent. The motive is the main reason why terrorism is treated differently from other sorts of crimes.<sup>256</sup>

However, although essential as the distinguishing feature, the requirement of motive creates the paradoxical position that counter-terrorism legislation is vague. Such a requirement necessitates the identification of a plethora of differing motives so as not to unnecessarily restrict the scope of those acts that fall under the definition of terrorism. The motives frequently mentioned in most counter-terrorism legislation include political motive, ideological motive, racial motive, religious motive, etc.<sup>257</sup> The definition of terrorism based on motives is also recognised under section 1 TA 2000. This Act defined terrorism as: "the use or threat of serious violence...designed to influence the government or an international organisation or to intimidate the public"; and is committed for "...the purpose of advancing a political, religious, racial or ideological cause".<sup>258</sup> As will be shown below, the EATP is no exception on this point.

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<sup>253</sup> Binder, G. (2002). The Rhetoric of Motive and Intent. 6(1) *Buffalo Criminal Law Review* 1-94

<sup>254</sup> For details, see Walker, C. (2011), supra note 224, p. 38

<sup>255</sup> Saul, B (2006). The Curious Element of Motives in Definitions of Terrorism: Essential Ingredients-or Criminalising Thoughts? Law and Liberty in the War on Terror. *Sydney Law School Research Paper*, no. 08/123, 28-38

<sup>256</sup> Ibid

<sup>257</sup> See Schmid, A. P. and Jongman, A. J. (2005), supra note 251

<sup>258</sup> For further discussion, see discussions on R v Gul [2013] UKSC 64 in chapter three on how the UK Supreme Court has attempted to demarcate the scope of section 1 TA 2000; for a detail discussion on the definition of terrorism under TA 2000, see also Stone, R. (2006). Police Powers and Human Rights in the Context of Terrorism. 48 (4) *Managerial Law* 384.

Yet, finding the scope of these motives is not easy; too restrictive an approach risks rendering the definition ineffective; too expansive one risks including offences that can be best dealt with under criminal laws. The paradox becomes apparent when one envisages removing this requirement. Yet if it were to be, it will be difficult to identify conventional crimes from terrorism. For instance,

*Like terrorists, criminals use violence as a means to attaining a specific end. However, while the violent act itself may be similar -- kidnapping, shooting, arson, for example -- the purpose or motivation clearly is not. Whether the criminal employs violence as a means to obtain money, to acquire material goods, or to kill or injure a specific victim for pay, he is acting primarily for selfish, personal motivations (usually material gain).*<sup>259</sup>

Therefore, it could be argued that the prosecution face the task of proving the criminal intent and that the said act is committed in furtherance of a defined motive. If the latter is not proved, then the act will be an ordinary crime. But some also argue that "the inclusion of motive does not in practice make proof of terrorist offences much more arduous."<sup>260</sup> The latter argument could be supported by the practice in the US that the definition of terrorism under the Patriot Act<sup>261</sup> "does not require proof of political or religious motives."<sup>262</sup> However, we have also need to note that the Patriot Act is not the only legal document in the US that defines terrorism.<sup>263</sup> For instance, title 22, Chapter 38 of the United States Code denies terrorism as "...premeditated, politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents".

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<sup>259</sup> Hoffman, B. supra note 251, p. 36

<sup>260</sup> See Walker, C. (2011), supra note 224, p. 38

<sup>261</sup> It defines domestic terrorism as "activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the U.S. or of any state, that (B) appear to be intended (i) to intimidate or coerce a civilian population, (ii) to influence the policy of a government by intimidation or coercion, or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping, and (C) occur primarily within the territorial jurisdiction of the U.S."

<sup>262</sup> Roach, K. (2004), supra note 209, p.178

<sup>263</sup> For further details, see Hoffman, B., supra note 251, pp. 30-32

The other factor that needs consideration is the seriousness of the violence. Some argue that only very 'serious violence' should be dealt with by anti-terrorism laws.<sup>264</sup> But how serious is serious? It is stated that seriousness is defined by the use of weapons of mass destruction and the 'extent of the damage'.<sup>265</sup> Some also argue that serious violence during a 'riot' under some exceptional circumstances<sup>266</sup> and 'ethnic conflict, religious conflict, and class warfare' could be included within the definition of terrorism.<sup>267</sup>

This definition, however, is further qualified by the exclusion of 'guerrilla warfare' and 'lunatic assassination',<sup>268</sup> and war.<sup>269</sup> Some argue that:<sup>270</sup>

*Terrorism is often confused or equated with, or treated as synonymous with, guerrilla warfare. This is not entirely surprising, since guerrillas often employ the same tactics (assassination, kidnapping, bombings of public gathering-places, hostage-taking, etc.) for the same purposes (to intimidate or coerce, thereby affecting behaviour through the arousal of fear) as terrorists.*

However, they argue that 'guerrilla warfare', unlike terrorism, "refer to a numerically larger group of armed individuals, who operate as a military unit, attack enemy military forces, and seize and hold territory (even if only ephemerally during daylight hours)"<sup>271</sup> As will be discussed below, this confusion over terrorism and 'guerrilla warfare' is particularly evident in Ethiopia.

In the case of 'lunatic assassinations', the fact that the perpetrator knows the victims of the assassination and the effect of such crime is 'anger not terror' and reduces the chance of treating it under terrorism laws.<sup>272</sup>

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<sup>264</sup> Saul, B. (2008). *Defining Terrorism in International Law* (Oxford, Oxford University Press; Malik, O. (2000). *Enough of the Definition of Terrorism*. (USA, Royal Institute of International Affairs), p. 38-60

<sup>265</sup> Malik, O, supra note 264, p. 60

<sup>266</sup> Ibid

<sup>267</sup> Ibid

<sup>268</sup> Hoffman, B., supra note 251, p. 35-38

<sup>269</sup> Malik, O, supra note 264

<sup>270</sup> Hoffman, B., supra note 251, p.35

<sup>271</sup> Ibid

<sup>272</sup> Schmid, A. P. and Jongman, A. J. (2005), supra note 251, p 13



The third factor is the target of terrorist attacks. Terrorists most often target innocent civilians as a means of influencing a government or other entity. The aim is "either to immobilise the target of terror in order to produce disorientation and/or compliance or to mobilise secondary targets of demand (e.g. a government) or targets of attention (public opinion)".<sup>273</sup> Influencing the 'targets of terror', meaning the victims, is not the primary goal of the attack. The attack is calculated to send a message to the 'targets of demand' and change public attitude in the 'targets of attention'.<sup>274</sup>

A question, therefore, arises as to how terrorists select the targets. The attacks and the tactics used are constantly modified based on various factors such as the availability of publicity;<sup>275</sup> causing prevalent uncertainty and exposing the limitation of the political systems;<sup>276</sup> the high degree of suspicion in the attack and the magnitude of the attack;<sup>277</sup> and the 'ability to repeat' the attacks.<sup>278</sup> However, not all of these factors are necessarily part of every attack. The political game plan and the intended results determine the nature of the factors.<sup>279</sup> Whatever tactics they choose, "terrorists want a lot of people watching and a lot of people listening and not a lot of people dead".<sup>280</sup>

To conclude, terrorism could arguably be defined by reference to the above elements. This approach, however, is not to be taken for granted. As some have pointed out, there are several pertinent countervailing considerations appertaining to each of these elements.<sup>281</sup> For instance, some authors suggest six

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<sup>273</sup> Ibid, p.2

<sup>274</sup> Ibid

<sup>275</sup> Cook, D. and Allison, O. (2007). *Understanding and Addressing Suicide Attacks: The Faith and Politics of Martyrdom Operations*. (USA, Greenwood Publishing Group), p. 89

<sup>276</sup> Lutz, B. J. and Lutz, J. M. (2008). *Global Terrorism*. (Oxon, Routledge), p. 289

<sup>277</sup> Jackson, R. (2009). Knowledge, Power and Politics in the Study of Political Terrorism. in Jackson, R., et al (editors). *Critical Terrorism Studies: A New Research Agenda*. (Oxon, Routledge), p. 72

<sup>278</sup> Cordesman, A. H. (2002). *Terrorism, Asymmetric Warfare, and Weapons of Mass Destruction: Defending the U.S. Home Land* (USA, Greenwood Publishing Group), p.35

<sup>279</sup> Keefer, P. and Loayza, N (2008) *Terrorism, Economic Development, and Political Openness* (Cambridge, Cambridge University Press), p. 148; see also Pape, R. A. (2003). The Strategic Logic of Suicide Terrorism. *97 American Political Science Review* 343

<sup>280</sup> Jenkins, B. (1975). International Terrorism: A New Model of Conflict in Carlton, D. and Schaerf, C (editors). *International Terrorism and World Security* (London, Wiley), p. 15

<sup>281</sup> Higgins, R. (1997). *The General International Law of Terrorism*. in Higgins, R. and Flory, M. (eds.) *Terrorism and International Law*. (London, Routledge), pp. 14-15

elements that need to be taken into consideration if terrorism is to be defined at international level: "the *mens rea* aspect; the purpose of the act; the characterisation of the act itself; the target of the act; the perpetrators; the scope of the definition in time or place, and whether any exception or justification could be applicable."<sup>282</sup> Yet, other commentators have proposed between five and eight elements in their definitions.<sup>283</sup> The very fact that many commentators differ on the relevant factors pertinent to any potential international definition of terrorism is, at the very least, proof that consensus is absent on the precise parameters of what constitutes terrorism. Thus, if scholarly works fundamentally differ on the constituent parts of an international definition of terrorism, one holds little hope that States will find harmony, not least because of the competing political factionalism that assumes prominence when we speak of States interactions.

#### 1.1.1.2. Defining Terrorism under Ethiopian Law

We have seen above that defining terrorism remains as controversial as ever on an international level. For this reason, different States have come up with their own definitions tailored to suit their domestic needs.<sup>284</sup> However, the study of terrorism has been a similarly daunting task for Ethiopia. Until 2009, Ethiopia's legal regime contained not one law specifically designed to deal with terrorism.

The preamble to the EATP recognises this problem by stating that "...it has become necessary to legislate adequate legal provisions since the laws presently in force in the country are not sufficient to prevent and control terrorism." In the absence of clear legal provisions, the judiciary had been relying on the Ethiopian Criminal Code and the Ethiopian Criminal Procedure Code. The current Ethiopian government has dragged its feet on the issue of counterterrorism legislation, though it has ratified the Organisation of the African Union Convention on the Prevention and Combating of Terrorism (Algiers

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<sup>282</sup> Ginkel, B. V. (2008), *supra* note 248, p. 472

<sup>283</sup> Schmid, A. P. and Jongman, A. J. (2005), *supra* note 251, p. 6-8

<sup>284</sup> Ginkel, B. V. (2008), *supra* note 248

Convention)<sup>285</sup> in 2003 and Ethiopia was one of the countries that acceded UN resolution 1373, which obliges states to adjust their national laws in relation to terrorism.<sup>286</sup>

The Algiers Convention obliges ratifying countries to "review their national laws and establish criminal offences for terrorist acts..."<sup>287</sup> Moreover, Article 4(2) of the Algiers Convention obliges States to "adopt any legitimate measures aimed at preventing and combating terrorist acts". According to Article 9(4) of the FDRE constitution, "all international agreements ratified by Ethiopia are an integral part of the law of the land." Thus, the Algiers Convention could have been used as a legal basis to create a definition of terrorism within Ethiopia.<sup>288</sup> However, despite the ratification of the Algiers Convention in 2003, the Ethiopian judiciary has made no reference to the Algiers Convention in any of the Ethiopian terrorism cases to date.<sup>289</sup> The failure to apply the Algiers Convention could be attributed to the lack of knowledge of international instruments by Ethiopian judges.<sup>290</sup>

For some commentators, the definition embodied in the Algiers Convention is 'long, complex, and confusing'.<sup>291</sup> For instance, Article 1(3)(a)(iii) of the Algiers Convention defines terrorist acts as 'any act which is a violation of criminal laws

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<sup>285</sup> The Organisation of the African Union Convention on the Prevention and Combating of Terrorism 1999. It was adopted on 14 June 1999 in Algiers and came into force on 6 December 2002

<sup>286</sup> Security Council Resolution 1373 (2001)

<sup>287</sup> Article 2(a) of the Algiers Convention

<sup>288</sup> Article 3 of the Algiers Convention defines terrorism as:

(a) 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.

(b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii)

<sup>289</sup> Please see the discussion on freedom of expression in Ethiopia in chapter three

<sup>290</sup> *XX v Secretary of the State for the Home Department*, supra note 197

<sup>291</sup> Shinn, D. H. (2005). 'Domestic or International Terrorism? A Dysfunctional Dialogue' (Paper presented at a symposium organised by the National Defence University, Fort Lesley J. McNair, Washington D.C., 15-16 November )

of a State party ..." This is a vague reference which does not make a distinction between criminal acts and terrorist acts that might "... endanger the life, physical integrity or freedom of, or cause serious injury or death..." The above article also defines terrorism as any act that "create general insurrection in a State".<sup>292</sup> But this definition is problematic as it seems to criminalise any peaceful movement that might cause temporary civil disobedience or a revolt against dictatorial regimes such as the Arab Spring.

The condemnation of the Algiers Convention is not limited to the definition of terrorism but also extends to 'the protected targets' as defined under the Algiers Convention, which are similarly described as 'very wide and ill-defined'.<sup>293</sup>

More significantly, Article 3(2) of the Algiers Convention includes a very long list of non-exhaustive motives and declares that "political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act." This, in turn, has opened the door for the signatories to make these motives part of domestic definitions. Many domestic definitions in Africa,<sup>294</sup> with the exception of a few countries,<sup>295</sup> include more than one motive in their definition, ranging from broad concepts based on philosophical and ideological motives, to specific motives that refer to political and religious imperatives.

There is also a marked difference between the Algiers Convention and some domestic definitions. The Algiers Convention, under Article 3, states that:

*Notwithstanding the provisions of Article 1, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-*

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<sup>292</sup> Article 1 (3(a)(iii) of the Algiers Convention

<sup>293</sup> Saul, B. (2008), supra note 264, p. 158.

<sup>294</sup> See for instance, Article 3 of the EATP; section 7(2) of Ugandan Anti-terrorism Act 2002; section 2(1) Of Zambian anti-terrorism Act 2007; section 2 art 2(2) of Rwandan Counter Terrorism Act 2008; section 1(c) of Kenyan Anti-Terrorism Bill 2003; section 1 (1)(xxv(c) of South African No. 33/2004: Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004; sec 2(2) of Gahanna Anti-Terrorism Bill 2005

<sup>295</sup> Se for instance, Counter-terrorism legislation of Zimbabwe (Public Order and Security Act 1/2002); Tanzania (Prevention of Terrorism Act 2002); and Gambia (Anti-terrorism Act {amended} 2008) omit motives from the definition of Terrorism

*determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.*

The Algiers Convention in this aspect is similar to other regional instruments that make specific exception to armed struggle. For instance, the European Council Framework Decision on Combating Terrorism makes exception to «actions by armed forces during periods of armed conflict, which are governed by international humanitarian law».<sup>296</sup>

Some African countries have specifically excluded liberation movements from the definition of terrorism.<sup>297</sup> The EATP, on the other hand, is silent on the extent to which it could impact on national and liberation movements. Though article 3 of the EATP<sup>298</sup> outlaws terrorist acts perpetrated to advance political, religious or ideological causes, it does not seem to recognise use of force by some liberation or self-determination movements. This is indirect contrast to Article 3 of the Algiers Convention and Article 9(4) of the FDRE Constitution, which recognises the direct application of international instruments ratified by Ethiopia.

There are some rebel movements in Ethiopia some with a secessionist agenda and others who have the primary objective of overthrowing the government by force. One particular defect with Article 3 of the Algiers Convention is the absence of a definition of the ambiguous wording within the overall definition; terms like 'occupation', 'aggression' and 'domination by foreign forces' are all

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<sup>296</sup> See Council of the European Union (2002). Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA). Luxembourg, Council of the European Union

<sup>297</sup> The typical example for this is Sec 1(1(xxvi)(4) of South African South African No. 33/2004: Protection of Constitutional Democracy Against Terrorist and Related Activities Act

<sup>298</sup> Article 3 of the EATP: 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; 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.

inherently broad. Some Ethiopian organisations, to be discussed below, use the same terminology as exist within Article 3 of the Algiers Convention to justify their armed struggle against the Ethiopian government. Therefore, analysing the profile of each organisation based on their location; examining historical and geographical facts about some regions in Ethiopia, and scrutinising the terrorism charges brought against these organisations is crucial to understanding the problem of terrorism in Ethiopia. Moreover, our discussion on the terrorism cases brought against these organisations will show that the enactment of the EATP is, albeit with its legal defects, justified.

*1.1.2. The Oromo Liberation Front; Ogaden National Liberation Front, Ginbot 7, Ethiopian People's Patriotic Front, etc: Terrorist Organisations or Freedom Fighters?*

We have seen above that there are unsettled questions relating to the elements necessary to define terrorism and the status of terrorism under international criminal law, and this lack of clarity is prevalent too within Ethiopia. We shall now examine one of the perennial dichotomies that exist within the terrorism debate: one man's terrorist is another man's freedom fighter.

Perspective is important when trying to understand elusive concepts such as 'human rights activists', 'rebels', 'freedom fighters', 'pro-democracy activists' and 'terrorists'. The 'Arab spring' has taught us many lessons about how journalists, opponents and supporters of dictatorial regimes in Northern Africa and the Middle East interpret these concepts. The on-going Syrian crisis is a pertinent example in this respect. For Western and Gulf States, those who lead the opposition against President Assad are termed 'rebels' and 'freedom fighters'. Yet, President Assad himself, as leader of the Syrian regime, has on numerous occasions referred to the opposition as 'terrorists' who seek the destruction of Syria.

This *false dichotomy* is nothing new in the study of terrorism. Whether the 'use of force' against oppressive regimes is justified has been a contentious issue for

decades.<sup>299</sup> For instance, the African National Congress and its leaders, together with Nelson Mandela, was 'embarrassingly' on the US terror watch list until 2008.<sup>300</sup> Moreover, oppressive regimes would cynically label their opponents as 'terrorists'.<sup>301</sup> For instance, Libya, under former strong man Kaddafi, "persuaded others to adopt its moral viewpoint"<sup>302</sup> in rendering 'terrorist' suspects.<sup>303</sup>

'Ethno-nationalist' terrorism is another issue within the broader context of terrorism. Though the motives, the violence, and the targets might not be significantly different, it is said that "unlike other terrorists, ethnic terrorists focus on forging a distinct ethnic identity and fostering ethnic mobilisation".<sup>304</sup> This form of terrorism is also characterised by 'territorial claims and armed struggle' with the aim of 'breaking the will of the State'.<sup>305</sup> The IRA<sup>306</sup> and ETA<sup>307</sup> are typical examples from the West.

Furthermore, Ethno-nationalist terrorism "...has been the most successful, in terms of soliciting acceptance and legitimacy from international actors outside the conflict".<sup>308</sup> The reception of this form of terrorism is a manifestation of how most African and Asian countries have used 'ethno-nationalist' terrorism to liberate themselves from colonial powers.<sup>309</sup>

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<sup>299</sup> Cassese, A. (1995). *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University press), p. 150 and seq.; see also Cassese, A. (1986). *The Current legal Regulation of the Use of force* (Dordrecht, Martinus Nijhoff Publishers)

<sup>300</sup> BBC (2008). *Mandela taken off US terror list*, 2 July

<sup>301</sup> Schmidt, A. (2004). Terrorism-the Definitional Problem 36 *Case W. Res. J. Int'l L.* 375

<sup>302</sup> Jenkins, B. (1980). *The Study of Terrorism: Definitional Problems* (Rand Paper Series, Rand Corporations, California); see also UN Commission on Human Security (2003), supra note 229

<sup>303</sup> See The Constitution Project (2013). *Project Report on the Constitutional Project's Task Force on Detainee Treatment*, Washington, pp. 180-191, 214, 279, 285

<sup>304</sup> Byman, D. (1998). The Logic of Ethnic Terrorism. 21 *Studies in Conflict and Terrorism* 150

<sup>305</sup> Sánchez-Cuenca, I. (2007) The Dynamics of Nationalist Terrorism: ETA and the IRA. 19(3) *Terrorism and Political violence* 289

<sup>306</sup> For further details on the IRA, see Moloney, E. (2007). *A Secret History of the IRA* (UK, Penguin Books Ltd); Coogan, T. P. (2002). *The IRA*. (New York, PALGRAVE); see also Shanahan, T. (200). *The Provisional Irish Republican Army and the Morality of Terrorism*. (Edinburgh, Edinburgh); see also Walker, C. (2011), supra note 224, pp. 340-344

<sup>307</sup> For further readings on ETA, see Alexander, Y., et al (2001). *ETA: Profile of a Terrorist Group*. (USA, Transnational Publishers)

<sup>308</sup> Aubrey, S. M. (2004). *The New Dimension of International Terrorism* (Zurich, vdf Hochschulverlag AG), p.43

<sup>309</sup> Lefebvre, S (2003). *Perspectives on Ethno-Nationalist/Separatist Terrorism*. Defence Academy of the United Kingdom, Conflict Studies Research Centre, Surrey. England

Studying terrorism in Ethiopia, therefore, requires an understanding of its history, ethnic composition, and the geographical location of the country. Though a detailed study is beyond the scope of this thesis, the history of Ethiopia tells us that military power has been the only way to form a leading movement. From Emperor *Tewodros II*,<sup>310</sup> to Emperor *Minilik I*,<sup>311</sup> who is credited with establishing modern Ethiopia by suppressing tribal leaders; to *Mengistu-Hailemariam*, who unleashed a reign of terror during the Ethiopian civil war between 1974-1991,<sup>312</sup> to the late prime minister *Meles Zenawi*, who led a coalition of rebels, the Ethiopian People's Revolutionary Democratic Front (EPRDF) against *Mengistu-Hailemariam*, they all used war as a means to secure power. Throughout its modern history, no Ethiopian leader has come to power through democratic means. Yet, these leaders once called themselves 'rebels', and did not consider themselves terrorists. But they used the word *Wenbedes* (an *Amharic* word for terrorists) against their enemies.

The most powerful coalition partner of the current ruling party, the Ethiopian People's Revolutionary Democratic Front (EPRDF), is the Tigray People's Liberation Front (TPLF). As the name indicates, the TPLF was born out of the need for national self-determination.<sup>313</sup> Thus, according to one of its founding members, the TPLF "utilized class and ethno nationalist ideologies to mobilize Tigrayans until it ousted the Mengistu government."<sup>314</sup> Some argue that the EPRDF has been the dominant political force since 1991 through "a deft combination of armed force and political guile"<sup>315</sup>. However, the organisations, to be discussed below, claim that establishing a free democracy and liberty has been the ultimate goal for most Ethiopians in the last 30 years. They accused the EPRDF of systemic repression, widespread human rights violation, corruption,

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<sup>310</sup> Marsden, P. (2007). *The Barefoot Emperor: An Ethiopian Tragedy*. (UK, Harper Collins)

<sup>311</sup> Milkias, P. and Metaferia, G. (2005). *The Battle of Adwa: Reflections on Ethiopia's Historic Victory against European Colonialism* (New York, Algora Publishing)

<sup>312</sup> Tareke, G. (2009). *The Ethiopian Revolution: War in the Horn of Africa* (US, Yale University)

<sup>313</sup> Young, J. (1997). *Peasant Revolution in Ethiopia: the Tigray People's Revolution Front, 1975-1991* (Cambridge, Cambridge University Press), p. 100 and seq.

<sup>314</sup> Berhe, A. (2004). The Origins of the Tigray People's Liberation Front. 103(413) *African Affairs* 569

<sup>315</sup> XX v Secretary of the State for the Home Department, supra note 197, para. 13



and of concentrating power within a few elite circles. For them, the only way to reverse the current *status quo* is through a military struggle.

Our discussion below will show that ethno-nationalism is the basis for most of the currently labelled *Wenbedes* organisations. To understand the paradox of terrorism in Ethiopia, we will first discuss the profile of each *Wenbedes* organisation based on the region they claim to represent. According to article 47 of the FDRE Constitution, there are nine States with their own regional powers and administrative governments.<sup>316</sup> The regions of interest to us in regard to terrorism are the States of Oromia, Amhara, and the Somali regional State of Ethiopia. As can be seen from tables 2.3 and 2.5, most of the terrorism charges were brought against organisations or individuals from these regions. Our discussion relating to these organisations and the analysis of the terrorism cases against them will help us identify the problem of nationalist terrorism in Ethiopia.

#### 1.1.1.3.Oromia Region

Our discussion will start with the *Wenbedes* organisations that are predominately active in the Oromia region. The Oromo tribe is the largest ethnic group in Ethiopia both in terms of population size and the geographical location they occupy. According to a recent census, this tribe alone constitutes 37% of the overall Ethiopian population of 84 million.<sup>317</sup> The Oromo tribe predominately lives in the Western, Eastern and South Western part of Ethiopia.

There have been conflicting historical accounts concerning both the origins of the Oromo tribe and the true annexation of the area occupied by them into Ethiopia.<sup>318</sup> Leaving the issue of their origin to historians, there has been rising grievances amongst some members of the Oromo tribes that, despite constituting the majority of the population, they have never been treated fairly within the

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<sup>316</sup> These are: Tigray, Afar, Amhara, Oromia, Somalia, Benshangul/Gumuz, Gambela Harrari and the Southern Nations, Nationalities and Peoples

<sup>317</sup> Source: 2007 Population and Housing Census of Ethiopia

<sup>318</sup> For details, see Braukämpe, U. (2004). *Islamic History and Culture in Southern Ethiopia: A Collection of Essays* (Munster, LIT VERLAG)

Ethiopian political and economic system.<sup>319</sup> This has led to the formation of two sections within the same tribe: "those who have totally rejected Ethiopian identity and those who have not rejected Ethiopian identity...the former are struggling for the formation of an independent state of Oromia, while the latter seek self-determination for Oromia within Ethiopia."<sup>320</sup>

The Oromo Liberation Front (OLF), and little-known organisations like the Front for the Independence of Oromia (FIO) and the Islamic Front for Liberation of Oromia (IFLO), have become flagship organisations for 'those who have totally rejected Ethiopian identity'. The common goal for these organisations is to break the Oromia region from Ethiopia. The OLF, for instance, claims that:<sup>321</sup>

*The root cause of political problems in Ethiopia is national oppression by the Ethiopian empire state and refusal by the state to respect the rights of oppressed peoples to self-determination. The current Ethiopian regime has recognized in its constitution the right of self-determination with serious limitations imposed on the exercise of the right. The aspiration of the people to regain the fundamental freedom, which was snatched from them by brutal conquest, is supported by the principle enshrined in the UN Charter and related international instruments.*

The OLF was part of the Transitional Government of Ethiopia that overthrew former dictator *Mengistu Hailemariam* in 1991. However, in 1992, the OLF fell out with the current ruling party, EPRDF, and "was ordered to leave when its leaders withdrew from participation in the 1992 elections".<sup>322</sup> Thus, some claim that the OLF was forced out and it has "spearheaded the construction of Oromo

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<sup>319</sup> Keller, E. J. (1995). The Ethnogenesis of the Oromo and its Implication for Politics in Ethiopia. 33(4) *The Journal of Modern African Studies* 621-34

<sup>320</sup> Hassen, M. (1996). The Development of Oromo Nationalism. In Baxter, P.T.W. et al (editors). *Being and Becoming Oromo: Historical and Anthropological Enquiries*. (USA, the Red Sea Press, Inc), p.71

<sup>321</sup> See OLF Major Policies at <http://www.romoliberationfront.org/OLFPolicies.htm>

<sup>322</sup> Joireman, S. F. (1997) Opposition Politics and Ethnicity in Ethiopia: We Will Go Down Together. 35 (3) *The Journal of Modern African Studies* 387

nationalism and, as a liberation front, fought different Ethiopian regimes."<sup>323</sup> For the OLF and its sympathisers, any struggle waged against 'the Ethiopian empire state' is not a terrorist act, but rather justified under international law, including Article 3 of the Algiers Convention. The fact that many of the prominent leaders of the OLF have received political asylum in the West<sup>324</sup> could also arguably be interpreted as a tacit approval of OLF causes by the West.<sup>325</sup>

The Ethiopian government blame the OLF for several attacks that targeted civilians, foreigners, and private and government installations. For instance, in 2002, the OLF was blamed for the bomb attacks against the Tigray Hotel in the Ethiopian capital Addis Ababa. There were at least five killings and thirty-eight injuries. However, the OLF denied responsibility and released a statement declaring that:<sup>326</sup>

*The Executive Council of the Oromo Liberation Front [OLF] clearly stated its policy on terrorism, condemning any and all acts of terror against peaceful civilians. In the statement, we warned the international community and all peoples in Ethiopia that the regime in Addis Ababa was desperately trying to jump on the anti-terrorism bandwagon to use it as a political ticket to stay in power, to deceive the international community and to blackmail opposition forces that are struggling for legitimate causes ...*

In another instance, the government blamed the OLF for a bomb blast in Bishoftu, Oromia in May 2004.<sup>327</sup> The bomb killed one and wounded three students. But the OLF did not assume responsibility. There are also other

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<sup>323</sup> Adigna, F. (2010). Making Use of Kin Beyond the International Border. In Feyissa, D. and Höhne, M. V. (editors). *Borders and Borderlands as Resources in the Horn of Africa*. (UK, James Currey), p. 52

<sup>324</sup> For instance, former Ethiopian Army Brigadier General *Kemal Gelchu*, *Taha Tuko*, and *Amin Jundi* live in the US while other leaders live in Germany.

<sup>325</sup> In a secret meeting with a former US Ambassador, the Head of the Ethiopian National Intelligence and Security Services (NISS) complained about 'the visit to European Capitals and Washington of ONLF senior leaders and said they met with staffers in the U.S. Vice President's office'. For details of the meeting, see Guardian (2010). *US Embassy Cables: Ethiopian Intelligence Chief Gives Rare Interview*, 8 December

<sup>326</sup> BBC Monitoring (2002). Ethiopia: *Oromo Rebel Group Condemns Addis Ababa Hotel Bombing*, 18 September

<sup>327</sup> Rubin, B. M. and Rubin, J.C. (2008). *Chronologies of Modern Terrorism*. (New York, M.E. Sharpe), p. 170

instances of claims and counter-claims by both the Ethiopian government and the OLF.<sup>328</sup> The OLF seems to take responsibility only where the attack is on a government installation or military target.<sup>329</sup> Nonetheless, as far as the Ethiopian government is concerned, the OLF is a terrorist organisation and as a result, it was one of the proscribed organisations as of June 2011.<sup>330</sup> Article 25 of the EATP states that:

*The House of Peoples' Representatives shall have the power, upon submission by the government, to proscribe and de-proscribe an organization as a terrorist organization. 2/ Any organization shall be proscribed as a terrorist organization if it directly or indirectly: a) commits acts of terrorism; b) prepares to commit acts of terrorism; c) supports or encourages terrorism; or d) is otherwise involved in terrorism.*

However, Proscribing 'terrorist' organisations, such as the OLF, is symbolic as it was a banned organisation since 1991. The fact that the government decided to proscribe the OLF in 2011 does not change its status. As indicated in tables 2.3 and 2.5, joining the OLF has been a crime since 1991. Article 25(2) of the EATP is the legal tool to proscribe a terrorist organisation in Ethiopia. This article is similar to section 3(5) of TA 2000 in terms of *actus reus* required to proscribe an organisation.<sup>331</sup> But Article 25 (2) does not have the "subjective tests"<sup>332</sup> stipulated under Section 3 (4) of the TA 2000, which states that "the Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism".

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<sup>328</sup> For instance, Public Prosecutor v kemal Sheh Muhhamed (51539/2009). In this case, the Ethiopian government blamed the OLF for several bomb explosions on *Diredawa-Djibouti* train line. But the OLF and the defendant denied responsibility for the attacks.

<sup>329</sup> IRIN Africa (2002). *ETHIOPIA: OLF Claims Responsibility for Bomb Blast*, 26 June; for details on the explosion of bombs on Ethio-Djibouti Railway, see Public Prosecutor v Ayub Ahmed et al (4281 /2002)

<sup>330</sup> The five organisations proscribed in June 2011 are: Al-Qaeda; Al-shaba; OLF; ONLF and *Ginbot 7*. This chapter will discuss in detail the last three organisations on the list.

<sup>331</sup> For detail discussions on proscription of terrorism organisations in the UK, see Alexander, Y and Renner, E. H. (2003). *UK's Legal Responses to Terrorism* (London, Cavendish Publishing Limited), p. 90 and seq.; see also Walker, C. (2011), *supra* note, pp. 342 and seq.; see also Walker, C. (2011). *Militant Speech*, *supra* note 192, p. 1407 and seq.

<sup>332</sup> See Walker, C. (2011). *Militant Speech*, *supra* note 192, p. 1410; see also Walker, C. (2011), *supra* note 224, pp. 341 and seq.

Another difference between the EATP and TA 2000 relates to the organ that has the power to proscribe a terrorist organisation. It might be argued that proscribing an organisation through an elected parliament instead of a branch of a government, as it is the case in the UK which "applies a steadfastly executive approach"<sup>333</sup>, will ensure that political organisation with nonviolent agenda will not be targeted. However, this argument works only if there is a real representation of all parties with varying views in parliament. Moreover, Unlike TA 2000<sup>334</sup>, the EATP does not provide any procedure for appeal against proscription. In the UK, the Secretary of the State is "not required to satisfy a court that an organisation is concerned in terrorism".<sup>335</sup> However, "a proscribed organisation may subsequently seek to discharge the burden of persuading The Proscribed Organisations Appeals Commission (POAC) that her decision was flawed on public law grounds".<sup>336</sup> On the other hand, the construction of Article 25(1) of the EATP suggests that the government has absolute discretion to 'proscribe or de-proscribe' an organisation without any possibility for appeal.

As could be seen from tables 2.3 and 2.5, the majority of terrorism cases in Ethiopia were brought against suspected members of the OLF. The allegation of inciting civil war is the most common charge followed by the allegation of membership to a terrorist organisation and providing material support to terrorist organisations. Analysis of some of these terrorism cases shows that the targets of the attacks or attempted attacks were high ranking government officials<sup>337</sup> and

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<sup>333</sup> For further details, see Walker, C. (2011), supra note 224, p. 349

<sup>334</sup> For further details, see Walker, C. (2011), supra note 224, pp. 348-352

<sup>335</sup> Anderson, D (2012). The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 And Part 1 of the Terrorism Act 2006, Independent Reviewer of Terrorism Legislation, para. 4.22

<sup>336</sup> Ibid

<sup>337</sup> Public Prosecutor v Murad Hashim Omar (61656/2008); Public Prosecutor v Hailu Tesima Daba et al (36268/2007); Public Prosecutor v Chane Yalew Belihu Tula et al (59989/2008)

other personnel (soldiers or police officers);<sup>338</sup> government installations;<sup>339</sup> and civilians.<sup>340</sup> However, most of the court cases do not show the intended targets.

Moreover, some cases were legally deficient in many ways. The first problem relates to insufficient evidence adduced against the defendants during the trial. In one case the public prosecutor presented twenty-six witnesses against defendants who were charged with rising civil war.<sup>341</sup> However, the testimony of the witnesses can be argued to be likely to be unreliable given that most of them were in police custody during the commission of the alleged crime for which the defendants are charged, with some witnesses even alleging that they were beaten by the police to coerce their testimony against the defendants.

In some cases, the public prosecutor had two witnesses, unlike the above case, against alleged members of OLF.<sup>342</sup> The defendants were charged with violating Article 240(3) (membership in an organisation that participates in armed rebellion) of the Ethiopian Criminal Code. One of the prosecution witnesses failed to appear before the court during the trial. According to Article 144(1) of the Ethiopian Procedure Code, the "deposition of a witness taken at a preliminary inquiry may be read and put in evidence before a High Court where the witness is dead or insane, not be able to attend the trial or is absent from the empire". However, the court admitted the deposition and convicted the defendant, despite the fact that the police did not provide as a reason for the absence of the witness one of the permissible reasons stated in the above article. In another case, a witness testimony given to the police was read to the judge during the trial.<sup>343</sup> The court admitted the evidence without questioning why the police failed to call the witness in person during the trial. These practices

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<sup>338</sup> Public Prosecutor v. Bira Mega, et al (60086/2008); Public Prosecutor v Tsegaye Korcho (27720/2007); Public Prosecutor v Beyan Ahmed Esmael, supra note 16; Public Prosecutor v Abdisa Afa Gari (50798/2008)

<sup>339</sup> Public Prosecutor v kemal Sheh Muhhamed, supra note 328

<sup>340</sup> Public Prosecutor v Ahmed Nur Yosuf Abdilahi (8191/2003); Public Prosecutor v abuya ekuber Abong et al (37041/2004); Public Prosecutor v Dechasa Abate Lema (1025/2000); Public Prosecutor v Rabi Hussien et al (238/1998)

<sup>341</sup> Public Prosecutor v Rabi Hussien et al (238/1998)

<sup>342</sup> Public prosecutor v Elias Gibril Boru and Mohamed shawal Amhmed (40783/2008)

<sup>343</sup> Public Prosecutor v Abdela Efa, supra note

contradict article 20(4) of the FDRE constitution, which guarantees the rights of persons accused to "examine witnesses testifying against them".

The court in most of these cases accepted the police designations to the effect that the suspects were members of the OLF at face value. Even article 240(3) of the Ethiopian Criminal Code, which deals with membership of organisations that support armed rebellion, is unhelpful on this point in light of the fact that it does not set the standard required to prove membership. Unless the act is one of 'a lone wolf',<sup>344</sup> the failure by the prosecution to prove membership to a specific terrorist organisation will have the effect of treating the act as criminal rather than terrorist. However, the Ethiopian courts did not place much emphasis on the allegation of membership.

In another case, the court challenged the prosecution, stating that they did not produce sufficient evidence to support their allegation of the suspect's membership in OLF.<sup>345</sup> However, even in that case, the court did not elaborate the standard required to prove membership in a terrorist organisation. As will be discussed in chapter three with regard to the UK;

*...the Crown must lead evidence that satisfies the magistrate or jury beyond a reasonable doubt either that the defendant is a member of the proscribed organisation or that he professes - in the sense of claiming to other people and in a manner that is capable of belief - that he belongs to the organisation*<sup>346</sup>

The Ethiopian courts were also apathetic to allegations of torture and cruel treatment while individuals were in police custody. Defendants alleged that they were beaten up, forced to sign pre-prepared confession documents, and held incommunicado.<sup>347</sup> Though this research does not have the evidence to support

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<sup>344</sup> For details on 'alone wolf' terrorism, see Spaaij, R. *Understanding Lone Wolf Terrorism: Global Patterns, Motivations and Prevention*. (Melbourne, Springer); see also Michael, G. (2012). *Lone Wolf Terror and the Rise of Leaderless Resistance* (USA, Vanderbilt University Press)

<sup>345</sup> Public Prosecutor v Debela Waqjira Gemelal and Sheferaw Hinsermu Yigezu (33101/2007)

<sup>346</sup> *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, para 65

<sup>347</sup> Public Prosecutor v Ahmed kemal Abdela (41449/2006); Public Prosecutor v Abdela Efa supra note; Public Prosecutor v Abas Hussein and kasim Mohammed (6000/2008); Public Prosecutor v Dechasa Abate Lema, supra note 340; Public Prosecutor v Rabi Hussien, supra note 340

the defendants' position, it was unfortunate of the courts not to scrutinise their complaints.

Furthermore, in another particular case, the court summoned more than a dozen witnesses against alleged members of OLF.<sup>348</sup> But, the judgement was short in its reasoning, despite the fact that it was one of the most highly publicised terrorism cases against alleged OLF members both in terms of the number of arrests (62) and the alleged terrorist acts (various explosions around the capital *Addis Ababa*, and other cities such as *Harar* and *Dire Dawa*). As a reader, the absence of detail reasoning begs the question how courts reach their conclusions on membership in each case.

Another observation to mention arising out of the terrorism cases against alleged members of OLF is the length of detention they were held between their first arrest and the charge.<sup>349</sup> We will discuss in chapter 5 if the EATP, which provides 4 months pre-charge detention, could be construed positively for setting a maximum period.

Another organisation claiming to represent the Oromia tribe is the Front for the Independence of Oromia (FIO). However, little is known about this organisation and, as indicated in table 2.3, there is only one documented court case brought against seven alleged members of the FIO, with the pertinent charges including inciting civil war, storing terrorist materials, preparation, and membership to a proscribed organisation.<sup>350</sup> The court convicted six out of the seven suspects in this case. What is interesting about this court case is the court in this case basically based its decision on testimony of witnesses who alleged that the suspects were members the FIO. But, and rather absurdly, the FIO was not a proscribed organisation at the time the case was brought against the suspects. Incidentally, there was no legal basis for the proscription of an organisation when the case was brought up in 2008. Even with the coming into effect of the EATP in 2009, the FIO still remained unproscribed. Apart from this case, there

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<sup>348</sup> See *Public Prosecutor v Rabi Hussien, et al*, supra note 340; see also *Public Prosecutor v Murad Hashim Omar*, supra note 337

<sup>349</sup> See chapter five for further discussion

<sup>350</sup> *Public Prosecutor v Rabyie Mehammed Hassen*, supra note 16



is no documented attack that has been credited to this organisation. Therefore, the status of the FIO remains controversial.

A third organisation that espouses the Oromo cause is the Islamic Front for Liberation of Oromia (IFLO). Founded in 1985, the IFLO is considered an offshoot of the OLF.<sup>351</sup> Similar to OLF, the IFLO had joined the Transitional Government of Ethiopia that toppled *Mengistu Hailemariam*, but later pulled out from the 1992 Ethiopian general election due the 'arrest of candidates and many kinds of irregularities in the preparation of the election'.<sup>352</sup> Thus, the goal of this organisation was gradually transformed from a peaceful movement into an armed rebellion.

However, as indicated in table 2.3 and table 2.5, there is only one documented case against the IFLO that alleges acts of terrorism.<sup>353</sup> The Public prosecutor accused two alleged members of the IFLO of inciting an armed uprising and civil war,<sup>354</sup> violation of the right of freedom of movement,<sup>355</sup> and aggravated robbery.<sup>356</sup> One of the alleged members of the IFLO was condemned to spend the rest of his life behind bars and while the other was sentenced to death. Yet, this case shows us that there were no fatalities, no attacks against civilians, government or private institutions. At the same time, the IFLO was not and is still not a proscribed organisation. For this reason, it is not clear why the case was initially brought as one of terrorism cases.

Despite the insistence on the part of the Ethiopian government that it only prosecutes terrorists, some accused of the Ethiopian government bringing politically motivated charges. Human rights organisations and opposition parties

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<sup>351</sup> Haile, B. (2011). *Profile: Islamic Front for the Liberation of Oromia (IFLO)*, 6 February Dehai Newspaper

<sup>352</sup> Shongolo, A. A (2012). The Impact of War on Ethnic and Religious Identification in Southern Ethiopia in the Early 1990s. in Schlee, G. and Shongolo, A. A. *Islam and Ethnicity in Northern Kenya and Southern Ethiopia*. (UK, James Currey), p. 160

<sup>353</sup> Public prosecutor. v Ebrahim Ahmed Muhamud and Mohammed Osman Bala (9832/2003)

<sup>354</sup> Article 252 of the 1957 Penal Code of Ethiopia

<sup>355</sup> Article 569 of the 1957 Penal Code of Ethiopia

<sup>356</sup> Article 637 of the 1957 Penal Code of Ethiopia

mentioned the case of *Tesfahun Chemda and other co-defendants*<sup>357</sup>. The government charged 15 defendants with an attempted coup, armed robberies, funding the OLF, and an attempt to split the *Oromia* from Ethiopia. The defendants in this case include well-known Oromo businessmen and politicians such as Bekele Jirata, General Secretary of the Oromo Federal Democratic Movement, which participated in one of the main opposition alliances in the 2010 Ethiopian general election. He shortly fled the country after he was initially released on bail and was given 12 years jail term in *absentia*.

Moreover, despite claims by the organisations discussed above that they are committed to the liberation of the Oromo from Ethiopian 'colonialism', recent developments suggest a shift in political direction on the part of the OLF. In 2012, the OLF dropped its core demand of secessionism and, instead, announced that "...the new OLF political programme will accept the new federal democratic republic of Ethiopia and will work for the betterment of all of its citizens, neighbouring countries and international communities."<sup>358</sup> However, this move does not renounce an armed struggle against the Ethiopian government.

#### 1.1.1.4. Amhara Region

The Amhara tribe is the second largest ethnic group in Ethiopia. A recent census indicates that this ethnic group comprises approximately 20 % of the population.<sup>359</sup> Unlike the Oromo, the Amhara ethnic group had been the dominant political and economic force throughout the history of Ethiopia.<sup>360</sup> This dominance ended with the coming into power of the Ethiopian People's Revolutionary Democratic Front (EPRDF) (composed of an alliance of rebels led by the late prime minister *Meles Zenawi*) in 1991.<sup>361</sup> There are several parties

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<sup>357</sup> Public Prosecutor v Tesfahun Chemedha Gurmesa et al (public prosecutor file no 5-2592/01335/01/2008)

<sup>358</sup> Gellaw, A. (2012). *Ethiopia: OLF Drops Secession, Embraces Ethiopian unity*, ESAT

<sup>359</sup> Source: 2007 Population and Housing Census of Ethiopia

<sup>360</sup> Levine, D. N. (2000). *Greater Ethiopia: The Evolution of a Multiethnic Society*. 2<sup>nd</sup> edition (Chicago, University of Chicago Press), pp. 72 and seq.

<sup>361</sup> The TPLF waged 17 years of bloody war against former dictator Mengistu Hailemariam. For historical details how the TPLF came to power, see Young, J. (1997). *Peasant Revolution in Ethiopia: The Tigray People's Liberation Front, 1975-1991* (Cambridge, Cambridge University Press)

based in the Amhara region but our discussion in this thesis will be limited to those frequently accused of committing terrorist acts.

Our discussion will begin with *Kingit* (Coalition for Unity and Democracy) and *Ginbot 7*. *Kingit* was formed by the coalition of the four main political parties in 2005.<sup>362</sup> During the 2005 general election, *Kingit* won 109 out of the 527 seats available in the House of People's Representative.<sup>363</sup> Moreover, it also won many seats in the administrative district of *Addis Ababa* and many seats in the regional assemblies. However, *Kingit* was split into two groups: those who boycotted parliamentary and regional seats due to election irregularities and those who were willing to take their seats despite their complaints. The first group, led by Dr. *Birhanu Nega*, who was later to be sentenced to death in *absentia*,<sup>364</sup> called upon their supporters to take to the streets. Many people lost their lives during demonstrations that took place in different parts of the country between the 8<sup>th</sup> of June and 2<sup>nd</sup> of October, 2005 and the government squarely blamed the opposition for the ensuing violence that claimed innocent lives and destroyed properties.

This was followed by a wave of arrests of 'up to 30,000 political prisoners'.<sup>365</sup> The public prosecutor filled terrorism charges against leaders of the opposition who denounced the election results, with most of them condemned to spending the rest of their life in prison.<sup>366</sup> Similar cases were brought against other people.<sup>367</sup>

The charges against the senior opposition leaders stated that the individuals incited people to overthrow the government and the constitutional order using

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<sup>362</sup> Ethiopian Democratic League, All Ethiopian Unity Party (AEUP), Medhin Party and Rainbow Ethiopia.

<sup>363</sup> See Ethiopian National Election Board (2005). Final Result of the 2005 elections, 5 September. See also Carter Centre (2009). Observing the 2005 Ethiopian National Elections. Carter Centre Final Report (Atlanta, the Carter Centre); EUROPEAN Union (2005). Ethiopian Legislative Elections 2005: European Union Election Observation Mission Final Report

<sup>364</sup> See Public Prosecutor v Tefera Mamo Cherkos (General), supra note 64

<sup>365</sup> XX v Secretary of the State for the Home Department, supra note 197, para. 14

<sup>366</sup> Public Prosecutor v Hailu Shawul (Engineer), et al, supra note 61

<sup>367</sup> See the following cases for instance: Public Prosecutor v Shimels Degene and Dereje Gutema (26858/2007); Public Prosecutor v Derege Kassa Bekele, supra note 15; Public Prosecutor v Yasin Shifa and Mesfin Gebere, supra note 15; Public Prosecutor v Birhanu Degu, supra note 15

force by organising a series of ‘protests’<sup>368</sup> that took place between the 8 June and 2 October 2005. They called for civil disobedience, sit-ins, general strikes, hunger strikes, and for boycotting of government affiliated institutions.<sup>369</sup> Moreover, the charge sheets stated that the leaders made speeches and distributed materials through newspapers that encouraged people to follow the examples of the Orange Revolution (Ukraine, 2004). In granting harsh sentences against the defendants, the Ethiopian High Court found that due to their reckless disregard for the constitutional order and security of the country, they caused the loss of lives and destruction of properties. However, due to a concerted effort by a *committee of wise men*,<sup>370</sup> most senior leaders of the opposition were pardoned by the Ethiopian government.<sup>371</sup>

Some leaders, led by *Birhanu Nega*, used this opportunity to flee the country. They founded a political party called *Ginbot 7* while in exile in the US.<sup>372</sup> *Ginbot 7* declares that their "struggle for freedom and democracy is born out of the ashes of the brutal repression that followed the May 15, 2005 election"<sup>373</sup> and their goal is "to create the conditions where power is obtained through the expressed will of the people in a peaceful, legal and democratic manner thereby making the current dictatorship the last in Ethiopia's history".<sup>374</sup>

However, the government seemed to find evidence that implicate the involvement of these people in terrorist activities and it brought terrorist charges against many politicians, *Birhanu Nega*.<sup>375</sup> The second terrorism case against the opposition leaders alleged, *inter alia*, that the defendants participated in setting up terrorist organisations (*Ginbot 7*); recruited members and raised financial aid

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<sup>368</sup> See the above cases for details

<sup>369</sup> Public Prosecutor v Hailu Shawul, supra note 61

<sup>370</sup> Composed of well-known figures such as Ephraim Isaac, an Ethiopian origin who is the first Professor of Afro-American Studies at Harvard University and internationally renowned Athlete Haile Gebresselassie

<sup>371</sup> Blunt, E. (2007). What Next for Ethiopia's Freed Leaders?, 23 July BBC

<sup>372</sup> *Ginbot* is an Amharic name for the month of May. Therefore, *Ginbot 7* refers to the disputed Ethiopian general election that was held in 15 May, 2005

<sup>373</sup> *The Political Programme of Ginbot 7 Movement for Justice, Freedom and Democracy could be found at <http://www.ginbot7.org/program-3/>*

<sup>374</sup> Ibid

<sup>375</sup> Public Prosecutor v Tefera Mamo Cherkos (General), supra note 64

for terrorist groups; prepared terrorist plans to assassinate government officials and disrupt the constitutional order.<sup>376</sup>

However, this case was marred by controversy from the moment the suspects were arrested. At first, the government announced on national TV that the suspects were the main instigators of a failed *coup d'etat* against the Ethiopian government. But, the government later retracted the claim by stating that "[t]he intention of these people was not to conduct *coup d'etats*. We're not implicating them (in) *coup d' etats*. We know this desperado group was intending to assassinate people and demolish public utilities and that was intended to attack, the attack was intended on the government."<sup>377</sup>

Most of the alleged members and supporters of *Ginbot 7* received jail terms ranging from 15 years to life while five defendants including the founder of *Ginbot 7* were sentenced to death in *absentia*.<sup>378</sup>

Finally, in June 2011, the government announced that *Ginbot 7* is a proscribed terrorist organisation. As indicated from the analysis above, this announcement lacks substantive effect given that *Ginbot 7* was already in terrorist activities by the government before the announcement.

Another alleged terrorist organisation in the Amhara region is the Ethiopian People's Patriotic Front (EPPF). Set up in 1988, the primary objective of the EPPF is "...to bring an end to the TPLF tyranny and oppression through armed struggle and bring about unity, justice, democracy, and equality to the Ethiopian people."<sup>379</sup> Although the EPPF advocates principles such as equality, unity and democracy, the means by which it seeks to achieve those ends appears far from analogous to those same principles. Indeed, the group has engaged several times in open military confrontation with the Ethiopian government.<sup>380</sup> Moreover, the

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<sup>376</sup> Ibid

<sup>377</sup> Voice of America (2009). *Ethiopia Denies Coup Plot, Jails 40 'Desperadoes'*, 1 January

<sup>378</sup> Public Prosecutor v Tefera Mamo Cherkos (General), supra note 64

<sup>379</sup> Read EPPF's mission, vision and goals at <http://www.arbegnochginbar.org/index.php>

<sup>380</sup> See for instance Reuters (2006). *Ethiopian Rebels Rebuff Government Claims of Rout*, June 29

Ethiopian government has alleged that this organisation is supported and funded by its arch-enemy<sup>381</sup> the Eritrean government.<sup>382</sup>

As indicated in table 2.3 and table 2.5, there were five terrorism cases brought against alleged members or supporters of the EPPF. In one case a defendant was charged with seeking membership to the EPPF and distributing 600 pamphlets with pro-terrorism agenda<sup>383</sup> and in another case two defendants were charged with downloading terrorist messages from an EPPF website.<sup>384</sup>

However, the charges in both cases were dismissed by the Ethiopian Federal High court on the basis of a lack of adequate evidence to support the case against the defendants. The reasoning of the Court in the second case is particularly relevant here. The defendants did not deny the allegation that they downloaded materials related to the EPPF. However, they argued that the materials were publically available for anyone to download. The court accepted their argument stating that there was no law in Ethiopia that criminalises downloading materials that are publically available. Most importantly, the court held that the materials they downloaded contained nothing that incites terrorism.

However in the other cases, the defendants were found guilty of being a member of the EPPF;<sup>385</sup> soliciting support for EPPF;<sup>386</sup> and for the possession of communication materials intended to be transferred to EPPF.<sup>387</sup> Apart from the cases of *Assemu Mihret* and *Getachew Niguse*, where their 25 years 'rigorous imprisonment'<sup>388</sup> was based on their confession, the evidence presented by the

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<sup>381</sup> Eritrea was part of Ethiopia before it broke away in 1993 and the two countries had fought a bloody war between 1998- 2000. For details see, Negash, T. and Tronvoll, K. (2000). *Brothers at War: Making Sense of the Eritrean-Ethiopian War* (James Currey Limited)

<sup>382</sup> See Public Prosecutor v Assemu Mihret and Getachew Niguse, supra note 16

<sup>383</sup> Public prosecutor v Afera Gidey Kiflu (61663/2008)

<sup>384</sup> Public Prosecutor v Shiferaw Mokonnen and Ethiopia Aregaw, supra note 16

<sup>385</sup> Public prosecutor v Tadele Yeshanew, et al (60575/ 2008)

<sup>386</sup> Public Prosecutor v Assemu Mihret and Getachew Niguse, supra note

<sup>387</sup> Public Prosecutor v Mubarek Admasu (56118/2008)

<sup>388</sup> Article 108: Rigorous imprisonment is a sentence applicable only to crimes of a very grave nature committed by criminals who are particularly dangerous to society. Besides providing for the punishment and for the rehabilitation of the criminal, this sentence is intended also to provide for a strict confinement of the criminal and for special protection to society. Without prejudice to conditional release, the sentence of rigorous imprisonment is normally for a period of one to twenty-five years but where it is expressly so laid down by law it may be for life.

public prosecutor in all other cases was stained with allegations of torture and other inhumane treatment by the police.

To conclude, unlike the organisation discussed in relation to the Oromia region, the organisations that are from the Amhara region are not motivated by secessionism. Their armed struggle is controversially centred on political and human rights issues rather than secessionism.

#### 1.1.1.5.Somali Region of Ethiopia

Bordering the lawless country of Somalia, the Somali region, with a population size of around 5% of the population<sup>389</sup> is one of the most volatile areas in Ethiopia. There has been several cross border wars between Ethiopia and the neighbouring country of Somalia.<sup>390</sup> As discussed in the previous sections, the aim of the two recent wars was to "dislodge a radical Islamic government"<sup>391</sup> that posed a threat both to the interests of the US and Ethiopia. Moreover, the question of the identity of the Somalis who live in *Ogaden*, a South-eastern area of the Somali regional State of Ethiopia, has been a controversial matter since the era of colonialism.<sup>392</sup> Ethiopia asserted sovereignty over Ogaden in 1948 through a series of agreements with Italy and the U.K.<sup>393</sup> Since then, secessionisms, tribal wars over pastoral lands and border conflicts with Somalia have made this region one of the most dangerous places to live in Ethiopia.<sup>394</sup>

Separatist conflicts, led by the Ogaden National Liberation Front (ONLF), have posed grave concern for Ethiopia since the group's establishment in 1984. As separatists, the ONLF claims that:<sup>395</sup>

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<sup>389</sup> Source: 2007 Population and Housing Census of Ethiopia

<sup>390</sup> 1960-1964; 1977-1978; 1988-2000; and 2006-2009

<sup>391</sup> Lyman, P.L., *supra* note 198

<sup>392</sup> Negash, S. (2008). Colonial Legacy, State Intervention and Secessionism: Paradoxical National Identities of the Ogaden and the Ishaq. In Zewde, B. (editor). *Society, State, and Identity in African History*. (Addis Ababa, Forum for Social Studies), pp. 275 and seq.

<sup>393</sup> Ibid

<sup>394</sup> Ibid

<sup>395</sup> ONLF. Political objectives, at [http://onlf.org/?page\\_id=14](http://onlf.org/?page_id=14)

*... their movement is to obtain the right of self-determination, rather than a struggle aimed at realizing the identity of a nationality. This is because Ogaden has never been historically or politically part of Ethiopia ...It is moreover based on the charter of the United Nations and its resolutions, which call for the elimination of colonialism and on the declaration of the General Assembly of the United Nations in 1960; and on the sixth principle supplemented to the United Nations Charter regarding the elimination of colonialism.*

The ONLF claims that it only targets government institutions and soldiers,<sup>396</sup> though it has also been implicated in some atrocities that target ordinary civilians and foreigners. The recent attack, killing nine Chinese miners and sixty-five Ethiopian employees of a Chinese-owned oil exploration company in the Ogaden was later claimed by ONLF as an act of their organisation.<sup>397</sup> *However, in many other attacks in the region that targeted civilians, the ONLF did not claim responsibility. For example, in May 2007, 16 civilians were killed in a hand grenade attack in the Somali region.*<sup>398</sup> But, the ONLF denied responsibility stating that 'they do not target civilians'.

Despite the claim by the Ethiopian government that a "2007 offensive" by the Ethiopian military has "effectively ended the ONLF's military capability" and "the ONLF bandit group is on the run,"<sup>399</sup> it decided to proscribe the ONLF in 2011, along with *Ginbot 7* and the OLF. However, documented terrorist cases against ONLF sympathisers, members, or supporters are very rare. This research has only managed to get hold of one case.<sup>400</sup> In this case, the defendant was charged with crimes of armed uprising against the State in violation of articles 238(2)<sup>401</sup> and 241<sup>402</sup> of the Ethiopian Criminal Code by seeking membership to

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<sup>396</sup> Shabelle Media Network (2008). *Ethiopia: Ogadeni Media Claims Rebels Have Killed At Least 33 Ethiopian Soldiers Since Late June*, 10 July; see also Sudan Tribune (2006). *Ogaden Rebels Destroy Ethiopian Military Convoy En route to Somalia*, 24 December; see also Voice of America (2009). *Ogaden Rebels Say 626 Ethiopian Troops Killed in Clashes*, 18 December

<sup>397</sup> China Daily (2007). *9 Chinese workers killed in Ethiopia*, 24 April

<sup>398</sup> Associated Press (2007). *16 killed in Attacks in Eastern Ethiopia*, 28 May

<sup>399</sup> See Voice of America (2009), *supra* note 396

<sup>400</sup> Public Prosecutor v Abdi Shafi (60184/2008)

<sup>401</sup> Article 238 deals with Crimes Against the Constitution or the State

<sup>402</sup> Article 241 deals with Attack on the Political or Territorial Integrity of the State



ONLF; taking military training in Eritrea; conspiring to overthrow the government; and organising rebellion against the constitutional order.

However, the defendant denied the charges and alleged that he was compelled to confess during an interrogation by the police. He called in five witnesses for his defence. Two of the witnesses, who were detained with him at the time for crimes unrelated to the case, testified that the interrogating officers kept the defendant naked during this procedure as well as inflicting acts of torture. They also said the defendant was unable to bear the interrogation. The other three witnesses testified that the defendant was a peaceful person with no connection to any terrorist organisations. However, the court rejected the testimonies and instead chose to validate the statements made in the police interrogation. Yet, there is no substantive reasoning within the courts report of the case that justifies or explains why the court concluded that the defence witness's testimonies were 'unreliable'.

To conclude, in a similar fashion to the OLF, the ONLF appeared to soften its steadfast demand for secessionism. In 2010, a breakaway faction of the ONLF signed a peace agreement with the Ethiopian government.<sup>403</sup> This was followed by the release of several members of the ONLF from jail.<sup>404</sup> This development, however, seemed to be contradicted by the Ethiopian government's decision to proscribe the ONLF in 2011. Then in 2012, the ONLF announced that it was holding negotiations with the Ethiopian government over reviving peace talks aimed at ending the old armed rebellion.<sup>405</sup>

Al-ittihad Al-Islamia (AIAI) is another organisation that aims at forming an Islamic caliphate State in the horn of Africa by breaking away the Somali region of Ethiopia and unifying it with Somalia.<sup>406</sup> However, AIAI is not strictly

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<sup>403</sup> AFP (2010). *Ethiopia Signs Peace Agreement with Rebel Faction*, 12 October, Addis Ababa

<sup>404</sup> M. A. Roble, (2010). *Ethiopia Releases Rebel Prisoners*, 18 October, AfricaNews reporter in Nairobi, Kenya

<sup>405</sup> ONLF Press Release (2012). *Peace talks between Ogaden National Liberation Front (ONLF) and the Ethiopian Government Held in Kenya*, 8 September

<sup>406</sup> Schmid, A. P. (2011). Glossary and Abbreviations of Terms and concepts Relating to Terrorism and Counter-Terrorism. in Schmid, A. P. (editor). *The Routledge Handbook of Terrorism Research* (Oxon, Routledge), p. 600

speaking an organisation based in Ethiopia. It is an organisation based in Somalia that engaged in cross-border conflicts with Ethiopia and which has also been implicated in some attacks inside Ethiopia.<sup>407</sup> Moreover, unlike all the other organisations discussed above, AIAI harbours an extremist Islamist ideology and is thought to have connections with Al-Qaeda and Al-Shaba.<sup>408</sup> This is also the only organisation with an 'Ethiopian link' to be both placed on the US terrorist watch list<sup>409</sup> and be proscribed under TA 2000.<sup>410</sup>

Because of the terrorist nature of AIAI is a well-documented fact,<sup>411</sup> our discussion below will focus on the terrorism cases against alleged members of AIAI.

The first complex terrorism case that the Ethiopian judiciary had to face was the case of Muhamed Mahemmed Farah.<sup>412</sup> In 1998, 17 individuals comprising alleged members of AIAI, Ethiopians and non-Ethiopians, were arrested for an attempted assassination on the former transport and communications minister of Ethiopia, Dr. Abdulmejid Hussien. Together with this, the defendants were also charged with causing the deaths of several people connected with explosions in several hotels in the Ethiopian capital Addis Ababa (*Ghion Hotel*, *Wabi-Shebelle hotel*, *Dire-Dawa Ras hotel*). The prosecution used several provisions of the old Ethiopian penal code that dealt with homicide,<sup>413</sup> inciting armed rebellion,<sup>414</sup> participating in armed rebellion,<sup>415</sup> causing injury to persons and properties.<sup>416</sup> However, the court was of the opinion that there was no need to bring various charges against the defendants. It ordered the prosecution to include all the

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<sup>407</sup> See below a discussion on the case of Public prosecutor v Muhamed Mahemmed Farah et al (123/1998)

<sup>408</sup> See UN Security Council (2011). *Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities (O.E.A.2.01. AL-ITIHAAD AL-ISLAMIYA / AIAI)*, 7 April

<sup>409</sup> United States Department of State (2006). *Foreign Terrorist Organisations: Country Reports on Terrorism, Office of the Coordinator for Counterterrorism*, 28 April

<sup>410</sup> Horne, A and Douse, D. (2013). *The Terrorism Act 2000: Proscribed Organisations*, (SN/HA/00815), 7 January

<sup>411</sup> For details, see UN Security Council (2011), supra note 408

<sup>412</sup> Public Prosecutor v Muhamed Mahemmed Farah , supra note 407

<sup>413</sup> Article 522 of the old Ethiopian penal code

<sup>414</sup> Article 252 of the Old Ethiopian penal code

<sup>415</sup> Article 32 of the Old Ethiopian penal code

<sup>416</sup> Article 63 of the Old Ethiopian penal code

charges under the same article that is violation of article 252 of the old Ethiopian Penal Code. This article states that:

*(1) Whosoever raises, or attempts to raise:(a) a revolt, mutiny or armed rebellion against the Emperor, the State or the constitutional authorities; or (b) civil war, by arming citizens or inhabitants or by inciting them to take up arms against one another, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death. (2) Whosoever of his own free will takes part in such a movement is punishable with rigorous imprisonment not exceeding fifteen years.*

As can be deduced from the above paragraph, there is nothing that relates this article to the suspected terrorist acts committed by the defendants. It could be argued that the above article may be appropriate against AIAI and its members considering fact that the purpose of this organisation is to separate Somali through armed revolt. However, the facts of the case and the applicable law appeared to be unrelated. The problem of the judiciary and the prosecution to find the appropriate applicable law against alleged terrorists was not confined to this case. This problem was evident in all cases discussed in this thesis.

In all the cases discussed so far, it is evident that the Ethiopian public prosecutor has a tendency to rely on articles 240, 241, and 256(b) of the Ethiopian Criminal code and Article 252 of the old Ethiopian Penal code. However, these provisions do not deal with terrorism; they deal, rather, with crimes against engaging in armed uprising or civil war and attacks against the political integrity of the State, respectively. It is well documented that the justifying the use of force within the international community can only be done within a very limited ambit, still less when attempting to advance political ends.<sup>417</sup>

This has been one of the stumbling blocks when attempting to obtain consensus on an international definition of terrorism. However, the point that needs to be made in respect of the Ethiopian cases discussed above is that the discussion of terrorism and terrorist organisations have been a confused subject due lack of a

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<sup>417</sup> Cassese, A. (1995), supra note 299

clear law on this area. Thus, there appears to be evidential disparity between the definition of a terrorist organisation in Ethiopia and the conduct of the group so labelled.

## 5.5. Conclusion

From the above discussion we can conclude that there are three sorts of terrorist organisation in Ethiopia: nationalists, Islamists and political parties that oppose the policy of the ruling party. Therefore, any study of the problem of terrorism has to be seen through these categorisations. However, this classification is challenged by some who would suggest that those with a separatist agenda are 'traditional internal enemies'<sup>418</sup> of the Ethiopian government due to their 'political and irregular military opposition'.<sup>419</sup>

Moreover, the organisations discussed in this thesis are not the only organisations that are considered 'terrorists' in Ethiopia. There are also others who assume responsibility for recent attacks against the Ethiopian government, civilians and foreign tourists. For instance, an organisation known as Afar Revolutionary Democratic Unity Front (ARDUF) abducted five Britons and eight Ethiopians in March, 2007. However, "Ethiopia dismissed ARDUF's claim of responsibility for the action and put the blame on Eritrea."<sup>420</sup> Again, in January 2012, ARDUF assumed responsibility for the killing of European tourists in the Afar region of Ethiopia. The Ethiopian government again dismissed their claims and blamed Eritrea for the attack stating that "[i]t is already clear that the attack was carried out with the direct involvement of the Eritrean Government".<sup>421</sup> However, the UN Security Council "...found no evidence of direct Eritrean involvement in the operation".<sup>422</sup> Apart from these two incidents, this research has found no evidence of other terrorism charges

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<sup>418</sup> See *XX v Secretary of the State for the Home Department*, supra note 197, para. 19

<sup>419</sup> *Ibid*, para 13

<sup>420</sup> FAST International (2007). *Ethiopia: Trends in Conflict and Cooperation. Switzerland: Country team; Ethiopia, March to April, 2007*

<sup>421</sup> CBS News (2012). *Ethiopia Terrorist Attack Leaves 5 Tourists Dead*, 18 January

<sup>422</sup> UN Security Council (2012). Letter dated 11 July 2012 from the Chair of the Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) Concerning Somalia and Eritrea addressed to the President of the Security Council (S/2012/545), p.5

being filed against ARDUF. Though these two incidents could be qualified terrorist attacks, the Ethiopian government rather pointed the finger at Eritrea.

Another fact that needs to be considered in this thesis is that Ethiopian demography is predominately composed of Christians (43%) followed by Muslims (33 %).<sup>423</sup> However, religious extremism, apart from the case of AlAI whose threat to Ethiopia's security has been insignificant for some time,<sup>424</sup> is not a concern for Ethiopia. Despite the existence of a few incidents of religiously motivated violence among both followers, "Orthodox Christians and Muslims generally respected each other's religious observances and tolerated intermarriage and conversion".<sup>425</sup> Moreover, despite the recent reports of Al-Qaeda linked arrests,<sup>426</sup> the terrorism cases discussed above do not show "a growing Islamist threat to the security of Ethiopia and its inhabitants".<sup>427</sup> This research did not find evidence of religiously motivated terrorist attacks.<sup>428</sup>

Finally, we have criticised the absence of a clear legal regime on terrorism as one of the problematic features of studying terrorism cases in Ethiopia. For this reason, the enactment of the EATP could be justified on this premis. The EATP, which was basically modelled on UK and US laws, might solve the legal lacuna. But as will be seen in the subsequent chapters, it is riddled with defects. The purpose of the next chapters is, therefore, to assess the experience of the US and the UK and finds some alternatives that could help amending the EATP.

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<sup>423</sup> Source: 2007 Population and Housing Census of Ethiopia

<sup>424</sup> Chazan, D. (2002). *Who Are Al-Ittihad?*, 30 November BBC

<sup>425</sup> US Department of State (2011). Ethiopia Executive Summary, at <http://www.state.gov/documents/organization/192923.pdf>

<sup>426</sup> Note that there were three reports of arrests of Al-Qaeda linked suspects (one in 2012 and two in 2013. However the details of these arrests have never been disclosed. For the details of reports, see The Africa Report (2012). *Ethiopia Arrests Suspected Al-Qaeda Militants*, 6 February; see also Sudan Tribune (2013). *Ethiopia Arrests Four Al-Qaeda Allied Suspects*, 16 March

<sup>427</sup> See XX v Secretary of the State for the Home Department , supra note 197, para.19

<sup>428</sup> A further research on this area might be necessary in the future

## Chapter three: Freedom of Expression and Anti-Terrorism Laws

### 3.1 Introduction

Freedom of expression, as an important right in any country, is the first meeting point between anti-terror laws and protected rights. The forms of expression are various and the implications are different.<sup>429</sup> Recognizing the right by passing a piece of legislation is one thing. Striking the balance between protected and non-protected expressions, and legitimate national security interests is quite another. It is a conundrum the answer to which is in large part found beyond the constitution detail. It requires interpretation of different interests and the evaluating of different circumstances.

Have the courts in the UK and US developed comprehensive guidelines that enable them to tackle any problems related to protected and non-protected expressions? Or do they leave the answer open-ended for a case-by-case analysis?

Answering the substance of these two apparently differing questions will help in finding a proper balance between terrorism and freedom of expression. There are countries that follow in the footsteps of the West and change their legal positions depending on the prevailing 'weather' in the latter. The focus of this chapter is, thus, a comparative analysis of the UK and US anti-terror regimes and one of the 'weather affected' countries, Ethiopia. This requires us to gain an insight into these countries' anti-terrorism laws and the domestic courts' balancing of the relevant principles at play. Moreover, we must also understand the approach of the European Court of Human Rights towards freedom of expression, for it is a major factor shaping the UK perspective.

Chapter three is structured as follows. The first part deals with the constitutional arrangement of freedom of expression in the US, UK, and Ethiopia. This is followed by an analysis of the determining factors that compose the right to

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<sup>429</sup> Sottiaux, S. (2008). *Terrorism and the Limitation of Rights: the ECHR and the US Constitution* (Portland, OR, Hart Publishing), p.67.

freedom of expression. These factors include the forms of the expression, the content of a speech, the medium of expression, and the identity and affiliation of a speaker, and the circumstances in which the speech is given. Moreover, the relevance of these factors will be evaluated in light of the scope of the incitement and/or encouragement of terrorism. This chapter expands upon the experience of the UK and US in the fight against terrorism by drawing a balance between expressions that have and those that have not obtained constitutional protection. Moving forwards, this chapter critically examines the difficulty of implementing some of those balancing principles in countries such as Ethiopia where democracy is in its infancy.

### **3.2 Freedom of Speech and Constitutional Protection: UK, US, and Ethiopia**

The UK does not have a written constitution, and has only relatively recently adopted a written code of rights, the Human Rights Act 1998 (HRA). This does not mean to suggest that fundamental rights are less protected in the UK. Statutes, common law, conventions, and EU laws filled the gap left by the absence of a written code of rights pre-1998. The European Convention on Human Rights (ECHR) becomes instrumental in domestic cases as the result of the 1998 HRA. Even before the adoption of the above Act, UK citizens were given the green light to bring legal action before the ECtHR and the ECtHR had the opportunity to entertain individual complaints dating back to the *Golder v United Kingdom* case.<sup>430</sup>

The construction of Article 10 of the ECHR, which guarantees right to freedom of expression, is not absolute. As one of the cornerstones of any democratic society,<sup>431</sup> a restriction on freedom of expression under 10(2) of the ECHR could be justified if it is 'prescribed by law', pursues legitimate aims, and is necessary in a democratic society. In accordance with *Handyside v UK*, any "interferences entail a violation of Article 10 if they do not fall within one of the exceptions provided for in paragraph 2 (art. 10-2)".<sup>432</sup> Therefore, Article 10 "is applicable

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<sup>430</sup> *Golder v UK* [1975] 1 EHRR 524

<sup>431</sup> *Handyside v the UK*, 7 December 1976, Series A no. 24., para. 49

<sup>432</sup> *ibid.*, para 43

not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".<sup>433</sup>

Though the ECtHR acknowledged that member states have a 'margin of appreciation'<sup>434</sup> in laying down restrictions in their domestic laws, it stressed that interferences 'prescribed by law' must be 'adequately accessible' and sufficiently clear.<sup>435</sup> However, "the level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed".<sup>436</sup>

In respect of the second requirement of Article 10(2), i.e. pursuing legitimate aims, the ECtHR evaluates "whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient".<sup>437</sup> Article 10(2) contains an array of legitimate aims that could be taken into account by the member states. These are interferences:

*...in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

However, the jurisprudence of the ECtHR<sup>438</sup> and the construction of Article 10(2) show that the fact that a certain restriction is 'prescribed by law' and has a legitimate aim does not mean that national authorities are discharged of their obligation not to interfere with freedom of expression arbitrarily.

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<sup>433</sup> Ibid, para. 49

<sup>434</sup> Autronic AG v. Switzerland, 22 May 1990, Series A no. 178

<sup>435</sup> See Sunday Times v UK (No. 1) judgment of 26 April 1979, Series A no. 30, p. 31, para. 49; see also Herczegfalvy v Austria, 24 September 1992, Series A no. 244; see also Hashman and Harrup v UK [GC], no. 25594/94, ECHR 1999-VIII

<sup>436</sup> Rekvényi v Hungary [GC], no. 25390/94, § 34, ECHR 1999-III), para. 34

<sup>437</sup> See for example, Handyside v UK, supra note 431, para. 50

<sup>438</sup> Ibid, para. 47



Therefore, the third requirement under Article 10(2), i.e. 'necessary in a democratic society', must be satisfied, which "implies the existence of a pressing social need".<sup>439</sup> This requirement is a limit on the 'domestic margin of appreciation'; it gives the ECtHR a power of 'supervision' over the "the aim of the measure challenged and its "necessity". It covers not only the basic legislation but also the decision applying it, even one given by an independent court.<sup>440</sup>

In contrast, the construction of the First Amendment of the US Constitution is absolute. This Amendment reads as follow:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*

However, while textually appearing as an absolute right, the First Amendment is not absolute by virtue of judicial amendment. The US Supreme Court adopted various means of limiting the apparently absolute right to freedom of expression under the first amendment.

For example, in *Patterson v Colorado*,<sup>441</sup> the US Supreme Court applied the 'bad tendency test' by stating that the First Amendment was primarily occupied with preventing prior restraints, not subsequent punishment for 'speeches that may be deemed contrary to the public welfare'. Accordingly, a speech is gauged "by the tendency of its effects. Speech tending to cause good effects enjoyed constitutional protection; but speech tending to cause bad effects - those that

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<sup>439</sup> *Vogt v. Germany*, 26 September 1995, Series A no. 323, para. 52

<sup>440</sup> *Handyside v the UK*, supra note 431, para. 49

<sup>441</sup> *Patterson v Colorado* - 205 U.S. 454 (1907).; the same test was applied in *Whitney v California* 274 U.S. 357 (1927) and *Abrams v United States* 250 U.S. 616 (1919)

threatened the order or morality of a community or the security of society - did not".<sup>442</sup>

However, in *Schenck v United States*,<sup>443</sup> the Supreme Court devised another test and held that speech can be abridged under certain circumstances, such as war. This, in effect, upheld the 1917 Espionage Act. The court applied the 'clear and present danger' test in this case, which became controversial for years to come.<sup>444</sup> According to this test, "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent".<sup>445</sup> However, this test was later abandoned and replaced by other tests.

The test that followed was defined by the 'incitement to imminent lawless action'.<sup>446</sup> In a retreat from earlier tests,<sup>447</sup> which appeared to punish 'mere advocacy of violence,' the US Supreme Court held that "...a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action...falls within the condemnation of the First and Fourteenth Amendments".<sup>448</sup> The above test is composed of three parts: "1) the speaker subjectively intended incitement 2) in context, the words used were likely to produce imminent, lawless action and 3) the words used by the speaker objectively encouraged and urged incitement."<sup>449</sup>

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<sup>442</sup> Eastland, T. (2000). *Freedom of Expression in the Supreme Court: The Defining Cases* (US, Rowman & Littlefield Publishers, INC), p. 1

<sup>443</sup> *Schenck v United States*, 249 U.S. 47 (1919)

<sup>444</sup> For further commentaries, see Cole, D. (1986) Agon at Agora: Creative Misreading in the First Amendment Tradition 95 *The Yale Law Journal* 857; see also Strauss, D.A. (2003) Freedom of Speech and the Common-Law Constitution in Bollinger, L. C. and Stone, G. R. (Editors). *Eternally Vigilant: Free Speech in the Modern Era* (Chicago, University of Chicago Press), pp.47-50; see also Barnum, D. G. (2006). The Clear and Present Danger Test in Anglo-American and European Law, 7 *San Diego Int'l L.J.* 263.

<sup>445</sup> *Schenck v United States*, supra note 443, para.249

<sup>446</sup> *Brandenburg v Ohio*, 395 U.S. 444 (1969)

<sup>447</sup> See *Whitney v California*, supra note 441

<sup>448</sup> *Brandenburg v Ohio*, supra note 446, para. 449

<sup>449</sup> Harr, J. S., et al (2011). *Constitutional Law and the Criminal Justice System*. 5th ed. (US, Cengage Learning), p. 142

In another twist to the scope of the First Amendment, as will be discussed in further later in this chapter, the US Supreme Court in *Holder v Humanitarian Law Project* ‘appeared to retreat dramatically’<sup>450</sup> from previous tests by holding that it is possible to restrict “speech on the basis of its content.”<sup>451</sup> *Holder v Humanitarian Law Project* deviated from the incitement test of *Brandenburg v Ohio* by punishing purely political advocacy in relation to foreign terrorist groups. This has prompted some to argue that this case “...has potentially grave repercussions. Most immediately, nongovernmental organizations working to resolve conflict or to provide humanitarian assistance may well be unable to operate where designated ‘terrorist organizations’ are involved”.<sup>452</sup>

Incidentally, these are not the only tests applied by the US Supreme Court in regard to the scope of the First Amendment. Further tests include the ‘balancing’<sup>453</sup> and ‘Redeeming social value’<sup>454</sup> tests. As discussed above, however, these different tests have been modified over the years and in some instances have been by-passed altogether without due consideration.<sup>455</sup>

In Ethiopia, however, interpretation of the fundamental rights enshrined in the FDRE Constitution is beyond the reach of the Ethiopia courts. As discussed in chapter two, instead the power to interpret constitutional rights is given to the House of Federation, the legislative branch of the Ethiopian government. That means Ethiopian courts are not the primary dispute-settling organs in areas related to constitutional matters. Therefore, Ethiopian rights discourse is not fortunate enough to have the benefit of judicial scrutiny.

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<sup>450</sup> Cole, D. (2012). The First Amendment's Borders: The Place of *Holder v Humanitarian Law Project* in First Amendment Doctrine. 6 *Harv. L. & Pol'y Rev.* 147-177

<sup>451</sup> *Holder v Humanitarian Law Project* 130 S. Ct. 2705 - Supreme Court 2010, para. 22

<sup>452</sup> Cole, D. (2012), The First Amendment's Borders, *supra* note 455, p. 149

<sup>453</sup> see *Ward v Rock Against Racism*, 491 US 781 (1989) (the Supreme court balanced the interest of the complainants against the interest of the New York city holding that the government was within its legal boundaries to regulate “the volume of amplified music at the bandshell so the performances are satisfactory to the audience without intruding upon those who use the Sheep Meadow or live on Central Park West and in its vicinity”); see also *Barenblatt v United States*, 306 US 109 (1959)

<sup>454</sup> *Miller v. California*, 413 U.S. 15 (1973) (primarily in obscenity cases)

<sup>455</sup> For further discussion, see Brennan, W. J. The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 *Harv.L.Rev.* 11

Article 29 of the Federal Democratic Republic of Ethiopia (FDRE Constitution) provides protection to freedom of expression. This article adopts a similar format in its protection of that right as is seen in Article 10 ECHR by declaring that "everyone has the right to freedom of expression without interference."<sup>456</sup> Unlike Article 10 ECHR and the First Amendment, Article 29 of FDRE Constitution further acknowledges that the medium of expression can be "... in writing, in print, in the form of an art, or through any medium ... of choice."<sup>457</sup> This is a direct replica of Article 19 (1-2) of the International Covenant on Civil and Political Rights (ICCPR).

Reading the first five sub-articles of Article 29, the FDRE Constitution gives the impression that the right is absolute. However, sub-articles 6-7 provide for a situation where the right can be circumscribed.

Similar to Article 10 but unlike the First Amendment, the FDRE constitution specifically declared that the right to freedom of expression is not absolute. However, there are fundamental differences in how the scope of the right is defined. Article 29(6) states that "the content or the effect of the point expressed" should not be the sole reason for imposing a limitation on the right to freedom of expression. It seems that this idea was adopted from the US Supreme Court's early court decisions and reflects an old argument in America of the "balancing test."<sup>458</sup> The main issue in the US case of *Barenblatt v United States* was whether the US government can enact legislation that restricts the First Amendment if the interest of the government overrides a person's exercise of the right. The US Supreme Court affirmed the argument in the positive. Moreover, as discussed, the Supreme Court has also accepted the regulation of 'speech on the basis of its content.'<sup>459</sup>

Nevertheless, the FDRE constitution seems to suggest that the Ethiopian government is devoid of such power if it attempts to restrict speech based on its

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<sup>456</sup> Article 29(2) of the FDRE Constitution.

<sup>457</sup> Article 29(5) of the FDRE Constitution.

<sup>458</sup> *Barenblatt v United States*, supra note 453

<sup>459</sup> *Holder v Humanitarian Law Project*, supra note 451, para. 22

"content or the views expressed."<sup>460</sup> However, as will be seen<sup>461</sup>, the practice suggests otherwise.

Though the idea under Article 29 (6) of the FDRE constitution is borrowed from early US Supreme Court decisions,<sup>462</sup> the construction of the above Article makes it apparently impossible to impose any limitation based on the content of the expressed views. Imposing general restrictions, as in the spirit of the First Amendment, is not the same as prohibiting the legislature from enacting a law that restricts an expression that has an adverse effect on constitutionally protected rights. The US balancing test - 'content' based limitation - was devised by the courts as the First Amendment is constructed in general terms. However, the FDRE Constitution specifically adopted the same limitation.

The second paragraph of Article 29(6) further proclaims that a limitation is only possible if the "expressed view injures human dignity; infringes honour and reputation; abuses the well-being of the youth;" or contains "propaganda for war." Some of these limitations are borrowed from the ICCPR, whereas the rest are novel to the FDRE constitution.

A major difference between Article 29 of the FDRE constitution and Article 10 of the ECHR is the absence of some of the three test criteria devised by the ECtHR, which complements the functioning of Article 10.<sup>463</sup> The only criterion mentioned under Article 29(6) is limitation "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". Moreover, the FDRE constitution failed to envisage the most obvious element of limiting the

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<sup>460</sup> This Ethiopian position seemed to be in line with the dissenting opinion of Justice Black in *Barenblatt v United States*, supra note 453, para.141-153 (Justice Black disagreed with the Supreme Court's conclusion that "First Amendment freedoms must be abridged in order to "preserve" our country").

<sup>461</sup> See further discussions in this chapter

<sup>462</sup> In addition to *Barenblatt v United States*, supra note 453, see also, for example, *Texas v Johnson*, 491 U.S. 397 (1989) ( held that a government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

<sup>463</sup> Prescribed by law, legitimate aim, and necessary in a democratic society; see , *Handyside v UK*, supra note 431; see also *Sunday Times v UK* (No.1), supra note 435

right: national security, protection of public order, health and/or morals. These are enshrined in both the ICCPR<sup>464</sup> and Article 10 ECHR.

However, although some of the three test criteria devised by the ECtHR are absent in the FDRE constitution, it could be argued that their implementation in the Ethiopian legal system is possible by virtue of Article 13 (2) of the FDRE constitution, which states that:

*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.*

Consequently, the protection and promotion of the human rights as guaranteed in the FDRE constitution have to be considered in light of the international standards set by the Universal Declaration of Human Rights and other conventions ratified by Ethiopia. Otherwise stated, any human rights instrument ratified by Ethiopia, thus, becomes not only part and parcel of the domestic laws of Ethiopia, but also guiding principles for the interpretation of the rights guaranteed by the FDRE constitution. Thus, once adopted, they are applicable in the same manner as any law enacted by the Ethiopian parliament.

Some of the international human rights instruments Ethiopia adopted include the International Covenant on Civil and Political Rights (ICCPR);<sup>465</sup> the International Covenant on Economic, Social and Cultural Rights<sup>466</sup> and the African (Banjul) Charter on Human and People's Rights.<sup>467</sup> Article 9 (4) of the FDRE constitution declares that "...international agreements ratified by Ethiopia are an integral part of the law of the land."

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<sup>464</sup> Article 19(3) of ICCPR.

<sup>465</sup> Accessed on 11 June 1993

<sup>466</sup> Accessed on 11 June 1993

<sup>467</sup> Ratified on 15 June 1998

Consequently, Article 19 of the ICCPR becomes crucial in the interpretation of Article 29 of the FDRE constitution. Article 19 of the ICCPR espouses that limitations on freedom of expression must be 'provided by law'. This requirement "...would be interpreted as it has in the context of other ICCPR guarantees, i.e. that the limitation must be sufficiently delineated in a State's law."<sup>468</sup> A 'law' in this sense could refer to "formal legislation or an equivalent unwritten norm or common law" but it excludes "administrative provisions or vague statutory authorisation."<sup>469</sup>

Moreover, Article 19 of the ICCPR requires that a limitation on freedom of expression would be complied with if it is justified by one of the legitimate aims provided under sub-paragraphs (a) and (b) of sub-article 3, i.e. "...for respect of the rights or reputations of others; for the protection of national security or public order (*order public*), or public health or morals". One of the legitimate aims relevant to this thesis is national security. As discussed, the FDRE constitution does not stipulate national security as one of the legitimate aims for interfering with the right to freedom of expression. However, this deficiency in the FDRE constitution could be supplemented by the ICCPR; national security under the ICCPR covers "...only serious cases of political or military threats to the entire nation."<sup>470</sup> Examples that warrant a mention are "publication of a direct call to violent overthrow of the government in an atmosphere of political unrest or propaganda for war."<sup>471</sup> It would not be far from the fact to suggest that terrorist acts could be included in this category.

The third test promoted by Article 19 of the ICCPR is that the restriction must be 'necessary' to accomplish a lawful purpose. As the UN Human Rights Committee held:

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<sup>468</sup> For further discussion, see Joseph, S., et al (2005). *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford, Oxford University Press), p. 525; see also Nowak, M. (2005). *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. 2<sup>nd</sup> edition. (N P Engel Pub), p. 447; see also Gauthier v. Canada, Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999), para 13.5.

<sup>469</sup> Nowak, M. (2005), supra note 468, p. 460

<sup>470</sup> Nowak, M. (2005), supra note 468, p. 463-4

<sup>471</sup> Ibid

*This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value. As the Committee stated in its General Comment 10, the restriction must not put the very right itself in jeopardy.*<sup>472</sup>

However, Article 19 of the ICCPR "...lacks a reference to necessity in a democratic society".<sup>473</sup> For this reason, "...the relevant criterion for evaluating the necessity of interference is thus not the principle of democracy but rather whether it was proportional in the given case."<sup>474</sup> Thus, consideration of 'proportionality in a given case' is particularly relevant in Ethiopia where democratic principles are yet to materialise.<sup>475</sup>

Despite some difference in the construction of Article 19 of the ICCPR, the three criteria discussed above are more or less similar to those applied by the ECtHR in regard to Article 10 ECHR. For that reason, interference with the right to freedom of expression in Ethiopia could be evaluated based on the above tests.

However, the realisation of freedom of expression in Ethiopia is beset with many obstacles. A factor that facilitated "a downward spiral for freedom of expression in Ethiopia"<sup>476</sup> is the ever increasing mistrust between the government and its opponents. There are many opposition blogs and websites based in the West that are dedicated 24/7 to criticising the Ethiopian government's handling of political crisis's in Ethiopia.<sup>477</sup> They are established by journalists and opponents of the

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<sup>472</sup> Faurisson v France, Communication (550/1993), U.N. Doc. CCPR/C/58/D/550/1993(1996), para. 8. For further discussion see Joseph, S., et al (2005), supra note 468; see also Nowak, M. (2005), supra note 468, p. 447

<sup>473</sup> Nowak, M. (2005), supra note 468, p. 460

<sup>474</sup> Ibid

<sup>475</sup> Tesfaye, A. (2002). *Political Power and Ethnic Federalism: The Struggle for Democracy in Ethiopia* (Maryland, University Press America)

<sup>476</sup> Kaiser, K. (2012). *A Downward Spiral for Freedom of Expression in Ethiopia*. June 1, Electronic Frontier Foundation

<sup>477</sup> To mention some: <http://www.ethioguardian.com/news.php> ; <http://ethiopiazare.com/> ; <http://www.tadias.com/> ; [WWW.ethiopianreview.com](http://WWW.ethiopianreview.com); <http://addisnegeronline.com/>; [www.awurambatimes.com](http://www.awurambatimes.com); [www.addisvoice.com](http://www.addisvoice.com); [www.ethiopiafreedom.com](http://www.ethiopiafreedom.com); <http://www.zehabesha.com/>; <http://www.maledatimes.com/> <http://www.abugidainfo.com/>; <http://ecadforum.com/>;



government who fled the country after the 2005 controversial election. This tit-for-tat has spurred the government to block access to these websites.<sup>478</sup>

Some reports also allege that "the continuing abuse of anti-terrorism legislation to curb freedom of expression in Ethiopia"<sup>479</sup> has reached a critical point.<sup>480</sup>

The question that we need to answer in this chapter is, therefore, whether the enactment of the EATP creates a balance between the right to freedom of expression and the need to ensure the safety and security of Ethiopian inhabitants from terrorism.

### **3.3 Content and the Medium of an Expression under Article 10 ECHR**

The ECtHR takes several factors into consideration in creating a balance between permitted expressions and expressions that fall outside the ambit of Article 10 ECHR. Some of these factors include the medium of expressions such as books, newspapers, leaflets, periodicals and the identity of the speaker/publisher (whether they are members or supporters of terrorism organisations or just politicians or journalists). Our discussion below will try to attempt to find out the relevance of these factors in the jurisprudence of the ECtHR.

The starting point for this discussion is a string of ECtHR cases beginning with *Arslan v Turkey*<sup>481</sup>. Mr. Arslan published a book entitled "History in Mourning, 33 bullets". It was alleged that his book disseminated separatist propaganda by describing "the Turkish nation as barbarous", and maintaining "that the Kurds were the victims of constant oppression, if not genocide, and glorified the acts of

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<sup>478</sup> Reporters without Borders (2012). *Ethiopia: Government Steps Up Control of News and Information*, 7 June

<sup>479</sup> Office of the High commissioner for Human Rights (2012). *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (A/HRC/20/17)*, p. 6

<sup>480</sup> We will discuss some cases later in this chapter

<sup>481</sup> *Arslan v. Turkey* [GC], no. 23462/94, 8 July 1999.

insurgents in south-east Turkey."<sup>482</sup> Extracts from his book to demonstrate the allegation include the following<sup>483</sup>:

*...it has become axiomatic among [the Turks] that, as the saying has it, 'A Turk's only friend is another Turk'. ... Several groups, such as the Bulgarians, the Greeks and the Arabs, have won their freedom from this barbarous administration. Only the Kurds remain. Both Turks and Kurds are at a loss to know what to do about this situation. A Turk from Turkistan denies the Turk who lives in Kurdistan. A Kurd may neither give his father's forename to his son nor choose his name.*

The relevant courts found him to have disseminated separatist propaganda and he was sentenced to imprisonment. He brought his case before the ECtHR. The ECtHR applied a three-limb-test to determine whether there was a violation of the applicant's right to freedom of expression under Article 10 ECHR. It was found that there was a sufficient legal basis for his conviction and taking the security situation at that time into account, the conviction pursued a legitimate purpose. However, as to the test of 'necessity in a democratic society,' it was stated that is up to the ECtHR to determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient."<sup>484</sup> The ECtHR has accepted that some of the specific extracts in the book, such as the

*joyful news of the day when they would tear down the fortress of violence of Turkish chauvinism, do not amount to "neutral" descriptions of historical facts and that through his book the applicant intended to criticise the action of the Turkish authorities in the south-east of the country and to encourage the population concerned to oppose it.*<sup>485</sup>

In the opinion of the ECtHR expressions that encourage resistance the Turkish nation at a time where Turkey was facing serious instability as a result of

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<sup>482</sup> Ibid, para 10

<sup>483</sup> Ibid, para.10.

<sup>484</sup> Ibid, para.44

<sup>485</sup> Ibid, para.45

domestic problems due to the Gulf War could be a relevant factor in determining the proportionality of the measures taken.<sup>486</sup>

At the same time, the ECtHR tried to balance the content of the expression with the medium used. It affirmed that it is possible to show leniency if the expressions were merely communicated via books, literary works, and not the mass media.<sup>487</sup> The ECtHR was similar in its approach in subsequent cases.<sup>488</sup>

Arslan is not the only case that dealt with potential for incitement of violence via the publication of books in Turkey. The case of Başkaya and Okçuoğlu v Turkey<sup>489</sup>; and Önal v Turkey<sup>490</sup> could be mentioned here. However, unlike in Arslan, the ECtHR did not focus on the medium of expression in these cases.

Though the ECtHR consistently applied the three test criteria in its rulings, the focus of the ECtHR in these cases, unlike in Arslan and other cases, was on the potential impact of the contents of the publications. For instance, in Başkaya and Okçuoğlu v Turkey, the focus of the ECtHR was on "...the content of the impugned statements and the context in which they were made."<sup>491</sup> And it concluded that, "...the views expressed in the book could not be said to incite to violence; nor could they be construed as liable to incite to violence".<sup>492</sup>

In a similar manner, an interesting decision of the ECtHR is the Handyside v UK case.<sup>493</sup> The case is among the most important of its kind. It lays down the three

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<sup>486</sup> Ibid, para.47.

<sup>487</sup> Ibid, para.48.

<sup>488</sup> See for example, Sürek v Turkey (no. 1) [GC], no. 26682/95, ECHR 1999-IV. (Dissenting with the court, Casadevall and Greve held that the court was inconsistent in its attempt to create exceptions to Article 10 of the Convention rights); see also Polat v. Turkey [GC], no. 23500/94, 8 July 1999 (the ECtHR held that "applicant is a private individual and that he made his views public by means of a literary work rather than through the mass media, a fact which limited their potential impact on "national security", public "order" and "territorial integrity" to a substantial degree".); see also Jersild v. Denmark (Application no. 15890/89, 23 September 1994), Telegraaf Media Nederland Landelijke Media B.V. v. Netherlands (Appl. No. 39315/06,22 November 2012).

<sup>489</sup> Başkaya and Okçuoğlu v. Turkey [GC], nos. 23536/94 and 24408/94, ECHR 1999-IV

<sup>490</sup> Önal v. Turkey, nos. 41445/04 and 41453/04, 2 October 2012

<sup>491</sup> Başkaya and Okçuoğlu v. Turkey, supra note 489, para. 61

<sup>492</sup> Ibid, para. 64

<sup>493</sup> Handyside v UK, supra note 431

limb test connected to Article 10 ECHR. The dispute centred on the content of an expression. Moreover, the medium used was similarly a book. Unlike the above cases, however, "The Little Red Schoolbook" had nothing to do with an expression that incites, encourages, or endorses violence. The focus was on the sexual nature of the book. The ECtHR held that the UK did not breach Article 10 when a British court ordered the seizure and destruction of the books.

In *Handyside v UK*, the focus was entirely on the content of the book. There was no discussion of the identity of the writer or about the medium of communication. With regard to obscene materials, the same position was taken in other cases.<sup>494</sup> The same is true with regard to the use of films displaying negative images of religious doctrines<sup>495</sup>.

Another case worth considering in regard to the publication of books that might incite separatist agenda is the case of *Ekin Association v. France*.<sup>496</sup> In the same manner as *Arslan v Turkey*, the applicants in *Ekin Association* published a book ("Euskadi at war") (*Euskadi en Guerre*) detailing the Basque Country conflicts. Although the book was in circulation in other countries, the French government banned the circulation of the book in France on the ground that "...the circulation in France of this book, which promotes separatism and vindicates recourse to violence, is likely to constitute a threat to public order."<sup>497</sup> However, before the case even reached the ECtHR, the French Supreme Court upheld the applicants claim stating that the ministerial decree that banned the book was in breach of Article 10 ECHR as "...the content of this publication does not provide sufficient legal justification for the serious infringement of press freedom embodied in the impugned decision."<sup>498</sup> The ECtHR also found in favour of the applicants.<sup>499</sup>

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<sup>494</sup> Müller and others v Switzerland, 24 May 1988, Series A no. 133.

<sup>495</sup> Otto-Preminger-Institut v Austria, 20 September 1994, Series A no. 295-A.

<sup>496</sup> Association Ekin v. France, no. 39288/98, ECHR 2001-VIII

<sup>497</sup> Ibid, para. 13

<sup>498</sup> Ibid, para. 19

<sup>499</sup> Ibid, para. Para. 64

However, the dissenters in *Karatas*<sup>500</sup>, as discussed below, has pointed out that the ECtHR seems to drift away from appreciating the merits of the content of the communication by introducing external factors such as the medium of communication that have nothing to do with the contents of the expression.

In his anthology of poems entitled 'the song of the rebellion, Dersim' Mr. Karatas "invited" his fellow Kurds to "freedom" and to "die" and, to wage "a secret rebellion." The relevant domestic courts found him guilty of disseminating separatist propaganda. The Commission stated that "some parts of the applicants poem glorified armed rebellion against the Turkish State and martyrdom in that fight."<sup>501</sup> Thus, the Commission agreed with the assessment of the national authorities. Though the ECtHR agreed with the conclusion of the national court on the general impact of the expressions which can be "construed as inciting readers to hatred, revolt and the use of violence," it found a violation of Article 10 ECHR because "the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers."<sup>502</sup>

The same conclusion was reached in *Okçuoğlu v. Turkey*<sup>503</sup> and *Sürek v. Turkey* (No. 4).<sup>504</sup> The ECtHR in *Okçuoğlu* held that "comments hostile in tone" would be tolerated under Article 10 ECHR if they are "...published in a periodical whose circulation was low, thereby significantly reducing their potential impact on "national security", "public order" or "territorial integrity."<sup>505</sup> And, in *Sürek*, the ECtHR ruled that the publication of an article that has an "overall literary and metaphorical tone" does not amount to incitement to terrorism, though it "contained hard-hitting criticism" of the Turkish authorities such as the statement that "the real terrorist is the Republic of Turkey".<sup>506</sup>

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<sup>500</sup> *Karatas v Turkey* [GC], no. 23168/94, ECHR 1999-IV (see joint dissenting opinion of Joint concurring opinion of judges Palm, Tulkens, Fischbach, Casadevall and Greve).

<sup>501</sup> *Ibid*, para.47

<sup>502</sup> *Ibid*, para.49

<sup>503</sup> *Okçuoğlu v. Turkey* [GC], no. 24246/94, 8 July 1999

<sup>504</sup> *Sürek v. Turkey* (no. 4)[GC], no. 24762/94, 8 July 1999

<sup>505</sup> *Okçuoğlu v. Turkey*, supra note 503, para. 48

<sup>506</sup> *Sürek v. Turkey* (no. 4), supra note 504, para. 58

The ECtHR further considered the medium of expression in its analysis of a newspaper interview in *Zana v Turkey*:<sup>507</sup> an interview in a monthly review in *Erdoğan and İnce v Turkey*,<sup>508</sup> a live TV debate in *Gündüz v. Turkey*<sup>509</sup> and distribution of leaflets in *Féret v Belgium*.<sup>510</sup> However, the latter two cases dealt with hate speech, not with incitement to violence/terrorism. But even in hate speech cases, the ECtHR considers the medium of expression. As confirmed in *Féret v Belgium*, "...the Court attaches particular importance to the medium and the context in which the offending were released."<sup>511</sup>

The more relevant cases for this thesis in regard to expressions that incite terrorism are the case of *Zana v Turkey* and *Erdoğan and İnce v Turkey*. In the interview, Zana was quoted as saying "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake."<sup>512</sup> These expressions do not incite any violence nor do they encourage any kind of resistance unlike the expressions that were used in *Arslan v Turkey* and *Karatas v Turkey*.

Moreover, the message in the Zana was less explicit because it did not endorse any violence nor did it invite people to commit any violence. But Arslan's and Karatas's expressions were more direct and with more likelihood of producing violence. But the medium of expression, in the words of the ECtHR, made them unlikely to have the intended effect.

The main reasoning of the ECtHR in *Arslan v Turkey* was concerned with the contents of the expression, and to a lesser extent the medium used thereof. However, in *Arslan v Turkey* and *Karatas v Turkey* the ECtHR stated that, although the expressions in both cases were violent in nature, the fact that they were not published through the 'mass media' limited their general impact.

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<sup>507</sup> *Zana v Turkey*, 25 November 1997, Reports of Judgments and Decisions 1997-VII.; see also *Sürek v. Turkey* (no. 2)[GC], no. 24122/94, 8 July 1999

<sup>508</sup> *Erdoğan and İnce v. Turkey* [GC], nos. 25067/94 and 25068/94, ECHR 1999-IV

<sup>509</sup> *Gündüz v. Turkey* (dec.), no. 59745/00, ECHR 2003-XI

<sup>510</sup> *Féret v. Belgium*, no. 15615/07, 16 July 2009

<sup>511</sup> *Ibid*, para. 76

<sup>512</sup> *Zana v Turkey*, supra note 507, para.12.

In conclusion, though the ECtHR considers the medium of expression as a factor in its decisions, the focus of the court in creating the balance between permitted and non-permitted expression is primarily linked to the content and impact of expressions that incite violence or terrorism.

### 3.3.1 *Relevance of medium of communication under domestic laws: US and UK*

The forms of expression can be generally categorized into those that do and do not involve physical violence.<sup>513</sup> They can also be further divided into speech, writing, artistic works, broadcasting, and conduct.<sup>514</sup> The analysis in this part of the thesis will be restricted to various forms of non-violent expressions. Space constraint does not allow discussing expressions that involve physical violence.

As it is used here, the term non-violent expression refers to those expressions that, although directly or indirectly incite, encourage, support, or provoke violence, do so implicitly without reference to physical harm.

#### 3.2.1.1 Non-violent Terrorist Expressions

Incitement to terrorism is not the same as incitement to violence. Of course, there are various forms of violent acts that would not fall within the definition of terrorism.<sup>515</sup> At international level, the ICCPR<sup>516</sup> and some UN resolutions<sup>517</sup> broadly condemn any incitement to violence. However, they lack a specific definition of the latter; particularly the term is intermingled with incitement to terrorism. Some authors suggest that the 'Rwandan Media Trial' case could be used as a standard to define incitement.<sup>518</sup> As this author stated, the analogical

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<sup>513</sup> Sottiaux, S., *supra* note 429, p.67.

<sup>514</sup> Henkin, K. (1986). Foreword: On Drawing Lines. 82 *Harvard law Review* 63; see also *Arslan v. Turkey*, *supra* note 481; see also *Karatas v Turkey*, *supra* note 500.

<sup>515</sup> Saul, B. (2008), *supra* note 264; see also Walker, C. (1992), *supra* note 223, pp. 6-10.

<sup>516</sup> Article 20(2) of the ICCPR

<sup>517</sup> See General Assembly Resolution A/RES/46/51 (1991): Measures to Eliminate International Terrorism; see also UN Security Council, Security Council Resolution 1624 (2005) [on Threats to International Peace and Security], 14 September 2005, S/RES/1624 (2005).

<sup>518</sup> Davis, S. W. Incitement to Terrorism in Media Coverage: Solutions to Al-jazeera after the Rwandan Media Trial. 38 *Geo. Wash. Int'l L. Rev.* 749.

application of the principles employed by the Nuremberg trial is in line with some US Supreme Court cases.<sup>519</sup>

The UN High Commissioner for Human Rights<sup>520</sup> has accepted the three-test requirement followed by the ECtHR.<sup>521</sup> It further gave unreserved support to the definition of incitement to terrorism provided by the Council of European Convention on the Prevention of Terrorism (Warsaw 16. v. 2005) (ECPT). According to Article 5 of the ECPT, incitement to terrorism is defined by a three-fold criterion, namely; communication with the public, intent and probability of causing a danger.<sup>522</sup>

The explanatory notes to the ECPT provide a broad definition of public communication. The Convention states, *inter alia*, that public communication could be:

*...printed publications or speeches delivered at places accessible to others, the use of mass media or electronic facilities, in particular the Internet, which provides for the dissemination of messages by e-mail or for possibilities such as the exchange of materials in chat rooms, newsgroups or discussion fora.*<sup>523</sup>

The first segment of the above definition, i.e. "printed publications or speeches delivered at places accessible to the public" is particularly relevant here as it differs from the ECtHR position in *Arslan v Turkey* and other cases. This part of the definition disregards the consideration as to whether a particular expression that incites terrorism is in newspapers or in books or literally works.

The second element needs no further explanation as the explanatory notes state that "the exact meaning of "intentionally" is left to national law."<sup>524</sup> With regard

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<sup>519</sup> See for instance, *Brandenburg v Ohio*, supra note 446

<sup>520</sup> Office of the United Nations High Commissioner for Human Rights (2008). Human Rights, Terrorism and Counter-Terrorism, Fact Sheet No. 32. ISSN 1014-5567, para. 35.

<sup>521</sup> See for example, *Sunday Times v UK* (no. 1), 26 April 1979, Series A no. 30.

<sup>522</sup> Article 5(1)

<sup>523</sup> Council of Europe (2005). Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism .CETS No. 196, para. 104.

<sup>524</sup> *Ibid*, para. 85.



to the third element, the explanatory notes to the ECPT stated that Article 5 covers non-causative speech.<sup>525</sup> What is important is whether the speech causes potential danger, not its link to actual danger.

In the UK, Terrorism Act 2000 (TA) has specifically outlawed direct incitement to terrorism.<sup>526</sup> However, TA differs from the precedent of the ECtHR, as it does not refer to the medium of communication. A literal interpretation of TA appears to suggest that the UK legislature has distanced itself from the consideration of the medium of expression as employed by the ECtHR. Even in earlier legislation<sup>527</sup>, such distinctions were absent. Moreover, contrary to the position of the ECtHR, many common law decisions that dealt with incitement to violence/terrorism did not pay attention to the medium of communication.<sup>528</sup> The common law contains some criteria of evaluating incitement to an offence i.e. a person is guilty of incitement to commit an offence or offences if:

- a. s/he incites another to do or cause to be done an act or acts which, if done, will involve the commission of an offence or offences by the other; and*
- b. s/he intends or believes that the other, if he acts as incited, shall or will do so with the fault required for the offence.*<sup>529</sup>

The content of an expression is evaluated by reference to these elements. None of these elements refers to the medium of expression. The Crown Prosecution Service (CPS) guidance defines violent extremism as:

*the demonstration of unacceptable behaviour by using any means or medium to express views which foment, justify or glorify terrorist violence in furtherance of particular beliefs; seek to provoke others to terrorist acts; foment other serious*

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<sup>525</sup> Ibid, p.34.

<sup>526</sup> See sections 59-61TA 2000 for incitement overseas.

<sup>527</sup> Section 2 of the Sexual Offences Act (Conspiracy and Incitement Act 1996); Section 4 of Offences Against the Person Act 1861; Section 19 of Misuse of Drug Act 1971

<sup>528</sup> See House of Lords Select Committee on Religious Offences in England and Wales (2003). Religious Offences in England and Wales: First Report of session 2002-2003 (HL Paper 95-I). London, TSO, para. 70; see also R v Higgins [1801] 2 East 5; R v Fitzmaurice [1983] 2 WLR 227; R v Krause (1902) 18 LTR 238; Invicta Plastic LTD v Clare (1976) Crim LR 131.

<sup>529</sup> See R v Claydon [2006] 1 Cr. App. R. 20.

*criminal activity or seek to provoke others to serious criminal acts; or foster hatred which might lead to inter-community violence in the UK.*<sup>530</sup>

The above definition does not consider the medium of expression as it specifically states that violent extremism could be communicated "by using any means or medium to express views which foment, justify or glorify terrorist ..."

Unlike the UK courts, the US courts, as discussed in the previous sections, have managed to identify several competing principles in the determination of what constitutes violent nature in speech. The position of the US courts is not as consistent as the UK courts. This is partially due to the absence of consensus on the definition of these principles. This is not to say that the principles are vague. The problem rather rests on the absence of a general definition of each doctrine.

Legal scholars have spent years trying to define 'clear and present danger,' the 'bad tendency tests,' the 'incitement to imminent lawless action test,' and the 'categorical and balancing test.' They have yet to reach agreement on the exact scope of these doctrines. Some doctrines have been ignored, modified, or abandoned over time.<sup>531</sup> In contrast, the UK's criteria of evaluating incitement to an offence are relatively easy to understand.

Irrespective of the various principles it tried to employ, the US Supreme Court has never shifted the balance from the content-effect approach in its analysis of the medium of expression.<sup>532</sup> To the extent of the knowledge of this research, no Supreme Court case has found a breach of the First Amendment based on the medium of expression. As some authors have alluded to,<sup>533</sup> the arguments in the

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<sup>530</sup> Crown Prosecution Service. Prosecution Policy and Guidance: Violent Extremism and Related Criminal Offences, at [http://www.cps.gov.uk/publications/prosecution/violent\\_extremism.html](http://www.cps.gov.uk/publications/prosecution/violent_extremism.html)

<sup>531</sup> For instance, see *Brandenburg v Ohio*, supra note 446 (in "*Whitney v California* ... the court upheld a statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S. 494 at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

<sup>532</sup> Sottiaux, S supra note 429.

<sup>533</sup> Barnum, D. G., supra note 444 and Brennan, W. J. , supra note 455

US are instead dominated by the various competing principles the US Supreme Court employed at different times to analyse the content of a speech and its potential effect.

However, under exceptional circumstances, the US Supreme Court has also deferred the full protection of the First Amendment. This is especially true in commercial speeches such as adverts.<sup>534</sup> While defining speeches that fall into the category of commercial speeches as those that "propose a commercial transaction,"<sup>535</sup> the US Supreme Court held that the First Amendment "...affords a lesser protection to commercial speech than to other constitutionally guaranteed expression."<sup>536</sup> Other exceptions to the First Amendment based on the medium of expression include radio and Television broadcasts.<sup>537</sup> However, even this regulation of speech via radio and Television is limited to an expression that is detrimental to the well-being of children, such as the broadcast of indecent materials.<sup>538</sup>

However, from 'bad tendency test'<sup>539</sup> to the latest decisions such as *Holder v Humanitarian Project Law*<sup>540</sup> that regulates 'pure political speech' in regard to foreign terrorist organisations, the Supreme Court has never taken into account whether these expressions are communicated via literary works, books, or artistic works to determine that they incite violence.

### 3.4.1 The relevance of medium of expression under Ethiopian law

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<sup>534</sup> For further details, see Brody, S. G. and Johnson, B. E. H. (2004). *Advertising and Commercial Speech: A First Amendment Guide*. 2<sup>nd</sup> edition. (New York, Practising Law Institute)

<sup>535</sup> *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989), para. 482

<sup>536</sup> *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), para. 426; see also *Central Hudson Gas & Electric Corp. v Public service Commission of New York*, 447 U.S. 557 (1976)

<sup>537</sup> See *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); see also *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978)

<sup>538</sup> For further discussion see Cohen, H. (2009). *Freedom of Speech and Press: Exceptions to the First Amendment*. CRS Report for Congress Prepared for Members and Committees of Congress (Congressional Research Service 7-5700), 16 October, pp. 23-25

<sup>539</sup> *Patterson v Colorado*, supra note 441

<sup>540</sup> *Holder v Humanitarian Law Project*, supra note 451

Several court cases deal with incitement to terrorism in Ethiopia. As can be inferred from table 2.3 below, incitement to terrorism is the most commonly mentioned offence. However, there is a fundamental problem associated with these cases. Defining the content of an expression based on the medium of communication in similar manner to the jurisprudence of the ECtHR could give more protection to artists or journalists or publishers in countries such as Ethiopia

The positive effect of the ECtHR position on the following newspapers is a good example why the medium of expression could be relevant in the analysis of expressions that do not necessarily incite terrorism.

The following is translations of articles in newspapers published during the 2005 general election in Ethiopia.

**Table 2. 1: Editorial Opinions in Newspapers**

Abay February, 2005	It is a sin to be ruled by bandits, but it is liberating to revolt against them. We have to express our frustration. If a soldier comes and frightens you, you should push forward not backward. If you do not accept this plea, you are Ethiopia's number one enemy. There is no redemption without blood
Tobia February, 2005	The unfair election has began
Ethop February, 2005	Not only public violence, but there could also be war. Members of the ruling party should free themselves by stopping to follow few individuals. They should stop living only to fill their belly like animals
Tobia November 2004	The election is to coincide with war
Reporter April, 2005	The election may be unfair.
Abay January, 2005	Lets come together and get rid of this government
Abay January, 2005	Ethiopian revolutionary front or Eritrean Revolutionary Front? If EPRDF wins this election, not only will all the hopes and developments be buried, but we will also be under Eritrean colony. Thus, individual electorate should know that the choice is between freedom and slavery

Tobia November, 2005	Published an artistic expression which displays a gun standing next to a big ballot box with a title "stop blaming the darkness by lighting two candles at a time"
Abay April , 2005	As the election is approaching, the attack is intensifying
Abay February 2005	Before this country is disintegrated and disappeared from the world map, let's come together and make history. Otherwise, the blame rests on this generation.
Abay February , 2005	Published 10 declarations that should be followed by the public. Declaration number six stated, "we can shorten the life of the ruling party by identifying members, supporters, and the spies."
Ethiop February, 2005	One that experienced a burning fire should not play with it again. EPRDF and the election board are the same.
Ethiop January, 2005	the election is coming fast and the election board is in disarray
Abay February, 2005	A power lost in election should be retaken back by revolution.
Freedom September, 2005	Dear Ethiopians, you should expect a call for public revolt. The public should rise to uncover the conspiracy that is targeting the country. My freedom should not be taken away. Governing the people at a gun point should be stopped now.

**Table 2. 2: Articles Published based on Interviews and Polling Predictions Compiled by the Opposition Parties in the Aftermath of the 2005 Controversial Election.**

Freedom May, 2005	We will take action. We have got 201 parliamentary seats so far.
Freedom May, 2005	Election board has ruled itself out of the election process. We have got around 314 seats. This is enough to administer Addis Ababa and Amhara region
Minilik, April, 20005	Kingit won 95% of the votes disclosed so far.
Finch, April 2005	Confirmed results: EPRDF 162; opposition parties 240.
Ethop, May , 2005	The opposition parties need only 38 seats to establish a government
Freedom, May, 2005	Agazi Brigade is moving towards the capital. The public should expect a call.

Addis Zena, July , 2005	Leaders! Pull the trigger and we will follow you. It is time to flood the streets with a revolution. You should be a shield and we will be the spear. EPRDF should hand over power.
Freedom, June , 2005	If the public turns into fire, the government should be the petrol
Freedom, June , 2005	War has broken out. We have overcome government soldiers.
Minilike, September , 2005	Industrial public protest; bumper strike, delay production, absenting from work place, leaving your job voluntarily.
Addis Neger, 2009	Welaita is embracing itself for a green starvation
Tobia, 2006	There is no fertile ground for investment in Ethiopia
Raja, August , 2008	New fears of famine in Ethiopia. A ticking bomb
Reporter, 2009	Expensive dam faces landslide within one year of its inauguration

As indicated above, some of the expressions in the newspapers are, in terms of their content, the same as the series of cases that came after *Arslan v Turkey*. The only detail on which they differ from *Arslan v Turkey* is the medium of expression used. If content is to be taken as the main criteria, then some of the articles appear to incite violence. Only some of the articles contained a specific or general call to violence. As it has been demonstrated by the ECtHR,<sup>541</sup> the common law<sup>542</sup>, and the US cases<sup>543</sup>, it is insignificant whether the intended incitement to violence is expressed or implied. On the other hand, some of them

<sup>541</sup> See *Hogefeld v Germany*, no. 35402/97, 20 January 2000; see also Council of the European Union (2002). Council Frame Work Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA). Luxembourg, Council of the European Union; see also Council of Europe (2005). Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16.V.2005). Strasbourg : Council of Europe; see also UN Security Council, Security Council Resolution 1624 (2005) [on Threats to International Peace and Security], 14 September 2005, S/RES/1624 (2005).

<sup>542</sup> *Invicta Plastics Ltd v Clare*, supra note 528; see also *Hansard HC Deb Vol. 676 Col. 452* (5 Dec 2005) ("the difference between direct and indirect incitement depends not on intent-both require the same intent. The difference seems to lie in the strength of language used by the potential defendant.")

<sup>543</sup> *Brandenburg v Ohio*, supra note 446

fall into either the category of 'mere incitement' (advocacy)<sup>544</sup> or 'creating discontent or dissatisfaction'.<sup>545</sup>

Though the US courts have yet to define what direct or indirect incitement is, a call to overthrow the government by force is one of the non-protected expressions on both sides of the Atlantic.<sup>546</sup>

Closer scrutiny of the above Ethiopian newspaper articles show that most of them would likely be grouped into, to borrow the words of the US Supreme Court, expressions that 'create discontent or dissatisfaction'<sup>547</sup> rather than categorized as inciting violence.

For instance, some of the commentary<sup>548</sup> merely criticises the Ethiopian government for failing to handle the country properly. This is an opinion readily and rightly available in any democracy. Moreover, the articles urged the people to come together and resist any government attempt to stifle the opposition and riddle the election results. In US or the ECtHR terminology, they can be construed as motivating the people to "... believe in something"<sup>549</sup> or inform about "matters of a general public interest, respectively."<sup>550</sup>

The Reporter<sup>551</sup> and Tobia<sup>552</sup> particularly announce that the election will be rigged. As a result, the intended effect is likely to cause readers to lose trust in the election process and election board.

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<sup>544</sup> Ibid

<sup>545</sup> See *Arslan v Turkey*, supra note 481, para.44; see also *Yates v United States* 354 U.S. 298 (1957) (it was held a speech that "... urge to believe in something' is not punishable.")

<sup>546</sup> For the United States, see *Gitlow v New York*, 268 U.S. 652 (1925) and *Whitney v California*, supra note 441, and *Yates v United States*, supra note 545. For ECtHR, see *Ceylan v Turkey* (no. 2), no. 46454/99, 11 October 2005; see also *Incal v Turkey*, 9 June 1998, Reports of Judgments and Decisions 1998-IV

<sup>547</sup> *Brandenburg v Ohio*, supra note 446

<sup>548</sup> Abay, January 21, 2005; Tobia, 2006; Raja, August 16, 2008; Addis Neger, 2009

<sup>549</sup> *Yates v United States*, supra note 545

<sup>550</sup> *Thorgeirson v Iceland*, 25 June 1992, Series A no. 239; *Fressoz and Roire v France* [GC], no. 29183/95, ECHR 1999-I.

<sup>551</sup> Reporter, April 2 2005.

<sup>552</sup> Tobia, February 1 2005.

By contrast, other newspapers<sup>553</sup> had predicted that the opposition parties won the election. The effect seen here balances out the argument: people started to believe that the ruling party lost the election. This is democracy at work. If the standard of the US and ECtHR is to be taken, then there would be no criminal liability in these instances as they do not incite violence or terrorism.

Other articles<sup>554</sup>, in contrast, contained elements that could be seen to amount to a direct or indirect call to overthrow the government, wage war or incite public violence.

The article in Abay<sup>555</sup>, for example, begins with an implicit call on the public to strike. It did not call for war, violence, or terrorist activities. Instead, it is a general call to the public to express their 'frustration' through the means of a strike. However, expressing one's 'frustration' does not necessarily imply violence. The contention arises during the third, fourth, and fifth sentences, in which the Article explicitly calls for the resistance by force of any government attempts to stifle the 'frustration'. These sentences could tenuously be seen as an attempt by the newspaper to draw attention to a matter of legitimate public concern.<sup>556</sup> It would be disingenuous to interpret them as a general call to overthrow the Ethiopian government; it does not assume the tone of a "radical political view."<sup>557</sup> Perhaps, the best way to explain the article is as a call to resist any "government enforcement of a law," as they seem to merely encourage "the use of force or a law violation"<sup>558</sup> and as such are unlikely to cause "imminent lawless action."<sup>559</sup> The lack of imminence owes itself to the qualification within the calls that force is dependent on State attempts to quash what the Article sees as a legitimate right of protest; in effect, force is advocated as a policy of last resort.

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<sup>553</sup> Ethop, May 17, 2005; Minilik, April 19, 20005; Finch, April, 2005; Freedom May 25, 2005

<sup>554</sup> Abay, February 5, 2005; Abay, January 28, 2005; Abay, February 12, 2005; Freedom June 16, 2005; Ethop February 23 2005; Tobia November 2004; Tobia November 2000

<sup>555</sup> Abay February 5, 2005.

<sup>556</sup> *Wingrove v the United Kingdom*, 25 November 1996, Reports of Judgments and Decisions 1996-V.

<sup>557</sup> See *Gitlow v New York*, supra note 546; see also *Whitney v California*, supra note 441

<sup>558</sup> *Brandenburg v Ohio*, supra note 446

<sup>559</sup> *Ibid*



The content of other articles<sup>560</sup> were different, however. Not only did the articles advocate the use of violence, they also (directly or indirectly) used expressions that could be construed as an attempt to incite the use of force to overthrow the government. By contrast with the previous articles, they are not reactive in their tone; they advocate proactive action. This crucial distinction is what determines these articles as outside the remit of legitimate expression.

The article in *Tobia*<sup>561</sup> needs special analysis. As in *Arslan*, the case concerned the use of artistic expression as the means by which the applicant gave effect to his right to freedom of expression. This article published an artistic expression which displays a gun standing next to a big ballot box with a title "stop blaming the darkness by lighting two candles at a time". The article in *Tobia* raised the possibility of using both a peaceful and a violent means of protest.

However, contrary to the mediums used in *Arslan v Turkey* and *Karatas v Turkey*, the artistic expressions in the *Tobia* example were published in a national newspaper. According to ECtHR precedent, therefore, they would be tantamount to direct incitement to violence, as they were disseminated to the public via the mass media. If the position of the ECtHR is to be taken at face value, it arguably makes for a dangerous scenario as the focus would shift from the contents of the articles to whether they are published via the mass media. This is especially true for countries that do not provide a forum in which parties can challenge decisions of domestic courts by regional courts such as the ECtHR or independent supreme courts such as the US one. However, when the ECHR was making distinction into mass media and artistic works or books, the intention was to give more protection to people who are not "representatives of organisations which resort to violence against the State."<sup>562</sup>

Therefore, the ECtHR precedent should be interpreted positively in order to avoid prosecuting every piece of work that appears in a mass media.

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<sup>560</sup> Freedom June 16, 2005.

<sup>561</sup> *Tobia* Nov, 2005; *Abay* February 12, 2005; Freedom June 16, 2005.

<sup>562</sup> *Erdođdu and İnce v Turkey*, supra note 508

After the 2005 general election in Ethiopia, many allege that the Ethiopian government imposed a blanket criminalisation of all newspaper articles that advocate violence. They base their argument on the journalists who wrote the news articles listed in tables 2.1 and 2.2 above and were tried and convicted. One case that is often mentioned is the 2006 terrorism charge against senior opposition political leaders and several journalists.<sup>563</sup> Although all of them were charged with several offences, the following charges could be mentioned here:

*Violating Article 238(1) and 241 of the Ethiopian Criminal Code (committing an act of violence, threats, conspiracy to overthrows, modifies or suspends the Federal or State Constitution); violating Articles 247 of the Ethiopian Criminal Code (destroying, sabotaging, or putting out of action any enterprise, installation or position, any means of production, trade or transport or any works, establishments, depots, armaments or resources of a military nature or intended for the defence of the country); violating Article 269 (a) of the Ethiopian Criminal Code (Organising, ordering or engaging in: killing, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear).*

The evidence against the journalists was composed of news reports listed in the above tables and other evidences. The Court ruled that the prosecutor's evidence proved *prima facie* that the articles written by the journalists during and after the 2005 general election incited violence, terrorism and resulted in the death of several people.

As discussed in this chapter, though the FDRE constitution does not stipulate that a restriction on freedom of expression could be imposed only if it is necessary and proportionate, we have shown that this requirement could be applicable in Ethiopia by virtue of Article 13 (2) and Article 9 (4) of the FDRE constitution, which gives weight to international documents ratified by Ethiopia. Therefore, a limitation on freedom of expression and the press is lawful under Ethiopian law

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<sup>563</sup> See Public Prosecutor v Hailu Shawul (Engineer), supra note 61; see also another case against the same political leaders and journalists at Public Prosecutor v Tefera Mamo, supra note 64; see also chapter two for discussions on *Kinjit* and *Ginbot 7*

only if it is provided by law, legitimate, and necessary. However, the charges against the journalists as stated above are vague because they do not distinguish between peaceful expression and terrorist expression. Moreover, the applicable laws against them dealt with violence against the state or the constitutional order. But the journalists are tried for inciting and committing terrorist acts. The conviction of the defendants for inciting terrorist acts is problematic in light of their right to freedom of expression as guaranteed under Article 26 of the FDRE Constitution because their conviction was not 'proscribed by law'. This is due to the fact that the charges against the journalists do not have adequately precise definition, consequently undermining the principle of legitimacy, which necessitates that criminal law is formulated clearly and precisely to allow individuals to know what constitutes a crime.<sup>564</sup>

It could be argued that the government had a legitimate aim to contain the violence that was spreading throughout the country after the announcement of the general election. Many people lost their lives during demonstrations that took place in different parts of the country between the 8<sup>th</sup> of June and 2<sup>nd</sup> of October, 2005. Thus, abridging freedom of expression during compelling circumstances and in accordance with specific laws is justified.<sup>565</sup> But as discussed in this chapter, Article 29 of the FDRE Constitution does not contain national security or maintaining public order as compelling circumstances. However, we have argued that these circumstances could be applied in Ethiopia via Article 19 of the ICCPR.

A further argument could be made based on the provisions of the Ethiopian Criminal Code. According to Article 24(1) of the Ethiopian Criminal Code, "In all cases where the commission of a crime requires the achievement of a given result, the crime shall not be deemed to have been committed unless the result achieved is the consequence of the act or omission with which the accused person is charged." But some of the newspaper articles did not incite violence or

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<sup>564</sup> *Sunday Times v UK* (no. 1), *supra* note, para. 435

<sup>565</sup> See for instance, *Leroy v. France*, no. 36109/03, 2 October 2008 (the ECtHR in this cases upheld the conviction of a French cartoonist for publishing a cartoon depicting the terrorist attack in the US. The ECtHR was convinced that the publication of the drawings two days after the 9/11 attack mounts to giving "moral" support to the terrorists.)

terrorism despite the ruling of the Ethiopian High Court that the newspaper articles had "cause and effect" relationship with the violence that ensued following the election.<sup>566</sup> But it undermines democracy to prosecute journalists for encouraging people to "express their frustration" against the Ethiopian government<sup>567</sup>; or informing the electorate that the "election board is in disarray";<sup>568</sup> or predicting the results of the election<sup>569</sup>.

The third test to consider is whether the measures taken were necessary and proportionate.<sup>570</sup> Punishing journalists<sup>571</sup> for writing newspaper articles that criticise the government and reflecting the views of the opposition parties is disproportional "to the value which the restriction serves to protect"<sup>572</sup>. The decisions of the Ethiopian High court to impose fines and ban the publishing companies of the newspapers were also disproportionate. Moreover, it is also against the spirit of the FDRE Constitution, which prohibits restricting freedom of the press based on the "content or the views expressed."<sup>573</sup>

Though the journalists were later released on pardon together with the opposition leaders as a result of the concerned effort of the *committee of wise men*,<sup>574</sup> human rights organisations take the view that this trial has set a bad precedent in relation to press freedom in Ethiopia as the same journalists and political leaders were later convicted for inciting terrorism.<sup>575</sup> Since the above trial, some argue that it has become an 'Ethiopian reality'<sup>576</sup> for journalists to flee the country in search of safety. All of the newspapers listed in the above tables are now defunct. Some

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<sup>566</sup> Public Prosecutor v Hailu Shawul (Engineer), supra note 61

<sup>567</sup> Abay Feb, 2005

<sup>568</sup> Ethiop January , 2005; Freedom May, 2005

<sup>569</sup> Freedom May 11, 2005; Minilik, April 19, 20005; Finch, April 2005; Ethop, May 17, 2005

<sup>570</sup> See Faurisson v. France, supra note 472, para. 8; see also Vogt v. Germany, supra note 439, para. 52; see also Joseph, S., et al (2005), supra note 468; see also Nowak, M. (2005), supra note 468, p. 447

<sup>571</sup> A decision against the newspaper editors of Hadar, Ethiop, Tobia, Freedom, Minilik, Finch, Addis Zena, Tobia, and Raja

<sup>572</sup> See Faurisson v. France, supra note 472, para. 8

<sup>573</sup> Article 29(6) of the FDRE Constitution

<sup>574</sup> See chapter two for further discussion

<sup>575</sup> Public Prosecutor v Tefera Mamo, supra note 64; see also for further discussion on some of the journalists at Prosecutor v Elias Kifle, et al, infra note 763 ; Public Prosecutor v Andualem, infra note 763

<sup>576</sup> Tadesse, K. (2012). Press in exile: An Ethiopian reality, 16 April, *Capital Newspaper*

international organisations has arguably placed Ethiopia amongst the worst place to live for journalists in the world.<sup>577</sup>

To allay the above concerns, it might be better for the government to implement a case-by-case analysis policy to adopt the ECtHR jurisprudence that seeks to determine the legal liability of expressions based on each article's propensity to 'effect' violence, or any other illegality criteria the government deems fit to incorporate. Crucially, a case-by-case analysis allows for the consideration for potential implications each article will have on its readers, thereby allowing for greater democracy. We must remember that there is a fine line between a powerful dissenting opinion, and the promotion of illegal behaviour. A blanket approach too readily risks subverting human rights ideals in favour of societal security.

Taking the interpretation of the ECtHR in *Arslan v Turkey* and *Karatas v Turkey* at face value could pave the way for the suppression of political dissent. Indeed, a challenge to new legislation is commonly met by African officials with a defence identifying its Western roots as giving *ipso facto* legitimacy and legality. The same kind of defence was used when Ethiopia passed its counter-terrorism law. It would be encouraging, however, if the jurisprudence of the ECtHR is used positively.

#### *3.4.2 Incitement to Terrorism: the Scope between Permitted and non-permitted expression under Ethiopian Law*

Under the category of terrorism cases, incitement was the most commonly mentioned charge. As can be seen from table 2.3 below, 24 out of 59 court cases consisted of allegations concerning direct and indirect incitement to terrorism. Unlike the newspaper articles discussed above, where there was clear communication between the alleged inciter and the readers of these articles, there was no such mass communication in most of the cases in table 2.3.

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<sup>577</sup> See Committee to Protect Journalists (2013). *456 Journalists Forced Into Exile since 2008*. Data covers June 1, 2008, through May 31, 2013

**Table 2. 3**<sup>578</sup>: Terrorism Cases and the Most Commonly Alleged Terrorism Offences in Ethiopia

file No.	nature of alleged offence	organisations linked to the alleged offence	weapons used or planned	law cited <sup>579</sup>
39/1995	Inciting religious violence, civil war, arming citizens, illegal organisation, disruption of public services, breach national security	No	No	252
94/1995	Adhere to scheme, armed raising, homicide, breach of peace	OLF	No	252, 282
41/1996	Inciting ethnic violence; inciting civil war; possession of fire arms; murder	N	firearms	522; 637; 764
?/1997	Membership, support, material preparation, crimes against a foreign state	Jamaat- al-islami	firearms	273 274 522(1)
123/1998	Membership, organize secret meeting, murder, adhere to terrorist organisation scheme, receiving instruction, support (advice), training	Ali-Tad	bombs	252(1), 270(b-d), 253;271;255
1025/2000	Membership to terrorist organisation; possessing terrorist flag; recruiting and taking terrorist training; material preparation	OLF	Bombs	241; 252;
17511/677/2000	Espionage, material preparation, burning emblems, possession, training, recruiting	OLF	bombs	251(1)(a)
8705/2003	Membership to terrorism organisation; inciting murder;	OLF	arms	252, 281
9832/2003	Armed raising, robbery, membership	IFLO	guns	252;637;569
238/1998	Raising civil war, armed rebellion, publication, possessing terrorist materials, support, membership,	OLF	bomb	252, 254, 475, 522
33101/2004	Membership, organising meeting, incitement, espionage, armed raising	OLF	No	252
37041/2004	Inciting attacks on civilians	N	Guns	637 ; 538
36268/2005	Training, membership, support, armed raising, receive instruction,	OLF	N	252(1)(a)
	material preparation, possession, and collecting information			

<sup>578</sup> The table only makes a reference to the file numbers. Please see Appendix A for details of the cases.

<sup>579</sup> All the articles cited are from the old and the new Criminal Code of Ethiopia as well as the EATP

37299/ 2005	Organize, inciting, plan, murder, robbery, membership, breach of peace	ONLF	arms	637;252; 269;522
40783/ 2005	Possession, endorsing, terror preparation, support	OLF	bombs	240(3)
41449/ 2006	Membership, recruit, material preparation, receive instruction,	OLF	money, arms	256(b)
17722/ 2007	Inciting civil war and terrorism; inciting murder and ethnic violence	OLF		252;282
25845/ 2007	Burning emblem	KINJIT	stones, fire, explosive	238(1)(a)
25993/ 2007	Participating in a violent protest, and conspiracy	KINJIT	stones	238(1)(a)
26208/ 2007	Burning emblem	KINJIT	stones, fire	238(1)(a)
26858/ 2007	Accomplice in a conspiracy to overthrow the government modify the constitution	KINJIT	No	238(1)(a)
27093/ 2007	Accomplice in a conspiracy to overthrow the government modify the constitution	Kinjtit	stones	238(1)
27536/ 2007	Accomplice in a conspiracy to overthrow the government modify the constitution	KINJIT	No	238(1)a
27720/ 2007	Incitement, robbery, armed raising & civil war, organize & lead	OLF	arms, munitions	252(1)(a), 255(2)
50798/ 2008	Membership, possession, arms traffic, material preparation, recruit, support, organize	OLF	Storing arms, munitions	
51539/ 2008	Raising armed war, training, membership	OLF	bomb	241
51550/ 2007	Membership, supporter, military training, , incitement			
56118/ 2007	Membership, material preparation,	EPPF	knives, arms	256
56550/ 2007	Collecting information, incitement, revolt & mutiny, recruit, support participate in material preparation, treason, planting bombs, storing bombs, receiving instruction, espionage, illicit trafficking	Eritrea	bombs	246;252;242; 256;248; 346
29574/ 2008	Public provocation, incitement to racial hatred	No	No	480(b)
34705/ 2008	Support, incite to terror, adhere to scheme	OLF	bombs	269(c)
49303/ 2008	Material possession, civil war, storing, material ,preparation, membership	FIO	arms, bombs	241;240(1) 256(b)
59989/ 2008	Support, membership, provocation & preparation, possession, crimes against public security, recruit, train, incite, organize meetings	OLF	bombs, arms	238(1);241;2 58
6000/2008	Membership, conspiracy, threat, support, espionage, recruit, organize, receive	OLF	N	238,241, 811
	instruction, incitement			

60086/ 2008	Membership, conspiracy, to overthrow the constitution, recruit, train, support, raising war, organizing riot	OLF	bombs	238(1);256(b);481
60184/ 2008	Membership, arms raising, military training, counterfeit	ONLF	N	238(2);241;36(1)(a)
60575/ 2008	Recruit, support, membership, organize, incite, material preparation	EPPF	N	238; 256
61656/ 2008	Training, armed raising, membership, inciting war, forgery, unlawful departure, lead, recruit, possession	OLF	N	240;241 243;385
61663/ 2008	Distributing pamphlets	EPPF	N	240(3)
62221/ 2008	Adhere to scheme, membership, recruit, support, possessing, conspiracy, material preparation,	OLF	bombs	258(d);238(1)(b);385(1);390
64246/ 2008	Membership, mutiny, revolt, recruit, incite, organize, armed raising or civil war, adhere to scheme, receiving instruction,	OLF	No	240(1);241;256
69430/ 2008	Indirect aid and encouragement,	N	N	254(1)
5-2592/ 01335/2009	Inciting violence against the political or territorial integrity of the State; inciting armed rising or civil war or terrorism	N	N	241
58070/ 2009	Membership, organize, recruit, and train for (guerrilla warfare); support (money, documents), storing weapons	OLF	arms, munitions	241, 811
60083/ 2009	Membership, threat, conspiracy, violence, training, support, traffic in arms, possessing materials that incite	OLF	bombs, arms	238(2);241
60265/ 2009	Membership, training, preparing manifesto, seduction, incite publication	OLF	N	238(2), 241
68104/ 2009	Printing, distributing and possessing terror materials, incite, provocation, support, encourage, seduction, misuse of public property	EPPF	N	257(a);244(1); 677(1)
69201/ 2009	Publishing false rumours to cause discontent and dissatisfaction among some religious followers; inciting violence and hatred	N	N	?
71000/ 2009	Provoking and inciting ethnic violence; murder; robbery;		Arms,	269(a);494(2); 683(c);
77113/ 2009	Joining a terrorist organisation; participating in training provided by a terrorist organisation;	OLF		241,
81406/ 2009	Establishing a terrorist organisation; preparing terrorist plan; disrupting the constitutional order; recruiting soldiers for terrorism; violating territorial integrity of	Ginbot 7		238;240(1);247, 256,



	the state;			
89341/ 2009	Inciting civil war, taking military training, conspiring to kill public officials	EPPF	Arms, munitions, money	240, 256
89647/ 2010	Membership to terrorist organisation	OLF	N	257
112198/ 2011	'Rendering Support to Terrorism; 'Participation in a Terrorist Organisation; Violation of Political or Territorial Sovereignty	ONLF	N	Articles 5 and 7 of the EATP and article 242 of the Ethiopian Criminal Code
?/2011	Planning, Preparation, Conspiracy, Incitement and Attempt of Terrorist Act'; Participation in a Terrorist-Organisation'; Possessing and dealing with the Proceeds of a Terrorist Act; Money Laundering and Aiding; Rendering Support to Terrorism	Ginbot 7	N	Articles 3, 4, 5, 7, and 9 of the EATP and article 648 of the Ethiopian criminal Code
?/ 2011	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; Planning, Preparation, Conspiracy, Incitement and; Attempt of Terrorist Act; Encouragement of Terrorism; High Treason; Espionage; Participation in a Terrorist Organisation; Rendering Support to Terrorism	Ginbot 7	N	Articles 3, 4, 5, 6, and 7 of the EATP and articles 248 (b) and 251 (1)(a) of the Ethiopian Criminal Code
?/ 2011	Attacking the Political or territorial integrity of the State; material preparation for Subversive; Provocation and Preparation	OLF		Articles 241, 256, and 257 of the Ethiopian Criminal Code
?/ 2011	Attacking the Political or territorial integrity of the State	OLF		241 of the Ethiopian criminal Code
?/ 2011	Attacking the Political or territorial integrity of the State; material preparation for Subversive; Provocation and Preparation	OLF		


As shown in table 2.3, the allegations of incitement range from raising war and armed rebellion, to creating discontent and dissatisfaction, destroying the unity and overthrow of the constitution, to causing religious and ethnic violence, murder, breach of peace, racial hatred, and terrorism. But how many of them were likely to cause or have caused real danger to national security? And how is the scope of freedom of expression and violent expressions balanced in Ethiopia? Is mere advocacy of violence punishable?

Before the enactment of the EATP, the motives for violence were not one of the definitional elements of violence in Ethiopia. Incitement to terrorism and incitement to other serious offence were defined under the same heading. However, there are fundamental differences between the two forms of violence. Accordingly, terrorism could be defined by the three-fold criterion, namely; the targets, the seriousness of the violence, and the motives.<sup>580</sup> But the definition of incitement provided under Article 36 of the Ethiopian Criminal Code does not require either the motives or the targets to be considered. It simply states that

*Whoever intentionally induces another person whether by persuasion, promises, money, gifts, and threats or otherwise to commit a crime shall be regarded as guilty of having incited the commission of the crime*

A similar definition of incitement is provided under Article 2(6) of the EATP which states that "incitement means to induce another person by persuasion, promises, money, gifts, threats or otherwise to commit an act of terrorism even if the incited offence is not attempted." However, unlike the Ethiopia Criminal Code, the EATP under Article 3 contains the elements necessary to define

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<sup>580</sup> Saul, B. (2008), supra note 264

terrorism, namely; the motives (advancing a political, religious or ideological cause); targets (civilians, natural resource, environment, historical or cultural heritages, etc); and serious offences (destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country, etc)

For the above reasons, not all the acts mentioned in table 2.3 are acts of terrorism as they do not contain one or two of the above elements. However, in Ethiopia, there seems to be an issue with the identification of acts that fall, on the one hand, within the Ethiopian definition of terrorism and, on the other hand, acts of mere serious violence. The issue being that all acts of serious violence are categorized as terrorism. If that is the case, there would not have been a need for a separate law to deal with terrorism and the Ethiopian government would be unable to justify the need for the EATP.

The most frequently mentioned provision with regard to incitement to terrorism is Article 240 of the Ethiopian Criminal Code (Article 252 of the old Penal Code). The Article deals with 'armed rising or civil war.' Among the many unlawful acts mentioned under said Article 240 of the Ethiopian Criminal Code, sub-Article (1) (b) states that:

*... whoever intentionally raises civil war, by arming citizens or inhabitants or by inciting them to take up arms against one another, is punishable with rigorous imprisonment from ten years to twenty-five years.*

This Article is particularly utilised against one organisation, the Oromo Liberation Front (OLF), which is frequently accused of inciting and causing terrorism. Regardless of the legality of the procedures for proscription, the organisation is deemed terrorist. But taking the literal meaning of the above Article in the Ethiopian Criminal Code, if an organisation has instigated war and raised armed rebellion, the subsequent acts are governed by the rules of war, not anti-terrorism laws.

With a corresponding definition of incitement under Article 36 of the same Code and Article 2(6) of the EATP, Article 240(2) of the Ethiopian Criminal Code

provides a more severe punishment. Accordingly, "where the incitement has entailed serious crimes against public security or life, the punishment can be life imprisonment or death." Therefore, the Ethiopian Criminal Code provides only two options: death or life imprisonment. This is a more rigorous punishment than it is provided under Article 3(7) of the EATP, which provides "rigorous imprisonment from 15 years to life or with death." The problem here has been the fact that the Ethiopian courts do not differentiate between armed raising or civil war and inciting terrorism.

A case to emphasize this point is the case of Shiferaw Hinsermu.<sup>581</sup> The facts of the case were as follows. The defendant, in a newspaper article, criticised the regional president of the Oromo region for failing to take into account the horrible measures taken by the government against the Oromo tribe. He also criticised the government for the brutality being waged against that tribe. He further alleged that members of the Oromo tribe are imprisoned, persecuted, tortured, and killed without fair trial. Some of the highlights of what the defendant was demanding were as follows:

*A call for the government to give the Oromo tribe the right to self determination; freedom from colonisation by the Ethiopian government; a guarantee to freedom of speech; a call for the immediate release of those detained illegally and; call for foreign governments to stop aiding the government.*

However, as can be seen, the demands of the defendant appear not to cause any threat to national security or territorial integrity of the State. Indeed, they do not advocate any form of violence. Taking the standards of the ECtHR as the benchmark for assessment here, the comments above were merely a criticism of government's handling of political situations.<sup>582</sup> Though the case was dismissed for lack of jurisdiction, it is relevant here as it furthers the argument that the medium of expression should not be as relevant as the content of a particular expression.

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<sup>581</sup> Debelu Waqqira Gemelal and Sheferaw Hinsermu Yigezu, *supra* note 345

<sup>582</sup> *Sunday Times v UK (No.1)*, *supra* note 435; see also *Lingens v Austria*, 8 July 1986, Series A no. 103

Unlike the US and ECtHR positions, causing discontent or dissatisfaction amongst the public or within a specific section of the public is apparently punishable in Ethiopia. These allegations are similar to the outdated Sedition Act 1918.<sup>583</sup> In one case,<sup>584</sup> a newspaper editor and the owner were charged for causing discontent and dissatisfaction within a religious organisation in an article that exposed the dispute between the Ethiopian Islamic Religious organisation and Ethiopian Ministry of Education. The prosecution alleged that the content of the newspaper was full of lies and based on false rumours. The article, it was alleged, incited people to violence and hatred.

The defendants argued that the article was written based on news published on the internet. The first defendant was subsequently prosecuted and fined. However, in other cases<sup>585</sup>, the Ethiopian courts were lenient when punishing defendants whose articles were based on the media reports of others. In their reasoning, the Ethiopian courts surprisingly endorsed the ECtHR demarcation between "factual judgment and value judgement."<sup>586</sup> Nevertheless, the Ethiopian courts have refrained from delimiting the scope of permitted and non-permitted expressions. Despite the inconsistency of the decisions, the content of the expressions was not the main reason for quashing the decisions in the above cases. The fact that they were written on the basis of external sources made the courts decidedly more lenient.

The ambiguity regarding the meaning of incitement to terrorism is not restricted to newspapers editors and journalists. It is also common in other cases. This is evident from one case in particular in which the defendant was accused and convicted of incitement to terrorism for passing a bomb to a suspect who remained at large.<sup>587</sup> Taking the three elements relevant for the definition of terrorist, it is difficult to see how passing a bomb to someone else could be

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<sup>583</sup> The Sedition Act of 1918 (an Amendment to the Espionage Act of 1917)

<sup>584</sup> Public Prosecutor v Ezedin Mohammed Abdulseman, supra note 16

<sup>585</sup> Public Prosecutor v Arega Welde Kirkos (42277/2007); Public Prosecutor v Stegaye Zeleke et al. (43220/2000); Public Prosecutor v Andualem Ayele Legese (40757/2007); Public Prosecutor v Amare Aregawi W/Kidane (81380/2002)

<sup>586</sup> See *Bladet Tromsø and Stensaas v Norway* [GC] no. 21980/93, ECHR 1999-III

<sup>587</sup> Public Prosecutor v Merga Negara et al., supra note 16

considered act of incitement to terrorism. The prosecutor did not establish the motives, the targets or the serious nature of the alleged crime. Moreover, the case did not give much detail why the defendant was in possession of the bomb. He could be in possession of the bomb for other criminal activities or just to sell it. It was not also established that the person who remained at large was a terrorist. Without proving all these details, the defendant was convicted of inciting terrorism.

In a separate case,<sup>588</sup> a judge attempted the unenviable task of defining incitement to terrorism or violence. The defendant, an editor of a newspaper, was charged with inciting racial hatred and terrorism. The series of articles, published at different times, containing the following messages:

*why do we have to be ruled by the Tigrian tribe? Why do we choose silence when the tribal ruling system is spreading across the country? The Tigrian tribe is robbing the resources of the country. They are inhuman animals. They conspired with our enemies and betrayed the country into the hands of our enemies.*

The series of articles were entitled "Say no to Judas-Kiss." Article 480(b) of the old Ethiopian Criminal Code was the provision cited for the case. The said provision reads:

*Whosoever ... by whatever accusation or any other means foment dissension, arouses hatred, or stirs up acts of violence or political, racial or religious disturbances, is punishable with simple imprisonment or fine.*

The judge proposed four requirements for the substantiation of a racial hatred allegation and incitement to terrorism. First, the messages must target a particular race and should be based on false rumours. Second, it must be proved that the messages stirred up dissention and hatred. Third, there should be "objective and subjective" criteria to determine whether the messages provoke violence or terrorism. But the judge stopped short of explaining the objective and subjective

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<sup>588</sup> Gurum T/Himanot and Tadios Gantu v Public Prosecutor (29574/2008)

criterion. Fourth, he proposed that there should be an element of causation between the violence and the articles on the newspapers. Taking into account these factors, the judge in this particular case could not find sufficient evidence that the articles had indeed incited terrorism or racial hatred. He rather treated them as defaming remarks against a particular race.

He was right to declare that defamatory remarks do not have constitutional protection. The ECtHR took the same approach.<sup>589</sup> Even in other defamation cases, Ethiopian courts did not shy away from imposing hefty penalties for defamation.<sup>590</sup>

Introducing an element of causation in the determination of incitement to terrorism was a novel approach. Such position appears to be at odds with that of the UK<sup>591</sup>, US<sup>592</sup>, and international tribunals<sup>593</sup> where causation was disregarded from the definition of incitement. No other domestic case considered for this research followed the position taken in the above decision.

To conclude, Ethiopian courts do not distinguish between serious violence and incitement to terrorism. There is a tendency to treat all violence as terrorism. Moreover, despite the existence of a definition of incitement in the Ethiopian Criminal Code and the EATP, courts rarely bother to strike the balance between protected and non-protected speech.

Finally, the consideration of the medium of expression as devised by the ECtHR should not be taken as a standard by countries that transfer Western laws on terrorism. This approach could wrongly be applied to punish those articles that are published in newspapers, which apparently seem to incite discontent or dissatisfaction but which appear not to incite terrorism.

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<sup>589</sup> Tolstoy Miloslavsky v the United Kingdom, 13 July 1995, Series A no. 316-B

<sup>590</sup> Public Prosecutor v Addis Girma Gebre (42473/2008); Public Prosecutor v Mesele Mengistu G/selassie (35465/2004); Public Prosecutor v Wesen Seged G/kidane (27870/2006)

<sup>591</sup> See Crown Prosecution Service. Inchoate Offences, at [http://www.cps.gov.uk/legal/h\\_to\\_k/inchoate\\_offences/#P20\\_588](http://www.cps.gov.uk/legal/h_to_k/inchoate_offences/#P20_588)

<sup>592</sup> See for instance, Brandenburg v Ohio, supra note 446. (The Supreme court did not consider causation as one factor in the definition of incitement to 'imminent lawless action')

<sup>593</sup> See Davis, S. W., supra note 518

### 3.5 Identity and Freedom of Expression

The connection between the identity of the speaker and the substantive right to freedom of expression is explicitly evidenced in the decisions of the ECtHR. This is evident from the decision of the ECtHR in *Arslan v Turkey*<sup>594</sup> and subsequent cases. Considering the identity of the person in a speech introduces an external factor that may or may not be relevant to the contents of the expression.

It is true that whom or what a person believes in makes the difference in determining terrorist acts from ordinary crimes. It is arguable that had it not been for the religious associations of a person suspected of terrorism, the specific nature of the targets of terrorism, and the graveness of terrorist acts, there would not have been separate laws for terrorism. A question thus arises as to how the identity of the person fits into the First Amendment, Article 10 ECHR and Article 29 the FDRE Constitution.

As discussed above, the First Amendment seems to be absolute<sup>595</sup> and the later two articles provide specific exceptions. Absolute or not, advocating violence with a purpose likely to cause risk to national security is not tolerated in these pieces of legislation. However, inserting qualifications based on external factors such as the identity of the person is not included in the textual format of the right to freedom of expression protected in the various documents just mentioned.

Besides the scope of the expression, the ECtHR placed emphasis on the identity of the speaker. It was stated that the individuals in some of the cases before the ECtHR were ‘private individuals’ whose message could not endanger national security, public order and territorial integrity.<sup>596</sup> Moreover, the decisions of the domestic courts in *Erdoğdu and İnce v Turkey* were also quashed because the interviewee expressed his opinion about the situation in Turkey “without

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<sup>594</sup> see *Arslan v Turkey*, supra note 481

<sup>595</sup> Sottiaux, S., supra note 429, p. 76-78 (see the arguments on the scope of the First amendment)

<sup>596</sup> See *Karatas v Turkey*, supra note 500, para.52 and *Arslan v Turkey*, supra note 481, para.48.; *Ceylan v Turkey*, supra note 546; see also *Castells v Spain*, 23 April 1992, Series A no. 236



expressly advocating the PKK's role in the Kurdish struggle for independence".<sup>597</sup> The fact that the interviewee had not associated himself with the PKK was considered a relevant factor as the interview itself, which contained nothing that incites violence.<sup>598</sup> On the whole, the ECtHR gives special protection to journalists, politicians or other 'private individuals' who are not "representatives of organisations which resort to violence against the State".<sup>599</sup>

The ECtHR consistently held that political expressions by members of a certain radical group, instead of political figures, get less protection.<sup>600</sup> For instance, in *Mr. Ceylan* described the measures taken by the Turkish government in a particular situation. Mr. Ceylan, who was at the time the president of the petroleum workers' union, wrote an article in a weekly newspaper. It read as follows: "the time has come for workers to speak out. Tomorrow it will be too late."<sup>601</sup> The applicant was convicted of "inciting the people to hatred and hostility on the basis of race or regional origin"<sup>602</sup> at a domestic level. However, the ECtHR found against Turkey holding that, although the article was critical of the measures taken by the Turkish authorities, it "does not encourage the use of violence or armed resistance or insurrection."<sup>603</sup> The ECtHR was convinced that the contents of the expressions were violent. However, it continued to reason that besides the medium of the expressions, the applicants were 'private individuals' that did not have any connection to terrorist organisations.

In another instance, the ECtHR held that "the applicant was an elected politician and freedom of expression was especially important for elected public representatives."<sup>604</sup>

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<sup>597</sup> *Erdođdu and İnce v Turkey*, supra note 508, para. 51

<sup>598</sup> *Ibid*, para. 52; see also *Jersild v. Denmark*, supra note 488 (The ECtHR was found violation of Article 10 in the conviction of applicants who were convicted for conducting TV interviews without endorsing the views of the interviewees)

<sup>599</sup> *Erdođdu and İnce v Turkey*, supra note 508, para. 54

<sup>600</sup> See *Ceylan v Turkey*, supra note 546; see also *Zana v Turkey*, supra note 507

<sup>601</sup> *Ceylan v Turkey*, supra note 546

<sup>602</sup> *Ibid*

<sup>603</sup> *Ibid*

<sup>604</sup> *in Jerusalem v Australia*, no. 26958/95, § 43, ECHR 2001-II

But a restriction of freedom of expression that aimed at members of a proscribed terrorist organisation was found to be compatible with Article 10.<sup>605</sup> For instance, in *Hogefeld v Germany*<sup>606</sup>, the applicant was a member of the Red Army Faction (RAF), a left-wing terrorist organisation. The relevant domestic courts refused to grant her permission to give an interview to a journalist. The ECtHR considered, besides the content of the speech, the applicant's personal history and her association with RAF in upholding the decision of the Frankfurt Court of Appeal. Moreover, Article 17 ECHR has also been used in cases against radical groups. This article prohibits "... any State, group or person ... to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth ..."

For instance, in the case of *Hizb ut Tahrir v Germany*,<sup>607</sup> the ECtHR upheld the decision of German Ministry of the Interior to ban *Hizb ut Tahrir* on the ground that the latter was engaged in activities 'aimed at destroying any of the rights and freedoms set forth in the Convention'<sup>608</sup>. The ECtHR accepted as a legitimate reason to outlaw *Hizb ut Tahrir* as it openly advocates 'use of violence as a means to achieve its political goals'.<sup>609</sup>

Considering the above case law of the ECtHR, there appears to be an increased likelihood of the ECtHR agreeing with the restrictions placed on individuals' freedom of expression by Member States when that individual is associated with groups who advocate violence, as opposed to when individuals have no particular affiliation, and as such are described as 'private individuals.' The ECtHR has demonstrated this trend especially with cases against Turkey.<sup>610</sup> Convictions

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<sup>605</sup> *Brind v United Kingdom* (1994) 18 EHRR CD 76; see also Halliwell, M. (1991). *Judicial Review and Broadcasting Freedom: the Route to Europe*. 42(3). *N.I.L.Q.* pp. 246; see also Jowell, J. (1990). *Broadcasting and Terrorism, Human Rights and Proportionality*. *P.L. Sum.* p. 149; see also Lewis, C. (1991). *The European Convention, Proportionality and the Broadcasting Ban*. 50 (2). *C.L.J.* 211; see also Thompson, B. (1991). *Broadcasting and Terrorism in the House of Lords*. *P.L.*, p. 346

<sup>606</sup> *Hogefeld v Germany*, supra note 541, para. 5-8

<sup>607</sup> *Hizb ut Tahrir v Germany* (App. No. 31098/08, 12 June 2012); see also *Kasymakhunov and Saybatalov v Russia*, App nos 26261105 and 26377/06, 14 March 2013

<sup>608</sup> *Paksas v Lithuania* [GC], no. 34932/04, § 45, 6 January 2011)

<sup>609</sup> *Hizb ut Tahrir v Germany*, supra note 607, para. 5

<sup>610</sup> Besides the above cases, see also the following case to understand how the ECtHR focused on the identity of the applicants; *Sürek and Özdemir v Turkey* [GC], nos. 23927/94 and 24277/94,

against some defendants were found to be in breach of Article 10 because they were 'private individuals,' notwithstanding the fact that the content of those expressions clearly displayed elements that do not fall under the permitted expressions enshrined in 10 ECHR.

In the UK, the identity of a speaker is a factor not extraneous to the analysis of a legitimate expression. First, membership of a proscribed organisation is illegal.<sup>611</sup> Though membership is most often dealt with under freedom of association, it also fits with the current analysis. Second, it is indirectly related to the study of providing training for terrorism or other purposes.<sup>612</sup> It is also relevant in the examination of the audiences of a speech.<sup>613</sup> In *R v El-Faisal* for instance, besides the contents of his speech which incites young Muslims to kill the kuffir [non-believers], the UK Supreme Court agreed with the decision of the lower court in its consideration the audiences of the speech. These are some of the few cases where the identities of the speaker and/or listener were implicitly considered. These factors were considered relevant to the analyse of the likelihood that certain speeches would lead the intended audiences to commit acts of terrorism

### *3.5.1 The relevance of identity of a speaker or publisher under Ethiopian law*

We have seen above how the ECtHR provides special protection to journalists, politicians and other private individuals. However, under Ethiopian law, it is indistinguishable between individuals affiliated with terrorist groups and others that are not affiliated with any organisation.

The conviction rates of Ethiopian court cases are covered in this specific topic. Our assessment seeks to show how the identity of a speaker has played a role, if

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8 July 1999; for case comments on the above cases, see Conviction of Publisher for Breach of Anti-Terrorism Laws. 5 *E.H.R.L.R* 1998, 643

<sup>611</sup> Section 11 TA 2000

<sup>612</sup> *R v Sulayman Zain-Ul-Abidin* [arrested for "inviting people to receive weapons training contrary to section 54(3) (a) (b) TA 2000." The defendant argued that the main reason for the charge was that the organisation Islamic Jihad was founded by Muslims]

<sup>613</sup> *R v El-Faisal* [2004] EWCA Crim 456; *R v Abu Hamza* [2007] 1 Cr. App. R. 27; *R v Saleem and others* [2008] 2 Cr App R (S) 12; *R v Rahman (Mizanur)* [2008] EWCA Crim 2290

any, in the Ethiopian courts' decisions. In most of the cases, the charge sheets alleged that the defendants' affiliation with terrorist organisations was taken into account in the analysis of whether the defendants were found to have committed incitement to terrorism. Nevertheless, the Ethiopian courts did not pay enough attention to whether the prosecution had sufficient evidence to support the allegations. This begs the question: was this because the identity of the defendants genuinely assumed no relevance in the decision to charge of inciting terrorism?

To answer this question, it is important to consider the type of charges brought against the defendants and the conviction rates thereof. The Ethiopian government preferred to use the provisions of the Ethiopian Criminal Code that dealt with serious offences when the defendants were alleged to be affiliated with a terrorist organisation. As indicated in table 2.3, provisions that dealt with incitement to crimes against the constitution, armed forces, attacks on political integrity of the territory, provocation and material preparation were frequently used. In the majority of the allegations, the affiliation of the defendants' was used as a pre-condition for the charges.

**Table 2.4: Conviction Rates**<sup>614</sup>

File No.	No. Of defendant	Convicted	Acquitted	Length of jail terms (Rigorous imprisonment in years unless stated otherwise)	Affiliation with terrorist organisations
39/1995	35	7	27	13-18	None
94/1995	1	1	0	25	OLF
41/1996	4	2	2	10 years to life	None

<sup>614</sup> Please see Appendix A for the details of the case. A question mark indicates that there are some missing parts from the case. As a result, it is difficult to know the length of the sentences/ the final outcome of the appeal .

?/1997	3	2	1	25 years to life	Jamaat- al- islami
123/1998	17	10	7	5 years to death	Ali-Tad
1025/2000	4	1	?	?	OLF
17511/677/2000	4	3	1	?	OLF
8705/2003	2	2	0	Life, death	OLF
9832/2003	2	2	0	Life, death	IFLO
238/1998	62	34	28	7 years to life	OLF
33101/2004	1	0	1		OLF
37041/2004	3	3	0	18 to 20 years	None
36268/2005	9	7	2	?	OLF
37299/2005	6	6	0	8 to 20 years	ONLF
40783/2005	2	2	0	6 to 7 years	OLF
41449/2006	1	1	0	4 years	OLF
17722/2007	4	4	0	20 years to death	OLF
27720/2007	1	1	0	?	OLF
50798/2008	10	6	4	1 to 5	OLF
51539/2008	1	1	0	life	OLF
51550/2007	9	4	5	?	
56118/2007	1	1	0	?	EPPF
56550/2007	8	0	8	0	Eritrea
29574/2008	2	1	1	?	None
34705/2008	3	1	2	1 year	OLF
49303/2008	7	6	1	7 years	FIO
59989/2008	15	15	0	1 year to 20 years	OLF
6000/2008	2	2	0	?	OLF
60086/2008	8	7	1	8 to 10 years	OLF
60184/2008	1	1	0	12 years	ONLF
60575/2008	4	4	0	1 to 2 years	EPPF
61656/2008	1	1	0	10 years	OLF
61663/2008	1	1	0	?	EPPF
62221/2008	2	2	0	5 to 6 years	OLF
64246/2008	1	1	0	?	OLF
69430/2008	15	15	0	?	None
58070/2009	9	3	6	1 to 13 years	OLF
60083/2009	2	2	0	15 years	OLF
60265/2009	4	2	2	?	OLF
68104/2009	2	2	0	?	EPPF
69201/2009	2	2	0	1 to 3 years	None
71000/2009	127	62	65	5 years to life	
77113/2009	4	4	0	10 years to death	OLF
81406/2009	46	40	6	10 years to death	Ginbot 7
89341/2009	2	2	0	25 years	EPPF
89647/2010	10	3	7	5-10 years	OLF
112198/2011	4	4	0	11-17	OLF
?/2011	5	5	0		Ginbot 7
?/2011	24	24	0	18 to life	Ginbot 7

?/2011	69	69	0	?	OLF
?/2011	20	20	0	?	OLF
?/2011	9	8	1	8 to 13	OLF
Total	557	409			

A breakdown of the cases in table 2.3 shows the total number of cases considered for this thesis, and table 2.4 shows that conviction rates were higher in cases involving allegations of an affiliation with a terrorist organisation than for other serious offences. Out of the 557 defendants, 409 defendants were successfully convicted while 148 were acquitted. Charges against 17 defendants were terminated for different reasons such as lack of jurisdiction.

From table 2.4, we can see that it was only in seven cases where the public prosecution did not allege membership to terrorist organisation. There were a total of 62 defendants in these cases with only 30 defendants being convicted. That means the success of terrorist convictions not involving allegation of membership to terrorist organisation were 48%.<sup>615</sup> on the other hand, the conviction of terrorist suspects in this category accounted for only 7%<sup>616</sup> of the total defendants convicted for being involved in terrorism.

On the other hand, 93%<sup>617</sup> of the total conviction rates involve allegation of affiliation with terrorist organisations. This implies that the probability of convicting defendants for incitement is higher when they are associated with organisations/groups that are deemed terrorists. Thus, the evidence allows us to conclude that the identity of the speaker does play crucial role in the conviction of terrorist suspects for terrorism related cases in Ethiopia.

As seen above, the position of the ECtHR in the Turkish cases of Arslan, Karatas, and Zana concerning the identity of the speaker was *explicit*. The Ethiopian courts' position, on the other hand, is arguably moot in view of the fact that they refrained from openly discussing the relevance of the identity of the speaker in

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<sup>615</sup> 30/62x100

<sup>616</sup> 30/409x100

<sup>617</sup> [409-30]/409x100

determining incitement to terrorism. However, taking the data on the conviction rates, the identity of the speaker does play crucial role in the conviction of incitement to terrorism cases in Ethiopia.

Moreover, after the 2005 Ethiopian election, the government declared that the authors of the newspaper articles discussed in table 2.1 and table 2.2 were affiliated with terrorist organisations. In a documentary, which was broadcast to the public,<sup>618</sup> the authors of the articles were named and shamed, and their backgrounds were scrutinized. Despite the publication of the newspapers before the election, the Ethiopian government deferred from using these allegations at that time. When things spiralled out of control after the 2005 election<sup>619</sup>, the identity of the speaker (or the writer) became a big issue.

This is one reason why this thesis supports the position of the ECtHR, which seeks to pay some attention to the identity of the speaker, in imposing speech related restrictions. The fear is that resorting to external factors such as the identity of the speaker or to their affiliation with a particular organisation is more likely to be misused in countries where democracy is in its infancy. Therefore, in order to counter-balance this fear, there needs to be special protection to political leaders and journalists. As held by the ECtHR:

*The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.*<sup>620</sup>

The essence of the argument put forward here is that if we are going to consider the identity of the speaker as a determining factor in the conviction of individuals

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<sup>618</sup> *The Birth and Growth of Free Press in Ethiopia* (2009) [TV Broadcast] ETV, 13 December.

<sup>619</sup> Lyons, T. (2005). Ethiopia: Implication of the May 2005 Elections for Future Democratization Programs, August 1, 2005 - IFES; Carter Centre (2009). Observing the 2005 Ethiopian National Elections. Carter Centre Final Report (Atlanta, the Carter Centre); European Union (2005). Ethiopian Legislative Elections 2005: European Union Election Observation Mission Final Report

<sup>620</sup> *Lingens v. Austria*, supra note 582

charged with incitement to terrorism in Ethiopia, we should understand the underlying principle of the ECtHR decision. As discussed both in chapter two and in this chapter in regard to the journalists listed in tables 2.1 and 2.2., the prosecution of individuals whose affiliation to terrorist organisation is not proved contravenes internationally accepted standards on freedom of expression.

In determining the relevance of identity of a speaker or publisher, we could also argue that the identity of the audience should be paid as much, if not more, attention when consideration is given to the relevance of the identity of the speaker. Messages need to be communicated to be known. But, messages need to be understood to be effective.<sup>621</sup> The likelihood of the audience being impressed by the message is as important in the consideration of whether there is an intention to incite terrorism, as is consideration of the actual speaker. Arguably, the identity of the speaker can be regarded as a superficial consideration, whereas the substantive issue of effect is more pertinent to answering whether there is the mindset present within a defendant to be confident they were intending to incite terrorism. Unless a message gets to the right target and in the right circumstances, its effect will be no more significant than dropping a bomb in a designated no man's island.

This argument may be counter-balanced by the UK case of *Invicta Plastic LTD v Clare*, where the UK court held that it was irrelevant whether the message had influenced the target of the message.<sup>622</sup> However, the focus of the UK court here was on the content of the expressed views, rather than the identity of the addresser. If the identity of the speaker is neutralised in the evaluation of a speech, then it makes sense to follow the above case. However, if there is an emphasis on identity, it might be appropriate to evaluate the effect of the speech on the addressee.

The conclusion is that views expressed via the mass media, books, or artistic expressions should be examined based on their effect as held by the ECtHR.

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<sup>621</sup> *R v Abu Hamza*, supra note 613 (The argument can be best illustrated by the analysis of the speech in the scripts seen in evidence were addressed to young Muslims. Assume that the same sort of speech was addressed to university professors.)

<sup>622</sup> *Invicta Plastic LTD v Clare*, supra note 528



There should be no consideration of the medium or the identity of the speaker, without such extra factors being relevant also.

### **3.6 Membership of a Terrorist Organisation**

For some countries, such as the UK, membership of a terrorist organisation on its own is a crime. This is part of "the pattern of militant democracy by allowing the executive to proscribe specific groups and by making membership and association with such outlawed groups illegal"<sup>623</sup>. But for others, such as the US, unless it is accompanied by active participation, membership *per se* is not a crime. Why belonging to a terrorist organisation without there being any financial contribution from the member is illegal is a question worth asking.

In the UK, section 11(1) Terrorism Act (TA) 2000 provides that belonging or professing to belong to a proscribed organisation is an offence. Besides the defences available to the defendant under section 11(2), the burden of proof is on the prosecution.<sup>624</sup>

The law provides further protection to the defendant. First, membership is an offence only if it is to a proscribed organisation. This is clarified by section 11(4) and schedule 2 TA 2000, which gives a list of proscribed organisations. The first step for a prosecutor is, therefore, identifying whether the organisation falls into the list of proscribed organisations. Second, in order for prosecution under section 11(2) (b) TA 2000 to be successful, there must be participation in the activities of the organisation. These activities are explained under section 12 and section 15 of TA 2000, which deal with support to a proscribed organisation or commission of terrorist acts, respectively. Finally, a time sequence of membership and proscription is differentiated under section 11(2) (a). The cumulative readings of these sections reveal that belonging to an organisation before proscription is not an offence unless it is followed by some sort of participation.

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<sup>623</sup> See Roach, K. (2004), *supra* note 209, p. 172; See also Walker, C. (2011). *Militant Speech*, *supra* note 192; see also Thiel, M (2009), *supra* note 208, chapter 13

<sup>624</sup> Walker, C. (2009). *Blackstone's Guide to the Anti-Terrorism Legislation*. 2<sup>nd</sup> edition. (Oxford, Oxford University Press), p.49-50

However, there appears to be a lack of clarity with regard to section 11(1) and (2) (b) TA 2000. Section 11(1) appears to suggest that membership on its own merit is an offence. But section 11(2) (b) TA 2000 explains that, despite his membership, if a defendant does not take part in any activities of the organisation after proscription, he will not be criminally liable. Some questions arise out of this issue: What would happen if a defendant fails to prove non-participation? Will he be convicted for membership *per se*? A related question is: how is a defendant supposed to prove non-participation after proscription? What kinds of evidence are acceptable?

A case that may be of help in answering these questions is *Sheldrake v Director of Public Prosecutions*.<sup>625</sup> According to *Sheldrake v Director of Public Prosecution*, membership is an offence of its own right with no need to refer to section 11(2). Moreover, it was stated that section 11(1) applies to not "only members of the proscribed organisation but people who, though not members, profess to belong to it."<sup>626</sup> Therefore, for the second alternative of section 11(1) to apply, the prosecution need not prove membership of the defendant with a proscribed organisation. The sort of evidence required to prove membership or professing to belong to a proscribed organisation is also clarified in the same case:

*...the Crown must lead evidence that satisfies the magistrate or jury beyond a reasonable doubt either that the defendant is a member of the proscribed organisation or that he professes - in the sense of claiming to other people and in a manner that is capable of belief - that he belongs to the organisation*<sup>627</sup>

A broader application of section 11(1) is provided further in the case, with Lord Rodger of Earlsferry taking the view that:

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<sup>625</sup> *Sheldrake v Director of Public Prosecutions*, supra note 346

<sup>626</sup> *Ibid*, para.63

<sup>627</sup> *Ibid*, para 65

*...section 11(1) is apt to catch people who joined the organisation before it was proscribed - at a stage, perhaps, when it was not even a terrorist organisation. It could catch someone who joined the organisation without knowing that it was proscribed, or when he was an immature youth. And it would cover someone who joined the organisation abroad, where it was legal, and came to this country without being aware that it was illegal here.*<sup>628</sup>

According to this case, section 11(2) is the exception to section 11(1) because:

*it applies after the Crown has established that, at the relevant time, the defendant remains a member of the organisation or professes to belong to it and where, accordingly, in any other case he would fall to be convicted under section 11(1). Exceptionally, in this particular situation the defendant is to be acquitted if he proves that he has not taken an active part in any of the activities of the organisation while it was proscribed.*<sup>629</sup>

Unlike under UK law, membership of a proscribed organisation is not an offence in the US. Moreover, there are not legal or evidential burden to be proved on the part of the defendant. Despite early attempts, such as the Smith Act 1940,<sup>630</sup> to punish both membership *per se* and any association with organisations that advocate violence, the Supreme Court maintained that passive membership or professing to belong to a terrorist organisation is not an offence. *Scales v United States*<sup>631</sup> and *Holder v Humanitarian Law Project*<sup>632</sup> exemplify this position.

There are laws that deal with membership to a specific organisation in the US, but they are unrelated to a criminal prosecution. They deal with grounds for

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<sup>628</sup> Ibid, para 67

<sup>629</sup> Ibid, para.68

<sup>630</sup> For detail discussion, see Alien Registration Act of 1940 (Smith Act), *infra* note 640 ; see also Ardis, M. W. (editor) (2005) *Real ID Act of 2005 and Its Interpretation* (New York, Nova Science Publishers); see also Malkin, M. (2002). *Invasion: How America Still Welcomes Terrorists, Criminals, and Other Foreign Menaces to Our Shores*. (USA, Regnery Publishing, Inc); see also L'Hommedieu, J.H. (2011). Alien and Sedition Acts. In: Hastedt, G. P. and Guerrie, S. W. (eds). *Spies, Wiretaps, and Secret Operations: An Encyclopedia of American Espionage*. ( USA, ABC-CLIO)

<sup>631</sup> *Scales v United States* 355 U.S. 1 (1957) 355 U.S. 1

<sup>632</sup> *Holder v Humanitarian Law Project*, *supra* note 451; see also Cole, D. (2012). The First Amendment's Borders, *supra* note 450

refusing entry into the US for belonging to a terrorist organisation.<sup>633</sup> Under section 411(iv) of the Patriot Act 2001, several offences are listed under the category of 'engaging in terrorist activities.' However, the case remains that membership of a terrorist organisation is not outlawed within the US.<sup>634</sup>

The Smith Act 1940 and the Internal Security Act 1950 were at the centre of the controversy in *Scales v United States*. The former Act prohibits membership and knowingly and intentionally engaging in activities of an organisation which advocates the overthrow of a government by force, while the latter Act permits membership *per se*. The US Supreme Court followed two criteria. Therefore, it had to be proved that:

*1) the organisation advocated overthrow of a government and 2) petitioner was an "active" member of the Party, and not merely "a nominal, passive, inactive or purely technical" member, with knowledge of the Party's illegal advocacy.*<sup>635</sup>

The US Supreme Court upheld the conviction of Scales since he knowingly and intentionally engaged in the activities of the Communist Party of the United States. Therefore, he was not convicted *per se* of membership. The sorts of activities prohibited in the US are illustrated under 18 USC § 2339B (commonly known as the Material Support Statute).<sup>636</sup> This statute will be discussed shortly in the next section.

One difference between the UK and US, found in the reasoning of Lord Rodger in *Sheldrake v Director of Public Prosecution*, discussed above, is that under section 11(1) TA 2000 it is not relevant to the question of membership whether the suspect is an active member. Moreover, under the TA 2000, it is a requirement that the organisation be proscribed. Therefore, "proscription serves the purpose of short-circuiting the process of proof-the link is to the organisation

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<sup>633</sup> See INA: Act 212 - General Classes of Aliens Ineligible to Receive VISAS and Ineligible to for Admission; Waivers of Inadmissibility

<sup>634</sup> *Scales v United States*, supra note 631

<sup>635</sup> *Ibid*, paras. 222-224

<sup>636</sup> For detail discussion, see also Doyle, C. (2010). Terrorist Material Support: An Overview of 18 U. S. C. 2339A and 2339B. Congressional Research Service. July 19

rather than to specific activities."<sup>637</sup> While in *Scales v United States*, it was held that it is a pre-condition that the organisation supported violent activities and that it is a designated terrorist organization. In the US, therefore, the link is both to the activities, and to the organisation. This is similar to the position of the UK. Another difference between *Scales v United States* and *Sheldrake v Director of Public Prosecution* is that it is a requirement in the former that the defendant must know the illegal activity of the concerned organisation, which is not the case with the latter. However, in both cases, *active* membership is prohibited outright.

*Scales v United States* was affirmed relatively recently in *Holder v Humanitarian Law Project*.<sup>638</sup> The US Supreme Court, here, stated that "section 2339 (B) does not criminalize mere membership in a designated foreign terrorist organisation. It instead prohibits providing "material support" to such a group."<sup>639</sup> This supports the argument that the US does not outright prohibit passive membership.

The EATP that deals with the same issue is framed differently. As it is stated, some articles of the EATP appeared to be directly taken from the UK. However, the way the EATP is framed is fundamentally different from its original UK source. The relevant provision that deals with membership is Article 7 of the EATP. Similar to the UK law, passive membership is treated as an offence on its own merit.

However, the following are the basic differences between the UK and EATP. First, membership is not specifically differentiated from other manners of participation. Article 7 EATP simply states that:

*Whoever ... 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.*

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<sup>637</sup> Walker, C. (2009), supra note 624, p.48

<sup>638</sup> *Holder v Humanitarian Law Project*, supra note 451; see also Doyle, C. (2010), supra note 636

<sup>639</sup> *Holder v Humanitarian Law Project*, supra note 451, para.2718

Second, the above Article prohibits membership to both proscribed organisations and organisations that are not proscribed, but participate in terrorist activities. Thus, the EATP does not make any distinction between membership before or after proscription. Furthermore, one can be prosecuted for mere membership, even though the organisation is not proscribed. Third, there are striking differences on the severity of the penalty imposed. Both impose a maximum 10 years imprisonment. However, the sentence in EATP is rigorous imprisonment. Moreover, the Ethiopian law does not provide for summary conviction as appears under section 11(3) TA 2000.

Fourth, the construction of the provision on membership under the EATP bears a closer resemblance to 411(iv) Patriot Act 2001 than to the TA 2000. Both the EATP and the Patriot Act 2001 use broader terms such as 'participation in a terrorist organisation' and 'engaging in a terrorist activity,' respectively. While the UK law more specifically deals with membership. However, the US law is more specific in that it prohibits the commission of the enumerated acts, rather than the more ambiguous term, membership. Fifth, the omission of a provision similar to section 11(2) TA 2000 from the EATP begs the question of whether the burden of proving membership is entirely on the prosecution.

The history of the US shows us that there is a certain element of alarm with regard to the position of the UK and Ethiopia on prosecuting membership *per se*. When mere membership was made a crime in the US during the Communist era, the persecution of political parties and their members were intensified. The main targets were communists and socialists.<sup>640</sup> There were political out cries until the US Supreme Court intervened.<sup>641</sup> From *Scales v United States* to *Holder v Humanitarian Law Project*, the US Supreme Court firmly positioned itself by rejecting any attempt by the US government to prosecute membership *per se*. For

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<sup>640</sup> See for *Whitney v California*, supra note 441; see also the Alien Registration Act (the Smith Act) U.S. Statutes at Large (76th Cong., 3rd Sess., 670-676) now codified at 18 U.S. C. § 2385 (2000) was enacted to deal with the American Communist Party. The mere advocacy of violence was upheld in *Whitney v California*, supra note 441. But *Brandenburg v Ohio*, supra note 446, somehow deviated from *Whitney v California* and the Supreme Court insisted that it is only incitement to violence that is prohibited in the US.

<sup>641</sup> Hall, K. L. (editor) (2002). *The Oxford Companion to American Law*. (Oxford, Oxford University Press), p. 214

this reason, the drastic attempts by the US government in prosecuting mere membership received short thrift from the US Supreme Court.

The concern of the UK is not related to political parties or people with different political opinion. Looking at the organisations proscribed in the UK under the TA 2000, they are dominated by international terrorist groups.<sup>642</sup> The international threat is thus more of a concern for the UK than a domestic threat. The prohibition of membership will be confined to those proscribed organisations.

However, in the case of Ethiopia the purpose of the proscription and the method of identifying terrorist organisations are arguably not the same. Before the enactment of the EATP, there were no laws that prohibited membership of any organisation. However, the number of prosecutions for mere membership was the second highest next to the allegation of incitement to terrorism before the EATP has come into effect. As indicated in table 2.3, the prosecution mentioned membership in eighteen of the cases considered in this research. This was before the EATP came into force. The only thing the new EATP has done is, therefore, to provide a legal ground for the courts.

In conclusion, having a law that punishes mere membership in an organisation is not advisable for countries that do not have strong institutional independence. Some point that the EATP could provide a legal excuse to prosecute people who join opposition political parties that do not even support any form of violence.<sup>643</sup>

### **3.7 Encouragement of Terrorism**

The scope of encouraging or glorifying terrorism is not easy to delimit. The controversy stirred up by this offence in the UK was immense. From human rights organisations to legal scholars, all agreed that the Terrorism Bill on

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<sup>642</sup> The Home Office website states that there are 48 proscribed international terrorist organisations under TA 2000 compared to 14 organisations in Northern Ireland proscribed under previous legislation.

<sup>643</sup> See Amnesty International (2011). *Special Rapporteur on Freedom of Expression and Access to Information in Africa- Ethiopia*. (AFR 25/009/2011)

encouragement of terrorism would have a 'chilling effect' on freedom of expression.<sup>644</sup> Garnering support for TA 2006 that includes among other things new offences on encouraging terrorism was a bumpy road for the former Prime Minister, Tony Blair. Though Tony Blair won the backing of the House of Commons, its success was short lived because the House of Lords twice rejected the inclusion of 'glorifying' terrorism as a separate offence before the lords dropped their stiff opposition.<sup>645</sup> In this section of the thesis we will identify some of the arguments against encouraging terrorism.

Much of the ambivalence towards the offences relate to the fact that the criminalisation of encouraging or glorifying terrorism is drafted bluntly and is vague on details. Moreover, the relevance of the offences when discussed alongside the already available options to prosecute terrorists stimulated heated discussions. The analysis below identifies these discussions in the UK. Then the next section poses a question on whether the offences of encouraging terrorism would be unconstitutional in the US. This will be followed by an analysis of the problems of the EATP in relation to encouraging terrorism in light of section 1 of the TA 2006 and the misuse of Article 6 of the EATP against politicians and journalists.

Because the focus of this thesis is on Ethiopian law, we will use the above arguments as a basis for supporting the Ethiopian government's decision to enact new provisions on encouraging terrorism. However, although the conclusion of this thesis is in favour of introducing these offences, we will show in the subsequent sections that the Ethiopian law is poorly drafted and implemented.

#### A) Argument one:

One of the refuting arguments against the need for offence of encouraging terrorism as stipulated in TA 2006 is that such an act can already be charged

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<sup>644</sup> See Submission from different bodies at Joint Committee on Human Rights (2005). Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters: Third Report of Session 2005-06: Vol. 2 Oral and Written Evidence HL Papers 75-II, HC Papers 561-II. London, TSO; see also ARTICLE 19 (2005). Statement On the Encouragement of Terrorism: Clause 1 of the UK Terrorism

<sup>645</sup> Hansard, HL Deb Vol. 680, col.241 (22 Mar 2006)



under existing common law and statutory offences.<sup>646</sup> However, the elements stipulated for an offence of inciting violence and encouraging terrorism are not the same. A comparison to the offence of racial hatred could be made here to show the difference between inciting violence and encouraging terrorism. For the incitement of racial hatred, the offence can be committed by any means (written, oral, conduct) publicly or privately with the intention of "or having regard to all circumstances, racial hatred is likely to be stirred thereby."<sup>647</sup> The cumulative reading of sections 18(2) and 18(4) of the Public Order Act 1986 reveal that racially motivated remarks that fall short of communication (publically or privately) are not within the ambit of the law. The 1986 Act has been further amended to include other offences.<sup>648</sup>

However, there is striking a difference between the Public Order Act 1986 and the offences under TA 2006. In respect of the former, the offence can be committed privately *or* publicly, whereas the offence under the latter Act must involve communication to the *public*.<sup>649</sup> As some have pointed out, it is arguably that the distinction between public and private communication undermines the basic justification for enacting the law.<sup>650</sup>

*they were said to be necessitated by the Council of Europe Convention on the Prevention of Terrorism and the government claimed that the ... offences were necessary because the existing law of incitement failed to catch certain categories of speech which encouraged terrorism because that law required a degree of explicitness, in terms of the speech constituting encouragement, and a degree of specificity in terms of the behaviour which was encouraged.*

The argument is then making a distinction into public and private communication may unnecessarily shift concerns from the *content* of the views expressed to the

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<sup>646</sup> See for instance Hansard, HC Deb Vol.443, col.1673 (16 Mar 2006) (Nick Clegg, MP argued that " the arrest of ... a number of protesters who used sickening and inflammatory language on their placards when demonstrating against the anti-Islamic cartoons published in Denmark shows that current laws against incitement appear to be working fairly well ...")

<sup>647</sup> Section 18 of the Public Order Act 1986

<sup>648</sup> Racial and Religious Hatred Act 2006

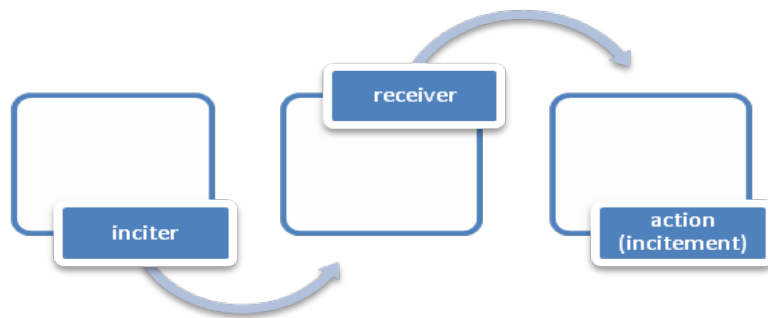
<sup>649</sup> Section 1(3) of TA 2006

<sup>650</sup> Hunt, A. (2007). Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism. 6 *Criminal Law Review* 441

*audience* at which they are communicated.<sup>651</sup> This argument is backed up by existing laws such as the 1986 Public Order Act, as amended by the Racial and Religious offences Act 2006, which criminalizes both forms of communication.

Therefore, the argument that there is no need for a different law owing to the fact that such offences can be caught by existing laws is arguable fallacious; the elements of the offence of encouraging terrorism as discussed below is covered in a completely different manner.

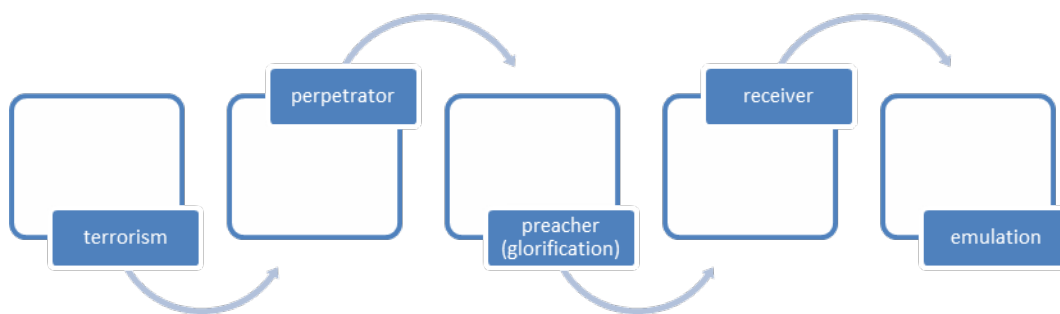
There are three sorts of relationship between encouraging terrorism and inciting violent actions. This nexus is best shown diagrammatically:



The offence of encouragement, specifically, the glorification of past terrorist acts as stipulated in the TA 2006 Act, adds more to the above illustration:

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<sup>651</sup> Ibid



A speech in the first diagram is closer to the action and it can be a direct cause of violent action. But the speech in the second diagram simply glorifies terrorist acts which have already been committed. To use the language of the law, it 'praises or celebrates' terrorist acts.<sup>652</sup> The relationships become even more remote when recklessness is used as a *mens rea*. Therefore, the argument that the existing laws can cover glorification or indirect encouragement is rather vague. As the UK government and others have agreed,<sup>653</sup> there was a loophole in the law.

R v El-Faisal<sup>654</sup> could be referred as the justification for rejecting<sup>655</sup> the provisions under TA 2006 that deal with encouraging terrorism. While a plausible argument could be made that he could have been prosecuted under terrorism laws,<sup>656</sup> El-Faisal was prosecuted and deported for inciting racial hatred. Two pieces of legislation were mentioned when justifying why the defendant should be convicted; section 4 Offences against the Person Act 1861; section 18(1) and 21(1) of Public Order Act 1986.<sup>657</sup> The following are a selection of the speeches given by the defendant on tapes submitted as evidence:

<sup>652</sup> Section 20(2) TA 2006

<sup>653</sup> Hansard, HL Deb Vol.676, col.455 (December 5, 2005)

<sup>654</sup> R v El-Faisal, supra note 613

<sup>655</sup> Roach, K. (2012) supra note 193, p. 299; see also ARTICLE 19 (2005). Statement On the Encouragement of Terrorism: Clause 1 of the UK Terrorism

<sup>656</sup> Hunt, A. (2007), supra note 650

<sup>657</sup> Section 4 of 1861 Offences Against the Person Act; section 18(1) and 21(1) of Public Order Act 1986

*...the way forward can never be the ballot. The way forward is the bullet...'; 'we spread Islam by the sword and so what, and today we are going to spread by the Kalashnikov and there is nothing you can do about.'; 'is there any peace treaty between us and the Hindus and Indians? No, so you can go to India and if you see a Hindu walking down the road, you are allowed to kill him and take his money.*

The defendant also stated that any Muslim who was killed whilst carrying out jihad would become a martyr and go on to paradise. The defendant encouraged suicide bombing campaigns and played tape recordings of Osama Bin Laden encouraging strikes against Western targets.

The prosecution conceded that "the plain and ordinary meaning to be given to the appellant's words was that they were a general encouragement to his listeners to carry out acts of terrorism, the violent overthrow of democracy, and extermination of non Muslims."<sup>658</sup> The conviction of the appellant, which was based on a 'general encouragement' of terrorism, was affirmed on appeal.

Despite the prosecution emphasising that the language used amounted to only a general encouragement of terrorism, in truth the evidence of the speeches display more of a mixture of messages specifically, directly and indirectly encouraging terrorism. For instance, the following sentence is clearly an offence of directly encouraging terrorism: "whenever the holy months expire, kill the pagans wherever you find them."<sup>659</sup> In contrast, it is arguable that the following sentence is not an offence in any of the existing legislation or common law rules:

*...the jihad of a woman is to bring up her male children with a jihad mentality... when you buy toys for your boys you buy tanks and guns ... this is the jihad of the woman, to bring up her sons with jihad mentality ...*<sup>660</sup>

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<sup>658</sup> R v El-Faisal, supra note 613, para. 31

<sup>659</sup> Ibid, para.24.

<sup>660</sup> Ibid, para.22

It is doubtful whether, based on the above statement, the prosecution would have succeeded with a charge of inciting violence. However, there is higher probability of prosecutorial success under the offences in TA 2006 because the above expressions satisfy all the elements of the offences of glorification of terrorism (the expressions glorify future terrorist acts as they teach the 'Jihad of women' and the targets in this case, i.e. the women, could also reasonably be expected to emulate the message). This is exactly the kind of statement the UK government is trying to criminalize under the new law.<sup>661</sup>

Accordingly, section 1 of the TA 2006 requires either specific intent or recklessness for the prosecution of encouraging terrorism. The proposal to include glorification of terrorism as a separate offence from encouragement of terrorism was also dropped during the parliamentary debates. It is now included under sections 1(3) and 2(4) TA 2006.

Moreover, an indication as to how the offences concerning encouraging terrorism are going to be applied has become clear in the aftermath of a case in which a young Muslim girl, Roshonara Choudry, stabbed an MP,<sup>662</sup> for which she was sentenced to 15 years imprisonment. Though she was tried under ordinary criminal law, her act was a terrorist act as it was committed in furtherance of "political and religious reasons".<sup>663</sup>

Moreover, what has happened after the trial was a clear indication of why the offence encouraging terrorism does not necessarily encroach upon freedom of expression. Her supporters chanted outside the courtroom the following

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<sup>661</sup> See Hansard HC DebVol.442 Col. 1437 (15 February 2006); see also the speeches in *R v Saleem and others*, supra note 613 (the speech by Rahman that called for British soldiers to come back in body bags could not have been covered under the existing common law incitement); see also *Leroy v. France*, supra note 565 (the ECtHR in this case upheld the conviction of a French cartoonist for publishing a cartoon depicting the terrorist attack in the US. The ECtHR was convinced that the publication of the drawings two days after the 9/11 attack amounts to giving "moral" support to the terrorists.)

<sup>662</sup> *R v Roshonara Choudhry* [2010] T20107212

<sup>663</sup> Anderson, D (2012). *The Terrorism Acts in 2011* supra note 335, para. 101

sentences: "Islam will dominate the world, we Muslims demand the release of all Muslims, Stephen Timms [the stabbed MP], go to hell..."<sup>664</sup>

These words, though they did not encourage, justify or glorify the stabbing of the MP, were expressions that were "controversial, shocking, or offensive."<sup>665</sup> But none of the people chanting these extreme views were arrested, or threatened with arrest other than escorting them from the court to a safe place. However, this case is different from another, *R v Saleem*,<sup>666</sup> in which four defendants were convicted for offences contrary to section 18(1) of the Public Order Act 1986. In this case, a speech by Rahman that called for British soldiers to come back in body bags, were far more serious than those used at the demonstration during the sentencing of Roshonara Choudry. However, it is arguable that the statements made by Rahman were not directly inciting terrorism, but were instead "uttered with the intent that they should encourage others to commit terrorist acts."<sup>667</sup>

Therefore, closer scrutiny of TA 2006 tells us that not all statements that encourage, justify or glorify terrorism are in fact curtailed by law. The emphasis on the contents and circumstances in which the statements are made provides a significant protection to freedom of expression.<sup>668</sup> However, during peace time and war, words can imply different things. It should not come as a surprise then if a government does not show leniency in the interpretation of the law during exceptional circumstances. As discussed in the preceding sections, this trend has been accepted by the US Supreme Courts<sup>669</sup> as well as the ECtHR in many cases against Turkey.

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<sup>664</sup> Seamark, M. (2010). Curse the Judge, Shout Fanatics as Muslim girl who Knifed MP Smiles as she Gets Life. Daily Mail, 5 November

<sup>665</sup> *Castells v Spain*, supra note 596; see also *Handyside v the UK*, supra note 431

<sup>666</sup> *R v Saleem*, supra note 613; see also Wildhaber, L. (2001). The Right to Offend, Shock or Disturb? Aspects of Freedom of Expression under the European Convention on Human Rights. *36 Irish Jurist*. 17

<sup>667</sup> See Letter from Charles Clarke, U.K. Home Secretary, to Rt. Hon David Davis MP and Mark Oaten MP, Members of the House of Commons (Sept. 15, 2005)

<sup>668</sup> See for instance, *Leroy v. France*, supra note 565 (the ECtHR in this cases upheld the conviction of a French cartoonist for publishing a cartoon depicting the terrorist attack in the US. The ECtHR was convinced that the publication of the drawings two days after the 9/11 attack amounts to giving "moral" support to the terrorists.)

<sup>669</sup> See for example, *Schenck v United States*, supra note 443; *Brandenburg v Ohio*, supra note 446

B) Argument two:

The other related argument is whether the offence of encouraging terrorism is directed against democratic or non-democratic regimes. While reflecting the views of the UN High Commissioner for Human rights,<sup>670</sup> some suggest that "prosecution of those encouraging terrorism against undemocratic regimes could breach a right to freedom of expression as guaranteed by Article 10 of the ECHR and Article 19 of the International Covenant on Civil and Political Rights."<sup>671</sup> This view was also shared by the then Home Secretary, Charles Clark MP.<sup>672</sup> As with the argument above, the validity of this argument is also doubtful, seemingly tolerating the glorification of terrorism within undemocratic regimes. This argument is problematic for several reasons. Recent decisions in the UK showed that the above argument is not supported.

For instance, in *R v F*,<sup>673</sup> a UK court entirely rejected the appellant's arguments by stating that the TA 2000 does not make a distinction between terrorist acts directed against a tyrant as opposed to a representative government. The UK Supreme Court also affirmed this position in *R v Gul*.<sup>674</sup> The appellant uploaded several 'martyrdom videos' showing attacks by proscribed groups on military targets.<sup>675</sup> He argued that:<sup>676</sup>

*..force against the military was justified and that those who were fighting the Coalition forces were rightly resisting the invasion of their country. He did not agree with the targeting of civilians and attacks on civilians. He was therefore not encouraging terrorism, but self defence.*

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<sup>670</sup> A letter written by the UN High Commissioner for Human Rights Louise Labour states that the definition of encouragement to terrorism "fails to strike a balance between national security considerations and the fundamental right of freedom of expression." For details see Arbour, L. (2005). Letter to the UK's Permanent Representative to the UN Office and other international organisations in Geneva, 28 November

<sup>671</sup> The Religious Society of Friends (Quakers) (2005). Definition of Terrorism in UK Law: Memorandum to Lord Carlile's Independent Review of the Definition of Terrorism in UK Law, at <http://www.quaker.org.uk/definition-terrorism-uk-law> ; see also Liberty (2005). Terrorism Bill: Liberty's Briefing for Second Reading in the House of Lords, November 2005.

<sup>672</sup> Hansard HC Deb Vol 438 col 324-328 (26 Oct 2005)

<sup>673</sup> *R v F* [2007] EWCA Crim 243; see also section 59 of TA 2000 for incitement to commit acts of terrorism overseas

<sup>674</sup> *R v Gul* [2013] UKSC 64

<sup>675</sup> *Ibid*, para. 6

<sup>676</sup> *Ibid*, para. 7

However, the UK Supreme Court considered the definition of terrorism under section one of TA 2000 and held that:<sup>677</sup>

*The definition in s 1 is clear. Those who attacked the military forces of a government or the Coalition forces in Afghanistan or Iraq with the requisite intention set out in the Act are terrorists. There is nothing in international law which either compels or persuades us to read down the clear terms of the 2000 Act to exempt such persons from the definition in the Act*

Unlike some regional definitions of terrorism, such as the Algiers Convention,<sup>678</sup> the TA 2000 does not make an exception for 'freedom fighters'. If the courts were to deviate from the current construction of section 1 TA 2000, they could face the more difficult question of applying the same legislation against the IRA,<sup>679</sup> despite the fact that this threat is diminishing. Thus, the approach of UK courts in the above case is perhaps not necessarily to be criticised.

However, the above decisions may prompt some to argue that a failure to acknowledge a distinction between, on the one hand, an armed struggle against oppressive regimes and, on the other hand, terrorist acts would require the UK government "to protect every crazy government in the world."<sup>680</sup> Although this argument might be plausible, at least theoretically, it is not supported by recent practices. To start with, Libyan 'rebels' managed to topple Col. *Kaddafi* with the help of NATO and other Gulf States. In a stark turn of events, the UK government has agreed to compensate some 'terrorists' who were rendered to Libya.<sup>681</sup>

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<sup>677</sup> Ibid, para. 60

<sup>678</sup> See chapter two for further discussion

<sup>679</sup> For detail analysis on IRA, see Moloney, E. (2007). *Supra* note 306; see also Coogan, T. P. (2002). *The IRA*. *Supra* note 306; see also Shanahan, T. (200), *supra* note 306; see also Walker, C. (2011), *supra* note 224, pp. 340-344

<sup>680</sup> Walker, C. (2002). *Blackstone's Guide to the Anti-Terrorism Legislation*. 1st edition. (Oxford, Oxford University Press), p.175

<sup>681</sup> Talor, R. N. (2012). *Government pays Libyan dissident's family £2.2m over MI6-aided rendition*, 13 December, *Guardian*; see also Cobain, I. (2012). *Libyan dissidents launch action against UK government over rendition*, 28 June, *Guardian*



To add another example: it is claimed that Syrian 'rebels' are funded, trained and armed by their Gulf backers with the implicit approval of Western countries.<sup>682</sup> Videos showing attacks on Syrian government military installations and other institutional targets are awash on the internet. Some of these videos, which praise the 'heroic' attacks, are widely accessible from Western newspapers.<sup>683</sup> But neither the UK government nor other western countries are in any mood to bring terrorism charges against people who upload these videos.

Moreover, there were few reported terrorism-related arrests against British nationals who travelled to Syria. Concededly, some individuals were charged for participating in the kidnapping of western journalists or for joining jihadist movements in Syria.<sup>684</sup> However, it would be absurd if the UK government brought terrorism charges for the sole reason that such individuals have supported a war against an oppressive regime. This is due to the fact that there are some Syrians living in the UK who openly support the 'rebels',<sup>685</sup> with similar sentiments felt by much of Europe.<sup>686</sup> The UK government and other western governments are more concerned with the radicalisation of young Muslims who travelled to Syria.<sup>687</sup>

Furthermore, arguments in favour of encouraging terrorism against undemocratic regimes raise a complicated issue of finding who is 'democratic' and who is not. Taking the case of Ethiopia, for instance, the late Prime Minister, *Meles Zenawi*, was widely regarded by some Ethiopian Diasporas as a dictator. Some international human rights organisations have also branded him a tyrant.<sup>688</sup> But, for Western allies of the country, such as the UK, the late Ethiopian leader was

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<sup>682</sup> Bayoumy, Y. and Bakr, A. (2013). Western, Arab states to step up Syrian rebel support, 22 June, Reuters; see also Oweis, K. Y. (2013). Large Arms Shipment Reaches Syrian Rebels: Opposition, 25 August, *Reuters*

<sup>683</sup> To mention some: New York Times (2012). *The Lions of Tawhid*, 20 August; see also Guardian (2012). *Syrian Rebels 'Down Army Helicopter' In Damascus*, 27 August; see also Guardian (2013). *Syria Rebels Battle to Take Taftanaz Air Base*, 3 January

<sup>684</sup> BBC (2013). *Brothers Deny Kidnapping Journalists In Syria*, 21 June; see also Whitehead, T. (2013). *Four Men Arrested Under Terror Laws After Kidnap Of Journalist*, 10 January, *The Daily Telegraph*

<sup>685</sup> MacFarquhar, N (2013). *A Very Busy Man Behind the Syrian Civil War's Casualty Count*, 9 April, *New York Times*

<sup>686</sup> Bayoumy, Y. and Bakr, A. (2013). *supra* note 682

<sup>687</sup> Schmit, E. (2013). *Worries Mount as Syria Lures West's Muslims*, 27 July, *New York Times*

<sup>688</sup> See for instance, Freedom House (2012). *The Unhappy Legacy of Meles Zenawi*, 22 August

one of the few African intellectuals.<sup>689</sup> Therefore, it can be subject to abuse as the decision to apply the law could be left to the discretion of the 'democratic' states. The prohibition of speech that incites and encourages terrorism should surely be the same for all nations, democratic or undemocratic, if freedom of speech is to be realised in its truest sense. It also makes no sense to permit the encouragement of terrorism in undemocratic regimes.

We have also explored the absurd dichotomy of 'terrorists' and 'freedom fighter' in chapter two from an Ethiopian perspective. For the Ethiopian government, *Ginbot 7*, OLF ONLF, EPPF constitute terrorist organisations. In a similar manner to the appellant in *R v Gul*,<sup>690</sup> these organisations, particularly OLF ONLF, justified attacks against the Ethiopian government as military targets, not terrorist attacks. But we have noted in chapter two that most of the leaders of these organisations have received political asylum in the West. Therefore, it would be Western hypocrisy at its height to tolerate encouraging terrorism against 'undemocratic' regimes, but condemning similar attacks against their citizens or their interests. Terrorists should be punished for committing terrorist acts and they should not get away with it for the sole reason that their act was directed against some perceived 'undemocratic' regimes.

To sum up, the criminalisation of indirectly encouraging terrorism, i.e. glorification has political, psychological, and legal relevance.

It has a psychological effect because criminalizing, for instance glorification of terrorism, has nothing to do with imminent threat to national security. It is arguable that the purposes of this sort of offence succeed not only in shunning an expression that is unbearable, but which might also indirectly encourage others to follow suit. For instance, people do not want to hear words that undermine fallen soldiers in a battlefield or make "celebration of despicable terrorist acts".<sup>691</sup> It is emotionally and physically disturbing, and frankly drives people to agitation.

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<sup>689</sup> The Daily Telegraph (2012). *Meles Zenawi Obituaries*, 22 August

<sup>690</sup> *R v Gul*, supra note 674

<sup>691</sup> See the argument of the former Home Secretary Charles Clarke in Letter from Charles Clarke, supra note 667; see also Council of Europe (2005). Explanatory Report, supra note 523, para. 95

To the receiver of the message, especially young Muslims, on the other hand, it sends out a signal that a terrorism in its various manifestations is appropriate; 'conduct that should be emulated by [the receivers] in existing circumstances.' Preaching to Muslims asking them to become martyrs is neither direct incitement nor general encouragement to terrorism. But, it urges, it reminds and it persuades those listening to emulate the behaviour of others who might have committed suicide atrocities. There is, thus, a danger with this sort of speech because it "resonates with the present and guides future action."<sup>692</sup>

The political aspect of the offence of indirectly encouraging (glorification) terrorism becomes particularly important if the speech is prejudiced based on the identity of the speaker. A speech should not be given special consideration depending on the speaker being a Muslim, or a member of an opposition party.

Finally, the legal relevance of the law is that it fills the gap in the existing law by capturing expressions:

*which do not amount to direct incitement to perpetrate acts of violence, but which are uttered with the intent that they should encourage others to commit terrorist acts.*<sup>693</sup>

The above justification was recently upheld in *R v Ahmed Faraz*.<sup>694</sup> The conviction of the defendant under TA 2006 was quashed after the UK Court of Appeal ruled that the trial court had improperly told the jury that other convicted terrorists possessed the same terrorist materials presented against Ahmed Faraz. However, the Court of Appeal ruled that the trial judge was correct to hold that the offences under TA 2006 are compatible with Article 10 ECHR.<sup>695</sup> This case has also underlined the notion that punishing offences that 'by necessary implication'<sup>696</sup> encourage terrorism are justified.

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<sup>692</sup> Walker, C. (2011), supra note 224, p.367

<sup>693</sup> Letter from Charles Clarke, U.K. Home Secretary, to Rt. Hon David Davis MP and Mark Oaten MP, Members of the House of Commons (July 15, 2005)

<sup>694</sup> *R v Ahmed Faraz* [2012] EWCA Crim 2820

<sup>695</sup> Ibid, paras. 54, 57

<sup>696</sup> Ibid, para. 52

So far, there have been seven prosecutions based on section 1-2 of TA 2006.<sup>697</sup> The Crown Prosecution Service has achieved a conviction in six<sup>698</sup> of the cases. The CPS has also listed encouragement of terrorism as a separate form of offence thereby supporting the argument for a need for specific legislation on expressions that encourage terrorism.<sup>699</sup>

Finally, punishing expressions that justify or glorify acts of terrorism has the legal backing of regional instruments<sup>700</sup> such as the European Convention on the Prevention of Terrorism (ECTP),<sup>701</sup> as well as international instruments such as UN Security Council Resolution (UNSCR) 1624.<sup>702</sup> Article 5 of the ECPT criminalises 'public provocation to commit terrorist offences'. The explanatory report to the ECPT states those offences such as Article 5 "...should not be considered as terrorist offences...They are criminal offences of a serious nature related to terrorist offences."<sup>703</sup>

Moreover, the UNSCR, in its preamble, condemns "...in the strongest terms the incitement of terrorist acts and repudiating attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts".

### ***3.8 Would the Glorification of Terrorism be Unconstitutional in the US?***

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<sup>697</sup> Home office (2012). *Home Office Statistical Bulletin Operation Of Police Powers Under The Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes And Stops And Searches* (HOSB 11/12), at Table 1.03(a)

<sup>698</sup> Ibid, Table 1.11(a)

<sup>699</sup> See Crown Prosecution Service. *Prosecution Policy and Guidance: Violent Extremism and Related Criminal Offences*, at [http://www.cps.gov.uk/publications/prosecution/violent\\_extremism.html](http://www.cps.gov.uk/publications/prosecution/violent_extremism.html)

<sup>700</sup> Hansard, HL Deb Vol.676, col.455 (December 5, 2005)

<sup>701</sup> Council of Europe (2005). *Council of European Convention on the Prevention of Terrorism* (Warsaw 16. v. 2005)

<sup>702</sup> United Nations Security Council (2005). *Threats to International Peace and Security* (S/RES/1624 (2005)).

<sup>703</sup> See Council of Europe (2005). Explanatory Report, *supra* note 523, paras. 77-78; for the distinction between Article 4 of ECPT and Section 1 TA, see Joint Committee on Human Rights (2007). *The Council of Europe Convention on the Prevention of Terrorism: First Report of session 2006-07, Report together with Formal Minutes and Appendices*. (HL Paper 26 HC 247. London, TSO), paras. 22-49

In the UK, there are arguments both for and against criminal offence of encouraging a crime.<sup>704</sup> As discussed above, the same is true with the offence of encouraging terrorism. It might be tempting to close the argument on encouraging terrorism by suggesting that because they would have been unconstitutional in the US, so they should assume the same illegitimacy in the UK. If this argument is made based on existing laws, then it is true that the US does not have a law that criminalises the glorification of terrorism. However, if it is made based on the Supreme Court's interpretation of the First Amendment rights, then the argument could be more 'speculative'.<sup>705</sup>

There are several reasons for above accentuation. First, the Supreme Court was inconsistent in its approach to the question of national security and the scope of constitutionally protected rights during war and peace times.<sup>706</sup> The various principles discussed above, such as the bad tendency test, the clear and present test, etc were a result of this. For this reason, it would be difficult to speculate that the US Supreme Court would overturn new offences on the issue of glorifying terrorism. The circumstances in which the law come into effect, for instance in time of war or terrorist attacks similar to 9/11, might convince the court not to do so.

Secondly, a comparison of the US laws on terrorism with the UK's is somehow misleading. More often than not, the cases cited for comparisons are those that dealt with the incitement of violence, not the glorification of terrorism. However, as discussed in detail in the previous sections, these two types of violence are not the same. Moreover, most of the US cases are related to the offence of

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<sup>704</sup> See Ormerod, D. and Fortson, R. (2009). Serious Crime Act 2007: the Part 2 Offences. *Criminal Law Review* No.6 pp. 389-414 (arguing that "It is questionable whether all of these tortuously difficult offences in ss.44-46 are even necessary.") See also a counter argument in Sullivan, G.R. (2006). Inchoate Liability for Assisting and Encouraging Crime. *Crim. L.R.* 1047. see also Barnum, D. G. (2006). ,supra note 444(arguing that "There do not appear to be any doctrinal impediments to using s.1 of the Terrorism Act to punish "indirect encouragement" to the commission of terrorist acts."); see also Child, J.J., supra note 72

<sup>705</sup> Barnum, D. G., supra note 444 ("Freedom of speech is widely thought to enjoy stricter protection in the United States than almost anywhere else in the world. Presumably government would be barred from imposing criminal penalties on an open-ended and ill-defined category of speech such as "indirect incitement". This conclusion is plausible but speculative. It appears that American courts, like British courts, might be prepared to entertain the possibility that indirect incitement should qualify as punishable speech.")

<sup>706</sup> Howard, R. D. et al. (2006). *Homeland Security and Terrorism: Readings and Interpretations* (New York: The McGraw-Hill Companies)

'dissemination', not to a 'statement offence.' These are different sorts of offences in the UK.<sup>707</sup> The charges in *Schenck v United States*, for instance, were related to:

*a conspiracy to circulate among men called and accepted for military services... a circular tending to influence them to obstruct the draft, with the intention to effect that result...*<sup>708</sup>

Consequently, First Amendment protection was denied as the circulars were found encouraging to the commission of subversive activities. The same is true with the *Masses Publishing Co. v Pattern*<sup>709</sup>, *Gitlow v New York*<sup>710</sup>, *Abrams v United States*<sup>711</sup> cases where the offences were related to publishing, printing, or writing offensive expressions and then disseminating them to the public. These allegations would fall under section 2 TA 2006.

The other landmark decisions, on the other hand, were centred on unprotected public speeches. *Feiner v New York*,<sup>712</sup> *Dennis v United States*<sup>713</sup> and *Brandenburg v Ohio*<sup>714</sup> fall under this category. Although the US Supreme Court applied the same balancing principles for both 'statement offenses' and 'disseminating offences', a comparison of TA 2006 with the US should be like for like as both are two separate offences.

Thirdly, the attempt to mix up the offence of indirectly encouraging terrorism and inciting terrorism is another confusing aspect of the comparison. An attempt to resort to court cases that deal with the latter by ignoring this difference is not helpful. For instance, the issue in the case of *Taylor v State of Mississippi* was the constitutionality of a Mississippi Statute that criminalized a person:

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<sup>707</sup> See section 1 and section 2 of TA 2006. For detail discussion on the difference between 'statement offences' and 'dissemination offences', see Hunt, A. (2007). *supra* note 650

<sup>708</sup> *Schenck v United States*, *supra* note 443

<sup>709</sup> *Masses Publishing Co. v Pattern* 244 F. 535 (S.D.N.Y. 1917)

<sup>710</sup> *Gitlow v New York*, *supra* note 546

<sup>711</sup> *Abrams v United States*, *supra* note 441

<sup>712</sup> *Feiner v New York*, 340 US 315 (1951)

<sup>713</sup> *Dennis v United States*, *supra* note 531

<sup>714</sup> *Brandenburg v Ohio*, *supra* note 446

*...who individually, or as member of any organisation... intentionally preach, teach or disseminate any teachings ... by any ... means or method designated and circulated to encourage violence... incite any sort of radical distrust...*<sup>715</sup>

The defendant was "... indicted for orally disseminating teachings designed and calculated to encourage disloyalty..."<sup>716</sup> Similar to the construction of the glorification clause (in the past or future) in the UK, Taylor condemned the sending of boys to battle overseas in the past and in the future. However, the US Supreme Court acquitted Taylor, and the other defendants, stating that the views expressed were "... their beliefs and opinions concerning domestic measures and trends in national and world affairs."<sup>717</sup> The content of the Mississippi Statute was similar to that of the UK's direct encouragement clause except the former requires only criminal intent while the latter requires intent or recklessness. Moreover, the former does not make any distinction between private and public communications.

Under the current UK TA 2006, therefore, Schenck would have been prosecuted under section 2 of the TA 2006 whilst Taylor would have been covered by section 1.

However, Schenck's conviction was upheld while Taylor's claim to the First Amendment was upheld. Nevertheless, a question is appropriate here: Would Taylor be prosecuted if he advised the women not to send their children to war instead of general condemnation of the recruitment of men to battlefields? The answer would seem to be in the affirmative if we consider the position taken in *Schenck v United States* discussed above and *Frohwerk v United States*.<sup>718</sup> The statements made in the anti-draft in *Frohwerk* were as follows:

*...a monumental and inexcusable mistake to send our soldiers to France...; 'out right murder without serving anything practical', 'few men and compatriots*

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<sup>715</sup> Taylor v State of Mississippi, 319 U.S. 583 (1943)

<sup>716</sup> Ibid

<sup>717</sup> Ibid

<sup>718</sup> Frohwerk v United States, 249 U.S. 204 (1919)

*might amuse unprecedented fortunes. We sold our honour, our very soul.', 'we say, therefore, cease firing.'*<sup>719</sup>

It would appear that this statement presents no obvious dangers. However, the conviction of the defendant was upheld because the US Supreme Court believed that "a little breath would be enough to kindle a flame."<sup>720</sup> However, the expressions used in Frohwerk would not be covered even by the strictest glorification clause in the UK because Frohwerk's statements contain nothing that 'praise or celebrate' act of violence.

Another case, where the incitement test was applied is *Brandenburg v Ohio*.<sup>721</sup> A look at this case suggests that a speech that falls short of inciting violence is protected by the US constitution. The US Supreme Court attempted to balance between permissible and non-permissible expressions. It went to the extent of overruling earlier cases such as *Whitney v California*<sup>722</sup> where an early US Supreme Court decision upheld a California's Criminal Syndicalism Act that criminalize mere 'advocacy' of violence.

If the *Brandenburg v Ohio* principle (held that a government cannot punish theoretical discussion of overthrow of a government by violence) is taken, the TA 2006 that deal with encouragement of terrorism would have been unconstitutional in the US. But is merely advocating violence the same as glorification of terrorism as appears under section 1 TA 2006? The answer would come in the form of negative because section 1 TA 2006, in terms of its construction, requires an *actus reus* that "the individual's statement was likely to be understood by those to whom it was published as a direct or indirect encouragement to them to engage in specific behaviour."<sup>723</sup> But none of this requirement was required in *Brandenburg v Ohio*.

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<sup>719</sup> Ibid

<sup>720</sup> Ibid

<sup>721</sup> *Brandenburg v Ohio*, supra note 446

<sup>722</sup> *Whitney v California*, supra note 441

<sup>723</sup> Hunt, A. (2007)., supra note 650



A more convincing argument could be drawn from *Holder v Humanitarian Law Project*.<sup>724</sup> This case has stirred much controversy by affirming the Material Support Statute (18 USC § 2339B). *Holder* has overruled, if not, retreated from *Brandenburg's* incitement test.

*Holder*<sup>725</sup> raises basically a question of how much support one can offer to terrorist organisations. The case had been dragging on for twelve years. The plaintiffs challenged the Material Support Statute:

*... asserting violations of Fifth Amendment due process clause on the ground that the statutory terms are impressively vague and a violation of their First Amendment rights to freedom of expression and association.*<sup>726</sup>

The US Supreme Court rejected this argument. The relevance of the case to this research comes from the application of the Material Support Statute to speeches that advocate any form of support. As discussed in the preceding sections, *Brandenburg v Ohio* criticised and overruled previous court cases that punished speech that merely advocate violence. The US Supreme Court in *Holder v Humanitarian Law Project* qualified *Brandenburg v Ohio* in the following respects.

First, the US Supreme Court held that the Material Support Statute does not ban speech. *Brandenburg v Ohio* was generous in the sense that it went to the extent of upholding the advocacy of violence by any group [foreign or domestic], and individuals. But, *Holder v Humanitarian Law Project* deviated from this incitement test by punishing purely political advocacy in relation to foreign terrorist groups. In other words, the US Supreme Court here criminalised speech that has nothing to do with incitement to violence or imminent lawless action.

Second, it distinguished between 'independent' advocacy and active membership. The US Supreme Court stated that 'independent advocacy' is advocacy not

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<sup>724</sup> *Holder v Humanitarian Law Project*, supra note 451

<sup>725</sup> *Ibid*

<sup>726</sup> *Ibid* (syllabus)

conducted "... under the direction of, or in coordination with foreign ... terrorist organisation."<sup>727</sup> The US Supreme Court held that this kind of advocacy is not prohibited. Moreover, the US Supreme Court is of the opinion that mere membership, even to proscribed terrorist groups, is not banned. The distinction made between various stages of participation is relevant here. One can be a member, but one may not take a role in any activity of a group. Independent advocacy is considered passive participation and not covered by the Material Support Statute. In contrast, one might not be a member, but one can still actively participate in the activities of the group, for instance, by contributing funds. Moreover, one can be both a member and an active participant. According to *Holder v Humanitarian Law Project*, the Material Support Statute covers both of the latter cases.

Third, the US Supreme Court made it clear that there should be a distinction between Communist and terrorist organisations. The US Supreme Court stated that the scrutiny of and restrictions placed on terrorist organisations will be more intense than in the former because of the very purpose for which they exist.<sup>728</sup>

More interesting is the point made by Justice Scalia with regard to the Material Support Statute. He stated that joining an organisation for 'philosophical reasons'<sup>729</sup> is not a crime under the US law. Until it is made a crime by a Federal or State entity, therefore, there could not be any punishment thereof. His statement is an appropriate response to the speculative argument that the UK's indirect encouragement of terrorism offence would be unconstitutional in the US. In the absence of any Federal law or US Supreme Court decision that deals with glorification of terrorism, arguing that the UK law would be unconstitutional is fallacious.

For all the reasons discussed above, it is wrong to conclude that the offences under TA 2006 in the UK would have been unconstitutional in the US.

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<sup>727</sup> Ibid

<sup>728</sup> See oral argument in *Holder v Humanitarian Law Project* [ as argued on February 23, 2010], supra note 451

<sup>729</sup> Ibid

### **3.9 How does the EATP define the Glorification of Terrorist Acts? How is this different from TA 2006?**

Before we embark a discussion on the definition of glorification under the EATP, we will first discuss the specific laws on incitement to violence under Ethiopian law.

The Ethiopian Criminal Code and the EATP contain provisions that deal with incitement. Accordingly, Article 36(1) of the Ethiopian Criminal Code provides the framework. Incitement is defined as intentional inducement of "another person whether by persuasion, promises, money, gifts, and threats or otherwise to commit a crime." This definition is similar to common law definition of incitement.<sup>730</sup> However, Sub-article two provides that there is no offence of incitement to violence if the intended offence is not attempted.

This is in a direct contrast to common law approach which had been in place before the coming into force of the Serious Crime Act 2007. This Act replaced the common law incitement of violence with offences of encouraging crimes.<sup>731</sup> In *R v Higgins*,<sup>732</sup> for instance, it was held that it is immaterial whether the incited act was attempted or not.

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<sup>730</sup> See for example, *Race Relations Board v Applin* [1975] AC 259, HL ("incite" means to urge or spur on by advice, encouragement or persuasions, and not otherwise ... A person may "incite" another to do an act by threatening or by pressure, as well as by persuasion."); see also Crown Prosecution Service. *Prosecution Policy and Guidance*, supra note (the CPS lists long list of offences that could be categorized under violent form of expression).

<sup>731</sup> See sections 44-46. See also Law Commission (2006). *Report on Inchoate Liability for Assisting and Encouraging Crime* (Law Com No. 300, Cm 6878). London, the Commission; see also Child, J.J. (2012). *Exploring the Mens Rea Requirements of the Serious Crime Act 2007 Assisting and Encouraging Offences*. 76(3) *J. Crim. L.* 220-231 ("Considers the complexity of the drafting of the Serious Crime Act 2007 Pt 2 offences of encouraging and assisting crime and in particular those provisions related to mens rea. Focuses on two categories of offence: (1) belief offences, comprising the s.45 and s.46 offences; and (2) the intention offence found in s.44. Considers the minimum mens rea requirements of the offences and suggests that they do not require belief or intention but are satisfied by mere recklessness and are therefore risk-based offences"); see also Ormerod, D. and Fortson, R., supra note 704; see also Sullivan, G.R., supra note 704.

<sup>732</sup> *R v Higgins*, supra note 528

Moreover, for a common law incitement to violence, there should be communication between the target and the inciter,<sup>733</sup> though under exceptional circumstances there can be criminal liability even before communication.<sup>734</sup> However, the Ethiopian Criminal Code is silent on this requirement.

In similar fashion to the case of *Brandenburg v Ohio*,<sup>735</sup> *Invicta Plastics Ltd v Clare*<sup>736</sup> affirmed that there can be indirect as well as direct incitement to a specific offence or addressed generally to the public.<sup>737</sup> The Ethiopian Criminal Code, on the other hand, specifically mentioned that liability arises only in case of directly intended incitement, and not through indirect incitement.

However, Article 255 of the Ethiopian Criminal Code contains an exception to the general principles stated under Article 36. There can be criminal liability for inciting a felony offence even if the incited act is not attempted.<sup>738</sup> Moreover, specifically, the EATP makes it a crime to incite someone "even if the incited offence is not attempted."<sup>739</sup>

But it remains unclear under Ethiopian law whether there should be public/private communication for the law to be triggered. Article 27(2) of the Ethiopian Criminal code can be of some help here. According to this article, "a mere attempt to instigate is not a crime unless the exception is clearly provided by law." As discussed above, Article 255 of the Ethiopian Criminal Code is one of the exceptions. Nevertheless, the question is: does liability for attempting to

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<sup>733</sup> *R v Fitzmaurice*, supra note 528.

<sup>734</sup> *R v Ransford* (1874) 13 Cox 9, (1874) 3 LT 488, CCR.

<sup>735</sup> *Brandenburg v Ohio*, supra note 446 (though incitement can be direct or indirect, "a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments").

<sup>736</sup> *Invicta Plastics Ltd v Clare*, supra note 528 (incitement is defined as encouragement, persuasion, or a command of another to commit a crime).

<sup>737</sup> The ECtHR also supports certain restrictions that directly or indirectly incite violence. See *Hogefeld v Germany*, supra note 541

<sup>738</sup> Note that there is not a definition of attempt under the Ethiopian Criminal Code though Article 27(2) of the same Code provided that 'an attempted crime is always punishable save as it is provided by law, and a mere attempt to instigate or assist crime does not come within the provisions of the law unless it is expressly provided to the contrary'. It is not clear how preparation is distinguished from attempt. According to common law cases, attempt and preparation are not the same. See *R v Robinson* (1915) 2 KB 342; *R v Widdowson* (1986) Crim LR 233; See also Criminal Attempts Act 1981 C. 47.

<sup>739</sup> Article 2(7) of the EATP.

incite arise in the absence of communication? Alternatively, does Article 27(2) of the Ethiopian Criminal Code simply refer to attempted incitement after communication is made or to attempted incitement that is not communicated?<sup>740</sup> According to *R v Ransford* in the UK,<sup>741</sup> the inciter could be legally responsible if he attempted to incite, but the attempt was not communicated. The Ethiopian Criminal Code, however, does not give a clue as to how the above provision is to be interpreted.

The relevant Article for a discussion on glorification of terrorism is Article 6 of the EATP. This Article states that:

*Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.*

This is a direct replica of section 1(1) TA 2006.<sup>742</sup> This raises a question as to whether encouragement to terrorism, more specifically glorifying acts of terrorism, is a new offence in Ethiopia. The answer is in the affirmative despite the existence of some provisions in the Ethiopian Criminal Code that deal with other serious offences.

Article 254 of the Ethiopian Criminal Code is entitled "indirect aid or encouragement." According to this article, failing to report or to do one's best to prevent attacks on the political or territorial integrity of the State is punishable

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<sup>740</sup> *R v Krause*, 66 JP 121, 18 TLR 238; see also *R v Higgins*, supra note 528

<sup>741</sup> *R v Ransford*, supra note 734.

<sup>742</sup> For the four main distinctions between Article 5 of The Council of Europe Convention on the Prevention of Terrorism (ECPT) and section 1 of TA 2006, see Joint Committee on Human Rights (2007). The Council of Europe Convention on the Prevention of Terrorism: First Report of session 2006-07, Report together with Formal Minutes and Appendices. HL Paper 26 HC 247. London, TSO. The explanatory report to the ECPT also states that offences stated from articles 5 to 7 "should not be considered as terrorist offences ... They are criminal offences of a serious nature related to terrorist offences." see Council of Europe (2005). Explanatory Report, supra note 523, paras. 77-78

from five to ten years rigorous imprisonment.<sup>743</sup> However, this Article has a different implication from that of Article 6 of the EATP. While the latter applies to 'statement offences,' the Ethiopian Criminal Code provision applies to actual physical attacks, rather than speech. For this reason, it could be said that the offences of encouragement to terrorism are new to Ethiopia.

Due to this novelty, it might simply not be a case of criticising Ethiopia for enacting a specific provision that deals with encouragement of terrorism because, as will be discussed below, incitement to terrorism could not cover the offences stipulated under TA 2006. Moreover, the UK government argued that criminalizing indirect encouragement has legal backing from the UN.<sup>744</sup> More importantly, the ECtHR has accepted that anyone who glorifies terrorists attacks would be considered giving "moral support for those whom he presumed to be the perpetrators" of the attacks.<sup>745</sup> Though the Ethiopian legislature did not have convincing justifications, having a specific provision that deals with encouragement to terrorism is relevant for political, psychological, and legal reasons.

While it is true that the provision concerning the encouragement of terrorism is taken directly from the UK, the Ethiopian legislature seems unwilling to provide a further definition and guidance on how the offences are to be interpreted. First, the TA 2006 requires two states of mind with regard to the encouragement of terrorism: *intent* or *reckless* behaviour.<sup>746</sup> But such requirements are omitted from the EATP. Second, TA 2006 has attempted, though vaguely<sup>747</sup>, to differentiate between direct or indirect encouragement. In view of that, a statement indirectly encourages acts of terrorism if it:<sup>748</sup>

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<sup>743</sup> Note that the said Article also applies to Articles 242, 244 and 246 of the Ethiopian Criminal Code that cover offences from espionage to Violation of Territorial or Political Sovereignty.

<sup>743</sup> It makes a reference to the United Nations Security Council resolution 1624 that mentions glorifying acts of terrorism. see Hansard HC Deb Vol.442 Col. 1429 (15 February 2006)

<sup>744</sup> It makes a reference to the United Nations Security Council resolution 1624 that mentions glorifying acts of terrorism. see Hansard HC Deb Vol.442 Col. 1429 (15 February 2006)

<sup>745</sup> Leroy v. France, supra note 560

<sup>746</sup> For a detail explanation on the *actus reus and mens rea* requirement, see Walker, C. (2011), supra note 224, pp. 365-366; see also section 1(2)(b)(I-II) of the same Act

<sup>747</sup> Walker, C. (2011), supra note 224, p. 368

<sup>748</sup> Section 1(3) TA 2006

(a) Glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) Is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances?

The TA 2006 does not define what a 'reasonable expectation'<sup>749</sup> means in this context. The problem with indirect encouragement to terrorism is that the impacts of the statements are "measured by reference to its likely understanding by members of the *Public* to whom it is published."<sup>750</sup> Therefore:

*conviction for a serious criminal offence will turn on inferences drawn by others, and that the existence of the offence may have a chilling effect on political speech, which is a category of speech that the Strasbourg court has accorded special importance.*<sup>751</sup>

Despite these problems, the 2006 Act also provides some useful hints that could negate the above concerns. First, the 'statements' and the group of people relevant for the 2006 Act must be determined based on "the contents of the statement as a whole; and the circumstances and manner of its publication."<sup>752</sup> The law does not take into account the identity or the affiliation of the publisher. Neither is it concerned with whether the public are actually 'encouraged.'<sup>753</sup> Thus, the law is identity neutral in the sense that it is immaterial who the publisher or the intended targets of the statements are. This is in a direct contrast to the

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<sup>749</sup> The Joint Committee on Human Rights has raised its concern on the vague requirement of reasonableness. See Joint Committee on Human Rights (2005). Counter-terrorism Policy and Human Rights: Terrorism Bill and Related Matters: Third Report of session 2005-06: Vol.1 Report and formal minutes. HL Paper 75-I 2005-06, HC 561-I. London, TSO, para. 28; But see also how reasonableness was defined with regard to encouragement of terrorism and the subsequent imposition of control orders in *Secretary of State for the Home Department v AL* [2007] EWHC 1970 (Admin)

<sup>750</sup> Choudhury, T. (2009). The Terrorism Act 2006: Discouraging Terrorism. In Hare, I. and Weinstein, J. (eds.). *Extreme Speech and Democracy*. (Oxford, Oxford, University Press), p.470

<sup>751</sup> Hunt, A. (2007). , supra note 650

<sup>752</sup> Section 1(4) of TA 2006

<sup>753</sup> Section 1(5)

position of the ECtHR with regard to the relevance of identity of the publisher/speaker in the analysis of a speech that incites terrorism.<sup>754</sup>

Secondly,

*...the notion of 'emulation' ensures that the words uttered should be understood as more than rhetorical. Consequently, praise for historical violence ... is not an offence, unless the statement can be understood to resonate with the present and to guide future action.*<sup>755</sup>

The psychological effect of statements that 'resonate with the present' will be discussed below. No such distinction is provided under Ethiopian law.

Third, the TA 2006 is also different from Article 5 of the European Convention on Prevention of Terrorism because the latter takes into account "the nature of the author and of the addressee of the message, as well as the context in which the offence is committed."<sup>756</sup> This effectively considers the identity of the speaker as well as the addressee. But, as discussed above, these elements are missing from section 1(4) of the TA 2006. Article 6 of the EATP, on the other hand, does not give any clue at all. As is argued throughout this chapter, taking into account the identity of the speaker could have unintended ramifications unless special protection is given to people who do not condone violence.

Fourth, TA 2006 provides definitions for 'statement', 'public', 'glorification' and 'publish' under section 20. However, the EATP does not provide any definition of these words. For this reason, it is not clear whether the 'public' element of the Ethiopian offence refers to expressions published inside or outside Ethiopia, or indeed whether publishing a public statement encompasses electronic, hard copy or audio/video visual materials. For the sake of certainty, 'public' should be precisely defined so as to avoid "private conversations."<sup>757</sup> Furthermore, though the Bill to the EATP defines glorification as any act that "praises or celebrates or

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<sup>754</sup> See a discussion in the preceding section in this chapter

<sup>755</sup> Walker, C., (2011) *supra* note 224, p.367

<sup>756</sup> Council of Europe (2005). Explanatory Report, *supra* note 523, para. 100

<sup>757</sup> Hansard HL Deb vol. 676 col. 435 (5 December 2005)



supports or encourages,"<sup>758</sup> the same definition was dropped from the EATP. One has to question why the Ethiopian legislature dropped this definition from the final version, given that such a definition was supported by the Council of Europe Convention on the Prevention of Terrorism.<sup>759</sup>

The most important part of the TA 2006 that was not incorporated into the EATP is a defence to a charge of encouraging terrorism. Under Section 1(6) TA 2006, it is stated that a person could challenge any accusation with regard to the offence under section 1 and section 2 if the published statements "neither expressed his views, nor had his endorsement." This "defence is intended, for example, to cover news broadcasters."<sup>760</sup> But there is a qualification to this defence; a court may refuse to avail the accused this defence if he fails to comply with the notice requirements under section 3 of the TA 2006. Moreover, the defence available under section 1(6) TA 2006 is limited only to recklessly made statements.<sup>761</sup>

The EATP, on the other hand, does not provide similar defences. This has caused wide spread confusion among the press<sup>762</sup> and the public. Some allege that people are scared of criticising the Ethiopian government or publishing verbatim reports made by groups or individuals deemed terrorists by the Ethiopian government.<sup>763</sup> They have linked some arrests to the 'Arab spring uprising' that brought about the downfall of some of the most notorious dictatorial regimes in the Middle-East and North Africa. Some Ethiopian journalists and politicians seized the opportunity to write news articles that compare the situation in the

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<sup>758</sup> Parliamentary minutes, supra note 46, p. 15

<sup>759</sup> See Council of Europe (2005). Explanatory Report, supra note 523, para. 95

<sup>760</sup> Explanatory Notes to Terrorism Act 2006 C.11, section 1(6)

<sup>761</sup> Walker, C. (2011), supra note 224, p. 366

<sup>762</sup> A research by the Committee to Protect Journalists (CPJ) indicates that between 2001 and 2011, the country had the highest number of exiled journalists in the world, see CPJ (2011). *Journalists in Exile: A Statistical Profile* at <http://cpj.org/reports/2011/06/journalists-in-exile-2011-iran-cuba-drive-out-crit.php#totalspast>

<sup>763</sup> Public Prosecutor v Elias Kifle, et al (112199/2011); Public Prosecutor v Andualem Arage, et al (?/2011)

North-Africa and Ethiopia.<sup>764</sup> While opposition sympathisers prophesied<sup>765</sup> the possibility of emulating the 'Arab Spring', government sympathisers dubbed the happening of an 'Ethiopian Teseley'<sup>766</sup> as a 'barren hope'<sup>767</sup> for the desperate opposition. The late Prime Minister *Meles Zenawi* once called the revolutionaries in the Arab world 'latecomers to the game'.<sup>768</sup> Although playing down the possibility of an 'Ethiopian Teseley', some argue that the government demonstrably intensified its clamping down on dissent out of a panic that the 'Arab Spring' would spread to Ethiopia. They mention the case of *Elias Kifle*;<sup>769</sup> and *Andualem Arage*<sup>770</sup>

In the case of *Elias Kifle*, the defendants were charged with:

*Violating Article 3 of the EATP (conspiring to destabilize or destroy the fundamental political, constitutional or, economic or social institutions of the country); violating Article 4 of the EATP (planning, preparation, conspiracy, incitement and attempt of terrorist Act); violating article 5 of the EATP (rendering support to terrorism); violating Article 6 of the EATP (Encouragement of Terrorism); violating article 7 of the EATP (participation in a terrorist organisation by creating relations with the Eritrean government and Ginbot 7, ONLF and OLF); violating Article 9 of the EATP (possessing and dealing with the proceeds of a terrorist act).*

Elias Kifle is the publisher and editor of the online news site Ethiopian Review.<sup>771</sup> He was one of the journalists convicted in 2007 together with senior

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<sup>764</sup> Nega, E. (2011). As Egypt and Yemen protest, wither Ethiopia's opposition? *Ethiomeia*, 28 January; Birara, A. (2011). Ethiopian fascinations with the Arab Spring. *Aljazeera Centre for Studies*, 17 July ; Arage, A. (2011). Ethiopian Awakening and the Arab Spring. *Ethiopian Current Affairs*, 17 September; Gedamu, T. (2011). *Republicans on the Throne: A Personal Account of Ethiopia's Modernization and Painful Quest for Democracy* (USA, Sehai Publishers & Distributors)

<sup>765</sup> Mariam, A. G. (2012). Is the Specter of the Arab Spring Haunting Ethiopia? *LBJ School of Public Affairs*, University of Texas at Austin, June 4

<sup>766</sup> Tsedey is an Amharic word for spring

<sup>767</sup> Ayalew, F (2013). "Hope Springs Eternal through....." like Barren-Hope, *AIGA FORUM*, 11 July

<sup>768</sup> *African Business* (2011). *Zenawi: 'We're On The Right Track'*, 10 October

<sup>769</sup> Public Prosecutor v Elias Kifle, et al, supra note 763

<sup>770</sup> Public Prosecutor v Andualem Arage, supra note 763

<sup>771</sup> [www.ethiopianreview.com](http://www.ethiopianreview.com)

opposition party leaders.<sup>772</sup> He fled the country and headed for the US after he was released on pardon. The other defendants in the case were journalists (*Reeyot Alemu and Wubshet Taye*); and chairman of the opposition Ethiopian National Democratic Party (ENDP) (*Zerihun Gebregziabher*), and another opposition sympathiser (*Hirut Kifle*).

Before *Reyot Alemu* was arrested, she had written articles for the now-defunct *Feteh* newspaper criticising the late Prime Minister *Meles Zenawi's* project on the Nile Dam. She also sent news articles to the *Ethiopian Review*.

Opposition members and human rights organisations take the view that some of crucial evidence against the defendant took the form of news articles, which were deemed favourable to the banned organisations such as *Ginbot 7*, ONLF and OLF.<sup>773</sup>

They are also charged with encouraging people to participate in a movement called 'Beka!' <sup>774</sup>It was alleged that the 'Beka' movement was intended to encourage people to emulate the 'Arab Spring uprising'. However, their sympathisers maintained that the content of the publications were mostly concerned with calls for peaceful demonstrations planned to be held on 28 May 2011. This date marks the 20<sup>th</sup> anniversary of the coming to power of the current ruling party.

For instance, opposition political parties allege that news articles similar to the one mentioned below would likely be considered inciting or encouraging terrorism under the current Ethiopian law:

*"Last month, the newly formed Tinsae Ethiopia Patriots Union has distributed "Beka!" (Enough!) pamphlets in Amharic, Oromgna and Tigregna using its network throughout Ethiopia."*

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<sup>772</sup> See Public Prosecutor v Hailu Shawule (Engineer), supra note 61

<sup>773</sup> Some of the evidence in support of their argument are sketchy

<sup>774</sup> An Amharic word for 'enough is enough'

*In a follow up pamphlet two weeks ago, Tinsae Ethiopia called for nationwide protests in the month of May, 2011, to remove Meles Zenawi's dictatorship from power (read here)*

*Tinsae Ethiopia has stated that Ethiopians have rejected the Meles regime during the 2005 elections, but the regime has taken brutal measures to stay in power, while continuing to misrule the country and commit atrocities.*

*May 2011 will be the Meles regime's 20th anniversary in power. Tinsae Ethiopia has called on Ethiopians inside the country and around to rally around the slogan "Beka!" (Enough).*

*Recalling previous attempts by the Meles regime to divert attention from itself by inciting ethnic and religious clashes, Tinsae Ethiopia has asked every Ethiopian to not fall prey for such scheme and look after the well-being of each other regardless of one's religion or ethnic back ground.*

*Tinsae Ethiopia has also sent out a message to the armed forces in Ethiopia to join the people's demand for change and help bring Meles and his collaborators to justice."<sup>775</sup>*

However, the Ethiopian High Court accepted that the prosecution had sufficient evidence against the defendants. *Elias Kifle* was sentenced to life in prison in *absentia* while the others received 14 years jail terms.

The other relevant case to be discussed is the case of *Andualem Arage*, and 23 defendants.<sup>776</sup> The defendants were charged with planning an Egyptian-style revolution in coordination with *Ginbot 7*, OLF and ONLF by:

*...using as a cover their constitutional right to freedom of expression and association for their terrorist mission and using that as a strateg; disseminated*

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<sup>775</sup> Ethiopian Review (2011). *Press Release: Tinsae Ethiopia calls for the end of Meles Zenawi's regime*, 29 March

<sup>776</sup> Public prosecutor v Andualem Arage, et al , supra note 763

*calls for terrorist actions; conducted and used others in inciting and mobilizing activities; called for chaotic/violent meetings and demonstrations; agreed to jointly work on their terrorist mission and strategy with the Eritrean media, media in foreign countries set up for terrorist mission as well like ESAT television, radio, internet and other information networks and Paltalk for terrorist mobilization.*<sup>777</sup>

The specific charges against the defendants include:

*Violating Articles 3 and 4 of the EATP (Planning, Preparation, Conspiracy, Incitement and Attempting to 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; committing kidnapping or hostage taking; causing serious damage to property; and endangering, seizing or putting under control, or causing serious interference or disruption of any public service); violating Article 248 (b) of the Ethiopian Criminal Code (High Treason).*

Some of the defendants were amongst the political leaders and journalists who were convicted following the 2005 Ethiopian general election.<sup>778</sup> However, they were released on pardon. *For instance, Andualem* served as vice chairman of the opposition party Unity for Democracy and Justice (UDJ) until he was detained in 2011. *Eskinder Nega*, worked as a journalist and political activist before his arrest. His publishing company, which run three newspapers (*Askual, Menelik* and *Satenaw*), was found guilty in 2007 of publishing stories that incite and encourage terrorism.<sup>779</sup> Before both were arrested in 2011, they wrote several articles and released video clips on the similarities between the 'Arab spring' and the current Ethiopian situation.<sup>780</sup>

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<sup>777</sup> *ibid*

<sup>778</sup> For details, see chapter two on the discussion of Public Prosecutor v Hailu Shawul, *supra* note 61

<sup>779</sup> Public Prosecutor v Hailu Shawul, *supra* note 61

<sup>780</sup> Nega, E. (2011). As Egypt and Yemen Protest, Wither Ethiopia's Opposition? *Ethiomedias*, 28 January; Nega, E. (2011). Ethiopia: Time for Peaceful Change. *Ethiomedias*, 2 September; Nega, E. (2011). Gadhafi's Fall and Meles Zenawi. *Ethiomedias*, 26 August; Nega, E. (2011). SOS: Dissent and Terrorism in Ethiopia. *Ethiomedias*, 1 July; Nega, E. (2011). Open Letter to PM Meles Zenawi. *Ethiomedias*, 4 March Nega, E. (2011). Debebe Eshetu's Arrest and the New Year,

However, their supporters argue that the evidence presented by the public prosecutor did not support the claim that the defendants incited and encouraged terrorist activities. For instance, one of the articles written by Eskinder reads as follow:

*...ordinary citizens took the initiative all over North Africa and the Middle East. The results made history. They are powerful precedents for the rest of humanity. While inspiring words, sober analyses and robust debates are indispensable as ever, they will remain exactly no more than mere words unless translated into actions. To Ethiopia this means risking the core of a much cherished collective vision - peaceful transition to democracy. In the event of prolonged absence of peaceful action, an implosion, perhaps violent and no doubt dangerous, is unavoidable. Needless to say, the status-quo is increasingly untenable. The time to call for peaceful and legal action has arrived in Ethiopia. History cannot be postponed indefinitely."*<sup>781</sup>

Another article reads:

*The news headlines are invariably dominated by the protests in Egypt, Tunisia and Yemen. Egypt in particular is at the core of international suspense. If Mubarak is successfully ousted, the protests will most certainly spread to other countries. But for many pundits, the surprising restraints of the security services also dominate their thoughts. Is what is happening in Egypt and Yemen a slow motion replay of what undid Ben Ali in Tunisia - that is, are the Generals refusing to fire on unarmed protesters? If so, what implication does this hold for Sudan, the next most probable country to which the protests could spread - and if Sudan explodes, inexorably, the next country in line, is Ethiopia?*<sup>782</sup>

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Ethiomeia, 9 September; Arage, A. (2011). Ethiopian Awakening and the Arab Spring, *Ethiopian Current Affairs*, 17 September

<sup>781</sup> Nega, E. (2011). Ethiopia: Time for Peaceful Change, supra note 780

<sup>782</sup> Nega, E. (2011). As Egypt and Yemen protest, supra note 780

In his 'Dissent and Terrorism in Ethiopia' article, Eskiner criticised the Ethiopian government for creating a climate of fear"<sup>783</sup> by using the EATP against journalists and politicians. He also compares the government's tactic in 2005 and 2011 in the following paragraph:

*Unlike the 2005 treason trials, however, when newspapers were notoriously charged, convicted and proscribed as distinct legal entities, the government's wrath is more circumspect this time, entangling only journalists, Webeshet Taye and Reeyot Alemu, rather than the entire newspapers they work for.*

It is true that these articles did not encourage terrorism. There was nothing in these articles that invited the reader to resort to terrorism. They were even non-violent when compared to the content of the articles, artistic works and books considered by the ECtHR.

None of the above articles "...promote separatism and...recourse to violence...likely to constitute a threat to public order".<sup>784</sup> They were just 'neutral descriptions'<sup>785</sup> of current events.

Furthermore, there was no need to consider "...the content of the impugned statements and the context in which they were made".<sup>786</sup> This is due to the fact that there was no violence or tension whatsoever in Ethiopia in 2011. Therefore, if the government's case were based on the above news articles, 'time, place and circumstance'<sup>787</sup> did not justify the imprisonment of the journalists and political leaders discussed above. Based on the three test criteria<sup>788</sup> seen here, it would be right to conclude that the conviction of the political leaders and journalists was neither proportional to the threat posed nor justified by a legitimate aim. However, the Ethiopian government always maintained that it had strong

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<sup>783</sup> Nega, E. (2011). SOS, supra note 780

<sup>784</sup> Association Ekin v. France, supra note 496, para. 13

<sup>785</sup> Arslan v Turkey, supra note 481, para.45

<sup>786</sup> Başkaya and Okçuoğlu v. Turkey, supra note 489, para. 61

<sup>787</sup> Frisby v. Schultz, 487 U.S. 474, 481 (1988) (the US Supreme Court held that "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.") For further discussion, see Cohen, H. (2009), supra note 538

<sup>788</sup> Handyside v UK, supra note 431

evidence linking these individuals to terrorist activities apart from the above news articles.

As discussed above, the UK government attempted to take into account the identity of individuals when it prohibited interviewing a person or persons affiliated with proscribed terrorist organisations.<sup>789</sup> The ECtHR also upheld a decision of a German court that prevents giving media-access to proscribed organisations and/or their members.<sup>790</sup> However, in some the Ethiopian cases, the prosecution failed to show that the defendants were members of any terrorist organisations, despite the vague claim by the prosecution that they had *links* with proscribed organisations. This claim also failed and the defendants were not prosecuted for it.

Moreover, the EATP could also have a negative effect on academics who, for example, seek to 'explain' the position of proscribed organisations without endorsing their views. With the absence of the defence discussed above under the EATP, conducting an interview, for instance, with *Birhanu Nega*<sup>791</sup> or anyone affiliated with '*Ginbot 7*' would be more likely than not considered as the glorification or endorsement of terrorism. With the TA 2006 in place in the UK and the position taken by the ECtHR in *Sürek and Özdemir v Turkey*,<sup>792</sup> it is unlikely that one would be prosecuted for talking to the Taliban or making a documentary about them.<sup>793</sup> Indeed, it would be considered by many as an affront to democracy were a news organisation prosecuted for reporting on terrorist related matters.

The case of *Temesgen Desalegn*<sup>794</sup> might also be considered here. The defendant, who was the founder of the now defunct national newspaper 'Feteh', was charged with contempt of the judiciary for publishing the statements made by a defendant

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<sup>789</sup> *Brind v UK*, supra note 605

<sup>790</sup> *Hogefeld v Germany*, supra note 541

<sup>791</sup> See chapter two for further discussions

<sup>792</sup> *Sürek and Özdemir v Turkey*, supra note 610

<sup>793</sup> See for instance, a Channel 4 documentary: *Dispatches, Pakistan's Taliban Generation* (2009) [TV Broadcast] Channel 4, 16 March 20.00 hrs. Making similar documentary about *Ginbot 7* would be impossible under the EATP.

<sup>794</sup> Editor-in-chief of *Feteh* (Justice) Newspaper



who was charged with terrorism related activities. Temesgen was not even "explaining or understanding"<sup>795</sup> the defendant's views. But, it was enough for the Ethiopian court to impose a fine and a four-month suspended sentence. The prosecution in this case could also have resorted to Article 6 of the EATP for publishing verbatim statements of the defendant if these statements were in any way deemed as encouraging terrorism. The best way to suppress the temptation of the prosecution to prosecute under the EATP is, therefore, to provide a defence so that a publisher will not be prosecuted for a statement that he does not endorse.

Fifth, considering Article 6 of the EATP, it is only concerned with 'statement offences', not with 'dissemination' offences. The parliamentary minutes do not explain why the Ethiopian government picked the former and decided to drop the latter offence. Before the coming into effect of the EATP, the Ethiopian government had used the Criminal Code to prosecute those who published and distributed materials deemed to encourage or incite serious violence.<sup>796</sup> This could be the logic behind dropping the 'dissemination offences.' But the problem with resorting to the Ethiopian Criminal Code is that the provisions therein deal only with incitement or general encouragement to violence. As discussed, there is a big difference between the incitement of terrorism and the encouragement of terrorism. Thus, it might be worthwhile reconsidering the EATP before the prosecution starts to regularly resort to Article 6 of the EATP for the prosecution of both 'statement offences' and 'dissemination offences.'

Finally, the EATP stipulates from 10 to 20 years of rigorous imprisonment for violating Article 6 of the same legislation. This is too excessive compared to section 1(7) TA 2006, which provides "imprisonment for a term not exceeding 7 years or to a fine, or to both." Though the EATP was modelled on the British law, the parliamentary minutes do not provide a reason why the punishment for the same offences is so severe under Ethiopian law.

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<sup>795</sup> The Home Secretary made a distinction between encouraging and glorifying on one hand and explaining and understanding on the other hand. But that attempt was shot down by the Joint Committee. See Joint Committee on Human Rights (2007). The Council of Europe Convention on the Prevention of Terrorism, *supra* note 703, para. 27-28

<sup>796</sup> See chapter two

### 3.10 Conclusion

The speech related restrictions discussed in this chapter might have changed the 'the rules of the game'<sup>797</sup> for terrorists in the West. These restrictions can be traced back to 'a British tradition extending from colonial emergency rule'<sup>798</sup> or they could be considered part of the broad 'militant' response of western democracies.<sup>799</sup> However, these restrictions have brought unintended consequences; they have paved for an 'international invitation to crush dissent'.<sup>800</sup> They are being transplanted and are generally applied for the wrong purposes.

First, it has to be said that the demand for freedom of expression in Ethiopia has become 'a pie in the sky' since 2005.<sup>801</sup> Critics of the Ethiopian government held that the scale of the protest in 2005 has unnerved the Ethiopian government with the consequence that the government has given free rein to security officials to arrest and convict under anti-terror laws those who dare to discuss the 'Green Revolution'<sup>802</sup> or the 'Arab Spring'.<sup>803</sup> They highlighted that the evidence linking the 'terrorists' to the crime they are charged - membership of terrorist organizations and inciting or encouraging terrorism - has not been proved. Moreover, there were no restrictions on the ambit of the cases: 'terrorist suspects' have been charged and convicted using vague laws of terrorism, such as treason, outrages against the constitution, violation of the territorial integrity of the country, etc.

Additionally, what politicises the issue more is that counter-terrorism measures have been specifically used to target political leaders, members of the senior

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<sup>797</sup> Following the 2005 London Bombing, Tony Blair famously declared that "Let no one be in any doubt, the rules of the game are changing". For details see Jeffery, S. (2005). *The Rules of the Game Are Changing*, 5 August, Guardian

<sup>798</sup> Roach, K, (2012), supra note 193, p. 299

<sup>799</sup> SaJo, A. (2004), supra note 209; see also Thiel, M (2009), supra note 208; see also Walker, C. (2011). *Militant Speech*, supra note 192

<sup>800</sup> Roach, K, (2012), supra note 193, p. 56

<sup>801</sup> This view is particularly shared by human rights organisations and opposition political parties

<sup>802</sup> See the case of *Public Prosecutor v Hailu Shawul*, supra note 61

<sup>803</sup> See the case of *Public Prosecutor v Elias Kifle*, supra note 763 ; see also *Public Prosecutor v Andualem Arage*, supra note 763

leadership of political parties and those more reputable or, as the some care to call them, 'dangerous' journalists that hold increased sway within public opinion; imprisoning these people serves to disconnect them from the public and drains their popularity.

We cannot talk of a balance between freedom of expression and anti-terrorism laws in Ethiopian if counter-terrorism measures, both those that are in the Ethiopian Criminal Code and the EATP, are used against expressions of political dissent. There is little doubt in many people's mind that the sentencing of people who emerged as political figures has been largely politically motivated.<sup>804</sup>

The design of the counter-terrorism provisions, at least in part, could also further contribute to their poor implementation. For example, the failure of the EATP to make a distinction between memberships before or after proscription has resulted in the prosecution of people for mere per se of membership. Another example, this time on the issue of encouraging terrorism, is the EATP's failure to stipulate a criminal state of mind; to differentiate between direct and indirect encouragement; to provide definitions of different terms used under the EATP; or to provide any defenses for those accused of encouraging terrorism. The effect of all these flaws is, therefore, stifling political dissent that could be tolerated in a democratic system.

Therefore, while supporting Ethiopia's attempt to include provisions in the EATP that restrict speech related terrorist expressions, it has to be underlined that the EATP requires major amendments before it is applied against terrorist suspects. Moreover, as discussed in chapter two, Ethiopia has learned a lot from the West while trying to modernise its laws. In the same manner, the Ethiopian judiciary could benefit from examining the decisions of the ECtHR in order to provide more protection to politicians and journalists. These factors would help restore the balance between the need to restrict terrorist expressions and allow permitted expressions, such as political dissent.

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<sup>804</sup> See Human Rights Watch (2012). *Ethiopia: Terrorism Law Used to Crush Free Speech: Donors Should Condemn Verdicts, Demand Legal Reforms*, 27 June; see also Kaiser, K (2012), *supra* note 476; see also Kebede, D. (2012). A 'Dark Day' For Freedom Of Expression in Ethiopia, 28 June, *Awramba Times*



## Chapter Four: Right to Privacy and Anti-Terrorism Laws

### *4.1 Introduction: Covert Investigation and Terrorist Suspects*

The right to privacy is directly affected by freedom of expression. One's speech, writing, and conduct influence how one's privacy is perceived by law enforcers. The unintended or intended consequences of a particular expression on one's privacy are particularly visible in the context of the fight against terrorism. Those who dare to express their views against the generally accepted societal norms are the people most likely to be targeted for search, seizure, interception and surveillance of communication.

The challenge for privacy in covert investigations into terrorist suspects is more controversial than the values of privacy in the general law of entry, search and seizure. For one thing, suspects do not have the opportunity to adapt their conduct to on-going investigations due to the covert nature of the investigation. The whole process is tailored to the suspect not knowing he is being investigated.

Second, covert investigations reveal intimate details of the suspect's private life. Revealing these details arguably undermines the integrity of the suspect. Despite the allegedly strict authorisation procedures, there remains little privacy after a third party gets access to those details. Third, the completion of the investigation and the process of prosecution further complicate the adversarial process. Defendants do not get the opportunity to challenge the evidence, the sourcing of that evidence, or the process of investigation because it is all conducted under the banner of national security. The interest of the public prevails over the right of the defence to disclosure. Moreover, in some countries, for instance in the UK, the judiciary plays a major role in deciding whether to exclude evidence on the basis of it being obtained illegally.<sup>805</sup>

Fourth, a government's failure to either confirm or deny the existence of an ongoing investigation ostensibly contradicts a suspects the right to live in a

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<sup>805</sup> R v Austin [2009] EWCA Crim 1527, ("court is not obliged to exclude evidence that has been unlawfully obtained provided that it does not infringe section 17 of RIPA." ), para. 47

peaceful environment without governmental intrusion. As will be shown below, bringing a legal challenge against covert investigation is futile, as governments are not forced to confirm or deny it. The arguments used in favour of limiting disclosure are numerous; fear of exposing intelligence practices and undermining the purpose of covert surveillance, to list a few .<sup>806</sup>

Another related issue is the question of standing to sue. While there are some differences in the UK and US as to how this issue is approached, those who think that they have been subjected to illegal interception or surveillance face an uphill battle to bring legal action for breach of privacy. The case could be dismissed out of hand, as the individual might not have sufficient evidence to support the allegation. Furthermore, the claimant has to prove the injury that he suffered as a result of the investigation. In other words, he has to prove that he has a legitimate interest in order to request a hearing. This by itself is not an easy task.

The above factors make privacy litigation onerous compared to other fundamental rights. The subsequent sections concern with how legal regimes, court interpretations, human right organisations and scholars are addressing the delicate issue of privacy and national security in terrorism cases.

To this effect this chapter is divided into five parts. The first part discusses the general principles on privacy in the UK, US, and Ethiopia. The second covers the legal regimes on interception of communication with an emphasis on the definition of interception, the requirements for issuing warrants and warrantless interception. The third part compares and contrasts the experiences of the US with intercept evidence in criminal proceedings governed under section 17 of The Regulation of Investigatory Powers Act 2000 (RIPA) in the UK.

The last part deals with the use of intercept evidence in terrorism cases under Ethiopian law.

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<sup>806</sup> Privy Council (2008). Privy Council Review of Intercept as Evidence Report to the Prime Minister and the Home Secretary. (Cm 7324). Norwich, TSO, p.17 et seq. (the Chilcot Review from this onwards).

## 4.2 Constitutional Frameworks on Right to Privacy

### 4.2.1 The UK and the US Approaches

The right to privacy in the UK has its own unique history. It has developed from a non-constitutional and indeed non-existent right<sup>807</sup> to a fundamental right by virtue of the incorporation of the ECHR through the Human Rights Act 1998 (HRA)<sup>808</sup> and the decisions of the ECtHR. For this reason, "the interception of communications and the use of data obtained from it interferes with individuals' rights protected by Article 8 of the Human Rights Act 1998."<sup>809</sup>

Despite the absence of comprehensive law on privacy, English courts have recognized<sup>810</sup> and provided some remedies for the violation of privacy.<sup>811</sup> However, the courts have taken a conservative approach to the development of this right, despite the incorporation of the ECHR. For instance, in *Wainwright v Home Office*, the UK Court of Appeal held that "...the 1998 Act could not change the rule at common law that there was no tort of invasion of privacy, by introducing a retrospective right to privacy."<sup>812</sup> For some commentators, even with decisions such as *Douglas v Hello*,<sup>813</sup> "...the law governing the right to respect for a private and family life...remains in a considerable degree of uncertainty, despite the numerous opportunities the courts have had to develop the common law."<sup>814</sup>

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<sup>807</sup> See *Kaye v Robertson* [1991] FSR 62 ("It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy.")

<sup>808</sup> Harpwood, V.H. (2009). *Modern Tort Law*. 7<sup>th</sup> edition. (Oxon, Routledge-Cavendish), p.409

<sup>809</sup> For a detail discussion on Article 8 and interception of communications, see Esen, R. (2012). *Intercepting Communications "In Accordance with the Law"*. 76(2) *J. Crim. L.* 164

<sup>810</sup> See Seipp, D. J. (1983). *English Judicial Recognition of a Right to Privacy*. 3(3) *O.J.L.S.* 328

<sup>811</sup> In *Kaye v Robertson*, supra note 802, for instance, they considered four options (Libel, malicious falsehood, trespass to the person, and passing off) to accommodate the appeal ; in *Coco v A.N.Clark (Engineers) Ltd* [1969] R.P.C. 41, courts accepted breach of confidence as a cause of action; , see *League Against Cruel Sports v Scott* [1985] 2 All ER 489 (for tress pass)

<sup>812</sup> *Wainwright v Home Office* 2001 WL 153539

<sup>813</sup> *Douglas v Hello! Ltd* [2005] EWCA Civ 595

<sup>814</sup> Michalos, C. (281). *Image Rights and Privacy: After Douglas v Hello!*, speech given by the author at a dinner meeting hosted by The Intellectual Property Lawyers Organisation ("TIPLo") at Gray's Inn on June 15, 2005

A comprehensive legislative framework on privacy rights has yet to be developed. Some efforts in the past have failed to materialize.<sup>815</sup> For instance, there were attempts to introduce privacy Bills during 1961-1972.<sup>816</sup> One of the reasons for that failure was the difficulty of defining the concept of privacy.<sup>817</sup> However, that pretext has attracted criticism from those arguing that defining the concept and enacting legislation are two different things.<sup>818</sup> Despite the stance of the UK Parliament and the judiciary, there is a push for a different approach towards the enforcement of privacy rights.<sup>819</sup>

Article 8 governs the scope of privacy under the ECHR. This article states that:

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 8 (1) enumerates four different but related rights: private life, family life, home and correspondence. However, Article 8 does not define privacy and "...there is no accepted definition of privacy."<sup>820</sup> The above article remains 'open-ended'<sup>821</sup> although right to privacy is assumed to cover:

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<sup>815</sup> Seipp, D. J., supra note 810, p. 326

<sup>816</sup> Ibid, p. 326

<sup>817</sup> see the Young Committee Report cited at Seipp, D. J., supra note 810

<sup>818</sup> Ibid

<sup>819</sup> Hudson, A. (2003). Privacy: A Right by Any Other Name. *E.H.R.L.R., Supp (Special issue: privacy 2003), 73-85* (Supports the introduction of a statutory tort of invasion of privacy to overcome the existing confusing and incoherent range of remedies.)

<sup>820</sup> House of Lords Select Committee on the Constitution (2009) *Surveillance: Citizens and the State, Volume 1, 2<sup>nd</sup> Report of Session 2008-09* (HL Paper 18-I)

<sup>821</sup> Hert, P. D. and Gutwirth, S (2006). Privacy, Data Protection and Law Enforcement: Opacity of the Individual and Transparency of the Power. In Claes, E., et al (editors). *Privacy and the Criminal Law* (Antwerpen-Oxford, Intersentia), p. 90



*...the right to live one's own life with a minimum of interference...physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially.* <sup>822</sup>

Although 'further definition is lacking,'<sup>823</sup> the ECtHR has also attempted to broaden the scope of Article 8. In *X and Y v the Netherlands* <sup>824</sup> and *Dudgeon v the United Kingdom*,<sup>825</sup> the ECtHR expands the notion of private life under Article 8 to cover the sexual life of an individual.

ECtHR has held that the term private life within Article 8 extends to a person's work place.<sup>826</sup> Moreover, the ECtHR in *Huvig v France*<sup>827</sup> has recognized the protection of private life at home and in business premises. In addition, without making a distinction between 'private life' and 'public life' the ECtHR in *Niemietz v Germany* held that:

*...to deny the protection of Article 8 on the ground that the measure complained of related only to professional activities - as the Government suggested should be done in the present case - could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them.* <sup>828</sup>

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<sup>822</sup> Council of Europe (1970). *Constitutional Assembly, Twenty-First Ordinary Session, Resolution 428*

<sup>823</sup> Dijk, P. V. et al (2006). *Theory and Practice of the European Convention on Human Rights. 4<sup>th</sup> edition* (the Hague, Kluwer Law International), p. 489

<sup>824</sup> *S X and Y v the Netherlands*, 26 March 1985, Series A no. 91

<sup>825</sup> *Dudgeon v the United Kingdom*, 22 October 1981, Series A no. 45

<sup>826</sup> *Halford v the United Kingdom*, 25 June 1997, Reports of Judgments and Decisions 1997-III

<sup>827</sup> *Huvig v France*, 24 April 1990, Series A no. 176-B

<sup>828</sup> *Niemietz v Germany*, 16 December 1992, Series A no. 251-B, para.29

Article 8 (2) provides some qualifications against arbitrary and intrusive measures. These are the 'compelling grounds to justify interference'.<sup>829</sup> First, any interference must be in accordance with specific laws. In fact, member states, such as the UK, previously boasted 'no law governing the gathering of information on the public by the police and the intelligence services',<sup>830</sup> and thus failed to meet this requirement. In *Malone v United Kingdom*,<sup>831</sup> the absence of a law that governs telephone tapping was found to be contrary to Article 8 and, therefore, not 'in accordance with the law'. However, the existence of a 'law' is not sufficient in itself to be in compliance with Article 8(2). The 'law' must also have some 'qualities': accessibility and foreseeability.<sup>832</sup> In other words, for a 'law' to be 'compatible with the rule of law' it must:

*...be sufficiently clear in its terms to give citizens in general an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.*<sup>833</sup>

The second 'compelling' ground is that any inference must be for some widely drawn legitimate aim listed under Article 8(2). In *Leander v Sweden*,<sup>834</sup> a Swedish national's application for a job was turned down on the basis of secret police files. These files were retained to identify an applicant's suitability for 'certain posts of importance for national security'.<sup>835</sup> The ECtHR accepted that "...the requirement of foreseeability in the special context of secret controls of staff in sectors affecting national security cannot be the same as in many other fields".<sup>836</sup> It found no violation of Article 8.

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<sup>829</sup> Fenwick, H. (2007). *Civil Liberties and Human Rights*. 4th Edition. (New York, Routledge-Cavendish), p. 814

<sup>830</sup> Donohue, L.K. (2008), *supra* note 203, p. 183

<sup>831</sup> *Malone v United Kingdom* (1984) 7 EHRR 14; see also Starmer, K. (1990). *European human rights law: The Human Rights Act 1998 and the European Convention on Human Rights* (London, Legal Action Group.), p. 166

<sup>832</sup> *Kruslin v France* (Series A No 176-B; Application No 11801/85), para. 27

<sup>833</sup> *Malone v United Kingdom*, *Supra* note 831, paras. 66-68

<sup>834</sup> *Leander v Sweden* (1987) 9 EHRR 433

<sup>835</sup> *Ibid*, para. 26

<sup>836</sup> *Ibid*, para.51

Interference with the privacy of an individual in order to 'protect the economic well-being' of a country was considered in *MS v Sweden*.<sup>837</sup> The ECtHR held that the sharing of personal data of the applicant among public institutions had a legitimate aim because it was made in order to assess "...whether the applicant satisfied the legal conditions for obtaining a benefit which she herself had requested."<sup>838</sup>

The third 'compelling' requirement under Article 8 (2) is that the interference must be 'necessary in a democratic society'. According to the jurisprudence of the ECtHR, "...interference will be considered necessary in a democratic society if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued".<sup>839</sup>

For instance, blanket retention of data for the prevention of disorder or crime was found to be disproportional.<sup>840</sup> In *Matheron v France*,<sup>841</sup> the applicant was unable to intervene in the proceedings in which the order to monitor telephone calls had been made. This was considered a violation of Article 8 (2) of the ECHR. Availability of 'effective control' in telephone tapping has been considered an element of the test of necessity under Article 8(2) of the Convention in this case. The proportionality test might have a different meaning within different contexts. In general the proportionality test will be met if the means is not more than the objective.<sup>842</sup>

As in the case of the UK, there is no express constitutional right to privacy in the US. The Bill of Rights does not address the right specifically. Unlike the UK, however, "the freedoms mentioned in the Bill of Rights are not a complete catalogue of American rights."<sup>843</sup> There is larger "judicial guardianship"<sup>844</sup> of

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<sup>837</sup> *MS v Sweden* (1997) 28 EHRR 313, 1997-IV 1437

<sup>838</sup> *Ibid*, paras. 11-14

<sup>839</sup> *Coster v. the United Kingdom* [GC], no. 24876/94, 18 January 2001, para. 104

<sup>840</sup> *S and Marper v United Kingdom* [2008] ECHR 158

<sup>841</sup> *Matheron v France*, no. 57752/00, 29 March 2005

<sup>842</sup> For further discussion, See Arai-Takahashi, Y. (2002), *supra* note 243; see also Blake, N. (2002). *Importing Proportionality: Clarification or confusion* *EHRLR* Issue 1 pp. 19-27; see also Blake, C (2012), *supra* note 243, pp. 111 et seq

<sup>843</sup> Glenn, R. A. (2003). *The Right to Privacy: Rights and Liberties under the Law*. (California, ABC-CLIO, Inc)(acknowledgement)

rights that stretches out to other rights beyond the Bill. Moreover, the First, Third, Fourth, and Fifth Amendments have been interpreted flexibly to give protection to privacy.<sup>845</sup> Privacy of beliefs, the home, thoughts, the person, possessions, and information are amongst the rights impliedly given strong "judicial guardianship". Moreover, contrary to the options available to UK courts, the Ninth Amendment specifically allows courts to look beyond the Bill so as to restrain and contain the US government from unjustified intrusion. This Amendment states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Amendment has been the basis for the protection of broad range of rights.<sup>846</sup> Furthermore, this Amendment is expected to be the basis for the controversies regarding the "right to die, human cloning, genetic testing, and similar developments"<sup>847</sup> that approach American society in the future

More specifically, the Fourth Amendment is frequently mentioned in cases involving unlawful invasion of the home, correspondences, and electronic communications.<sup>848</sup> The Fourth Amendment states that:

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

Interpreting the Fourth Amendment is not as straight forward as it seems. it has been noted that "...it is apparent that not only do the police not understand the fourth amendment law, but that even the courts, after briefing, argument, and calm reflection, cannot agree as to what police behaviour is appropriate in a

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<sup>844</sup> Ibid

<sup>845</sup> Ibid

<sup>846</sup> For instance, see Paul, R. Abramson et al. (2003). *Sexual Rights in America: the Ninth Amendment and the Pursuit of Happiness*. (New York, New York University Press) ; for right to education , see Meyer v Nebraska, 262 U.S. 390 (1923)

<sup>847</sup> Menez, J. F and Vile, J. R. (2004). *Summaries of Leading Cases on the Constitution*. 14<sup>th</sup> edition. (USA, Rowman & Littlefield Publishers, Inc), p. 430

<sup>848</sup> Katz v United States, 389 U.S. 347 (1967)

particular case."<sup>849</sup> Despite these problems, the Supreme Court has devised some principles over the years to protect privacy within the ambit of the Fourth Amendment. The first among many is the *exclusionary* rule laid down in *Weeks v United States*.<sup>850</sup> The police, without securing a court warrant, searched Mr. Weeks' house and seized some documents that implicate the defendant in illicit lottery trading. These documents were produced as evidence. The Supreme Court held that it is against the Fourth Amendment to:

*"...retain for the purposes of evidence against the accused his letters and correspondence seized in his house during his absence and without his authority by a United States marshal holding no warrant for his arrest or for the search of his premises."*<sup>851</sup>

The case of *Nardone v United States*,<sup>852</sup> which involves illegally intercepted evidence, also further extended the *exclusionary* rule by holding that derivative evidence (the 'fruit of the poisonous tree') obtained in violation of the Fourth Amendment are also inadmissible. However, the above principle applies only against government intrusion. As held in *Burdeau v McDowell*,<sup>853</sup> the *exclusionary* rule does not apply, for instance, to 'private investigators' not commissioned by the government.<sup>854</sup>

The US courts have also acknowledged that Fourth Amendment protection is not absolute.<sup>855</sup> In *Hester v United States*<sup>856</sup> a defendant was convicted for 'concealing distilled spirits.' The US Supreme Court rejected the defendant's

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<sup>849</sup> Bradley, C (1985). The "Good Faith Exception" Cases: Reasonable Exercises in Futility. 60 *Indiana Law Journal* 287

<sup>850</sup> *Weeks v. United States*, 232 U.S. 383 (1914)

<sup>851</sup> *Ibid*

<sup>852</sup> *Nardone v. United States* - 308 U.S. 338 (1939)

<sup>853</sup> *Burdeau v. McDowell* - 256 U.S. 465 (1921)

<sup>854</sup> For further reading, see Hensley, T. R. and Snook, C. (2006) *The Rehnquist Court: Justices, Rulings, and Legacy* (USA, ABC-CLIO Supreme Court handbooks), p. 162

<sup>855</sup> Girard, J. E. (2011). *Criminalistics: Forensic Science, Crime and Terrorism*. 2<sup>nd</sup> edition. (Ontario, Jones & Batten Learning, LLC), p. 22; see also Kim, Y. (2009). Protecting the U.S. Perimeter: Border Searches under the Fourth Amendment, Congressional Research Service 7-5700 RL 31826; Harr, J. S. et al. (2011) *Constitutional Law and the Criminal Justice System*. 5<sup>th</sup> edition. (California, Wadsworth), p. 230

<sup>856</sup> *Hester v United States* 265 U.S. 57 (1924)

argument that the officers did not have a search or arrest warrant. Mr. Justice Holmes stated that

*the fact that the examination of the jug took place on land belonging to defendant's father did not violate the Fourth Amendment because the special protection accorded by the Fourth Amendment did not extend to the open fields.*<sup>857</sup>

Hester was not the only exception to the protections offered under the Fourth Amendment. In *Chimel v California*,<sup>858</sup> the US Supreme Court held that in case of a lawful arrest, an arresting officer does not need a search warrant to search the person as well as the place "within the immediate control of the person arrested". The court upheld a search incidental to a lawful arrest. In *Minnesota v Carter*, it was held that "while an overnight guest may have a legitimate expectation of privacy in someone else's home ..., one who is merely present with the consent of the householder may not."<sup>859</sup>

With further discussions to follow in chapter five, the US Supreme Court has also accepted deviation from the strictest standard of probable cause under the Fourth Amendment for minor intrusion of privacy on public places<sup>860</sup>

However, despite the existence of constitutional protections and the US Supreme Court's strong 'guardianship' of fundamental rights, privacy concerns have been growing since 9/11. The authorisation of 'illegal'<sup>861</sup> executive orders that allow the interception of communication and the establishment of other organs that intercept communications 'without oversight'<sup>862</sup> were some of the few challenges on privacy.

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<sup>857</sup> Ibid , para. 57

<sup>858</sup> *Chimel v California*, 395 U.S. 752 (1969)

<sup>859</sup> *Minnesota v Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998)

<sup>860</sup> *Terry v Ohio* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 1968 U.S.; see also *Illinois v Wardlow* 528 U.S. 119120 S. Ct. 673145 L. Ed. 2d 570,2000 U.S.; see also *Spinelli v United States* 1393 U.S. 410, 89S.ct 584, 2 L.Ed 637 (1969); see also *Aguilar v Texas* 378 U.S. 108 (1964); see also *Brinegar v United States*, 338 U.S. 160 (1949).

<sup>861</sup> Roach, K. (2012), supra note 193, p. 184

<sup>862</sup> Rocha, K., (2012), supra note 193, p. 195

From *Olmstead v United States*<sup>863</sup> to more recent cases such as *Al-Haramain Islamic Foundation, Inc. v G. W. Bush*<sup>864</sup> and *ACLU v NSA*<sup>865</sup>, striking the balance between the right to privacy and national security has been a challenge. With ‘a long public history of aggressive surveillance’<sup>866</sup> by the US executive, the US Supreme Court seems to lack consistency in its approach to the delicate issues of security and privacy; with the balance swinging back and forth during war and peace times.<sup>867</sup> Moreover, due to its vast implications, the scope and the precise meaning of the privacy remains vague.<sup>868</sup>

To clarify, the differences between the British and American approaches to privacy are summarized as follows: the primary disparity lies in the formulation of the Ninth Amendment. Due to the explicit acknowledgment of other rights that lay beyond the Bill of Rights, the US Supreme Court and litigants have used the Amendments as a shield against unreasonable interference. The ECtHR has also attempted to broaden the scope of Article 8.<sup>869</sup> However, there is no such Charter in the UK for the UK courts to base constitutional protections. The UK courts have thus tentatively and rather reluctantly acknowledged the general right to privacy under the fragmented common law of remedies.<sup>870</sup>

Second, there are different perceptions of privacy across each side of the Atlantic. For instance, the use of CCTV has stirred wide criticism in the US while the same practice has been tolerated in the UK.<sup>871</sup> Despite the acceptance of such a

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<sup>863</sup> *Olmstead v United States*, 277 U.S. 438 (1928)

<sup>864</sup> *Al-Haramain Islamic Foundation, Inc. v Bush* ("Al-Haramain I"), 507 F.3d 1190 (9th Cir. 2007); see also *Al-Haramain Islamic Foundation, Inc. v Bush* ("Al-Haramain II"), 564 F.Supp.2d 1109 (N.D. Cal. 2008)

<sup>865</sup> *ACLU v NSA*, 128 S. Ct. 1334 (U.S. 2008)

<sup>866</sup> Donohue, L.K. (2008), *supra* note 203, p.184

<sup>867</sup> Howard, R. D. et al. (2006). *supra* note 706, p. 404

<sup>868</sup> United States Department of Defense (2004). *Safeguarding Privacy in the Fight against Terrorism: Report of the Technology and Privacy Advisory Committee* United States Department of Justice: USAM 9-27.000 Principles of Federal Prosecution (1980), p. 21

<sup>869</sup> See also the decision of the ECtHR in *X and Y v the Netherlands*, 26 March 1985, Series A no. 91 and *Dudgeon v the United Kingdom*, *supra* note 825. In both cases, the ECtHR expands the notion of private life under Article 8 to cover sexual life of an individual

<sup>870</sup> Remedies for breach of confidentiality, defamation, trespass, and nuisance. For details, see Hudson, A. (2003)., *supra* note 819

<sup>871</sup> Beckman, J. (2007). *Comparative Legal Approaches to Homeland Security and Anti-terrorism*. (Hampshire, Ashgate Publishing Limited), p. 82

practice in the UK, publication of CCTV images to the public still constitutes a potential breach of right to privacy under Article 8 ECHR.<sup>872</sup>

Third, before the doctrine of misuse of Private information was conceived,<sup>873</sup> the press had been invading private lives in the name of freedom of speech, with no check on this practice owing to a lack of privacy law within the UK.<sup>874</sup> Invasion of privacy by the media in the US, on the other hand, is a separate cause of action.<sup>875</sup>

Fourth, the UK Parliament has yet to introduce a comprehensive right to privacy. The Data Protection Act 1998 and the Human Rights Act 1998 do not provide as comprehensive protection as the US Bill of rights because "in this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for 'invasion of privacy'".<sup>876</sup> However, the US Constitution and the US courts' willingness to extend the right beyond the Bill of Rights have provided a shield against executive zeal.<sup>877</sup> Despite the coming into effect of the HRA and the suggestion by some commentators that there is a new era of privacy rights emerging within the UK,<sup>878</sup> English courts have yet to confirm a general right to privacy.

Finally, beside the US constitutional principles discussed above, the US has statutory provisions that provide protection of privacy in tort law.<sup>879</sup> Accordingly, the laws provide remedies for 'public disclosure of private facts', 'intrusion upon seclusion', 'false light and appropriation'.<sup>880</sup> Though analysis of these

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<sup>872</sup> Peck v the United Kingdom, no. 44647/98, ECHR 2003-I. For details see Fenwick, H. and Kerrigan, K. (2011). *Civil Liberties and Human Rights*, 5<sup>th</sup> edition. (Oxon, Routledge), pp. 127-129

<sup>873</sup> This doctrine was developed in *Campbell v MGN Limited* [2004] UKHL 22

<sup>874</sup> Michalos, C. (2005), *supra* note 814

<sup>875</sup> Fenwick, H. and Kerrigan, K., *supra* note 872, p. 297

<sup>876</sup> See *Campbell v MGN Limited*, *supra* note 873, para. 11; see also *Wainwright v Home Office*, *supra* note 812

<sup>877</sup> For a specific tort of privacy in the US, see 'How U.S. State Law Quietly Leads the Way in Privacy Protection,' Special Report Issued by Privacilla, (2002) at [http://www.privacilla.org/releases/Torts\\_Report.html](http://www.privacilla.org/releases/Torts_Report.html); for arguments in favour of introducing tort of privacy in the UK, see Hudson, A. (2003)., *supra* note 814

<sup>878</sup> Fenwick, H. and Kerrigan, K., *supra* note 872, p.297

<sup>879</sup> Restatement (Second) of Torts §652 (c) to §652(d) Regarding the Privacy of Torts

<sup>880</sup> For detail discussion on privacy tort, see Solove, D. J. et al. (2006). *Privacy, Information, and Technology*. (New York, Aspen Publishers), pp. 26 et seq



classifications is beyond the scope of this thesis, similar protections are absent in the UK.<sup>881</sup>

#### 4.2.3 *An Ethiopian Constitutional Right to Privacy*

The right to privacy in Ethiopia is specifically mentioned under Article 26 of the FDRE Constitution. However, the FDRE constitution is not the only document that deals with privacy. The Ethiopian Civil Code, the Criminal Code, and the Criminal Procedure code contain fragmented provisions on the invasion of privacy. Article 26 (1-2) of the FDRE constitution states that:

- 1. Everyone has the right to privacy. This right shall include the right not to be Subjected to searches of his home, person or property, or the seizure of any Property under his personal possession.*
- 2. Everyone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, Telecommunications and electronic devices.*

However, this right is not absolute with the exceptions outlined under Article 26(3), which states that the right could be restricted during "compelling circumstances" and "in accordance with specific laws."

Moreover, the third paragraph of Article 26(3) states that the purpose of "the interference could be national security, public peace, the prevention of crime, or the protection of health, public morality or the rights and freedoms of other."

The first problem with the above Article is that it uses broad concepts such as the 'home' without giving any further definition. This term is not defined in the FDRE constitution nor is it clarified by subsequent judicial decisions. The construction of Article 26(1) seems to suggest that it is mainly concerned with

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<sup>881</sup> See for instance *Wainwright v Home Office*, supra note 812 (the court of appeal said that there is no tort of invasion of privacy in Common law)

physical trespass. In the US and UK<sup>882</sup>, the privacy of a person is extended to his home, vehicles, public and business places.

The FDRE Constitution and the Ethiopian Codes, on the other hand, fall short of clarifying the scope of the 'home.' The cumulative reading of Article 12 (freedom of residence) and Article 13 (inviolability of domicile) of the Ethiopian Civil Code show that physical trespass to the home covers both residence and domicile. However, both residence and domicile excludes privacy in one's vehicle, work place or public places.

In addition, despite the protection given to the taking of images and photographs in public places under Article 27 of the Ethiopian Civil Code, bugging and interception of a person's mobile phone in public seemed to have been overlooked under Ethiopian law. Moreover, in the absence of a definition of the 'home', what would happen if a person owns two properties and one of them is being subjected to warrantless search? Which is his 'home' for the purpose of the FDRE constitution?<sup>883</sup> Does the FDRE constitution protect interception of communication in work places?<sup>884</sup>

With regard to the protection of privacy in business places, Article 183 of the Ethiopian Civil Code provides for the inviolability of business provided the place is the "principal seat of his business and of his interest, with the intention of living there permanently." Could this mean that interception of communications and correspondence in branch offices as opposed to the 'principal seat' of a business is legal? What does 'with the intention of living there permanently' imply? Judicial progress and legislative guidelines on these ambiguities offer little help.

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<sup>882</sup> Halford v the United Kingdom, supra note 826; see also Peck v the United Kingdom, supra note 872; see also Von Hannover v Germany [2004] ECHR 294; see also sections 27-32 of RIPA

<sup>883</sup> See the decision of the ECtHR in Demades v Turkey, no. 16219/90, 31 July 2003 ("denial of access to home amounted breach of Article 8.")

<sup>884</sup> Halford v the United Kingdom, supra note 826

The US Supreme Court is of the opinion that there could be breach of privacy without physical trespass.<sup>885</sup> Physical trespass in the UK has developed under tort law, which is different from privacy law. In addition, Regulation of Investigatory Powers Act 2000 (RIPA) has identified three sorts of surveillance: directed, intrusive, and covert intelligence.<sup>886</sup> Directed surveillance, which could include bugging or placing listening devices outside a house, does not require any physical intrusion. Therefore, breach of privacy can arise from trespass or breach of RIPA.

However, the scope of privacy law in Ethiopian is uncertain. For one thing, 'search' is not defined in the Ethiopian Civil Code, Criminal Code, or Criminal Procedure code. Additionally, use of the word 'entry' under Article 13 (2)<sup>887</sup> of the Ethiopian Civil Code and Article 32 of the Ethiopian Criminal Procedure Code that deal with searching premises seem to uphold the legality of directed surveillance and other kinds of intrusion that do not require physical intrusion into domestic premises and business places.<sup>888</sup>

However, if we consider the experience of the US,<sup>889</sup> these kinds of practices breach privacy in the absence of a relevant warrant. Moreover, the ECtHR held that "telephone tapping ... amounted without any doubt to an "interference by a public authority" with the exercise of the applicants' right to respect for their "correspondence" and their "private life."<sup>890</sup>

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<sup>885</sup> Katz v United States, supra note 848. Katz overruled Olmstead v United States, supra note 863 (holding that there could be invasion of privacy without physical trespass if a person has 'reasonable expectation of privacy.'). See also Moore, A. D (2010). *Privacy Rights: Moral and Legal Foundation*. (Pennsylvania, Pennsylvania State university Press), p. 106

<sup>886</sup> See also sections 27-32 of RIPA; see also Home Office (2010). *Covert Surveillance and Property Interference: Revised Code of Practice Pursuant to section 71 of the Regulation of Investigatory Powers Act 2000* (LONDON: TSO); see also Home Office (2010). *Covert Human Intelligence Sources: Code of Practice Pursuant to section 71 of the Regulation of Investigatory Powers Act 2000* (LONDON: TSO); on the similarities and differences between directed and intrusive surveillances, see McKay, S. (2011). *Covert Policing: Law and Practice* (Oxford, Oxford University Press), p. 71 pp. 143 and seq.

<sup>887</sup> This sub-article states that "no one may enter the domicile of another person against the will of such person; neither may a search be effected therein, except in the cases provided by law."

<sup>888</sup> See for instance in the UK, Home Office (2010). *Covert Surveillance and Property Interference*, supra note 886

<sup>889</sup> Katz v United States, supra note 848

<sup>890</sup> Huvig v France, supra note 827, para.25

However, Ethiopia does not have any legislation that deals with telephone taping without physical intrusion nor is there a clear distinction between private life and public life. In the absence of a clear definition of the 'home' and 'privacy', it is difficult to ascertain how privacy law applies in Ethiopia if there is directed surveillance.

As with many other rights, except those that are absolute and non-derogable, the FDRE constitution provides the conditions where right to privacy could lawfully be set aside. As discussed above, Article 26(3) of the FDRE constitution indicates that the right could be restricted where "compelling circumstances arise." Furthermore, it identifies a two-tiered test for lawful interference with a person's privacy.

First, any interference must be "in accordance with specific laws." If the interpretation of the ECtHR is taken as a basis for this definition, this requirement is qualified by clear and accessible domestic laws.<sup>891</sup> The requirement of 'specific laws' under the FDRE constitution is tantamount to enactment of domestic laws. However, the FDRE constitution is silent as to the accessibility and clarity of domestic laws. This requirement is particularly relevant with regard to covert investigations. Despite the existence of general laws on entry and search, the FDRE constitutional requirement that intrusion into one's privacy must be 'in accordance with the law' remains obscure, in that there are no laws that deal with covert investigations of the directed, intrusive or human surveillance kind akin to that seen above in the UK.

The second requirement under the FDRE constitution is that interference should be for some legitimate aims. Article 26(3) contains a similar list of legitimate aims to that of Article 8(2) of the ECHR. The only justification omitted in the former is interference with privacy in "the interest of the economic well being of

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<sup>891</sup> Starmar, K. (1990). *Supra* note 831, p. 166; see also *Malone v United Kingdom*, *Supra* note 831; see also *Leander v Sweden*, *supra* note 829

the country."<sup>892</sup> The wording of the FDRE constitution apparently seems to suggest that the listing is exhaustive.

Yet, a major omission from the FDRE constitution is the requirement of necessity and proportionality. Despite the clear requirement of interference "in accordance with law" and for some legitimate aims under Article 26(3) of the FDRE constitution, evaluating legitimate State interference into a person's privacy would be difficult in the absence of the necessity and proportionality test.<sup>893</sup> In the jurisprudence of the ECtHR, an intrusion that is legal and legitimate must also be necessary<sup>894</sup> and proportionate.<sup>895</sup> The US version of proportionality test<sup>896</sup> has been applied in several US Supreme Court cases.<sup>897</sup> It is also part of the US Constitution.<sup>898</sup> Accordingly, the test imports a level of scrutiny into the relationship between the means and the ends.<sup>899</sup> This is more or less similar to the definition of proportionality employed by the ECtHR in *MS v Sweden*.<sup>900</sup>

Although it is difficult to reach the same conclusion from a reading of Article 26(3) of the FDRE constitution, a similar approach drawn into the Ethiopia legal system would have the effect of discouraging excessive executive zeal.

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<sup>892</sup> To understand the necessity test of interference into privacy of an individual in order to 'protect economic well-being' of a country, see *MS v Sweden* (1997) 28 EHRR 313, 1997-IV 1437

<sup>893</sup> For arguments why it is absolutely crucial to have the principle of proportionality, see Blake, N. (2002)., *Supra* note 842, pp. 19-27

<sup>894</sup> *Matheron v France*, *supra* note 841

<sup>895</sup> See Arai-Takahashi, Y. (2002), *supra* note 243; for proportionality debate in the UK, see Blake, C (2012), *supra* note 243

<sup>896</sup> There are current arguments in the United States on how 'proportionality' should be defined. See Christopher, S. (2010). Proportionality, Privacy and Public Opinion: A Reply to Kerr and Swire. *Minnesota Law Review*, Research Paper No. 10-21. (Arguing that 'proportionality' should be gauged empirically. While others counter argue that it should be gauged normatively); see also Brennan, C. R. (2012) *Katz Cradle: Holding onto Fourth Amendment Parity in an Age of Evolving Electronic Communication*. 53 *wm. & mary l. Rev.* 1797

<sup>897</sup> See *Oliver v United States*, 466 U.S. 170 (1984); *Korematsu v United States*, 323 U.S. 214 (1944); see also Lawson, G. et al. (2010). *The Origins of the Necessary and Proper Clause*. (Cambridge, Cambridge University Press)

<sup>898</sup> Article 1 of the US Constitution, Section 8, Clause 18

<sup>899</sup> Lawson, G. et al., *supra* note 892, p. 175

<sup>900</sup> *MS v Sweden*, *supra* note 892

### ***4.3 Interception of Communications***

#### *4.3.1 Legal Regimes in the US and UK on Interception*

Interception has two broad aspects. One covers the contents of the communication with the other concerning intercepts that are incidental to the content. This section analyses the legal regimes on content interception. Moreover, a separate part discusses Ethiopian laws on the same subject matter.

##### *4.3.1.1 Interception without Warrant*

There are several legal regimes on interception in the UK.<sup>901</sup> Moreover, section 32 of TA 2006 specifically deals with terrorist suspects and their communications. TA 2006 made several amendments to RIPA regarding duration, authorisation and safeguards on external communications. Article 8 ECHR is also relevant in case of intercepting communications, particularly if the interception breaches privacy.

Identifying the targets, the time and the place of interception, access, disclosure, and retention<sup>902</sup> are some of the relevant factors surrounding the interception of communications. However, the scope of this thesis is restricted to use of intercept evidence in court proceedings.

Generally, RIPA is divided into three main parts; interception of communications, the acquisition of communication data, and the investigation of electronic data protected by encryption.<sup>903</sup> The focus of this research will be limited to the first part.

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<sup>901</sup> RIPA 2000; the Telecommunications Regulation 2000 (SI 2000/2699); Anti-terrorism, Crime and Security Act (ATCSA) 2001; Serious Organised Crime and Police Act (SOCAP) 2005; HRA 1998, Data Protection Act 1998, and Telecommunications (Data Protection) Privacy Regulation 1999

<sup>902</sup> See for instance, section 37 et seq. of the Protection of Freedoms Act 2012 c.9 for 'Safeguards For Certain Surveillance Under RIPA'

<sup>903</sup> Interception of Communications Commissioner (2011). Reports of the Interception of Communications Commissioner (HC 496 SG/2012/125), (table I RIPA summary box); see also Home Office (2010). Covert Surveillance and Property Interference supra note 886; see also Home Office (2010). Covert Human Intelligence Sources, supra note 886; see also Home Office

Under RIPA, two types of unauthorised interception are distinguished: interception on public communication systems and interception on private telephone systems.<sup>904</sup> The phone hacking scandal is a good example to mention as to why breaching section 1 of RIPA could result in criminal prosecution: "What started as a small bush fire...has become a forest fire destroying countless reputations (and the NoW itself) in its wake. The few hacked by NI in 2007 became nearly 6,000 in late 2011".<sup>905</sup> This scandal has led to the prosecution of some journalists,<sup>906</sup> while there are also on-going trials.<sup>907</sup>

Besides criminal prosecutions, it is also a requirement of Article 13 ECHR that there should be an 'effective' remedy for a violation of any of the fundamental rights that emanate from the Convention, including the right to privacy.<sup>908</sup> Accordingly, under section 65 of RIPA, there is an Independent Investigatory Powers Tribunal (IPT) with the power to investigate contraventions of RIPA by government security services. The IPT is an institution "...different from all others in that its concern is with security. For this reason it must remain separate from the rest and ought not to have any relationship with other tribunals".<sup>909</sup> The administrative remedies under section 65 allows individuals whose communications have been intercepted in contravention of RIPA to request the IPT to investigate the matter. Their complaints criteria include issues relating or "...concerning the acquisition, storage and use of information by the intelligence

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(2007). Code of practice for the acquisition and disclosure of communications data: Pursuant to section 71 of the Regulation of Investigatory Powers Act 2000 (LONDON: TSO); see also Home Office (2007). Investigation of Protected Electronic Information: Code of Practice Pursuant to section 71 of the Regulation of Investigatory Powers Act 2000 (LONDON: TSO)

<sup>904</sup> Section 1(1) and section 1(2) of RIPA

<sup>905</sup> For further reading, see Keeble, R. L. and Mair, J. (2012). *The Phone Hacking Scandal: Journalism on Trial*. (UK, Arima Publishing)

<sup>906</sup> See for example, *R. v Goodman (Clive)* (Unreported, January 26, 2007) (Central Crim Ct); see also *Various Claimants v News Group Newspapers Ltd* [2013] EWHC 2119 (Ch); see also *Various Claimants v News Group Newspapers Ltd* [2012] EWHC 2692; see also Home Affairs Committee (2011). *Unauthorised Tapping Into or Hacking Of Mobile Communications: Thirteenth Report of Session 2010-2012 (HC 907)*. London: The Stationary Office

<sup>907</sup> See Bingham, J. (2013). *Phone Hacking Trial: Three News of the World Journalists Admit Hacking*, 30 October, *the Daily Telegraph*; see also Evans, M. (2013). *Phone Hacking Trial: Rebekah Brooks and Andy Coulson trial begins*, 28 October, *the Daily Telegraph*

<sup>908</sup> Home Office (1999). *Interception of Communications in the United Kingdom: A Consultation Paper (Cm.4368)* London: Stationary Office

<sup>909</sup> Leggat, A (2001). *Tribunals for Users: One System, One Service, Report of the Review of Tribunals* (HMSO, London), para. 3.11

services of his or her entry in the National Identity Register established under the Identity Cards Act 2006".<sup>910</sup> If the IPT is satisfied that there is a violation of RIPA, it could "...make an order which may quash the interception warrant, require the destruction of intercepted material, and/or require the Secretary of State to pay compensation".<sup>911</sup>

In addition, the Interception of communications Commissioner (ICC) is empowered, among other things, to 'keep under review' warrants issued by the Secretary of State and compliance with RIPA by government agencies or other organisations involved in warranted interception and safe-handling of intercepted materials.<sup>912</sup> Section 57 (3) RIPA also requires the ICC to assist the IPT as to any issue falling to be determined' by it. The ICC could issue 'red, amber, or green' recommendations depending on the degree of non-compliance.<sup>913</sup> For instance, "...[a]ny red recommendations are of immediate concern as they mainly involve serious breaches and/or non-compliance with the Act or Code of Practice which could leave the public authority vulnerable to challenge".<sup>914</sup> Furthermore, the ICC can impose civil sanction for unlawful interception of communications.<sup>915</sup> However, there are some exceptions to the power of the ICC to impose civil remedies. For instance, if a criminal offence of intentional unlawful interception under section 1(1) is committed, there will be criminal prosecution instead of imposing civil remedies.<sup>916</sup>

However, RIPA does not distinguish between a terrorist threat and general crime control. The standards for both types of interception are similar, although the warrant requirement and the duration of interception in the case of national security are regulated by Anti-Terrorism, Crime and Security Act 2001 (ATCSA)

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<sup>910</sup> House of Lords Select Committee on the Constitution (2009). *Surveillance: Citizens and the State*, supra note 820, para. 258

<sup>911</sup> Home Office (1999). *Interception of Communications in the United Kingdom* (Cm.4368), supra note 908, para. 1.9

<sup>912</sup> Section 57 RIPA

<sup>913</sup> Interception of Communications Commissioner (2013). *2012 Annual Reports of the Interception of Communications Commissioner* (SG/2013/131 HC 571), London, TSO, p. 26

<sup>914</sup> *Ibid*

<sup>915</sup> Section 2 of the Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011 (SI 2011 No.1340)

<sup>916</sup> Interception of Communications Commissioner. *Exercise of Powers under Section 1a And Schedule A1 of the Regulation of Investigatory Powers Act 2000*, para. 1.8



and TA 2006. Another distinction stipulated under RIPA is interception based on the location of the parties to the communication. This is governed by section 8(4) and section 2 of RIPA.

RIPA also provides lawful interception with or without warrant. Section 3 provides for the grounds of lawful interception without warrant; when both or either of the parties to the communication gives their consent, and when the interception is conducted by service providers. Consent interception could be permitted if authorisation for the same effect is obtained. However, service providers could lawfully intercept provided such conducted is restricted to the 'provision of the service' or 'enforcement' of a law related to the service.<sup>917</sup> Further guidance on interception by service providers is provided under the Telephone Communications (Lawful Business Practices) Interception of Communication Regulations 2000 (LBP regulations) (SI 2000/2699).

By virtue of section 17 of RIPA, intercept evidence obtained is excluded from legal proceedings. However, section 18 contains several exceptions. One of these exceptions is intercept obtained according to section 3 of RIPA. These intercepts could be disclosed or produced as evidence.<sup>918</sup> Section 3(1) RIPA contains two kinds of consent: specific consent of both parties or the reasonable expectation of the person conducting the interception without getting specific consent from the parties.<sup>919</sup> The latter element requires the existence of "reasonable grounds for believing that both parties consent."<sup>920</sup> However, the UK government conceded that the standard of "reasonable grounds for believing" that the parties had consented to the interception is contrary to the standards required by EU law.<sup>921</sup>

However, under section 3(2) RIPA, i.e. single party consent, it only requires the consent of one party and authorisation under part II of RIPA. "In these

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<sup>917</sup> Section 3(3)(b); see also *Regina v Sargent* [2001] UKHL 54, para.26

<sup>918</sup> Section 18(4)(5) RIPA

<sup>919</sup> Home Office (2010). *Regulation of Investigatory Powers Act 2000: Proposed Amendments Affecting Lawful Interception, A Consultation*.

<sup>920</sup> Emmerson, B. et al. (editors) (2012). *Human Rights and Criminal Justice*. 3<sup>rd</sup> edition. (London, Sweet and Maxwell), p. 327

<sup>921</sup> *Ibid*

circumstances, the definition of 'surveillance' is extended to include the interception of a communication in the course of its transmission."<sup>922</sup> Therefore,

*it follows that section 3(2) demonstrate that, in the circumstances contemplated by that section, interception may, if consented to by one party to the call, be authorised by senior police officers. If so authorised, the interception is lawful, no offence is committed and section 17 does not render the contents inadmissible.*<sup>923</sup>

Once consent is obtained, a question lingers as to the probative value of the evidence. If the police played an active role in the process of obtaining illegal evidence, the evidence is likely to be thrown out as shown in *R v Mason*.<sup>924</sup> Another case worth discussing is *R v H*.<sup>925</sup> The victim in *R v H* was intentionally trapping the suspect in concert with the police. Therefore, the court concluded that the victim's consent in this case was not vitiated.

However, it is an established principle in the UK that illegally obtained evidence is not automatically excluded from court proceedings.<sup>926</sup> The discretion whether to consider the intercept is left to the judge. The use of 'tricks' by the police is one of the factors that courts take into account when making a decision under section 78 of PACE.<sup>927</sup> It is also well established that deceit does not necessary lead to exclusion.<sup>928</sup> Section 78 of PACE states that:

*in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having*

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<sup>922</sup> Colvin, M. and Cooper J. (2009). *Human Rights in the Investigation and Prosecution of Crime*. (Oxford, Oxford University Press), p. 60

<sup>923</sup> *R v Hardy & Hardy* [2003] 1 Cr. App. R. 30, para.39

<sup>924</sup> *R v Mason* (1987) 3 All AR 481 (In this case, both the defendant and his solicitor were deceived by police. But it was a confession obtained by deception not interception.)

<sup>925</sup> *R v H* [1987] Crim LR 47

<sup>926</sup> *R v Leatham* (1861). 8 Cox CC 498 ("it matters not how you get it; if you steal it even, it would be admissible in evidence."); see also *R v Khan* [1996] 3 WLR 162; *R v Latif* [1996] 1 WLR 104

<sup>927</sup> Stone, R. (1995). *Exclusion of Evidence Under Section 78 of the Police and Criminal Evidence Act: Practice And Principles* 3 *Web JCL*

<sup>928</sup> *Ibid*; see also Richardson, P. J. (2007). *Archbold: Criminal Pleading, Evidence and Practice*. (Sweet & Maxwell), p. 1505; see also Murphy, P. and Badour, L. (2010). *International Criminal Law and Common Law Rules of Evidence*. In Karim A. A. Khan, et al. *Principles of Evidence in International Criminal Justice*. (New York, Oxford University Press)

*regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

Furthermore, recent court cases in the UK such as *R v Hammond*<sup>929</sup> upheld the legality of 'participant monitoring,' where one party to a telephone call records the conversations on the other end of the telephone.<sup>930</sup>

However, a problem may arise due to the absence of a definition of consent in RIPA. The UK government conceded that consent should be defined in line with Article 5(1) of the E-Privacy Directive (Directive 2002/58/EC) and Article 2(h) of the EU Data Protection Directive (Directive 95/46/EC).<sup>931</sup> Consent under Article 2(h) of the EU Data Protection Directive is defined as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."

Accordingly, Article 7 the EU Data Protection Directive provides 'unambiguous consent' for processing of personal data and Article 8 of the same directive requires 'explicit consent' for processing of special categories of data such as data that divulge " racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."

US law on lawful interception without a warrant is governed by federal and State laws. The federal law only requires the consent of one party<sup>932</sup> while the standard

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<sup>929</sup> *R v Hammond* [2002] EWCA Crim 1243

<sup>930</sup> *Ibid*; the same conclusion is reached in *R v Hardy and Hardy* [2003] 1 Cr. App. R. 30. For some commentators, however, "the judgments in *R v Hammond* and *R v Hardy* are confusing. Both judgments appear to miss the distinction between a situation where an interception has occurred but has lawful authority by virtue of section 3(2)». See Colvin, M. and Cooper J., *supra* note 922, p.57

<sup>931</sup> Regulation of Investigatory Powers Act 2000: [2000 c. 23 Explanatory Notes](#)

<sup>932</sup> See 18 U.S.C. § 2511(2)(c), and 18 U.S.C. § 2511(2)(d)

varies across states.<sup>933</sup> Accordingly, the Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III)<sup>934</sup> states that:

*It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.*<sup>935</sup>

There are 'specific authorisations and reporting procedures'<sup>936</sup> for use of consensual interception.

In a similar fashion to RIPA, Title III provides lawful interception by service providers.<sup>937</sup> The protection provided under Title III is specific, covering not only service providers but also their agents, employees, and officers. RIPA, on the other hand, is not clear on whether the same sort of specification is implied within section 3. Moreover, similar to the RIPA requirement of reasonable expectation, Title III requires either specific or implied consent in case of one-party consent.<sup>938</sup>

However, consent is required only where the contents of the communication are intercepted, as Title III does not prohibit the US government from getting access to non-content communications. Non-content communications are instead regulated by another Statute.<sup>939</sup> In the UK, non-content communication is regulated by section 8(4) of RIPA. Similar to the Pen/Trap Statute,<sup>940</sup> the said

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<sup>933</sup> For instance, Arizona is a "one-party" state, ARS 13-3005.A (1) (2); Pennsylvania requires the consent of all parties. 18 Pa. Cons. Stat. Ann. Sec. 5704(4); see American Legal Guide on Telephone Recordings at <http://www.callcorder.com/phone-recording-law-america.htm#The US Federal Law>

<sup>934</sup> Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. \_ 2510 et seq.) [(Public Law 90-351, 82 Stat. 197, June 19, 1968 [H.R. 5037.] (18 U.S.C. § 2510 et seq.)

<sup>935</sup> 18 U.S.C. §.2511 (2)(c)

<sup>936</sup> See United State Secret Service Directives System : Chapter II Consensual interceptions, 08/06/2009

<sup>937</sup> 18 U.S.C. § 2511(2)(a)(i),

<sup>938</sup> 18 U.S.C. § 2511(2) (c); see also *United States v Van Poyck*, 77 F.3d 285, 292 (9th Cir.) cited at Exceptions to the Prohibitions-Consensual Law Enforcement Interceptions US Attorneys Criminal Resource Manual 1054

<sup>939</sup> 18 U.S.C. § 3121 et seq. - (Pen Registers and Trap and Trace Devices; Exceptions)

<sup>940</sup> A court order is required Under 18 USC § 3121(A) of The Pen Register Statute; For detail discussions on the Pen/Trap Statute, see also Becker, M. (1999). *The Electronic*

section does not require the consent of either party for non-content communications.

Title III is not the only federal law that regulates the interception of communications in the US. The Communications Assistance for Law Enforcement Act (CALEA) is relevant here.<sup>941</sup> However unlike other federal laws on interception, CALEA "...was not intended to expand law enforcement's authority to conduct electronic surveillance."<sup>942</sup>

CALEA, rather, requires a "telecommunications carrier"<sup>943</sup> to assist in the interception of communications for law enforcement purposes.<sup>944</sup> The scope of interception under CALEA extends both to content and non-content communications.<sup>945</sup> Moreover, US government agencies may or may not be required to have a prior court authorisation in order to have electronic communications intercepted. This is due to the drafting of CALEA, which states 'a court order or other lawful authorization'<sup>946</sup> is required to conduct the above activities.

There are some controversies in regard to the reach of a 'telecommunications carrier'. The Federal Communications Commission (FCC), an organ empowered to regulate communications,<sup>947</sup> has ruled that a 'telecommunications carrier' does

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Communications Privacy Act. In: Paglin, M. D. et al. *The Communications Act: A Legislative History of the Major Amendments, 1934-1996*. (Maryland, Pike & Fischer, Inc); see also Smith, C. S. and Hung, L. C. (2010). *the Patriot Act: Issues and Controversies*. (Charles C Thomas-Publisher, LTD), p. 33

<sup>941</sup> Pub. L. No. 103-414, 108 Stat. 4279, codified at 47 USC 1001-1010

<sup>942</sup> Figliola, P. M. (2007). *Digital Surveillance: The Communications Assistance for Law Enforcement Act. CRS Report for Congress, Order Code RL30677*, 8 June

<sup>943</sup> Under 47 U.S.C. 1001 (8) (a), a "telecommunications carrier" is defined as "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.

<sup>944</sup> See 47 U.S.C. 1002

<sup>945</sup> See 47 U.S.C. 1001(2): dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier

<sup>946</sup> See 47 U.S.C. 1002

<sup>947</sup>

not include providers of internet services, private mobile networks, pay-booth telephones.<sup>948</sup>

However, a recent move by US federal agencies to have the scope of CALEA expanded has stirred controversy.<sup>949</sup> US federal agencies argue that "...the FBI and other government agencies are facing a potentially widening gap between our legal authority to intercept electronic communications pursuant to court order and our practical ability to actually intercept those communications."<sup>950</sup>

The scope of CALEA has been limited only to telephone systems until 2005 when the FCC ruled that a limited number of "...facilities-based broadband Internet access service providers and VoIP providers that offer services that use the public switched telephone network..."<sup>951</sup> are subjected to the requirement of CALEA. However, this ruling did not include communications over the Internet. Therefore, US agencies argue that expanding the scope to include new communications systems over the Internet such as Vontage telephony, which turns any computer with Internet access into a telephone,<sup>952</sup> would help lessen the gap. Their proposal specifically includes placing some wiretapping tools on computers or phones. This is different from the requirement of CALEA where 'communications are aggregated or controlled' by the service provider.<sup>953</sup> Opponents of this move argue that placing wiretapping software on computers or phones would compromise the security of users by allowing criminals to breach their communications.<sup>954</sup>

The controversy surrounding CALEA is not the only problem that poses a grave concern on privacy in the US. Warrantless Interception under the Foreign

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<sup>948</sup> FCC (1999). Second Report and Order, in the matter of Communications Assistance for Law enforcement Act, CC Docket No. 97-213, FCC 99-229; see also Perritt, H. H. (2001). *Law and the Information Superhighway* (New York, Aspen Law and Business), p. 196

<sup>949</sup> Addida, B., et al (2013). *CALEA II: Risk of Wiretap Modifications to Endpoints*. Center for Democracy & Technology, 17 May

<sup>950</sup> Caproni, V. (2011). *Statement before the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security*, 17 February

<sup>951</sup> Figliola, P. M., supra note 942

<sup>952</sup> Federal Bureau of Investigation (2011). *Going Dark: Law Enforcement Problems In Lawful Surveillance*, 29 June At [Http://Info.Publicintelligence.Net/Fbi-Goingdark.Pdf](http://Info.Publicintelligence.Net/Fbi-Goingdark.Pdf)

<sup>953</sup> Addida, B., supra note 949

<sup>954</sup> Addida, B., supra note 949

Intelligence Surveillance Act of 1978 (FISA),<sup>955</sup> and the ever expanding power of the National Security Agency's (NSA) warrantless surveillance also deserve some discussion.

FISA deals with four different issues: Electronic Surveillance,<sup>956</sup> physical searches,<sup>957</sup> Pen registers and trap & trace devices,<sup>958</sup> and accessing business records.<sup>959</sup>

However, in light of the scope of this thesis, our focus will be limited to the interception of electronic communications, which is defined as "...the acquisition...of the contents of any wire or radio communication."<sup>960</sup>

FISA is mainly concerned with the interception of communication of foreign powers, and their agents.<sup>961</sup> The Patriot Act 2001 has expanded the targets of FISA by including 'a group engaged in international terrorism' that are not connected to any foreign powers. Moreover, the Intelligence Reform and Terrorism Prevention Act (IRTPA)<sup>962</sup> further expanded FISA to be applicable to 'lone wolf' terrorists i.e. "...surveillance of non-U.S. persons engaged in international terrorism without requiring evidence linking those persons to an identifiable foreign power or terrorist organization."<sup>963</sup>

There are two procedures for intercepting communications under FISA: warrantless interception and warranted interception. With discussions on warranted interception to be followed, warrantless interception under FISA is

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<sup>955</sup> See 50 U.S.C. § 1801 and Seq. (Pub.L. 95-511, 92 Stat. 1783, 50 U.S.C. Ch. 36)

<sup>956</sup> 50 U.S.C. Chapter 36, Subchapter I - Electronic Surveillance

<sup>957</sup> 50 U.S.C. Chapter 36, Subchapter II - Physical Searches

<sup>958</sup> 50 U.S.C. Chapter 36, Subchapter III - Pen Registers And Trap And Trace Devices For Foreign Intelligence Purposes

<sup>959</sup> 50 U.S.C. Chapter 36, Subchapter IV - Access To Certain Business Records For Foreign Intelligence Purposes

<sup>960</sup> See 50 U.S.C. § 1801 (f)

<sup>961</sup> See 50 U.S.C. § 1801

<sup>962</sup> See Section 6001(a) of the IRTPA

<sup>963</sup> For further discussion see, Liu, E. C. (2011). *Amendments to the Foreign Intelligence Surveillance Act (FISA) Extended Until June 1, 2015*. Congressional Research Service, CRS Report for Congress (7-5700)

executed for a year through the authorisation of the President.<sup>964</sup> However, this warrantless interception does not apply to international terrorism or to circumstances where one of the participants is a US citizen.<sup>965</sup>

However, the amendment of FISA in 2008 has blurred the legal limitations that exclude US citizens from FISA's warrantless interception. Although the FISA Amendment Act 2008<sup>966</sup> does not allow the targeting of US citizens, applicants in the case of Clapper<sup>967</sup> argued that the fact that this amendment allows interception without identifying the targets or satisfying the probable cause test of the fourth amendment is a clear violation of the Fourth Amendment. Although the case was dismissed for lack of standing to sue,<sup>968</sup> it is considered one of the instances in the US where challenges to blanket authorisation of surveillance has been 'founded'<sup>969</sup> due to the reluctance of the US courts to rein in the executive.

Moreover, the 9/11 terrorist attack was partly attributed to the failure of the National security Agency (NSA) to "...connect the dots of information available to the intelligence community."<sup>970</sup> For this reason, President Bush used his executive powers as stipulated under FISA<sup>971</sup> to develop the 'Terrorist Surveillance Program'.<sup>972</sup> This program gave more powers to the NSA in order to fight terrorism. Without requiring a court order, the NSA could use this program to intercept a communication provided that "...one party to the communication is

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<sup>964</sup> 50 USC § 1802 - Electronic surveillance authorization without court order; certification by Attorney General; reports to Congressional committees; transmittal under seal; duties and compensation of communication common carrier; applications; jurisdiction

<sup>965</sup> Ibid, 50 USC § 1802 (a)

<sup>966</sup> Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, H.R. 6304, enacted 2008-07-10

<sup>967</sup> Clapper v. Amnesty International USA, 132 S. Ct. 2431

<sup>968</sup> A further discussion on standing to sue will be followed

<sup>969</sup> Richards, N.M. (2013). The Dangers of Surveillance. 126 (7) *Har. L. Rev.* 1934

<sup>970</sup> Federation of American Scientists (2013). *The National Security Agency: Missions, Authorities, Oversight and Partnerships*, 9 August, at <http://www.fas.org/irp/nsa/nsa-story.pdf>

<sup>971</sup> See 50 U.S.C. § 1802, 1809

<sup>972</sup> For detail discussions, see Fine, G. A. (2009). *Unclassified Report on the President's Surveillance Program: Prepared by the Office of Inspectors General of the Department of Defence, Department of Justice, Central Intelligence Agency, National security agency and Office of the Director of National Intelligence.* (Report No. 2009-003-AS)



outside the US and where there are reasonable grounds to believe that either party is a member of al-Qaeda or an affiliated terrorist organisation."<sup>973</sup>

Once revealed by the New York Times,<sup>974</sup> supporters of the Terrorist Surveillance Program argued that it "...does not involve an arbitrary intrusion into personal privacy..."<sup>975</sup> and it "...has proven so important to protecting America".<sup>976</sup> However, under pressure from Congress, warrantless interception under the program appeared to be abandoned in 2007.<sup>977</sup> However, recent revelations by the fugitive whistle-blower, Edward Snowden, have exposed the ever expanding power of the NSA to intercept communications with or without court oversight. In a series of documents leaked to the Guardian, the US and UK have been shown to be involved in secret programs aimed at the mass collection of anyone's communications "...regardless of whether they are suspected of any wrongdoing."<sup>978</sup>

#### 4.3.1.2 Interception with a Warrant

In the UK, the Secretary of State has the power to issue intercept warrants.<sup>979</sup> However, all US warrants on interception are authorised by a court,<sup>980</sup> except for warrantless interceptions under FISA.<sup>981</sup> There are four *grounds*<sup>982</sup> for issuing an

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<sup>973</sup> Alexander, Y. and Kraft, M (2008). *Evolution of U. S. Counterterrorism Policy*. (USA, Praeger Security International), p. 590; see also Cummins, S. J. (2006). *Digest of United States Practice in International Law*. (Washington, International Law Institute), p. 364

<sup>974</sup> United States Congress (2007). *United States Congressional Serial Set, Serial No. 15017, Senate Reports Nos. 356-369, United States Congressional Serial Set* (Serial Number 15017)

<sup>975</sup> Cummins, S. J. (2006)., supra note 973

<sup>976</sup> Alexander, Y. and Kraft, M (2008), supra note 973, p. 590

<sup>977</sup> United States Congress (2007). supra note 974

<sup>978</sup> For instance, see Greenwald, G. (2013). NSA Collecting Phone Records Of Millions Of Verizon Customers Daily, 6 June, *Guardian*; see also MacAskill, E., et al (2013). GCHQ intercepted Foreign Politicians' Communications at G20 Summits, 17 June *Guardian*; see also Gellman, B. and DeLong, M. (2013). First Direct Evidence Of Illegal Surveillance Found by the FISA Court, 15 August, *Washington Post*; see also Gellmann, B. (2013). NSA Broke Privacy Rules Thousands of Times per Year, Audit Finds, 16 August, *Washington Post*; see also BBC (2013). *K GCHQ 'can Spy on Smartphones'*, 8 September

<sup>979</sup> Section 5 of RIPA

<sup>980</sup> See 18 U.S.C. § 3121 ; 18 USC § 2516 ; 50 USC § 1804 - Applications For Court Orders (FISA)

<sup>981</sup> The Cable Communications Policy Act (CCPA) 1984 (codified at 47 U.S.C. 551 ("a cable operator shall provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of nature of personally identifiable information, frequency and purpose of any disclosure, etc."), and Video Privacy Protection Act (VPPA) 1988 (codified at 18 U.S.C. § 2710) ("wrongful disclosure of video tape rental or sale records.") These

intercept warrant in the UK, with there being two<sup>983</sup> *types* of interception warrant. Those authorised to apply for a warrant are specified under section 6 of RIPA. Moreover, the purposes of an external warrant under section 8(4) are similar to those under FISA,<sup>984</sup> though the requirements and the application procedures are different. One difference under FISA, for instance, is that there could be warrantless interception of communication by the executive provided "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party."<sup>985</sup> No such requirement is stated under RIPA.

The four grounds for issuing an interception warrant under section 5(3) of RIPA are 'national security', 'preventing or detecting serious crimes', 'safeguarding economic well-being' of the UK, and 'giving effect to an international mutual assistance agreement'. The Code of Practice on interception of communications states that an intercept warrant is not to be issued by the Secretary of the State unless a 'direct link between the economic well-being of the United Kingdom and state security is ... established'.<sup>986</sup> It further states that 'state security' and 'national security' do not have significant difference in meaning.<sup>987</sup>

But, the grounds for issuing interception warrant in the US are regulated by Electronic Communications Privacy Act of 1986 (ECPA)<sup>988</sup> and the Patriot Act 2001.<sup>989</sup> Accordingly, the issuance of an interception warrant by a court is

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statutes deal with warrantless interception outside the scope of FISA; for detail discussions, see also Chemerinsky, E. and Levenson, L. L. (2008). *Criminal Procedure*. (US, Aspen Publishers Inc), pp. 282-289

<sup>982</sup> See section 5(2) and section 5(3) of RIPA

<sup>983</sup> These could be domestic interception regulated by section 5 and external interception regulated by section 8(4) of RIPA

<sup>984</sup> See 50 U.S.C. § 1802 (electronic surveillance authorization without court order)

<sup>985</sup> See 50 U.S.C. § 1802 (1)(B)

<sup>986</sup> Home Office (2007). *Interception of Communications: Code of Practice: Pursuant To Section 71 of the Regulation of Investigatory Powers Act 2000*. London, TSO, p. 16

<sup>987</sup> *Ibid*

<sup>988</sup> Electronic Communications Privacy Act of 1986 (as amended by CALEA (1994) (codified at 18 USC § 2510, and the PATRIOT Act (2001)). This 1986 statute also amended Title III (also called the Wire Tape Act). Title III, as will be discussed in detail, provides definitions for different terms such as 'wire communications', 'oral communication', 'intercept', etc. Accordingly, 'intercept' is defined as 'the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device.'

<sup>989</sup> This Act amends Title III of the Omnibus Safe Streets and Crime Control Act 1968 (title III or Wire Tape Act)

dependent upon the fact that the applicant has shown probable cause that "an individual is committing, has committed, or is about to commit a particular offence listed in 18 U.S.C §2516 18."<sup>990</sup> These grounds contain very specific offences such as murder, kidnapping, espionage, treason, etc.,<sup>991</sup> whereas the RIPA mentions very broad lists. Moreover, the period of a warrant is 30 days under the above US Acts. However, it is 6 months under section 9(6) (b) of RIPA.

Furthermore, Title III outlines specific guidance that should be followed in the case of intercept warrants. Accordingly, orders:<sup>992</sup>

*Must be issued by a judge; must have a specified time limit; the applicant must show probable cause; extension of orders must be on probable cause; must be accompanied by judicial supervision in their execution; normal investigative procedures have been exhausted.*

As will be discussed in *Katz v United States* below, the absence of any of these elements is enough for the US courts to dismiss a criminal prosecution. Apart from the requirement of 'relevant period' under section 9(6)(b) and exhausting normal investigative procedures under Section 5 and section 7(2)(a),<sup>993</sup> most of these requirements under Title III are absent under RIPA, particularly the showing of probable cause and judicial supervision in the execution of interception warrant.

#### 4.3.1.3 What is an Interception?

As discussed, there are significant differences between the UK and US positions on the legal requirements of interception. The same is true with the definition of interception. Defining the concept is a pre-condition of whether the legal requirements are satisfied.<sup>994</sup> Under section 2(2) and 2(3) RIPA, interception of

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<sup>990</sup> 18 U.S.C § 2518 (3)(a)

<sup>991</sup> 18 U.S.C§ 2516

<sup>992</sup> 18 U.S.C § 2518 (3)(a)

<sup>993</sup> Home Office (2007). *Interception of Communications: Code of Practice*, supra note 986, p. 17

<sup>994</sup> Ormerod, D. and McKay, S. (2004). *Telephone Intercepts and Their Admissibility. Criminal Law Review* 15-38

communication is defined as the 'interference', 'modification' or 'monitoring' of communication to reveal its contents by persons other than the participants.

Section 2(5) RIPA excludes interception of non-content communications. These exclusions are further explained under section 2(9). This non-content data merely identifies the person, the location, the apparatus, and signals, but does not reveal what has been said or written.

The Secretary of State could issue a warrant to intercept the contents of the interception only on the grounds specified under section 5(2-3). While one of the grounds, national security, is not clearly defined, the national security interest specified under this section could be triggered if there are "threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means ..."<sup>995</sup>

By the same token, there is a statutory definition for serious crimes.<sup>996</sup> Furthermore, detecting crime is referred to as the identification of a suspect, the purpose and the circumstances of a crime.<sup>997</sup> Moreover, other possible means of obtaining the evidence must be exhausted before the Secretary of State personally issues the warrant.<sup>998</sup> Furthermore, the intercept warrant must identify a person or premises as the target, and additional factors that specify addresses, apparatus, etc.<sup>999</sup>

However, the controversy on how, when, and where interception is said to take place is not settled by the law. The words 'interference', 'modifies', and 'monitors', within section 2(2) of RIPA are very broad terms which are not defined by the relevant Act. As a result, they have stirred a fierce legal battle, as

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<sup>995</sup> Section 1(2) of the Security Service Act 1989

<sup>996</sup> Section 81(3)(a) or 81(3)(b) RIPA; see also *Kennedy v the United Kingdom*, no. 26839/05, 18 May 2010, para.34; see also schedule 1 of Serious Crime Act 2007; see also Serious Crime Prevention Orders (SCPO) Guidance, Serious Crime Act 2007 - Sections 1 - 41 and Schedules 1 and 2, section 9 et seq. For a definition of seriousness of a crime, see also *AH (Algeria) v Secretary of State for the Home Department* [2012] EWCA Civ 395

<sup>997</sup> Section 81(5) RIPA; see also *Kennedy v UK*, supra note 996, para.35

<sup>998</sup> Section 5 and section 7(2) (a) RIPA; see also *Kennedy v UK*, supra note 996, para. 36 and 38

<sup>999</sup> Section 8 RIPA; see also *Kennedy v UK*, supra note 996, para. 40

indicated by the cases discussed below. What is interesting in these cases is how the UK courts have tried to balance privacy concerns by looking into the issues raised by the litigants.

In *R v Effik*<sup>1000</sup>, the appellants were convicted for conspiracy to supply 'controlled drugs' based on intercept evidence. However, their conviction would have been unlikely had it not been for the intercept evidence. The prosecution and the appellant differed on what amounts to interference with public communications. The appellant argued that intercept evidence is inadmissible according to sections 1 and 9 of the Interception of Communication Act 1985 (ICA). However, at trial the UK court dismissed their argument and held that a privately run system is not covered by the alleged Act. The case went all the way to the House of Lords, which held that "the evidence of the telephone conversation was a material contributory factor in the appellant's convictions."<sup>1001</sup> Moreover, it was evident that a warrant was not issued to intercept the conversations. The House of Lords focused on what constitutes 'telephone apparatus' and what is meant by being 'connected' to answer the controversy surrounding the distinction between public and private communications.

However, for all the lengthy analysis, Lord Oliver agreed with the trial judge that the cordless telephone was not part of public communications despite the fact that it was connected to a BT line.<sup>1002</sup> He concluded that

*what was actually intercepted by the police radio receiver consisted of the impulses transmitted between the base unit and the hand set, both of which formed part of a telecommunication system ... but formed no part of public telecommunication systems run by BT.*<sup>1003</sup>

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<sup>1000</sup> *R v Effik* (Godwin Eno) [1994] 99 Cr. App. R. 312

<sup>1001</sup> *Ibid*, para.313

<sup>1002</sup> *Ibid*, para. 317

<sup>1003</sup> *Ibid*

His Lordship dissected section 1(1) of ICA and focused on interception "in the course of transmission ... by means of public telecommunication."<sup>1004</sup>

He reasoned that an offence under section (1) ICA occurs if there is interception 'in the course of transmission' not during its transmission.<sup>1005</sup> Moreover, he held that the phrase "by means of" for the purpose of the criminal offence occurs when the impulses pass through the public system."<sup>1006</sup> In all of his Lordship's analysis, there was no mention of concern for privacy rights. He was merely concerned with whether the purpose of the prohibition of intercepting public communication system is tailored to the ultimate aims. The aims, paraphrased from his reasoning, were that of:<sup>1007</sup> protecting the systems; allowing interception under exceptional circumstances (national security); and restricting the material to a particular purpose (investigation, not criminal proceedings).

His Lordship was firmly of the opinion that privacy concerns are not the primary reasons for the prohibition contained within the ICA. Therefore, a privately run system is not covered under the legislation.<sup>1008</sup>

The decision in *Effik* as to what constitutes interception in the UK was affirmed in subsequent cases such as *R v Smart and Beard*<sup>1009</sup>, *R v E*<sup>1010</sup>, and *R v Allsopp and others*.<sup>1011</sup>

In *R v Smart and Beard*, one of the defendants, Mr. Beard, raised several grounds against his conviction for conspiracy to supply controlled drugs. One of the grounds<sup>1012</sup> required clarification of whether the interception of his communications by the authorities consisted of unlawful interception within the meaning of section 9(1) ICA 1985. The court in this case referred to *Effik* to find out whether the telephone conversation of the appellant should have been

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<sup>1004</sup> *Ibid*

<sup>1005</sup> *Ibid*

<sup>1006</sup> *Ibid*

<sup>1007</sup> *Ibid*, para. 319

<sup>1008</sup> *Ibid*, para. 320

<sup>1009</sup> *R v Smart and Beard* [2002] EWCA 772

<sup>1010</sup> *R v E* [2004] EWCA 1243

<sup>1011</sup> *R v Allsopp and others* [2005] EWCA Crim 703

<sup>1012</sup> *R v Smart and Beard*, *supra* note 1009, para. 64

inadmissible. The Court of Appeal held that because "...the listening device simply heard and recorded what Harris said into his phone. There was thus no interception of an electrical impulse or signal passing through the public telecommunication system."<sup>1013</sup>

The facts in *R v E* were similar to the above case where, in the same manner as *Smart and Beard*, the police placed a listening device in E's car. The fruit from the intercept material was accepted by the trial judge. However, the appellant argued that this should have been inadmissible because the interception was obtained in contravention of RIPA. The Court of Appeal accepted that the complainant has a right to expect some degree of privacy in his car unless there is lawful authorisation to place a device in his car.<sup>1014</sup>

However, The Court of Appeal has also attempted to answer the crucial point: when is interception said to occur for the purpose of section 2 of RIPA? Unlike in *Effik*, the contents of the conversations in *R v E* were picked up as they were spoken into the mobile. Thus, the intercept material in this case did not involve "...the use of electrical or electromagnetic energy."<sup>1015</sup> Therefore, the Court of Appeal held that there was no interception within the meaning of RIPA. Moreover, it was held that despite the legislative instruments at issue in *Effik*, i.e. ICA 1985 and in *R v E*, i.e. RIPA, the question of when interception is said to occur remains the same. .<sup>1016</sup>

The case of *R v Allsopp and others*<sup>1017</sup> is different from the above cases, in that the appellants did not use any communications, private or public - "It was a face-to-face communication".<sup>1018</sup> The court in this case made extensive reference to the cases discussed above to reach the conclusion that orally transmitted communication is not covered under RIPA.<sup>1019</sup> This conclusion does not appear to be plausible for some commentators as it, among other things, disregards

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<sup>1013</sup> *Ibid*, para. 68

<sup>1014</sup> *R v E*, supra note 1010, paras. 9-10

<sup>1015</sup> *Ibid*, paras. 21-22

<sup>1016</sup> *Ibid*, para. 25

<sup>1017</sup> *R v Allsopp and others*, supra note 1011

<sup>1018</sup> *Ibid*, para. 36

<sup>1019</sup> *Ibid*, paras. 20-23

section 2 (8) RIPA which describes interception as "any case in which any of the contents of the communication, while being transmitted, are diverted or recorded".<sup>1020</sup>

Several questions remain unanswered. Why did the UK court focus on the distinction between private and public systems? Does such a distinction make a difference with regard to the actual contents of the conversations? The reasoning could be attributed to the particularly long-standing position that the aim of the law on interception is promoting public confidence in using public systems, not protecting privacy.

A cursory look at the explanatory notes to RIPA seems to provide two differing liabilities depending on whether the interception is on public systems or private systems. Accordingly, the consequence of interfering with public systems entails criminal liability while interference with private systems entails civil liability if the interception is conducted by the system controller or with his express or implied consent.<sup>1021</sup> The only instance where interference with private systems entails criminal liability is if the systems are attached to a public system.<sup>1022</sup>

Accordingly, "an entirely self-standing system... such as a secure office intranet does not fall within the definition."<sup>1023</sup> However, the explanatory notes to RIPA do not provide reasons as to why the legislature opted for two types of liability, and thus preferring to distinguish between public and private systems. It is not clear what public interest is served by such distinctions. The explanatory notes do, however, seem to contradict a statement made by the former Home Secretary Jack Straw, in which he stated that RIPA:

*... is not confined to any particular communications handling system; covert monitoring of private messages sent through telephone networks, e-mail systems,*

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<sup>1020</sup> For a detail criticism of the case, please see McKay, S. (2011), supra note 886, pp. 82-84

<sup>1021</sup> Regulation of Investigatory Powers Act 2000: Explanatory Notes

<sup>1022</sup> Ibid; see also section 1(2) of RIPA

<sup>1023</sup> Ibid



*pager communications or other wireless transmissions are all examples of interception.*<sup>1024</sup>

Despite the apparent clarity of the above statements, some commentators remain of the belief that the definition of interception under RIPA is opaque.<sup>1025</sup> For this reason, they argue that the concerns raised in *Halford v UK*,<sup>1026</sup> i.e. the recommendation by the ECtHR to 'regulate the interception of private networks,' seem to be unsolved.<sup>1027</sup>

In the US, the controversy on the scope of interception in the course of a communication's transmission is approached rather differently. For instance, Title III<sup>1028</sup> defines interception as an "aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."

Moreover, the 'content' of the interception under Title III is also defined as "... any information concerning the substance, purport, or meaning of that communication."<sup>1029</sup> The definition of 'content' in the US is thus different from the UK because the latter makes a distinction between content and non-content interception. As discussed above, the US also has separate legislation that governs non-content interceptions.<sup>1030</sup> But the former does not recognize such distinction, with the definition of 'content' in the US covering *any information* recording particular interception. Similar to the current RIPA prohibitions, Title III also prohibits unlawful and intentional interception and disclosure of any communications.<sup>1031</sup>

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<sup>1024</sup> Home Office (1999). *Interception of Communications in the United Kingdom*(Cm.4368), supra note 908

<sup>1025</sup> Ormerod, D. and McKay, S. (2004), supra note 994

<sup>1026</sup> *Halford v the United Kingdom*, supra note 826

<sup>1027</sup> See Ormerod, D. and McKay, S. (2004), supra note 994; see also McKay, S. (2011), supra note 886, p. 78

<sup>1028</sup> 18 USC § 2510 (4)

<sup>1029</sup> 18 U.S.C. § 2510 (8)

<sup>1030</sup> 18 USC § 3121 et seq.

<sup>1031</sup> See 18 USC § 2511 (1); See also *Goldstein et al. v US* 316 U.S. 114 (62 S.Ct. 1000, 86 L.Ed. 1312), para. 118

The focus in the US is not, therefore, on whether the interception is on private/public systems<sup>1032</sup> or content/non-content interception but whether there is intrusion into private lives and reasonable expectations of privacy. The only instance where privacy is taken into account in the UK is "...where the subject of the interception...reasonably assumes a high degree of privacy, or where confidential information is involved."<sup>1033</sup> However, as held in *R v MCE*,<sup>1034</sup> even the standard of 'high degree of privacy' does not mean that these materials could not be intercepted. Apart from these instances where privileged materials are involved, RIPA does not stipulate<sup>1035</sup> the same standards as those established in the following US case laws.

A comparison of the case law on both sides of the Atlantic is worth looking into. The facts that gave rise to *Katz v United States*<sup>1036</sup> were similar to *R v Effik*. In *R v Effik*, the police placed a device on an adjoining house in order to pick up the sound waves transmitted from a cordless handset in the target house. In *Katz v United States*, Federal agents placed similar devices on a telephone booth for the same purpose as in *R v Effik*. In both cases, there was no physical intrusion. In *R v Effik*, the UK courts attached great significance to the distinction between public and private communication systems, while failing to look at whether the defendant had reasonable expectations of privacy. Whereas, in *Katz v United States*, the US court did not follow similar justifications. In *Katz v United States*, it was stated that "the governments activities in electronically listening to and recording ... words violated the privacy upon which he justifiably relied on while using a telephone booth and thus considered a 'search and seizure' within the meaning of the Fourth Amendment."<sup>1037</sup>

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<sup>1032</sup> See for example Elements of 18 U.S.C. § 2511 Offenses at US Attorneys [Criminal Resource Manual](#) 1052

<sup>1033</sup> Home Office (2007). *Interception of Communications: Code of Practice*, supra note 986, p. 11 -13

<sup>1034</sup> *R V MCE* [2009] 2 WLR 782

<sup>1035</sup> See for instance McKay, S. (2011), supra note 886, p.78 (stating that RIPA "has fundamental flaws; it is both confusing and fails to meet its basic and self-avowed objective to protect the privacy of the individual from highly intrusive state activity".)

<sup>1036</sup> *Katz v United States*, supra note 848

<sup>1037</sup> *Ibid*, paras. 350-353

Moreover, according to *Shubert v Metrophone*,<sup>1038</sup> it was stated that both cellular and wireless telephone systems are protected under Title III. The justification of the US courts is based on what an individual expects to be shielded outside interference. Contrarily, *R v Effik* was not concerned with the point of privacy.

Another similarity between *Katz v United States* and *R v Effik* is that the interceptions in both cases were conducted without proper authorisation. However, *R v Effik* did not pay attention to the absence of proper authorisation in light of the legal position that illegally obtained intercept evidence is not automatically excluded under common law. In the US, however, unlawfully obtained evidence is inadmissible, without qualification.<sup>1039</sup>

Moreover, in *Katz v United States*, despite the argument of the US government that there was probable cause that a criminal activity was afoot; interception was limited to 'the specific purpose' and the fact that the interceptors "took greater care to overhear only the conversations of the petitioner himself,"<sup>1040</sup> the US Supreme Court held that all these safeguards were not properly scrutinized "both before and after by a neutral court."<sup>1041</sup> As a result, the US Supreme Court quashed the conviction.

The case of *Goldman v United States*<sup>1042</sup> has also attempted to answer the question as to what consists of interception. Accordingly, it was held that "divulgence of a person's telephone conversation overheard as it was spoken into the telephone receiver, does not violate §605 of the Federal Communications Act."<sup>1043</sup> In the same token, the case of *United States v Yee Ping Jong* held that "a mere recording of the conversations at one end of the line by one of the

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<sup>1038</sup> *Shubert v Metrophone, Inc* 898 F. 2d 401, 404-405 [CA3 1990], para. 1

<sup>1039</sup> *Nardone v United States* - 308 U.S. 338 (1939 ("evidence procured by tapping wires in violation of the Communications Act of 1934 is inadmissible.") Note that the Federal Communications Act of 1934 regulates interstate and foreign commerce communications ; see *Goldstein v US*, supra note 1031

<sup>1040</sup> *Katz v United States*, supra note 848, at 354

<sup>1041</sup> *Ibid*, at 357

<sup>1042</sup> *Goldman v United States* - 316 U.S. 129 (1942)

<sup>1043</sup> *Ibid*, para. 133; the Federal Communications Act of 1934 regulates interstate and foreign commerce communications. But §605 of the same Act regulates unauthorized disclosure of radio or telephone communications

participants"<sup>1044</sup> did not amount to the interception of communications. This is the same as the position taken in *R v Hammond*, which held that:

*... the telephone calls were recorded by the persons to whom the calls were made, and subject to any statutory guidance as to the meaning of the word 'interception', we would have thought that if a recording of a telephone call is to be regarded as an interception, it can only be so regarded when the recording is not made by either the maker of the call or the receiver of it, but by a third party.*<sup>1045</sup>

Hammond was criticised by some commentators because the UK court has concluded that:

*no interception occurred on such facts because no third party was "involved" and one party (the officer) had consented to the recording. On examination, these overlapping bases for this conclusion do not support such a narrow interpretation of "interception".*<sup>1046</sup>

However, the position taken in Hammond is the same with that of *Yee Ping Jong* in the US.

As a general rule, it is not classed as interception in the US if interception takes place "at or near ... the end of the telephone line" or at "locality of the consenting party" or "by a recording device attached to or in proximity to the instrument."<sup>1047</sup> This is similar to the UK position, which held that interception conducted when one is "speaking into a mobile phone is not interception within section 2(2) of RIPA."<sup>1048</sup> But in *R v Effik*, it was not the words spoken to the receiver that were intercepted. The conversations rather passed through the handset and were on their way to the base unit. The UK courts were of the opinion that sections 1 and 9 ICA did not protect signals. Whereas, *Goldman v*

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<sup>1044</sup> *United States v Yee Ping Jong*, 26 FSupp 69

<sup>1045</sup> *R. v Hammond* , supra note 929

<sup>1046</sup> Ormerod, D. and McKay, S. (2004), supra note 994

<sup>1047</sup> *U.S. v Yee Ping Jong*, supra note 1044, para. 122

<sup>1048</sup> See *R v E*, supra note 1010; see also *R v Smart and Beard*, supra note 1009 (speaking into a phone is not interception within section 1(1) of the 1985 Act )

United States held that signals are protected as far as there is interception "between the points of origin and reception of such transmission including all instruments, facilities, apparatus and services."<sup>1049</sup>

To conclude, the above cases highlight the difference in the approach of British and US courts on privacy concerns in case of interception.

#### 4.3.1.4 Why is Intercept Excluded from Court Proceedings in English Law?

With the exception the disclosure of intercepts in camera,<sup>1050</sup> a target could not force the UK government to disclose or produce intercept material. On the other hand, if the police could not secure a conviction by means other than intercept evidence, they have to release a suspect, unless they suspect the individual of terrorism. Here, it has been said that the suspect could be "detained without charge under control orders or by improper use of immigration laws."<sup>1051</sup> Improper use of immigration laws or the legitimacy of the new Terrorism Prevention and Investigation Measures Act 2011 are beyond the scope of this thesis. Suffice to say, here, that each is controversial.

At the same time, English courts can consider "material intercepted in a foreign country under that country's law;<sup>1052</sup> a telephone conversation recorded with the consent of one of the participants; or a telephone conversation recorded by a hidden microphone not connected to the telephone."<sup>1053</sup>

But intercept evidence obtained through a warrant issued by the Secretary of the State is excluded from court proceeding in the UK despite the contrary claim that

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<sup>1049</sup> Goldman v United States, supra note 1042

<sup>1050</sup> See section 18 of RIPA (such as illegal interception proceedings, and control orders under the PTA 2005).; see also the Chilcot Review, supra note 806, para.20

<sup>1051</sup> Democratic Audit (2007). Evidence for Change: Lifting the Ban on Intercept Evidence in Court, 1 March

<sup>1052</sup> See the case of In re Hilali (Respondent) (application for a writ of Habeas Corpus) [2008] UKHL 3 (Mr. Hilali was extradited from the UK to Spain based on solely mobile phone intercept and voice identification evidence ); see also Regina v P [2002] 1 A.C. 146 (intercept evidence obtained in accordance with the law of a foreign country admissible in the UK); see also Rozenberg, J. (2009). Whitehall Needs to Re-examine How Best to Use Intercept Evidence. Law Gazette, 17 September

<sup>1053</sup> The Chilcot Review, supra note 806, para.22

RIPA was introduced to bring domestic legislation in line with ECHR.<sup>1054</sup> This justification lacks validity when privacy rights are violated for national security reasons and when the breach remains behind the scenes without becoming available for scrutiny by the courts due to the prohibition under section 17 of RIPA.<sup>1055</sup>

In addition, by virtue of the Birkett Report,<sup>1056</sup> the non-disclosure of intercept evidence obtained under a warrant to "private individuals, private bodies, or domestic tribunal" became a continuously upheld principle in English law.

The Birkett Report was a response to The Marrinan Case, where a barrister was disbarred for obstructing justice based on intercepts released by the then Home secretary, Viscount Tenby MP. This disclosure was condemned in the strongest possible fashion by the Birkett Report, which stated that:

*the power given to the Secretary of State to issue a warrant to intercept communications, whether by letter or by telegram or by telephone, is a power of such importance and consequence that it should be most rigorously confined to the purposes which convinced the Home Secretary that it was right to issue the warrant in the first place.*<sup>1057</sup>

The Report's publication reaffirmed previously held position that intercept evidence should be confined to the very purpose it was obtained. The purpose was "the prevention and detection of serious crime and for the preservation of the safety of the State."<sup>1058</sup> The Report, however, did not explain the potential

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<sup>1054</sup> Ibid

<sup>1055</sup> Akdeniz, Y. et al. (2001). Regulation of Investigatory Powers Act 2000 (1): BigBrother.gov.uk: State surveillance in the age of information and rights *Crim.L.R.* 73 (arguing that RIPA provides 'limited judicial oversight')

<sup>1056</sup> Great Britain (1957). Report of the Committee of Privy Councillors Appointed to Inquire into the Interception of Communications, (Cmnd.283) London: HMSO; see also Home Office (1980). The Interception of Communications in Great Britain. (Cmnd. 7873). London, HMSO; Diplock, W. J. K. (1981). The Interception of Communications in Great Britain. (Cmnd 8191) London: HMSO

<sup>1057</sup> Great Britain (1957). Report of the Committee of Privy Councillors, supra note 1056, para. 100

<sup>1058</sup> Ibid, para.8

consequences for the intelligence community if intercept were to be adduced as evidence in criminal proceedings.

The Report listed three requirements for issuance of a warrant:<sup>1059</sup> 1) There must be a national security interest; 2) The intercept must be restricted to discharging the duty of the Secretary of State; 3) Interception is to be used as a last resort. These requirements are the same as the grounds mentioned under section 5(3) of RIPA.

There is wide support for the use of intercept evidence in criminal proceedings,<sup>1060</sup> but more dispute regarding the use in terrorism prosecutions. For instance, Lord Carlile did not accept the argument that intercept evidence is appropriate in terrorism trials. However, Lord Lloyd of Berwick holds opposing opinion.<sup>1061</sup>

The latest report on the admissibility of intercept, the Chilcot Review,<sup>1062</sup> could be considered here to highlight the opposing arguments on intercept evidence. Despite the particularly positive perspective in which Sir John Chilcot viewed the use of intercept evidence in terrorism cases and serious crime cases, the then Labour government decided against implementing the recommendations because a committee set up to undertake mock trials with the recommendations having been implemented advised against the bringing those recommendations into law.

The Chilcot Review issued some pre-conditions for the disclosure of intercepts. These are 'operational risks' that need to be addressed before any change is made to the current regime on interception:<sup>1063</sup> An analysis of each of these 'risks'

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<sup>1059</sup> Ibid

<sup>1060</sup> JUSTICE (2006). *Intercept Evidence: Lifting the Ban*, 1 October; see also Human Rights Watch (2009). *Letter to the UK Parliament on Control Orders*; see also HWR (2007). *Hearts and Minds Putting Human Rights at the Center of United Kingdom Counterterrorism Policy*. pp. 13-15; see also Joint Response of the Law Reform Committee of the General Council Of The Bar And the Criminal Bar Association To The Home Office Consultation On Proposals For The Counter Terror Bill, 2007; see also Equality and Human Rights Commission (2010). *Equality and Human Rights Commission submission: Review of Counter-Terrorism and Security Powers*

<sup>1061</sup> For details, see Horne, A. (2011). *The Use of Intercept Evidence in Terrorism Cases*, Commons Standard Note SN/HA/5249

<sup>1062</sup> The Chilcot Review, *supra* note 806

<sup>1063</sup> The Chilcot Review, *supra* note 806, chapter IV

follows below. The first legal risk considered by the Chilcot Review is the impact of lifting the ban on Article 6 and Article 8 of the ECHR. The Report stated that allowing intercept evidence could bring 'operational and organisational risks.'<sup>1064</sup>

This test basically revolves around the issue of 'inequality of arms' in criminal proceedings where the ban is lifted.<sup>1065</sup> The conclusion that could be taken from them is that the prosecution and the defense are prohibited from mentioning or relying on intercept evidence except for the 'tightly drawn'<sup>1066</sup> exceptional circumstances covered under section 18 RIPA. At the same time, if the prosecution has decided to use intercept evidence, then "...fairness demands that the defendant must be given the opportunity to challenge the use and admission in evidence of the material."<sup>1067</sup> Moreover, the UK government has accepted<sup>1068</sup> that the decision over what to retain or destroy for the purpose of prosecution might raise the question of fairness as seen in *Natunen v Finland*.<sup>1069</sup> The ECtHR in this case found that the partial retention of intercept materials, which only incriminates the applicant, was in violation of article 6 ECHR.

But there are different circumstances where intercept is already in use in the UK.<sup>1070</sup> These include intercept obtained with the consent of one party; intercept recorded by a covert listening device rather than the direct intercept from the telecommunication network; and communication made to or from one prison or a secure mental health facility.<sup>1071</sup> Moreover, In *R v P*,<sup>1072</sup> the House of Lords criticised the over-cautious approach of the UK government to the secrecy of interception in circumstances where secrecy is not the primary concern.

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<sup>1064</sup> The Chilcot Review, supra note 806, paras. 62-64

<sup>1065</sup> The Chilcot Review, supra note 806, paras. 62-64; see also *R v Austin*, supra note 805, para. 47

<sup>1066</sup> Home Office (2007). *Interception of Communications: Code of Practice*, supra note 986, p.33

<sup>1067</sup> *R v Austin*, supra note 805, para. 47

<sup>1068</sup> Home Office (2009). *Intercept as Evidence: A Report (Cm 7760)*. London: Stationery Office , para.10-12

<sup>1069</sup> *Natunen v Finland* (application no. 21022/04)

<sup>1070</sup> JUSTICE (2006). *Intercept Evidence: Lifting the Ban*, 1 October, p.42

<sup>1071</sup> For interception from prison, see *R v Ian Huntley* [2005] EWHC 2083 (QB)

<sup>1072</sup> *R v P* [2000] All ER (D) 2260



Furthermore, the ECtHR in *Schenk v Switzerland*<sup>1073</sup> and in *Chinoy v United Kingdom*<sup>1074</sup> also held in favour of intercept evidence in criminal proceedings. The argument is that if these sorts of intercept are already allowed, it is hard to envisage why the UK courts cannot be entrusted with the task of balancing security interests in case of intercept obtained through a warrant.

Second, besides the above risks on Articles 6 and 8 ECHR, the UK government stated that disclosing intercept evidence would compromise the techniques used by and the work of the intelligence community.<sup>1075</sup> The Chilcot Review further highlighted this risk by stating that:

*Any disclosure of interception capabilities could have a profound impact on national security, by encouraging a wide range of targets (not only criminals but also terrorists and other individuals of intelligence value) to change their behaviour in ways that would make them more difficult to investigate in the future.*<sup>1076</sup>

However, it is claimed that if intercept evidence is used to detect serious crimes such as terrorism, the justification against the use of intercept evidence in criminal proceedings for national security reasons is less convincing.<sup>1077</sup> This argument is based on the fact that suspected terrorists and criminals are already aware of interception capabilities; that interception capabilities could be protected by public immunity principles;<sup>1078</sup> and that there is no evidence to

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<sup>1073</sup> Cf *Schenk v Switzerland* (App. No. 10862/84)

<sup>1074</sup> *Chinoy v United Kingdom* (App. No. 15199/89)

<sup>1075</sup> Home Office (2009). *Intercept as Evidence* (Cm 7760), supra note 1068, para.21; see also Report of the Interception of Communications Commissioner for 2005-06, HC 315 (19 Feb 2007). London, TSO; see also evidence from the ACPO at Joint Committee on Human Rights (2007). *Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning: Nineteenth Report of session 2006-07 HL 157/HC 394*. London, TSO, Oral Evidence 12 March, Ev. 1, Q3

<sup>1076</sup> The Chilcot Review, supra note 806, para.65

<sup>1077</sup> JUSTICE (2006). *Intercept Evidence: Lifting the Ban*, 1 October; see also Liberty (2007). *Liberty's Response to the Joint Committee on Human Rights: "Relaxing the Ban on the Admissibility of Intercept Evidence"*, February

<sup>1078</sup> Section 3(6) and the Code of Practice under Part 2 of the Criminal Procedure and Investigations Act 1996: for detail discussions on public immunity in the UK, see Walker, C. and Roberson, G. *Public Immunity and Criminal Justice* in Walker, C. and Starmer, K. (1999). *Miscarriages of Justice: A Review of Justice in Error*. (New York, Oxford University Press), pp. 170-79; see also [R v H \[2004\] 2 AC 134](#)

show that public interest principles have failed to protect interception capabilities in other common law jurisdictions.<sup>1079</sup>

The above argument could be supported from the decision reached in *Rowe and Davis v UK*. In this case, the ECtHR indicated that a government is not under an obligation to disclose sensitive information where such practice reveals, among other things, "secret police methods of investigation."<sup>1080</sup> The same conclusion was reached in *R v H*.<sup>1081</sup>

The third risk considered by the Chilcot review is the UK government's ability to cope with technology changes if the ban on intercept is lifted. It stated that "the advent of new technology will require wide-ranging and very expensive changes to the UK's interception systems".<sup>1082</sup> However, this has been criticised as a 'worn-out' and 'a lightweight argument'.<sup>1083</sup> For instance, the laws on "internet gambling, data protection and RIPA itself" are driven by an advancement of technology.<sup>1084</sup> Therefore, the same advancement in communication technology could be covered by expanding the existing laws. Therefore, the UK government has either to amend the existing legal regimes or risk the wrath of the ECtHR as demonstrated by *Malone v UK*.<sup>1085</sup>

Fourth, the government accepted the Chilcot Review position that to allow intercept evidence would weaken the trust and confidence of service providers,

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<sup>1079</sup> See Oral evidence from the then Director of Public Prosecutions, Sir Ken Macdonald QC and Lord Lloyd of Berwick at Joint Committee on Human Rights (2007). Intercept and Post-Charge Questioning, supra note 1075, 12 March, Ev. 1, Q10

<sup>1080</sup> *Rowe and Davis v UK* [2000] 30 ECH, para. 61

<sup>1081</sup> *R v H*, supra note 1078; for further discussion, see McKay, S. (2006). Public Interest Immunity after *Edwards and Lewis v United Kingdom* and *R v C* and *R v H* and the Role of Special Advocate. *Covert Policing Review* 110-124; see also Harfield, C. and Harfield, K. (2012) *Covert Investigation: Blackstone's' Practical Policing*. 3<sup>rd</sup> edition. (Oxford, Oxford University Press), p. 195 and seq.

<sup>1082</sup> The Chilcot Review, supra note 806, para.123

<sup>1083</sup> See the testimony of former Assistant Commissioner, Andy Hayman at Home Affairs Committee (2006). Terrorism Detention Powers, Fourth Report of session 2005-06, (HC 910-II). London: Stationery Office, Q 224

<sup>1084</sup> Liberty (2007). *Liberty's Response to the Joint Committee on Human Rights: "Relaxing the Ban on the Admissibility of Intercept Evidence,"* February

<sup>1085</sup> *Malone v United Kingdom*, Supra note 831 (absence of a law that governs telephone tapping found to be contrary to Article 8 and therefore not 'in accordance with the law.'). See also Tapper, C. (2007). *Cross and Tapper on Evidence*. 11<sup>th</sup> edition. (Oxford, Oxford University Press), p. 226 see also McKay, S. (2011), supra note 886, p. 71 (stating that the precursor for the Interception of Communications Act 1985 was the decision of the ECtHR in *Malone*)

inter-agency relations and international relations.<sup>1086</sup> Unlike the concerns related to national security, the question here is whether revealing the source would endanger future cooperation. The UK government's concern is protecting the interests of third party sources. The Chilcot Review explained that there is much uncertainty from the service providers with regard to the introduction of intercept evidence. However, the report did not indicate that service providers would stop cooperating if intercept evidence is used in criminal proceedings.

Generally, the over-cautious approach of the UK government, being careful not to offend CSPs, inter-agency cooperation and foreign governments is flawed for the following reasons.

First, RIPA is mandatory<sup>1087</sup> in the sense that it obliges CSPs to "provide assistance in giving effect to an interception ... or a reasonable intercept capability".<sup>1088</sup> The CSPs have to comply with the law once a warrant is issued. According to section 11(7) of RIPA, the penalty for refusal to cooperate with a warrant is two years imprisonment and/or fine. Considering the severe legal consequences, it would be less convincing to argue that CSPs would back away from cooperating voluntarily though the government might use the evidence they intercept in criminal proceedings. More importantly, however, 'service providers do not have an objection in principle to the use of intercept as evidence'.<sup>1089</sup>

Second, the fear that international cooperation would be damaged is also grossly misguided because prosecuting terrorists based on shared intercept is in the interest of all countries involved. As discussed above, intercept evidence obtained from abroad is already in use in the UK. The UK government does not offer a shred of evidence to support its case that sharing intercept evidence with foreign governments is based on the understanding that it would not be used in criminal proceedings. A country that uses intercept evidence in domestic courts is thus unlikely to oppose the same practice in the UK.

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<sup>1086</sup> Home office (2009). *Intercept as Evidence (Cm 7760)*, supra note 1068, paras. 17, 21

<sup>1087</sup> See section 11(4), sections 12 and *et seq* of RIPA

<sup>1088</sup> Home Office (2007). *Interception of Communications: Code of Practice*, supra note 986, p. 9

<sup>1089</sup> Joint Committee on Human Rights (2007). *Intercept and Post-Charge Questioning*, supra note 1075, para. 158

Moreover, what 'international cooperation' means also remains a divisive issue in any event. It is unlikely that other countries would back down from cooperating when they use the same evidence to convict terrorists. As mentioned above, the UK is the only country that prohibits the fruits of interception in criminal proceedings. The question is, then, which country would object if the UK relaxes the ban?

For all the above reasons, the effect of lifting the ban on third parties that cooperate with the UK government is negligible.

#### *4.3.3 The Arguments in favour of lifting the Ban*

It is not only the UK government that has failed to provide good arguments to rebuff the wide support for using intercept communication in court. As well, some of the arguments of proponents in favour of the use of intercept evidence are also flawed. These flaws are summarised below.

##### *4.3.3.1 Intercept Evidence Would Increase the Conviction of Terrorists*

An argument could be made on whether lifting the ban on intercept would increase in the number of convictions.<sup>1090</sup> But this raises some serious questions: how exactly would it increase conviction? It is valid argument to say that that lifting the ban 'may assist ... greatly in the prosecution of terrorists'.<sup>1091</sup> There is also no doubt that relaxing the ban could be 'a key tool to prosecute serious and

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<sup>1090</sup> Human Rights Watch (2009). Letter to the UK Parliament on Control Orders; see also Human Rights Watch (2007). Hearts and Minds Putting Human Rights at the Center of United Kingdom Counterterrorism Policy. pp. 13-15; see also Joint Response of the Law Reform Committee of the General Council Of The Bar And the Criminal Bar Association To The Home Office Consultation On Proposals For The Counter Terror Bill, 2007; see also Equality and Human Rights Commission (2010). Equality and Human Rights Commission submission: Review of Counter-Terrorism and Security Powers

<sup>1091</sup> See oral evidence from John Murphy, Deputy Chief Constable of Merseyside Police and ACPO's lead on intercept at Joint Committee on Human Rights (2007). Intercept and Post-Charge Questioning, 12 March, Ev 1, Q3, supra note 1075; see also Letter from Sir Ian Blair, former Commissioner of Police of the Metropolis, 2 February 2007, Ev 49

organised crime and terrorism'<sup>1092</sup> and it may also 'likely support some prosecutions'.<sup>1093</sup> But to argue that intercept evidence would increase the conviction rate is completely a different argument that requires solid evidence. There are different factors that affect the conviction process.

First, not all terrorist cases involve electronic or telephone communication. There is a need to analyse the percentage of terrorism cases that involve interception of communications. This data should be compared to overall terrorist cases. Unless such statistical analysis is produced, the argument remains vague.

Second, there is a difference in the rate of terrorist convictions. In the UK, there were 1,963 arrests between 2001 and 2010.<sup>1094</sup> However, the conviction rate varies from year to year. For instance, there was an 82% conviction rate in 2008/9<sup>1095</sup> compared to the 60% conviction rate between 2001 and 2008.<sup>1096</sup> Moreover, the conviction rate reached a peak at 86% in 2005/2006 while it dropped to 59% and 55% in 2006/07 and 2007/08, respectively.<sup>1097</sup>

These statistical disparities show that intercept evidence cannot be the single factor determining the rate of convictions. For instance, Lord Carlile has criticised the argument that the admissibility of intercepts would be a 'silver bullet' for the problems connected with control orders and conviction of terrorism suspects.<sup>1098</sup> He has also examined Operation Pathway, which looked into the arrest of 12 Pakistani terrorist suspects, and concluded that "a change in the law would have made no difference in this case, in the sense of assisting either the

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<sup>1092</sup> See the opinion of the former Attorney General, Lord Goldsmith, at Dyer, C. (2006). Courts Set to Admit Wiretap Evidence, 21 September, *the Guardian*; see also his view at Joint Committee on Human Rights (2007). Intercept and Post-Charge Questioning, Oral evidence, 26 June, Q247, supra note 1075

<sup>1093</sup> Home Office (2009). Intercept as Evidence (Cm 7760), supra note 1068, para. 8

<sup>1094</sup> Home Office (2011). Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops and Searches, (HOSB 15/11). United Kingdom, 2011

<sup>1095</sup> Ibid, table 1.4

<sup>1096</sup> Home Office (2009). Statistics on Terrorism Arrests and Outcomes: Great Britain, 11 September 2001 to 31 March 2008. Home Office statistical bulletin, 04/09, London: Home Office, para.16.

<sup>1097</sup> Ibid, at table A

<sup>1098</sup> Carlile, A. (2009). Operation Pathway: Report following Review. London, Home office, para. 98

prosecution or the suspects."<sup>1099</sup> Moreover, the then Assistant Commissioner of the Metropolitan Police, Andy Hayman, gave a qualified support by stating that lifting the ban may be useful 'in a selected number of cases, not just for terrorism but also for serious crime'.<sup>1100</sup> This further shows that it has yet to be seen how the introduction of intercept evidence would change the conviction rate. A further analysis is needed to determine how many of the acquittals were due to the blanket prohibition. Without that analysis, the argument remains unconvincing.

The conviction rate of terrorist suspects in the US with or without the use of intercept evidence shows a different picture. The average conviction rate between 2001 and 2010 in the US was 87%,<sup>1101</sup> which is higher than the data between 2001 and 2010 in the UK. However, the lower rate of conviction for terrorist offences in the UK cannot be solely attributable to the ban on intercept evidence. Indeed, it may be one of the factors. But it is unacceptable to assume that the rate would have been higher or equivalent to the US had it not been for the ban.

One reason for a higher rate of arrest and lower rate of conviction under TA 2000 is that "the police may have been far quicker to make use of powers of arrest under the Act than was necessary."<sup>1102</sup> The TA 2000 gave the police extensive powers to arrest and to detain terrorism suspects. However, the powers failed to net many convictions. This has nothing to do with the legal prohibition on interception of communications. It rather shows the flaws of the hasty decision to prevent rather than to prosecute terrorist suspects.

Finally, the ban on intercept might not hinder the conviction of terrorist suspects as the UK government could *get round* this ban.<sup>1103</sup>

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<sup>1099</sup> Ibid, para. 96

<sup>1100</sup> See Home Affairs Committee (2006). Terrorism Detention Powers, Fourth Report of session 2005-06, (HC 910-I). London: Stationery Office, Q 224

<sup>1101</sup> New York University of law (2011). Terrorist Trial Report Card: September 11, 2001 - September 11, 2011

<sup>1102</sup> Mattison Public Relations (2010). Ten Years of the Terrorism Act 2000, at <http://www.sweetandmaxwell.co.uk/about-us/press-releases/Ten%20years%20of%20the%20Terrorism%20Act%202000.pdf>

<sup>1103</sup> Rozenberg, J. (2009). , supra note 1052

#### 4.3.3.2 Intercept Helps to Reduce Pre-Charge Detention

This is the second argument offered in support of using intercept in a court. But it begs the question whether allowing intercept evidence would actually shorten pre-charge detention.

This is based on the wrong argument that the UK's pre-charge detention is longer than any other democratic country.<sup>1104</sup> As will be discussed in chapter five, this argument might not necessarily be true. There are situations in the US where investigative agents could hold a suspect longer than that the period for pre-charge detention in the UK.<sup>1105</sup> These measures are available in the US on the top of the use of intercept material. Therefore, the argument that lifting the ban on intercept evidence in the UK could serve as an alternative to pre-charge detention is weak in the sense that a shorter period of detention in the US is not necessarily attributable to the use of intercept material. The length a suspect might be held depends on the complexity of the case, not whether a country is using or prohibiting communication materials.

More reassuring, however, is that the legislation that permits extended periods of detention in the UK is rarely used. UK government's statistics for the period between 2001 and 2008 show that the time from arrest to charge were well below the maximum period allowed by the law. The report indicates that "46% of those arrested under section 41 were held for under one day and 66% for under two days. 42% of those charges were charged within 2 days and 80% of those released were released within 2 days."<sup>1106</sup> The same trend continues in recent reports.<sup>1107</sup> This further complicates the attempt to use intercept evidence as an

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<sup>1104</sup> Liberty (2010). Terrorism Pre-Charge Detention Comparative Law Study, at <http://www.liberty-human-rights.org.uk/policy/reports/comparative-law-study-2010-pre-charge-detention.pdf>

<sup>1105</sup> See chapter five for discussions on material witness statute, detention under the USA PATRIOT Act and other alternative measures; see also Stigall, D. E. (2009). *Counterterrorism and the Comparative Law of Investigative Detention*. ( USA: Cambria Press), p.166; see also Turnbull, J.H (2007). Recent Legislative Questions and Internal Security Policy. 170 *crim.law*. 5

<sup>1106</sup> Home Office (2009). Statistics on Terrorism Arrests and Outcomes , supra note 1096, para.12

<sup>1107</sup> Home Office (2011). Operation of Police Powers (HOSB 15/11), supra note 1094

alternative to pre-charge detention when the latter practice is not in fact working oppressively as many had thought. However, there is an argument to be had about the democratic legitimacy of having such laws on the books considering such laws are argued by some to be too excessive.

#### 4.3.3.3 Intercept Evidence could serve as an Alternative to Control Orders

A discussion into control orders, or the now newly (re)formulated TPIM regime<sup>1108</sup>, is beyond the scope of this thesis.<sup>1109</sup> Suffice to say that the TPIM regime, as it is known, is seen by some to pose one of the greatest threats to the credibility to the UK's justice system, in particular due process, arguably placing that system one step back into the ancient history of oppressive summary justice.<sup>1110</sup> However, this section will instead attempt to show that control/TPIM orders are not necessarily related to the ban on intercept evidence.

It is true that the main reason for the introduction of control orders in 2005 was to avoid revealing evidence gathered via secret intelligence.<sup>1111</sup> However, an interesting empirical perspective would first want to know how much of the evidence gathered for use against control order detainees is drawn from the fruits of interception. The data shows that there were 52 control orders between 2005 and 2011.<sup>1112</sup>

But, it would seem that not all of them were based on intercept material. For instance, one defendant claimed that he was subjected to control orders because he 'met' a certain extremist,<sup>1113</sup> whereas some were placed under the order

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<sup>1108</sup> See Terrorism Prevention and Investigation Measures Act 2011 (2011 Chapter 23)

<sup>1109</sup> For a detail discussion on control orders, see Walker, C. (2011), *supra* note 224, pp. 301-327; see also Walker, C. (2010). The Threat of Terrorism and the Fate of Control Orders. *Public Law* 4-17; see also Forster, S. (2010). Control Orders: Borders to the Freedom of Movement or Moving the Borders of Freedom? In: Wade, M. and Maljevic, A. (eds.). *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications*. (New York, Springer), p. 349

<sup>1110</sup> BBC (2013). Labour Questions Tpins as Terror Suspect Absconds. 1 January at <http://www.bbc.co.uk/news/uk-20882357>

<sup>1111</sup> BBC (2011). Q&A: Control orders, at <http://www.bbc.co.uk/news/uk-12108075>

<sup>1112</sup> Anderson, D. (2012). Control Orders In 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005, Independent Reviewer of Terrorism Legislation, para. 3.13

<sup>1113</sup> BBC (2011). Q&A, *supra* note 1111



because "they wished to travel abroad for terrorist purposes."<sup>1114</sup> The nature of the circumstances in which these controlees were placed under a control order, merely meeting a suspect or wishing to travel abroad, would appear to suggest that intercept evidence played no part in the decision to subject these people to control orders. The reasoning seems rather more superficial, possibility based on the potential for a threat to arise out of those circumstances.

Thus, even if intercept evidence is allowed, control orders based on non-intercepted materials would continue to exist. These include orders based on the "transcript of audio bags, tips from important informants, or information from other intelligence agencies."<sup>1115</sup> The RIPA provisions that deal with direct interception do not bar these kinds of evidence.

An important decision of the House of Lords on control orders is worth mentioning here.<sup>1116</sup> The House held that if a person is subjected to control orders, he must be given sufficient information to answer the allegations against him to satisfy Article 5(4) and Article 6 ECHR. This means that the UK government cannot hide behind a veil of secrecy when imposing control orders.<sup>1117</sup> Furthermore, the cases cautioned against using RIPA prohibitions on intercept evidence as an excuse for failing to provide sufficient information to a controlee.

Second, the main purpose of a control order is prevention, not prosecution.<sup>1118</sup> In the same manner, RIPA does not prevent the use of intercept evidence to prevent terrorist activities. What is prohibited is use of the same material in legal proceedings. Thus, removing the ban would not necessarily lead to the removal of control orders.<sup>1119</sup> The Chilcot Review also admitted that it has "not seen any

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<sup>1114</sup> Anderson, D. (2012). Control Orders in 2011, *supra* note 1112, para. 3.18

<sup>1115</sup> *Ibid*

<sup>1116</sup> Secretary of State for the Home Department v AF & Others [2009] UKHL 28 (AF & Others) ; see also the decision of the ECtHR in A. and Others v the United Kingdom [GC], no. 3455/05, ECHR 2009

<sup>1117</sup> See also Secretary of State for the Home Department v MB and AF [2007] UKHL 46 [2008] AC1 AC400 ((secret evidence cannot be used to impose control orders)

<sup>1118</sup> Walker, C. (2011), *supra* note 224 , p. 302

<sup>1119</sup> Carlile, A. (2008). Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005. London, Home Office

evidence that the introduction of intercept as evidence would enable prosecutions in cases currently dealt with through Control Orders." <sup>1120</sup> This further undermines the argument that lifting the ban on intercept could reduce the need for control orders.

Fourth, as discussed in the previous sections in this chapter, intercept evidence is neither prohibited nor restricted in the US. However, Obama announced a new Executive Order that would enable the US government to detain Guantanamo prisoners indefinitely without a trial. <sup>1121</sup>

Although the application of control orders and this particular Executive order are different, the justifications and implications are the same. A control order is in place because the UK government does not have sufficient evidence to either prosecute or deport suspects, but feels it has sufficient evidence to ground fears that such individuals pose a threat to the UK. The same could be said with that of the above Executive Order.

To conclude, neither the use of intercept evidence nor removing the control order regime could allay the fears of compromising intelligence techniques. This is due the fact that secret intelligence is more than just the interception of communications and, further, that control orders are not primarily built upon intercept evidence.

#### 4.3.2 *The US Experience and Section 17 of RIPA*

Critics argue that "section 17 of RIPA ensures that the United Kingdom interception regime remains unique in Europe and virtually alone in the world." <sup>1122</sup> This is due to the several prohibitions on intercepted communications stipulated under section 17 of RIPA. What follows is comparison of these prohibitions against the US federal laws.

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<sup>1120</sup> The Chilcot Review, *supra* note 806, para. 210

<sup>1121</sup> See chapter five for further discussion on the indefinite detention of terrorist suspects in the US

<sup>1122</sup> See Ashworth, A. and Macdonald, A. (2012). *Human Rights and Criminal Justice*. 3<sup>rd</sup> edition. (London, Sweet and Maxwell), p.328

#### 1.1.1.1. Disclosing the Contents of an Interception

In the US, intercepted communication could be disclosed or used in a court provided that:<sup>1123</sup>

*The interception is made without a warrant in case of emergency and an application for a warrant is made within 48 hours; the parties receive a copy of the court order under which the interception was authorized not less than 10 days before the trial; the interception is not contrary to 18 U.S.C §2515<sup>1124</sup>; The interception is made with a court warrant upon probable cause.*

Moreover, intercept evidence obtained under FISA<sup>1125</sup> is also admissible if<sup>1126</sup> the attorney general permitted disclosure of such material; if the aggrieved person is notified in advance; if the person is given the right to challenge the legality of the evidence; and if there is a review in camera by a court to determine the effect of disclosure on national security. However, FISA does not deal with content or direct interception of communications as with section 17(1) of RIPA. Its aim is restricted to electronic surveillance.

Section 17 of RIPA, on the other hand, does not prohibit the use of direct, intrusive, or covert surveillance in criminal proceedings.<sup>1127</sup> Thus, comparisons

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<sup>1123</sup> See 18 U.S.C. §2518(7); 18 U.S.C. §2518 (9); 18 U.S.C. §2518(3) cited in Stevens, G. M. and Doyle, C. (2008). Privacy: An Abbreviated Outline of Federal Statutes Governing Wiretapping and Electronic Eavesdropping, CRS Report for Congress, Order Code 98-327

<sup>1123</sup> 18 U.S.C §2515 sets the general rule that illegally obtained intercept is not admissible in any trial

<sup>1124</sup> 18 U.S.C §2515 sets the general rule that illegally obtained intercept is not admissible in any trial

<sup>1125</sup> For the difference between interception under title III and FISA, see Comparison of Electronic Surveillance Under Title III and FISA, available at <http://www.cdt.org/security/usapatriot/020919fiscrbriefchart.pdf> ; see also TITLE III and FISA at

<http://www.gusjsolomoninnofcourt.org/Documents/Meeting%20Documents/2007%20April%20I nn%20of%20Court%20Materials%20Part%202.pdf>

<sup>1126</sup> 50 U.S.C 36 § 1806; see also Smith, R. E. (2002). *Compilation of State and Federal Privacy Laws* (Privacy Journal), p.85

<sup>1127</sup> Home Office (2010). Covert Surveillance and Property Interference, supra note 886; see also Home Office (2010). Covert Human Intelligence Sources, supra note 886

of electronic surveillance in both countries do not help much in the controversy surrounding the use of intercept evidence in English courts.

18 U.S.C §2518(8) provides strict procedures to be followed during and after interception. Consequently, 18 U.S.C §2518(8) declares that:

*The contents of an interception should be reduced to a record form; the recorded material should not be tampered with; it should be submitted to a judge after the expiry of the order and the judge should seal and determine the custody of the evidence; the intercept shall be kept for ten years except with an order for its destruction; duplication is not possible except for investigative purposes.*

A court plays a crucial role both before and after authorisation of interception order. A judge will not issue intercept order unless the four requirements discussed above are satisfied. There is also *ex post* supervision of the warrants because "the court may require progress reports at such intervals as it considers appropriate"<sup>1128</sup> and the intercept material is required to be handed to the judge. The judge can then rule on issues such as the custody of evidence by denying the government the right to get hold of it.

There are two types of prohibition under section 17(1) (a) RIPA; direct and indirect prohibitions.<sup>1129</sup> Revealing what has been spoken over the phone, the participants, their numbers, the location, the time, the means of communication, etc., all fall under direct prohibition. These refer to both content and non-content prohibitions. On the other hand, there cannot be any disclosure of any suggestion that reveals, for instance, the existence of intercept warrant. These are categorised under indirect prohibitions.<sup>1130</sup>

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<sup>1128</sup> 18 U.S.C. §2518(6); see also Stevens, G. M. and Doyle, C., *supra* note 1123, p.37

<sup>1129</sup> Regulation of Investigatory Powers Act 2000: 2000 c. 23 Explanatory Notes, para.137

<sup>1130</sup> *Ibid*, para.137

In the US, Title III<sup>1131</sup> on the other hand states that a person is in violation of the provisions within if he "intentionally discloses ... the contents of any wire, oral, or electronic communications, knowingly or having reason to believe that the information was obtained ... in violation of the Act." Moreover, "actual involvement in the illegal interception is not necessary in order to establish a violation of that statute."<sup>1132</sup> This is due to the fact that the person disclosing the intercept must have the knowledge or in the absence of specific knowledge, 'reasonable belief' as to the means by which the intercept was acquired.<sup>1133</sup> The question is, therefore, did you have the necessary knowledge or reasonable belief that your actions were contrary to Title III even if you were the one who intercepted the communication? If the answer is no, then no violation despite the fact that you actually participated in the illegal interception and you disclosed the material thereof.

While the prohibition under section 17 of RIPA is all but absolute, subject only to section 18, the US counterpart is not. For one thing, what is prohibited under Title III is intentional disclosure of illegally obtained intercept material.<sup>1134</sup> Therefore, to the degree that it is legally obtained, disclosure is not barred except in specific circumstances such as protected materials under the 'State Secrets Privilege.'<sup>1135</sup> Such grounds of withholding sensitive information are also specified in the UK.<sup>1136</sup> However, RIPA does not make any exception between legal and illegal interception, though it does contain some provisions on offences for unauthorised disclosure.<sup>1137</sup>

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<sup>1131</sup> Title 18 U.S.C. §2511(1)(c); see also *Bartnicki v Vopper* (99-1687) 2001.3d 109

<sup>1132</sup> *Bartnicki v Vopper*, above, para 18

<sup>1133</sup> Besides *Bartnicki*, see also *Pereira v United States*, 347 U.S. 1, 9 (1954)

<sup>1134</sup> Besides the above section of Title III, see also 18 U.S.C. §2515, §2511(1) (c) and §2511(1) (d)

<sup>1135</sup> *United States v Reynolds* - 345 U.S. 1 (1953); See also Edward, C. L. (2009). *The State Secrets Privilege and Other Limits on Litigation Involving Classified Information*. CRS Report for Congress, 7-5700; R40603. 28 May

<sup>1136</sup> See Walker, C. and Roberson, G., *supra* note 1078, ; see also *Criminal Procedure and Investigations Act 1996*, the Code of Practice Part 6; see also *Kennedy v UK*, *supra* note 996; *Liberty and Others v the United Kingdom*, no. 58243/00, 1 July 2008

<sup>1137</sup> See Section 19 RIPA et seq.

Another difference is that Title III prohibits interception of oral communications<sup>1138</sup> provided there is the reasonable expectation of privacy.<sup>1139</sup> RIPA contains no corresponding presumption.<sup>1140</sup>

As held in *Bartnicki*, Title III is content neutral because it "protects the privacy of wire (electronic) and oral communications" and it:

*does not distinguish based on the contents of the intercepted conversations nor is it justified by reference to the contents of those conversations. Rather the communications at issue are singled by virtue of the fact that they were illegally intercepted ... by virtue of the source rather than subject matter.*<sup>1141</sup>

Though neither RIPA nor its predecessor declared such purpose explicitly, *R v Effik*<sup>1142</sup> reached a similar conclusion by declaring that the purpose of the communication Act in the UK was to enhance public confidence in using public systems. Thus, the content of an interception is not the primary reason for the prohibition of intercept evidence. But unlike *R v Effik*, the US strongly emphasises privacy interests in communication systems due to the fact that "the fear of public disclosure of private conversations might well have a chilling effect on private speech."<sup>1143</sup> But, the prohibition under RIPA is not primarily driven by privacy concerns. The concern for privacy is outweighed by the need to protect the secrecy of the interception itself.<sup>1144</sup>

The above analysis on US law may lead to the conclusion that allowing intercept evidence in terrorist cases by following similar procedures under RIPA would not be as complicated as the UK government is trying to portray. In the UK, it is argued that allowing intercept evidence in a terrorism trial is not viable as the

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<sup>1138</sup> 18U.S.C. § 2511(1)(b)

<sup>1139</sup> See *People v Blehm*, 623 p. 2d 411, 44 Colo. App. 472

<sup>1140</sup> *R v Allsopp and others*, supra note 1011

<sup>1141</sup> S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968) cited in *Bartnicki v Vopper*, supra note 1131

<sup>1142</sup> *R v Effik*, supra note 1000

<sup>1143</sup> *Bartnicki v Vopper*, supra note 1131, para 532

<sup>1144</sup> Ormerod, D. and McKay, S. (2004), supra note 994 (argued that RIPA failed to provide adequate safeguards to protect privacy); see also Gibson, P. (2009). Review of Intercepted Intelligence in Relation to Omagh Bombing of 15 August 1998

interception of communication for investigation purposes requires "only transcribing contents that appear significant" while interception for criminal proceedings require "hundreds of calls to be transcribed ... translated, stored, and indexed .... and officials say costs could run into billions of pounds."<sup>1145</sup> There are some flaws with this argument.

First, the US experience shows that even the interception of evidence for investigation purpose has to be stored, transcribed and indexed. According to Title 18 U.S.C. §2518(8) (a), there is an obligation on the part of the authorised authority to store the material. This material is to be kept for ten years unless the ordering judge gives permission for its destruction. This obligation does not take into account whether the material is for investigation or prosecution. Therefore, the information has to be stored, transcribed, and indexed irrespective of its relevance for prosecution.

Second, before 9/11, FISA was limited to the gathering of intelligence evidence despite the absence of a provision that disallows use of the same material in criminal matters.<sup>1146</sup> A milestone case in the US is the *Re Sealed* case.<sup>1147</sup> The FISA court barred the US government from using intelligence gathered for investigative purposes in criminal proceedings. This was due to the traditional stand of the FISA court before FISA amendment. Consequently, "the court apparently believes it could approve applications for electronic surveillance only if the government's objective is not primarily directed toward criminal prosecution ..."<sup>1148</sup> This had been hindering the smooth sharing of information between law enforcement organs and intelligence agents.<sup>1149</sup> However, the appellate court reversed the decision of the FISA court, holding that there is no restriction on "government's use ... [of] intelligence information ... in a criminal

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<sup>1145</sup> BBC (2009). Using Intercept Evidence in Court 'Not Yet Viable', at <http://news.bbc.co.uk/1/hi/uk/8405109.stm>

<sup>1146</sup> In re Sealed Case, 310 F.3d717 (2002)

<sup>1147</sup> Ibid

<sup>1148</sup> Ibid, para.10

<sup>1149</sup> Zabel, R. B. and Benjamin, J. J. (2008). In Pursuit of Justice Prosecuting Terrorism Cases in the Federal Courts: A White Paper, p.81; see also Seamon, R. H. and Gardner, W. D. (2005). The Patriot Act and the Wall between Foreign Intelligence and Law Enforcement, 320 *Harv. J.L. & Pub. Pol'y* 28

prosecution."<sup>1150</sup> Moreover, the USA PATRIOT Act 2001 also amended FISA so that "information sharing between law enforcement and foreign intelligence authorities" would be made easier.<sup>1151</sup> The relaxation of FISA has resulted in an increase in "prosecuting international terrorism cases in the post-9/11 era."<sup>1152</sup>

To conclude, the demise of prohibition on intercept evidence under FISA did not bring any compromise of intelligence techniques, which the UK government is using an excuse against lifting the ban on intercept. The fear of the UK government that relaxing the ban would substantially increase litigation against government agencies is, thus, meritless. Much to the disappointment of some senior personnel such as Guy Mansfield QC,<sup>1153</sup> Lord Lloyd,<sup>1154</sup> Anthony Arlidge QC,<sup>1155</sup> and others, the UK government refused to break its traditional stand on intercept evidence.

#### **4.4 Challenging Secret Interception is Onerous in the UK and the US for Applicants who Challenge Secret Interception**

RIPA is not only rigid on the use of the contents of interception, as well section 17 prohibits disclosing existence of secret interception subject to the limited exceptions under section 18.

The problem with intercept regimes is that a suspect could be detained, subjected to control orders, charged and prosecuted based on intercept materials.<sup>1156</sup> However, a suspect could not defend his rights if he finds out the existence of a secret interception. He has to overcome the hurdle of the neither confirm nor deny policy.

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<sup>1150</sup> Re Sealed Case, supra note 1146, para47

<sup>1151</sup> Zabel, R. B. and Benjamin, J. J., supra note 1149

<sup>1152</sup> Ibid

<sup>1153</sup> See Dyer, C. (2005). Turn the Tap on: the Government's Case for Banning Phone Bug Evidence in Court Looks Increasingly Fragile. 22 February, *the Guardian*

<sup>1153</sup> See House of Lords (2007). Interception of Communications (Admissibility of Evidence) Bill 2006-07 HL Bill 11 06-07

<sup>1154</sup> See House of Lords (2007). Interception of Communications (Admissibility of Evidence) Bill 2006-07 HL Bill 11 06-07

<sup>1155</sup> See Dyer, C. (2005), supra note 1153

<sup>1156</sup> See Walker, C. (2011), supra note 224, pp.70-71 (stating that "exculpatory materials cannot reach the attention of the defence." and "intercepting agency retains a veto over prosecutorial usage so that interception remains the ultimate property of the intelligence services.")



Unlike the UK, there is no statute in the US that prevents challenges to legality of intercept evidence. As argued in *ACLU v NSA*,<sup>1157</sup> interception of telephone and email communications without a warrant violates the Fourth & Fifth Amendments, together with other Federal Acts. The problem with secret interception, however, is that plaintiffs have to establish that they have standing to sue. As seen in *ACLU v NSA*, the US Supreme Court accepted that the NSA<sup>1158</sup> wiretaps without warrants on international telephone and emails in which at least one of the parties is reasonably suspected of al-Qaeda ties. But the US Supreme Court also stated that:

*the plaintiffs do not ... produce any evidence that any of their own communications have ever been interrupted. Instead they asserted a mere belief, they contend is reasonable and ... a well-founded belief.*<sup>1159</sup>

The plaintiffs insisted that they suffered personal injury as a result of several factors: the existence of NSA *per se*, leading to the fear that their communications would be intercepted, to the point where their clients refused to communicate with legal counsel on the basis of the latter.<sup>1160</sup> The US Supreme Court conceded that there could be actual or anticipated injury (but they must be imminent and concrete).<sup>1161</sup> However, the US Supreme Court reasoned out that the mere existence of a regime that allows secret interception is not enough to establish standing to sue.<sup>1162</sup> This is due to the fact that "all wiretaps are secret; neither the plaintiffs nor their overseas contacts would know ... whether their communications were being tapped."<sup>1163</sup>

Similar legal challenges were raised in *Al-Haramain v G.W. Bush*.<sup>1164</sup> But, unlike in *ACLU v NSA*, the plaintiff's argument in *Al-Haramain v G.W. Bush*

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<sup>1157</sup> *ACLU v NSA*, supra note 865

<sup>1158</sup> *Ibid*, p. 6

<sup>1159</sup> *Ibid*

<sup>1160</sup> *Ibid*

<sup>1161</sup> *Ibid*, p.8

<sup>1162</sup> *Laird v Tatum*, 408 US 1 - 1972 cited in *ACLU v NSA*, supra note 865

<sup>1163</sup> *ACLU v NSA*, supra note 865, p.22

<sup>1164</sup> *Al-Haramain v Bush*, supra note 864

was not based on a "well founded belief" or on a speculation that their communications would be intercepted. Their communications were *in fact* intercepted and the organisation was proscribed based on that information. Moreover, the justifications reached in *ACLU v NSA* - interception is secret and the parties could not know if they were a target of secret interception - did not apply in *Al-Haramain v G.W. Bush* by virtue of that fact that what was intercepted had been 'inadvertently' disclosed to the plaintiff. This should have enabled them to overcome the challenge of standing to sue. However, what appeared to be a straightforward case took a twist and raised complex legal issues.

The US government moved to dismiss the case based on 'State Secrets Privilege', which according to *United States v Reynolds*<sup>1165</sup> gives courts the power to exclude sensitive evidence from proceedings that could undermine national security. This is similar to the 'Public Interest Immunity' in the UK.<sup>1166</sup> The district court of California declined the US government's motion stating that "the suit itself was not precluded by the states privilege, although the privilege protected the Sealed Document."<sup>1167</sup> In addition:

*...because the government has not officially confirmed or denied whether plaintiffs were subject to surveillance, even if plaintiffs know they were, this information remains secret. Furthermore, while plaintiffs know the contents of the [Sealed] Document, it too remains secret.*<sup>1168</sup>

The US courts also reasoned that there could be no danger to national security if knowledge of the information is limited to those already inadvertently disclosed.<sup>1169</sup> Therefore, the district court was convinced that plaintiffs had the

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<sup>1165</sup> *United States v Reynolds*, supra note 1135; for detail discussion on Federal Rule of Evidence 501 see also Edward, C. L. (2009), supra note 1135 ("The state secrets privilege is a judiciary created evidentiary privilege that allows the government to resist court-ordered disclosure of information during litigation, if there is a reasonable danger that such disclosure would harm the national security of the United States.")

<sup>1166</sup> For detail discussions on 'Public Immunity Interest' in the UK, see Walker, C. and Roberson, G., supra note 1078

<sup>1167</sup> *Al-Haramain Islamic Found., Inc. v Obama*, No. 07-0109 (N.D. Cal., Mar. 31, para. 7

<sup>1168</sup> *Al-Haramain Islamic Foundation, Inc. v Bush* ("Al-Haramain I"), supra note 864, para. 1223

<sup>1169</sup> *Ibid*, p. 17

standing to sue on the basis of what is already disclosed to them: "the burden was then on the government to squarely affirm or deny those charges."<sup>1170</sup>

*Al-Haramain v G.W. Bush* was a landmark case not on the basis of its challenge to the existence of a secret intercept regime that threatens privacy. But, rather, as a case that overcame the challenges of 'State Secrets Privileges' to establish standing to sue on behalf of a plaintiff.

Two similar cases occurred in the UK.<sup>1171</sup> In a similar manner to *ACLU v NSA*, applicants in *Liberty & Others v UK* alleged that the existence of a regime that allows secret interception is against Article 8 ECHR. Although *ACLU V NSA* relied upon, *inter alia*, the First and Fourth Amendment, the applicants in *Liberty & others v UK* did not have such wide options. While the secret interception in *ACLU V NSA* was grounded on the warrantless interception of the communications of people who have a connection with international terrorist organisations, the interception in *Liberty & others v UK* was done through a warrant regardless of the nature of the organisations. Unlike *ACLU V NSA*, the ECtHR held that:

*...the mere existence of legislation which allows a system for the secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied. This threat necessarily strikes at freedom of communication between users of the telecommunications services and thereby amounts in itself to an interference with the exercise of the applicants' rights under Article 8, irrespective of any measures actually taken against them.*<sup>1172</sup>

The ECtHR acknowledge an interference, which, in ECHR parlance, gives standing to sue. It should be recalled that *ACLU V NSA* was dismissed because the mere existence of a regime that allows secret interception was found insufficient to establish standing to sue. However, the ECtHR instead chose to accept the essence of this argument as a basis for instituting a case.

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<sup>1170</sup> *United States v Alter* 482 F2d (9th Cir. 1973) at 1027 cited in *Al-Haramain Islamic Found., Inc. v Obama*, No. 07-0109 (N.D. Cal., Mar. 31, 2010), para. 23

<sup>1171</sup> *Liberty and Others v UK*, supra note 1136; *Kennedy v UK*, supra note 996

<sup>1172</sup> *Liberty and others v UK*, supra note 1136, para 56

Moreover, both cases were concerned with external interception as opposed to domestic interception. Striking the right balance between national security and privacy seems to sit better in the ECtHR position, which allows a case to stand without establishing an actual personal injury, which is completely rejected by the appellate court in *ACLU V NSA*. The ECtHR, at least, gives an opportunity for the grievance to be aired. However, the ECtHR did not take the same position in *Kennedy v UK*.<sup>1173</sup>

*Kennedy v UK* is different from both *ACLU V NSA* and *Liberty & others v UK* in the sense that the latter cases base their argument on a general existence of a regime that allows secret interception. Moreover, *Kennedy v UK* was a dispute on domestic interception. *Kennedy v UK* is also different from *Al-Haramain v G.W. Bush* because *Kennedy* did not have concrete evidence to show that his communication was in fact intercepted. *Kennedy* relied on 'a reasonable likelihood' that interception had taken place on his communications due to his fierce campaign against injustice after his release from prison. The applicant argued that the interference with his communications led to the collapse of his business. In addition, he argued that "the mere existence of RIPA was sufficient to show interference."<sup>1174</sup>

Contrary to *ACLU V NSA*, which supported secret interception by the NSA against persons who are suspected to have a connection with al-Qaeda, the ECtHR in *Kennedy v UK* held that:

*... an individual may, under certain conditions, claim to be a victim of a violation by the mere existence of secret measures or of legislation permitting secret measures without having to allege that such measures were in fact applied to them.*<sup>1175</sup>

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<sup>1173</sup> *Kennedy v UK*, supra note 996

<sup>1174</sup> *Ibid*, para. 107

<sup>1175</sup> *Kennedy v UK*, supra note 996, para. 34

The ECtHR also stressed that an applicant has to show "a reasonable likelihood"<sup>1176</sup> that the measures were applied to him because the mere existence of secret interception is deemed insufficient to show in itself a violation of a person's privacy. The ECtHR, however, rejected the applicant's claim that he had shown 'a reasonable likelihood' saying that:

*the applicant has alleged that the fact that calls were not put through to him and that he received hoax calls demonstrates a reasonable likelihood that his communications are being intercepted. The Court disagrees that such allegations are sufficient to support the applicant's contention that his communications have been intercepted. Accordingly, it concludes that the applicant has failed to demonstrate a reasonable likelihood that there was actual interception in his case.*<sup>1177</sup>

The trouble is that the ECtHR did not outline guidelines that help determine the standard of 'reasonable likelihood.' A related problem is whether the 'reasonable likelihood' standard of the ECtHR covers past and prospective interceptions. In *ACLU V NSA and Al-Haramain v G.W. Bush*, it was stated that victim status includes both past and future interceptions. But the European standard does not seem to imply prospective interceptions because an applicant has to 'demonstrate a reasonable likelihood that there was actual interception in his case.'<sup>1178</sup>

To conclude, both the UK and the US governments stick to a policy of 'neither confirm nor deny' to answer any attempt by applicants to have the contents of interception disclosed and as a shield against allegations of privacy violations. However, unlike the Title III in the US, RIPA allows neither the use of intercept in criminal proceedings nor permits a challenge to the existence of a warrant or a secret interception. As indicated above, the US position is that if an applicant has standing to sue, "the burden was then on the government to squarely affirm or deny those charges."<sup>1179</sup> Such kinds of burdens are improbable under section 17

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<sup>1176</sup> Ibid, para. 122

<sup>1177</sup> Ibid , para 126

<sup>1178</sup> Ibid

<sup>1179</sup> United States v Alter, supra note 1170

of RIPA because the said section does not allow a discussion on the existence of an intercept warrant.

#### **4.5 Ethiopia's Legislation on Terrorism and the Interception of Communications**

It is often the case that countries will have legislation that is regarded as vague and complex. In similarly frequent fashion a country uses general laws to fill in the gaps left by the absence of specific laws relating to a particular topic. The Ethiopian law on terrorism could be categorised in either of the above cases with respect to the law that governs the interception of communications. Until 2005,<sup>1180</sup> Ethiopia had no specific laws governing the circumstances under which a communication could be intercepted and used as evidence before a court of law. As discussed above, the UK and the US have different legislation that deal with the issue at hand. Ethiopia has been relying on the general laws of search and seizure to execute the interception of communications. The following sections will highlight the practices before the coming into effect of the EATP. The discussions will be limited to the provisions that deal with the interception of communications and the probative value of intercept evidence in terrorism cases.

##### *4.5.1 Some legal backgrounds on Ethiopian Counter-Terrorism Laws on Interception of Communication before 2009*

The probative value of interception evidence in criminal proceedings has remained vague for a long period of time. Under the Ethiopian Draft Evidence Law, evidence has been defined simply as an "oral admission, judicial notice or presumption of law which proves or disapproves any wrong doing."<sup>1181</sup> If this definition is interpreted narrowly, it does not seem to include intercept evidence. However, as will be discussed below, this has not precluded the prosecution from relying on intercept evidence in criminal proceedings.

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<sup>1180</sup> That is until the anti-corruption offences proclamations discussed below are enacted

<sup>1181</sup> Ethiopian Draft Evidence Code: Preliminary and Relevance of Facts : Interception, Section 3

As will be shown shortly, long before the coming in to force of the Ethiopian Anti-Terrorism proclamation (EATP) in 2009, the prosecution had succeeded in prosecuting terrorist suspects based on telephonic or electronic communications, despite there not being any legal basis for using intercept evidence.

The Ethiopian Civil Code, the Ethiopian Criminal Procedure Code, the Ethiopian Criminal Code and various other pieces of insignificant legislation contain the provisions on privacy that apply to Ethiopia. However, protection of privacy in Ethiopia is inconsistent and sporadic, to say the least. For instance, Articles 27-28 of the Ethiopian Civil Code prohibit unauthorised publications of a person's images. But the Civil Code does not contain a single article on unauthorised access of a person's telephone or other electronic communications.

Another instance to mention is the Ethiopian Criminal Procedure Code. Articles 22-39 of this code set the general standards on police investigation. However, none of these articles deal with police powers on interception of communications. For instance, Article 32 of the Ethiopian Criminal Procedure Code deals with search and seizure. It states that:

*Any investigating police officer or member of the police may make searches or seizures in accordance with the provisions which follow: (1) No arrested person shall be searched except where it is reasonably suspected that he has about his person any articles which may be material as evidence in respect of the offence with which he is accused or is suspected to have committed. (2) No premises may be searched unless the police officer or member of the police is in possession of a search warrant*

The title of this article, *searches and seizures*, seems to suggest, although 'seizures' is nowhere defined in the Ethiopian Criminal Procedure Code or in the FDRE constitution, that 'seizure' has limited scope i.e. it applies to the seizure of the 'articles which may be material as evidence'. Whether this definition encompasses 'seizure' of intercept evidence remains unclear. There is no judicial precedence on the issue, which could be of any help or guidance.

Moreover, as will be shown below, the Ethiopian judiciary has been willing to admit intercept evidence in criminal proceedings. However, the admittance of this evidence by the judiciary has been conducted without any attempt to define 'search' under Article 32 of the Ethiopian Criminal Procedure Code. This practice raises some important questions: does 'search' under the Ethiopian Criminal Procedure Code include interception of communication? Could Article 32 be used to issue an intercept warrant? These are some of unanswered questions in Ethiopian law. The case laws discussed in this thesis has never attempted to provide a definite answer on the scope of Article 32. It is not only the absence of definitions of 'search' and 'seizure' that make it difficult to answer these questions. The failure of the judiciary to admit intercept evidence without ever challenging the prosecution as to how they were obtained has undermined the right to privacy under Article 26 of the FDRE Constitution.

Article 606 (1) of the Ethiopian Criminal Code also deserves some attention. This article, entitled *Violation of the Privacy of Correspondence or Consignments*, prohibits unauthorised access to "...a business or private closed or open letter, envelope or correspondence, or electronic, telegram, telephone or telecommunication correspondence." However, this article only lays the general rules on unlawful access to any communications. It does not specifically deal with situations where lawfully obtained communications could be produced as evidence before a court of law. Moreover, it does not specify who could authorise the lawful interception of communication nor does it define what interception of communication means.

The only specific law before the enactment of the EATP in 2009 that clearly deals with the relevance of intercept evidence in criminal proceedings in Ethiopia is the 'Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-Corruption'.<sup>1182</sup> Article 46 of this proclamation states that:

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<sup>1182</sup> Revised Proclamation (Proclamation No. 434/2005) , supra note 56



- 1. Where it is necessary for the investigation of corruption offences, the head of the appropriate organ may order the interception of correspondence by telephone, telecommunications and electronic devices as well as by postal letters.*
- 2. Where it is necessary, evidence gathered through video camera, sound recorder, and similar electronic devices may be produced as evidence.*
- 3. An order given in accordance with sub-article of this Article shall indicate the offence which gives rise to the interception, and the duration of the interception, and, if it is a telephone or telecommunication, the link to be intercepted. Unless the head of the appropriate organ decides otherwise, the duration of the interception may not exceed four months.*

Unlike the Ethiopian Codes discussed above, there are three positive things that could be discussed in regard to the above article. First, the above article clearly states that intercept evidence, including telephone or other communications, could be used as evidence in criminal proceedings. Second, although it does not identify the 'appropriate organ' that can authorise interception of communications, Article 73 (2) of the Revised Federal Ethics and Anti-Corruption Commission Establishment<sup>1183</sup> identifies the Federal Ethics and Anti-corruption Commission (FEAC) as an 'appropriate organ' who can authorise the interception of communications in respect of corruption offences. Third, it puts a limit on the duration of interception, i.e. a maximum of four months unless otherwise extended by the 'the head of the appropriate organ'.

However, there are still flaws with this proclamation. First, it does not require a court warrant. As discussed in the previous sections in this chapter, article 26 of the FDRE constitution guarantees the right to the inviolability of one's correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices. Without the necessary supervision from the judiciary, it must be questioned how a proper check can be conducted on the possibility of abuse of the power by the executive. Second, it does not define what constitutes the interception of communications. Thirdly, and most importantly, the scope of this proclamation is limited to corruption

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<sup>1183</sup> Revised Federal Ethics (Proclamation No.433/2005) , supra note 56

offences. This leaves a big gap in the Ethiopian legal system with regard to the probative value of intercept evidence in other criminal proceedings, including terrorist crimes.

#### 4.5.1.1 The Evidential Value of Intercept Evidence under the Ethiopian Legal System: the practice before 2009

Despite there being many terrorism cases shown in table 2.3, the following six terrorism cases are the only instances which indicate how the courts and the prosecution have been relying on intercept evidence before the EATP came into force.<sup>1184</sup> In *Tesfahunegn Chemed et al. v Public Prosecutor*,<sup>1185</sup> 16 defendants were charged for alleged crimes against the political or territorial integrity of the State, inciting armed rising or civil war or terrorism. Part of the evidence produced by the prosecutor consisted of email communications between the defendants. Their emails and the content of their communications were revealed to the court. But, there was no indication as to how the evidence were gathered, who authorised them or whether they were the result of direct interception of communication or evidence retrieved later on. The court did not challenge the prosecution as to how it managed to gather the evidence.

In *Public Prosecutor v Birga Merga Buli et al.*,<sup>1186</sup> eight defendants were successfully prosecuted for crimes against the FDRE Constitution and the State based on intercepted email communications. In *Samuel Goitom et al. v Public prosecutor*,<sup>1187</sup> the alleged crimes include inciting terrorist attack against the State, espionage, and high treason. The prosecution produced the contents of satellite mobile communications between the defendants. Unlike the case of *Birga Merga Bulir*, all defendants in *Samuel Goitom, et al. v Public prosecutor* were acquitted by the court. However, the court did not place much emphasis on the intercepted evidence relied on by the prosecutor. The focus of the trial court

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<sup>1184</sup> How the EATP has been used after 2009 will be further discussed in the subsequent sections in this chapter

<sup>1185</sup> *Public Prosecutor v Tesfahunegn Chemed et al.* (public prosecutor file no 5-2592/01335/2008)

<sup>1186</sup> *Public Prosecutor v Bira Merga Buli et al.* (60086/2008)

<sup>1187</sup> *Public Prosecutor v Samual Goitom et al.* (56550/2007)

was on the reliability of confessions given to the police. It has sidelined the intercept evidence, which could have been instrumental in the prosecution.

In a case against Tefera Mamo Cherkos (General) et al. v Public prosecutor,<sup>1188</sup> 46 defendants were charged with terrorism. The prosecution produced different sorts of evidence which included evidence obtained through surveillance, confessions, and oral testimonies. A meeting chaired by one of the defendants was bugged and the same evidence was produced before the court. Furthermore, telephone communications made between the defendants and their overseas contacts were used against the defendants. Some of the evidence obtained comprised communications which were directly intercepted and others which were obtained from the Ethiopian Telecommunication Service. As discussed in chapter two and chapter three, this was one of the most controversial terrorism cases because most of the alleged terrorists were leaders or members of different political parties and journalists who fell out with the ruling party after the much criticised 2005 Ethiopian General Election.

In *Public Prosecutor v Rabyie Mohamed Hasen et al.* and *Public Prosecutor v Wegari Alemu Kass*<sup>1189</sup> the email communications of the defendants were intercepted and used as evidence against them. As shown in tables 2.3 and 2.4, six out of the seven defendants in the first case were charged and convicted for possessing and storing terrorist materials, inciting civil war, participating in the preparation of terrorist activities and seeking membership in terrorist organisations. The prosecution alleged that the defendants used their email to recruit terrorists and spread terrorist propaganda. These email communications were printed out and adduced as evidence before the court. The defendants denied that the email addresses belong to them. Instead of answering the question as to whether the police had the relevant legal authority to access the defendant's email, the court focused on whether the emails belong to the defendants. Now, of course it is entirely relevant to establish who sent and received the emails. However, this question should have been dependent upon a

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<sup>1188</sup> *Public Prosecutor v Tefera Mamo Cherkos (General)*, supra note 64

<sup>1189</sup> *Public Prosecutor v Rabyie Mohamed Hasen*, supra note 16; *Public Prosecutor v Wegari Alemu Kasa*, supra note 16

determination of the police's legal authority to intercept the communications. As a fundamental of the rule of law, it is a prerequisite of criminal proceedings to establish at first whether there is sound legal authority for the basis of a prosecution. Without such, in theory the defendants could have been talking about the most serious of atrocities, yet the evidence would remain inadmissible. This state of affairs is commonly known as 'cleared by technicality'.

In the second case, as shown in tables 2.3 and 2.4, four defendants were charged with seeking membership in a terrorist organisation, taking training for the purpose of terrorist activities, preparing and publishing the manifesto of a terrorist organisation. As with the case of Rabyie discussed above, their email communications were printed out and produced before the court. The prosecution in this case not only produced the printed out form of the defendants email communications, but it also produced the email address of one of the defendants as well as his password. The court should have asked the prosecution how they managed to access the email, what legal authority they had and whether they had obtained a court warrant to intercept them. But as with the other cases discussed above, they court in this case did not find it relevant to raise these concerns.

As discussed above, Article 606 (1) of the Ethiopian Criminal Code deals with violations of the privacy of any communications. Moreover, despite some of the defects discussed in this chapter, Article 26 of the FDRE Constitution contains similar principles to Article 8 ECHR. However, the reluctance of the courts to challenge the prosecution has made these legal bases irrelevant. The point highlighted quite clearly in the above cases is the fact that the Ethiopian judiciary have been relying, prior to 2009, on intercept evidence in terrorism cases where there were no clear laws to govern the practice.

What follows is an attempt to discover whether the EATP has brought with it some solutions to rectify this and associated problems related with the interception of communication in terrorist cases.

#### **4.6 Intercept Warrant**

The relevant provision here is Article 14 of the EATP.<sup>1190</sup> The said Article states that a court of law can issue intercept warrants on the request of the National Intelligence and Security Service. According to sub-article 1 of the same Article, an intercept warrant allows the holder to do one of the following things:

*Intercept or conduct surveillance on telephone, fax, radio, internet, electronic, postal and similar communication of on person suspected of terrorism; enter into any premises in secret to enforce the interception; install or remove instruments enabling the interception.*

This provision raises several issues. The first one being the grounds on which the warrant is issued? It is to be recalled from the discussions in the previous sections that the US and the UK differ on the grounds for the issuance of an intercept warrant. Under UK law, interception could be conducted with or without a warrant. There is no need for a warrant if the interception is obtained through the consent of both or one of the participants to the communication, or if it is obtained through interception conducted by service providers.<sup>1191</sup> Apart from these exceptions, UK law enforcement officers need to have a warrant issued by the Secretary of State to intercept any communication. According to section 5(3) of RIPA, the Secretary of State can issue a warrant for one of the following reasons: national security; preventing or detecting serious crimes; or safe guarding the economic well-being of the country.

However, under US law, all interception warrants are issued by a court, except for those warrantless interceptions governed under FISA.<sup>1192</sup> Accordingly, issuing a warrant is conditional on the demonstration of 'probable cause'; that is "an individual is committing, has committed, or is about to commit a particular offence ..."<sup>1193</sup> In comparison, the UK does not require either probable cause or judicial supervision in the execution of intercept warrant.

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<sup>1190</sup> Anti-Terrorism Proclamation No. 652/2009 (EATP)

<sup>1191</sup> Section 3 of RIPA

<sup>1192</sup> See 50 U.S.C § 1802 (Electronic surveillance authorization without court order; certification by Attorney General; reports to Congressional committees; transmittal under seal; duties and compensation of communication common carrier; applications; jurisdiction)

<sup>1193</sup> See 18 U.S.C § 2518 (3)(a) (Procedure for interception of wire, oral, or electronic communications)

On the other hand, Article 14 of the EATP states that an intercept warrant should only be issued by a court. But, the legislation does not specify objective grounds which the Ethiopian court must consider when issuing an intercept warrant. Article 14(1) (a) EATP appears to suggest that the fact that an individual is a terrorist suspect is the only justification needed for an intercept warrant. In comparison to the standards required under the UK and the US, the Ethiopian requirements fall well short of providing a guarantee against violation of privacy.

The structure of Article 14 of the EATP possesses neither the broad grounds specified under section 5(3) of RIPA nor the specific standards mentioned under 18 U.S.C §2516 and §2518. Moreover, though Article 14 of the EATP resembles the US law in view of the fact that an intercept warrant has to be issued by a court, unlike the UK law where the Secretary of State holds this power, it does not provide judicial supervision in the *execution* of an issued warrant. Furthermore, in the contrast to the UK and the US, Article 14 of the EATP does not have a time limit. Under 18 U.S.C §2516 and §2518, an intercept warrant is issued for 30 days. Section 9(6) of RIPA provides for an extended period of six months. No such time constraint is provided for under Article 14 of the EATP.

Under Article 14 of the EATP, given that any person suspected of terrorism can be subjected to secret interception of his communication, a related question arises as to what sort of evidence the requesting authority has to or is expected to produce in order to persuade a court that the person for whom a warrant requested is in fact a terrorist suspect?

A close comparison of Article 14 and Article 19 of the EATP, which deals with power of arrest, reveals that the latter Article requires a stricter standard; the power of arrest requires reasonable suspicion that the person has committed or is committing terrorist acts as provided under the EATP<sup>1194</sup> Under the EATP, the legislature has inserted a lower threshold of 'being a terrorist suspect' as a ground for the issuance of an intercept warrant, while a reasonable suspicion is required

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<sup>1194</sup> Article 3 of the EATP

to issue an arrest warrant. Yet, no justification is given for this difference; the difference remains unexplained, and given the former's propensity to violate fundamental rights, would appear to require justification. Issuing an intercept warrant on what might be an unsubstantiated allegation by the police that a person is a terrorist suspect violates a person's fundamental right to privacy.

To make Article 14 of the EATP compliant with international human right standards and to put it in a similar footing with that of the UK and the US, which have a wealth of experience in the fight against terrorism, it should require the applicant to show probable cause, if not, reasonable suspicion that the person to be subjected to secret interception is a terrorist suspect. Moreover, Article 14 of the EATP should contain a time constraint. Anything between 30 days, which is the practice in the US, and between three to six months, the relevant period under RIPA, could be used as a standard to modify Article 14 of the EATP. As discussed in this chapter, the anti-corruption offences proclamation,<sup>1195</sup> which sets a maximum of four months for any intercept order, could also taken into account.

The absence of a fixed time constraint on an interception warrant, together with vagaries within the grounds for issuing intercept warrants are but two serious issues that are in need of remedy. One important question remains unanswered, though: Under the EATP what is the consequence of intercepting communications without a warrant? Do the Ethiopian courts have the power to throw the evidence away in such a case? The EATP is silent. Under the Title III of the US, law enforcers are allowed to intercept without a warrant under exceptional circumstances provided an application is made within 48 hours.<sup>1196</sup>

The combined reading of section 7(2) and 9(6) (a) of RIPA reveals that senior officials could issue an intercept warrant in an urgent case provided the "Secretary of State has herself expressly authorised the issuance of the warrant." According to section 9(6) (a) of RIPA, the maximum period allowed in case of an emergency is five days. As seen above, this is clearly longer than the 48 hour

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<sup>1195</sup> See Article 46 of the Revised Proclamation (Proclamation No. 434/2005) , supra note 56

<sup>1196</sup> See 18 U.S.C. §2518(7); see also Stevens, G. M. and Doyle, C., supra note 1123

limit provided under Title III. Turning to the Ethiopian position, Article 14 of the EATP, on the other hand, lacks clarity on the issuance of intercept warrant in urgent situations. The EATP does not state whether the National Intelligence and Security Service may intercept communications without a warrant in urgent cases.

While there is an argument to be made in favour of the active participation of the judiciary in the execution of intercepts warrant, this would be a practical hindrance to the security services that may need to act in an urgent fashion; delay could cost them valuable evidence. Thus, the exceptional circumstance provisions discussed in relation to the US and UK are written into legislation for good reason. They are designed to accommodate such situations where it is impossible to obtain a warrant through the normal procedures. Therefore, Article 14 of the EATP remains deficient in one important respect; it does not cater for the reality of an urgent situation arising demanding the need for swift action.

A comparison of Article 14 and Article 17 of the EATP, which deals with covert searches, gives a different insight into the intention of the Ethiopian legislature. The later Article states that the police can obtain a covert search warrant from a court where they have reasonable grounds to believe that:

*A terrorist act has been or is likely to be committed; or a resident or possessor of a house to be searched has made preparations or plans to commit a terrorist act; and; covert search is essential to prevent or to take action against a terrorist act or suspected terrorist activity.*

As discussed, the only standard required for the issuance of an interception warrant under Article 14 of the EATP is subjective ground i.e. showing the Ethiopian court that an individual is a terrorist suspect. Here, section 17 of the EATP requires a far stricter standard; one of reasonable grounds to believe. As will be discussed in chapter four, reasonable suspicion requires objective facts or information or intelligence. The requirement under Article 14 of the EATP - being a terrorist suspect - does not require any objective facts.



Serious questions must be asked as to why the legislature requires unsubstantiated suspicion in the case of Article 14 of the EATP, whereas requires 'reasonable grounds to believe' to issue covert search warrant under Article 17. We might well ask what is the notional difference in each case? It would seem that both State measures strike at the heart of an individual's freedom and liberty, particularly their privacy, yet one requires stronger justification for invocation than the other. Indeed, as far as normative argument goes, the interception of communications in fact entails a more severe violation of privacy than does a covert search; the former is more likely to reveal up-to-date intimate personal details in real-time, whereas the latter will at most discover recorded personal details, whether out-dated or otherwise.

To conclude, this analysis poses a consolidated argument for the amendment of Article 14 of the EATP to include the requirement of 'reasonable suspicion' or 'reasonable grounds to believe' before an intercept warrant is authorised.

#### **4.7 How is the Interception of Communications Defined under Ethiopian Law?**

Defining interception and its scope is the pre-condition of whether a particular act falls within the ambit of the law. Without a clear definition it would be difficult to distinguish between surveillance and direct interception. Article 14 of the EATP requires a court warrant for both surveillance and interception. But, it does not provide the element that helps distinguish between the two; a precise definition. The section of the EATP that contains the definitions of terms used in the Proclamation fails to provide a clue on how interception is to be understood.

Taking the experience of the UK as a starting point, there is big difference between surveillance and interception. First, part two of RIPA deals specifically with surveillance. Accordingly, three main types of surveillance are illustrated. These are directed surveillance, intrusive surveillance and covert human intelligence.<sup>1197</sup> Though a detailed discussion on surveillance is beyond the scope

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<sup>1197</sup> Section 26 of RIPA

of this thesis, a close reading of section 26 RIPA *et seq* show that surveillance has a different connotation, legal implication and authorisation process from that of interception. The following examples could shed a light on the differences:<sup>1198</sup>

*Covertly recording conversation; CCTV identify those responsible for the commission of an offence enabling officers to attend and make arrests; use of unmarked helicopters to obtain images identifying vehicles being used in the commission of an offence; setting up an observation point in the premises opposite a criminal target; the installations of surveillance devices in a target object to gather intelligence.*

All the above examples do not require the interception of communications, even though they all involve the gathering of private information.<sup>1199</sup>

Another fundamental difference between surveillance and interception in the UK is their probative value in criminal proceedings. According to section 17 and 3(2) (b) RIPA, surveillance evidence could be used in criminal proceedings. But, by virtue of section 17 RIPA, intercept evidence is excluded from legal proceedings if it is obtained "through a warrant issued by the Secretary of State." However, under Ethiopian law, the legislature has failed to provide a distinction between the two means of obtaining personal information. Despite the absence of these distinctions, as will be discussed below, by virtue of Article 23 of the EATP, there are not any limitations on using intercept evidence in terrorism cases in Ethiopia.

As discussed, the UK and the US differ on the meaning and scope of interception. Under section 2(2) and 2(3) of RIPA, interception is defined as the 'interference', 'modification', or 'monitoring' of communications to reveal its content by other person other than the participants. According to section 2(7) RIPA, 'interception in the course of its transmission' applies to "both communications that are in the process of transmission and those that are being

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<sup>1198</sup> See Home Office (2010). Covert Surveillance and Property Interference, *supra* note 886; see also Home Office (2010). Covert Human Intelligence Sources, *supra* note 886

<sup>1199</sup> See McKay, S. (2011), *supra* note 886, p. 137-138

stored on the transmission system".<sup>1200</sup> Accessing 'stored communications do not necessary require a warrant.'<sup>1201</sup>

However, Section 2(5) RIPA excludes non-content communication from the definition of interception in the course of its transmission. These exclusions are further elaborated under section 2(9) RIPA. According to 2(9) RIPA, these concern non-content data that merely identifies the person, location, apparatus or signals used in the communication. This 'traffic data' does not reveal what has been said or written. However, the words 'interference', 'modification', and 'monitoring' are broad terms that are no further defined under RIPA.

We now turn to whether the Ethiopian legal regime pays attention to the distinction between public and private communication systems. From a cursory scan of Article 14 of the EATP, it would appear that Ethiopian legislation does not pay attention to the distinction. In this case, the EATP resembles Title III as it does not make a distinction between private and public systems. In this particular instance, the focus of the courts would be on whether the interception reveals private matters without the proper procedures.

If the need to interpret communications under Article 14 of the EATP arises, Ethiopian courts would struggle to define interception of communication, even latest legislation such as the Telecom Fraud Offences Proclamation (TFOP) does not define the legal term.<sup>1202</sup> According to Article 5 of the TFOP:

*Whosoever without the authorisation of the service provider or lawful user, or any other competent authority obstructs or interferes with any telecom network, service or system; intercepts or illegally obtains access to any telecom system: or intercepts, alters, destroys or otherwise damages the contents of telephone calls, data, identification code or any other personal information of subscribers commits an offence and shall be punishable with rigorous imprisonment from 10 to 15 years and with fine from Birr 100.000 to Birr 150.000*

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<sup>1200</sup> Home Office (2007). Interception of Communications: Code of Practice, supra note 986, p. 10

<sup>1201</sup> Ibid

<sup>1202</sup> Proclamation 761/2012 on Telecom Fraud Offences (TFOP)

The phrase "without the authorisation of the provider, or lawful user or any other competent authority" consists of three elements. The first element concerns an interception with the authorisation of service providers. This can be compared to section 3 RIPA which it provides the three grounds of lawful warrantless interception, one of which refers to any interception by service providers. However, according to section 3(3) (b) RIPA, service providers do not have outright power to intercept every communication. Their power is limited to circumstances where the interception is related to the 'provision of the service' or 'enforcement' of law. A similar protection is provided under Title III.<sup>1203</sup> Title III is more specific as it covers not only service providers but also their agents, employees, and officers. However, RIPA is not clear on whether the same sort of specification is implied into section 3.

The EATP, on the other hand, does not attach any condition to the lawful interception of communications by service providers, leading to obvious questions over the ambit of their power to intercept: Do they need a court warrant? Should their power to intercept be restricted to activities related to the 'provision of service' or law enforcement? In the absence of a clear law that limits the power of service providers, right to privacy of service users cannot be protected against unnecessary interference either by the service providers themselves or unnecessary interference on behalf of the Ethiopian government. This research proposes that the TFOP should be amended to include limitations on the power of service providers to intercept communications. There has also to be criminal as well as civil liabilities to discourage service providers from getting involved in illegal activities.

The second element provided under Article 5 of the TFOP is interception with the authorisation of a 'lawful user.' This is similar to the provision on consented interception under section 3 RIPA. Section 3(1) RIPA contains two kinds of consent: specific consent or consent based on the reasonable expectation of the person conducting the investigation. The consent could be obtained from both or

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<sup>1203</sup> 18 U.S.C. § 2511(2)(a)(i)

one of the participants. Consent for interceptions in the US is governed by Federal and State laws. The Federal law<sup>1204</sup> requires single party consent. But, with regard to State legislation, some States require two-party consent, while others require single party consent.<sup>1205</sup> The Ethiopian position on the other hand is vague. It is not clear whether implied or specific consent is required under Article 5 of the TFOP. Moreover, the law is also vague as to whether it requires two-party or one-party consent. It simply says authorisation with the consent of a 'lawful user.'

However, the fact that 'lawful user' is stated in singular tense could be construed to indicate that the law requires only single party consent. However, this interpretation would be a rather weak one; what is preferable is for the legislation to be amended to clarify the situation. But, the essence of the problem, here, is the sort of consent law enforcers are expected to get before they intercept any communication. Given that Ethiopia looks to the likes of the US and UK as a template for much of its legislation, it is curious to see the Ethiopian position on this issue lacks so much clarity. Such curiosity would appear to lend weight to the supposition that Ethiopia acquiesces in the grey area created when terms lack definition; put simply, without a precise definition of what constitutes consent, Ethiopian officials are able to flout the most basic of democratic requirements - interference with an individual's privacy requires justification.

Moreover, in the US<sup>1206</sup> and UK,<sup>1207</sup> law enforcement officials do not need a warrant to intercept a communication provided there is a consent. However, there are clear procedures on approval and implementation of consensual interception. To begin with, in the Department of Justice US Attorney's Manual, 9-7.301, there is a list of personnel conferred with the power to approve consensual

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<sup>1204</sup> 18 U.S.C. § 2511(2)(c), and 18 U.S.C. § 2511(2)(d)

<sup>1205</sup> For instance, Arizona is a "one-party" state, ARS 13-3005.A(1)(2); Pennsylvania requires the consent of all parties. 18 Pa. Cons. Stat. Ann. Sec. 5704(4); see American Legal Guide on Telephone Recordings at <http://www.callcorder.com/phone-recording-law-america.htm#The US Federal Law>

<sup>1206</sup> See United States Secret Service Directive System: Consensual Interception, at [https://www.eff.org/sites/default/files/filenode/social\\_network/SecretService\\_ECPA-Consensual-Interceptions\\_Manual.pdf](https://www.eff.org/sites/default/files/filenode/social_network/SecretService_ECPA-Consensual-Interceptions_Manual.pdf)

<sup>1207</sup> Section 3(2) of RIPA

interception. The same is true with part II of RIPA where senior police officers can authorise a consensual interception.

In contrast, Article 5 of the TFOP is silent as to who has the power to approve consensual interceptions. Furthermore, because the word 'consent' is not mentioned in the article, it is difficult to talk about consent obtained through undue influence and duress. The phrase 'authorisation of lawful' user cannot be a substitute for consensual interception because the former is a broad term compared to the latter one. Therefore, the law should be amended to indicate a clear requirement of express or implied consent.

The third element under Article 5 of the TFOP is interception with the authorisation of 'any other competent authority.' This is a particularly vague phrase which is not properly defined in the Proclamation. It does not give a clear indication as to whom these 'competent authorities' are. To the analytical eye, the possibility for abuse is obvious. As discussed, Article 14 of the EATP states that the National Intelligence and Security Service can obtain a court warrant to intercept communications. But, Article 14 of the EATP fails to provide the grounds the court should consider to issue an interception warrant. Again, with no justificatory requirement, Article 14 of the EATP misses out on a major democratic ideal. Moreover, there is not a clear link if the phrase 'any competent authority' under Article 5 of the TFOP is a reference to the authorities mentioned under Article 14 of the EATP or to a court of law.

To conclude, the Ethiopian legislature has passed three separate pieces of legislation that deal with interception of communication. However, all are riddled with vagueness. Contrary to the claim of the Ethiopian government - that the EATP is directly transposed from the US and UK - it is not a direct replica of those laws. All Proclamations discussed above do not clearly define interception. Without a clear definition of the term, it is difficult to know whether some activities fall under surveillance, a term which does not necessarily require interference with telephone or electronic communications.

As discussed, the EATP and the TFOP also do not distinguish between external and domestic interception, and content and non-content interception. Unlike RIPA, however, Article 5 of the TFOP provides protection to all private and public systems by virtue of it banning interferences with "any telephone networks, services or systems." This is similar to US law where interception is not distinguished based on whether it is privately or publicly owned. The standard in the US is whether there is an intrusion into private lives.

Furthermore, the EATP lack clarity on the distinction between warrantless and non-warrantless interceptions. Despite Article 5 of the TFOP talking about an interception with the "authorisation of service providers or lawful user or any other competent authority," it is not clear whether these kinds of interceptions require a warrant. Although it resembles section 3 RIPA and Title III<sup>1208</sup>, in that it provides consensual interception by service providers, Article 5 TFOP differs from both countries' laws in that the UK and US legislation clearly states that a warrant is not required for these sorts of interception.

Due to the novelty of the provisions on interception of communications in terrorism cases within the Ethiopian legal system, it is far from wrong to take into account the experiences of the UK and US when creating Ethiopia's own system of controlling the intercepting of communications. Therefore, any consensual interception or interception by service providers should not require a warrant from a court. Moreover, the circumstances where service providers are allowed to intercept communications should be limited to avoid misuse of the power given under Article 5 of the TFOP.

#### 4.7.1 *Probative value of Intercept Evidence under the EATP*

Article 14 of the EATP sets clear guidelines on the persons who can apply to a court for an intercept warrant. But the defect with this Article as discussed above is that it does not specify the objective grounds for issuing such warrants as this

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<sup>1208</sup> 18 U.S.C §2511(2) for intercept without a warrant through consensual or by service providers and other exceptions

Article does not require the National Intelligence and Security Service have to show 'probable cause' or 'reasonable suspicion'. According to Article 14(1) (a) of the EATP, the National Intelligence and Security service is only required to show that the person is a terrorist suspect. Moreover, Unlike Title III<sup>1209</sup>, the EATP does not give the court the power to supervise the execution of intercept warrant.

With regard to the probative value of intercept evidence, the EATP contains some vague provisions. Article 14(2) of the EATP states that information obtained through interception should be kept secret. This is a vague provision. Is this provision about 'unauthorised disclosure'? Comparing 14(2) of the EATP to the practice in the US, as discussed in the preceding sections, Title III bans disclosure of intercept evidence only if it is obtained illegally.<sup>1210</sup> However, such an issue does not arise in relation to the UK simply because the UK does not admit intercept evidence obtained through a warrant in a criminal trial *per se*. Moreover, US law prohibits the interception of oral communications<sup>1211</sup> provided there is a reasonable expectation of privacy. But, RIPA does not have a corresponding qualification.<sup>1212</sup> This puts Article 14(2) of the EATP on the same footing as the UK's RIPA legislation; it does not require 'reasonable expectation of privacy.'

Moreover, as held in the US case of *Barnicki*, Title III is content-neutral because it "protects the privacy of wire (electronic) and oral communications" and it:

*... does not distinguish based on the contents of the intercepted conversations nor is it justified by reference to the contents of those conversations. To a certain extent, the communications at issue are singled out? by virtue of the fact that they were illegally intercepted ... by virtue of the source rather than subject matter.*<sup>1213</sup>

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<sup>1209</sup> 18 U.S.C § 2518 (3)(a)

<sup>1210</sup> See 18 U.S.C. §2515; 18 U.S.C. §2518(7); §2518 (9) and §2518(3); see also section 19 et seq. of RIPA for offences of unauthorized disclosure

<sup>1211</sup> See 18U.S.C. § 2511(1)(b)

<sup>1212</sup> *R v Allsopp and others*, supra note 1011

<sup>1213</sup> S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968) cited in *Bartnicki v Vopper*, supra note 1131



Even though neither RIPA nor its predecessor declared such purpose plainly, *R v Effik* reached a similar conclusion by declaring that the purpose of the ICA 1985 in the UK was to enhance public confidence in using public systems. To this effect, RIPA could be said content-neutral legislation. But, unlike in *R v Effik*, the US strongly emphasises privacy interests in communication systems due to the fact that "the fear of public disclosure of private conversations might well have a chilling effect on private speech."<sup>1214</sup> But, the prohibitions under RIPA are not primarily driven by privacy concerns. The concern for privacy is outweighed by the need to protect the secrecy of the interception itself.<sup>1215</sup> But considering Article 23 of the EATP, as discussed below, privacy concerns are given little protection in Ethiopia.

A cursory reading of Article 14(2) and the first sentence of sub-section 14(1) of the EATP, i.e., issuance of intercept warrant to 'prevent and control a terrorist act', seems to suggest that evidence obtained through intercept warrants would be restricted to the prevention and control of a terrorist act. This interpretation would be in line with section 17 of RIPA. However, as shown in the pre-2009 cases above and will be shown below in the case of Elias Kifle, Ethiopia does not ban the use of intercept evidence in criminal proceedings. In addition to these decisions, Article 14(1) of the EATP is in a direct contrast to Article 23 of the EATP. The latter Article enumerates a list of admissible evidence in terrorism cases. These include:

*Intelligence reports prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered; digital or electronic evidence; evidence gathered through interception or surveillance or information obtained through interception conducted by foreign law enforcement bodies.*

Accordingly, Article 23 of the EATP gives the National Intelligence and Security Service unchecked authority to gather evidence by any means and produces it as evidence. They are not required to disclose the source or the method through which it was obtained. This means even if the evidence is obtained through

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<sup>1214</sup> *Bartnicki v Vopper*, supra note 1131

<sup>1215</sup> Gibson, P. (2009). , supra note 1144; see also the Chilcot Review, supra note 806

forced confession or torture, or illegal interception, it can be used in criminal proceedings provided it is prepared in the form of an intelligence report. Article 23 of the EATP, therefore, curtails the Ethiopian judiciary's role in excluding evidence obtained covertly and illegally. This encourages a practice of investigation officers gambling to get evidence at any cost regardless of its legality.

Articles 23(3) and 23(4) of the EATP provide two apparently different types of admissible evidence. Both state that intercepted evidence and surveillance evidence are admissible. As discussed in this chapter, even before the enactment of the EATP, these sorts of evidence have played crucial roles in the prosecution of terrorist suspects. This is demonstrated in the above Ethiopian court cases.

As discussed, UK made several exceptions to the principle stated under section 17 of RIPA. These include, among other things, disclosure of intercept evidence in camera in cases related with, for instance, control orders;<sup>1216</sup> material obtained from a foreign country;<sup>1217</sup> a telephone conversation recorded with the consent of one of the participants; evidence recorded by a covert listening devices rather than a direct interception of communication; and communications made to or from one prison or a secret mental health facility.<sup>1218</sup>

Articles 23(3) and 23(4) of the EATP make clear that all these kinds of evidences are admissible in a court of law. But, this Article goes somewhat further than the exceptions provided for under section 18 of RIPA. This is due to the fact that Articles 23(3) and 23(4) do not make any distinction between intercept evidence obtained through a warrant or without a warrant.

As discussed, in the US a court plays crucial role both before and after authorisation of interception an order. A judge would not issue an intercept order unless the four requirements under 18 U.S.C. § 2516 *et seq.* are satisfied. There is also *ex post* supervision of the execution of the warrant because the material

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<sup>1216</sup> See Secretary of State for the Home Department v AF & others, supra note 1116

<sup>1217</sup> See re Hilali supra note 1052 and Regina v P, supra note 1052

<sup>1218</sup> R v Ian Huntley, supra note 1071

must be handed to the judge. He can pass several decisions including the custody of evidence by denying the US government the right to get hold of the evidence.

All the above safeguards are absent under section 23 of the EATP. Without these procedural safeguards, allowing intercept evidence in criminal proceedings could entail a gross violation of privacy.

The case of Public Prosecutor v *Elias kifle*<sup>1219</sup> is an example of how the EATP in its current form has failed to provide adequate protection against the violation of a person's privacy. As seen from table 2.3 only the case of Public Prosecutor v *Elias kifle* sees the prosecution rely partly on communication materials during the prosecution of those individuals after 2009. Some of the evidence against the defendants also included e-mails communications and telephone calls. The contents of these interceptions, as revealed in court, indicated that the defendants were discussing about mobilising people for protests.

The reluctance of the judiciary in the six terrorism cases that predated 2009 to challenge the prosecution could possibly, at least in part, be attributed to the absence of clear laws on the interception of communication in criminal proceedings. The coming into effect of the EATP should have provided the legal basis for the courts to reject intercept evidence in contravention of the EATP. However, that did not happen in the case of *Elias kifle*. There was no indication from the prosecution how the email and telephone conversation of the defendants were obtained. For this reason, the intercept evidence should have been excluded

Moreover, instead of challenging whether intercept warrant was authorised, on what basis it was issued, if any and how long it was authorised, the defence in the above case seemed to be caught by surprise when their clients were confronted with their own telephone conversations.

#### **4.8 Conclusion**

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<sup>1219</sup> See Public prosecutor v Elias kifle, et al , supra note 763

Unlike other rights that might be affected by counter-terrorism measures, discovering how the right to privacy has been eroded since 9/11 is not an easy task. Recent revelations in the West have shown the limit of academic scholars' knowledge in relation to the interception of communication. Apart from black and white law, knowing what governments are doing behind closed doors, as seen recently, remains as obscure as ever. We are told that clandestine surveillance practices are no threat to law-abiding citizens. But we are not sure how this guarantee could withstand criticism when the targets are head of states.<sup>1220</sup>

In regard to Ethiopia, we can identify two major problems that have effectively hindered the desire to strike the balance between the right to privacy, on one hand, and the need to investigate and prosecute terrorists by intercepting their communications, on the other hand. The first problem is the design of the sections of the EATP that deal with interception of communications. We have criticised the EATP for lacking limits on the length of an intercept warrant, the absence of objective grounds for issuing intercept warrants; the absence of a definition of interception; lack of clarity between surveillance and interception; lack of limits on the power of service providers to intercept communications; vagueness on consensual interception; the absence of a time limit on intercept warrants; and the absence of judicial scrutiny over the execution of intercept warrants.

The second major problem is the poor implementation and lack of knowledge on the part of those exercising the provisions of the EATP. Even if the legislature is to amend the EATP to address the above concerns, the main criticism should have been reserved for the traditional lack of enthusiasm by the judiciary in holding the police or the executive to account for illegal eavesdropping. It would be disingenuous to assert that the mere fact that intercept evidence has been used sparingly in terrorism cases within Ethiopia suggests that the police are not involved in widespread illegal interception. On the contrary, the government has

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<sup>1220</sup> Speigel (2013). *Embassy Espionage: The NSA's Secret Spy Hub in Berlin*, 27 October; see also James, B (2013). NSA monitored calls of 35 world leaders after US official handed over contacts, 25 October, *the Guardian*

been *accused* of blocking and filtering access to the internet and other electronic media outlets run by the opposition.<sup>1221</sup>

As used to be the case in the UK,<sup>1222</sup> open discussion on the power of the police or any of security agencies to intercept communications in Ethiopia is still a taboo subject. Therefore, the possibility of amending the EATP articles on interception to make them more compatible with their original sources - the US and UK - would seem to be remote. Perhaps, what might be a more viable approach is increasing the awareness of the public and, in particular, lawyers as to the limits on the ability of the executive to intercept communications. This could be done by encouraging Ethiopian legal scholars to write and publish about the complex issues of the right to privacy and national security. However, although profitable in terms of igniting debate, this approach may suffer from the same stifling of dissent. Thus, the government mindset towards constitutional debate needs to shift in order to allow the free opinion necessary to furnish the development of knowledge. Therefore, in the same way as it strives to discharge its obligation to enhance the security of its citizens, the Ethiopian government has to refrain from punishing academic works. Unfortunately, the only realistic influence able to bear upon a nation's mindset is international pressure and involvement; otherwise there is no 'carrot and stick' mentality for change.

Moreover, the power of the NISS and other organs that participate in the interception of communication has to be subject to judicial scrutiny. Until 2013, the NISS has remained a shadowy security agency with obscure legal personality. A new draft proclamation<sup>1223</sup> has now been announced to formally organise the NISS into a separate federal government organ. This draft merely states that the NISS is to be established with a 'ministerial status as an autonomous federal government office having its own legal personality' and it will be 'accountable to the Prime Minister'. However, how this arrangement will

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<sup>1221</sup> Reporters without Borders (2012), *supra* note 478; see also Kaiser, K. (2012), *supra* note 476

<sup>1222</sup> Donohue, L.K. (2008), *supra* note 203, p.184. For historical development and the influence of the Human Rights Act on covert policing in the UK, see also McKay, S. (2011), *supra* note 886, pp. 1-5 (discusses about the 'statutory baptism' of different security agencies)

<sup>1223</sup> Draft Bill on National Intelligence And Security Service Re-Establishment Proclamation No .../2013

effect domestic spying remains unanswered, and, indeed, looks ominous in light of the fact that the proclamation fails to provide a supervisory structure for the protection of the right to privacy. A ray of hope shines from the proclamation's draft status at the time of writing. It would be a great opportunity missed if the Ethiopian government failed to include clauses that impose a limitation on the powers of the NISS and give greater power to the judiciary to scrutinise and reject illegally intercepted evidence. In other words, the Ethiopian government could use this as another opportunity to revise articles 14 and 23 of the EATP that do not place any limitation on the NISS.

In sum, the combined effect of the above factors may help realise the full extent of right to privacy from an Ethiopian perspective.

## **Chapter Five: The Right to Liberty and Anti-Terrorism Laws**

### **5.1 Introduction**

Liberty means different things for different people; its scope varies from country to country. The extent to which someone is deprived of their liberty under each country's counter-terrorism legislation is also different. This is due in no small part to a lack of international consensus on how to deal effectively with terrorism. Moreover, the availability of constitutional safeguards against arbitrary deprivations of liberty is a crucial factor in determining the extent to which counter-terrorism legislation has the potential to impinge upon a citizen's liberty. The particular differences that divide the UK, US and Ethiopia are highlighted throughout the following chapter.

This chapter begins with general remarks on the constitutional scope of the right to liberty. This is followed by critical analysis of the power of arrest on the basis of suspicion of terrorism and the length of pre-charge detention in terrorism cases. Moreover, this chapter explores whether there is a need for a watered down version of the standard of reasonable suspicion in terrorism cases. Furthermore, there will be a separate section that explores the quantity and quality of information required to effect arrest under Ethiopian law and the length of pre-charge detention of terrorist suspects in Ethiopia. The last part of this chapter will focus on the UK and US pre-charge detention regimes and any lessons Ethiopia could learn from them with a view to shortening the 120-days pre-charge detention of terrorist suspects currently available.

### **5.2 The Scope of the Right to Liberty in the UK, US and Ethiopia**

Like many other fundamental rights, the right to liberty is not absolute. There are circumstances where the right can be lawfully curtailed. Under Article 5 of the ECHR, deprivation of liberty simply implies physical restraint. The ECtHR has maintained that deprivation of liberty under Article 5 excludes "mere restriction

of movement."<sup>1224</sup> The distinction between actual deprivation and restriction of movement is determined by examining different factors; *inter alia*, "the type, duration, effects and manner of implementation of the measures; the difference between the two is merely one of a degree or intensity, and not of nature or substance."<sup>1225</sup>

Moreover, a distinction is also made between deprivation of liberty, freedom of movement, and freedom to choose one's residence. The latter two refer to Article 2 of protocol 4 of the ECHR.<sup>1226</sup> Furthermore, the court has continuously held that deprivation has an autonomous meaning:<sup>1227</sup> "that is, it has a Council of Europe-wide meaning for purposes of the Convention, whatever it might or might not be thought to mean in any Member State."<sup>1228</sup> Because several factors are thought to distinguish the two terms, the court acknowledges that "deprivation can take several forms other than classic detention in prison."<sup>1229</sup> This includes, among other things, where a person is subjected to confinement within a certain place, although not necessarily prison cell, and where their movement is severely restricted.<sup>1230</sup>

In *Gillan and Quinton v United Kingdom*,<sup>1231</sup> a protester and a journalist were stopped and searched under section 44-45 TA 2000, which notably did not require reasonable suspicion to exercise the power. Both applicants complained

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<sup>1224</sup> *Engel et al. v the Netherlands*, 8 June 1976, Series A no. 22, at 58; see also *Guzzardi v Italy*, 6 November 1980, Series A no. 39, para. 93

<sup>1225</sup> *Ibid*, para. 59

<sup>1226</sup> *Ibid*, para 58

<sup>1227</sup> For instance, the principles laid down in *Engel et al. v the Netherlands* and *Guzzardi v Italy* are reiterated in subsequent cases such as *Ashingdane v the United Kingdom*, 28 May 1985, Series A no. 93, para 41

<sup>1228</sup> *Secretary of State for the Home Department v JJ and others (FC)* Session 2006-07 [2007] UKHL 45, para.13; see also Council of Europe (2007). *Key Concepts of the European Convention on Human Rights*, pp. 14-18

<sup>1229</sup> *Engel et al. v the Netherlands*, supra note 1224, para. 58

<sup>1230</sup> In *Ashingdane v the United Kingdom* (Despite the liberty that he had within the mental hospital and despite the fact that he was allowed to leave the hospital not having the involvement of somebody, the court stated that there could be deprivation of liberty.) In *Guzzardi v Italy*, supra note 1224, the Court acknowledged that placing someone in isolation in a rural community or similar areas could engage Article 5. The contrary reasoning is that the absence of isolation would be more likely to be treated as restriction of movement. For the inconsistency of the ECtHR interpretation as to what consists of deprivation other than classic detention, see Stone, R. (2012). *Deprivation of Liberty: the Scope of Article 5 of the European Convention on Human Rights*. *European Human Rights Law Review*, 2012 (1). pp. 46-57

<sup>1231</sup> *Gillan and Quinton v the United Kingdom*, no. 4158/05, ECHR 2010



that the exercise of the power against them violated several fundamental rights stipulated under the ECHR, including Article 5. The ECtHR held that:

*... although the length of time during which each applicant was stopped and search did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5.*<sup>1232</sup>

The ECtHR in *Gillan and Quinton*, therefore, effectively outlined the conditions under which stop and search can amount to deprivation of liberty. This is in fact contrary to the position taken by the then House of Lords that 'relatively brief' incidents under section 44-45 do not amount to deprivation of liberty.<sup>1233</sup> The UK government has now repealed the stop and search powers under TA 2000.<sup>1234</sup>

In *Austin and Others v United Kingdom*,<sup>1235</sup> the ECtHR entertained for the first time a different issue in regard to the meaning of deprivation of liberty. The main issue in this case was whether the use of a police practice, known as 'containment' (also called 'Kettling'), against protesters violated Article 5. In this connection, the police have statutory powers<sup>1236</sup> to contain protesters to "...prevent an imminent breach of the peace in circumstances where there are no other means by which that imminent breach can be obviated."<sup>1237</sup> This has been

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<sup>1232</sup> Ibid, para. 57

<sup>1233</sup> R (on the application of Gillan (FC) and another (FC)) (Appellants) v. Commissioner of Police for the Metropolis and another (Respondents) [2006] UKHL 12, para. 25; for further discussion on criticisms of the decision of the House of Lords in this particular case, see Edwards, R. A. (2008). Stop and Search, Terrorism and the Human Rights Deficit. 37(3) *C.L.W.R.* 211 (arguing that 'the decision of the House of Lords that ss. 44 and 45 are compatible with Convention rights was wrong'.)

<sup>1234</sup> See Terrorism Act 2000 (Remedial) Order 2011; see also Section 59 Protection of Freedoms Act 2012

<sup>1235</sup> *Austin and others v the United Kingdom*, (Applications nos. 39692/09, 40713/09 and 41008/09)

<sup>1236</sup> Section 60 Criminal Justice and Public Order Act 1994 c. 33

<sup>1237</sup> *Susannah Mengesha v Commissioner of Police of the Metropolis* [2013] EWHC 1695 (Admin) 2013 WL 2976042

controversial in the UK with some reports<sup>1238</sup> criticising the tactic, particularly after the death of Ian Tomlinson and another tragic incident that led to a woman miscarrying.<sup>1239</sup>

By reiterating previously held principles in *Engel v Netherlands*<sup>1240</sup> on the meaning of deprivation, the ECtHR held that the purpose of the measure in this case was to "...isolate and contain a large crowd, in volatile and dangerous conditions."<sup>1241</sup> Therefore, it held that the practice could not be said to be in violation of Article 5.<sup>1242</sup> However, in the case of *Susannah Mengesha*,<sup>1243</sup> the same police tactics came under the spotlight again. In this case, the judges agreed that containment is necessary to prevent imminent breaches of the peace. However, requiring protesters to hand over their personal details in lieu of being released from a condoned area was found to be straying beyond the bounds of permissibility.

Besides the nature of the confinement, the jurisprudence of the ECtHR also states that the status of the person might be considered in the determination of loss of liberty. For instance, the ECtHR distinguishes between civilians and members of the armed forces.<sup>1244</sup>

A further point on the scope of liberty under the ECHR is that "though Article 5 talks of liberty and security, it is limited to deprivation and does not provide security and safety of the person i.e. the state does not owe the obligation to protect individual from harm."<sup>1245</sup> Furthermore, "Article 5 is not engaged by a claim of the conditions under which a person is detained."<sup>1246</sup> Therefore,

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<sup>1238</sup> Her Majesty's Chief Inspector of Constabulary (2009). *Adapting to Protest: Inspecting policing in the Public Interest*, 5 June; see also Lewsi, P (2009). G20 Police Chiefs Were Unclear On Kettling Law, Report Finds, 7 July, the *Guardian*

<sup>1239</sup> Walker, P. (2009). IPCC Demands Change in Police Tactics after G20 Protests inquiry, 6 August, *Guardian*

<sup>1240</sup> *Engel et al. v the Netherlands*, supra note 1224

<sup>1241</sup> *Austin and others v UK*, supra note 1235, para. 66

<sup>1242</sup> *Austin and others v UK*, supra note 1235, para 67

<sup>1243</sup> *Susannah Mengesha v Commissioner of Police of the Metropolis*, supra note 1237

<sup>1244</sup> *Engel et al. v the Netherlands*, supra note 1224

<sup>1245</sup> Foster, S. (2008). *Human Rights and Civil Liberties*. 2<sup>nd</sup> edition. (Essex, Pearson Education Limited), pp. 221-222; see also Powell, R. L. (2007). The Right to Security of person in European Court of Human Rights Jurisprudence. 6 *E.H.R.L.R*649

<sup>1246</sup> *Ibid*, p222

according to *Winterwerp v Netherlands*, "a mental patient's right to treatment appropriate to his condition cannot as such be derived from Article 5."<sup>1247</sup>

Despite the textual construction of Article 5(1) ECHR in absolute terms, the subsequent sub-articles clarify a list of exhaustive conditions<sup>1248</sup> where the right can be limited. Accordingly:

*A person can be deprived of his liberty after conviction by a court of law;*<sup>1249</sup> *for non-compliance with a court order or to secure non-fulfilment of any obligations prescribed by law;*<sup>1250</sup> *deprivation on reasonable suspicion of committing an offence or preventing him from committing an offence or fleeing after having done so*<sup>1251</sup> *or lawful detention of a minor;*<sup>1252</sup> *detention to prevent the spreading of infectious diseases or persons of unsound mind, alcoholics, or addicts or vagrants;*<sup>1253</sup> *deprivation under immigration laws.*<sup>1254</sup>

Moreover, Article 5(2-4) ECHR enumerates the procedural safeguards in cases of a deprivation of liberty. These include the right to be informed of the reasons for the arrest, prompt judicial intervention, right to bail, and right to habeas corpus.

Schedule 1 of the Human Right Act 1998 (HRA) incorporates the same legal provisions specified under Article 5 ECHR. Moreover, section 2(1) HRA obliges UK courts to take into account the judgement, decision, declaration, or advisory opinion of the ECtHR.

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<sup>1247</sup> *Winterwerp v the Netherlands*, 24 October 1979, Series A no. 33, para 51

<sup>1248</sup> See for instance *Al-Jedda v the United Kingdom* [GC], no. 27021/08, ECHR 2011 (detention on security grounds is not one of the permissible grounds under Article 5)

<sup>1249</sup> Article 5(1)(a); see also *Weeks v the United Kingdom*, 2 March 1987, Series A no. 114

<sup>1250</sup> Article 5(1)(b)

<sup>1251</sup> Article 5(1)(c); for the definition of reasonable suspicion, see *Doorson v the Netherlands*, 26 March 1996, 1996-II; see also *Fox, Campbell and Hartley v the United Kingdom*, 30 August 1990, Series A no. 182 (Fox from now on wards); see also *Brogan and Others v the United Kingdom*, 29 November 1988, Series A no. 145-B; see also *Murray v the United Kingdom*, 28 October 1994, Series A no. 300-A; see also *Guzzardi v Italy*, supra note 1224 (preventive detention for security reasons not allowed)

<sup>1252</sup> Article 5(1)(d); see also *Nielsen v Denmark*, 28 November 1988, Series A no. 144

<sup>1253</sup> Article 5(1)(e); see also *Winterwerp v the Netherlands*, supra note 1247 (stages for detaining mentally unsound people)

<sup>1254</sup> Article 5(1)(f); see also *Chahal v the United Kingdom*, 15 November 1996, 1996-V (deportation on grounds of national security)

On the other hand, the scope of liberty in the US under the due process clauses<sup>1255</sup> of the US Constitution is broader than Article 5 ECHR. The Fifth Amendment states that "no person ... be deprived of life, liberty, or property, without due process of law." "This due process clause is the basis for many of the rights afforded criminal defendants and procedures followed in criminal courts."<sup>1256</sup> At the same time the Fourteenth Amendment declares that

*... no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Fourteenth Amendment, thus, has both substantive and procedural implications.<sup>1257</sup> The clauses have also been expanded to include freedom of expression,<sup>1258</sup> general right to make contracts,<sup>1259</sup> sexual rights,<sup>1260</sup> and family rights,<sup>1261</sup> to mention a few.

Unlike the autonomous definition of liberty under Article 5 ECHR, the scope and meaning of the liberty under the above Amendments remain elusive due to the absence of an authoritative definition. The Supreme Court has acknowledged that:

*... the absence of formal exactitude, or want of fixity of meaning is not an unusual or regrettable attribute of Constitutional provisions... when the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times.*<sup>1262</sup>

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<sup>1255</sup> The Fifth and the Fourteenth Amendments to the US Constitution

<sup>1256</sup> Berman, P and Berman, S. (2011). *The Criminal Law Handbook, Know Your Rights, Survive the System*. 5<sup>th</sup> edition. (USA, Nolo), p.354

<sup>1257</sup> For detail discussion on the scope of due process protection, see *Snyder v Massachusetts*, 29 U.S. 97 105 (1934)

<sup>1258</sup> *N. A. A. C. P. v Alabama*, 357 U.S. 449 (1958) (holding that freedom of association is protected under the Fourteenth Amendment due process clause)

<sup>1259</sup> *Lochner v New York* 198 U.S. 45(1905)

<sup>1260</sup> *Lawrence v Texas* 539 U.S 558 (2003)

<sup>1261</sup> *Planned Parenthood of Southern Pennsylvania v Casey* 509 U.S 833 (1992)

<sup>1262</sup> *Rochin v California* 342 U.S. 165 (1952)

In addition, the US Supreme court has held several times, that "liberty protection implies restraints on arbitrary wrongful government actions"<sup>1263</sup> and guarantees "freedom from unreasonable bodily restrains."<sup>1264</sup> In ascertaining whether an individual is deprived of his liberty, the US Supreme Court has stated that regard must be given both to the "purpose and to the duration of deprivation of physical liberty."<sup>1265</sup> This is similar to the position taken by the ECtHR in *Engel*<sup>1266</sup> and *Guzzardi*.<sup>1267</sup>

However, the US Supreme Court has failed to define 'deprivation of liberty', even though it has acknowledged in *Zadvidas v Davis* that "freedom from imprisonment, from government custody, detention or any other forms of physical deprivation lies at the heart of liberty."<sup>1268</sup> Another striking feature of the US Constitution is that it does not have comparable grounds of deprivation that are enumerated under Article 5(1) (a-f) ECHR. Furthermore, the above Amendments do not deal with the right to security of the person. The Second and the Third Amendments cover that right.

The right to liberty is one of the fundamental rights recognized under the Federal Democratic Republic Constitution of Ethiopia (FDRE Constitution). Nevertheless, the FDRE constitution is not the only document that deals with liberty. Both the Ethiopian Civil Code and the Ethiopian Criminal Code contain provisions that deal with the same right. According to Article 17 of the FDRE constitution, "no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law." This provision differs from Article 5 ECHR, as Article 17 of the FDRE constitution does not list the grounds of deprivation. This Article simply states that deprivation should be "on such grounds and in accordance with such procedures as are established by law." In a similar manner to Article 5(2-5) ECHR, Article 19 of the FDRE Constitution enumerates the rights of persons arrested, which include:

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<sup>1263</sup> *Zinermon v Burch* 404 U.S. 113, 125

<sup>1264</sup> *Youngberg v Romeo* 457 U.S. 307, 316 (1982)

<sup>1265</sup> *United States v Salerno*, 481 U.S. 739. 750-751(1987)

<sup>1266</sup> *Engel et al. v the Netherlands*, supra note 1224

<sup>1267</sup> *Guzzardi v Italy*, supra note 1224

<sup>1268</sup> *Zadvidas v Davis*, 533 U.S. 678. (2001)

*Right to be informed of the reason of arrest; right to remain silent (absent under Article 5 ECHR); right to be brought before a court within 48 hours (no such limitation under Article 5 ECHR); right to habeas corpus; right not to be compelled to make confessions or admissions that could be used against them; and right to be released on bail (absent under Article 5 ECHR)*

As discussed, although Article 5 ECHR talks about liberty and security, it is only concerned with liberty of persons. In the same manner, the FDRE Constitution makes it clear that liberty and security, although inalienable, are two different rights by providing for them in separate articles under Article 16 and Article 17. In addition, the combined reading of Article 17 and Article 32 of the FDRE Constitution, which deal with freedom of movement, demonstrate that deprivation of liberty is not the same as restriction of movement under the FDRE Constitution. Therefore, according to Ethiopian constitutional exactitudes, liberty is restricted to physical restraint.

However, the Ethiopian Civil Code provides a different scope for deprivation. Article 2040(1) of this code states that "a person commits an offence where, without legal authority, he interferes with the liberty of another person, even for a short time and prevents him from moving about as he is entitled to do." The word 'interfere' expands the scope of deprivation beyond 'classical prison' by stretching its scope to include restriction of movements. This is different from the scope of deprivation provided under Article 17 and Article 32 FDRE of the Constitution.

Moreover, Article 423 of the Ethiopian Criminal Code stipulates that "any public servant who, contrary to the law or in disregard of the forms and safeguards prescribed by law, arrests, detains, or otherwise deprives another of his freedom is subject to punishment." The phrases 'contrary to law' or 'in disregard of the forms' refer to substantive and procedural requirements, respectively. These requirements are dispersedly mentioned in the Ethiopian Criminal Procedure Code and Civil Procedure Code. The procedural and substantive tests of Article

423 of the Ethiopian Criminal Code are tantamount to the lawfulness test of the ECtHR,<sup>1269</sup> which in turn implies accessibility and foreseeability.

In contrast to the scope of liberty in the US under the Fifth and the Fourteenth Amendments, liberty in Ethiopia does not imply social, political or other choices. Although the word 'freedom' is frequently mentioned in the FDRE, and in Ethiopian Codes, it has yet to be seen if these broad implications could be inferred from Article 17 and Article 19 of the FDRE Constitution.

With regard to the remedies for a violation of liberty, the FDRE Constitution provides the right to "petition the court to order their physical release where the arresting officer fails to bring them before a court within the prescribed time and to provide the reasons for their arrest."<sup>1270</sup> Moreover, the Ethiopian Civil Code lists general civil remedies where a person "without due legal authority ... interferes with the liberty of another person."<sup>1271</sup> However, the Ethiopian Civil Code does not specify the kind of civil remedies available in case of violation of liberty.

To conclude, the right to liberty under the FDRE Constitution has limited scope compared to the US's Fourth and Fourteenth Amendments. Moreover, in a similar manner to the US and ECHR, its application is limited to deprivation of liberty. It does not cover restriction of movement or security of the person. In contrast to Article 5 ECHR, it does not mention the exhaustive grounds where deprivation of liberty can be justified. By enumerating general standards on procedural and substantive rights, the FDRE Constitution leaves it up to the specific laws to list these grounds.

### **5.3 Arrest on Reasonable Suspicion**

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<sup>1269</sup> Paragraph one of Article 5 (deprivation must be 'in accordance with the procedures prescribed by law'); see also *Kurt v Turkey*, 25 May 1998, 1998-III, para. 123 ("the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act.")

<sup>1270</sup> Article 19(4) of the FDRE Constitution

<sup>1271</sup> See articles 2040-2043 of the Ethiopian Civil Code

Article 5(1) ECHR enumerates the grounds of arrest. Accordingly, arrest can be effected based on reasonable suspicion, to prevent a crime or fleeing. It is the view of the ECtHR that the standard of reasonable suspicion can vary between Conventional and terrorist crimes.<sup>1272</sup> For the reasons that follow, it is submitted that there should *not* be a modified version of the reasonableness test in terrorist cases. Before doing so, this section will highlight the background to the reasonableness standard in the UK.

When the distinction between felonies and misdemeanours ceased to exist, the common law standard of reasonable suspicion became part of the Criminal Law Act 1967.<sup>1273</sup> In *Holgate-Mohammed v Duke*,<sup>1274</sup> the House of Lords accepted that the arrest of a person so as 'dispel or confirm a reasonable suspicion' is "well established as one of the primary purposes of detention upon arrest".<sup>1275</sup> It has further elaborated that though the police officer may 'reasonably suspects an individual of having committed an arrestable offence',<sup>1276</sup> it is up to the courts to determine whether the grounds considered by the arresting officer are relevant to the arrest.<sup>1277</sup>

There is also a difference between 'reasonable cause to believe' and 'reasonable cause for suspicion.' Accordingly, it is held that "reasonable cause to believe implies a more definite state of knowledge of certain events than "reasonable cause for suspicion" which by definition suggests that the state of knowledge lacks any basis of proof."<sup>1278</sup>

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<sup>1272</sup> *Fox v UK*, supra note 1251

<sup>1273</sup> Lidstone, K.W., et al. (1996). *The Investigation of Crime: A Guide to Police Powers*. (UK, Butterworths), p244. For detail discussion how the standard of reasonable suspicion has developed in the UK, see Smith, G. (2002). Reasonable Suspicion: Time for a Re-evaluation? 30 *International Journal of the Sociology of Law* 1

<sup>1274</sup> *Holgate-Mohammed v Duke* [1984] AC 437; see also Jason-Lloyd, L. (2005) *Introduction to Policing and Police Powers*. 2<sup>nd</sup> edition. (London, Cavendish Publishing Limited), p. 83; see also Walker, C. and Starmer, K. (1999), supra note 1078, p. 101 (explaining that "detention for the purpose of placing psychological pressure on suspects to provide answers is regarded as lawful".)

<sup>1275</sup> *Holgate-Mohammed v Duke*, supra note 1274

<sup>1276</sup> *Holgate-Mohammed v Duke*, supra note 1274

<sup>1277</sup> Similar decisions have been made in other cases such as *Alanov v Chief Constable of Sussex* [2012] EWCA Civ 234 para. 25 ("... was there "reasonable cause" for that suspicion. This is a purely objective question and is to be determined on the facts as found by the judge (or by the jury where there is a jury trial".); see also *Castorina v Chief Constable of Surrey* [1988] NLJ Rep 180 woolf LJ

<sup>1278</sup> *Dryburgh v Galt* 1981 J.C 6972, para 13



Another distinction made is between mere suspicion and reasonable grounds for suspicion.<sup>1279</sup> For actions against unlawful arrest to succeed, Lord Justice Woolf in *Castorina* suggested cumulative tests:<sup>1280</sup> a subjective element that depends on the arresting officer's 'state of mind; objective element 'be determined by the judge if necessary on facts found by a jury'.<sup>1281</sup>

The power of arrest now resides in section 24 of the Police and Criminal Evidence Act 1984 (PACE). As amended by section 10 of the Serious Organised Crime and Police Act 2005, section 24 PACE contains cumulative criteria of reasonableness and necessity for any lawful arrest.<sup>1282</sup>

It could be argued that these two criteria under section 24(1-4) and 24(5) PACE are similar to Article 5(1) (c) ECHR.<sup>1283</sup> However, PACE does not provide an autonomous definition of reasonableness; it is instead decided on a case-by-case basis. Moreover, according to Code A of PACE, reasonable grounds for suspicion can be inferred from objective facts, information or intelligence.<sup>1284</sup> The Code A also states that reasonable suspicion can be inferred in the absence of specific information or intelligence when the suspicious behaviour of the suspect leads to that conclusion.<sup>1285</sup> The Code A specifically rules out any reasonable suspicion based on 'generalisations or stereotypical images of certain groups or categories of people,' or previous criminal history.<sup>1286</sup>

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<sup>1279</sup> For 'definition of "suspicion" and how this differs from "reasonable grounds for suspicion" in legislation relating to money laundering offences,' see Harwood, J. (2008). Reasonable Grounds - and a Vague Feeling of Unease. 96(May) *T.E.L. & T.J.* 15; see also Stone, R. (2005). *The Law of Entry, Search and Seizure*. (Oxford, Oxford University Press), p. 22 (For instance, under UK law with regard to the power of search and entry, it has been stated that "there are no hard and fast rules as to what is reasonable; each case must depend on its own circumstances...")

<sup>1280</sup> *Castorina v Chief Constable of Surrey*, supra note 1277; see also Gearey, A., et al (2013). *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions*. 2<sup>nd</sup> edition. (Routledge), p. 311

<sup>1281</sup> See also latest cases such as *Alanov v Chief Constable of Sussex*, supra note 1277, para. 25

<sup>1282</sup> See Fenwick, H. (2005). Reasonable Suspicion for Arrest Purposes. 44(Spr) *S.L. Rev.* 4

<sup>1283</sup> Stone, R. (2008). *Text Book on Civil Liberties and Human Rights*. 7<sup>th</sup> edition. (Oxford, Oxford University Press), p107

<sup>1284</sup> The Police and Criminal Evidence Act of 1984 (PACE) Code A: Code of Practice for the Exercise by Police officers of Statutory Powers of Stop and Search, para. 2.2

<sup>1285</sup> *Ibid*, para 2.3

<sup>1286</sup> *Ibid*, para 2.2; for detail discussions on reasonable suspicion under PACE 1984, see Stone, R. (2012). *Text Book on Civil Liberties and Human Rights*. 9<sup>th</sup> edition. (Oxford, Oxford University Press), pp. 90-91; see also Stone, R. (2005), supra note 1279, pp. 21-22

We now turn to the question of whether the reasonable suspicion ground of arrest applies to terrorism cases in the same way as it applies to conventional criminal cases. It will quickly become clear that there seems to be a disparity of approach; more specifically, there would appear to be a diluted version of reasonable ground of suspicion applied to terrorism cases. The question then transposes into analyse of the degree of the disparity between case types.

### 5.3.1 *Brogan, Fox, O'Hara and Murray: a Watered down Version of Reasonable Suspicion?*

Before the coming into effect of Terrorism Act 2000 (TA), two pieces of legislation dealt with arrest on suspicion of committing terrorism offences. The first was section 11 of the Northern Ireland (Emergency provisions) Act 1978 (NIA 1978), which laid down the requirements for a lawful arrest of terrorist suspects. In *McKee v CCNI*, the House of Lords said "the powers of arrest under section 11 are not qualified by any word "reasonableness." The suspicion has to be honestly held but it need not in addition be a reasonable suspicion."<sup>1287</sup> The above provision was replaced by section 12(1) of the Prevention of Terrorism Act 1984 (PTA), which requires reasonableness. Lord Steyn in *O'Hara v Chief Constable for R.U.C* assumed that reasonableness under section 12(1) of the above Act is different from that of Article 5(1) ECHR in the sense that the latter is broader in scope than the former.<sup>1288</sup>

According to the decision in *O'Hara v CCRUC*, the narrow reasonable test under section 12(1) PTA can be inferred from an "informer tip off or hearsay. Information which causes the constable to be suspicious of the individual must be in existence to the police officer at the time he makes the arrest."<sup>1289</sup>

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<sup>1287</sup> *McKee v Chief Constable for N. Ireland* [1984], W.L.R 1358 (*McKee v CCNI* from this onwards), cited in *O'Hara v CCRUC*, *infra* note 1283; see also Jackson, D. W. (1997). *The United Kingdom Confronts the European Convention on Human Rights*. (Florida, the University Press of Florida), p. 51; see also also Alexander, Y. and Brenner, E. H (2003). *The United Kingdom's Response to Terrorism*. (London, Cavendish Publishing Limited), p. 459

<sup>1288</sup> *O'Hara v Chief Constable for R.U.C* [1997] AC 286 (*O'Hara v CCRUC* from this onwards) see also Alexander, Y. and Brenner, E. H (2003), *supra* note 1287, pp. 457 et seq.

<sup>1289</sup> *Ibid*; the relevant test is now incorporated under section 41 of the Terrorism Act 2000

Therefore, it is not reasonable to arrest without a warrant, merely on instructions given by a superior or 'equal ranking officer or junior officers'<sup>1290</sup>, without additional facts being disclosed to the arresting officer.<sup>1291</sup>

The case of *Fox, Hartley and Campbell v UK (Fox v UK)*<sup>1292</sup> is worth looking at here. They were arrested on suspicion of being terrorists under section 11(1) of the NIA 1978, but subsequently released without charge. They complained to the ECtHR stating that their arrest violated Article 5 of the ECHR because there was no reasonable suspicion that they committed any specific offences. *Fox v UK* concluded that there was breach of Article 5 because "the government have not provided any further material on which the suspicion against the applicants was based."<sup>1293</sup>

However, in what amounted to a striking acknowledgement from the ECtHR, the court also stated that "suspicion justifying terrorist arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime."<sup>1294</sup> The same view is affirmed in the cases of *Brogan, Murray and O'Hara*.<sup>1295</sup> The question is: what are the parameters of this watered down standard of reasonable suspicion in terrorism cases?

The ECtHR found a breach of Article 5(1) (c) because the UK government did not "furnish at least some facts or information capable of satisfying reasonableness."<sup>1296</sup> However, there are apparent contradictions here. On one hand, the court acknowledged that "contracting states cannot be asked to

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<sup>1290</sup> *O'Hara v CCRUC*, supra note 1288; see also Alexander, Y. and Brenner, E. H (2003), supra note 1287, pp. 457 et seq.

<sup>1291</sup> On the subjective and objective elements of the *O'Hara* decision, see Hunt, A. (1997). *Terrorism and Reasonable Suspicion By "Proxy"* 113(Oct) *L.Q.R.* 548-552; see also Ovey, C. and Ashworth, A.J. (2002). *Human Rights: Meaning of Reasonable Suspicion. Crim. L.R.* 493; see also *Arrest: Suspected Persons - Suspected Terrorist Arrested by Constable Acting on Instructions of Senior Officer. Crim. L.R.* 1997, Jun, 432-434; see also Alexander, Y. and Brenner, E. H (2003), supra note 1287, pp. 457 et seq.

<sup>1292</sup> *Fox V UK*, supra note 1251

<sup>1293</sup> *Fox V UK*, supra note 1251, para.35

<sup>1294</sup> *Ibid*, para. 32

<sup>1295</sup> *Brogan v UK*, supra note 1251; see also *Murray v UK*, supra note 1251; *O'Hara v the United Kingdom*, no. 37555/97, ECHR 2001-X

<sup>1296</sup> *Fox V UK*, supra note 1251, para 34

establish reasonableness ... by disclosing confidential sources."<sup>1297</sup> On the other hand, it rejected the position of the UK government when trying to rely on secret evidence to justify the arrest, saying that the UK failed to 'furnish at least some facts.' What if the arrest was entirely based on secret evidence? How is the government supposed to 'furnish at least some facts?'

What is interesting is that the ECtHR in *Fox v UK* did not criticise the NIA 1978, despite the Act only requiring mere suspicion to justify arrest. Therefore, it would be logical to expect a government to provide some facts if and only if the domestic legislation is construed in an objective manner. In contrast, it would also be inconceivable for the ECtHR to have meant when referring to a different standard of reasonableness for terrorist suspects that mere suspicion of terrorism would be sufficient; indeed, this would be contrary to *Fox*.

Although the ECtCH in *Fox* ruled that the past activities of a suspect could not establish reasonable suspicion, it was inconsistent in its approach. The inability of the ECtCH to clearly identify the watered down standard of reasonable suspicion for terrorist suspects has led the ECtHR to uphold an arrest based on past activities or family relationships in the case of *Murray*.<sup>1298</sup> The ECtHR reaffirmed the previously held position that proving reasonable suspicion requires a lower threshold than that required to bring a charge or "justify conviction."<sup>1299</sup> However, the court muddled the standard of reasonableness by accepting 'special exigencies of investigating terrorist crime'<sup>1300</sup> as objective grounds to establish reasonableness.

The case of *Raissi* is worth mentioning here. In *Commissioner of Police of the Metropolis v Mohamed Raissi*,<sup>1301</sup> the wife and brother of Mr. Lotfi Raissi<sup>1302</sup> were arrested "on suspicion of involvement in terrorist attacks in the United States." Both brought a court action challenging the legality of the arrest. While

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<sup>1297</sup> *Ibid*

<sup>1298</sup> *Murray v UK*, supra note 1251

<sup>1299</sup> *Ibid*, para. 55; the same conclusion is reached in *O'Hara v UK*, supra note 1295, para. 34

<sup>1300</sup> *Murray v UK*, supra note 1251, para. 63

<sup>1301</sup> *Commissioner of Police of the Metropolis v Mohamed Raissi* (2008) [2008] EWCA Civ 1237

<sup>1302</sup> *Raissi v Secretary of State for Justice* [2008] EWCA civ 1237

evaluating the tests laid down in *Castorina*,<sup>1303</sup> the lower court rejected the argument that "the extreme seriousness of the attacks in America on 9/11"<sup>1304</sup> could establish reasonableness in the absence of objective facts. This seems to be a direct rebuttal to the reasoning of the ECtHR which accepted the 'special exigencies of investigating terrorist crime'.<sup>1305</sup>

In addition, the ECtHR seemed to give the impression that arrest based on facts provided by informants is a watered down reasonableness standard.<sup>1306</sup> Lord Steyn in *O'Hara v CCRUC* also accepted facts from informants or tip-offs from the public. However, Lord Steyn and the ECtHR are not talking in the same language here. Lord Steyn was only affirming that reasonableness could be construed from informants or tip-offs without saying that a different standard is required for terrorist suspects.

As judges Walsh and Carillo Salcedo point out in their joint dissenting opinion in respect of Article 5(1) (c), the ECHR "does not afford to states any margin of appreciation. If the concept of margin of appreciation were to be read into Article 5(1) (c), it would change the whole nature of this all-important provision which then become subject to executive policy".<sup>1307</sup> Their view is that domestic UK legislation should be scrutinised against Article 5(1)(c) ECHR instead of giving states an escape route by allowing a watered down standard for terrorism cases.

Judge Loucaides in *O'Hara v UK* also maintained that the officer arrested the applicant because he "was told by a superior officer that the applicant was suspected of having been involved in the murder under investigation."<sup>1308</sup> This justification is equivalent to "legalising a general formula for justifying an arbitrary arrest."<sup>1309</sup> He did not contend that arrest based on facts supplied by informants was against the spirit of Article 5 ECHR. His primary concern was

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<sup>1303</sup> *Castorina v Chief Constable of Surrey*, supra note 1277

<sup>1304</sup> *Commissioner of Police of the Metropolis v Mohamed Raissi*, supra note 1301, para. 6

<sup>1305</sup> *Murray v UK*, supra note 1251, para. 63

<sup>1306</sup> *O'Hara v UK*, supra note 1295

<sup>1307</sup> *Brogan v UK*, supra note 1251

<sup>1308</sup> *O'Hara v UK*, supra note 1295

<sup>1309</sup> *Ibid*

rather to do with the 'scant' evidence given at domestic courts to justify reasonableness.

To conclude, *Fox v UK* and *Murray v UK* both show how inconsistent the ECtHR is in its approach to the question of reasonableness. In both cases, the UK government relied on reliable but confidential information. However, the ECtHR reached different conclusions. This research could not find any convincing evidence to suggest that the UK government in *Murray v UK* had provided "sufficient facts or information which would provide a plausible and objective basis for a suspicion."<sup>1310</sup> The only difference between *Fox v UK* and *Murray v UK*, if any, is that the arresting officers in the latter were "transparently honest witnesses."<sup>1311</sup> However, this could not be a substitute for, to quote the ECtHR, 'sufficient facts or information' required under Article 5. Furthermore, due to the inability of the ECtHR to clearly define the watered down standard of reasonableness in terrorism cases, it took into account several unrelated matters in *Murray v UK* to define reasonableness: the duration of the arrest; special nature of the fight against terrorism; conviction of Murray's brothers in the US; and the fact that they were assisted by a trustworthy person in the UK.

#### **5.4 Reasonable Suspicion v. Probable Cause**

The Baker Report on extradition treaty between the UK and the US has stated that "there is no significant difference between the probable cause test and the reasonable suspicion test."<sup>1312</sup> However, compared to the US standard of probable cause, it is arguable that the European standard of reasonable suspicion demands less of the arresting officer and the level of knowledge required for both standards differs to a large degree.. Despite an attempt in *Dallison v Caffrey*<sup>1313</sup> to mingle reasonable suspicion and probable cause, subsequent decisions in the UK have taken a more definitive approach.

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<sup>1310</sup> *Ibid*, para. 63

<sup>1311</sup> *Murray v UK*, *supra* note 1251, para. 61

<sup>1312</sup> Home Office (2011). A Review of the United Kingdom's Extradition Arrangements, Presented to the Home Secretary on 30 September 2011, para 1.21

<sup>1313</sup> *Dallison v Caffrey* [1965] 1 QB 348 ( held that "the test whether there was reasonable and probable cause for arrest ... is an objective one, namely, whether a reasonable man ... believes that there was reasonable and probable cause.")

The principle in the Fourth Amendment as discussed in this chapter is that the police need to get a warrant in order to 'seize' a person. However, arrest without a warrant could be justified if there is probable cause that suggests the commission of a crime. It is an established principle in the US that a police officer may stop and frisk a suspect based on a reasonable suspicion. The US Supreme Court held that the police do not need the strictest standard of probable cause under the Fourth Amendment for minor intrusion of privacy on public places.<sup>1314</sup> If, for instance, someone "walks past a store window to peer inside,"<sup>1315</sup> or he made off when he saw a police car,<sup>1316</sup> there is reasonable suspicion to apply the procedure of stop and frisk.<sup>1317</sup> Nevertheless, the police need to wait for probable cause before arresting the person. Thus, probable cause is not necessarily built upon reasonable suspicion. The US Supreme court tried to distinguish the two standards in the following manner:

*...reasonable suspicion can be established with information that is different in quantity or content than required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that is required to show probable cause.*<sup>1318</sup>

Despite the alleged difference both in quantity and quality of the information required for both standards, they both require some verifiable facts. In contrast to the position of the ECtHR, the US Supreme Court has in *Brinegar v. United States* held that anonymous tip-offs are enough for reasonable suspicion of stop and frisk, but not for probable cause in order to affect arrest.<sup>1319</sup> Thus, in the US,

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<sup>1314</sup> *Terry v Ohio*, supra note 860; see also *Illinois v Wardlow*, supra note 860.

<sup>1315</sup> *Terry v Ohio*, supra note 860

<sup>1316</sup> *Illinois v Wardlow*, supra note 860

<sup>1317</sup> These are similar to the examples provided under Code A: Code of Practice, supra note 1284. According to Code A of PACE, the police are allowed to infer reasonable suspicion based on suspicious behaviour of a person without any objective facts, information, or intelligence. The difference, however, is that while existence of reasonable suspicion is enough to effect arrest in the UK, a police officer in the US needs to wait until there is probable cause to arrest the suspect.

<sup>1318</sup> *Alabama v White* 496 U.S 325 (1990)

<sup>1319</sup> *Brinegar v United States*, 338 U.S. 160 (1949). In *Brinegar*, the US Supreme Court accepted the definition of probable cause devised in *Carroll v. United States*, 267 U.S. 132, para. 162 ("probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to

a police officer can stop and frisk search a suspect based on reasonable suspicion, but the same standard cannot be used to arrest the suspect. Some have summarized the differences between the two standards in the following manner:<sup>1320</sup>

**Table 4.1: Reasonable Suspicion v. Probable Cause in the US**

Probable Cause	Reasonable Suspicion
<p>Legal definition: <i>Brinegar v United States</i><sup>1321</sup></p> <p>Practical definition: more likely than not.</p> <p>Sufficient for arrest.</p> <p>After arrest, officer may search person and immediate vicinity.</p> <p>Sufficient for issuance of warrant.</p>	<p>No good legal definition</p> <p>Practical definition: "less certain than probable cause, but more than mere suspicion."</p> <p>Sufficient for stop and search, but not for arrest.</p> <p>Officer may search a suspect if there is fear for officer's safety.</p> <p>Not sufficient for issuance of warrant.</p>

Besides the above differences, the US Supreme Court has thus far not deviated from the standard of probable cause in terrorism cases. In *Terry v Ohio*, the US Supreme Court balanced the interest of the individual's privacy and the police officers' safety when it deviated from the Fourth Amendment in a limited violation of privacy such as stop and frisk. However, the US Supreme Court firmly held that "the Terry cases progeny do not support the application of a balancing test so as to hold that "seizure" ... may be justified by mere reasonable suspicion."<sup>1322</sup>

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warrant a man of reasonable caution in the belief that an offense has been or is being committed."); see also *Spinelli v United States*, supra note 860

<sup>1320</sup> Carmen, R. V D. (2009). *Criminal Procedure: Law and Practice*. (Belmont, Cengage Learning, Inc), p86

<sup>1321</sup> *Brinegar v. United States*, supra note 1319

<sup>1322</sup> *Dunaway v New York*, 442 U.S 200 (1979)



The role of tip-offs in establishing probable cause was also considered in *Spinelli v United States*.<sup>1323</sup> The US Supreme Court stated that:

*... informant tip off was not sufficient to provide the basis for a finding of probable cause*<sup>1324</sup> *unless it 'set forth any reason to support the conclusion that the informant was "reliable" and ... sufficiently state the underlying circumstances from which the informant had concluded the petitioners activity.*<sup>1325</sup>

What constitutes reliable information is further discussed in *Aguilar v Texas*, according to which:

*The affiant need not disclose the identity of the informant. Moreover, the affidavit could be based on hearsay information. But the magistrate must be informed of some underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was credible or his information was reliable.*<sup>1326</sup>

Therefore, the informant cannot rely on 'casual rumour or general reputation' to tip-off the police.<sup>1327</sup> Lord Steyn did not set out such requirements in his statement in *O'Hara v CCRUC*, although his Lordship did accept that hearsay and tip-offs can be used to establish reasonable suspicion.

Although the ECtHR did consider the role of tip offs, it did not touch on the issue of the reliability of the 'tipsters'. The ECtHR in the cases of *Fox*, *Murray*, *Brogan* and *O'Hara* did not request from UK government facts that support the proposition that the informants were indeed credible and the information was reliable. When the UK government argued that the tip-off was from a reliable informant, the ECtHR failed to seize the opportunity to evaluate the credibility of the informant and the reliability of the information supplied. Although it was

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<sup>1323</sup> *Spinelli v United States*, supra note 860

<sup>1324</sup> *Ibid*

<sup>1325</sup> *Ibid*

<sup>1326</sup> *Aguilar v Texas*, supra note 860 as cited in *Spinelli v United States*, supra note 860

<sup>1327</sup> *Spinelli v United States*, supra note 860

not specifically discussed, one of the reasons for this reluctance might emanate from the fact that illegally obtained evidence is admissible under English common law. However, the same is not true in the US. Another possible justification could be attributed to the prohibition of disclosure of contents interception, and its method of obtaining. Nevertheless, this is less convincing justification because ICA 1984, as replaced by RIPA, is concerned with interception of communication, not with tip-offs from informants or the public.

Moreover, as the US Supreme Court in *Aguilar* stated there was no need to disclose the identity of the informants. The ECtHR also accepted in *Brogan, Fox, Murray and O'Hara* that member states are not required to disclose sensitive information to prove reasonableness of an arrest. As discussed in the preceding sections, the dissenting judges in *Murray v UK* also states that the government could prove some evidence to show that the arrest was based on reasonable suspicion without jeopardising secret information.

Therefore, a member State government cannot hide behind the veil of secrecy and refuse to disclose information which supports or otherwise the credibility and reliability of informants. But the ECtHR in general has shown its inconsistency in this matter in *Fox v UK* and *Murray v UK*.

Whatever the underlying factors might be, the standard of the ECtHR on reasonable suspicion is weaker than that of the probable cause test in the US. As a result, the test of the ECtHR when justifying arrest in terrorism cases based on a watered down version of reasonableness, falls short of the stricter standards required under the probable cause test in the Fourth amendment.

If the US Supreme Court rejected deviation from the probable cause standard for conventional crimes, one wonders if the court would be willing to consider a different test in terrorism cases. The answer is no as the US Supreme Court has clearly refused such deviation in terrorism cases in the following situations. In *United States v United States District Court*, (the Keith case)<sup>1328</sup> the US

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<sup>1328</sup> *United States v United States District Court* (the Keith case) 407 U.S. 297 (1972)

government attempted to convince the US Supreme Court to deviate from the Fourth Amendment standard in national security cases, specifically in spy cases. The US government argued that "disclosure to a magistrate of all or even a significant portion of the information involved in domestic security surveillance would create potential danger to national security."<sup>1329</sup> The Supreme Court acknowledged that there could be less demanding probable cause in surveillance cases. A similar position was reached in the *Re Sealed* case where the standard of Foreign Intelligence Surveillance Act of 1978 (FISA) under section 50 U.S.C. §1805(a) (3) was considered.<sup>1330</sup> The US Supreme Court in this case accepted that in intelligence cases, "congress allowed this lesser showing for clandestine intelligence cases, but not, notably, for other activities, including terrorism."<sup>1331</sup>

Therefore, US Supreme Court in the *Re Sealed* case clearly stated that the FISA standard is not applicable in terrorism cases. This marks the major difference between the European approach and the US approach. In the opinion of the Supreme Court in *Re Sealed* case, the less demanding probable cause under FISA is not applicable to arrest. Its application is, therefore, limited to mere surveillance. As soon as the decision to arrest is made, the stricter standard under the Fourth Amendment comes to the fore. This can be further inferred from *Ashcroft v Al-Kidd*.<sup>1332</sup> The applicant was detained as a material witness in a terrorism case. The Supreme Court referred to earlier cases where the Fourth Amendment standards of warrant and probable cause were not required. These circumstances apply to cases "where the search or seizure is justified by special needs, beyond the normal need for law enforcement; such as the need to deter drug use in public schools or inspection of fire damaged premises to determine the cause."<sup>1333</sup>

Apart from these limited exceptions, the Supreme Court has rejected any departure from the probable cause test.

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<sup>1329</sup> Ibid

<sup>1330</sup> *re Sealed Case*, supra note 1146

<sup>1331</sup> Ibid

<sup>1332</sup> *Ashcroft v Al-Kidd* 131 S.Ct. 2074 (2011) (citing *Indianapolis v Edmond*, the Supreme Court held that detention under the Fourth Amendment "requires predominantly objective inquiry.")

<sup>1333</sup> *Vernonia School Dist. 47J v Acton*, 515 U.S. 646, 653 (1995)

To conclude, the ECtHR watered down standard of reasonableness gives less protection to the right to liberty compared to the much stricter standard of its US counterpart.

## 5.5 The Ethiopian Legal System

Article 49 *et seq* of the Ethiopian Criminal Procedure Code deals with arrest with or without warrant. The general standard under Article 49 Ethiopian Criminal Procedure Code is that the police need to obtain an arrest warrant. However, there are several exceptions to this general principle. Arrest without a warrant can be effected against a person who commits flagrant offences;<sup>1334</sup> who is reasonably suspected of having committed or about to commit an offence punishable with imprisonment for not less than one year or who is in the act of breaching the peace or who is reasonably suspected of having evaded police supervision or deserted the armed force or being a dangerous vagrant.<sup>1335</sup>

Moreover, the same Article also provides that there can be an arrest without warrant if a person possesses stolen materials or materials that might be used in the commission of a crime.

However, there is neither a provision in the Ethiopian Codes nor any case law that defines the general standard of reasonable suspicion under Ethiopian law.

The EATP embodied the same standard of reasonableness as that of the Ethiopian Criminal Procedure Code. Articles 16 and 17 of the EATP, which deal with sudden searches and covert searches, respectively, require reasonable suspicion.

According to Article 16 of the EATP, a 'sudden search' is authorised when:

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<sup>1334</sup> See Article 50 of the Ethiopian Criminal Procedure Code. According to Article 19 of the Ethiopian Criminal Procedure Code, a flagrant offence is an offence "where the offender is found committing the offence, attempting to commit the offence or has just committed the offence."

<sup>1335</sup> Article 51 Ethiopian Criminal Procedure Code

*a police officer has reasonable suspicion that a terrorist act may be committed and deems it necessary to make a sudden search in order to prevent the act, with the permission of the Director General of the Federal Police or a person delegated by him, may stop vehicle and pedestrian in an area and conduct sudden search at any time, and seize relevant evidence.*

Though a 'sudden search' is not specifically defined, the last sentence of the above article implies that this sort of search could be authorised at any time and at any place in order to prevent terrorist act. A closer look at Article 16 of the EATP reveals that reasonable suspicion alone is not enough to carry out a sudden search; the police officer must also get the permission of the Director General of the Federal Police or their delegate. Article 16 of the EATP further narrows the scope of seizure only to material connected with the commission of the suspected crime. A question arises as to whether the police are also allowed to seize the person as well as the evidence. Although 16 of the EATP is constructed in a narrower sense, Articles 50 and 51 of the Ethiopian Criminal Procedure Code, which deal with arrest without warrant, allow the police to seize the person and the evidence. A similar interpretation is followed in the UK with the power to stop and search under section 43 TA 2000 for people who fall under section 41.<sup>1336</sup>

For covert searches, however, Article 17 of the EATP provides that the police need a court warrant issued upon showing of a 'reasonable grounds to believe' that "a terrorist act has been or is likely to be committed" or "there are preparations or plans to that effect." Although Article 17(3) of the EATP seems redundant, being as it covers the same issue dealt with by subsection 2, the latter is concerned with preparations within certain premises while the former apparently covers preparations of terrorist acts anywhere, including in public places, or vehicles.

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<sup>1336</sup> See para. 2.8-2.9 of Code A: Code of Practice, supra note 1284. It states that the police may detain the suspect in order to carry out the search. This brief detention can result into arrest for possession of unlawful materials. The same is true with section 43(1) if the person has been , after being searched, found in possession of "anything which may constitute evidence that person is a terrorist"

What is more, reasonableness is required for arrest without a warrant under Article 19 of the EATP. But the said Article does not use the same phraseology as Article 17 of the EATP. Article 19 presupposes 'reasonable suspicion', not reasonable grounds to believe. The Article states that: "... the police may arrest without court warrant any person whom he reasonably suspects to have committed or is committing a terrorist act as defined under this proclamation."

The EATP provides a broad definition of terrorism under Article 3, which is not fundamentally different from section 1 TA 2000.<sup>1337</sup> However, Article 19 is different from section 41 TA 2000; the latter Act does not require the commission of specific acts for arrest to take effect and "the police need have no particular offence in mind; nor need they worry overmuch about the level of involvement of the person arrested."<sup>1338</sup> Moreover, in contrast to section 41 TA 2000, Article 19 of the EATP does not require disclosure to the arrestee of the reasons for the arrest.<sup>1339</sup>

Whether the standard in Article 19 of the EATP requires a lower threshold compared to the requirements for covert searches under Article 17 of the EATP is uncertain. The parliamentary minutes of the EATP appears not only to fail to elaborate on the stipulation of using different phraseology, but also complicates the definitions. The *Amharic*<sup>1340</sup> translations of reasonable suspicions and reasonable grounds for suspicion state that "the police needs to hold a genuine belief"<sup>1341</sup> to conduct sudden or covert searches. But this definition is completely different from the English version of Article 16 and 17 of the EATP. This is due to the fact that both articles require objective standards, not subjective belief of the police officer.

The reason why the Ethiopian legislature has inserted apparently two different standards for arrest and sudden searches, on one hand, and covert searches, on

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<sup>1337</sup> For a detail discussion on the definition of terrorism under TA 2000, see Stone, R. (2006). *Police Powers and Human Rights in the Context of Terrorism*. 48 (4) *Managerial Law* 384

<sup>1338</sup> *Ibid*

<sup>1339</sup> For detailed discussions on the extent of disclosure under section 41, see Walker, C. (2011), *supra* note 224, pp. 144-145

<sup>1340</sup> The Ethiopian official language

<sup>1341</sup> Parliamentary minutes, *supra* note 46, p.17

the other hand, is not clear. Does 'reasonable suspicion' have different implications from 'reasonable grounds for suspicion' or 'reasonable grounds to believe'? Neither the EATP nor the parliamentary minutes give any clue. The parliamentary minutes of the EATP merely state that Article 19 is directly taken from section 41 TA 2000. Thus, it might be appropriate to look into the legislative background of the TA 2000 in order to decipher the difference, if any, between 'reasonable suspicion', 'reasonable grounds for suspicion', and 'reasonable grounds to believe'.

### 5.5.1 *Legislative Background in the UK*

Section 41 TA 2000 requires reasonable suspicion, not reasonable grounds for suspicion, to arrest a suspect. However, section 42 TA 2000, which deals with searches of premises, requires reasonable grounds for suspicion for a search warrant. As discussed above, Fox, O'Hara, Brogan and Murray are some of the prominent cases that deal with the issue of reasonableness before the coming into effect of the TA 2000. The standard under section 11 of the NIA 1978 was that the police could arrest without a warrant "any person suspected of being a terrorist. This criterion was not qualified by any words of reasonableness. The suspicion has to be honestly held but it need not in addition be a reasonable suspicion."<sup>1342</sup>

On the other hand, section 12 of PTA 1984 allowed arrest without a warrant based on 'reasonable grounds for suspicion.' A similar phraseology can be found under section 14 PTA (Temporary Provisions) 1989. The construction of TA 2000, on the other hand, requires only reasonable suspicion, not reasonable grounds for suspicion, that the target is a terrorist suspect. The explanatory notes to TA 2000 state that the power of arrest under sections 41-43 are similar to section 14 and 15 of the PTA 1989, despite the disparity in their phraseology. This indicates that there is no significant difference in meaning between 'reasonable suspicion' and 'reasonable grounds for suspicion.'

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<sup>1342</sup> McKee v CCNI, supra note 1287

Paragraph 2.2 of the Code of Practice A<sup>1343</sup> and UK court cases<sup>1344</sup> also use the two wordings interchangeably. Without attempting to distinguish between the two, the UK courts merely focused on the grounds for the arrest. It could, therefore, be concluded that the terms do not have any significant difference in meaning in the UK.

However, UK courts also distinguish between 'reasonable cause to believe' and 'reasonable cause for suspicion.' Accordingly, it is held that "reasonable cause to believe implies a more definite state of knowledge of certain events than "reasonable cause for suspicion" which by definition suggests that the state of knowledge lacks any basis of proof."<sup>1345</sup>

Nevertheless, one wonders why sections 41, 42 and 43 TA 2000 use different wordings if they imply the same thing. A related question asks why the UK legislature swung back and forth at different times between 'reasonable suspicion' and 'reasonable grounds for suspicion'.

Taking the practice in the UK as a standard, it might be right to conclude that in light of EATP being explicitly stated to be transposed from the UK, it should be interpreted in the same manner as its original source. However, many issues are not addressed either by the EATP or by the Ethiopian Criminal Procedure Code.

First, the ECtHR and the House of Lords in O'Hara held that the grounds of suspicion could be constructed from hearsay or tip-offs. However, as discussed above, the US Supreme Court is sceptical on the use of tip-offs unless the 'tipster' is credible and the information is reliable. The European standard is more relaxed, as it does not require credibility and reliability. In both in Fox v UK and Murray v UK, it was only the government that was arguing that the

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<sup>1343</sup> Code A: Code of Practice, , supra note 1284

<sup>1344</sup> See for example Alanov v Chief Constable of Sussex, supra note 1272 ("Although a police officer suspected that the appellant was guilty of an alleged offence, objectively that suspicion was not based on reasonable grounds."); see also Secretary of State for the Home Department v CD [2012] EWHC 3026 (Admin); see also Mossop v Director of Public Prosecutor [2003] EWHC 1261 (Admin)

<sup>1345</sup> Dryburgh v Galt, supra note 1278, para 13



confidential information were from credible sources.<sup>1346</sup> The ECtHR did not force the government to disclose further evidence to support that argument. The ECtHR simply accepted that confidential information could be used to justify arrest under Article 5 ECHR. The question, then, is which position is Ethiopia best to adopt? This is a difficult question to answer as the EATP falls short of providing the factors or information required for establishing reasonableness.

With regard to hearsay, the traditional position in Ethiopia was that such information could not be used as evidence before a court.<sup>1347</sup> However, the parliamentary minutes on the EATP criticised this traditional approach and made it clear that hearsay is relevant in criminal litigation in Ethiopia.<sup>1348</sup> Taking into account Article 263(1) of the Ethiopian Civil Procedure Code and Article 137(1) of the Ethiopian Criminal Procedure Code, the drafters of the EATP were right to criticise the traditional approach, as both codes clearly allow the testimony of witnesses, both their direct and indirect knowledge of facts.

However, the focus of the parliamentary minutes was not on the relevance of hearsay in establishing reasonable suspicion. The focus was merely whether hearsay would be accepted as evidence before a court. Admission of evidence is a different subject matter from establishing reasonable suspicion. Thus, can hearsay evidence be relevant to establish the necessary reasonable suspicion for the arrest of a terrorist suspect? It could be argued that since hearsay is admissible before a court, there is high probability that the same evidence will be permitted in the establishment of reasonable suspicion.

However, there are some inherent problems with the use of hearsay or tip-offs from the public. In a country where political mistrust is extremely high, and joining an opposition party is considered the biggest crime in the country,

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<sup>1346</sup> For details, see Fox v UK, supra note 1251 and Murray v UK, supra note 1251

<sup>1347</sup> Melin, R. A. (1972). *Evidence in Ethiopia* (Addis Ababa. Haile Sellassie I University), p.213; But the courts are not consistent in all cases. See for instance in Public Prosecutor v Amhed kemal Abdela (03139/98) (one of the public prosecutor witnesses testified based on hearsay the alleged involvement of the suspect in the preparation of terrorist activities); see also Public Prosecutor v Tefera Mamo Cherkos (General), supra note 64 ( part of the evidence against defendant no.16 was based on hearsay)

<sup>1348</sup> Parliamentary minutes, supra note 46, p. 112; see also Article 23(1) of the EATP which clearly refers to hearsay

hearsay and tip-offs should be viewed with scepticism. Even members of the ruling party that participated in the drafting process of the EATP have raised this concern.<sup>1349</sup> Therefore, the fact that the law is taken from the UK should not mean that the interpretation should be the same as well. This is due to the simple fact that the two countries do not have the same political environment.

Second, the principle in the UK is that reasonable suspicion is not enough to effect arrest. It must also be necessary.<sup>1350</sup> The same principle is espoused in Article 5(1) (c) ECHR.<sup>1351</sup> However, Ethiopian law does not require the latter principle.

Moreover, the traditional approach in the UK is that there could be a question of false imprisonment if the police knew that there was no possibility that a charge would be brought against the suspect.<sup>1352</sup> Moreover, the ECtHR has acknowledged that with regard to terrorism cases "the requirement under the ordinary law to bring the person before a court had been made inapplicable."<sup>1353</sup> Thus, for terrorism related cases, the suspect might not be charged at all following the initial arrest nor be brought before a court of law. This position is reflected under TA 2000.<sup>1354</sup>

In Ethiopia, the drafters of the EATP did not transpose this position. As a result, it is not clear whether the suspect should be charged following arrest. In the cases that this research has considered, the Ethiopian courts did not clarify whether bringing a charge subsequent to arrest was part of the requirements of the law of arrest under the EATP or the Ethiopian Criminal Procedure Code. The police

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<sup>1349</sup> Parliamentary minutes, supra note 46, p. 113

<sup>1350</sup> See *Holgate-Mohammed v Duke*, supra note 1274; see also Fenwick, H. (2005), supra note 1282; see also Stone, R. (2008), supra note 1283, p. 105

<sup>1351</sup> See *Belevitskiy v Russia*, no. 72967/01, 1 March 2007, para. 82-93 (for legality of detention); see also *Baranowski v Poland*, no. 28358/95, ECHR. 2000-III, para.73 (for accessibility and foreseeability of law); see also Arai-Takahashi, Y. (2002), supra note 243

<sup>1352</sup> Stone, R. (2008), supra note 1283, p. 105

<sup>1353</sup> *Brogan v UK*, supra note 1251, para. 52

<sup>1354</sup> Section 33 of schedule 8 to Terrorism Act 2000 regarding representation and exclusion of the arrested person during an application for extension of detention which is different from section 43 of PACE 1984. At the same time, the position taken in *Brogan* is different from the position taken in *Lawless v Ireland* (1961) 1 EHHR 1 where arrest under Article 5 1(c) was supposed to be accompanied by prompt judicial access.

simply arrests and requests for extension at the first appearance, and then begins gathering evidence. This is done with little challenge from the judiciary.

As a safeguard against arbitrary arrest, it could be argued that the police should not be allowed to arrest in the absence of a possibility of bringing a charge and there should be the possibility of bringing false imprisonment charges against the police if they did not deem the arrest strictly necessary. However, as a principle, the decision to bring a charge is not necessarily linked to the decision to arrest on reasonable suspicion. The former decision demands stronger evidence compared to the latter. Therefore, arrest based on a reasonable suspicion should not be necessarily be followed by a charge unless the police have enough evidence to do so.

Third, it is a settled law in the UK that a constable cannot arrest a suspect based on orders given because a mere order to arrest does not establish reasonable suspicion in and of itself.<sup>1355</sup> Before the police exercised their power, they need to have objective facts or information, or they need to be briefed regarding the suspect and the same briefing must invoke<sup>1356</sup> reasonable suspicion in the mind of the arresting officer.

However, as discussed in the previous sections, the US position is stricter; reasonable suspicion alone is not enough to effect an arrest; indeed, the police need to show probable cause. Thus, the proper comparison of the Ethiopian counter-terrorism law should be with the UK. Under the EATP, use of the phrase ‘police’<sup>1357</sup> could refer to a constable or his superior. A question may arise whether a constable could arrest based on orders given by his superior. There are several terrorism related cases that show police constables acting based on

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<sup>1355</sup> O'Hara v CCRUC, supra note 1288; on the subjective and objective elements of the O'Hara decision, see Hunt, A. (1997), supra note 1291; see also McKee v CCNI, supra note 1287; see also Alanov v Chief Constable of Sussex, supra note 1277; in case of searches based on instructions given by senior officers, see Mossop v Director of Public Prosecutor [2003] EWHC 1261 (Admin)

<sup>1356</sup> For difficulties of arrest based on briefings and instructions, see Hunt, A. (1997), supra note 1291

<sup>1357</sup> See Article 19 of the EATP

instructions given by their superiors.<sup>1358</sup> It is a norm in the country that the arresting officer is not required to have reasonable suspicion provided their superior has it. Thus, the reference to 'police' under Article 19 of the EATP is rather vague and may mean that under Ethiopian law the arresting officer is not expected to know the factual basis for the arrest.

For this reason, the Ethiopian definition of reasonableness is similar to Article 5 ECHR, but completely different from the UK position. As mentioned by Lord Steyn in O'Hara, there are two categories of reasonableness:

*Where reasonable grounds for suspicion are required in order to justify the arrest of someone who turns out to be innocent, the [Police and Criminal Evidence Act 1984] requires that the constable personally has reasonable grounds for the suspicion, and it would seem to follow that he is not protected if, knowing nothing of the case, he acts on orders from another officer who, perhaps, does have such grounds. On the other hand, under statutes which require only the objective existence of reasonable grounds for suspicion, it is possible that the officer need neither have the reasonable grounds nor himself suspect anything; he can simply follow orders.*<sup>1359</sup>

Lord Steyn held that the definition of reasonableness under PACE falls into the first category. But, turning to the practice in Ethiopia, reasonable grounds for suspicion under the Criminal procedure Code and the EATP falls under the second category; the arresting officer is not expected to have reasonable grounds when making an arrest.

However, it could be also argued that because the provisions on counter-terrorism are taken from the UK, they should be interpreted in the same manner and that the arresting officer should be required to prove that he has reasonable suspicion before effecting an arrest. Although this research acknowledges that not every interpretation in the UK should be transposed into Ethiopia, not least

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<sup>1358</sup> All the cases discussed in chapter 2-3, including the arrests after 2009, were executed based in instructions given by police superiors.

<sup>1359</sup> Feldman, D. (1993). *Civil Liberties & Human Rights in England and Wales*. (Michigan, Clarendon Press) , p.199, cited in O'Hara v CCRUC, supra note 1288

because the two countries do not share the same legal traditions, this could be one of the few examples where a provision should be interpreted in accordance with its original source. If the arresting officer does not have the necessary objective facts, he should face the full force of the law for violating the right to liberty. This can serve as deterrence against violating fundamental right to liberty.

To conclude, despite the application of reasonable suspicion as the principal standard in regular crimes since 1961, and the inclusion of the same principle in subsequent legislation such as the EATP, there are no Ethiopian precedents to mention where the scope of this standard has been dealt with. Moreover, as the EATP is modelled on UK law, this research argues that the principles of interpretation on reasonable suspicion in the UK should be taken into account when interpreting Ethiopian legislation.

However, this research does not recommend the watered down standard of reasonable suspicion devised by the ECtHR, for it is vague and it would add confusion to an already misunderstood concept in Ethiopia.

The ECtHR has never outlined what should be taken into account when applying their watered down version of reasonableness; it has been left to domestic courts tried their utmost to formulate general guidelines.<sup>1360</sup> For this reason, it seems to take into account different factors that might not be necessarily important in determining reasonableness of an arrest. For instance, in *Murray v UK*, the ECtHR held that:

*The length of the deprivation of liberty at risk may also be material to the level of suspicion required. The period of detention permitted under the provision by virtue of which Mrs Murray was arrested, namely section 14 of the 1978 Act, was limited to a maximum of four hours.*<sup>1361</sup>

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<sup>1360</sup> See for instance the three limb test proposed by Woolf LJ in *Castorina v Chief Constable of Surrey*, supra note 1277

<sup>1361</sup> *Murray v UK*, supra note 1251, para. 56

But the question is how does this factor make a difference to the requirement to produce some objective facts that there was a reasonable suspicion whether a defendant is detained for two hours, as in the case of *Murray v UK*, or six days, as in the case of *Fox v UK*<sup>1362</sup>? The court did not give any further explanation on this point.

Moreover, the ECtHR seems to have conveniently acknowledged terrorism as possessing such a level of uniqueness that it requires a departure from the strict application of objectivity under Article 5 ECHR. However, it is contended that there are already plenty of exceptions out there that are applicable to terrorist suspects. Therefore, this research holds that there should not be another tier of reasonableness applicable to terrorist suspects in Ethiopia.

Finally, by its very nature, the standard of reasonableness amounts to a lower threshold than the threshold required to prove beyond reasonable doubt. The ECtHR in *O'Hara v UK* also conceded that the standard is less strict than the evidence required to press charges.<sup>1363</sup> In terms of the strength of evidence required, the standards can be categorized from the lowest to the highest threshold in the following manner:

*Bona fide and honest suspicion (subjective test) → reasonable cause (objective test) → probable cause (an American standard to effect arrest but stronger than the European version of reasonable cause) → evidence required to bring charge (facts stronger than objective cause) → proof beyond reasonable doubt (moral certainty beyond a certain point).*

The question is, therefore, where the watered down standard of reasonableness falls within this grander scheme of standards?

## **5.6 Pre-charge Detention: UK**

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<sup>1362</sup> *Fox v UK*, supra note 1251

<sup>1363</sup> *O'Hara v UK*, supra note 1295

The first question that is often raised with regard to terrorism cases is how long is too long when detaining a suspect pre-charge? 28 days; 14 days; 90 days; and in extreme cases, such as the Ethiopian position, 120-days, are all instances that have been or were put forward as the term for pre-charge detention. The length of pre-charge detention has a checkered history in the UK, going up from seven to fourteen days and then to twenty-eight days before an unsuccessful attempt by former Prime Minister, Tony Blair MP, to scale it up to 90-days.<sup>1364</sup> The need for 90-days pre-charge detention had some backing from the then Assistant Commissioner of the Metropolitan Police Andy Hayman.<sup>1365</sup> He was 'a strong advocate' of locking terrorist suspects for 90-days without charge. In fact, the ACPO had been a strong advocate of a lengthy detention of terrorist suspects. Its former president, Ken Jones, was quoted by *The Guardian* arguing in favor of holding 'terrorist suspects without charge for 'as long as it takes''.<sup>1366</sup> Moreover, he advised the Home office that extended period of detention beyond 28-days could be needed under some circumstances.<sup>1367</sup>

Generally, in the UK, a suspect can be detained for up to 36 hours without charge, while an additional 60 hours can be granted by the relevant UK court.<sup>1368</sup> As PACE's application is restricted to conventional crimes, terrorist detention is covered by the far-reaching legal regimes of TA 2000, and TA 2006, with section 41 of TA 2000 and TA 2006 Act governing the length of pre-charge detention. The TA 2000 is also intended to rectify the shortfalls of judicial supervision and other safeguards stipulated under schedule 8, which were absent in previous Acts.<sup>1369</sup> However, the UK government rejected a shorter period of pre-charge detention, i.e. 4 days, recommended by Lord Lloyd. The government argued that it would be insufficient to complete investigations within 4 days.<sup>1370</sup>

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<sup>1364</sup> Berman, G. and Horne, A. (2012). Pre-Charge Detention in Terrorism Cases, Standard notes SN/HA/5634.

<sup>1365</sup> See the content of his letter at Home Affairs Committee (2006), Appendix: Police Briefing Note, supra note 1100

<sup>1366</sup> Townsend, M. and Doward, J. (2007). Lock Terror Suspects Up Indefinitely Say Police, 15 July, the *Guardian*

<sup>1367</sup> Home office (2007). Options for Pre-Charge Detention In Terrorist Cases, 25 July

<sup>1368</sup> Section 41-44 PACE 1984

<sup>1369</sup> Lloyd, A. J. L. (1996). Inquiry into Legislation against Terrorism. (Cm 3420). London, TSO

<sup>1370</sup> Home Office (1998). Legislation against Terrorism: A consultation paper (CM 4178) London: Stationery Office, p.36, paras 8.21-8.24

The need for extended pre-charge detention was justified by the laborious nature of the following factors:

*... checking of finger prints; the completion of forensic tests; finding and interviewing witnesses; searching the suspect's home address; conducting search of garages; storage facilities and other non-residential premises; checking alibis; making and analysing the results of financial and other enquires and putting the results of the above to the suspect at interview.*<sup>1371</sup>

However, most of these justifications do not necessarily require excessive pre-charge detention. The Home Office has failed on numerous occasions to provide official data/statistics demonstrating the average time it takes to complete the above individual tasks. The Labour government also put forward other arguments why 28 days pre-charge detention was necessary. These included:

*... the number of people who might be engaged in a single terrorist network and who are therefore likely to be arrested; the volume of information and modern communication/data storage methods which may hold; the need to secure evidences from countries overseas given the very significant likelihood that there will be overseas aspect to terrorism operations; the requirement to interpret multiple languages, etc.*<sup>1372</sup>

However, the number of terrorist arrests under section 41 TA 2000 between 2001 and 2010 do not support the Labour government's argument. According to these statistics, even 14 days pre-charge detention was too excessive.<sup>1373</sup> That means the introduction of 28 days detention under TA 2006, which was available between 25 July 2006 and 25 January 2011, was surplus to requirement. The incremental extension of the initial seven days and a total of 28 days were found

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<sup>1371</sup> Ibid

<sup>1372</sup> Home Office (2011). Review of Counter Terrorism and Security Powers: Review Findings and Recommendations. (cm 8004), London, TSO, para. 6

<sup>1373</sup> Home Office (2011). Operation of Police Powers Under the Terrorism Act 2000 and Subsequent legislation: Arrests, outcomes; and stop and searches; Quarterly updates to September 2010



to be "neither appropriate, nor necessary."<sup>1374</sup> The coalition government further conceded that 28 days detention was not needed because,<sup>1375</sup>

*It is not routinely required, as demonstrated by the fact that no one has been detained for longer than 14 days since July 2007; it is out of step with other Western democracies; it is incompatible with human rights obligations (primarily the right to liberty); it has a negative impact on Muslim communities in particular and undermines other aspects of the government's counter-terrorism strategy.*

The proposal to reduce the length of pre-charge detention is part of the coalition government's promise to "restore the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness"<sup>1376</sup>

However, as an alternative, the UK government has now put in place an alternative, which would effectively restore the 28 days pre-charge detention under exceptional circumstances. There are also other alternatives considered and discussions on these alternatives follow below.

#### 5.6.1. *Contingency Powers as an Alternative to Pre-charge Detention Regime?*

The UK government did not feel comfortable with a complete abandonment of the 28 day pre-charge detention regime. It wants to preserve the possibility of resorting to that maximum period under exceptional circumstances.

Accordingly, the plan is to activate the maximum period, when necessary. There will be a sunset clause<sup>1377</sup> so that the extended maximum period would be in

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<sup>1374</sup> Ibid

<sup>1375</sup> Home Office (2011). Review of Counter Terrorism and Security Powers, supra note 1367, para.4

<sup>1376</sup> The Coalition (2010). Our Programme for Government: Freedom, Fairness and Responsibility, May

<sup>1377</sup> For a detail discussion on the relevance of sunset clauses in anti-terrorism laws, see Ip, J. (2013) Sunset Clauses and Counterterrorism Legislation. *Public Law* 74-99

force for a period of three months upon a grant of royal assent.<sup>1378</sup> This need for contingency powers entails a trade off involving a shortening of the 28 days pre-charge detention regime, which it concluded was rarely used anyway, while still allowing recourse to that length of detention when the circumstances demand it.<sup>1379</sup>

There are some factors that mitigate the need for a pre-charge detention regime over 14 days in length. These include:

*... the improved relationship between the police and the Crown Prosecution Service (CPS); the CPS's accumulation of a "wealth of experience" in dealing with terrorism; the threshold test, enabling earlier charging; improved resources being made available for investigations; "lower level" of terrorism offences having been introduced such as doing things in preparation to an act of terrorism (section 5 of the 2006 Act).*<sup>1380</sup>

Taking into account these factors, some argued against the introduction of contingency powers allowing for recourse to the 28-day maximum. They held that the only circumstances that required lengthy detention periods are "national catastrophes or a serious national state of emergency."<sup>1381</sup> However, Lord Macdonald seems to contradict himself. On one hand, during his tenure as Director of Public Prosecutions (DPP), his office requested over 14 days pre-charge detention for 11 suspects, which resulted in eight suspects being charged. On the other hand, he argued that the only circumstances that require pre-charge detention beyond 14 days are 'national catastrophes.'

One could easily attack Lord Macdonald's position as there was no national catastrophe when the 11 suspects were held beyond 14 days. With the exception of Operation Seagram (London and Glasgow bombings, 2007), neither Operation

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<sup>1378</sup> Joint Committee on Human Rights (2011). Draft Detention of Terrorist Suspects (Temporary Extension) Bills. HL Paper 161/ HC Paper 893. London, TSO, para. 3

<sup>1379</sup> Ibid, par.14

<sup>1380</sup> Ibid, par. 37

<sup>1381</sup> See the argument of Lord Macdonald of River Glaven QC at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated evidence, 8 June, Q1, supra note 1378

Overt (Transatlantic liquid bomb plot, 2006) nor Operation Gingerbread (active terrorist planning, Manchester arrest, 2006) triggered the sort of emergencies envisaged by Lord MacDonal. Moreover, Lord MacDonal conceded that they would have managed to deal with the cases within four days if that was the maximum. However, the former DPP, Keir Starmer QC, and Deputy Director Counter Terrorism Division, Sue Hemming, refute that argument. Both stated that "it is absolutely clear that it was genuinely needed"<sup>1382</sup> in the above cases.

Despite the conclusion that there was no need for extended detention over 14 days, extension over 14 days is envisaged only in case of "mass casualties in a number of cities" and when the police lacked sufficient evidence to prosecute.<sup>1383</sup>

However, others have argued that taking the catastrophe test alone is problematic. He presented the case of the 7/7, 21/7, and the London-Glasgow bombings. He has stated that the cases could easily be categorized into the catastrophe test envisaged by Lord Macdonal in light of the fact that the "bombs have actually gone off."<sup>1384</sup> However, he argued that there was no need to go beyond 14 days in the first two cases and it was only in the latter case that detention beyond 14 days was requested.<sup>1385</sup>

The above position was also supported by the independent counter-terrorism measures reviewer, David Anderson QC, who argued that "one cannot say that the nature of the threat simply translates into the number of days you need to question somebody or accumulate evidence."<sup>1386</sup>

However, an absolute refusal to entertain the idea of contingency powers is less sustainable for the following reasons.

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<sup>1382</sup> Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 195, supra note 1378

<sup>1383</sup> Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, supra note 1378, par 8-13

<sup>1384</sup> See the views of the DPP, Kier Starmer, at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 199, supra note 1378

<sup>1385</sup> Ibid

<sup>1386</sup> Ibid

First, the problem with most counter-terrorism legislation is a lack of foresight and the inability of the legislature to prepare in advance of a major disaster. The current draconian counter-terrorism legislation in the Western world would have been unthinkable before 9/11, which radically changed the perception of human rights. The legislation came into effect in the grip of strong emotions. This tipped the balance towards national security concerns. Now all the dust has settled, the balance slowly swings back to the protection of basic rights. This is followed by a foul cry over the violation of fundamental rights during the preceding period of emotion.

Had there been comprehensive legislation well in advance of a major national crisis, such as 9/11 or the 7/7 bombings, governments would have saved themselves from passing hasty legislation. One-way of avoiding past mistakes is, therefore, having all the necessary powers that enable the police and the intelligence community to tackle a serious threat of terrorism. The draft bill is therefore a good way of accommodating possible complex terrorism cases that require an extended period of detention.

Second, as Lord MacDonalld mentioned, there was an attempt to politicize the debate on extended detention in 2005.<sup>1387</sup> This could be because people's emotions were overwhelmed by the on-going events. In contrast, if members of parliament decide issues with a clear state of mind before the eventuation of such catastrophes, there will be less scope for politicizing the issue.

Third, past experience tells us that to pass a law during national crisis is more likely to risk the erosion of fundamental rights.<sup>1388</sup> The expiration of the 28 day maximum and the repeal of stop and search under section 44-47 TA 2000 are but a few examples why legislation should not be rushed through parliament in time of emergency.

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<sup>1387</sup> See the argument of Lord Macdonald of River Glaven QC at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 1, *supra* note 1378

<sup>1388</sup> See Walker, C. (2011). Militant Speech, *supra* note 192, p. 1403 (arguing that states should "avoid over-reaction to the latest event-the "politics of the last atrocity".)

Fourth, a question could be raised as to why it is wrong *per se* to have contingency powers for pre-charge detention. The police did not abuse it while the 28-day maximum was in force for 4 and half years. The only argument raised against contingency powers being introduced centres on the now often referred to fact that the 28 day maximum pre-charge detention regime would be the longest of its kind in the democratic world.

However, the above argument lacks substance for a number of reasons. While it is true that there is no comparable law in terms of a fixed pre-charge detention in other Western countries, such countries have other constitutional procedures that enable them to orchestrate pre-charge detention equivalent to, possibly longer than, the 28 day maximum intended as a contingency power for the UK. In the United States, for instance, law enforcers use the Material Witness Statute<sup>1389</sup> to detain a suspect for extended periods.<sup>1390</sup> There is also an option to detain suspects via administrative detention powers,<sup>1391</sup> which could in practice be longer than the 14 days pre-charge detention currently allowed in the UK. Thus, the availability of 28 days pre-charge detention in some exceptional circumstances is not as evil as it sounds when compared to the United States. Moreover, India, though not a Western democracy, is the world's largest democracy. Yet, it provides a lengthy pre-charge detention of 180 days.<sup>1392</sup>

Therefore, contingency powers providing for a 28-day maximum are far better than rushing legislation into force in a time of emergency.

Fifth, the draft contingency powers do not contain as drastic a set of measures as are seen in the US, which includes such measures as the secret detention of

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<sup>1389</sup> 18 USC § 3144 (Release or detention of a material witness)

<sup>1390</sup> See Stigall, D. E., *supra* note 1105; see also *Ashcroft v Al-Kidd*, *supra* note 1332

<sup>1391</sup> See section 412 of the USA PATRIOT Act allows administrative detention of terrorist suspects from seven days to six months with the possibility of renewing it several times. See also 18 U.S.C. § 1226a (5-7); 18 U.S.C. § 3144. For administrative detention in the UK, see Spencer, J. R. (2010). Telephone-Tap Evidence and Administrative Detention in the UK. In: Wade, M. and Maljevic, A. (eds.). *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications*. (New York, Springer)

<sup>1392</sup> The Unlawful Activities (Prevention) Amendment Act, 2008 of India law

enemy combatants in Guantanamo bay or other secret locations around the world.<sup>1393</sup>

The combinations of the above factors lead to the conclusion that the existence of contingency powers would not entail a grave violation of liberty.

There are now changes brought about by the Protection of Freedoms Act 2012 (PFA).<sup>1394</sup> Accordingly, the 28 day regime would be limited by a three month sunset clause, unlike the expired provisions that were renewable annually. In addition, whereas under TA 2006 renewal occurred four times, despite that the 28 day maximum had not been used since July 2007. Under the current proposal, extension will be sought if, and only if, the need arises. Part four of the PFA contains specific sections that deal with 'counter-terrorism powers'. The issues that are relevant to us in this section are sections 57-58 of the PFA.<sup>1395</sup> Section 57 of the PFA amended the TA 2000 and TA 2006 by reducing the length of pre-charge detention from 28 days to 14 days.

However, the Secretary of State is also given the power to introduce orders, at the request of the Director of Public prosecution (DPP), to extend pre-charge detention from 14 days to 28 days by virtue of section 58 of the PFA.<sup>1396</sup> However, the Home Secretary can only exercise this power if Parliament is not in a position to exercise its normal powers. This covers the period when parliament is in recess or after recess 'but the first Queen's Speech of the Parliament has not yet taken place'.<sup>1397</sup> Moreover, this power is only to be exercised in times of emergency. The changes brought about by section 58 are different from what Lord Carlile and others have proposed. For instance, Lord Carlile preferred to:

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<sup>1393</sup> See the Military Order November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism; See also *Hamdi v Rumsfeld* 316 F.3d 450, 2003 U.S. (the court upheld government action to detain enemy combatants stating that the President has the right to hold suspects for extended period)

<sup>1394</sup> Received Royal Assent in May, 2012

<sup>1395</sup> For changes brought by the PFA in regard to stop and search, see a section in this thesis that deals with 'The Scope of the Right to Liberty in the UK' (specifically the changes that are brought after *Gillan and Quinton v the United Kingdom*, supra note 1231)

<sup>1396</sup> Now schedule 8 para.38 to TA 2000.

<sup>1397</sup> schedule 8 para.38 to TA 2000

"...create a power for a High Court judge to permit, on a day-by-day analysis, a person who has been detained for 14 days to be released but on counter-terrorism bail...That would, therefore, range from a 24-hour curfew - realistically, house arrest - to something rather less, for example, not communicating with certain named people."<sup>1398</sup>

It must be stated that the current arrangement under the PFA does actually include judicial scrutiny, though not to the level preferred as can be seen. Others, such as Lord McDonald "...rejects the option of a further 14 days of strict bail...This new restriction would...have been widely regarded as an unwarranted form of control order."<sup>1399</sup>

Moreover, some commentators, although not supporting as a general proposition the notion of detention beyond 14 days, have conceded that there should be some 'triggers and safeguards' in order to activate a contingency power of pre-charge detention in case of emergency.<sup>1400</sup> No such 'triggers and safeguards' are included in the PFA.

### 5.6.2 *A Threshold Test as an Alternative to Pre-charge Detention Regime.*

#### 5.6.2.1 General background of the Test

Under normal circumstances, the Crown Prosecution Service (CPS) applies what is known as the 'full test code' in deciding "whether to prosecute after investigation has been completed."<sup>1401</sup> The test has two significant elements: the evidential test and the public interest test.<sup>1402</sup> If there is "sufficient evidence to provide a realistic prospect of conviction" and public interest requires

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<sup>1398</sup> See Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 81, supra note 1378

<sup>1399</sup> For details see MacDonald, K D J (2011). Review of Counter-terrorism and Security Powers: A Report by Lord MacDonal of River Glaven QC. Norwich, TSO, p. 4

<sup>1400</sup> For detail discussions, see witness testimony of Professor Clive Walker and Professor Connor Gearty at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, supra note 1378

<sup>1401</sup> See Code for Crown Prosecutors, February 2010, para. 4.2

<sup>1402</sup> Ibid

prosecution, the case should proceed further. Prosecuting terrorist suspects would definitely pass the public interest element. However, the first element demands the existence of sufficient and reliable evidence. As discussed in chapter three, the use of intercept evidence is restricted to prevention and detention of a crime. However, the same sort of evidence cannot be used to bring charges in light of its current inadmissibility in criminal trials.

The case is likely to be dropped if both elements are absent. The threshold test is, therefore, an exception to the 'full code test' in the sense that the public prosecutor will be able to bring charges if the following conditions are met:<sup>1403</sup>

*There is insufficient evidence currently available to apply for full code test; there are reasonable grounds for believing that further evidence will become available within in a reasonable period; the seriousness of the case justifies the making of an immediate charge decision; there are continuing substantial grounds to object to bail in accordance with the Bail Act 1976 and in all the circumstances of the case an application to withhold bail may be properly be made.*

As well as taking into consideration the above conditions, the CPS also has to determine whether there are reasonable grounds to substantiate the allegation that the person has committed the alleged offences. This evaluation of reasonableness is particularly relevant as it gives the chance for third party evaluation of the reasonableness of the arrest. This means that the police, the public prosecutor, and the UK courts assess the reasonableness of the arrest. In this three tier evaluation of reasonableness, the CPS is in a better position to evaluate the initial arrest because they have all the evidence before them, unlike the UK courts where some of the evidence might be withheld from them.

The decision of the CPS on whether to initiate, decline, or select other charges are similar to those enumerated under the Principles of the Federal Prosecution in the US.<sup>1404</sup> Similar to CPS guidelines, the mere existence of sufficient evidence

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<sup>1403</sup> Ibid

<sup>1404</sup> United States Department of Justice: USAM 9-27.000 Principles of Federal Prosecution (1980)



against a suspect is not enough to commence prosecution. Other factors are also considered. These include public interest considerations and 'non-criminal alternatives to prosecution'.<sup>1405</sup> However, because the US does not have comparable legislation on pre-charge detention; the Principles of the Federal Prosecution do not contain equivalent provisions to the threshold test. The focus will, therefore, be restricted to the UK.

#### 5.6.2.2 How effective is the Threshold Test in Replacing Extended Pre-charge Detention?

As stated in the fourth report of the Home Affairs Select Committee, the test is "totally different from the grounds for arrest."<sup>1406</sup> In other words, the threshold test is completely different from the reasonable suspicion standard required under section 41 TA 2000. In this test, the prosecution have evidence that goes beyond reasonable suspicion, but "the standard for the final test (the realistic prospect of conviction) has not been reached."<sup>1407</sup> Prosecutors apply the test when it is believed that additional evidence will come out in due course. Due to this speculative nature of the test, it is considered incongruous for most counter-terrorism investigations.<sup>1408</sup> Thus, the threshold test cannot totally replace the need for extended pre-charge detention.

The extent of use of the test in terrorist cases in the UK is difficult to ascertain, as there is no practice of keeping "specified data about which test was applied in every case since the test was introduced."<sup>1409</sup> However, in the cases where the test has been applied, it raises the question whether the test is used as an alternative to pre-charge detention or as an additional legal ploy to further detain suspects.

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<sup>1405</sup> Ibid, USAM9-27.220: see also USAM 9-27.230 to 9.27.250

<sup>1406</sup> Home Affairs Committee (2006), supra note 1100, para. 111

<sup>1407</sup> Ibid

<sup>1408</sup> Ibid, para. 112

<sup>1409</sup> See Letter from Sue Hemming, Deputy Director Counter Terrorism Division, Crown Prosecution Service, Dated 18 January 2008 at Joint Committee on Human Rights (2008). Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill Ninth Report of session 2007-08. Report together with Formal Minutes, and Oral and Written Evidence. HL Paper 50 HC 199. London, TSO, Appendix 9

In the same year a letter from Sue Hemming, Deputy Director Counter Terrorism Division, was submitted to the Joint Committee on Human Rights, it was stated that the number of suspects charged based on the full test and the threshold test was equal. In both categories of charges, it was revealed that the suspects were held over 14 days. This shows that the prosecution was resorting to the threshold test after holding the suspect for prolonged periods. Compared to those charged based on the full test, those charged based on the threshold test were held for a longer period. As stated in Sue Hemming's letter, the four defendants under the threshold test were held between 20-27/28 days,<sup>1410</sup> while those charged under the full code test were held between 15-19/20 days.<sup>1411</sup>

This raises a question about why it would be necessary to charge early if it does not shorten the length of detention. It does not bring any fundamental change in the circumstance of the detainees whether they are charged early or after 28 days.

A related argument connected to why the threshold test can be considered a mere legal ploy is that there is no disclosure to the detainee or the relevant UK court as to which test was applied to charge them.<sup>1412</sup> This by itself reduces greater judicial scrutiny and limits the right of the suspect to know the basis of the charges against him.<sup>1413</sup> As highlighted by the Joint Committee on Human Rights, the advantage of disclosing the basis of the charges is that "it provides the opportunity for the court to subject the prosecution's time table to independent scrutiny and to ensure that the defence is in a better position to challenge the basis of the charge."<sup>1414</sup> The Joint Committee on Human Rights also criticised the test for lacking parliamentary scrutiny, abuse of the test (used at the end of the expiry of 28 days in some cases), lack of an independent body that reviews the operation of the threshold test in terrorism cases, and the limited role of the UK court in setting the time table for the receipt of any additional evidence.<sup>1415</sup>

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<sup>1410</sup> Ibid

<sup>1411</sup> Ibid

<sup>1412</sup> Joint Committee on Human Rights (2008). Counter-Terrorism Policy and Human Rights (Eighth Report), supra note 1409, paras. 80-81

<sup>1413</sup> Ibid

<sup>1414</sup> Ibid

<sup>1415</sup> Ibid

With these major defects, it is unlikely that the test will be the best alternative to pre-charge detention now that the 28-day maximum has reverted to 14 days. This leaves the proposal for contingency powers the only viable option.

Besides the above major problems, some questions need clarification. What would happen if, after bringing a charge early, the police and the prosecution fail to get hold of the key evidence they are hoping to uncover? It may be, for example, a key witness has died or crucial evidence might be lost due to a virus attack in relation to electronic evidence.

According to written evidence by Sue Hemming given to the Joint Committee on Human Rights, the prosecutor can decide to discontinue the case during the review period if it becomes clear that "the expected evidence is not developing as expected or if there is no longer a realistic prospect of conviction." However, the first review takes place at the time of the charge.<sup>1416</sup> Assuming that the charge was brought after 14 days of pre-charge detention, the next review takes place 11 days after the date of the charge. That means the suspect is held for 25 days without knowing whether he is charged based on the full code test or the threshold test. This is almost equivalent to the 28-day maximum.

The decision to discontinue a case after such a lengthy detention period amounts to a major violation of liberty. While it may be the case that a charge is dropped owing to no realistic prospect of conviction, this decision should take place as early as possible, not after an excessively long period of pre-charge detention. If the suspect is held excessively after being charged with no prospect of release or conviction, there could be a challenge under Article 5(3) ECHR for lack of a speedy trial. A court case has yet to test the compatibility of the threshold test with Article 5(3).

Another issue missed by the Joint Committee on Human Rights is the impact of threshold test on total conviction rates since its introduction. The test has been applied to terrorism cases since 2005/2006. However, there is a lack of

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<sup>1416</sup> Ibid, para. 9

information on the impact of the test in securing convictions against those charged early. In the limited cases mentioned in Sue Hemming's letter, it is stated that not a single case had been dropped. However, these cases show only suspects who were detained over 14 days. They did not show the success of convictions for cases where there was early charge but suspects were detained under 14 days.

To conclude, when the CPS resorts to the threshold test, in theory it appears that this test would reduce the need for a lengthy pre-charge detention. But, in practice, the test does not improve the right to a speedy trial because, as evidenced above, it is most often used at the end of the maximum period allowed. With pre-charge detention reverting to 14 days, the CPS' code on threshold test is not clear on how early the prosecutor should bring a charge. It is not even clear whether there is a need for the threshold test *per se* as the 28 days maximum is no longer applicable.

Moreover, the biggest loophole in the threshold test is that the defence might not be served for up to six months once the suspect is charged.<sup>1417</sup> This is four times lengthier than the 42 day time limit for ordinary crimes.<sup>1418</sup>

### 5.6.3 Charging Terrorist Suspects for 'Preparation of Terrorist Acts': as an Alternative to a lengthy pre-charge detention?

A proposal to introduce a "...lower level of terrorism offences...such as doing things in preparation to an act of terrorism"<sup>1419</sup> has been long overdue. It was first proposed by Lord Lloyd<sup>1420</sup> but was 'rejected'.<sup>1421</sup>

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<sup>1417</sup> Home Office (2006). Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention: The Government Reply to the Twenty-Fourth Report from the Joint Committee on Human Rights, session 2005-06 HL Paper 240, HC 1576. London: Stationery Office, para. 130

<sup>1418</sup> Ibid

<sup>1419</sup> Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, *supra* note 1378, par. 37

<sup>1420</sup> Lloyd, A. J. L. (1996). Inquiry into Legislation against Terrorism. (Cm 3420). London, TSO

<sup>1421</sup> Carlile, A. (2010). Report on the Operation in 2009 of the Terrorism Act 2000 And Part 1 of the Terrorism Act 2006. London: HMSO, para. 138

Section 5 TA 2006 outlaws intentional engagement in the preparation of specific or general acts of terrorism either as a principal or as an accessory. The criminalisation of preparatory terrorist acts is intended to 'widen the net by extending the reach of the law to prior acts'.<sup>1422</sup> Section 5 was also distinguished from other 'precursor crimes'<sup>1423</sup> in that it requires more than mere possession of terrorist materials.<sup>1424</sup>

However, charging terrorist suspects under section 5 TA 2006 has the potential to criminalise "...equivocal or foolish dabbling in the fringes of extremism by individuals with neither the intention nor resolve to go further."<sup>1425</sup> Despite this, recognition of the usefulness of section 5 in reducing the need for lengthy pre-charge detention has been growing in academic circles.<sup>1426</sup> The argument is that section 5 "...helps bring early charges at a point where evidence is perhaps less certain than for other charges which existed pre-2006."<sup>1427</sup> This strategy of 'combating terrorism through pre-emption'<sup>1428</sup> is nothing new in the West.

Section 5 TA 2006 has been the 'one of the commonest charges' in relation to terrorism,<sup>1429</sup> accounting for 16% of the total terrorist charges since 2001.<sup>1430</sup> The conviction rate in this area rests at 21%,<sup>1431</sup> which is the highest compared to other terrorist charges.

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<sup>1422</sup> Anderson, D (2013). The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 And Part 1 of the Terrorism Act 2006, Independent Reviewer of Terrorism Legislation, para. 11.2

<sup>1423</sup> Anderson, D (2012). The Terrorism Acts in 2011, supra note 335, para. 10.5

<sup>1424</sup> R v Roddis [2009] EWCA 58

<sup>1425</sup> Walker, C. (2013). Terrorists on Trial: An Open or Closed Case? In Cole, D., et al, supra note 185

<sup>1426</sup> See witness testimony of Professor Clive Walker and David Anderson, QC at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, supra note 1378

<sup>1427</sup> Ibid

<sup>1428</sup> McGarrity, N. and Williams, G. (2010). When Extraordinary Measures Become Normal: Pre-emption In Counter-Terrorism Laws. In Lynch, A., et al (editors). *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11*. (Oxon, Routledge), p. 132

<sup>1429</sup> See witness testimony of Professor Clive Walker, at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, supra note 1378

<sup>1430</sup> Home office (2012). Home Office Statistical Bulletin Operation Of Police Powers Under The Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes And Stops And Searches (HOSB 11/12), Persons charged by Offence (Tables 1.03a, b and c)

<sup>1431</sup> Ibid, Persons Convicted by Offence (Tables 1.11a, b and c)

However, a question that falls for consideration in terms of our discussion is whether section 5 is suitable viable alternative to 28 day pre-charge detention in times of exceptional circumstances. David Anderson QC, the government's independent reviewer of terrorism legislation, argues that the availability of different options, including section 5 TA 2006, 'do not extinguish the need for some sort of contingency'.<sup>1432</sup>

Considering some of the statistics for the detention of terrorist suspects held for more than 14 days becomes relevant as a mechanism to test the utility of section 5. There were a total of 11 suspects held beyond 14 days between 2006 and 2007.<sup>1433</sup> Four of the terrorist suspects held between 19-28 days were charged under section 5 TA 2006.<sup>1434</sup> As discussed in the previous sections in this chapter, all these arrests were related to Operation Seagram, Operation Overt and Operation Gingerbread. Moreover, of those operations, only Operation Seagram triggered exceptional circumstances. However, even in the absence of exceptional circumstances and with the availability of section 5 TA 2006, the prosecution did not manage to bring charges within 14 days. Therefore, although we cannot underrate the utility of section 5, we cannot conclusively say that such a provision is the best alternative for the operational gap left in the absence of 28 days pre-charge detention.

With there apparently being no appetite for 'holding' charges,<sup>1435</sup> and with all the practical problems of the threshold test discussed above, the question is what would happen if a need for a lengthy detention in complex terrorism cases arises.<sup>1436</sup> As discussed, the threshold test cannot be used for difficult and complex cases. Having contingency powers of a 28-day maximum remains the

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<sup>1432</sup> Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, supra note 1378, para. 38

<sup>1433</sup> Home Office (2011). Operation of Police Powers under the Terrorism Act 2000 and Subsequent legislation: Arrests, outcomes; and stop and searches; Quarterly update to September 2010. United Kingdom, 2011, table 1.3

<sup>1434</sup> Berman, G. and Horne, A. (2012), supra note 1364

<sup>1435</sup> Home Office (2006). Reply to the Twenty-Fourth Report, supra note 1417, para. 140. Holding charges will be discussed in detail shortly.

<sup>1436</sup> Some of the complex terrorism cases that required extended period of detentions and lengthy investigations before arrest was made are mentioned in Home Affairs Committee (2006). Terrorism Detention Powers, Fourth Report, supra note 1100, p. 56 et seq.

only viable option to compensate for the current operational gap left in the law on pre-charge detention.

## 5.7 Length of Pre-charge Detention in the US

In the US, we do not find a fixed period of detention compared to the UK (14 days) or in Ethiopia (28-120 days). However, US authorities use measures that are 'rooted in an executive model of counter-terrorism as opposed to a legislative one'<sup>1437</sup> that enable them to orchestrate pre-charge detention equivalent to, possibly longer than, the 28 day maximum intended as a contingency power for the UK via the Protection of Freedom Act 2012. These measures are discussed below.

### 5.7.1 Detention under the Material witness Statute

Detaining people as a material witness has a "widespread existence"<sup>1438</sup> in the US. The practice "... serves a vital and useful public purpose in the prosecution of felony offenses."<sup>1439</sup> According to 18 USC § 3144<sup>1440</sup>, US authorities are required to obtain a court issued warrant in order to arrest a person as a material witness. It must be shown that the material witness has information pertaining to 'criminal proceedings'<sup>1441</sup> and that it is 'impracticable to secure the presence of the person by subpoena'<sup>1442</sup>. To give an example, a person who is a flight risk would be appropriately held under this law.<sup>1443</sup> By holding its constitutionality,<sup>1444</sup> the US Supreme Court has held that 'citizens' have a 'duty to disclose knowledge of crime'.<sup>1445</sup>

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<sup>1437</sup> Roach, K. (2012), supra note 193, p. 165

<sup>1438</sup> State of Iowa, Appellee, v. Antonio Hernandez-Lopez, Joe Edward Ramirez, and Alberto Ruiz, Appellants. (206/00-1855. 2002)

<sup>1439</sup> Ibid

<sup>1440</sup> Entitled 'Release Or Detention of a Material Witness'

<sup>1441</sup> This is interpreted to include testimony before a grand jury' as well as 'pre-trial' proceedings. See United states v Awadallah 349 F.3d 42 (2d Cir. 2003)

<sup>1442</sup> 18 USC § 3144

<sup>1443</sup> Ashcroft v Al-Kidd, supra note 1332

<sup>1444</sup> see Barry v United States ex rel. Cunningham, 279 U.S. 597, 617 (1929)

<sup>1445</sup> In re Francisco M., 103 Cal. Rptr. 2d 794, 802 (Cal. Ct. App. 2001)

However, the Material witness Statute does not set a time limit on a person's detention under the statute. It simply says that a material witness may not be released "...for a reasonable period of time until the deposition of the witness can be taken". The absence of a time limit 'provides cold comfort'<sup>1446</sup> to a material witness. The only superficial time limit available is the requirement to provide "...a biweekly report to the court listing each material witness held in custody for more than ten days and justifying the continued detention of each witness."<sup>1447</sup> Whether this requirement provides an effective check on executive zeal is debatable.<sup>1448</sup>

The absence of a specific time limit on the detention of material witnesses seems to have led to its (mis)use as a tool for the detention of several terrorist suspects in the aftermath of the 9/11. Although the law is not a counter-terrorism measure by design, it has been a 'favoured tool'<sup>1449</sup> of officials and adapted 'to make it fit a new set of circumstances for which it was not designed'.<sup>1450</sup> For instance, the statute is one of the instruments that has been misused to 'effectuate preventive detention after 9/11'.<sup>1451</sup>

The total number of terrorist suspects arrested under this law is not officially available. For this reason, our discussion here will be limited to the most high profile cases.

The instance of the statute's misuse appeared in 2003 in the case of Awadallah.<sup>1452</sup> Awadallah was detained for twenty days as a material witness based on information gleaned from one of the 9/11 terrorist suspects. However, Awadallah was arrested without a warrant, was not informed of his Miranda

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<sup>1446</sup> United states v Awadallah, supra note 1441

<sup>1447</sup> Ibid

<sup>1448</sup> Stoller, H., et al (2004). Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy. 22(1) *Yale Law & Policy Review* 197; see also Cochran, D. Q. (2010). Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start? 18 (1) *George Mason Law Review* 1

<sup>1449</sup> Beckman, J. (2007). *Comparative Legal Approaches to Homeland Security and Anti-Terrorism*. (England, Ashgate Publishing Limited), p.33

<sup>1450</sup> Cochran, D. Q. (2010), supra note 1448

<sup>1451</sup> David, C. (2009). Out of the Shadows: Preventive Detention, Suspected Terrorists, and War. 97 *California Law Review* 693

<sup>1452</sup> United states v Awadallah, supra note 1441



rights, nor did the authorities have a warrant to search his home and car.<sup>1453</sup> As discussed previously in this chapter, the principle in the Fourth Amendment is that the police need to obtain a warrant in order to 'seize' a person. However, officials may arrest an individual without a warrant if there is probable cause that the individual is committing or is about to commit a crime. Although Awadallah was not suspected of in any criminal or terrorist activities, the US Court of Appeals for the Second Circuit upheld his detention by reversing the ruling of the US district judge who held that Awadallah was illegally detained under the Material Witness Statute.

Another high profile 'misuse' of the above law was seen in the case of Abdullah al-Kidd.<sup>1454</sup> The case was 'the first' challenging the government's witness detention practices to reach the Supreme Court.<sup>1455</sup> Al-Kidd was detained for 16 days as a material witness without being charged or called as a witness. Al-Kidd brought a suit against the then US Attorney General, John Ashcroft, for misuse of the Material Witness Statute. However, the US Supreme Court dismissed Al-Kidd's attempt, stating that "...the objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the ground that the arresting authority allegedly had an improper motive".<sup>1456</sup>

The decision of the Supreme Court in this case has generated wide academic criticism.<sup>1457</sup> For some, the decision is a general reflection of the judiciary's attitude to the "...cognitive biases and excessive pressure to defer to the

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<sup>1453</sup> Ibid

<sup>1454</sup> Ashcroft v Al-Kidd, supra note 1332

<sup>1455</sup> Gouldin, L. P. (2012). When Deference is Dangerous: The Judicial Role in Material-Witness Detentions 49 (3). *American Criminal Law Review* 1333

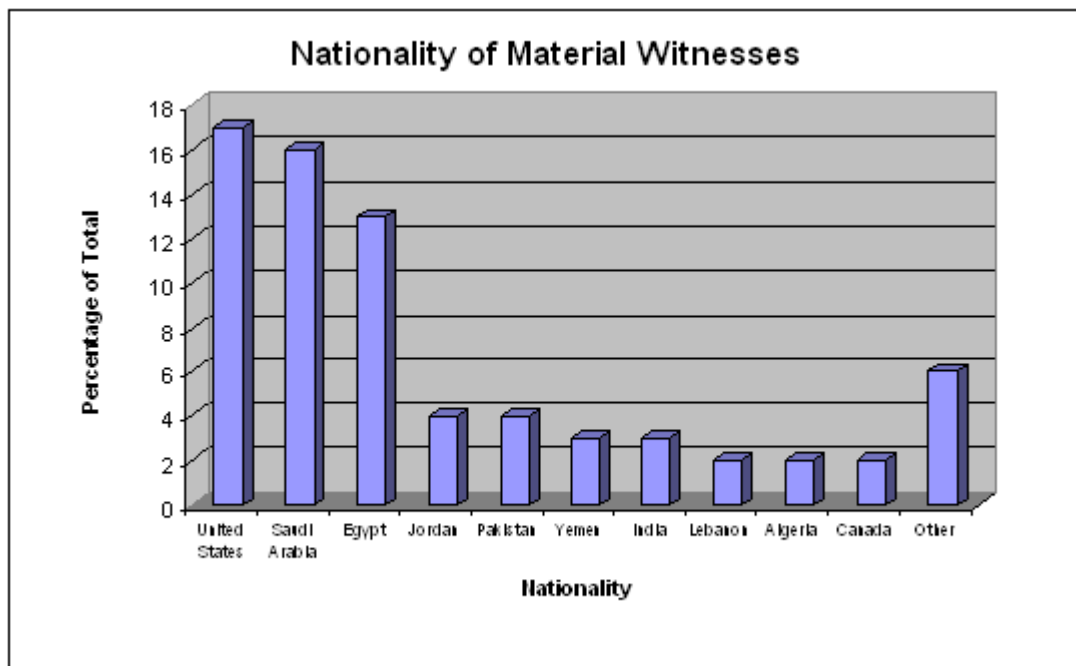
<sup>1456</sup> Ashcroft v Al-Kidd, supra note 1332

<sup>1457</sup> See Recent Decisions: Constitutional Law-Arrest and Detention Under The Material Witness Statute-Objectively Reasonable Arrest Did Not Violate Fourth Amendment. 81 *Miss. L.J.* 621; see also Gouldin, L. P. (2012). supra note 1455; see also Oliver, W. (2005). Material Witness Detentions After al-Kidd. 1(2). *NYU Journal of Law & Liberty*; see also Cone, C. (2012). *Text and Pretext: The Future of Material Witness Detention after Ashcroft v. Al-Kidd.* 62 (2) *American University Law Review* 333

executive branch"<sup>1458</sup> in terrorism cases after 9/11. For others, the decision was ‘a tempest in a teapot’<sup>1459</sup> that has been building for some time.

However, there are also other cases where individuals have been arrested in connection with specific terrorist attacks but later released without charge. The case of Brandon Mayfield is notable. He was arrested as a material witness in relation to the 2004 Madrid terrorist bombings.<sup>1460</sup> However, it was later discovered that the arrest was a case of mistaken identity.<sup>1461</sup> Only in this case has the US government apologised to and compensated the victim, despite the fact that the number of people detained via the misuse of the law had reached 70 at one point according to reports.<sup>1462</sup> As shown in the table below, the law has been arbitrary applied to US and non-US citizens alike.

Table 4.2 Arrest of Material witness by nationality<sup>1463</sup>



<sup>1458</sup> Gouldin, L. P. (2012), supra note 1455

<sup>1459</sup> Oliver, W. (2005), supra note 1457

<sup>1460</sup> U.S. Department of Justice (2006). *A Review of the FBI's Handling of the Brandon Mayfield Case, Office of the Inspector General Oversight and Review Division*, January 2006

<sup>1461</sup> Mnookin, J. L. (2004). The Achilles' Heel of Fingerprints, 29 May, *Washington Post*

<sup>1462</sup> Barnes, R. (2010). Supreme Court to Decide Whether Ashcroft Can be Sued by Detained Citizen, 18 October, *Washington Post*

<sup>1463</sup> Source: Human Rights Watch (2005). *USA: Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*

To sum up, the above cases shows that the law is not used to detain people ‘with information about the wrongdoing of others would turn up to testify” but rather to ‘hold people themselves suspected of links to terrorism’.<sup>1464</sup> Moreover, the law is not only used to circumscribe constitutional limitations on detaining suspects, but it is also used ‘as information gathering device’<sup>1465</sup> in relation to terrorism investigation.

### 5.7.2 Detention under section 412 of the USA PATRIOT Act 2001

Besides the above vague application of ordinary US law to terrorism cases, US authorities have also utilised other pre-charge detention powers under the US Patriot Act. The USA PATRIOT Act contains many provisions that deal with different issues.<sup>1466</sup> However, the discussion in this section will be limited only to the controversial facet of the Patriot Act i.e. the length of detention of terrorist suspects.

Section 412<sup>1467</sup> of the USA PATRIOT Act authorises the detention of aliens who participate in terrorism or pose a threat to national security.<sup>1468</sup> Unlike the Material Witness Statue, the USA PATRIOT Act sets some controversial time limits. Accordingly, the US Attorney General is required to initiate removal proceedings or charge the alien with criminal offences within seven days.<sup>1469</sup> However, if the alien is not removed for any reason within 90 days of removal order,<sup>1470</sup> he could be detained for a further six months.<sup>1471</sup> The US Supreme

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<sup>1464</sup> Liptack, A. (2011). The 9/11 Decade: Criminal Law Changed Surprisingly Little after the Attacks. How Law was Enforced is Another Matter, 7 September, *the New York Times*

<sup>1465</sup> Pallitto, R. M. and Weaver, W. G. (2007). *Presidential Secrecy and the law*. (Maryland, Johns Hopkins University Press), p.145

<sup>1466</sup> To mention few: surveillance procedures, funding of terrorism and Anti-money-laundering, border security, etc. It is generally argued that this Act contains the ‘most intrusive provisions’. For further discussion, see Donohue, L.K. (2008), supra note 203, pp.15 and seq.

<sup>1467</sup> Entitled ‘Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review’; now codified at 18 U.S.C. § 1226 a. It is also referred as Immigration and National Authorisation Act section 236A; see also 18 U.S.C. § 3144.

<sup>1468</sup> See 18 U.S.C. § 1226 a (3)(b)

<sup>1469</sup> See 18 U.S.C. § 1226 a (5)

<sup>1470</sup> See 8 USC § 1231 - Detention And Removal of Aliens Ordered Removed

<sup>1471</sup> See 18 U.S.C. § 1226 a (60)

Court in *Zadvydas v. Davis*<sup>1472</sup> has accepted six months as a 'reasonable' period to detain aliens after removal order.<sup>1473</sup>

There are some problems with the time limit stipulated under the US Patriot Act. First, the Act provides the possibility of detaining a suspect anything from seven days to nine months (90 days+ 6 months). Moreover, the six month time period does not prohibit the possibility of renewing it several times.<sup>1474</sup> This in effect authorises "...the potential for indefinite detention of these non-citizens who have been certified as terrorists."<sup>1475</sup> For instance, in *Turkmen v Ashcroft*, it was revealed that the defendants were held from three to eight months after receiving final orders of removal or grants of voluntary departure.<sup>1476</sup>

The second problem is the flexibility of section 412 of the US Patriot Act, which allows the detention of an alien for a further six months if a threat to "...the national security of the United States or the safety of the community or any person" is perceived.<sup>1477</sup> This is potentially contrary to the letter, if not, the spirit of US Supreme Court pronouncements on the subject, which hold that indefinite detention of immigrants for flawed reasons would be unconstitutional.<sup>1478</sup> The inclusion of vague terms such as threat to 'the community or any person' is intended to "...detain aliens without a hearing and without a showing that they pose a threat to national security or a flight risk".<sup>1479</sup>

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<sup>1472</sup> *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001)

<sup>1473</sup> For further discussion, see Aleinikoff, T. A. (2002). Detaining Plenary Power: The Meaning and Impact of *Zadvydas v. Davis* 16 *GEO. IMMIGR. L.J.* 365

<sup>1474</sup> American Civil Liberties Union (2003). The USA PATRIOT Act and Government Actions that Threaten Our Civil Liberties, 11 February

<sup>1475</sup> Keith, K. (2004). In the Name of National Security or Insecurity? The Potential Indefinite Detention of Noncitizen. 16 *Fla. J. Int'l L.* 405

<sup>1476</sup> See *Turkmen v Ashcroft* 02-cv-02307 (2002), p. 4; see also *Turkmen v. Ashcroft*, No. 02 Civ. 2307(JG), 2006 WL 1662663, (E.D.N.Y. June 14, 2006); see also *Turkmen v Ashcroft* Docket Nos. 06-3745-cv(L); 06-3785-cv(Con); 06-3789-cv(Con); 06-3800-cv(Con); 06-4187-cv (XAP) (2008).

<sup>1477</sup> See 18 U.S.C. § 1226 a (6)

<sup>1478</sup> *Zadvydas v. Davis*, supra note 1472 ( though the US Supreme Court has recognised the possibility of having special procedures in relation to terrorist suspects, it has generally rejected the indefinite detention of 'aliens ordered removed for many and various reasons, including tourist visa violations')

<sup>1479</sup> Cole, D. (2002). Enemy Aliens. 54 *Stanford Law Review* 953; see also Aleinikoff, T. A. (2002), supra note 1473

Finally, it could be argued that the executive's incongruous approach to indefinite detention of aliens is further manifested by the fact that "...no bail is available and only a hearing can determine whether the alien qualifies as a criminal or terrorist alien."<sup>1480</sup>

### 5.7.3 Indefinite Detention of Terrorist Suspects at Guantanamo Bay

Indefinite detention of alleged enemy combatants at Guantanamo Bay (Guantanamo)<sup>1481</sup> is another controversial initiative for the detention of terrorist suspects in the US. The declaration of a 'Global War on Terror', coupled with the full backing of the US Congress to fight it, gave the former Administration free rein to use all "necessary and appropriate force"<sup>1482</sup> against the 9/11 perpetrators. A further Presidential Decree paved the way for the mass detention of terrorist suspects at Guantanamo.<sup>1483</sup> The US government has used every trick in the book since then to deprive the Guantanamo detainees of access to civilian courts. The Detainee Treatment Act of 2005<sup>1484</sup>, struck down by the US Supreme Court in *Hamdan v Rumsfeld*,<sup>1485</sup> and the Military Commissions Act of 2006,<sup>1486</sup> again rejected by the US Supreme Court in *Boumediene v Bush*<sup>1487</sup> are examples. In *Hamdan*, many of the procedures of the military Commission established to try Guantanamo detainees, as established by Military Commission Order No. 1, were found to be incompatible with domestic US laws and international humanitarian laws.<sup>1488</sup> Whereas in *Boumediene*, the US Supreme Court held that stripping of detainees right to *habeas corpus* under the Military Commissions Act of 2006 was unconstitutional.

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<sup>1480</sup> Siskin, A. (2012). *Immigration-Related Detention: Current Legislative Issues*. (CRS Report for Congress Prepared for Members and Committees of Congress, Congressional Research Service 7-5700) , 12 January

<sup>1481</sup> For legal advantages of detention at Guantanamo, see Donohue, L.K. (2008), *supra* note 203, p. 73

<sup>1482</sup> Authorization for Use of Military Force 2001 (115 STAT. 224 PUBLIC LAW 107-40-SEPT. 18, 2001)

<sup>1483</sup> Military Order of 13 November 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 66 F.R. 57833 (Nov. 16, 2001)

<sup>1484</sup> See section 1005(e) of Detainee Treatment Act of 2005 (DTA), Division A, Title X of the the United States Senate Department of Defense Appropriations Act

<sup>1485</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)

<sup>1486</sup> The Military Commissions Act of 2006 ( HR-6166)

<sup>1487</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008)

<sup>1488</sup> For further discussion see Donohue, L.K. (2008), *supra* note 203, pp. 86-88

Moreover, President Obama authorised an Executive Order that enables the US government to detain Guantanamo detainees indefinitely without trial.<sup>1489</sup>

According to the executive order;

*... the Executive Order applies to at least 48 of the 172 detainees...[T]hese groups could not be prosecuted in military commissions or in Federal court because evidentiary problems would hamper a trial. These detainees remain a serious threat and could not be safely repatriated or resettled in a third country.*<sup>1490</sup>

In a further exercise of executive power,<sup>1491</sup> President Obama has also authorised the indefinite detention of 'American terrorism suspects arrested on US soil'.<sup>1492</sup>

The conditions and the length of detention at Guantanamo have caused immense controversy ranging from the status of these prisoners *vis-à-vis* international humanitarian law and human rights law.<sup>1493</sup> Some of the questions raised include: whether the US is at war, whether the Genève convention does apply and, therefore, whether the detainees are prisoners of war and thus entitled to protection under international humanitarian law.<sup>1494</sup>

Furthermore, accusations relating to the prevalence of torture<sup>1495</sup> and the indefinite detention<sup>1496</sup> of terrorist suspects have been disregarded by the US.

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<sup>1489</sup> Executive Order 13567. Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force

<sup>1490</sup> Finn, P. and Kornblut, A. E. (2011). Obama Creates Indefinite Detention System for Prisoners at Guantanamo Bay. 8 March, *Washington Post*

<sup>1491</sup> See section 1021 and 1022 of the National Defense Authorization Act (NDAA) 2011 for indefinite detention of US citizens suspected of terrorism

<sup>1492</sup> McGreal, C. (2011). Military Given Go-Ahead to Detain US Terrorist Suspects Without Trial, 15 December, *the Guardian*

<sup>1493</sup> Hol, A. M., et al (2005). *Security and Civil Liberties: The Case of Terrorism*. (Intwerpen, Intersentia)

<sup>1494</sup> Pellet, A. (2001). No this is not War! The Attack on the World Trade Center: Legal Responses. *European Journal of International Law, Discussion Forum*, 3 October; see also Cassese, A (2001). Terrorism is also Disrupting Some Crucial Legal Categories of International Law. 12 (5) *European Journal of International Law* 993; see also Aldrich, G. H. (2005). The Taliban, Al-Qaeda, and The Determination of Illegal Combatants, 96 *A.J.I.L.* 891

<sup>1495</sup> Greenberg, K. J. (2006). *The Torture Debate in America*. (Cambridge, Cambridge University Press)

<sup>1496</sup> Steyn, J. (2004). Guantanamo Bay: The Legal Black Hole. 53 *International and Comparative Law Quarterly* 1

The detention of prisoners at Guantanamo has been said to be the most 'illegal, immoral and unjust'<sup>1497</sup> counter-terrorism measure that has been, and continues to be, implemented by the US Administration since 9/11. Here, measures of detention get as close as any country has come to the true meaning of 'indefinite'; prisoners are detained not for days or months, but for years without being charged or tried.

What could be concluded from the above discussion is that the practice of detention in the US is absolutely longer than the 14 days pre-charge detention currently allowed in the UK. Thus, the availability of 28 days pre-charge detention in some exceptional circumstances is not as evil as it sounds when compared to the US. Moreover, in the next section, we will discuss which of the pre-charge detention powers available in the UK and the US are more effective in replacing the 120-days pre-charge detention of terrorist suspects in Ethiopia.

## **5.8 Length of Pre-charge Detention in Ethiopia**

### ***5.8.1 Investigative Remand under the Ethiopian Criminal Procedure Code of Ethiopia***

There is a Constitutional guarantee to the effect of bringing an arrested person before a court within 48 hours.<sup>1498</sup> The right to *habeas corpus* is also available under Article 19(4) of the FDRE Constitution and Article 177(1) of the Ethiopian Criminal Procedure Code. As discussed in the preceding sections, the Ethiopian Criminal Procedure Code also distinguishes between arrests with warrant and without warrant. These are covered from Articles 49 to 55 of the code.

Article 59 of the Ethiopian Criminal Procedure Code provides three alternatives for a judge once the suspect is brought before him. Article 59(1) states that "the court before which the arrested person is brought shall decide whether such person should be kept in custody or be released on bail." The alternatives

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<sup>1497</sup> Roberts, R.C. (2007), The American Value of Fear and the Indefinite Detention of Terrorist Suspects. 21( 4) *Public Affairs Quarterly* 405

<sup>1498</sup> Article 19(3) of the FDRE Constitution and Article 29 of the Ethiopian Civil Procedure Code

provided under Article 59(1) (remand for investigation) and Article 59(2) (remand for trial) of the Ethiopian Criminal Procedure Code are not the same. The former is given when the investigation is not completed and the suspect cannot be released on bail, whilst the latter applies when the investigation is completed.

Accordingly, the police can apply for the suspect to be remanded during the time of the investigation. Once an order for remand for investigation is given, a question may arise as to whether the suspect can request a release on bail until the investigation is completed. Article 60 of the Ethiopian Criminal Procedure Code seems to block such an alternative; the wording of the Article states that remanded persons "shall be detained on conditions prescribed by law relating to prisons." Thus, once remanded, the suspect will remain under police custody.

Article 59 of the Ethiopian Criminal Procedure Code, however, does not provide for the immediate release of the suspect. The fourth alternative is provided under articles 177-179 of the Ethiopian Civil Procedure Code. Accordingly, "where the court is satisfied that the restraint is unlawful, it shall order the immediate release of the person arrested."<sup>1499</sup> But this Article does not specify the circumstances which guarantee immediate release for unlawful arrest. In general, the four alternatives under the Ethiopian Civil Procedure Code and the Ethiopian Criminal Procedure Code are; remand for trial, remand for investigation, bail or immediate release of the suspect for unlawful arrest.

Contrary to the law, the practice in Ethiopia shows that not all arrestees are produced before a court within 48 hours. The following cases from table 2.3 shows that Ethiopian courts granted remand for investigation even though the suspects were brought after 48 hours.<sup>1500</sup> Despite recognition of the right of access to a court of law within 48 hours, judges repeatedly fail to refuse remand for investigation requested by the police when suspects are brought after the

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<sup>1499</sup> Article 179 (2) Ethiopian Civil Procedure Code

<sup>1500</sup> Public Prosecutor v Muhamed Mahemmed Farah, supra note 412 (the defendants in this case were detained between 15 and 67 days before they were interrogated by the police after the initial arrest. This is against Article 27 of the Criminal Procedure Code which provides for immediate interrogation of arrested persons once their address and identity is established. ); see also a discussion below in the case of Yohannes Terefe.



expiry of the 48 hours time limit. Although the original detention might be lawful, the subsequent failure of the police to bring the suspects before a court entails a serious violation of liberty.

The very purpose of a court appearance is to examine the adequacy of the reasons why the individual is deprived of his liberty in the first place. It also gives the arrestee the opportunity to inform a court of any ill treatment during the custody. However, it would seem that practice indicates the Ethiopian courts tend to grant remand for investigation upon the request of the police without questioning the suspect or compelling the police to justify the arrest. In most cases, the Ethiopian courts grant remand after a request by the police,<sup>1501</sup> so there is no opportunity to subject the request for remand to scrutiny.

However, the major defect of the Ethiopian Criminal Procedure Code is the amount of time granted for a remand order. Article 59(3) Ethiopian Criminal Procedure Code provides that "no remand shall be granted for more than 14 days on each occasion." The first problem with this Article stems from a lack of judicial intervention once the remand is granted. Even at the initial application, the Ethiopian courts do not assess the complexity of the case or why a lengthy period is required in the first place or whether there is reasonable suspicion for the arrest. Judges appear to show even less enthusiasm towards the kind of evidence the police are expected to uncover within 14 days.

When the police return for an extension to their initial request by 14 days, there is minimum judicial scrutiny of why the police failed to complete the investigation within the first 14 days.<sup>1502</sup> Furthermore, Article 59(3) Ethiopian Criminal Procedure Code places no limit on the number of occasions the police may request for further 14 days.

### ***5.8.2 Investigative Remand for Terrorist Suspects under the Ethiopian Criminal Procedure Code***

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<sup>1501</sup> See the above table

<sup>1502</sup> Ibid

Although the 2004 Ethiopian Criminal Code repealed the 1961 Ethiopian Penal Code, it does not have specific provisions for terrorism. However, as shown in table 4.3 below, there are a number of cases where terrorism has been dealt with under the 1961 Code's provisions. As shown below, release of terrorist suspects during the first court appearance is very rare. The usual practice is that the suspects would appear before an Ethiopian court within 48 hours and the police will request additional 14 days, which is the maximum that can be requested at a given time, though they can request the maximum period several times at the expiry of each period. As indicated in table 4.3, some suspects were bailed but only on their second or third appearance. But it was extremely difficult for suspects to be bailed during the first court production.

**Table 4.3: Terrorist Arrests and Probability of being released conditionally**

file No.	Number of defendants	Remanded for investigation	Unconditionally released	bailed	Remanded for trial
41/1996	4	0	0	0	4
8705/2003	2	0	0	0	2
9832/2003	2	2	0	0	2
238/1998	62	62	0	0	62
33101/2004	2	1	0	0	1
36268/2005	9	9	0	0	9
37299/2005	6	6	0	0	6
40783/2005	2	2	0	0	2
41449/2006	1	1	0	0	2
26858/2007	2	1	0	1	0
27536/2007	1	0	0	1	0

27720/ 2007	1	1	0	0	1
50798/ 2008	10	10	0	0	10
51539/ 2008	1	1	0	0	1
51550/ 2007	9	9	0	0	9
56118/ 2007	1	1	0	0	1
56550/ 2007	8	8	0	0	8
29574/ 2008	2	1	0	0	1
59989/ 2008	15	15	0	0	15
60086/ 2008	8	8	0	0	8
60575/ 2008	4	0	0	4	0
61663/ 2008	1	1	0	0	1
64246 /2008	1	1	0	0	1
71000/ 2009	124	124	0	0	124
77113/ 2009	4	0	0	0	4
81406/ 2009	46	40	6	0	40
89647/ 2010	10	9	1	0	9
112198/ 2011	4	4	0	0	4
?/2011	5	5	0	0	5
?/ 2011	24	8	0	0	8
?/ 2011	69	69	0	0	69
?/ 2011	20	20	0	0	20
?/ 2011	9	9	0	0	9

Similar to other criminal offences, there was minimum judicial scrutiny when the police requested additional periods for the investigations. The reluctance of the judges to intervene is partially attributable to the wording of Article 59(3) of the Ethiopian Criminal Procedure Code. This Article only sets the maximum remand period of 14 days on each court appearance. The wording of the Article does not seem to allow active judicial participation.

Another fascinating result that can be deduced from table 4.3 above is the practice of remanding the suspects for trial after the protracted investigation is completed. There is a higher percentage of remand for trial than the percentage for bail or unconditional release after the completion of the lengthy police investigation. Of the 390 arrests made, only 24 suspects were bailed, amounting to a mere 6% of the overall total terrorist arrests. The total number of unconditional releases after full trial was 58, which is around 14%. That means there were around 86% conviction rates of terrorist suspects under the Ethiopian Criminal Code. This begs the question whether the EATP was even necessary for a country where such high percentages of terrorist arrests led to conviction.

### *5.8.3 Pre-trial Detention (Investigative Remand) under the EATP*

Pre-charge detention is covered by Article 20 of the EATP, which states that once a suspect is arrested on reasonable suspicion of having committed an offence contrary to the EATP, an Ethiopian court "may give an order to remand the suspect for investigation or trial."

The wording of Article 20(1) of the EATP is different from Article 59(1) of the Ethiopian Criminal Procedure Code that provides three alternatives i.e. remand for trial, remand for investigation or release on bail. Article 20(1) of the EATP does not seem to provide bail as an alternative or a right to be released unconditionally during the first court appearance. Moreover, the said Article as stated above is not clear whether an Ethiopian court can decide between the two alternatives on its own initiative or only at the request of the police.

Article 20(2) of the EATP talks in terms of a request by the police for sufficient time to complete the investigation. Article 20(2) reads as follows: "if the investigation is not completed, the investigating police officer may request the court for sufficient period to complete the investigation." But it does not say anything on whether the police can also request for the suspect to be remanded. The police can request the necessary time to complete the investigation without actually requesting the suspect to be remanded.

But it makes no sense why the Ethiopian courts would remand the suspect on their own initiative without a request by the police. Despite the vagueness of Article 20(2), the practice of Article 20 of the EATP shows that the police apply for an investigative remand while still holding the suspect in their custody. For instance, a well known Ethiopian actor, *Debebe Eshetu*, was arrested on suspicion of being involved in the provision of support to terrorist organisations such as *Ginbot 7*. When he first appeared before the court on the 9<sup>th</sup> of September 2011, the judges failed to question the suspect upon the police's request for a 28 days pre-charge detention. *Debebe* was finally released without being charged after a lengthy detention period.<sup>1503</sup>

In another high profile arrest discussed in chapter three and four,<sup>1504</sup> several defendants were charged for various offences under the EATP. As shown in table 4.3, there were 24 defendants mentioned on the charge sheet. However, 16 of the defendants were charged in absentia. For this reason, only eight defendants were actually brought before the court. The defendants were remanded several times, with one of the defendants, *Yohannes Terefe*, telling the court that he was actually detained for 55 days in isolation before he was even brought before a court. Yet, that did not deter the court from remanding him for a further periods

The fate of the defendants in further cases charged under the EATP was the same: they were all remanded between 28 and 120 days. As discussed in chapter three

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<sup>1503</sup> See Zehabesha Amharic newspaper, issue No. 33, p.3; see also Nega, E. (2011). Debebe Eshetu's Arrest, supra note 780

<sup>1504</sup> See Anduemlem Arage v Public Prosecutor, supra note 763

and four in the case of *Elias Kifle*,<sup>1505</sup> the four defendants charged with him were remanded twice. In the case of *Abdiweli Mohammed Ismael*,<sup>1506</sup> four defendants, including two Swedish journalists, were charged under the EATP. The charges included, *inter alia*, rendering support for and participating in terrorist organisations. The two Ethiopian defendants pleaded guilty and were sentenced immediately, having been remanded for 28 days already. However, the two Swedish journalists were remanded for a total of 36 days. In general, the police were continually granted the minimum 28 days pre-charge while already holding the suspects. None of the suspects were released on bail. These are just some samples from table 4.3 that show the defendants charged in relation to terrorism are seemingly always remanded for at least the minimum term offered under the EATP, without being given the opportunity of release on their first court appearance.

According to Article 20(3) of the EATP, "each period given to remand the suspect for investigation shall be a minimum of 28 days; provided that the total time shall not exceed a period of four months." According to this sub-article, once the suspect is brought before an Ethiopian court, the minimum remand period that can be requested is 28 days. Why the legislature chose to set a minimum period instead of fixing the maximum period is very difficult to understand.

The primary purposes of lengthy pre-charge detentions of terrorist suspects in the UK are:<sup>1507</sup> "to uncover admissible evidences sufficient to put before the court; to gather background intelligence; to facilitate the carrying out of searches; to deal with special problems posed by international terrorism".

However, these justifications are difficult to fit in into Article 20(3) of the EATP where suspects can be locked up for a minimum of 28 days without a court knowing about the complexity of the case or the kind of evidence the police are attempting to uncover.

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<sup>1505</sup> See the cases of Public Prosecutor v Elias Kifle, et al, supra note 763 ; see also table 2.3 for details of the charges of the cases

<sup>1506</sup> Public Prosecutor v Abdiweli Mohammed Ismael, et al (112198/2011)

<sup>1507</sup> Walker, C. (2009), supra note 624, pp. 134

Moreover, one of the problems in the UK, as stated above, is the international nature of the threat and the complexity of sharing intelligence with other countries. However, this aspect is almost completely absent in Ethiopia. International terrorism is not a threat to the country, as yet. Over thirty years, the only notable terrorist case that had international connections was the attempted murder of the former Egyptian president Hosni Mubarak in Addis Ababa.<sup>1508</sup> Neither Al-Qaeda, nor any of the many other international terrorist organisations have ever posed a threat to Ethiopia. Most of the proscribed organisations are domestic political parties that have fallen out with the Ethiopian government.<sup>1509</sup> Furthermore, due to the poor technological developments in the country, investigating terrorism cases is not as complex as in the UK, where the police more readily face sophisticated terrorists. This begs the question why the country took the drastic measure of introducing a 28-day minimum pre-charge detention.

By granting a minimum of 28-day, the police and the Ethiopian courts are just guessing at the period that would be required to complete a particular terrorism case. Page three of the parliamentary minutes to the EATP states that Article 20(3) of the EATP is intended to rectify the problems associated with Article 59(3) of the Ethiopian Criminal Procedure Code. The latter Article fixes a maximum of 14 days pre-trial detention but there is no limit on the number of times the maximum days can be requested. As a result, the police can request 14 days as many times as they deem necessary. Thus, the EATP attempts to rectify that flaw by setting a minimum of 28 days and a maximum of four months pre-charge detention. But instead it brought the worst form of violation of liberty which has no equivalence with any other law in the world.

As discussed in the preceding sections, the UK's 28-day pre-charge detention period was widely criticised. However, it was rarely used in practice. That is why the UK government reverted to 14 days. It appeared that the EATP on pre-charge detention was modelled on the British experience. However, although it might be

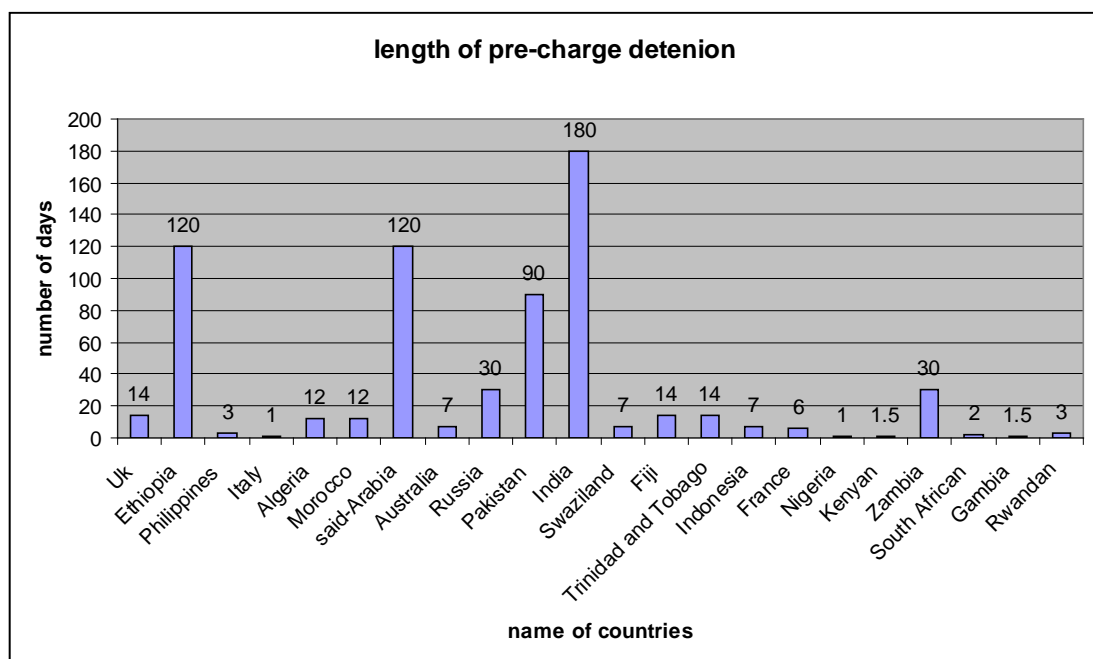
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<sup>1508</sup> Public Prosecutor v Sewfit Hassen Abdul Keni et, al (?/1997)

<sup>1509</sup> For details, see the discussions on *Ginbot 7*, *Kingit*, OLF and ONLF in chapter two

inspired by British law, there are no any substantive similarities between the two laws. First, the UK's 28-day maximum was renewable every year. The EATP does not provide for such a possibility. Second, British law sets a maximum period, whereas Ethiopian law sets a 28 day minimum and 120 days maximum. This is argued above to be too excessive. As indicated in the table 4.4 below,<sup>1510</sup> it is longer than all reviewed countries, bar India, and is certainly the longest in comparison to Western democratic countries.

**Table 4.4: Length of Pre-charge Detention in Selected Countries**



Third, the EATP does not provide for a periodic review of the arrest by the Ethiopian courts or by high-ranking officers before the first court production. In the UK, before a suspect is brought before a court, part II of schedule 8 to TA 2000 (as amended by the Criminal Justice Act 2003 and TA 2006), paragraphs 21-28 provide for review procedures post-arrest but before a court warrant for further detention is issued.

<sup>1510</sup> The lion's share of the data is taken from the following source: Human Rights Watch (2012). In the Name of Security: Counter-Terrorism Laws Worldwide since September 11 <http://www.unhcr.org/refworld/pdfid/4ff6bd302.pdf> . But the data for some of the countries is taken from their counter-terrorism laws



The above paragraphs specify the time interval for review, grounds for continued detention, the identity of the reviewing officer, representation during reviews, etc. However, the EATP does not provide such review procedures. Although there are some similar procedures under the Ethiopian Criminal Procedure Code, they are not nearly as strict as the schedule 8 procedures. For instance, Article 27 of the Ethiopian Criminal Procedure Code talks about interrogation post-arrest. But it does not specify review intervals. Under the TA 2000, the reviews take place at intervals of not more than 12 hours before a court-ordered extension is granted.<sup>1511</sup> Moreover, the TA 2000 provides for grounds where the review procedure can be postponed.<sup>1512</sup>

The absence of such reviews in Ethiopia is attributed to the fact that the EATP and the FDRE constitution demands production of the suspects within 48 hours. Once the accusation is read out to the suspect, the next step is rushing him to the nearest court. Article 28 of the Ethiopian Criminal Procedure Code gives a power to the police to release a suspect on bond "where it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of."<sup>1513</sup> In other words, the police cannot hold the suspect for more than 48 hours unless "local circumstances and communications"<sup>1514</sup> permit. This has been interpreted to refer to the distance of a police station from the nearest courts and the availability of courts during bank holidays or weekends.

Therefore, the Ethiopian Criminal Procedure Code and the EATP should be amended to allow for the necessary reviews before a suspect is rushed to a court where the Ethiopian court will inevitably find itself in the difficult position of granting 28 days minimum without getting all the circumstances of the case. Without such amendments, it does not allow for an outcome of Article 28 of the Ethiopian Criminal Procedure Code, which requires the suspect to be released on bond in doubtful circumstances.

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<sup>1511</sup> Para. 21 of schedule 8 to TA 2000

<sup>1512</sup> Para. 22 of schedule 8 to TA 2000

<sup>1513</sup> See section 41 (4) of TA 2000 for comparison

<sup>1514</sup> Article 29 of the Ethiopian Criminal Procedure Code; Article 19(2) of the EATP; Article 19(3) of the FDRE Constitution; note also that access to a solicitor or making intimation may be delayed under par 16(4) and (7) and Para 17(3) & (4) of schedule 8 to TA 2000

Fourth, neither the EATP nor the Ethiopian Criminal Procedure Code provide for the right to consult a solicitor or to communicate his detention to someone.<sup>1515</sup> The focus is rather on rushing the suspect to a relevant Ethiopian court to meet the deadline.

Fifth, under English law, there is no need for the suspect himself to appear before a court when an application for extension over 48 hours is made.<sup>1516</sup> The police may apply for an extension without a personal appearance by the suspect. Moreover, the English courts can issue a shorter period of pre-charge detention than is requested by the police.<sup>1517</sup> Moreover, according to section 23 (4) TA 2006:

*A judicial authority may issue a warrant of further detention in relation to a person which specifies a shorter period as the period for which that person's further detention is authorised if-*

*(a) the application for the warrant is an application for a warrant specifying a shorter period; or*

*(b) the judicial authority is satisfied that there are circumstances that would make it inappropriate for the specified period to be as long as the period of seven days...*

When the EATP was passed, for some reason the legislature preferred to omit section 23(4) of TA 2006 and a similar power is not given to the judiciary under the EATP. Although Ethiopian law guarantees a personal appearance within 48 hours, this right is meaningless because the Ethiopian courts do not have the power to issue shorter periods when they believe that issuing longer period is inappropriate. This is because section 20(3) of the EATP makes it mandatory for the judges to issue a minimum of 28 days. This effectively handicaps the judiciary's power to issue shorter pre-charge detention.

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<sup>1515</sup> Para 16(6)-(9) and Para 16(11)-16(19) of schedule 8 to TA 2000

<sup>1516</sup> Para 29-30 and 36 of schedule 8 to TA 2000 do not allow for personal appearance; see also the decision of the ECtHR in *Brogan v UK*, supra note 1251 (it has stated that with regard to terrorism cases 'the requirement under the ordinary law to bring the person before a court had been made inapplicable.)

<sup>1517</sup> See sections 29-36 of schedule 8 to TA 2000

Article 20(3) of the EATP is on a direct collision with Article 19(4) of the FDRE Constitution, which states that "in determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial." This part of the FDRE constitution is rendered ineffective, as there is no right to a speedy trial if a suspect is to be locked up for a maximum of four months without being charged. As held in the ECtHR case of *Winterwerp v the Netherlands*,<sup>1518</sup> the review must not be limited to bare legality of detention but "deprivation of liberty ... requires a review of lawfulness to be available at reasonable intervals." Other cases also affirm the importance of review of the original detention.<sup>1519</sup> However, the construction of the EATP in Ethiopia shows a distinct lack of similar safeguards at these earlier stages of the case.

Consequently, a court appearance within 48 hours becomes worthless unless a judge is empowered to review every aspect of the original detention and is able to issue shorter periods of pre-charge detention than is requested. Moreover, the effectiveness of this appearance is doubtful if the judges are not interested in questioning the suspect and arranging for representation by a solicitor.<sup>1520</sup>

Sixth, Ethiopian courts do not have access to the information that formed the basis of the reasonable suspicion. As held in the ECtHR case of *Chahal v UK*,<sup>1521</sup> such a problem engages Article 5(4) ECHR, which states that

*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

In Ethiopia, Article 19(4) of the FDRE Constitution has the same spirit as Article 5(4) ECHR, because the former states that:

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<sup>1518</sup> *Winterwerp v the Netherlands*, supra note 1247

<sup>1519</sup> See *X v the United Kingdom*, 5 November 198, Series A no. 46

<sup>1520</sup> See the discussion above on Ethiopian cases on terrorism

<sup>1521</sup> *Chahal v UK*, supra note 1254

*all persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest.*

Nevertheless, neither the Ethiopian judges nor the police consider it necessary to disclose the basis of reasonableness at the first appearance. After the coming into effect of the EATP, there were many terrorism related arrests.<sup>1522</sup> In most cases, the police managed to get the 28 days minimum detention without disclosing the basis of the reasonable suspicion for the arrest. This practice is undoubtedly against Article 19 (4) of the FDRE Constitution.

Seventh, a major problem of the pre-charge detention in Ethiopia is the absence of judicial safeguards. In the UK, a suspect is not entitled to present during the hearing to extend pre-charge detention and their solicitors are also excluded from obtaining the "information which was seen by the judge."<sup>1523</sup> The argument of the UK government was that "the suspect is entitled to be legally represented, to be present at the open part of the hearing" and "to get extensive information provided to him both in writing in advance and during proceedings through representations."<sup>1524</sup> However, the Joint Committee on Human Rights has rejected the Home Secretary's view by stating that withholding information from the defence engages Article 5 ECHR as held in *Garcia v Germany*.<sup>1525</sup> Accordingly, "equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to challenge the lawfulness of his client's detention."<sup>1526</sup> The Joint Committee on Human Rights concluded that suspects are "told very little about the reasons for being detained and therefore have very little that they can challenge at an extension hearing."<sup>1527</sup>

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<sup>1522</sup> Human Rights Watch (2012). World Report 2012: Ethiopia at <http://www.hrw.org/world-report-2012/ethiopia>

<sup>1523</sup> Joint Committee on Human Rights (2008). Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill: Thirtieth Report of session 2007-08. HL 172/HC 1077. London, TSO, para. 58

<sup>1524</sup> Ibid, para. 59

<sup>1525</sup> Ibid, para. 60

<sup>1526</sup> *Garcia Alva v Germany* (2001) 37 EHRR 335, cited in the above report, para. 39

<sup>1527</sup> Joint Committee on Human Rights (2008). Counter-Terrorism Policy and Human Rights (Thirteenth Report), supra note 1523, para. 61

Although the Joint Committee on Human Rights highlights issues of inadequacy within the current arrangements in the UK,<sup>1528</sup> UK law on pre-charge detention at least permits representation and disclosure of some information to a judge at the extension hearing. The EATP, on the other hand, is devoid of even these minimum safeguards. The only argument the police present during the extension is "we need 28 days extension because the proclamation says so."<sup>1529</sup> This is similar to the problems reflected in the UK where the police's "understanding and experience was that it was enough for them to show that more time was needed to convert intelligence to evidence and that the inquiry was being progressed diligently and expeditiously."<sup>1530</sup> However, as noted by the Joint Committee on Human Rights, this kind of practice can result in a violation of Article 5 ECHR. In the Ethiopian case, allowing pre-charge detention at the request of the police without further disclosure to the defence is against Article 19 of the FDRE Constitution.

## **5.9 Alternatives to the Current 120-day pre-charge detention under the EATP**

As discussed in the preceding sections, the EATP on pre-charge detention is excessive. Therefore, the sub-sections below offer some alternatives to shorten this excessive pre-charge detention of terrorist suspects.

### *5.9.1 Bailing Terrorist Suspects?*

The right to bail is one of the rights specifically enumerated under the FDRE Constitution. Accordingly, Article 19(6) of the FDRE Constitution states that:

*Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.*

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<sup>1528</sup> See Joint Committee on Human Rights (2010). Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In. Sixteenth Report of session 2009-10. Report, together with formal minutes and oral and written evidence. HL Paper 86 HC 111. London, TSO, para. 65-80

<sup>1529</sup> See for example *Public Prosecutor v Andualem Arage*, supra note 763

<sup>1530</sup> See Joint Committee on Human Rights (2010). Counter-Terrorism Policy and Human Rights (Seventeenth Report), supra note 1528, para. 71

Given that the right to bail is not an unconditional right, there are specific laws that govern the conditions under which a person may be granted his freedom pending the outcome of a criminal investigation or the conclusion of a verdict against him.

These conditions are stated under Articles 63 and 67 of the Ethiopian Criminal Procedure Code. The cumulative reading of Articles 28, 63 and 67 of that code states that granting bail is the sole authority of the judiciary. The Ethiopian courts thus consider both objective and subjective criteria in determining whether a person should be released on bail.

For some commentators,<sup>1531</sup> Article 63 is considered an objective criteria due to the fact that the judge has no option but to evaluate the appropriate law against the suspect and decide whether the charge "carries the death penalty, or rigorous imprisonment of 15 years or more and where there is no possibility of the person in respect of whom the offence was committed dying."<sup>1532</sup>

The other conditions stipulated under Article 67 of the Ethiopian Criminal Procedure Code are considered subjective criteria;<sup>1533</sup> these conditions are decided on case-by-case basis. This Article states that bail shall not be granted if:

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

However, it would seem that bail is an uncertain area for Ethiopia. The practice indicates that the Ethiopian courts are inconsistent in their approach to the law on bail.<sup>1534</sup>

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<sup>1531</sup>Metiku, G. (2012). The Right to Bail in Cases Involving Sexual Offences Against Children. *Abyssinia Law*, 5 March

<sup>1532</sup> Article 63(1) of the Ethiopian Criminal Procedure Code

<sup>1533</sup> Metiku, G. supra note 1531

Moreover, the legislature needs to take its fair share of the blame on the confusion over bail law as it tends to 'frequently amend' it.<sup>1535</sup> For instance,

*when the Anti-Corruption Rules were originally adopted, corruption was a bailable offence. By a minor amendment made few days later, corruption became a non-bailable offence. This Rule again was amended after few years in that only those corruption offences that are punishable by at least ten years of rigorous imprisonment were made non-bailable.*<sup>1536</sup>

This resulted in substantial confusion over the FDRE constitutional principle of non-retrospective application of a law<sup>1537</sup>; the Ethiopian government tried to use the non-bailable offences under the 'Amended Rule' against suspects who were already in police custody.<sup>1538</sup>

This problematic nature of Ethiopian bail law discussed above does not really help in trying to understand the provisions that govern terrorist suspects and their conditional release on bail. In the same manner as the Ethiopian Criminal Procedure Code, Article 20 of the EATP gives the Ethiopian courts the power to decide whether the arrestee should be remanded for trial or investigation. However, unlike the Ethiopian Criminal Procedure Code, the EATP does not state the conditions the Ethiopian courts need to consider in bail decisions. It simply states that once a person is brought before a court within 48 hours, the relevant Ethiopian court "may give an order to remand the suspect for investigation or trial."<sup>1539</sup> Moreover, Article 20(2) of the EATP states that "the investigating officer may request the court for sufficient period to complete the investigation."

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<sup>1534</sup> Assefa, S. K. (2010). *Criminal Procedure Law: Principles, Rules and Practices*. (USA, Xlibris Corporation.), p.235-244

<sup>1535</sup> Ibid, p. 234

<sup>1536</sup> Ibid

<sup>1537</sup> See Article 5 of the Ethiopian Criminal Code for non-retrospective application of a law

<sup>1538</sup> Assefa, S. K. (2010), supra note 1534, p. 127

<sup>1539</sup> Article 20(2) EATP

The EATP is vague on whether bail is allowed for terrorist suspects. Article 20(4) of the EATP declares that a "public prosecutor may appeal on bail conditions." But there has to be clear law which allows conditional release of terrorist suspects. The EATP does not seem to provide that. In such circumstances, how the prosecutor could appeal in bail cases remains unclear. On the other hand, it could be argued that Article 19(6) of the FDRE constitution, which guarantees conditional release of terrorist suspects, should apply to terrorism cases. If so, it makes sense to talk about the relevance of Article 20(4) of the EATP. Even Article 36(1) the EATP does not render ineffective the application of Article 19(6) of the FDRE constitution to terrorist suspects. Article 36 (1) of the EATP states that "no law, regulation, directive or practice shall, in so far as it is inconsistent with this proclamation, be applicable with respect to matters provided for by this proclamation." It, therefore, seems possible to apply Article 19(6) of the FDRE constitution to terrorist suspects.

However, Article 36(2) causes another problem. This sub-article states that the Ethiopian Criminal Code and the Ethiopian Criminal Procedure Code are applicable to terrorist suspects in so far as they do not contradict with the EATP. As discussed above, the relevant provisions of the Ethiopian Criminal Procedure Code those deal with bail are articles 63 and 67. These provisions do not prohibit allowing bail for terrorist suspects provided the applicants meet the conditions laid down. In addition, they do not distinguish between persons who are already charged and those who are under police investigation. The sticking point under the EATP is Article 20(5). It states that "if a terrorism charge is filed in accordance with this proclamation, the court shall order the suspect to be remanded for trial until the court hears and gives decision on the case."

In other words, once a terrorist suspect is charged, he could no way be released on bail. Article 20(5) effectively renders ineffective the application of articles 63 and 67 of the Ethiopian Criminal Procedure Code and Article 19(6) of the FDRE Constitution. Therefore, appeal by a Public Prosecutor based on Article 20(4) of the EATP is relevant to bail only before the suspect is charged. If he is charged, Article 20(5) of the EATP bars the Ethiopian courts from granting him bail.



The denial of bail to terrorist suspects who are already charged is problematic in Ethiopia. According to the TA 2000, police officers do not have the power to release on bail terrorist suspects who are arrested under section 41.<sup>1540</sup> As held in Duffy, the main problem with TA 2000 is that it does not have a "provision for conditional release on bail within the statutory scheme."<sup>1541</sup>

The absence of bail has been criticised by David Anderson, QC as exclusion unjustified by any "principled basis".<sup>1542</sup> The arguments provided against the prohibition include:<sup>1543</sup>

*Bail is available under PACE to those arrested on suspicion of offences under TA 2006; bail is available from the Special Immigration Appeal Commission in immigration cases, even when the person subject to deportation is a terrorist suspect; and, bail was available prior to TA 2000 from a High Court Judge in Northern Ireland in a terrorist case.*

David Anderson, QC is not the only person who argues in support of the introduction of bail under section 41 TA 2000.<sup>1544</sup>

As discussed, the EATP, on the other hand, does not give the police the power to release terrorist suspects conditionally on bail. But in ordinary crime cases, Article 28 of the Ethiopian Criminal Procedure Code gives a power to the police to release a suspect on bond "where it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence

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<sup>1540</sup> R (I) v (1) City of Westminster Magistrates' Court (2) Chief Constable of Greater Manchester Police (Defendants) & Crown Prosecution Service (Interested Party) [2008] EWHC 2146 (Admin); see also Emmerson, B. et al. (2012), supra note 920

, p. 360 ("because Sch. 8 proceedings are not proceedings within in ss.3 or 3A of the Bail Act 1976, there exists no power vested in the police, or the judge, to grant bail. However ... the absence of any bail jurisdiction under what was then potentially a 30-day period of incarceration has been held not to breach art. 5.")

<sup>1541</sup> Re: Duffy Judicial Review (No. 2) [2011] 2 All ER, 364, para. 31, cited in Emmerson, B. et al. (2012), supra note 920, p. 360

<sup>1542</sup> Anderson, D (2012). The Terrorism Acts in 2011, supra note 335, para. 7.71

<sup>1543</sup> Ibid

<sup>1544</sup> See Walker, C. (2011), supra note 224; see also Joint Committee on Human Rights (2008). Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill: Twentieth Report of session 2007-08. Report together with Formal Minutes and Written Evidence. HL Paper 108 HC 554. London, TSO; see also Joint Committee on Human Rights (2010). Counter-Terrorism Policy and Human Rights (Seventeenth Report), supra note 1528, paras 84-94

complained of." However, unlike TA 2000, the EATP, specifically Article 20(5), contains a novel provision in the sense that once a terrorist suspect is charged, there is no possibility of releasing him conditionally on bail.

The ECtHR held that Member States could "justify continued detention provided there are relevant and sufficient reasons to show that detention was not unreasonably prolonged and contrary to Article 5 (3) (art. 5-3) of the Convention."<sup>1545</sup> Despite the difference in the construction, Article 5(3) ECHR has a similar message to that of Article 19(6) of the FDRE Constitution. The latter article is even more explicit; it clearly talks about the right to be granted bail pending trial or the conclusion of an investigation. In light of the FDRE Constitution, Article 20(5) of the EATP violates the right to liberty of terrorist suspects because the Ethiopian courts are not considering any 'sufficient reasons' why terrorist suspects charged under the EATP should be detained "until the court hears and gives decision on the case."<sup>1546</sup>

The attitude of Ethiopian courts towards bailing terrorist suspects who are already charged could shed light why Article 20(5) of the EATP is contrary to the constitutionally guaranteed right to liberty. In one case,<sup>1547</sup> nine defendants were charged with attacking the political and territorial integrity of the state. According to Article 241 of the Ethiopian Criminal code, such terrorist attacks, if proved, would entail "rigorous imprisonment from 10 years to 25 years, or in case of exceptional gravity, life imprisonment or death." This case came to the High Court before the enactment of the EATP. The applicants applied for a bail. Because the Ethiopian Criminal Procedure Code does not automatically rule out granting bail to anyone charged with serious criminal offences (except under the conditions listed down under Article 63 and Article 67 of the Criminal Procedure Code), the Ethiopian court in this case had exhausted all 'relevant and sufficient' grounds before it turned down the application.

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<sup>1545</sup> Wemhoff v Germany (1979-80) 1 EHRR 55 (App No 2122/64), para12

<sup>1546</sup> Article 20(5) of the EATP

<sup>1547</sup> Public Prosecutor v Adam Ahmed et al. (51550/2007)

In other cases,<sup>1548</sup> defendants were charged with violating Article 238(1) of the Ethiopian Criminal Code, which states that "whoever conspires to overthrow, modify or suspend the Federal or State Constitution" shall be punished with three years to life imprisonment depending on the gravity of the case. The defendants' application for bail was rejected by the Ethiopian High Court, which was appealed. The Ethiopian Supreme Court reversed the decisions of the lower court and granted bail to the applicants. It reasoned that the serious nature of the charges filed against the defendants should not be the only reason to deny bail to the applicants.

In the opinion of the Ethiopian Supreme Court in the above case, an application for bail will be denied only if the two cumulative criteria of Article 63 of the Ethiopian Criminal Procedure Code are satisfied. According to that article, a charge should not "carry the death penalty or rigorous imprisonment for fifteen years or more." In addition, it must be stated that "there is no possibility of the person in respect of whom the offence was committed dying." Unless these two elements are satisfied, the serious nature of the charges does not preclude courts from granting bail to individuals charged with terrorism.

These decisions support the argument that Article 20(5) of the EATP needs to be amended. Despite the decision of the Ethiopian Supreme Court in mind, lower courts are still inconsistent in their approach to bailing terrorism suspects.<sup>1549</sup>

To make the provisions of the EATP more compatible with Article 19(6) of the FDRE Constitution, Article 20(5) of the EATP should be amended to allow bail for terrorist suspects who are charged, unless there is 'relevant and sufficient' reason to take a contrary decision. The conditions laid down under articles 63 and 67 of the Criminal Procedure code could be considered 'relevant and sufficient' grounds to deny bail. Doing so would lessen the need to detain terrorist suspects for up to 120-day under Article 20(3) of the EATP.

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<sup>1548</sup> Public Prosecutor v Eyob Tilahun, *supra* note 15; see also Public Prosecutor v Derege Kassa Bekele, *supra* note 15; see also Public Prosecutor v Shimels Degene, *supra* note 367

<sup>1549</sup> Public Prosecutor v Tefera Mamo Cherkos (General), *supra* note 64 (in this case, all defendants, except those tried in absentia, were denied bail. The courts focused on the seriousness of the charges in their decision to deny bail to the suspects.) See also a report by Tamiru Tsige in the Ethiopian Reporter, Sunday 13 November 2011

All in all, allowing bail would effectively serve as an alternative to a lengthy pre-charge detention. Therefore, the Ethiopian legislature has to abandon the current 120-day pre-charge detention. As an alternative, Article 20(4) and Article 20(5) of the EATP need to be amended so that terrorist suspects, whether charged or not, should have the right to bail.

### 5.9.2 *Holding Charges?*

There is no universal definition of holding charges as it is not common in most countries. Some define the term as "a charge generally brought to justify the detention of a person suspected of other, usually more serious offences. A holding charge is based on (usually lawful) arrests for trivial offences."<sup>1550</sup> Others define a holding charge as:

*... a nominal charge for the purposes of ensuring that a suspect is kept in custody or detention; and which may later be replaced by a substantive charge (failing which the person concerned must be released as soon as it becomes clear that the holding charge cannot be 'firmed up' or otherwise proceeded with.)*<sup>1551</sup>

Another possible definition provided by others is that:

*A holding charge must be something which is a genuine, in-good-faith charge. Secondly ... it would have to be a charge which was quite serious because it would justify pre-trial detention.*<sup>1552</sup>

But the definition of a holding charge might differ from country to country. For instance, in Nigeria, the term is generally understood to mean:

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<sup>1550</sup> See Aronson, M. I. and Hunter, J. B. (1995). *Litigation: Evidence and Procedure*. (Sydney: Butterworths), p.211

<sup>1551</sup> Gibson, B. (2009). *The Pocket A-Z of Criminal Justice*. (United Kingdom, Waterside Press,), p.,36

<sup>1552</sup> See a discussion by Professor Clive Walker at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated evidence, 8 June, Q179, supra note 1378

*... a criminal charge that is filed by the police before a Magistrate Court against an accused person just for the purpose of securing an order of his remand in police custody pending the conclusion of an investigation or a criminal charge that is filed against an accused person by the police before a Magistrate court that ostensibly has no statutory power to try the offence charged, but makes an order, remanding the person in prison custody pending the conclusion of an investigation or the arraignment of the person in the High Court.*<sup>1553</sup>

The Nigerian definition bears little resemblance to the other definitions; here, the term holding charge is not used to hold a suspect until a more serious charge is found. Similarly, its application is different from the practice in other countries, like Australia and the US.<sup>1554</sup> In both countries, the police bring a lighter charge to hold the suspect keeping in mind that if more evidence is unravelled, they are obliged to amend the lighter charge with a more serious one.

Moreover, in Australia, "holding charges are used primarily to bypass the 'reasonable suspicion' requirement where [the police] cannot be satisfied on a more serious offence, but can be satisfied on a lesser offence."<sup>1555</sup> In contrast, the Nigerian practice seems to suggest that it is used as a form of remand i.e., the suspect is not charged earlier nor is the first charge amended at a later stage. As defined above, holding charges serve two purposes in Nigeria. One is securing the remand of the accused person pending the conclusion of an on-going investigation. The other is relieving the need by the police to travel long distances to a court that has the jurisdiction to try the accused.<sup>1556</sup> Therefore, any court that does not have the jurisdiction to try the accused could issue a remand order.

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<sup>1553</sup> Ademeji, A. (2011). Nigeria: Holding Charges and the Country's Laws, 5 January, at <http://allafrica.com/stories/201101060295.html> ; see also Nigerian Bar Association, Reform of the Holding Charge Practice in Nigeria (Protecting Constitutional rights), 20 May, 2008

<sup>1554</sup> See for instance in *R. (on the application of Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, para. 15 [In this cases, Mr Raissi was on extradition proceedings to the US for "failing to disclose prescribed information when renewing his pilot's licence." The "counsel for the United States Government referred to the extradition "charges" as "holding charges". He indicated that, in due course, Mr Raissi's extradition would be sought in respect of a charge of involvement in a conspiracy to murder in relation to the attack on the World Trade Centre, his alleged role having been as "lead instructor" of the four pilots who had hi-jacked planes for the attack."]

<sup>1555</sup> See Aronson, M. I. and Hunter, J. B., supra note 1550

<sup>1556</sup> Nigerian Bar Association, supra note 1553

The US also applies holding charges in a similar manner to Australia.<sup>1557</sup> The same practice is absent in the UK.<sup>1558</sup> However, unlike Australia, a holding charge in the US is not used to circumvent the requirement of reasonable suspicion before an arrest is made because the US requires probable cause to make arrest. As discussed in detail in this chapter, if the probable cause requirement is not met, the arrest would be unlawful whether the suspect is held under a holding charge or normal charge.

No such similar laws or practices can be mentioned under Ethiopian domestic law. With the coming into effect of the EATP, it might be appropriate to consider the relevance of using a holding charge as an alternative to 120-days pre-charge detention.

When the possibility of using holding charges in place of 28 days pre-charge detention was considered in the UK, the British Irish Rights Watch (BIRW) complained that holding charges "contravene the right to due process, and undermine the judicial system."<sup>1559</sup> Based on the practice in Northern Ireland, BIRW argued that a holding charge could result in the terrorist suspect being released on bail if "the time taken to get to trial has been deemed to take too long. In some cases this has enabled the suspects to commit further offences."<sup>1560</sup>

The use of a holding charge as an alternative to pre-charge detention has been flatly rejected by the CPS for the following reasons:<sup>1561</sup>

*The problem of finding an appropriate charge, and the potential risk to public safety if the charge were minor and the defendant pleaded guilty and were released on bail. Holding charges are really an abuse of State power. In theory a*

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<sup>1557</sup> Raissi v Secretary of State for the Home Department, supra note 1554

<sup>1558</sup> See oral evidence by the former DPP, Keir Starmer, at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 236, supra note 1378 ("We do not use holding charges. That principle does not apply just to terrorism offences but to all offences.")

<sup>1559</sup> Memorandum Submitted by BIRW to Home Affairs Committee (2006). Terrorism Detention Powers: Fourth Report of session 2005-06, Volume 2

<sup>1560</sup> Ibid

<sup>1561</sup> Joint Committee on Human Rights (2006), Twenty-Fourth Report, supra note 1417, para. 140

*person could be held on a holding charge for 6 months or a year and then the prosecution could offer no evidence, but that would clearly be an abuse.*

Due to these and other objections,<sup>1562</sup> it was considered inappropriate to use holding charges in lieu of pre-charge detention.

Therefore, considering the problematic nature of holding charges, this thesis does not support the introduction of holding charges into Ethiopian legal system. This procedure could easily be abused to detain terrorist suspects indefinitely, even longer than the 120 days pre-charge detention currently allowed under Ethiopian law.

### 5.9.3 Post-charge Questioning?

Before discussing whether post-charge question could be considered relevant in terrorism cases in Ethiopia, we will first discuss the availability of investigation techniques under the Ethiopian Criminal Procedure Code.

The Ethiopian Criminal Procedure Code contains the procedures that need to be followed in criminal investigations. These are divided into two parts: crime investigation<sup>1563</sup> and the instituting of criminal proceedings.<sup>1564</sup> The first part covers the power of the police in regard to criminal investigations. This part covers several issues, *inter alia*, summoning of the accused or suspected person,<sup>1565</sup> arrest,<sup>1566</sup> interrogation,<sup>1567</sup> procedures after arrest,<sup>1568</sup> and the closure of the police investigation file.<sup>1569</sup>

After an arrest is made, the police are required to establish the identity and address of the arrestee and read out the accusation or complaint made against the arrestee. Unless it is 'doubtful' that an offence has been committed or that the

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<sup>1562</sup> See Home Affairs Committee (2006). Terrorism Detention Powers, Fourth Report, supra note 1100, para. 101

<sup>1563</sup> Articles 22-39 of the Ethiopian Criminal Procedure Code

<sup>1564</sup> Articles 40-48 of the Ethiopian Criminal Procedure Code

<sup>1565</sup> Article 25 of the Ethiopian Criminal Procedure Code

<sup>1566</sup> Article 26 of the Ethiopian Criminal Procedure Code

<sup>1567</sup> Article 27 of the Ethiopian Criminal Procedure Code

<sup>1568</sup> Article 29 of the Ethiopian Criminal Procedure Code

<sup>1569</sup> Article 39 of the Ethiopian Criminal Procedure Code

summoned or arrested person has committed the offence complained of,<sup>1570</sup> the police must take the arrestee to the next available court within 48 hours. As discussed, although the court has several alternatives to make once the accused is brought before them, the Ethiopian Criminal Procedure Code does not allow the court to release the accused unconditionally. Therefore, the court could order the arrestee to be remanded for 14 days with the possibility of renewing it several times.

The second part of the criminal investigation procedure start with the completion of the police investigation and reporting of the results of the investigation to the public prosecution. The Public Prosecutor can do one of the following things after receiving the police report:<sup>1571</sup> prosecute the accused on a charge drawn up by him; order that a preliminary inquiry be held; order further investigations; or refuse to institute proceedings.

The Public Prosecutor is required to institute proceedings unless:<sup>1572</sup>

*1) (a) The public prosecutor is of opinion that there is insufficient evidence to justify a conviction;(b) There is no possibility of finding the accused and the case is one which may not be tried in his absence;(c) The prosecution is barred by limitation or the offence is made the subject of a pardon or amnesty;(d) (1) The public prosecutor is instructed not to institute proceedings in the public interest by the Minister by order under his hand.(2) On no other grounds may the public prosecutor refuse to institute.*

So long as the above elements are not satisfied, bringing a charge against the accused would be the next step. Once a charge is brought, the next question is whether the Ethiopian Criminal Procedure allows the possibility of questioning the suspect further to uncover additional evidence. As shown above, the Public Prosecutor has four options once the police report is received. If the first option

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<sup>1570</sup> Article 28 of the Ethiopian Criminal Procedure Code

<sup>1571</sup> Article 38 of the Ethiopian Criminal Procedure Code

<sup>1572</sup> See Articles 40 and 42 of the Ethiopian Criminal Procedure Code



is taken, i.e. charging the accused, the trial proceedings begin.<sup>1573</sup> During the trial, a judge can adjourn a case, fix the date and place of trial, issue a warrant for a witness or a defendant that has failed to appear, read out the charge to the defendant, record any pleas, etc.

However, the Ethiopian Criminal Procedure Code does not contain a single provision concerning the post-charge questioning of an indicted individual. Furthermore, as discussed in chapter two, because the Ethiopian legal system is adversarial in design, the judge plays a passive role during the trial process.

Therefore, post-charge questioning similar to the power available in the UK<sup>1574</sup> is not relevant in Ethiopia. This thesis does not consider post-charge questioning to be a proper alternative to the current pre-charge detention period in Ethiopia in view of the increased likelihood of abuse at the hands of the police, this being especially poignant in Ethiopia where the independence of the judiciary and the legislature is unclear.<sup>1575</sup>

Even if post-charge questioning is a judiciary controlled process, as it currently under section 22 of the Counter-terrorism Act 2008 (CTA), the judiciary in Ethiopia does not have extensive powers of scrutiny over any abuse taken place in police stations.<sup>1576</sup> Additionally, in order to use post charge-questioning as an alternative to the lengthy pre-charge detention under the EATP, the police need to have some evidence to enable them to bring a charge in the first place. In the absence of any evidence to bring charge, this alternative would be less likely to guarantee early release of a suspect either conditionally or unconditionally. It would also be an abuse of power if the police charge someone when they know

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<sup>1573</sup> Governed by articles 94- 107 of the Ethiopian Criminal Procedure Code

<sup>1574</sup> See section 22 of Counter-Terrorism Act 2008 c.28 (in force from July 10, 2012); for further discussion, see Zander, M (2008). Is Post-Charge Questioning A Step Too Far? 172(44) *J.P.* 716-718; see also Walker, C. (2008). Post charge questioning of Suspects. 7 *Criminal Law Review* 509-524

<sup>1575</sup> See chapter two for further discussion on the independence of the judiciary and the legislature in Ethiopia

<sup>1576</sup> See in the following case, for instance, where the suspects alleged that they were tortured in the hands of the police. But the courts failed to scrutinize that allegation: Public Prosecutor v Abas Hussein and Kasim Mohammed, *supra* note 347; see also chapter two for further discussion

that there is insufficient evidence to do so but with the hope that the suspect is more likely to confess if charged early.<sup>1577</sup>

There are also some inherent problems with the current design of section 22 CTA 2008. First, "there is absolute limit of forty-eight hours for any given authorisation, though there may be repeated authorisations."<sup>1578</sup> If similar legislation is adopted in Ethiopia, these "repeated authorisations" could encourage the police to use every means available to get a confession from the suspects.

Second, "the wording of section 22 strongly suggests that the application must relate only to 'the offence' which has been charged. If novel offences are uncovered, then a further pre-charge arrest would be viable."<sup>1579</sup> There might be also issue of compatibility with Article 6 of ECHR i.e. right not incriminate oneself.<sup>1580</sup> The same compatibility issue under Article 19(2) of the FDRE constitution could arise if post-charge questioning is introduced into the Ethiopian legal system.

Third, section 22(6) CTA 2008 contains the elements a judge needs to take into account before authorising a post-charge questioning of a terrorist suspect. However, some of the elements lack clarity. One of these factors is authorisation 'in the interest of justice.' But this requirement is defined no where in the Counter-terrorism Act 2008 and it is not clear what the judge is supposed to consider in deciding whether to allow further questioning of a suspect. A quick reference to the Criminal Justice Act 2003, for instance, shows that there are some guidelines a judge could take into account in admitting a statement not

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<sup>1577</sup> This argument is different from *Holgate-Mohammed v Duke*, supra note 1274, ("The interrogation of the subject so as to confirm or dismiss a reasonable suspicion of that person's guilt was a legitimate reasons for arrest and the officer was, therefore, entitled to take into account the possibility that HM might be more ready to confess at a police station."). The issue in this case is not to 'confirm or dismiss a reasonable suspicion.' The police have gone past that stage and there is a pending charge.

<sup>1578</sup> Walker, C. (2011), supra note 224, p. 192

<sup>1579</sup> Ibid

<sup>1580</sup> *Shannon v the United Kingdom*, no. 6563/03, 4 October 2005, para. 42 (" the requirement for the applicant to attend an interview with financial investigators and be compelled to answer questions in connection with events in respect of which he had already been charged with offences was not compatible with his right not to incriminate himself.")

made in oral hearings provided "the court is satisfied that it is in the interest of justice for it to be admissible."<sup>1581</sup> These guidelines are illustrated under section 114(2) of the Criminal Justice Act 2003. Not such non-exhaustive guidelines are provided under section 22(6) CTA 2008.

The other element that needs clarification is stipulated under section 22(6(a)) CTA 2008. Accordingly, a judge would refuse authorisation unless "what is authorised will not interfere unduly with the preparation of the person's defence to the charge in question or any other criminal charge." The purpose of introducing post-charge questioning in the first place is to gather further evidence that might come after a charge.<sup>1582</sup> This certainly will "unduly interfere with the preparation of the person's defence" particularly 'If novel offences are uncovered'.<sup>1583</sup> In this situation, the counsel for the defendant is not sure how best to defend the defendant as he might need more time to prepare. It is not clear if a judge would refuse further questioning in that situation.

Due to these practical problems, this research concludes that post-charge questioning should not be considered an alternative to pre-charge detention under Ethiopian law.

#### *5.9.4 The Threshold Test?*

As discussed, the threshold test is markedly different from the reasonable suspicion test. The requirements of the former are higher than the latter. At the same time, the requirement for the threshold test is lower than the conditions needed to use the full code test. Comparing the American standard, the probable cause test falls somewhere between reasonable suspicion and threshold test.

As discussed above, under the Ethiopian Criminal Procedure Code, one of the options a public prosecution could do after receiving the police report is

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<sup>1581</sup> Section 114 (1)(D) of Criminal Justice Act 2003

<sup>1582</sup> Joint Committee on Human Rights (2007). Counter-Terrorism Policy and Human Rights: 42 Days. HL 23 / HC 156 (Incorporating HC 994-I from Session 2006-07), Second Report of Session 2007-08 - Report, Together with Formal Minutes and Appendices.

<sup>1583</sup> Walker, C. (2011), *supra* note 224, p. 192

instituting criminal proceedings by bringing charge against an accused. The form, the manner, and the time of instituting a criminal charge is governed under articles 108-122 of the Ethiopian Criminal Procedure. According to article 109 of this code, the public prosecutor is required to file a charge 'within fifteen days of the receipt of the police report'. This charge must contain 'legal and material ingredients'<sup>1584</sup> and description of circumstances of the offence.<sup>1585</sup> Once a charge is brought, it cannot be changed or altered.

The only case where the prosecution is allowed is to change or alter the charge is if he erred in filing a charge.<sup>1586</sup> This covers a situation where a criminal proceeding is instituted "on a charge containing essential errors or omissions or such errors or omissions that the accused has been or is likely to be misled".<sup>1587</sup> Thus, the public prosecution could not bring lesser charges with the assumption that a more serious charge will be followed once more evidence is gathered.

Having said this, the question is whether the threshold test is the best option to replace the lengthy pre-charge detention of 120 days in Ethiopia. This research discourages any push for the threshold test to be introduced as an alternative.

First, it is acknowledged in the UK that the test does not completely overcome the need for pre-charge detention.<sup>1588</sup> Moreover, the UK does not have a complete picture of how frequently the test is used in terrorism cases.<sup>1589</sup> A conclusion that can be reached from the few cases that came to light is that suspects who are charged based on the threshold test were held longer than those charged based on the full code test.<sup>1590</sup> Thus, being charged early, in anticipation of key evidence, did not bring any fundamental change in the circumstances of the detainees; they remained in police custody. The Joint Committee on Human Rights also criticised the government for failing to disclose to the defence under

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<sup>1584</sup> Article 111 of the Ethiopian Criminal Procedure Code

<sup>1585</sup> Article 112 of the Ethiopian Criminal Procedure Code

<sup>1586</sup> Articles 118-121 of the Ethiopian Criminal Procedure Code

<sup>1587</sup> Article 119 of the Ethiopian Criminal Procedure Code

<sup>1588</sup> Letter from Sue Hemming, *supra* note 1409

<sup>1589</sup> *Ibid*

<sup>1590</sup> *Ibid*

what test a suspect is charged<sup>1591</sup>, which affects a person's right to know the basis of the charge against him. Furthermore, courts do not have the opportunity to scrutinise the use of the test in terrorism cases.

For these reasons, it might be argued that the test forms a perfect legal excuse to continuously hold terrorist suspects. Thus, for the Ethiopian legislature to introduce the threshold test as an appropriate alternative to the 120 day pre-charge detention currently offered would be to import a test riddled with defects. Even if all the defects of the test were rectified, for instance, by increasing judicial scrutiny and disclosing the basis of the charge as early as possible, dropping a charge after a lengthy detention entails a grave violation of liberty.

Therefore, the test is not suitable for Ethiopia. Even if the EATP is amended and the length of pre-charge detention is reverted to 14 days, as is the case for regular crimes under the Ethiopian Criminal Procedure Code, there is no guarantee that law enforcers will not abuse it by charging suspects at the end of the maximum pre-charge detention.

#### *5.9.5 Contingency Powers as an Alternative to 120 Days Pre-charge Detention?*

It has been argued throughout this thesis that Ethiopia's pre-charge detention regime detains suspects, or contains the potential to detain suspects, for too long. There is no justification for the detention of terrorist suspects for 120 days without a trial. Granting bail until completion of a criminal investigation has been suggested as one alternative to Article 20(3) of the EATP. Another option worth considering is using contingency powers to hold suspects for longer periods when exceptional circumstances demand.

The UK government does not want to completely abandon the 28 day pre-charge detention. It wants to preserve the possibility of resorting to that maximum period under exceptional circumstances. According to the Draft Detention of Terrorist Suspects Bill, the plan is to activate the maximum period, if need be.

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<sup>1591</sup> Joint Committee on Human Rights (2008). Counter-Terrorism Policy and Human Rights (Eighth report), Supra note 1409

There will be a sunset clause so that the extended maximum period would be in force for a period of three months upon a grant of royal assent.<sup>1592</sup> This need for contingency powers has come after a suggestion by the Committee on the Review of Counter-terrorism and Security Powers. The Committee's submission for a shorter period of detention was driven by the fact that the 28 days pre-charge detention was rarely used in practice. Despite opposing arguments to the use of such contingency powers, as discussed in this chapter, this thesis argued in favour of introducing the powers in lieu of a lengthy pre-charge detention. This is due to the fact that having contingency powers in reserve is far better than rushing through legislation, which will more than likely play at the boundaries of permissible interference with fundamental rights, at a moment of exceptional need.

Two problems associated with the above power concern, firstly, the difficulty of recalling parliament when it is in recess or when it is dissolved during general election<sup>1593</sup> and, secondly, undermining the right to a fair trial when a case is openly discussed in parliament.<sup>1594</sup> A possible solution proposed to the first problem is having:

*... a trigger in the legislation itself whereby the Home Secretary could not make that order at her absolute discretion but would need to be satisfied, for example, that there were compelling reasons of national security and that the investigation on its own, or in conjunction with other investigations, was wholly exceptional in its scale and complexity, or something along those lines.*<sup>1595</sup>

The absence of 'triggers', particularly the lack of safeguards around those powers has too been extensively explored.<sup>1596</sup>

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<sup>1592</sup> Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, supra note 1378, para. 3

<sup>1593</sup> Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 226, supra note 1378

<sup>1594</sup> Ibid, Q218

<sup>1595</sup> See David Anderson's Reply at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 252, supra note 1378

<sup>1596</sup> See a discussion by Professor Clive Walker at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 172 and Q 186, supra note 1378

The second problem could be solved by having:

*... fairly clear ground rules. It would be perfectly possible for the number and timing of the arrests and brief circumstances to be discussed in most cases. What could not be discussed ... is the underlying detail, but as for the number of arrests and what people had been arrested for, very often that would be in the public domain. If handled carefully, that could be discussed.*<sup>1597</sup>

Others also propose different procedures for introducing the powers under exceptional circumstances. Accordingly, the merits and limits of using the procedures under section 25 TA 2006, and the 2004 Civil Contingency powers have been evaluated in detail.<sup>1598</sup> However, a discussion on the Civil Contingency Powers is beyond the scope of this thesis.

Having said this, are there any legal or constitutional difficulties in using contingency powers under Ethiopian legal systems? It would seem not. To begin with, in the FDRE Constitution, Article 17(2) states that "no person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him." Taken literally, the second paragraph of this Article seems to suggest that after an initial arrest, a person has either to be charged or released. However, this would be a naive interpretation considering that Article 19(4) of the FDRE Constitution states that "the court may order the arrested person to remain in custody or, when requested remand him for a time strictly required to carry out the necessary investigation." In light of this article, it is difficult to justify how a pre-charge detention period of 120 days under the EATP is 'a time strictly required to carry out the necessary investigation.' Both the above articles make Article 20(3) of the EATP unconstitutional.

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<sup>1597</sup> See a discussion by Kier Starmer at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q 218, supra note 1378

<sup>1598</sup> See a discussion by Professor Clive Walker at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, Oral and Associated Evidence, Q171 and Q186, supra note 1378

The FDRE constitution does not have any articles that deal with using contingency powers to arrest criminal suspects. It does, however, have an article that deals with powers of arrest under a 'State of emergency'. According to Article 93(4) (c) of the FDRE Constitution, there are only a few fundamental rights<sup>1599</sup> that could not be suspended under emergency situations. All other rights, including right to liberty, could be suspended. According to Article 93(6) (a) of the FDRE Constitution, the State of Emergency Inquiry Board is expected to "make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest." This Article only talks about making public the names of people arrested under emergency powers. It does not provide the right to court appearance within one month and any subsequent public trial or release of those held under police custody. The FDRE Constitution does not have any limit on how long people could be held under the provisions enacted during a State of emergency.

If Article 20(3), which provides pre-charge detention between 28-day to 120-day, of the EATP is abrogated and replaced with 14 days of pre-charge detention as required under Article 59(3) of the Ethiopian Criminal Procedure Code, would it be appropriate to resort to Article 93(6) (a) of the FDRE Constitution to hold terrorism suspects for a period longer than 14 days?

The answer to this question is argued to be no. The police can only use Article 93 of the FDRE Constitution during a State of emergency as declared by The Council of Ministers. Moreover, even if a State of emergency is declared due to, for example, catastrophic terrorist attack "which endangers the Constitutional order and which cannot be controlled by the regular law enforcement agencies,"<sup>1600</sup> Article 93 of the FDRE Constitution could not be the appropriate remedy for Article 20(3) of the EATP because the FDRE Constitution does not put a limit on detaining people during a State of emergency.

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<sup>1599</sup> Theses refer to the following articles of the Constitution: Article 1 (Nomenclature of the State); Article 18(Prohibition against Inhuman Treatment); Article 25(Right to Equality); Article 39(1) and Article 39(2) (Rights of Nations, Nationalities, and Peoples)

<sup>1600</sup> Article 93(1)(a) of the FDRE constitution



With these difficulties in mind, in the event that Article 20(3) of the EATP was to be replaced, how would the police respond to complex terrorism cases that require extended periods of investigation? It would not be appropriate to recommend that terrorist suspects should be released at the end of 14 days. Rather, there should be legislation in place that can be triggered where a lengthy period is required to complete an investigation while the suspects are still held in custody. As declared by the Ethiopian government, the EATP is inspired by UK legislation and other Western legislation. Therefore, it is necessary to take into account changes that are taking place in the UK. One of the changes brought about by the coalition government is the abandonment of the 28 days pre-charge detention, reverting instead to 14 days. In addition, there is a draft bill that deals with contingency powers that could be triggered under exceptional circumstances.<sup>1601</sup> A similar procedure in Ethiopia would be appropriate because having all the powers in reserve is necessary to enable the police and the intelligence community to tackle complex terrorism cases that require an extended period of detention

One of the positive things about the UK as discussed is that contingency powers is that the 28 day maximum is to be introduced for shorter periods of three months unlike the expired provision that was renewable annually. Also, under the current Protection of Freedoms Act 2012<sup>1602</sup>, extension will be sought if and only if a need arises. On the other hand, the Ethiopian legislation on pre-charge detention is not renewable annually. It is a permanent legislation which can be abused easily. By having legislation on contingency powers, and with greater scrutiny by the legislature when these powers are triggered, abuse of the provisions that deal with pre-charge detention can be minimized. Therefore, transposing the contingency powers with a sunset clause into Ethiopian law is better than resorting to Article 93 of the FDRE constitution because the said Article places no limit on the length of pre-charge or post-charge detention of persons held during a State of emergency.

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<sup>1601</sup> See also section 58 of the Protection of Freedoms Act 2012

<sup>1602</sup> Already discussed in the previous sections

However, assuming that the government of Ethiopia is to introduce emergency powers by repealing the current pre-charge detention, there seems unsolved question of the procedures of introducing these powers. As discussed, section 58 of the Protection of Freedoms Act 2012 gives the Secretary of the State the power to introduce orders in under certain circumstances.

In Ethiopia, it is the Ministry of Justice<sup>1603</sup> that has similar powers to the Secretary of the State for the Home Department. If the British model on draft contingency power is to be introduced into the Ethiopia legal system, then it will be this very organ that could request parliament to extend the pre-charge detention from 14 days to 28 days in exceptional circumstances. The norm under the British Law is 4 days.<sup>1604</sup> For this reason, it might be difficult to argue that a return to 14 days is a return to normality.

But according to Article 59 (3) of the Ethiopian Criminal Procedure Code, a 14-day pre-charge detention has been the norm in the country since 1961. Therefore, proposing a 28-day detention in exceptional circumstances has the possibility to withstand some criticism. However, with the current Ethiopian government dominating parliament with 99% of the seats, it would be a rubber stamp procedure to ask parliament to approve the proposed legislation. With such lack of proper mechanism for scrutiny by the Ethiopian parliament, the only viable option would be to use these exceptional powers of detention through supervision by a senior Supreme Court judge. This procedure is different from section 58 of the Protection of Freedoms Act which does not seem to include judicial scrutiny.

There are some practical reasons why this research has preferred a Supreme Court Judge to a High Court Judge. According to Article 31 of the EATP, the High Court and the Supreme Court of Ethiopian are entrusted with the jurisdiction to entertain terrorism cases. However, some alleged that the

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<sup>1603</sup> For detail power of the Ministry of Justice, see A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic Of Ethiopia (Proclamation No. 691/2010); see also Article 28 (2) the EATP, which requires the Ministry of Justice to 'organize a separate specialized department which follow up terrorism cases'

<sup>1604</sup> See written evidence by Professor Clive Walker at Joint Committee on Human Rights (2011). Draft Detention of Terrorism Suspects, supra note 1378

adjudication process in Ethiopia is highly politicized.<sup>1605</sup> On top of that most of the judges appointed to the High Court are young professionals with little or no prior judicial experience.<sup>1606</sup> Though there still remains some suspicion on the independence of the judges at the Supreme Court, most of them are judges with many experiences under their belt to interpret and apply the law correctly. They are less likely to be influenced by the police or the prosecutor. Therefore, a judiciary controlled process of using contingency powers under exceptional circumstances would serve as a promising alternative to 120-day pre-charge detention currently in force in Ethiopia.

#### *5.9.6 Charging Terrorist Suspects for 'Preparation of Terrorist Acts': as an Alternative to a lengthy pre-charge detention?*

As a principle, preparatory acts are not punishable in Ethiopia. According to article 26 (1) of the Ethiopian Criminal Code, acts "which are committed to prepare or make possible a crime, particularly by procuring the means or creating the conditions for its commission are not punishable". Moreover, and consequently, article 39 of that Code, prohibits punishment for a failure to report constituting preparatory acts. However, as an exception, a failure to report preparatory acts could be punishable only if they are expressly stated by law.<sup>1607</sup> For instance, preparing for or failing to report the preparation of criminal activities that violate articles 241-246 and 252-258<sup>1608</sup> of the Ethiopian Criminal Code is a serious crime in Ethiopia. As discussed in this thesis, these articles have been used against terrorist suspects, although they are not designed specifically for that purpose.

Moreover, article 4 of the EATP is also one of the exceptions to the principle stated under article 26 of the Ethiopian Criminal Code as it specifically outlawed preparatory acts of terrorism. However, unlike section 5 of TA 2006, article 4 has

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<sup>1605</sup> See chapter 2 on a discussion on 'Loyalty to the Constitution'

<sup>1606</sup> Ibid

<sup>1607</sup> Article 26(2) of the Ethiopian Criminal Code

<sup>1608</sup> These articles deal with espionage; material preparation of subversive acts; collaboration with the enemy; treason; impairment of the defensive power of the state; attacks on the independence of the state; violation of territorial or political sovereignty; attack on the political or territorial integrity of the state

a far narrower scope in that it only criminalises preparatory acts specifically listed under the EATP. Whereas, section 5 (2) TA 2006 bans specific preparatory terrorist acts and 'terrorism generally'.

As can be seen from table 2.3, charges against terrorist suspects for the preparation of terrorist activities are one of the frequent charges. This charge was mentioned in relation to 18 cases of the (Total) number of cases listed in table 2.3.<sup>1609</sup> Although it has been accepted in the UK that section 5 TA 2006 has reduced the need for lengthy detention,<sup>1610</sup> neither the provisions of the Ethiopian Criminal Procedure Code nor article 4 of the EATP have had an effect on the length of pre-charge detention of terrorist suspects in Ethiopia. As discussed in chapter one, some of the court cases listed in table 2.3 are not replicated in table 4.3 because of the absence of some pages from the case reports. For this reason, we cannot show whether some defendants who were convicted of preparatory terrorist activities were remanded or not. However, the following cases<sup>1611</sup> from table 4.3 shows that charging the defendants for preparatory terrorist acts did not have an impact on the length of detention. All of the defendants in these cases were held for lengthy periods.

Therefore, although the respective provisions analysed from EATP and the Ethiopian Criminal Code in relation to preparatory offences have the design and nature in order to be used as an alternative to a lengthy pre-charge detention, their effect in this capacity is yet to be realised.

#### *5.9.6 Any Lessons to be taken from the US on Pre-Charge Detention of Terrorist Suspect?*

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<sup>1609</sup> Most of the cases are discussed in detail in chapter two, chapter three, chapter four and in this chapter

<sup>1610</sup> Anderson, D (2013). *The Terrorism Acts in 2012*, supra note 1422; see also see witness testimony of Professor Clive Walker and David Anderson, QC at Joint Committee on Human Rights (2011). *Draft Detention of Terrorism Suspects, Oral and Associated Evidence* supra note 1378

<sup>1611</sup> *Public Prosecutor v Haile Talisa Daba*, supra note 337; *Public Prosecutor v Elias Gibril Buru, et al*, supra note 342; *Public Prosecutor v Kemal Abdela*, supra note 347; *Public Prosecutor v Shimels Degene and Dereje Gutema*, supra note 367; *Public Prosecutor v Samual Goitom*, supra note 1187; *Public Prosecutor v Afera Gidey Kiflu*, supra note 383; *Public prosecutor v Teshale Bekashi*, supra note; *Public Prosecutor v Tefera Mamo Cherkos (General)*, supra note 64; *Public Prosecutor v Elias Kifle, et al*, supra note 763 ; *Public Prosecutor v Andualem Arage, e al*, supra note 763 ; *Public prosecution v Bekel Gerba, et al* (?/2011)

Counter-terrorism measures such as those found under section 412 of the USA PATRIOT Act and indefinite detention of non-citizens at Guantanamo via presidential orders are not relevant to Ethiopia. As can be discerned from table 2.3, and as discussed in chapter two, foreign grown terrorism is not so much of a problem in Ethiopia. All but few of the terrorists tried under Ethiopian law are nationals of Ethiopia.<sup>1612</sup> The US counter-terrorism regime is also morally and legally conflicted, having been applied against people of different origins.<sup>1613</sup> Thus, the measures in the US that are applicable to non-citizens cannot be considered viable alternatives to the problems discussed in relation to the EATP. One *prima facie* viable alternative to this issue found in the US is the Material Witness regime, and we shall now analyse.

The provisions of the Ethiopian Criminal Procedure Code and the EATP do not specifically allow mandatory detention of a witness. For instance, article 30 (1) of the Ethiopian Criminal procedure Code allows the investigating police officer to 'summon and examine any person likely to give information on any matter relating to the offence or the offender'. Moreover, article 30 (2) requires a witness to answer all questions put to him unless answering a question has 'a tendency to expose him to a criminal charge'. Similarly, article 22 of the EATP allows a police officer to summon and question anyone who has 'information or evidence which...could assist to prevent or investigate terrorism cases'. As can be seen, these articles are silent on whether the police are permitted to arrest a material witness who is, for instance, a flight risk. Expectedly, the research conducted for the benefit of this thesis failed to discover any individual having been arrested as a material witness in Ethiopia.

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<sup>1612</sup> See Public Prosecutor v Abdiweli Mohammed Ismael, supra note 1505 (two Swedish journalists were tried under the EATP); see Public Prosecutor v Sewfit Hassen Abdul Keni, supra note 1508 (This is the only notable terrorist case that had international connections. This was an attempted murder of the former Egyptian president Hosni Mubarak in Addis Ababa).

<sup>1613</sup> See a discussion in the previous section how president Obama has altered the rules on Guantanamo detention by applying them against US citizens. For the long term 'psychological' effect of indefinite detention, see also Donohue, L.K. (2008), supra note 203, pp. 115 and seq

In addition, although as a general rule it is up to the parties to call their witnesses<sup>1614</sup> during the preliminary inquiry<sup>1615</sup> or during the trial, article 87 of the Ethiopian Criminal Procedure Code states that a "...court may at any time call any witness whose testimony it thinks necessary in the interests of justice." If a witness refuses to attend, the court can issue a warrant that authorises the police to bring the material witness before the court. Moreover, article 90 of the Ethiopian Criminal Procedure Code also provides instances where a witness may be held in custody. Furthermore, witnesses who have given evidence at a preliminary inquiry are required to execute bonds 'binding themselves' to be in attendance before the court and on any date as they shall be summoned to appear. If they refuse to do so, they could be held in custody. However, the above discussions cover situations after the police investigation is completed.

Having discussed above Ethiopia's current position towards witnesses, and how that correlates to the US position, the question that now falls for consideration is whether it would be sensible to introduce a new system in Ethiopia that allows for the police to hold a material witness in detention as an alternative to 120-days pre-charge detention? In answering this question, we have to consider the previous criticisms levelled at the US regime, specifically how the regime is neither intended for use against terrorists, nor optimally designed for the particular time exigencies related to the questioning of a terrorist. In the US this has led to what has been described as an 'abuse' of the material witness regime, where suspected terrorists are held rather ironically under the title of 'material witness'.

However, toleration of the US position is perhaps manageable in light of the context of justice system that surrounds these 'abuses'. Being well grounded on fundamental rights and the protection of civil liberties, the US justice system might be considered to have sufficient checks and accountability in place to offset the injustice currently being felt under the far from ideal Material Witness Statute. However, contrarily, the fact that even the relatively simplistic

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<sup>1614</sup> Article 124 of the Ethiopian Criminal Procedure Code

<sup>1615</sup> The Ethiopian Criminal procedure Code allows holding of the preliminary inquiry to determine if there is sufficient evidence to set the matter down for trial. It is covered under articles 80-93 .

determination of remand in Ethiopia is frequently based on insufficient evidence, it is clear that Ethiopia has some way to go before such an arbitrary system of detention can be tolerated within their legal regime. Simply stated, Ethiopia has an embryonic democracy, and therefore it would perhaps be considered premature, at best, and irresponsible, at worst, to construct a similar material witness regime within Ethiopia.

To conclude, allowing bail, bringing early charges for preparatory terrorist acts and having legislation in place with contingency powers that can be triggered in complex terrorism cases are the best remedies that would serve as alternatives to the 120 days of pre-charge detention currently available in Ethiopia. However, for the reasons mentioned above, this thesis does not support using the threshold test, holding charges, post-charge questioning or the Material Witness method of holding terrorist suspects as preferable alternatives to pre-charge detention in Ethiopia.

## **5.10 Conclusions**

The criticism of Ethiopia's pre-charge detention is multi-layered. The first is manifested by the absence of proper checks and balances. What we have uncovered is that the Ethiopian judiciary gives little consideration to the basic fact that the right to liberty can be violated where a suspect is detained for as little as a few hours, let alone days or months, without sufficient legal justification. The reluctance of the judiciary to interfere with the investigation of terrorist suspects, for example, by asking the police to justify their request for lengthy pre-charge detention, has exacerbated the plight of many.

Second, the culture and attitude of members of the Ethiopian parliament has also contributed to a weak check on the government. We have seen how in the UK and US 'the struggle between controlling terrorism and maintaining citizen's

liberty rights ignited power struggles<sup>1616</sup> not only between the different branches of government, but also within the same party. Indeed, had it not been for the 49 'rebel' backbenchers from within the Labour party, the then UK Prime minister, Tony Blair, would have achieved a scaling up in the pre-charge detention period from 28 to 90 days.<sup>1617</sup> The fact that members of the Ethiopian parliament are all from the same ruling party should not be an excuse to adopt lengthy detention periods. The culture and attitude to speak up for fundamental rights is what is lacking in Ethiopia, but which is to be expected from an embryonic democracy.

What might be said to be even more chilling is the unwillingness of members of the Ethiopian Parliament to request quarterly or annual reports on the effectiveness of this prolonged detention period, either in terms of the success in bringing more prosecutions or its deterrent effect in general. Parliamentary Select Committees, such as those in the UK or US Congressional Committees, are unheard of in Ethiopia. The presence of similar committees in Ethiopia would have enabled the Ethiopian government to glean invaluable information not only on the success of the prolonged detention periods, but also on the effectiveness of the EATP as a whole.

Third, unlike the novel counter-terrorism measures adopted under the EATP that significantly curbed freedom of expression and right to privacy, the Ethiopian government does not even need to 'borrow' or 'learn' from the West in respect of counter-terrorism measures that affect liberty. The Ethiopian Criminal Procedure Code has always recognised reasonable suspicion as a standard to execute arrest without a warrant though it has been completely disregarded by the judiciary. What would have been preferable is to provide more guidelines and definitions under the EATP. In addition, 14-day pre-charge detention is already the standard under the Ethiopian Criminal Procedure Code. What the Ethiopian Parliament might have done is make a minor modification to the above Code that would empower judges to rigorously test the necessity of extending detention beyond

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<sup>1616</sup> See Donohue, L.K. (2008), *supra* note 203, pp. 34 and seq.; see also Roach, K. (2012), *supra* note 193, p. 239 (arguing that unlike the US, 'British approaches to terrorism also meant that the courts have played a prominent role in reviewing both laws and executive actions taken to prevent terrorism').

<sup>1617</sup> BBC (2005). *Blair Defeated over Terror Laws*, 9 November



the benchmark of 14 days. By so doing, this would inevitably limit the amount of times the police could request to extend the 14-day detention. Furthermore, similar tests to those of schedule 8 of the TA 2000, which require an arrest to be lawful, necessary and that the investigation is conducted expeditiously, are absolutely necessary under Article 20 (3) of the EATP. These could help the Ethiopian judiciary evaluate each individual case to find out the necessity of extending detention and whether the police are acting diligently to bring a charge or release the suspects at the earliest possible stage.

Making the above alternations would greatly enhance the Ethiopian approach when attempting to strike the proper balance between the need to investigate and prosecute terrorists on one hand, and to protect right to liberty, on the other.

Finally, while criticising the EATP for the length of pre-charge detention it provides is one thing, finding the rationale for that specific length of time is quite another. What could not be established from this research is the justification behind the Ethiopian legislature's decision to fix pre-charge detention at 28-days minimum and 120-days maximum. We cannot say by analysis, as is the case in the US, that 'a lack of faith in the criminal law'<sup>1618</sup> is the precursor for this measure. Evidence of the police struggling to complete terrorist investigations within the maximum period allowed under the Ethiopian Criminal Procedure Code is lacking. The terrorism cases we have discussed show this. Pre-charge detention within Ethiopia seems to be an entitlement of the police rather than justified by genuine need. Furthermore, the decision to adopt such lengthy pre-charge detention periods has not been promoted by exceptional circumstances around the time of their introduction. As discussed, the government has always been successful in prosecuting terrorist suspects. Thus, we can safely conclude that there is nothing special about investigating terrorism in Ethiopia that requires the excessive detention of terrorist suspects.

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<sup>1618</sup> Roach, K. (2012), *supra* note 193, p. 237

## Chapter Six: Conclusion

### 6.1 General Remarks

This thesis has attempted to critically analyse the effect of Ethiopian counter-terrorism law on the balance between freedom and security, focusing on three fundamental rights, and using to the perspective of the UK experience and to a lesser extent the approach of the US as yardsticks by which to measure Ethiopia's progress. From the outset, it has been stressed that one of the primary focuses of this research was to explore the responses of the UK and US to the fight against terrorism and to analyse the transposition of these responses into the Ethiopian counter-terrorism regime. Acknowledging the difficulty of transposing one legal system into another, the thesis has advanced different recommendations in each chapter that could help to amend the current design of the EATP, making it more compatible with accepted human right standards.

A question might be appropriate here asking whether the EATP is a direct replication of Western counter-terrorism measures or has it taken the path of 'lesson drawing'.<sup>1619</sup> The answer to this question depends on whether we are evaluating the EATP as whole or specific provisions in it. As discussed, the absence of clear legal provisions on terrorism was the motivation for enacting the EATP. Thus, the transfer of counter-terrorism measures from the West was necessitated to a large extent by 'domestic needs'.<sup>1620</sup> But, that's not to say that the influence of some Western countries might have played a somewhat lesser role in the decision of the Ethiopian legislature.<sup>1621</sup> Similarly, despite their insignificant impact domestically, Ethiopia has ratified several international instruments on terrorism.<sup>1622</sup> Additionally, though not officially recognised by the Ethiopian government, it would be inaccurate to suggest that 'epistemic

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<sup>1619</sup> Rose, R. (1993), *supra* note 73

<sup>1620</sup> *Ibid*, p. 27

<sup>1621</sup> Shinn, D. H. (2003), *supra* note 1 (this author was a former American Ambassador to Ethiopia); see also Whitaker, B.E (2007). Exporting the Patriot Act? Democracy and the 'War on Terror' in the Third World. 28 (5) *Third World Quarterly* 1017 (pointing that "counter-terrorism legislation is promoted through several international channels, most notably the United Nations counter-terrorism committee, but the USA is clearly seen as the driving force".)

<sup>1622</sup> See footnote 6 and chapter two for discussions on Algiers Convention and other international instruments ratified by Ethiopia

communities',<sup>1623</sup> such as the UNTC or the AU, have not have, at least, an indirect influence on the decision of the Ethiopian legislature in the construction of the country's counter-terrorism legislation. Therefore, it could be said that the EATP is a product of both voluntary and involuntary transfer of policy.<sup>1624</sup>

In relation, then, to the above posed question, the policy transfer mechanism in relation to the specific provisions of the EATP shows a mixed picture: some with duplication (specially the provisions on encouragement of terrorism and proscription of terrorist organisations) and others with major changes. If we understand the definition of comparative law to be the study of influences of one set of rules over another,<sup>1625</sup> we have attempted to show that some articles of the EATP are influenced by counter-terrorism legislation in the UK. These include the parts of the EATP that deal with inciting terrorism, encouraging terrorism, membership in terrorist organisations, and the requirement of reasonable suspicion/reasonable grounds for suspicion and reasonable grounds to believe. On the other hand, the part of the EATP and the TFOP that deal with interception of communications and the probative value of intercept evidence in criminal proceedings are taken from the US. But as shown in the preceding chapters, many of the 'transplanted'<sup>1626</sup> provisions in the EATP are altered to suit political factionalism.<sup>1627</sup>

## 6.2 Specific Remarks: Setting a Bad Precedent in the West

The first concluding remark is that the West's less than convincing justification for the transgression of fundamental rights in the name of the 'war on terror' has opened a 'Pandora's Box' of repercussions. The measures taken by the US post-9/11 and the UN Resolutions that have followed have provided the perfect

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<sup>1623</sup> Dunlop, C. (2009), *supra* note 72; see also Dolowitz, D. and Marsh, D. (2000) , *supra* note 67

<sup>1624</sup> Bennett, C. J. (1991), *supra* note 80, p. 2000; see also Dolowitz, D. and Marsh, D. (2000). , *supra* note 67, p. 13

<sup>1625</sup> Watson, A. (1978), *supra* note 88

<sup>1626</sup> *Ibid*

<sup>1627</sup> Rose, R. (2004), *supra* note 76

ammunition for some countries to crush dissent by appealing to the same counter-terrorist motives used by Western countries when infringing rights.<sup>1628</sup>

The West has arguably lost leverage over these countries when it comes to the enforcement of their observance of fundamental rights when they are perceived to themselves be at the fore-front of flouting civil liberties. The US publishes annual human rights reports from around the world, yet it continues to deny justice to many terrorist suspects who are languishing at Guantanamo. In the years following 9/11, the US has published several reports about human rights abuses in Ethiopia. Each time, the Ethiopian government had either reacted angrily or mocked the reports. For instance, the 2009 US State Department Report on Human rights situations in Ethiopia<sup>1629</sup> detailed several human rights violations in Ethiopia including the trial of members of opposition political parties on terrorism charges. However, the report was described by the Ethiopian government as 'full of lies and loopholes'.<sup>1630</sup>

Another Report published in 2011<sup>1631</sup> was dismissed as 'groundless and politically motivated',<sup>1632</sup> which was the last time the Ethiopian government openly denounced reports on human rights violations compiled by the US State Department.<sup>1633</sup> What we can conclude from the contempt of the Ethiopian government to criticism from the West is that the draconian counter-terrorism measures that came into force after 9/11 not only directly weakened human rights protections in the West, but also brought about an unintended reputational decline. The difficulty is that until the West is perceived to have 'got its house in

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<sup>1628</sup> Roach, K. (2012), supra note 193, pp.21 and seq.; see also Whitaker, B.E (2007), supra note 1616

<sup>1629</sup> US State Department (2010). 2010 Country Reports on Human Rights Practices: Ethiopia, 11 March, at <http://www.state.gov/j/drl/rls/hrrpt/2009/af/135953.htm>

<sup>1630</sup> Voice of America (2010). *Ethiopia's PM Says Human Rights Report Opens US To Ridicule*, 18 March

<sup>1631</sup> US State Department (2011). 2010 Country Reports on Human Rights Practices: Ethiopia, 8 April, at <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154346.htm>

<sup>1632</sup> Ministry of Foreign Affairs of Ethiopia (2011). *Ethiopia: Statement issued by the Ministry of Foreign Affairs of Ethiopia on the US State Department Human Rights Report 2010*, 15 April

<sup>1633</sup> See other reports that were published after 2011 at US State Department (2012). 2011 Human Rights Reports: Ethiopia, 24 May, at <http://www.state.gov/j/drl/rls/hrrpt/2011/af/186196.htm>; see also US State Department (2013). 2012 Human Rights Reports: Ethiopia, April 19, at <http://www.state.gov/j/drl/rls/hrrpt/2012/af/204120.htm>

order', they lack the credibility in developing nations to pronounce on violations of human rights there.

It would be incorrect to criticise the Ethiopian government purely on the basis that it decided to transfer counter-terrorism measures from the West. However, when many of these measures in the West that were enacted in response to emergencies were either abrogated or amended, it has become inexplicable why the Ethiopian government felt compelled to adopt legalisation that have severe consequences for the fundamental rights recognised under the supreme law of the land, i.e. the FDRE Constitution.

Unlike the knee-jerk legislation of the West, the Ethiopian government has had plenty of time (between 2001-2009) to learn from the mistakes created by the West in responding to terrorism. The West is gradually retreating from its 9/11 'siege mentality'.<sup>1634</sup> Moreover, partly under pressure from the public and the judiciary and partly due to the failure of the counter-terrorism measures to bring about the intended effect, the UK and US have reversed some of their more draconian counter-terrorism measures.<sup>1635</sup> There is of course a basic understanding that ordinary investigation techniques may, under exceptional circumstances, be inadequate to deal with terrorism<sup>1636</sup> but the stubborn insistence that civil liberties have to be sacrificed for the sake of national security is losing momentum.<sup>1637</sup>

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<sup>1634</sup> See Guardian books (2011). *9/11: the Attack on America, introduced by Ed Pilkington*; see also Sussex, M (2004). *Cultures in Conflict? Re-evaluating the 'Clash of Civilizations' Thesis After 9/11* In Shearman, P and Sussex, M. (editors). *European Security After 9/11* (England, Ashgate), pp. 28 and seq.; see also El Fadle, K. A. (2003). *9/11 and the Muslim Transformation* in Dudziak, M. L. (editor). *September 11 in History: A Watershed Moment?* (USA, Duke University Press), pp. 80 and seq.

<sup>1635</sup> See the preceding chapters on new measures introduced in the UK and the US. Just to mention few: the scrapping of stop and search, reverting pre-charge detention to 14-days and the defeat of the US government at the hands of the judiciary for attempting to strip foreign terrorist suspects right to *habeas corpus*

<sup>1636</sup> Cole, D. and Dempsey, J. (2006). *Terrorism and the Constitution: Sacrificing Liberties in the Name of National Security* (New York, The New Press), p. 22 (pointing that "the fact that U.S. intelligence agencies were unable to prevent the September attacks despite various warning signs reflected a failure that justifiably prompted a re-evaluation of traditional structures and procedures".)

<sup>1637</sup> See for instance, The Coalition (2010)., supra note 1376; see also Walker, C. (2011), supra note 224, p. 7 and seq. (arguing that "the ultimate test of success or failure of strategies against terrorism is the maintenance of public support while at the same time respecting the fundamental values on which legitimacy and consensus cohere".); see also Cole, D. and Dempsey, J. (2006),

However, these new developments in the West did little to sway the Ethiopian government from passing the current legislation.<sup>1638</sup>

### **6.3 The Consequences of Failing to Reconcile Human Rights and Counter-terrorism Measures in Ethiopia**

The second concluding remark we have attempted to demonstrate in the thesis is that the terrorist (perceived) threats in Ethiopia are fundamentally different from the threats Western countries including the UK and the US have faced since 9/11. One important difference is the absence of religious extremism in Ethiopia. Another is the blurred distinction between terrorist organizations and political organisations. The adoption of the EATP in 2009 does not recognise these realities. As a result, the question of fighting terrorism and enhancing human security has lacked a proper balance: protecting human rights in the context of counter-terrorism measures has not yet been crystallised in Ethiopia.

As it currently stands, the EATP is disproportionately designed to augment the security of the state. This in turn could result in the curtailment of expressions that would have been tolerated through the prism of Western standards.<sup>1639</sup> Therefore, the EATP needs to be reconciled with the FDRE Constitution and other international human rights standards adopted by Ethiopia.

Regrettably, the more the pressure is exerted on the opposition by resorting to counter-terrorism measures, the faster the opposition is likely to choose a different path: allying with groups that advocate violence<sup>1640</sup> or with countries that are arch enemies of Ethiopia.<sup>1641</sup> These are the worrying consequences of

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supra note 1636; see also Fenwick, H. and Phillipson, G. (2012) UK Counter-terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms. In Ramraj, V. et al. (eds.). *Global Anti-Terrorism Law and Policy* (Cambridge, Cambridge University Press); see also Stoller, H., et al (2004), supra note 1448; see also Gouldin, L. P. (2012)., supra note 1455; see also Sussex, M (2004)., supra note 1634

<sup>1638</sup> See the preceding chapters for details

<sup>1639</sup> See chapter three for a comparison of the ECtHR jurisprudence and the Ethiopian courts approach to expressions that incite or encourage terrorism.

<sup>1640</sup> Lyons, T. (2007). Conflict-Generated Diasporas and Transnational Politics in Ethiopia. 7(4) *Conflict, security and Development* 529

<sup>1641</sup> A leaked telephone conversation has revealed that the leader of *Ginbot 7*, Dr. *Birhanu Nega*, is receiving direct financial aid from Egypt following the recent spat between the two countries

abusing counter-terrorism measures. So the Ethiopian government needs to show a political willingness for a change in its attitude by significantly amending the EATP based on the recommendations given in the thesis.

More significantly, a political solution, such as opening channels of communication and accommodating the grievances of the terrorist organisations is the only way forward. There is a possibility as well that, despite their claim to the contrary, the organisations labelled as 'terrorist' could renounce their armed rebellion and join a peaceful political process. The changes of strategy by OLF and ONLF as discussed in chapter two and a failed attempt of *Ginbot 7* to talk to the Ethiopian Government<sup>1642</sup> substantiate this argument. Therefore, terrorism in Ethiopia is arguably best solved through political integration, not enacting a harsh counter-terrorism regime, such as the EATP which arguably fails to ensure the balance between nurturing human rights and securing the country from terrorist attacks.

#### 6.4 Recommendations for Further Research

We have attempted to make a significant contribution to the field of knowledge by offering contributions towards the practical implication of transferring Western counter-terrorism laws. This has been done by developing a new point of view for the examination of terrorism and human rights, particularly in Ethiopia where issues of human rights are accorded less significance than the issues of security and stability. The thesis is also original in that it provided an original research with regard to Ethiopian legal system on terrorism and human rights for which there has been no comprehensive research or publication to date. The general conclusion we have made in this thesis is that the Ethiopian case is different from other Western laws because the EATP is not enacted in response

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over the construction of the Ethiopian Renaissance Dam. For details see Awramba Times (2013). *Berhanu Nega Receives Half A Million "Grant" From Egypt to Run Ginbot 7 and ESAT, 20 June*; see also Stack, L (2013). *With Cameras Rolling, Egyptian Politicians Threaten Ethiopia over Dam, 6 June, the New York Times*; see also Plaut, M (2013). *Egypt–Ethiopia Crisis: "No Nile, No Egypt," 11 June, New Statesman*

<sup>1642</sup> The attempt of *Ginbot 7* to negotiate with the Ethiopian government after the death of the late Prime Minister, *Meles Zenawi*, had been dismissed out of hand. For details, see Powel, A. (2012). *Ethiopian Exiles Seek Talks with Government, 23 August, Voice of America*

to any emergency situation. However, the sweeping measures included in the EATP resembles that of Western laws that were enacted post 9/11. Although the country was right to pass counter-terrorism legislation, we have attempted to shown that the contents of the EATP severely curtail fundamental rights recognised under the FDRE Constitution.

However, there are some limitations with this research. First, this research only gives us a clue how the changing perception of human rights and terrorism in the West since 9/11 is shaping the legal response to terrorism in some part of the world. Therefore, we have to acknowledge that a research on Ethiopia's response to terrorism may not represent all developing countries in general or African nations in particular. For this reason, the findings of this research would have broader implications if any future research is done by looking into the experience of other African countries which are in a similar democratic status to Ethiopia.

Moreover, this research only covers counterterrorism measures *vis a-vis* three fundamental rights. Thus, a further research, be it from an Ethiopian context or African context, is required to analyse how 9/11 has affected other fundamental rights not discussed in this thesis.



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## □ **Appendix A**

### **Details of cases used in table 2.3**

Public Prosecutor v Muhammed abatiha, et al (39/1995)  
Public Prosecutor v Merga (94/1995)  
Public Prosecutor v Adelo Mengistu et, al (41/1996)  
Public Prosecutor v Sewfit Hassen Abdul Keni et, al (?/1997)  
Public Prosecutor v Mehammed Mohamud Farah et al. (123/1998)  
Public Prosecutor v Dechassa Abate et al. (1025/2000)  
Public Prosecutor v Dechasaw Abate et al. (17511/6771/2000)  
Public Prosecutor v Hamza Muhammed Ahmed and Ahmed Esmael muda (8705/2003)  
Public Prosecutor v Ebrahim Ahmed Muhamud and Mohammed Osman Bala (9832/2003)  
Public Prosecutor v Rabi Hussien, et al (238/1998)  
Public Prosecutor v Debela Waqqira Gemelal and Sheferaw Hinsermu Yigezu (33101/2004)  
Public Prosecutor v Abuya Akwar et, al (37041/2004)  
Public Prosecutor v Haile Talisa Daba et al. (36268/2005)  
Public Prosecutor v Abule H/mariam T/mariam et, al (37299/2005)  
Public Prosecutor v Alias Gibril Buru et, al (40783/2005)  
Public Prosecutor v Ahmed Kemal Abdela (41449/2006)  
Public Prosecutor v Beyane Ahmed Esmauel, et al (17722/2007)  
Public Prosecutor v Birhanu Degu et al. (25845/2007)  
Public Prosecutor v Yasin Shifa and Mesfin Gebere (25993/2007)  
Public Prosecutor v Tomas Asrat Dosha et, al (26208/2007)  
Public Prosecutor v Shimels Degene and Dereje Gutema (26858/2007)  
Public Prosecutor v Eyob Tilahun (27093/2007)  
Public Prosecutor v Derege Kassa Bekele (27536/2007)  
Public Prosecutor v Tsegaye Korto (27720/2007)  
Public Prosecutor v Abdisa Effa Gari et, al (50798/2008)  
Public Prosecutor v Kemal sheik Mohammed Seife (51539/2008)

Public Prosecutor v Adem Ahmmed et, al (51550/2007)  
Public Prosecutor v Yitbarek (Mubarek Admasu wete) (56118/2007)  
Public Prosecutor v Samuel Goitom Kifle et, al (56550/2007)  
Public Prosecutor v Gurum T/Himanot and Tadious Gantu (29574/2008)  
Public Prosecutor v Merga Negara et al. v (34705/2008)  
Public Prosecutor v Rabyie Mohamed Hassen et al. (49303/2008)  
Public Prosecutor v Chanyalew et al. (59989/2008)  
Public Prosecutor v Abas Hussein and kasim Mohammed (6000/2008)  
Public Prosecutor v Bira Merga Buli et al. (60086/2008)  
Public Prosecutor v Abdi Shafi Abdi (60184/2008)  
Public Prosecutor v Tadel yeshanew Akalu et, al (60575/2008)  
Public Prosecutor v Murad Hashim Omar (61656/2008)  
Public Prosecutor v Afera Gidey Kiflu (61663/2008)  
Public Prosecutor v Bati (Derege) Girma Edesa Tita et al. (62221/2008)  
Public Prosecutor v Teha Abagaro Abawaje (64246/2008)  
Public Prosecutor v Ali Abu Tero et al. (69430/2008)  
Public Prosecutor v Tesfahunegn Chemed et al. ( public prosecutor file no. 5-2592/ 01335/2009)  
Public Prosecutor v Teklu Assefa, et al (58070/2009)  
Public Prosecutor v Mehammed Junedin Esmael and Husni Abdi-Kadir (60083/2009)  
Public Prosecutor v Wegari Alemu Kasa, et al (60265/2009)  
Public Prosecutor v Shferaw Mokonnen and Ethiopia Aregaw (68104/2009)  
Public Prosecutor v Ezedin Mohammed Abdulseman, et al (69201/2009)  
Public Prosecutor v Alio Yosef et, al (71000/2009)  
Public Prosecutor v Jumue Rufael et al. (77113/2009)  
Public Prosecutor v Tefera Mamo Cherkos et, al (81406/2009)  
Public Prosecutor v Assemu Mihret and Getachew Niguse v (89341/2009)  
Public Prosecutor v Alio Muhammed et, al (89647/2010)  
Public Prosecutor v Abdiweli Mohammed Ismael, et al (112198/2011)  
Public Prosecutor v Elias Kifle, et al (112199/2011)  
Public prosecutor v Teshale Bekashi, et al (?/2011)  
Public Prosecutor v Ghetnet Ghemechu, et al (?/2011)  
Public prosecution v Bekel Gerba, et al (?/2011)

Public Prosecutor v Andualem Arage, e al (?/2011)

#### **Details of Cases Used in Table 2.4**

Public Prosecutor v Muhammed abatiha, et al (39/1995)

Public Prosecutor v Merga (94/1995)

Public Prosecutor v Adelo Mengistu et, al (41/1996)

Public Prosecutor v Sewfit Hassen Abdul Keni et, al (?/1997)

Public Prosecutor v Mehammed Mohamud Farah et al. (123/1998)

Public Prosecutor v Dechassa Abate et al. (1025/2000)

Public Prosecutor v Dechasaw Abate et al. (17511/6771/2000)

Public Prosecutor v Hamza Muhammed Ahmed and Ahmed Esmael muda (8705/2003)

Public Prosecutor v Ebrahim Ahmed Muhamud and Mohammed Osman Bala (9832/2003)

Public Prosecutor v Rabi Hussien (238/1998)

Public Prosecutor v Debela Waqqira Gemelal and Sheferaw Hinsermu Yigezu (33101/2004)

Public Prosecutor v Abuya Akwar et, al (37041/2004 )

Public Prosecutor v Haile Talisa Daba et al. (36268/2005)

Public Prosecutor v Abule H/mariam T/mariam et, al (37299/2005)

Public Prosecutor v Alias Gibril Buru et, al (40783/2005)

Public Prosecutor v Ahmed Kemal Abdela (41449/2006)

Public Prosecutor v Beyane Ahmed Esmael, et al (17722/2007)

Public Prosecutor v Tsegaye Korto (27720/2007)

Public Prosecutor v Abdisa Effa Gari et, al (50798/2008)

Public Prosecutor v Kemal sheik Mohammed Seife (51539/2008)

Public Prosecutor v Adem Ahmmed et, al (51550/2007)

Public Prosecutor v Yitbarek (Mubarek Admasu wete) (56118/2007)

Public Prosecutor v Samuel Goitom Kifle et, al (56550/2007)

Public Prosecutor v Gurum T/Himanot and Tadious Gantu (29574/2008)

Public Prosecutor v Merga Negara et al. v (34705/2008)

Public Prosecutor v Rabye Mohamed Hassen et al. (49303/2008)

Public Prosecutor v Chanyalew et al. (59989/2008)

Public Prosecutor v Abas Hussein and kasim Mohammed (6000/2008)

Public Prosecutor v Bira Merga Buli et al. (60086/2008)

Public Prosecutor v Abdi Shafi Abdi (60184/2008)

Public Prosecutor v Tadel yeshanew Akalu et, al (60575/2008)

Public Prosecutor v Murad Hashim Omar (61656/2008)

Public Prosecutor v Afera Gidey Kiflu (61663/2008)

Public Prosecutor v Bati (Derege) Girma Edesa Tita et al. (62221/2008)

Public Prosecutor v Teha Abagaro Abawaje (64246/2008)

Public Prosecutor v Ali Abu Tero et al. (69430/2008)

Public Prosecutor v Teklu Assefa, et al (58070/2009)

Public Prosecutor v Mehammed Junedin Esmael and Husni Abdi-Kadir (60083/2009)

Public Prosecutor v Wegari Alemu Kasa, etal (60265/2009)

Public Prosecutor v Shferaw Mokonnen and Ethiopia Aregaw (68104/2009)

Public Prosecutor v Ezedin Mohammed Abdulseman, et al (69201/2009)

Public Prosecutor v Alio Yosef et, al (71000/2009)

Public Prosecutor v Jumue Rufael et al. (77113/2009)

Public Prosecutor v Tefera Mamo Cherkos et, al (81406/2009)

Public Prosecutor v Assemu Mihret and Getachew Niguse v (89341/2009)

Public Prosecutor v Alio Muhammed et, al (89647/2010)

Public Prosecutor v Abdiweli Mohammed Ismael, et al (112198/2011)

Public Prosecutor v Elias Kifle, et al (112199/2011)

Public prosecutor v Teshale Bekashi, et al (?/2011)

Public Prosecutor v Ghetnet Ghemechu, et al (?/2011)

Public prosecution v Bekel Gerba, et al (?/2011)

Public Prosecutor v Andualem Arage, e al (?/2011)

### **Details of Cases Used in Table 4.3**

Public Prosecutor v Adelo Mengistu et, al (41/1996)

Public Prosecutor v Hamza Muhammed Ahmed and Ahmed Esmael muda (8705/2003)

Public Prosecutor v Ebrahim Ahmed Muhamud and Mohammed Osman Bala (9832/2003)



Public Prosecutor v Rabi Hussien (238/1998)  
Public Prosecutor v Debela Waqjira Gemelal and Sheferaw Hinsermu Yigezu (33101/2004)  
Public Prosecutor v Haile Talisa Daba et al. (36268/2005)  
Public Prosecutor v Abule H/mariam T/mariam et, al (37299/2005)  
Public Prosecutor v Alias Gibril Buru et, al (40783/2005)  
Public Prosecutor v Ahmed Kemal Abdela (41449/2006)  
Public Prosecutor v Shimels Degene and Dereje Gutema (26858/2007)  
Public Prosecutor v Derege Kassa Bekele (27536/2007)  
Public Prosecutor v Tsegaye Korto (27720/2007)  
Public Prosecutor v Abdisa Effa Gari et, al (50798/2008)  
Public Prosecutor v Kemal sheik Mohammed Seife (51539/2008)  
Public Prosecutor v Adem Ahmmed et, al (51550/2007)  
Public Prosecutor v Yitbarek (Mubarek Admasu wete) (56118/2007)  
Public Prosecutor v Samuel Goitom Kifle et, al (56550/2007)  
Public Prosecutor v Gurum T/Himanot and Tadious Gantu (29574/2008)  
Public Prosecutor v Chanyalew et al. (59989/2008)  
Public Prosecutor v Bira Merga Buli et al. (60086/2008)  
Public Prosecutor v Tadel yeshanew Akalu et, al (60575/2008)  
Public Prosecutor v Afera Gidey Kiflu (61663/2008)  
Public Prosecutor v Teha Abagaro Abawaje (64246/2008)  
Public Prosecutor v Alio Yosef et, al (71000/2009)  
Public Prosecutor v Jumue Rufael et al. (77113/2009)  
Public Prosecutor v Tefera Mamo Cherkos et, al (81406/2009)  
Public Prosecutor v Alio Muhammed et, al (89647/2010)  
Public Prosecutor v Abdiweli Mohammed Ismael, et al (112198/2011)  
Public Prosecutor v Elias Kifle, et al (112199/2011)  
Public prosecutor v Teshale Bekashi, et al (?/2011)  
Public Prosecutor v Ghetnet Ghemechu, et al (?/2011)  
Public prosecution v Bekel Gerba, et al (?/2011)  
Public Prosecutor v Andualem Arage, e al (?/2011)

## **Appendix B: Ethiopian Court Cases In Amharic**

የፍልጋ ሰነድ ሪፖርት

የታተመበት ቀን ፡ 30/10/2002

የፍልጋ ቁጥር 00/0100/ የጉዳይ አይነት መጀላ የፍልጋ ዕድሜ

የባለሙያ ማስ አይነት ሽብር

የፍልጋ ቁጥር	ዕድሜ/አመልካች	ተከላኝ/መልስ ስልጠና	ፍልጋ የተከፈተበት ቀን	ፍልጋ የተጠናቀቀበት ቀን	አድራሻ በዚህ (ጠር)	አድራሻ ከበታች (ጠር)
00/0100/37044	ዕቃቤ ሀገ	ተግባራዊ ሀገራዊ የሰነድ	17/6/1997	28/11/2000	42	42
00/0100/42509	ዕቃቤ ሕግ	አን ቻም ቻም ኡቻል	6/3/1998	22/5/1999	14	14
00/0100/47134	ዕቃቤ ሕግ	ፀሐይ ገርቤ ድራሳ	21/9/1998	8/10/1998	1	1
00/0100/56159	ዕቃቤ ሀገ	የአለም ዘመድ በተለ መላት	28/9/1999	17/7/2000	9	9
00/0100/56442	ዕቃቤ ሀገ	ሸክ አህመድ አሜን መሰጠፍ አብዱልታደር	29/9/1999	26/11/1999	2	2
00/0100/60655	ዕቃቤ ሕግ	መከሰድ ሐሰ ዳርሶ	9/3/2000	5/5/2001	14	14
00/0100/62879	ዕቃቤ ሀገ	አን ተፈራ ፈለቀ	6/5/2000	23/3/2002	23	23
00/0100/65027	ዕቃቤ ሕግ	አን ካሳ ጉድግ /42 ሰዎች /	3/7/2000	22/8/2000	1	1
00/0100/69422	ዕ/ሕግ	ሀገራዊ ጅም ሰይድ	6/12/2000	29/7/2001	8	8
00/0100/69423	ዕቃቤ ሕግ	አን መሀመድ ሀሰን መብሩክ	7/12/2000	1/8/2001	8	8
00/0100/69424	ዕቃቤ ሕግ	አን አብዱሳለም አልመደብ መንሱር	6/12/2000	29/7/2001	8	8
00/0100/69425	ዕቃቤ ሕግ	ሰሌሜን ሀገሰ አጂራ	12/12/2000	29/7/2001	8	8
00/0100/69426	ዕቃቤ ሕግ	አን አብዱላላ አብዱራዘቅ አብራሃም/7	12/12/2000	30/7/2001	8	8
00/0100/69427	ዕቃቤ ሕግ	አን ዘይዳን አደም ራዌስ	7/12/2000	29/7/2001	8	8
00/0100/69428	ዕቃቤ ሕግ	ሰይድ ጅም ፈረጅ	12/12/2000	29/7/2001	8	8
00/0100/69429	ዕቃቤ ሕግ	አን ከማል የሰነድ ሰነድ	12/12/2000	29/7/2001	8	8
00/0100/69431	ዕቃቤ ሕግ	መሀገድ አጅንቲ/ገንዶ/ /10 ሰዎች/	12/12/2000	30/7/2001	8	8
00/0100/69432	ዕቃቤ ሕግ	አን አብዱራሞ ፈጠር አልበሃድ	6/12/2000	29/7/2001	8	8
00/0100/69434	ዕቃቤ ሕግ	አብራሃም መርዳሳ ረሰገላ	12/12/2000	30/7/2001	8	8
00/0100/69435	ዕቃቤ ሕግ	አን አብዱላሂ ማህመድ አበድላሃሚድ /20 ሰዎች /	6/12/2000	30/7/2001	8	8
00/0100/70233	ዕቃቤ ሕግ	አን አሰር አህመድ ሰበከር7/	7/12/2000	21/5/2001	5	5
00/0100/70234	ዕቃቤ ሕግ	ረሀማ ባበከር አብራሃም	12/12/2000	30/7/2001	8	8
00/0100/70235	ዕቃቤ ሕግ	አብደላ የሰነድ ጉብ	12/12/2000	30/7/2001	8	8

የፌዴራል ከፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

6

የታተመበት ቀን ፦

14/12/2002

የተወሰነበት ቀን በ: 10/12/1996 አለክ: 13/12/2002 የክስ አይነት: የኃሪስ ወንጀል የጉዳዩ አይነት: ወንጀል

ፋይሎች የወንጀል ፋይሎች 5ኛ

የፋይል ቁጥር	ከሰላም/አመልካች	ተከሰሰ/መልስ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ዝቢ	የቀጠሮ ብዛት	አድማስ በፍ/ቤት (በወር)	አድማስ ከበታች /ቤት (በወር)	ፍ
00/0100/25414 ✓	ዐቃቤ ሀገ	አነ አቶ ሰቀባይ በርሔ ገ/ኪዳን	18/2/1996	27/5/1997	9	16	16	
						<b>ድምር</b>	<b>1</b>	

ፋይሎች አስረኛ ወንጀል ፋይሎች (አዲስ)

የፋይል ቁጥር	ከሰላም/አመልካች	ተከሰሰ/መልስ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ዝቢ	የቀጠሮ ብዛት	አድማስ በፍ/ቤት (በወር)	አድማስ ከበታች /ቤት (በወር)	ፍ
00/0100/02143 ✓	ዐቃቤ ሀገ	ታምራት ገ/ጊርጊስ ገ/ማርያም	2/11/1993	28/11/1997	15	49	49	
00/0100/08551 ✓	ዐቃቤ ሀገ	በይፈ ፋንታሁን ብዙነሀ	6/3/1993	5/10/1998	20	67	67	
00/0100/15090 ✓	ዐቃቤ ሀገ	አነ ወርቁ አለማየሁ ይገዙ	13/2/1995	25/8/1998	15	43	43	
00/0100/15092 ✓	ዐቃቤ ሀገ	አብርሃም ረታ አለሙ	13/2/1995	26/11/1999	20	58	58	
00/0100/27870 ✓	ዐቃቤ ሀገ	ወሰንሠገድ ገ/ኪዳን ተገኝ	17/5/1996	9/8/1998	9	27	27	
00/0100/29574 ✓	ዐቃቤ ሀገ	አነ ገሩም ተዘለሃይማኖት ውብሸት /2ሰዎቶች/	19/9/1996	19/6/2000	28	45	45	
00/0100/31059 ✓	ዐቃቤ ሀገ	ብሩ ሀጋዮ ጅማ	25/9/1996	9/9/1999	12	35	35	
00/0100/35465 ✓	ዐቃቤ ሕገ	አነ መሰለ መንግስቱ ገ/ሥላሴ	20/4/1997	26/3/2000	13	36	36	
00/0100/37049 ✓	ዐቃቤ ሕገ	አነ ለረመው ደነቀ ተሰማ/2 ሰዎች/	17/6/1997	19/7/1998	7	13	13	
00/0100/40757 ✓	ዐቃቤ ሕገ	አንዱዳለም አየለ ለገሠ	21/11/1997	6/4/1999	10	17	17	
00/0100/40768 ✓	ዐቃቤ ሕገ	አግረ አረጋዊ ወ/ኪዳን	25/11/1997	11/10/1999	9	22	22	
00/0100/40775 ✓	ዐቃቤ ሕገ	አግረ አረጋዊ ወ/ኪዳን	27/11/1997	27/2/2000	14	27	27	

የፋይል ቁጥር	ዘላቂ/አመልካች	ተከላኝ/መልሶ ሰጪ	ፋይል የተከፈተበት ቀን	ፋይል የተወሰነበት ቀን	እድሜ በዚህ (ወር)	እድሜ ከበታች (ወር)
00 0100 80784	ወታደራዊ ልግ	እን ሊሊያ ሙሉ በቀሎ ትጽል የጫካ ስም ፋርጋሣ	13/9/2001	1/10/2002	13	13
00 0100 82237	ወታደራዊ ልግ	አንዳል አበበ በላይ	26/10/2001	13/7/2002	8	8
00/0100/93427	ወታደራዊ ሆግ	ረሽድ ሸክ ሰይፍ ቱሬ	2/9/2002	3/10/2002	1	1
00/0100/93858	ወታደራዊ ሆግ	ም/ሳጅን አብዱ በከር መዘመድ	3/9/2002	3/10/2002	1	1

ጽምር 55

ላይኛው ቁጥር	የሰነድ አይነት	ተጠቃሚ/መልስ ስጪ	ፋይል የተከፈተበት ቀን	ፋይል የተጠበቀበት ቀን	እድሜ በዚያ (መር)	እድሜ ከበታች መር
00/0100/51550	የፌዴራል ዕቃዬ ሕግ	እነ አደም መሐመድ ዩሱፍ / 9 ሰዎች /	24/4/1999	15/9/2000	16	16
00/0100/51770	ዕቃዬ ሕግ	መሐመድ ዳዜ	25/4/1999	16/9/1999	4	4
00/0100/54860	ዕቃዬ ሕግ	እነ ፍራንሰስ መሃመድ ገራ / 13 ሰዎች /	11/8/1999	28/5/2001	22	22
00/0100/561184	ዕቃዬ ሕግ	ይትባረከ ወይም ሙባረከ አድማሱ ጠጬ	17/9/1999	30/1/2001	17	17
00/0100/56550	ዕቃዬ ሕግ	እነ ማሙኤል ጉይቶም ከፍሌ / ኢርምያስ ታደሰ	8/10/1999	14/4/2001	18	18
00/0100/59089	ዕቃዬ ሕግ	እነ ጫኔያለው ባልቡ ቶላ / 15 ሰዎች /	6/2/2000	11/7/2001	17	17
00/0100/60000	ዕቃዬ ሕግ	እነ አባስ ሁሴን ሸባ / 2 ሰዎች / ቅጽል ስም	11/2/2000	21/8/2000	6	6
00/0100/60083	ዕቃዬ ሕግ	እነ መሐመድ ጃንዲ እስማኤል / 3 ሰዎች /	13/2/2000	28/8/2001	19	19
00/0100/60086	ዕቃዬ ሕግ	እነ ቢራ መርጋ ቡሌ / 8 ሰዎች /	13/2/2000	15/4/2001	14	14
00/0100/60184	የፌዴራል ዕቃዬ ሕግ	አብዱ ሸፊላ አብዱ ቅጽል ስሙ አብዱ ባዩል	19/2/2000	21/9/2006	7	7
00/0100/60255	ዕቃዬ ሕግ	እነ ጠጋሪ ዓለሙ ከሰሳ	26/2/2000	30/8/2001	18	18
00/0100/60575	ዕቃዬ ሕግ	እነ ታደሰ የሻነው አካሉ / 4 ሰዎች /	29/2/2000	2/13/2001	22	22
00/0100/61656	ዕቃዬ ሕግ	ሙራድ ሐሽም ዑመር ወይም ተስፋዬ አበራ ጉደታ	4/4/2000	17/2/2001	10	10
00/0100/61663	ዕቃዬ ሕግ	አፈራ ግደይ ከፍሉ	14/4/2000	17/4/2000	0	0
00/0100/61664	ዕቃዬ ሕግ	እነ ኪሮስ ገብረጻዲት	4/4/2000	11/4/2000	0	0
00/0100/62221	ዕቃዬ ሕግ	እነ ባቲ/ደረጀ/ ግርማ ኢዳማ ጢጣ/ 3 ሰዎች /	16/4/2000	22/5/2001	13	13
00/0100/62806	ዕቃዬ ሕግ	እነ 10 አለቃ ወርቁ በለጠ ደሣለኝ / 8 ሰዎች /	7/5/2000	2/7/2001	14	14
00/0100/64246	ዕቃዬ ሕግ	ጠሃ አባጋሮ አባቶቹ	13/6/2000	24/2/2001	9	9
00/0100/68104	የፌዴራል ዕቃዬ ሕግ	እነ ሸፈራው መኮንን አየለ	6/10/2000	12/8/2001	10	10
00/0100/69430	ዕቃዬ ሕግ	እነ አሊ አቡጡርጌ 15 አቃይዶ	7/12/2000	26/10/2001	11	11
00/0100/69437	ዕቃዬ ሕግ	እነአብዱራህማን አቡዳ አመሩ	30/11/2000	1/8/2001	8	8
00/0100/74469	ዕቃዬ ሕግ	ረ/ኢ/ር ገመረዲን አኑር አብዱልብዲ	23/4/2001	16/10/2001	5	5
00/0100/74473	ዕቃዬ ሕግ	መዘመድ አልፋድል አብዱረህማን	4/5/2001	1/11/2001	6	6
00/0100/74636	ዕቃዬ ሕግ	በሸር አሀመድ መኸተል ወይም በሸር ሐሰን አሀመድ	8/4/2001	27/11/2001	8	8
00/0100/74659	ዕቃዬ ሕግ	እነ ተስፋዬን ጨመዳ ጉርማሣ / 16 ሰዎች /	6/4/2001	10/7/2002	15	15
00/0100/75852	ዕቃዬ ሕግ	? እነ ጂብራል ተማም ወንግሥቱ	7/5/2001	1/7/2002	14	14

የፍለጋ ውጤት ሪፖርት

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የተተመበት ቀን

30/10/2002

የፍለጋ ቁጥር 00/0100/ የጉዳይ አይነት መገጃ የፍይሉ ዓይነት የተመሰጠነ ስም አይነት ሽብር

የፍለጋ ቁጥር	ከሰነድ/አመልካች	ተከሰባ/መልስ ስጪ	ፍይሉ የተከፈተበት ቀን	ፍይሉ የተመሰጠነበት ቀን	አድሜ በዚህ (ወር) አድሜ ከበታች (ወር)
00/0100/10426	ዐቃቤ ህግ ✓	ደቅሳ አባተ	7/5/1992	15/4/1997	59 59
00/0100/12172	ዐቃቤ ህግ ✓	እነ እራቤ ሁሴን	13/7/1992	21/3/1999	80 80
00/0100/14281	ዐቃቤ ህግ ✓	እነ አቶ/21 ሰዎች/ አህመድ	28/1/1995	12/7/1997	29 29
00/0100/22593	የረደራል ዐቃቤ ስግ ✓	ጅሎ ቦንጽ ጂሎ	28/1/1996	21/4/1998	26 26
00/0100/25654	ዐቃቤ ስግ ?	አሰፋ ለገጠ	5/4/1996	23/3/2000	48 48
00/0100/29605	ዐቃቤ ህግ	ግጋቱ ተሰፋውን	30/7/1996	19/11/1997	15 15
00/0100/33101	ዐቃቤ ህግ ✓	እነ ደበሰ ዋቅጅራ ገመላል	20/11/1996	13/7/1999	32 32
00/0100/34705	ዐቃቤ ስግ ✓	እነ መርጋ ነገራ ደጉ	15/3/1997	9/7/2000	40 40
00/0100/36263	ዐቃቤ ስግ	ደርቤ ደምሴ ቦቱ	18/5/1997	30/5/2000	37 37
00/0100/36268	ዐቃቤ ስግ	እነ ኃይሌ ታሊሚ ዳባ/9 ሰዎች/	19/5/1997	30/5/1999	25 25
00/0100/37041	የራ/ ዐቃቤ ስግ ✓	እነ ኦቦያ ክፍለ-ወር ኦቦንግ	16/6/1997	26/5/1999	24 24
00/0100/37234	የራ/ዐቃቤ ስግ	እነ መሐመድ/መዶ/ ኦቦንግ ኦጅዋት/16 ሰዎች/	17/6/1997	22/5/1999	23 23
00/0100/37298	ዐቃቤ ስግ	እነ በራቹ ኦጅሎ ኦጅሎ /22 ሰዎች /	25/6/1997	21/3/1998	8 8
00/0100/37299	ዐቃቤ ስግ ✓	እነ አቡሌ ኃ/ጣርያም ተ/ጣርያም	25/6/1997	25/5/1999	23 23
00/0100/39679	የረደራል ዐቃቤ ስግ ✓	ቻም ቻም ዑቻላ	26/9/1997	9/9/1998	11 11
00/0100/40783	ዐቃቤ ስግ	እነ ኤልያስ ጅብራል ብሩ/2 ሰዎች/	28/11/1997	12/10/2000	34 34
00/0100/41449	ዐቃቤ ህግ	አህመድ ከሚል አብደላ	16/1/1998	4/2/2000	25 25
00/0100/42507	ዐቃቤ ስግ	እነ ኦሪያሚ ኦቶሃር አዳይዎ	6/3/1998	23/5/1999	14 14
00/0100/47967	ዐቃቤ ስግ	አሚን ከደር ገመዳ	7/11/1998	30/10/2000	24 24
00/0100/49303	ዐቃቤ ስግ	እነ ራብሰ መሀመድ ሀሰን	25/1/1999	3/3/2000	13 13
00/0100/50798	ዐቃቤ ስግ ✓	እነ አብዲሚ ኢፋ ጋራ /10 ሰዎች /	28/3/1999	30/10/2000	19 19
00/0100/51539	ዐቃቤ ስግ ✓	ከሚል ሸህ መሀመድ ሰይፌቅዳስ ሰመፈጫኦ	19/4/1999	30/8/2000	17 17
00/0100/51544	ዐቃቤ ስግ	ከምሣ ገራ ዳባ	23/4/1999	17/2/2001	21 21

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የፌዴራል ዘፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

የፌዴራል ዘፍተኛ ፍ/ቤት የተወሰኑ ፋይሎች ዝርዝር

የፌዴራል ከፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

የታተመበት ቀን ፡

11/11/2005

የተወሰነበት ቀን ስ: 1/1/2001 አባት: 11/11/2005 የተጻፉ ደረጃ: የመጀመሪያ ደረጃ የክስ አይነት: ሽብር የተጻፉ አይነት: ወንጀል

00/0100/93427	ዕቃቤ ሀገ	ረሽድ ሼክ ሰይጅ ተራ	2/9/2002	3/10/2002	3	1	1
00/0100/93858	ዕቃቤ ሀገ	ም/ሳጅን አብዱ በዘር መሀመድ	3/9/2002	3/10/2002	2	1	1
00/0100/95195	ዕቃቤ ሕገ	እነ ዝባሽን አዳኛ ሮቢ አያኛ	10/10/2002	30/11/2002	5	2	2
00/0100/96166	ዕቃቤ ሕገ	መኮንን አሰፋ ያሚ	2/11/2002	29/11/2002	2	1	1
00/0100/98203	ዕቃቤ ሀገ	እነ 10 አለቃ አበራ አዲሱ ቤታሎ	19/12/2002	21/3/2003	6	3	3

1ኛ ቢ.ፒ.አር. ወንጀል ችሎት

ድምር

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ችሎት

2ኛ ቢ.ፒ.አር. ወንጀል ችሎት

የፋይል ቁጥር	ከሳሽ/አመልካች	ተከሳሽ/መልሰ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ጊዜ	የቀጠሮ ብዛት	አድማሜ በፍ/ቤት (በወር)	አድማሜ ከበታች /ቤት (በወር)	ፍ
00/0100/95717	ዕቃቤ ሕገ	ኮ/ብል አዳኛ ምትኩ	17/10/2002	7/12/2002	5	2	2	

2ኛ ቢ.ፒ.አር. ወንጀል ችሎት

ድምር

1

ጠቅላላ ድምር

55



የፌዴራል ዘፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

የታተመበት ቀን ፡

14/12/2002

የተወሰነበት ቀን ሆኖ ፡ 10/12/1996 እስከ ፡ 13/12/2002 የክስ አይነት ፡ የንፅህና ወንጀል የጉዳዩ አይነት ፡ ወንጀል

00/0100/77363	ዕቃቤ ሕግ	✓	እነ ታምራት ወ/ገዳርገባ ገ/ግርግር	16/6/2001	24/5/2002	12	12	12
00/0100/81380	ዕቃቤ ሕግ		አግረ አረጋዊ ወ/ኪዳን	28/9/2001	11/9/2002	11	11	11
አሰሪዎች ወንጀል ችሎት (አዲስ)						<b>ድምር</b>		<b>31</b>
<b>ጠቅላላ ድምር</b>							<b>32</b>	

የፌዴራል ከፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

የታተመበት ቀን ፡

11/11/2005

የተወሰነበት ቀን ከ: 1/1/2001 እስከ: 11/11/2005 የተጻፉ ደረጃ: የመጀመሪያ ደረጃ የከሰ አይነት: ሽብር የተጻፉ አይነት: ወንጀል

00/0100/123995	ዐቃቤ ህግ	እነ ኡመድ ኡከት ኡመድ	14/12/2004	16/8/2005	16	8	8
00/0100/124005	ዐቃቤ ሕግ	እነ ንዮሌ ኡሊሮ አካር	14/12/2004	21/9/2005	11	9	9
00/0100/124209	ዐቃቤ ሕግ	ጉተማ አብድል ሸኩር አሜል	1/13/2004	4/10/2005	8	9	9
00/0100/124456	ዐቃቤ ህግ	አብደላ ሁሴን ባንካ	21/1/2005	4/10/2005	8	8	8
00/0100/124505	ዐቃቤ ህግ	እነ አብዲ መሀመድ አደም	24/1/2005	16/7/2005	7	5	5
00/0100/129793	ዐቃቤ ህግ	ዘለይ ማለደ አምበሉ	23/4/2005	26/4/2005	2	0	0
00/0100/131565	ዐቃቤ ህግ	መሀመድ ጃርፎ ዓሊ	2/7/2005	29/9/2005	4	3	3
00/0100/134025	የፌ/ዐቃቤ ሕግ	ዛለቃ ኒቆዲሞስ አሰራት ተገኝ	9/9/2005	23/9/2005	2	0	0
አራተኛ ወንጀል ችሎት (አዲስ)						<b>ድምር</b>	<b>12</b>

ችሎት

አሥራ አራተኛ ወንጀል ችሎት (አዲስ)

የፋይል ቁጥር	ከሰላሳ/አመልካች	ተከሰሰ/መልስ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ጊዜ	የቀጠሮ ብዛት	አድማ በፍ/ቤት (በወር)	አድማ ከበታች /ቤት (በወር )	ፍ
00/0100/107136	ዐቃቤ ህግ	ጥላውን ጋሻው	6/4/2004	21/6/2004	7	2	2	
አሥራ አራተኛ ወንጀል ችሎት (አዲስ)						<b>ድምር</b>	<b>1</b>	

ችሎት

አስራ ስድስተኛ ወንጀል ችሎት /አዲስ /

የፋይል ቁጥር	ከሰላሳ/አመልካች	ተከሰሰ/መልስ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ጊዜ	የቀጠሮ ብዛት	አድማ በፍ/ቤት (በወር)	አድማ ከበታች /ቤት (በወር )	ፍ
00/0100/123033	ዐቃቤ ሕግ	ምትኩ አምሩ	4/10/2004	4/10/2004	1	0	0	
አስራ ስድስተኛ ወንጀል ችሎት /አዲስ /						<b>ድምር</b>	<b>1</b>	

ችሎት

1ኛ ቢ.ፒ.አር. ወንጀል ችሎት

የፋይል ቁጥር	ከሰላሳ/አመልካች	ተከሰሰ/መልስ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ጊዜ	የቀጠሮ ብዛት	አድማ በፍ/ቤት (በወር)	አድማ ከበታች /ቤት (በወር )	ፍ

የፌዴራል ከፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

የታተመበት ቀን ፡ 11/11/2005

የተወሰነበት ቀን ፡ 1/1/2001 አስቤ ፡ 11/11/2005 የጥያቄ ደረጃ ፡ የመደመሪያ ደረጃ የበደ አይነት ፡ ሽብር የጥያቄ አይነት ፡ ወንጀል

00/0100/112198	ዕቃቤ ሀገ	እነ አብዱላ ሙሀመድ እስማኤል	1/13/2003	17/4/2004	6	3	3
00/0100/112199	ዕቃቤ ሀገ	እነ ኤልያስ ከፍሌ	1/13/2003	17/5/2004	9	4	4
00/0100/112493	ዕቃቤ ሀገ	ሸሪፍ ባደኖ	24/2/2004	5/10/2004	8	7	7
00/0100/59989	ዕቃቤ ሕገ	እነ ጫኒያለው በልሁ ቶላ /15 ሰዎች/	6/2/2000	11/7/2001	20	17	17
00/0100/60083	ዕቃቤ ሕገ	እነ ሙሐመድ ጁንዲ እስማኤል /3ሰዎች/	13/2/2000	28/8/2001	14	19	19
00/0100/60265	ዕቃቤ ሕገ	እነ ወጋሪ ዓለሙ ከበሳ	26/2/2000	30/8/2001	21	18	18
00/0100/60575	ዕቃቤ ሕገ	እነ ታደሌ የሻነው አካሉ/4 ሰዎች/	29/2/2000	2/13/2001	20	22	22
00/0100/62221	ዕቃቤ ሕገ	እነ ባቲ/ደረጀ/ ገርማ ኢዳማ ጢጣ/3 ሰዎች/	16/4/2000	22/5/2001	8	13	13
00/0100/74659	ዕቃቤ ሕገ	እነ ተስፋቲን ጨመዳ ጉርማኝ/16 ሰዎች/	6/4/2001	10/7/2002	35	15	15
00/0100/77929	ዕቃቤ ሕገ	እነ አጠናው ዋሴ ደስታ	4/7/2001	15/4/2002	16	9	9
00/0100/82237	ዕቃቤ ሕገ	እንዳለ አበበ በላይ	26/10/2001	13/7/2002	11	8	8
					<b>ድምር</b>	<b>13</b>	

ሰበተኛ ወንጀል ችሎት (አዲስ)

ችሎት

አራተኛ ወንጀል ችሎት (አዲስ)

የፋይል ቁጥር	ከሰበ/አመልካች	ተከሰባ/መልስ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ዝቤ	የቀጠሮ ብዛት	አድራሻ በፍ/ቤት (በወር)	አድራሻ ከበታች /ቤት (በወር)	ፍ
00/0100/106919	ዕቃቤ ሕገ	እነ ታደሌ ሙሰላ	21/10/2003	10/5/2005	16	19	19	
00/0100/114023	ዕቃቤ ሕገ	እነ ሙረድ አሚኖ ሙሜ	26/4/2004	18/4/2005	7	11	11	
00/0100/119650	ዕቃቤ ሕገ	እነ ሀሰን ጀርባ ሰቆሉ	3/8/2004	7/5/2005	14	9	9	
00/0100/123575	ዕቃቤ ሀገ	ሲራጅ ኤልያስ ሉንቾ	11/11/2004	3/5/2005	8	6	6	

የፌዴራል ከፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

የታተመበት ቀን ፡

11/11/2005

የተወሰነበት ቀን ስ፡ 1/1/2001 አስከ፡ 11/11/2005 የጉዳዩ ደረጃ፡ የመጀመሪያ ደረጃ የከሰ አይነት፡ ሸብር የጉዳዩ አይነት፡ ወንጀል

00/0100/56550	ዕቃቤ ሕግ	እነ ሣሙኤል ጉዳቸም ዘፍሌ / ኢርምያስ ታደሰ ሉጊቦ / 8 ሰዎች /	8/10/1999	14/4/2001	23	18	18
00/0100/60086	ዕቃቤ ሕግ	እነ ቢራ መርጋ ቡሊ / 8 ሰዎች /	13/2/2000	15/4/2001	14	14	14
00/0100/61656	ዕቃቤ ሕግ	ሙራድ ሐሽም ቡመር ወይም ተስፋዬ አበራ ጉደታ	4/4/2000	17/2/2001	8	10	10
00/0100/62806	ዕቃቤ ሕግ	እነ 10 አለቃ ወርቁ በለጠ ደሣለኝ / 8 ሰዎች /	7/5/2000	2/7/2001	20	14	14
00/0100/64246	ዕቃቤ ሕግ	ጠሃ አባጋሮ አባጥጅ	13/6/2000	24/2/2001	11	9	9
00/0100/68104	የፌዴራል ዕቃቤ ሕግ	እነ ሸፈራው መኮንን አየለ	6/10/2000	12/8/2001	9	10	10
00/0100/74636	ዕቃቤ ሕግ	በሸር አሀመድ መኸተል ወይም በሸር ሐሰን አሀመድ ወይም በሸር ሙከታር ዳሂር	8/4/2001	27/11/2001	10	8	8
00/0100/75852	ዕቃቤ ሕግ	እነ ጂብረል ተማም ወንግሥቱ	7/5/2001	1/7/2002	14	14	14
00/0100/77044	የፌዴራል ዕቃቤ ሕግ	እነ ደጀኔ ዐጋዬ በዳኔ / 5 ሰዎች /	10/6/2001	26/12/2002	19	19	19
00/0100/80784	ዕቃቤ ሕግ	እነ ኢሊሮ ሙሜ በቀሎ ቅጽል የጫካ ሰም ፋርጋሣ ተጨላ / 25 ሰዎች /	13/9/2001	1/10/2002	12	13	13
00/0100/84248	ዕቃቤ ሕግ	እነ ሙሐመድ ገዳ ቢርመጅ / 5 ሰዎች /	21/12/2001	17/12/2002	15	12	12
00/0100/85342	ዕቃቤ ሕግ	እነ ገዛኸኝ ኢብራሂም/ቅጽል ሰም በሩዳ ዳዲ	5/2/2002	25/12/2002	10	10	10

ኩለተኛ ወንጀል ችሎት (አዲስ)

ድምር 16

ጉዳዮች ስለተኛ ወንጀል ችሎት (አዲስ)

የፋይል ቁጥር	ከሰላ/አመልካች	ተከሰሰ/መልስ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ጊዜ	የቀጠሮ ብዛት	አድሜ በፍ/ቤት (በወር)	አድሜ ከበታች /ቤት (በወር)	ፍ
00/0100/100386	ዕቃቤ ሀገ	እነ ነዶ ኢሳ አብዲ	2/2/2003	16/9/2003	12	7	7	7
00/0100/106906	ዕቃቤ ሀገ	እነ ሲሳይ ብርሌ አፍራሴ	17/10/2003	20/7/2004	11	9	9	9

የፌዴራል ከፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

የታተመበት ቀን ፡

11/11/2005

የተወሰነ ቀን ፡ 1/11/2001 አስ፡ 11/11/2005 የተጻፉ ደረጃ ፡ የመደመሪያ ደረጃ የክስ አይነት ፡ ሸብር የተጻፉ አይነት ፡ ጠንጃል

ኛሎት 1ኛ ተዘዋዋሪ ኛሎት

የፋይል ቁጥር	ከሳሽ/አመልካች	ተከሳሽ/መልሰ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ጊዜ	የቀጠሮ ብዛት	እድሜ በፍ/ቤት (በወር)	እድሜ ከበታች /ቤት (በወር)	ፍ
00/0100/68745	ዐቃቤ ሀገ	አሰራ ሸፈራው ዜቶ	23/10/2000	9/9/2002	11	23	23	
						<b>ድምር</b>	<b>1</b>	

ኛሎት 2ኛ ተዘዋዋሪ ኛሎት

የፋይል ቁጥር	ከሳሽ/አመልካች	ተከሳሽ/መልሰ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ጊዜ	የቀጠሮ ብዛት	እድሜ በፍ/ቤት (በወር)	እድሜ ከበታች /ቤት (በወር)	ፍ
00/0100/69430	ዐቃቤ ሕገ	እን አሊ አቡጡር15 አቃይዶ	7/12/2000	26/10/2001	5	11	11	
00/0100/69437	ዐቃቤ ሕገ	እንአብዱራሀማን አቡዱ አመሩ	30/11/2000	1/8/2001	3	8	8	
00/0100/74469	ዐቃቤ ሕገ	ረ/ኢ/ር ገመረዲን አኑር አብዱልዘዲ	23/4/2001	16/10/2001	2	5	5	
00/0100/74473	ዐቃቤ ሕገ	መሀመድ አልፋድል አብዱራሀማን	4/5/2001	1/11/2001	3	6	6	
00/0100/80507	ዐቃቤ ሕገ	አይቤን አብዱራሀማን መሀመድ	10/9/2001	18/10/2001	2	1	1	
						<b>ድምር</b>	<b>5</b>	

ኛሎት ሁለተኛ ወንጀል ኛሎት (አዲስ)

የፋይል ቁጥር	ከሳሽ/አመልካች	ተከሳሽ/መልሰ ሰጪ	ፋይሉ የተከፈተበት	ፋይሉ የተወሰነበት ጊዜ	የቀጠሮ ብዛት	እድሜ በፍ/ቤት (በወር)	እድሜ ከበታች /ቤት (በወር)	ፍ
00/0100/01367	ዐቃቤ ሀገ	እን አቶ ከድር ዝናቡ	15/1/1994	8/11/2003	61	118	118	
00/0100/51544	ዐቃቤ ሕገ	ኩምሳ ገራ ዱባ	23/4/1999	17/2/2001	21	21	21	
00/0100/54860	ዐቃቤ ሕገ	እን ፍራንሶን መሃመድ ገሩ /13 ሰዎች/	11/8/1999	28/5/2001	29	22	22	
00/0100/56118	ዐቃቤ ሀገ	ይትባረከ ወይም መባረከ አድማሱ ወጪ	17/9/1999	30/1/2001	16	17	17	

የጽሑፍ ቁጥር	ከሰነድ/አመልካች	ተከሰባቸው/መልስ ሰጪ	ጽሑፍ የተከፈተበት ቀን	ጽሑፍ የተመሰገበበት ቀን	አድራሻ በዚህ (ጠር)	አድራሻ ከበታች (ጠር)
00/0100/70236	ወታደር ሕግ	ወላይ ጅም አሰመድ	12/12/2000	21/5/2001	5	5
00/0100/70238	ወታደር ሕግ	አን አብደላ አርብቲ ቢሻር	7/12/2000	30/7/2001	8	8
00/0100/70239	ወታደር ሕግ	በረ ፀሰን	12/12/2000	30/7/2001	8	8
00/0100/70241	ወታደር ሕግ	አባሃር መባር ወጀል	12/12/2000	29/7/2001	8	8
00/0100/70242	ወታደር ሕግ	ረሽድ አብዱላሂ መሀመድ	7/12/2000	30/7/2001	8	8
00/0100/70244	ወታደር ሕግ	ኮሚሽን ፀ/መር ኢብራሂም/2ሰዎች/	12/12/2000	30/7/2001	8	8
00/0100/70246	ወታደር ሕግ	አፋዲ ሃሚስ አንፋ	6/12/2000	1/8/2001	8	8
00/0100/74449	ወታደር ሕግ	አን መሀመድ አብዱልቃድር አሀመድ9/	23/4/2001	21/5/2001	0	0
00/0100/74451	ወታደር ሕግ	አን ሰብት አበኔ አዲል	23/4/2001	21/5/2001	0	0
00/0100/74452	ወታደር ሕግ	አባሱ ብሽራ አፋድ	4/5/2001	21/5/2001	0	0
00/0100/74453	ወታደር ሕግ	አረቦ መንሱር አበመንዳ	4/5/2001	29/7/2001	3	3
00/0100/74454	ወታደር ሕግ	አን ሙሳ አሻፊ አባደሌ	4/5/2001	29/7/2001	3	3
00/0100/74455	ወታደር ሕግ	አብልጎም የሱፍ መሐመድ	5/5/2001	21/5/2001	0	0
00/0100/74456	ወታደር ሕግ	ረዳት ማጅን ጅም አሀመድ ሙሳ	7/5/2001	29/7/2001	3	3
00/0100/74457	ወታደር ሕግ	አን ሙሳ በደዌ አብደላ	23/4/2001	29/7/2001	3	3
00/0100/74464	ወታደር ሕግ	አብደላ አብሸር ቀረሽ	4/5/2001	21/5/2001	0	0
00/0100/74465	ወታደር ሕግ	ሂሰን አሁሉን አብደሰላም	23/4/2001	21/5/2001	0	0
00/0100/74466	ወታደር ሕግ	አን አሀመድ ረዝገላ	4/5/2001	21/5/2001	0	0
00/0100/74467	ወታደር ሕግ	አኑር ደበላ አባሰ	23/4/2001	21/5/2001	0	0
00/0100/74471	ወታደር ሕግ	ደኑ አሀመድ ጅልጅሉ	23/4/2001	21/5/2001	0	0
00/0100/74472	ወታደር ሕግ	አሀመድ አብዱልሞሃድ ገሰማኤል	23/4/2001	29/7/2001	3	3
00/0100/74474	ወታደር ሕግ	አሸር በሸር ፈረጅላ	23/4/2001	30/7/2001	3	3
00/0100/74476	ወታደር ሕግ	ፋሪሳ ቀዋ በገንዳ	27/3/2001	21/5/2001	1	1
00/0100/74477	ወታደር ሕግ	ሙሳ የሱፍ አልፈዱል	23/4/2001	29/7/2001	3	3
00/0100/74480	ወታደር ሕግ	አን ያእቆብ ሰሊድ በሃድ	4/5/2001	21/5/2001	0	0
00/0100/80489	ወታደር ሕግ	አን አሻፊ አብዱልቃድር አሀመድ/8/	6/9/2001	1/11/2001	2	2
00/0100/84972	ወታደር ሕግ	አን ኑረዲን ሀጂ አሊ/3 ሰዎች/	13/1/2002	17/5/2002	4	4

የፌዴራል ከፍተኛ ፍ/ቤት



የተወሰኑ ፋይሎች ዝርዝር

የታተመበት ቀን ፦

14/12/2002

የተወሰነበት ቀን ስ: 10/12/1996 አስቦ: 13/12/2002 የክስ አይነት: የንፍስ ወንጀል የጉዳዩ አይነት: ወንጀል

00/0100/42277	ሀብት ስጥ	አረጋ ወ/ቲርቶስ አየለ	17/2/1998	5/10/1999	7	20	20
00/0100/42473	ሀብት ስጥ	አዲስ ግርማ ገብሬ	28/2/1998	3/4/2000	11	25	25
00/0100/42603	ሀብት ሀገ	አነ መለሰ ሸኔ ትኅዛዙ	13/3/1998	19/2/2000	13	23	23
00/0100/43220	ሀብት ስጥ	አነ ሀጋዩ ዘለቀ ሳዳም/ 2 ሰዎች/	3/4/1998	26/2/2000	10	23	23
00/0100/46647	ሀብት ስጥ	አንድአለም አየለ ለገሠ	3/9/1998	28/9/1999	4	13	13
00/0100/47122	ሀብት ስጥ	አነ አማራ አረጋዊ ወ/ቤዳን/2 ሰዎች/	21/9/1998	11/6/2000	10	21	21
00/0100/50372	ሀብት ስጥ	አነ ወናከሰገድ ዘለቀ ተሰማ	19/3/1999	5/6/2000	13	15	15
00/0100/51912	ሀብት ስጥ	አማራ አረጋዊ ወ/ቤዳን	14/5/1999	4/10/2000	11	17	17
00/0100/61578	ሀብት ስጥ	አነ ዩከንሰ ሩፋኤል አብዲ	1/4/2000	19/7/2000	5	3	3
00/0100/66964	ሀብት ስጥ	አነ አቶ ፍሰህ አሸቱ ጋ/ማርያም/14/	28/8/2000	29/11/2001	12	15	15
00/0100/69199	ሀብት ስጥ	ተመሰገን ዩሀንስ ዩሲፍ	8/11/2000	3/5/2002	13	18	18
00/0100/69201	ሀብት ስጥ	አነ ኢዘዲን መሀመድ አብዱልሰማን	8/11/2000	10/11/2001	12	12	12
00/0100/71562	ሀብት ሀገ	ኢብራሂም መሃመድ አሊ	19/1/2001	18/12/2001	12	11	11
00/0100/72175	ሀብት ስጥ	አነ ተክሌ ቀጃለ	30/1/2001	29/11/2001	12	10	10
00/0100/72356	ሀብት ስጥ	አነ ኢዘዲን መሀመድ አብዱራሀማን	7/2/2001	21/5/2002	16	15	15
00/0100/74421	ሀብት ስጥ	አነ ኢዘዲን መሀመድ አብዱራሀማን	26/3/2001	21/5/2002	13	13	13
00/0100/74910	ሀብት ስጥ	አሰራት ወዳጆ ራይሳ	20/4/2001	13/12/2001	8	8	8

