

FREEDOM OF EXPRESSION AND THE ETHIOPIAN ANTI-TERRORISM PROCLAMATION: A COMPARATIVE ANALYSIS

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ABSTRACT

The Anti-Terrorism Proclamation of Ethiopia has a far-reaching effect on human rights, such as freedom of expression. The provisions of this law that impact freedom of expression are discussed in this article. The law gives leeway to criminalize innocent acts of individuals who are critical of government policies. It criminalizes in/direct encouragement to the preparation, instigation and commission of terrorism through the publication of statements. The law falls short of international standards that require only the criminalization of a speech intended and likely to incite terrorist acts. The Proclamation demands everyone including the media and journalists provide terrorism-related information to law enforcement agencies. The only way to be relieved of this obligation is showing the existence of a 'reasonable cause', a phrase that is not defined by the law. Moreover, the journalistic privilege of confidentiality of information and the protection of sources is not stipulated as an exception to the obligation of disclosure of information. Nor does the law provides the circumstances in which a journalist may be forced to divulge her information. Though surveillance and interception undermine democracy, a mere suspicion of terrorism gives the National Intelligence and Security Service a power to conduct surveillance or intercept any type of communications. The Proclamation failed to provide circumstances that a court should consider before permitting surveillance or interception. Surveillance and interception invade privacy and chill freedom of expression. However, the Proclamation failed to provide any safeguards that limit the misuse of executive power against freedom of expression. The legal ambiguity together with the nascent jurisprudence pose problems on freedom of expression. Hence, domestic courts should draw upon or transplant principles and their interpretations from jurisdictions like South Africa and Council of Europe to fill legal loopholes. Moreover, the "jurisprudential dearth" could be filled and the impact of the Proclamation on freedom of expression may be assuaged by incorporating the three-part test (prescribed by law, legitimate aims and necessary in a democratic society) from the well-developed jurisprudences of human rights bodies and regional courts, notably the European Court of Human Rights, which stands at the heart of the Council of Europe system.

Keywords: encouragement of terrorism, freedom of expression, human rights, interception, journalistic privilege, terrorism, surveillance

I. INTRODUCTION

The security—freedom paradox is the major dilemma that countries are currently confronting. Security legislation like anti-terrorism laws widens executive power without a judicial supervision against human rights. Governments use their power not only to maintain

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legitimate national security and public order but also to silence political dissidents. In their joint declaration of 2010, the Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression and other international mandate holders working on freedom of expression singled out ten key challenges to freedom of expression in a decade starting from 2010.¹ The eighth challenge to freedom of expression is governments' over-zealous national security concern that aims to keep their security tight.² The groups also picked counter-terrorism legislation as a threat to freedom of expression.

Like other nations that are prompted by the 9/11 incident to devise counter-terrorism mechanisms, Ethiopia, though not immediately, has adopted its anti-terrorism Proclamation in 2009 "to prevent, control and foil terrorism" and "in order to bring to justice suspected individuals and organizations".³ However, the law hardly escapes criticisms of human rights groups, politicians, peer states, journalists and international human rights authorities.

Amnesty International and other human rights groups reiterated that the terms used to define terrorism and terrorist activities in the Proclamation are imprecise, and vague that can be used to criminalize a legitimate exercise of freedom of expression.⁴ In its evaluative comments, Article XIX said that "[t]he Proclamation seriously undermines freedom of expression rights in a manner that is unlikely to improve security."⁵ Human rights groups have repeatedly urged Ethiopia not to use its anti-terrorism legislation as a pretext to impinge on freedom of expression.⁶ Similarly, Amnesty International vociferously criticizes how the Ethiopian Government is implementing its anti-terrorism law.⁷ Even though some of the provisions of the law are similar with other democratic countries,⁸ its implementation in the absence of due process negatively infuses all human rights that the country has pledged to respect and protect. For instance, at times, the evidence adduced by prosecutors are not "sufficient and relevant" for conviction. Rather they are mere critical articles and journalistic reporting that epitomize a

¹ *Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression: Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*, A/HRC/14/23/Add.2 (2010). (hereinafter "the Joint Declaration of Special Rapporteurs")

² *Id.*, at 6.

³ *Anti-terrorism Proclamation* No. 652/2009, FED. NEGARIT GAZZETA 15th Year No. 57, Addis Ababa, 28th August 2009, Preamble, Para 4. Hereinafter "Anti-Terrorism Proclamation."

⁴ *Id.*; Oral Statement by Amnesty International to Special Rapporteur on Freedom of Expression and Access to Information in Africa (2011), available at <http://www.achpr.org/sessions/50th/ngo-statements/10/> (accessed 20 September 2016) (hereinafter "Comments of Article XXI").

⁵ Article XXI, *supra* note 4, at 11.

⁶ Amnesty International Submission to the UN Universal Periodic Review, Ethiopia: Failure to Address Endemic Human Rights Concerns (2014), 6; Amnesty International Public Statement, Ethiopia: Concerns that Anti-Terrorism Law is Being Used to Suppress Freedom of Expression (2011), UN Experts Urge Ethiopia to Halt Violent Crackdown on Oromia Protesters, Ensure Accountability for Abuses (2016), available at <file:///C:/Users/Me/Desktop/UN%20experts%20urge%20Ethiopia%20to%20halt%20violent%20crackdown%20on%20Oromia%20protesters.%20ensure%20accountability%20for%20abuses.html> (accessed 5 November 2016)

⁷ The Oakland Institution and Environmental Defender Law Center also conclude that the law at its face value and application violates international human rights standards. The Oakland Institution and Environmental Defender Law Center, Ethiopia's Anti-terrorism Law: A tool to Stifle Dissent 5 (2015), available at https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf (accessed 4 November 2016) (hereinafter "Report by Oakland Institute")

⁸ For instance, alike the Ethiopian Proclamation, the counter terrorism laws of Austria and United Kingdom criminalize encouragement of terrorism.

legitimate exercise of freedom of expression.⁹ Besides, evidence obtained through illegal means including torture, inhuman and degrading treatments are used to prosecute and convict individuals.¹⁰

Ethiopia is infamous for using its anti-terrorism legislation to silence political dissents, critical voices, and journalists who express innocent concerns against national policies, laws, and their implementations. The government has repeatedly failed to cooperate with the United Nations (hereinafter “the UN”) human rights groups (failed to accept and implement recommendations, to respond to communications, and to allow independent groups to investigate alleged human rights violations).¹¹ Against this backdrop of human rights violations and muzzling of freedom of expression, the article is devoted to discussing how the Ethiopian anti-terrorism law limits freedom of expression. The legal landscape of South Africa and Council of Europe will be discussed to examine and *compare* the status given and the protection accorded to freedom of expression under the Ethiopian counter-terrorism law. The relative effective protection of human rights and the well-developed case law on human rights in general and freedom of expression, in particular, prompted the author to choose the Council of Europe, particularly the European Court of Human Rights (hereinafter ECtHR), as a jurisdiction for a comparative analysis. The relative familiarity of the author with the case-law of the European Court of Human Rights and language accessibility of laws are other pushing factors that lead to the selection of the jurisdiction. There are also reasons that lead to the selection of South Africa as a comparator. Among other things, it is a democratic state and her anti-terrorism law, alike the Ethiopian one, is influenced by the Prevention of Terrorism Act of the United Kingdom.¹² In addition, Ethiopia and South Africa have duties that emanate from the same regional human rights regime, under the African Charter on Human and Peoples’ Rights and other regional human rights instruments.

The article is divided into five sections. The first section outlines some backgrounds of a contemporary protection of freedom of expression in Ethiopia. The second section discusses the legal framework of freedom of expression in the three jurisdictions. The permissible limitations that may be imposed on freedom of expression are discussed in the third section. As the main part of the article, section four deals with articles that give leeway for unwanted restrictions of freedom of expression. The definition of terrorism, encouragement of terrorism, the journalistic

⁹ Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (Amnesty International Ltd 2011), available at <http://www.amnestyusa.org/research/reports/ethiopia-dismantling-dissent-intensified-crackdown-on-free-speech-in-ethiopia> (accessed 3 September 2016)

¹⁰ Political prisoners usually complain before courts that they meted out torture and inhuman and degrading treatments by security agents and investigative police officers who aligned with the ruling government. For instance, *See*, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (2012), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (accessed 3 September 2016)

¹¹ Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment (2012); United Nations Human Rights Council, Opinions Adopted by Working Group on Arbitrary Detention, 66th session (2012); Ethiopia’s Response to Recommendations in A/HRC/27/14 (2014), UPR, 2nd Review, Session 19.

¹² United Kingdom: Terrorism Act 2006 [United Kingdom of Great Britain and Northern Ireland], 2006 Chapter 11, 30 March 2006, available at: <http://www.refworld.org/docid/46e552b52.htm> [accessed 12 July 2017].

privilege of confidentiality of information and protection of source, surveillance and interception are comparatively discussed from the perspective of freedom of expression. Finally, conclusion and some recommendations are presented in the last section of the article.

II. FREEDOM OF EXPRESSION

A. The Principle

The FDRE Constitution dispenses the right to freedom of expression to everyone as follows:¹³

Article 29: Right of Thought, Opinion, and Expression

1. *Everyone has the right to hold opinions without interference.*
2. *Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.*
3. *Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:*
 - (a) *Prohibition of any form of censorship.*
 - (b) *Access to information of public interest.*
4. *In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.*
5. *Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion.*
6. *These rights can be limited only by laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth and the honor and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.*
7. *Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.*

Article 29(1) and (2) are the verbatim copies of Article 19(1) and (2) of International Covenant on Civil and Political Rights (ICCPR) except the former as a principle provides freedom of expression *without any interference*.¹⁴ The Constitution provides an absolute

¹³ *The Constitution of the Federal Democratic Republic of Ethiopia*, Proclamation No 1/1995, FED NEGARIT GAZZETA 1st Year No. 1, Addis Ababa 21st August 1995. (Herein after the Constitution or the FDRE Constitution).

¹⁴ In its General Comment No 34, the Human Rights Committee recognize freedom to hold opinion as an absolute right. *Human Rights Committee General Comment No. 34* (2011), 102nd Session, CCPR/C/GC/34, Para 9. (Hereinafter “General Comment No. 34”). This General Comment is an explanation of Article 19 of ICCPR. It elaborates the elements of freedom of expression and opinion and states’ duty to protect, respect and fulfill the right as guaranteed by Article 19 of ICCPR.

protection of the right to hold opinions. Though the title of the provision includes *thought*, the main body of the article failed to incorporate it. It may be left because thought is the process of holding opinions and guaranteeing the protection of opinion necessarily protects freedom of thought. Generally, the provision enunciates both the private freedom (holding an opinion) and the public freedom (the public and social dimension of freedom of expression, which includes the right to seek, receive and impart any information or ideas).

Freedom of opinion and expression are provided in separate provisions in the Constitution of the Republic of South Africa¹⁵ while it is part of freedom of expression in the European Convention on Human Rights. In line with ICCPR and General Comment No 34¹⁶, the Ethiopian Constitution provides freedom of opinion as a distinct right to freedom of expression in which any interference is not allowed. There is no prohibition of interference in the exercise of freedom of opinion in the Constitution of South Africa. Nor is the right to hold opinions is recognized as a non-derogable right in Article 37. It is not also clear from the Constitution of South Africa whether freedom of opinion is recognized as a discrete right or part of freedom of expression, and whether it is guaranteed without interference. However, it is hardly possible to suppress freedom to hold opinion due to the nature of the right itself, which is an inner activity of human being. Therefore, it is safe to conclude that the right to hold an opinion is an absolute right in South Africa as stipulated in ICCPR and underpinned by General Comment No 34.

Freedom of media (including the press) and artistic creativity are protected in the Constitutions of South Africa and Ethiopia.¹⁷ Though artistic creativity and freedom of the press and other media are not specifically enumerated in the European Convention on Human Rights (hereinafter ECHR) with similar fashion to the two Constitutions, the right to use art and media to express an opinion is guaranteed.¹⁸ The European Court of Human Rights has reiterated the vital role played by the media to censure and control governments and to create an informed citizenry, which is necessary for democracies.¹⁹

Despite the constitutional enunciation, various publishing companies are forced to be closed and a small number of private presses (that softly criticize the government), are available in the market.²⁰ The government also imposes restrictions on artistic works despite their roles for

¹⁵ *Constitution of the Republic of South Africa* No. 108, as adopted on 8 May 1996 and amended on 11 October 1996, Articles 15 and 16. (hereinafter “The Constitution of South Africa”)

¹⁶ General Comment No 34, *supra* note 14.

¹⁷ FDRE Constitution, *supra* note 13, Article 29(3).

¹⁸ For instance, *Sunday Times v. the UK*, Eur. Ct. H. R. Application No 6538/74 (1979), *Jersild v. Denmark*, Eur. Ct. H. R. Application No 15890/89 (1994), *Observer and Guardian v. the UK*, Eur. Ct. H. R. Application No 13585/88 (1991), *Leroy v France*, Eur. Ct. H. R. Application No 36109/09 (2009); For freedom of expression in South Africa for instance see, *Goodman Gallery v The Film and Publication Board* 8/2012 (FPB Appeal Tribunal)

¹⁹ *Observer and Guardia*, *supra* note 18, para 59.

²⁰ Committee to Protect Journalists, *Ten Most Censored Countries* (2015), available at <https://www.cpj.org/2015/04/10-most-censored-countries.php> (accessed 8 August 2016). (hereinafter “CPJ most Censored Countries”). Magazines like *Lomi*, *Fact*, *Enqu*, *Jano*, *Addis Guday* and the newspaper *AfroTimes* have been forced to close their publication.

individuals' self-fulfillment and autonomy. The government prohibits the distribution and sale of books that it claims as they would, but without any tangible ground, incite violence.²¹

In Article 29(3), the Ethiopian Constitution protects the press from any form of censorship while the South African counterpart keeps silent. Despite the absence of explicit prohibition or otherwise of censorship in the South African Constitution, it is a permitted restriction of freedom of expression as long as it is in line with Article 36.²² Likewise, ECHR recognizes prior restraint as a jurisprudential device to limit freedom of expression as long as it passes through the three-part test (prescribed by law, legitimate aim and necessary in a democratic society) of Article 10(2).²³ However, due to its serious implications, like a chilling effect, on freedom of expression, the European Court is of the opinion that a prior restriction needs the "most careful scrutiny."²⁴

The Ethiopian Constitution gives legal protection to the press and clearly states its indispensable role in the development and functioning of a democratic society.²⁵ Though the Constitution prohibits censorship, Article 42 of the Freedom of the Mass Media and Access to Information Proclamation permits the public prosecutor to take an impounding measure.²⁶ A public prosecutor may impound periodicals if she/he has "sufficient reason" to believe that any statement expressed "leads to a clear and present grave danger." Though an impounding measure is different from censorship, both measures ultimately inhibit the right to freedom of expression. The expression may not be censored (since the Constitution prohibits so), however, its dissemination may be restricted by an impounding measure taken by a public prosecutor. Practically too, journalists are, by one way or another, forced to censor themselves or/and they

²¹ The Book vendors speak to the Voice of America Radio that they are arrested, tortured and asked to pay bribe for selling political and historical books. One of the vendor said that even he is prohibited to sell a book called *Aba Koster* (1991), which is about a young hero who battled with Fascist Italy from 1928-1935. Available at <http://amharic.voanews.com/a/book-vendors-in-addis-abeba/3482161.html>

²² *Midi Television v Director of Public Prosecutor*, Case No 100/06; *Tshabalala-Msimang v Makhanya* (The High Court of South Africa, Witwatersrand Local Division Application No 18656/07), Para 35. The court pointed out "[f]reedom of the press does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However, freedom of the press does mean that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish."

Article 36: Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

²³ *Sunday Times v. the UK*, Eur. Ct. H. R. (1979), *Observer and Guardian v. The United Kingdom*, Eur. Ct. H. R. Application No 13585/88 (1991).

²⁴ *Observer and Guardian v. the United Kingdom*, *supra* note 23, Para 60.

²⁵ FDRE Constitution, *supra* note 13, Article 29 (4).

²⁶ *Freedom of the Mass Media and Access to Information Proclamation* No. 590/2008, FED. NEGARIT GAZZETA, 14th Year No. 64, Addis Ababa, 4th December, 2008 (hereinafter "Mass Media Proclamation").

encounter direct and indirect governmental censorship.²⁷ Even though the Ethiopian Constitution prohibits censorship of only the *press*, this prohibition should extend to other forms of expressions and should pass the “strict scrutiny test” as stipulated in the ECHR and South African jurisprudence.

Additionally, the right of the press to access information of a public interest is enshrined in Article 29(3)(b) of the Ethiopian Constitution. The South Africa’s Constitution provides the right to access to information for everyone without any restriction,²⁸ unlike its Ethiopian counterpart that allows the press to access only information of a public interest. A public interest is not defined in Ethiopian jurisprudence and is amenable to governmental abuse. However, it can be interpreted in line with the example given by the non-governmental organization-Article XIX and endorsed by Special Rapporteur on freedom of opinion and expression. Accordingly, information of a public interest may include “operational information about how the public body functions and the content of any decision or policy affecting the public.”²⁹ The people do have a stake in any decision passed by or information related to the function of the executive, judiciary, and legislature. Hence, everyone has the right to access such information without undue restrictions.

With regard to the right of access to information, the Constitution failed to provide the right and limitation according to the internationally accepted standards. Because at the very beginning, it rather provides a restricted right. That means information is not accessible unless it is of a public interest. However, the Constitution should have provided a wider right of the press to access information alike the South African counterpart. Then the general limitation clause will be applied. That means, the right may be limited when the restriction is provided by law, for the sake of legitimate aims (like national security or public interest), and necessary in a democratic society.³⁰ Moreover, it is not clear why the Ethiopian Constitution singled out the press out of the media and guaranteed the right of access to information. However, it should be interpreted that other media (broadcast and online) plays no less role than the press, and do have a protected right of access to information. Besides, Article 29(2) provides the right to seek and receive information and Article 12 (1) which obliges the conduct of the government to be transparent permit this line of interpretation.

Though the South Africa’s Constitution bestows the right to information to everyone without limitation, the Protection of State Information Bill enshrines the possibility of limiting the right to access information.³¹ The Bill guaranteed access to state information as a basic human right.³² The right is also protected in the Council of Europe.³³ However, the sky is not the

²⁷ Human Rights Watch, Ethiopia: Events of 2015, 42ff, available at <https://www.hrw.org/world-report/2016/country-chapters/ethiopia> (accessed 11 November 2016).

²⁸ The Constitution of South Africa, *supra* note 15, Article 32.

²⁹ Abid Hussain, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (2000), E/CN.4/2000/63, Para 44, 15.

³⁰ Article XIX, *the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, International Standard Series* (1996), Principle 11. (hereinafter “The Johannesburg Principles”)

³¹ Republic of South Africa, *Protection of State information Bill* (B 6B 2010).

³² *Id.*, Article 6 (C)

limit for the exercise of this right. A limitation that is provided by law in a democratic society for a justified public or private interest warrants a restriction to the right of access to information in both South Africa³⁴ and Council of Europe.³⁵

Despite its practical absence, Article 29(5) of the Ethiopian Constitution provides that state-owned and state-financed media ought to open their home for diversified opinions, including dissidents. The reality shows otherwise and state-sponsored media shut their door to critical and opposition views and work for ‘hegemonizing’ the “developmental state” and “revolutionary democracy” ideals of the ruling government.³⁶ The European Court is of the opinion that there is no democratic society without “pluralism, tolerance, and broadmindedness.”³⁷ Media pluralism and diversified contents including critical voices are parts of freedom of expression and paramount for a democratic society. The Council of Europe in its recommendation stipulates that guaranteeing media pluralism is the positive obligation of member states.³⁸ Similarly speaking, reflecting a multiplicity of voice is one of the principles in the South Africa’s Media Code.³⁹

As stated above, the Ethiopian Constitution guarantees freedom of expression almost in line with international standards (this claim does not include the limitation clause which will be discussed below). However, following the 2005 election, the ruling party has restricted freedom of expression in various ways. Human rights groups like Human Rights Watch consider the environment of freedom of expression as suffocating.⁴⁰ The government owns accessible and strong media outlets (print and broadcast). Private media are threatened and intimidated by the mere fact of voicing dissents and they are expected to be conformists with government views. The government frequently jams transmissions from abroad, threat, arrest, convict their sources, and block foreign-based dissenting websites.⁴¹ The situation even gets worse in the aftermath of the 2010 election when the government secured a sliding victory of 99.6% of parliamentary seats (increased to 100% seats in the 2015 election).⁴² As Human Rights Watch claimed in its 2015

³³ *Council of Europe Convention on Access to Official Documents*, 18.VI.2009.

³⁴ *South African Protection of State information Bill*, *supra* note 31, Article 6 (a), and *the Constitution of South Africa*, *supra* note 15, Article 36.

³⁵ *Council of Europe Convention on Access to Official Documents*, *supra* note 33, Article 3.

³⁶ *A Struggle to Build Developmental Democracy System and its Challenges*, July 2014 (Amharic). This government document circulated as a training manual for university teachers.

³⁷ *Handyside v the United Kingdom*, Eur Ct. H. R. Application No 5493/72 7 (976), Para 49.

³⁸ Recommendation CM/Rec (2016) 4 of The Committee of Ministers to Member States on *the Protection of Journalism and Safety of Journalists and Other Media Actors* (2016), Article 15.

³⁹ *Code of Ethics and Conduct for South African Print and Online Media* (2016).

⁴⁰ *Human Rights Watch, Ethiopia: Events of 2015*, available at <https://www.hrw.org/world-report/2016/country-chapters/ethiopia> (accessed 11 November 2016).

⁴¹ For instance see VoA News: *US Criticizes Ethiopia for Jamming VOA Signals*, available at: <https://www.voanews.com/a/ethiopia-criticized-by-us-for-jamming-voa-signals-88733542/153788.html> (accessed 12 June 2017), Ethiopian Media Forum: *Association for International Broadcasting denounces Ethiopia’s intentional signal jam*, available at: <http://ethioforum.org/association-for-international-broadcasting-denounces-ethiopias-intentional-signal-jam/> (accessed 12 July 2017).

⁴² Despite this glaring fact of monopoly, President Obama praised Ethiopia as democratic during his official visit in 2016.

country report, at least 60 journalists fled their country and more than 19 are thrown to jail.⁴³ The government is against critical voices and its harassment increases when an election approaches. As its preparation for the 2015 election, the government decimated private media outlets by arresting journalists (ten journalists and bloggers arrested in 2014) and opinion writers on newspapers and magazines and intimidating persons who work on printing and distributing companies.⁴⁴ In the same year, the government accused six newspapers and magazines of encouraging terrorism and resulted in 16 journalists to flee their motherland.⁴⁵ Publishing opinions and criticisms against government policy and performance may lead to a conviction for the encouragement of terrorism.⁴⁶

Most of the journalists languishing in prison are accused/prosecuted under the Anti-Terrorism Proclamation.⁴⁷ Ethiopia is also number four in the Committee to Protect Journalists' list of the most censored nations of the world.⁴⁸ Despite the guarantee of freedom of expression by the Ethiopian Constitution, the above scenarios show how far freedom of expression is undermined. Below, the constitutional limitations on the exercise of the right to freedom of expression will be discussed.

B. Limitation on Freedom of Expression

Freedom of expression is not an absolute right in the three jurisdictions. The Ethiopian Constitution outlawed "content and effect-based restrictions" stating that an expression may not be restricted due to its content or effect.⁴⁹ However, this statement is not absolute. A speech may be limited based on its content or effect if the restriction is prescribed by law for the sake of protecting the "well-being of the youth, honor, and reputation of individuals, human dignity, and prevention of propaganda of war."⁵⁰ The legitimate aims of freedom of expression enshrined in the Constitution are "vulnerable to overly broad and abusive interpretation."⁵¹ Additionally, the "jurisprudential dearth"⁵² of freedom of expression in the Ethiopian legal system exposes the right to extreme restrictions. International instruments like Universal Declaration of Human Rights (UDHR) and ICCPR do not envisage legitimate aims, like the well-being of the youth and human dignity.⁵³ Nor do these phrases have a clear-cut definition in the Ethiopian legal system.

⁴³ Human Rights Watch, *Violation of Media Freedom in Ethiopia* (2015), 1, available at <https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia> (accessed 8 October 2016).

⁴⁴ CPJ, *Most Censored Nations*, *supra* note 20.

⁴⁵ *Id.*

⁴⁶ *Human Rights Watch, Ethiopia: Events of 2015*, *supra* note 27, at 61.

⁴⁷ CPJ, *Most Censored Nations*, *supra* note 20.

⁴⁸ *Id.*

⁴⁹ *FDRE Constitution*, *supra* note 13, Article 29 (6).

⁵⁰ *Id.*

⁵¹ *Human Rights Watch, Ethiopia: Events of 2015*, at 56-57.

⁵² Gedion Timothewos, *Freedom of Expression in Ethiopia: The Jurisprudential Dearth* (2010), 4 MIZAN LAW REVIEW 2, 201-231, 228 (2010).

⁵³ Article XIX, *the Legal Framework for Freedom of Expression in Ethiopia* (2003), 18-19. Article 19 opined that restriction of freedom of expression for the well-being of the youth is not necessary in a democratic society. Moreover, the expression "public expression of opinion intended to injure human dignity" is vague and not clear what it aimed to achieve. Nor does it provided in Article 19 and 20 of ICCPR. Therefore, curtailing free speech to

The terms should be interpreted narrowly so that the right to freedom of expression is not unduly restrained. In South Africa, protection of human dignity is one of the constitutional value that the post-apartheid era is founded on, and it is provided as a legitimate aim to vindicate limitations imposed on freedom of expression.⁵⁴ ECHR too invokes human dignity imperative to limit freedom of expression, for instance, in the case of hate speech.

Compared to Article 10 of ECHR and Article 19 and 20 of ICCPR, the legitimate aims envisaged by the Constitution are smaller in number. National security and public order, for instance, are not explicitly stipulated as legitimate aims to vindicate the restriction of freedom of expression. Besides, in contrast to the South Africa's Constitution and the ECtHR jurisprudence, the Ethiopian Constitution does not explicitly prohibit incitement of imminent violence through speech. In the international human rights system, national security and prevention of disorder are legitimate aims that vindicate the limits to free speech.⁵⁵ Though they are not incorporated in the Constitution, the Ethiopian government repeatedly use "public order and national security" as justification to restrain the exercise of the right. However, it is possible to incorporate these legitimate aims through interpretation despite the list of legitimate aims seems to be exhaustive. Because Chapter Three of the Ethiopian Constitution shall be interpreted "in a manner conforming" with principles of international human rights instruments that Ethiopia is a party.⁵⁶ Besides, pursuant to Article 9(4) of the Constitution, standards set by international human rights ratified by Ethiopia are part of the law of the land. Therefore, standards that recognize national security and public order as legitimate aims to restrict freedom of expression are also applicable in the domestic jurisdiction.

Moreover, unlike ECtHR and South Africa's jurisprudence, the Ethiopian Constitution does not have a test that examines whether the limit of freedom of expression is "necessary in a democratic society." The South Africa's Constitution gives a detailed account of how a right should be limited. It expounds what is commonly characterized as "necessary in a democratic society."⁵⁷ This stage is the most important stage to protect freedom of expression from excessive governmental interference. It is not easy for the judiciary to shield the right to freedom of expression without scrutinizing whether the limit is necessary and proportionate to the aim pursued. The Human Rights Committee is of the opinion that the restriction imposed on freedom of expression must be "proportionate and necessary" to the aim that the government wants to achieve.⁵⁸ The Special Rapporteur on promotion and protection of the right to freedom of

protect human dignity is not in line with international standards, since it does not full fill the triple-test. However, even though "human dignity" and the well-being of the youth are not verbatim expressed in the international and regional human rights instrument, they may fall under "public moral" and "reputation or rights of others."

⁵⁴ *Supra* note 16, Article 1 and 36; Ryan Haigh, *South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression*, WASH. U. GLOBAL STUD. L. REV. 5: 187, 187-210, 195 (2006).

⁵⁵ For instance, Article 19 of UDHR and ICCPR, Article 10 (2) of ECHR.

⁵⁶ FDRE Constitution, *supra* note 13, Article 13 (2). Proclamation No 590\08 cited *supra* note 26, recognizes that the right to freedom of expression may be trammled to protect national security.

⁵⁷ The Constitution of South Africa, *supra* note 15, Article 36.

⁵⁸ *Toonen V. Australia*, Communication No 488/1992, UN Human Rights Committee (1994), Para 8.3, *Velichkin V. Belarus*, Communication No 1022/2001, UN Human Rights Committee (2005), Para 7.3; and General Comment No 34, *supra* note 14, Para 22, 33-36.

opinion and expression noted that a restriction should be tailored to address a “pressing social need”.⁵⁹ The limitation must be necessary and the least intrusive means to the exercise of the right. Additionally, the African Commission on Human and People’s Rights, which monitors states’ compliance with the African Charter on Human and People’s Rights, to which Ethiopia is a party, uses the triple test to examine whether a restriction on freedom of expression is legitimate.⁶⁰

Therefore, pursuant to Article 13(2) of the Constitution that requires Chapter Three (which encompasses human and democratic rights) to be interpreted in conformity with international human rights laws that Ethiopia is a State Party, and Article 9(4) that makes these laws part of the law of the land, judges should test limitations against the principles developed by such human rights instruments and authorities. Therefore, despite the explicit gap in the Constitution, limitations imposed on freedom of expression shall be “*necessary in a democratic society.*”

III. COUNTER-TERRORISM LEGISLATION

The Ethiopian Anti-Terrorism Proclamation has been labeled as draconian since its drafting stage.⁶¹ For instance, Joanne Mariner, Terrorism and Counter-Terrorism Program Director at Human Rights Watch said, “[a]s drafted, this law could encourage serious abuses against political protesters and provide legal cover for repression of free speech and due process rights.”⁶² Despite the fear and urge of human rights groups, the law has been promulgated without significant amendments. The law has noticeable effects on freedom of expression. Human rights groups, UN, and other countries repeatedly recommended the government to stop an abusive use of the law to arrest and prosecute dissidents, human rights advocates, journalists and opposition party members and leaders. For instance, UN experts on human rights urged the government to stop using the anti-terrorism law to stifle freedoms like freedom of expression.⁶³ Nevertheless, the government turn a deaf ear and give a blind eye to the recommendations that call for abrogation or amendment of the Proclamation. For example, Ethiopia defied and rejected recommendations forwarded by peer countries in the Universal Periodic Review to apply the

⁵⁹ La Rue F, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (2010), A/HRC/14/23, Para 79.

⁶⁰ *Scanlen and Holderness\ Zimbabwe*, Commission Communication Number 297\05 (African Commission on Human and People’s Rights 2009); *Monim Elgak, Osman Hummeida and Amir Suliman\ Sudan*, Communication 379\09 (African Commission on Human and People’s Rights 2009); *The Declaration of the Principles of Freedom of Expression in Africa*, The African Commission on Human and People’s Rights (2002) Meeting at its 32nd Session, in Banjul, The Gambia.

⁶¹ For instance: Human Rights Watch (2009), *Ethiopia: Amend Draft Terror Law*, available at <https://www.hrw.org/news/2009/06/30/ethiopia-amend-draft-terror-law>, Human Rights Watch (2009), *Analysis of Ethiopia’s Draft Anti-terrorism law*, available at <https://www.hrw.org/print/237005> (accessed 8 August 2016).

⁶² *Id.*

⁶³ *UN Experts Urge Ethiopia to Stop Using Anti-terrorism Legislation to Curb Human Rights* (2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E#sthash.bJQYrx2x.dpuf> (Accessed 8 August 2016), OHCHR, Ethiopia, News, UN experts Disturbed at Persistent Misuse of Terrorism Law to Curb Freedom of Expression as cited by A/HRC/WGAD2012/62, Opinion Adopted by the Working Group on Arbitrary Detention (2012).

Proclamation apolitically (The USA and Australia) and remove the vague provisions that impinge on freedom of expression (Sweden).⁶⁴

In the following part, provisions of the Proclamation that shrink the sphere of freedom of expression will be discussed together with the standard set by the South African counter-terrorism bill and the Council of Europe including the European Court of Human Rights.

A. Definition of Terrorism

The *chapeau* of Article 3 and its subsequent lists stipulate the types of acts that may expose an individual to be accused of and punished for committing terrorist acts as follow:

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, 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.

The principle of legality is at the heart of a criminal justice system. Besides, any restriction on freedom of expression should be “prescribed by law.”⁶⁵ The law that limits a right should be accessible to the public and sufficiently precise to enable individuals to behave according to the law, and reasonably predict what their actions entail.⁶⁶ However, the above definition of terrorism is criticized for being broad and vague and against the principle of criminal justice system.⁶⁷ For a vague and imprecise definition is prone to be abused by the government to muzzle dissent voices.⁶⁸

Pursuant to the definition, a protest that aims to influence governmental decisions, seeks to advance a political, religious or ideological cause, and “causes interference or disruption of any public service” may amount to terrorism. This indicates that the definition is too vague and wide to include peaceful non-political demonstrations whereby free speech right is exercised. A peaceful demonstration with a benign motive may result in serious interference or disruption of a

⁶⁴ *Ethiopia's Response to Recommendations in A/HRC/27/14 (2014)*, UPR, 2nd Review, Session 19, 16.

⁶⁵ FDRE Constitution, *supra* note 13, Article 29 (6).

⁶⁶ General Comment No 34, *supra* note 14, para 25.

⁶⁷ Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (Amnesty International Ltd 2011), 21. Oakland Institute, *supra* note 8, at 12.

⁶⁸ *Id.*

public service like transportation. However, a peaceful protest that aims to channel certain grievances may be labeled as an act of terrorism.

Politicians who assembled to lobby the government for a policy change may damage properties in the course of their demonstration. Such persons may be prosecuted as terrorists. However, their action falls under the right to peaceful assembly and freedom of expression, or if it should be criminalized, it is not as serious as terrorism and should be rendered an ordinary crime that transcends the limit of the right to assembly and freedom of expression. Considering ordinary offenses as terrorism chills freedom of speech, for people will be discouraged to express themselves.

Additionally, a person who advised a protestor might be convicted as a terrorist by the broad definitional provision of Article 3 cumulatively with Article 5(1)(b).⁶⁹ Therefore, the definition of terrorism as provided by the Proclamation criminalizes a peaceful exercise of free speech right and it unwarrantedly trammes the constitutionally guaranteed right of freedom of expression.

An individual who threatens to commit any of the acts stipulated in Article 3(1)-(6) is a terrorist. That means a person who threatens to commit a serious damage to property or to disrupt public service by way of protest may be convicted as a terrorist. However, it is far from the international standard to include threatening to commit a crime against property as a terrorist act. The UN Human Rights Committee has found that such kind of broad definition of terrorism violates international human rights standards.⁷⁰ Besides, it urged that counter-terrorism laws should be formulated with sufficient precision so that the citizens are able to regulate their actions accordingly.⁷¹

Generally, the definition of terrorism in the Proclamation criminalizes “legitimate acts of protest and political dissent”, and encompasses minor crimes that do not amount to terrorism, like property crimes or disruption of public service or a threat thereof.⁷² Additionally, the definition of terrorist organizations (Article 2 (4) cumulative with Article 3) is broad to include actions that do not amount to terrorism. For instance, more than two people who conduct a political protest may be deemed as a terrorist organization and convicted as terrorists.⁷³ Therefore, it is safe to conclude that the broad and vague definition of terrorism in the Proclamation restricts freedom of expression.

The definitional provisions of the South African counter-terrorism legislation are broad and complex compared to the Ethiopian counterpart. However, Article 1(3) of the law has exempted

⁶⁹ Report by Oakland Institute; *supra* note 7, at 9.

⁷⁰ Article XIX, Comment on Anti-terrorism Proclamation of Ethiopia 3 (2010), available at <https://www.article19.org/data/files/pdfs/analysis/ethiopia-comment-on-anti-terrorism-proclamation-2009.pdf> (accessed on 23 October 2016) at 5.

⁷¹ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant* (2011), CCPR/C/ETH/CO/1, at 4. The Committee recommended the Ethiopian government to repeal those provisions that criminalize ordinary crimes as terrorism (like property crimes and crimes related to interference and disruption of public services) and revise laws that unduly impinge on the exercise of human rights in the name of countering terrorism.

⁷² Report by Oakland Institute; *supra* note 7, at 9.

⁷³ Human Rights Watch (2009), *supra* note 61, at 2.

advocacy, protest, dissent or industrial action as long as the persons have no intention of committing a harm stipulated in Article 1(a)(i –vi). That means, the exceptionally protected actions like advocacy and protest are narrowed down by the exception attached with Article 1(3), which provides that such actions are not outlawed as long as the individual “does not intend the harm contemplated in Paragraph 1(a)(i) – (v)” of the definitional provision.⁷⁴ However, despite the exceptional protection of these acts, the broadly worded exceptions attached with the provision has a negative influence on freedom of expression. For instance, a protest that restricts the physical freedom of a person (1(a)(iii)) may be considered as a terrorist activity. In addition, “a political demonstration that causes substantial property damage would not be protected by the important exemption for protests and strikes.”⁷⁵

The mental element that is incorporated in the definition of terrorism in the Ethiopian Proclamation is “intention.” However, Article 1(b) of the South African law stipulate that a terrorist activity should be “intended or by its nature or consequence, can reasonably be regarded as being intended” to cause all actions stipulated in Article 1(b)(i)-(iii)⁷⁶. This indicates that the mental element required in the South African legislation, which includes negligence,⁷⁷ is lower than the Ethiopian one that only envisages intention. According to such provision, protestors may be considered as a terrorist if they knew their action would cause a feeling of insecurity even though they did not have the intention to create such result.⁷⁸

The Council of Europe has no definition of terrorism except endorsing and incorporating Convention offenses that focus on thematic areas.⁷⁹ All of the Conventions failed to

⁷⁴ *Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004* (2005), Article 1 (3) (hereinafter “Anti-Terrorism Act of South Africa”) and Azhar Cachalia, *Counter-Terrorism and International Cooperation against Terrorism – an Elusive Goal: A South African Perspective*, 26 S. AFR. J. ON HUM. RTS. 510, 517 (2010).

⁷⁵ Kent Roach, *A Comparison of Canadian and South African Anti-Terrorism Legislation*, 18 S. AFR. J. CRIM. JUST. 2, 134 (2005).

⁷⁶ Anti-Terrorism Act of South Africa, *Supra* note 74, 1(b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to- (i) threaten the unity and territorial integrity of the Republic; (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organization or body or intergovernmental organization or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles, whether the public or the person, government, body, or organization or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic;

⁷⁷ Cachalia, *supra* note 74, at 514.

⁷⁸ Roach, *supra* note 75, at 137.

⁷⁹ Council of Europe Convention on the Prevention of Terrorism, Council of Europe Treaty Series - No. 196, Warsaw, 16.V (2005). Article 1 of the Convention define terrorist offences as any of the offences stipulated in any of the following instruments.

1. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971;
3. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973;
4. International Convention against the Taking of Hostages, adopted in New York on 17 December 1979;
5. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980;

comprehensively define terrorism. Of the instruments incorporated by the Council of Europe, the International Convention for the Suppression of the Financing of Terrorism attempted to define terrorism as “an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.”⁸⁰ This definition is narrower than the definition stipulated in the Ethiopian and South African legislation. An act attempted or committed against non-combatants to cause injury or death is considered as terrorism. The act should be intended and aimed to intimidate a population or to influence the behavior of the government or international body. This definition is far from undermining freedom of expression. A protest that aims to influence the government to act or not to act in a certain way may result in injury or death of civilians. However, if the suspect does not intend the result, she may not be considered as a terrorist. On the other hand, protesters or strikers knowingly and willingly may engage in an activity causing injury or death of a person while protesting against the government. In such instances, it seems unfair to render protection under the guise of freedom of expression and the act should be considered as an ordinary crime.

Generally, the thematic Convention offenses do not define terrorism and only focuses on specific acts like a hostage, and their effect on freedom of expression is less severe than that of South African and Ethiopian legislation. In addition, the Convention definition discussed above is effectively distanced from threatening freedom of expression.

B. Encouragement of Terrorism

The Special Rapporteur for Freedom of Expression and Opinion, David Kaye, and the Special Rapporteur for Peaceful Assembly and Association, Maina Kiai, have expressed their concern on the use of an anti-terrorism law to muzzle freedom of expression.⁸¹ David Kaye said that democracy needs critical voices, and silencing media and dissidents is not apposite to preventing terrorism.⁸² With an equivalent tone, human rights groups repeatedly urged the Ethiopian government not to use its counter-terrorism legislation to throttle critical voices and opposing political party members.

6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;

7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;

9. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997;

10. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999.

⁸⁰ International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)

⁸¹ United Nations Human Rights Office of the High Commissioner, Continued Detention of Ethiopian Journalists Unacceptable – UN human rights experts (2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15890&LangID=E> (accessed 29 August 2016).

⁸² *Id.*

Article 6 of the Ethiopian Anti-Terrorism Proclamation punishes “direct and indirect encouragement or other inducement [s]” to the commission, preparation or instigation of terrorist acts through the publication of a statement.⁸³ Besides, Article 25(2)(c) provides that an entity may be labeled as a terrorist by the House of People’s Representatives (HPR) if it encourages terrorism. Encouragement of terrorism as a justification to trammel human rights is outlawed by the Human Rights Committee when it has dealt with the Terrorism Act 2006 of the United Kingdom.⁸⁴ However, the Ethiopian Proclamation runs far against international standards and criminalizes “direct and indirect encouragement” to the commission, preparation, and instigation of terrorism through the publication of a statement. Besides, against the principle of legality, these terms have clear definition neither in the Proclamation nor in the jurisprudence. The Human Rights Committee and human rights groups pointed out that phrase like “in/direct encouragement and other inducements” are contrary to the international standards, for they are broad, imprecise and prone to be abused by governments like what the Ethiopian government did.⁸⁵ In its comment on the anti-terrorism law of Ethiopia, the non-governmental institution, Article XIX addressed that:

The offenses of ‘direct or indirect encouragement or other inducements’ are extraordinarily broad and vague offenses that fail the limitations for restrictions on rights required under international human rights law. While ‘encouragement’ and ‘inducement’ are vague terms, ‘indirect encouragement or other inducements’ is so vague as to be without meaning. They create a subjective standard based on what ‘some...members of the public’ may understand which can be applied (or misapplied) to nearly any statement made in the media as being supporting of terrorism.⁸⁶

The Johannesburg Principles, which have been endorsed by the Special Rapporteur on freedom of opinion and expression, dictate that freedom of expression should be trammled for a legitimate and genuine national security threat. Accordingly, Principle 6 stipulates that the right to freedom of expression may only be restrained under the pretext of national security if it is *intended and likely to incite immediate violence*, and “there is a *direct and immediate connection* between the expression and the likelihood and the occurrence of such violence” [Emphasis added].⁸⁷ Prohibiting incitement to terrorism is compatible with human rights. However, as epitomized by the Ethiopian case, the standard of limiting speeches that incite violence is being eroded by broad and vague touchstones in the aftermath of September 11 attacks.⁸⁸ As pointed out by the joint declaration of the Special Rapporteurs, “incitement should be understood as a *direct call* to engage in terrorism, with the *intention* that this should *promote* terrorism, and in a

⁸³ Anti-Terrorism Proclamation, *supra* note 3, Article 6: Encouragement of Terrorism.

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.

⁸⁴ *Concluding Observations of the Human Rights Committee, United Kingdom*, UN Doc. CCPR/C/GBR/CO/6, 21 July 2008.

⁸⁵ Article XIX; *supra* note 70, at 10 and *Id.*

⁸⁶ Article XIX, *Id.*, at 9.

⁸⁷ The Johannesburg Principles, *supra* note 30.

⁸⁸ The Joint Declaration of Special Rapporteurs, *supra* note 1, at 1.

context in which the call is *directly causally responsible for increasing the actual likelihood of a terrorist act occurring*” [Emphasis added].⁸⁹ Encouragement and inducements are loose and much broader than incitement, for they do not immediately, directly and casually result in terrorist acts.

Article 6 creates difficulties in making a rational linkage between the speech and the purported act, for the provision provides a “subjective standard.”⁹⁰ It is difficult to judge how much percent of the public should likely to understand the statement as in/direct encouragement or inducement to the commission, preparation or instigation of terrorism. Mesenbet said that “the law does not provide an objective assessment of the form of a speech made and the *mens rea* of the speaker but rather shifts the test in favor of the audience.”⁹¹ Besides, the English version of Article 6 does not mention the mental element required to prosecute a speaker however, the Amharic version (prevail over the English version) criminalizes both negligent and intentional act of encouragement of terrorism).⁹²

As repeatedly happen, this provision results in the prosecution of journalists for reporting, and politicians for writing about individuals or groups deemed to be a terrorist.⁹³ For instance, all the 24 defendants in the case of ‘*Federal Prosecutor vs Andualem Arage and others*’ are charged for in/direct encouragement and other inducements of terrorism.⁹⁴

The application of vague and overly broad crimes without defining with sufficient precision results in prosecuting individuals who innocently exercise their free speech right. For instance, the UN Human Rights Council said that Mr. Eskinder Nega is convicted “due to the use of his free expression rights and activities as a human rights defender.”⁹⁵ The UN Human Rights Committee too expressed its concern that the inclusion of vague words like “direct or indirect encouragement and other forms of inducement” may chill free speech.⁹⁶

In its Resolution No 1624, the United Nations Security Council calls states to prohibit incitement of terrorism by legislation.⁹⁷ The Security Council makes clear that it condones penalizing glorification (*apologie*)⁹⁸ or justification of terrorism that may incite terrorist acts.⁹⁹ However, the probability of abusing provisions that criminalize remote actions, like

⁸⁹ *Id.*, at 2.

⁹⁰ Mesenbet Tadege, *Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges* (2016), 5 Journal of Media Law and Ethics 1 / 2, 66, 93 (2016).

⁹¹ *Id.*, at 93, and Article XIX, *supra* note 70.

⁹² Besides, unlike the American jurisprudence, a speech that is not “*likely to incite immediate lawless action*” is outlawed. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁹³ Amnesty International, *Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (Amnesty International Ltd 2011), 21.

⁹⁴ *Id.* Andualem Arage is opposition politician who has been sentenced for life based on the Anti-terrorism Proclamation.

⁹⁵ *Opinion Adopted by the Working Group on Arbitrary Detention*, A/HRC/WGAD2012/62 (2012).

⁹⁶ CCPR/C/ETH/CO/1, *supra* note 69, at 4.

⁹⁷ United Nations Security Council Resolution 1624, available at <http://www.state.gov/j/ct/rls/other/un/65761.htm> (accessed 15 September 2016).

⁹⁸ The Terrorism Act of UK defined glorification as “any form of praise or celebration” that helps for the commission or preparation of terrorism “in the past, in the future or generally”. Articles 1 (3) and 20 (2).

⁹⁹ *United Nations Security Council Resolution 1624*, *supra* note 97.

encouragement and incitement, is high since “the commission of the crime is established without the need to show the actual resulting harm.”¹⁰⁰ Therefore, legal provisions that criminalize such actions should be framed cautiously, narrowly and in line with criminal justice system so that they may not unduly restrain freedom of expression.¹⁰¹ For instance, indirect encouragement committed negligently to the preparation of terrorism is difficult to prove in a court of law. For the encouragement is indirect, and it is recklessly which meant to make others get prepared to commit a terrorist act.

The ECtHR has a strong jurisprudence on freedom of expression. Freedom of expression may be trammled in order to curb terrorism and maintain public order. Even though national authorities do have a “margin of appreciation”, the Court plays a supervisory role of checking whether the national discretion is applied in line with the human rights standards of the Council of Europe.¹⁰² The restriction should be prescribed by law, to safeguard national security and must be necessary in a democratic society. There must be a “pressing social need” that the government aims to meet by restraining freedom of expression.¹⁰³ The interference must be proportionate to the aim pursued and the evidence produced by domestic authorities must be “relevant and sufficient” to vindicate the restriction.¹⁰⁴ The “nature and severity” of the measure should also be assessed to determine whether the restriction is proportionate to the aim sought to achieve.¹⁰⁵

State Parties do have a wide margin of appreciation to deal with remarks that incite violence.¹⁰⁶ Besides, ECtHR is of the opinion that media should not be a vehicle for the promotion of violence.¹⁰⁷ In *Erdoğdu case*, the Court ruled that analytical issues that do not reach to the magnitude of incitement to violence may not be inhibited no matter how they are unpalatable to the government.¹⁰⁸ However, the Court ruled in *Gual case* that the alleged speech does not encourage the use of violence and the government has violated Article 10 of the Convention.¹⁰⁹ This ruling seems that the Court tolerates to criminalize encouragement of violence. The *contrario* reading of the statement seems that Article 10 of the Convention would not have been violated had the alleged speech encouraged the use of violence.

Nevertheless, the Convention on the Prevention of Terrorism of the Council of Europe prohibits only “provocation of terrorism” as defined in Article 5. This definition is narrower than “encouragement of terrorism” as stipulated, not defined, in Article 6 of the Ethiopian Proclamation. First, it does not incorporate ambiguous phrase, as “some members of the public” but it requires the message to be distributed to the public, and it does not take the subjective element (the understanding of the public) into consideration. Second, it includes the *mens rea* of the speaker. That means the speaker should have the *intention* to incite terrorism. Thirdly, unlike

¹⁰⁰ Mesenbet Tadege, *supra* note 90, at 93.

¹⁰¹ *Id.*

¹⁰² *Gul and Others v Turkey*, Eur. Ct. H. R. Application No 4870/02 (2010), Para 36.

¹⁰³ *Id.*

¹⁰⁴ *Id.*, Para 37.

¹⁰⁵ *Id.*

¹⁰⁶ *Erdoğdu and Ince v. Turkey*, Eur. Ct. H. R., Applications nos. [25067/94](#) and [25068/94](#) (1999), Para 50.

¹⁰⁷ *Id.*, Para 54.

¹⁰⁸ *Id.*, Para 52.

¹⁰⁹ *Gul and Others v. Turkey*, *supra* note 102, Para 44.

the Ethiopian law that criminalizes in/direct encouragement or other inducement, the Convention only prohibits incitement. Fourth, the Ethiopian law penalizes in/direct encouragement or other inducement of remote crimes like preparation or instigation of terrorist acts. In contrast, though inchoate crimes like organizing are banned, the Convention only inhibits the incitement of the commission of terrorist acts. Moreover, the Convention explicitly sets principles that must be observed while countering terrorism. The Convention sets that any measure that is meant to curb terrorism should not excessively impinge on human rights like freedom of expression.¹¹⁰ It also sets out that anti-terrorism measures should pass through the three-part test and may not be arbitrary and discriminatory.¹¹¹

Moreover, the Committee of Ministers of the Council of Europe calls the member countries not to equate journalistic reporting with supporting or encouraging terrorism, and to “adequately and clearly define” incitement of terrorism.¹¹² However, under the Ethiopian law, journalistic reporting about terrorists and their organizations, or censuring the anti-terrorism policies of the government may be prosecuted as advice, encouragement, or inducement of the commission, preparation or instigation of terrorism.¹¹³ Interestingly, the South African legislation only criminalizes remarks that have the potential to incite terrorism.¹¹⁴ However, this inhibition should be decided on a case-by-case basis and must pass the constitutional muster. The restriction imposed on the speaker under the pretext of inciting terrorism shall pass through the maze of tests set out under Article 36 of the South African Constitution.

C. Journalistic Privilege of Confidentiality of Information and Protection of Sources

The Ethiopian counter-terrorism law imposes an obligation on individuals and media to furnish information that is deemed relevant to the protection of terrorism, or the prosecution or the conviction of a terrorist. These provisions impede journalists to exercise their investigative, journalistic and reporting duty. Forcing journalists to disclose their sources and information inhibit the flow of information and hinder the media from playing a public watchdog role, hamper the public to make their own opinion and adversely affect the press from providing reliable and accurate information.¹¹⁵ Hence, for instance, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information categorically prohibit compelling a journalist to divulge her/his information and sources to protect national security.¹¹⁶

¹¹⁰ Council of Europe Convention of the Prevention of Terrorism, (Warsaw, 16.V.2005) Article 12.

¹¹¹ *Id.*, Article 12 (1).

¹¹² Council of Europe, *Committee of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism* (2005), 2. They declared “...the mere fact of reporting on terrorism cannot be equated to supporting terrorism. It is also legitimate to engage in open dialogue and public debate about the causes of terrorism or about political issues surrounding it.”

¹¹³ The Anti-Terrorism Proclamation, *supra* note 3, Article 6 cumulative with Article 5(1)(b).

¹¹⁴ Anti-Terrorism Act of South Africa, *supra* note 74, Article 14.

¹¹⁵ Council of Europe, *Committee of Ministers, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information* (2000), 1. *Goodwin v. the UK*, Eur. Ct. H. R. Application No 17488/90, Para 39.

¹¹⁶ The Johannesburg Principles, *supra* note 30, at 18.

There are provisions of the Ethiopian Anti-Terrorism Proclamation that raise serious issues regarding the right to freedom of expression and access to information. Article 12 of the law enshrines that failure to provide information related to terrorism will result in rigorous imprisonment from three to ten years.¹¹⁷ Any media or private individual shall furnish any information that is relevant for the prevention of terrorism or the prosecution or conviction of terrorists unless she has a *reasonable cause* to act otherwise. However, the phrase *reasonable cause* is not defined in the Proclamation. Nor is it necessary to give a static definition, since it is more appropriate to define it on a case-by-case basis. Therefore, courts have the discretion to define *reasonable causes* that justify a failure to furnish terrorism-related information to the police. The journalistic privilege of confidentiality of information and protection of sources *may* be considered as *reasonable causes* that justify failure to inform the police. However, it should be backed by exceptions. The court has to define a *reasonable cause* as broadly as possible to give a wider breathing space to the right of access to information and freedom of expression. However, the privilege of journalists may not absolutely save a journalist from divulging her source or information. In the ECtHR jurisprudence, if vital public and individual interests are at stake, despite its role in a democratic society, the privilege may not be protected.¹¹⁸

Terrorism poses a threat to individual and public interests. Therefore, preventing terrorism, prosecuting or convicting a terrorist justify compelling journalists to disclose their information or/and sources. Nonetheless, the Ethiopian Anti-terrorism Proclamation does not provide conditions whereby a journalist may be compelled to disclose her information or sources. The law also failed to give the power to the court of law to assess in each case whether the compulsion of a journalist to disclose her information or sources is necessary and proportionate to prevent terrorism, prosecute and convict a terrorist.

In the Council of Europe, limitation of the non-disclosure of journalistic information and sources is not absolute. The right is subject to Article 10(2) of the Convention.¹¹⁹ As it transpires from the ECtHR jurisprudence, the disclosure of information or sources should be ordered after assessing whether the measure is proportionate and necessary to the aim pursued, including the prevention of terrorism, prosecution or conviction of a terrorist.¹²⁰ The court must ascertain that the evidence produced by the police, prosecutor or anti-terrorism task force to restrict the right is “relevant and sufficient.”¹²¹

Moreover, the Committee of Ministers of the Council of Europe is of the opinion that the principle of non-disclosure of journalistic information and sources is not only limited to

¹¹⁷ Anti-Terrorism Proclamation, *supra* note 3, Article 12: Failure to Disclose Terrorist Acts. Whosoever, having information or evidence that may assist to prevent terrorist act before its commission, or having information or evidence capable to arrest or prosecute or punish a suspect who has committed or prepared to commit an act of terrorism, fails to immediately inform or give information or evidence to the police without reasonable cause, or gives false information, is punishable with rigorous imprisonment from 3 to 10 years.

¹¹⁸ *Goodwin v. UK*, *supra* note 113, Para 37.

¹¹⁹ Council of Europe Recommendation No. R (2000) 7, Principle 3.*supra* note 115.

¹²⁰ *Id.*

¹²¹ *Goodwin v. the UK*, *supra* note 115, Para 40.

journalists.¹²² However, it also applies to those persons who get access to the journalistic information due to their professional linkage with journalists, like editors.¹²³

Confidentiality of journalistic information and sources has no statutory protection in South Africa. The counter-terrorism legislation imposes on any person an obligation to give information about a person who intended to commit or has committed a terrorist act or a place where she hides.¹²⁴ Section 189 and 205 of the Criminal Procedure Act underpin such provision. These provisions oblige a person, including a journalist, to be subpoenaed, appear before a court and give testimony of the fact that she knows or reveals any physical evidence in her possession under the pain of punishment of contempt of court if she failed to appear without a “just cause”.¹²⁵ The Criminal Procedure Code of South Africa and the anti-terrorism legislation of Ethiopia exempted those who do have reasonable cause from reporting duty. On the contrary, the duty to report in the anti-terrorism legislation of South Africa is formulated without exception. The counter-terrorism legislation should be interpreted in line with the South Africa’s Constitution that guarantees media freedom. Effective protection of freedom of expression requires the confidentiality of journalistic information and sources. Therefore, journalists should not be denied a privilege, nor they should be granted an absolute protection from revealing their information and sources. An absolute denial of the privilege will unnecessarily hamper the media from playing its informative, reporting, critiquing and public watchdog role. An absolute guarantee of the right of journalists’ to confidentiality of information and protection of sources will be detrimental to the interest of the public. The qualified privilege of journalists to the confidentiality of information and protection of sources will let the court weigh competing interests of a journalist and the public. Therefore, the exception of “just cause” set out in the Criminal Procedure Code should play a role while implementing the counter-terrorism legislation. The “just cause” exception ought to be interpreted on a case-by-case basis and compatibly with Article 36 of the South African Constitution.

Additionally, the Ethiopian law imposes a duty on any person or institution to disclose any information that a police “reasonably believes could assist to prevent or investigate terrorism cases.”¹²⁶ This imposition does not take into consideration the international standard of the protection of journalists’ sources and confidentiality of information, which are indispensable for the free flow of information, protection of whistleblowers and existence of a democratic society. Nor does the law obliged the police to request a court warrant to access information and documents.

¹²² “The term ‘journalist’ means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.” Committee of Ministers Recommendation No. R (2000) 7, *supra* note 115, at 2.

¹²³ *Id.*, at 3. *Principle 2 (Right of non-disclosure of other persons)*: Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established [in the recommendation that sets protection for journalists from any compulsion of disclosing journalistic sources].

¹²⁴ Anti-Terrorism Law of South Africa, *supra* note 74, Art 12.

¹²⁵ South African Criminal Procedure Act N0 51 (1977).

¹²⁶ Anti-Terrorism Proclamation, *supra* note 3, Article 22; Article XIX, *supra* note 70.

As highlighted above, the journalistic privilege of confidentiality of information and protection of sources is recognized internationally.¹²⁷ And it may only be trammled with exceptional circumstances. For instance, the Declaration of Principles on Freedom of Expression in Africa issued by the African Commission on Human and People's Rights provides that confidential journalists' sources and information may only be disclosed provided that:

the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defense of a person accused of a criminal offense; the information or similar information leading to the same result cannot be obtained elsewhere; the public interest in disclosure outweighs the harm to freedom of expression; Disclosure has been ordered by a court, after a full hearing.¹²⁸

Moreover, The UN Special Rapporteur on Human Rights and Counter-Terrorism has found that confidential information and sources may be divulged when the "need for disclosure is proved, the circumstances are of a sufficiently vital and serious nature and the necessity of the disclosure is identified as responding to a pressing social need."¹²⁹

Likewise, the Special Rapporteur on Freedom of Expression and Access to Information of African Commission on Human and Peoples' Rights, along with her fellows of the UN, OAS, and OSCE has said that confidential information and sources may only be divulged in exceptional circumstances.¹³⁰ The joint declaration states that a journalist may be forced to disclose confidential information or sources if it is decided by the court that it is "necessary to protect the public interest or private rights that cannot be protected by other means."¹³¹ Therefore, a journalist may only be forced when the court as a last resort order the disclosure of confidential information or sources. Besides, the court should enjoin to disclose information if it is necessary and proportionate to protect individual and public interest.

D. Surveillance and Interception

Surveillance and interception of communication are relevant to prevent terrorism or to prosecute and convict terrorists. However, unfettered executive power for conducting surveillance or intercepting communications divests an individual of freedom. As the UN Special Rapporteur

¹²⁷ Silencing Sources: *An International Survey of Protections and Threats to Journalists' Sources* (Privacy International, November 2007). Available at <http://www.privacyinternational.org/sources> ; *Legal Protections on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States* (PI and OSCE, May 2007), available at <http://www.privacyinternational.org/foi/OSCE-access-analysis.pdf> (accessed 8 October 2016).

¹²⁸ The Declaration of the Principles of Freedom of Expression in Africa, *supra* note 60.

¹²⁹ Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Doc. A/HRC/13/37, 28 December 2009.

¹³⁰ The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation*, 9 December 2008. Available at www.osce.org/documents/rfm/2008/12/35705_en.pdf (accessed 5 November 2016); *Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism* (2005), *supra* note 112.

¹³¹ *Id.*

pointed out, surveillance and interception should be “case-specific interference, on the basis of a warrant issued by a judge on showing of probable cause or reasonable grounds.”¹³²

Article 14 of the Ethiopian Proclamation bestows to the National Intelligence and Security Service (NISS) a right to intercept any means of communication and conduct surveillance on any person. Obviously, this executive privilege undermines human rights like the right to privacy and freedom of expression. The Committee of Ministers of the Council of Europe has declared that surveillance without effective safeguards has “a chilling effect on citizen participation in the social, cultural and political life and, in the longer term, could have damaging effects on democracy.”¹³³

Though the Ethiopian National Intelligence and Security Service (NISS) practically intercept and conduct surveillance without court authorization, the law stipulates that this responsibility should be undertaken after securing a court warrant. When the court is requested to give a warrant to intercept communications or conduct surveillance against individuals, it should reasonably be convinced that the action is sufficient and necessary to advance the prevention of terrorism, the prosecution or conviction of a terrorist. It should also make sure that the acts of the executive, NISS for that matter, do not excessively restrict human rights.

The ECtHR is of the opinion that a mere existence of a law that permits surveillance runs against the right to privacy and the right to freedom of expression.¹³⁴ However, this interference may only be justified if it is in accordance with a law, meant for protecting a legitimate aim and it is necessary in a democratic society.¹³⁵ The Court accentuated that “surveillance of citizens... are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.”¹³⁶ Besides, surveillance and interception must be “strictly necessary... for the obtaining of vital intelligence in an individual operation.”¹³⁷

Though judicial authorization is required to conduct surveillance and interception in Ethiopia, the Proclamation does not set out any safeguards to minimize the misuse of surveillance power. In contrast, the European Court of Human Rights has developed minimum safeguards that must be incorporated in law to prevent abuse of surveillance power. Besides, in the Ethiopian law, interception or surveillance may be conducted against any suspect of terrorism. However, the Committee of Ministers of the Council of Europe recommends that “special investigation techniques”, like surveillance and interception, “should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared,

¹³² Report of the Special Rapporteur on the Promotion and Protection of Human rights and Fundamental Freedoms While Countering Terrorism, A/HRC/13/37 (2009), 9.

¹³³ Declaration of the Committee of Ministers on Risks to Fundamental Rights Stemming from Digital Tracking and other Surveillance Technologies (Adopted by the Committee of Ministers on 11 June 2013 at the 1173rd meeting of the Ministers’ Deputies).

¹³⁴ *Szabo and Vissy v Hungary*, Eur. Ct. H. R. Application no. 37138/14 (2016) and *Klass and Other v Germany*, Eur. Ct. H. R. Application No 5029/71 (1978), *Weber and Saravia v. Germany*, Eur. Ct. H. R. Application No. 54934/00 29 (2006)

¹³⁵ European Convention on Human Rights (1950), Article 8 (2) and 10 (2).

¹³⁶ *Szabo and Vissy v Hungary*, *supra note 132*, Para 54 and *Klass v Germany*, *supra note 134*, Para 42.

¹³⁷ *Szabo and Vissy v Hungary*, *Id*, Para 73.

or is being prepared.”¹³⁸ The Committee appreciates the intrusive nature of the “special investigation techniques” against freedoms and recommends using them restrictively in exceptional circumstances where it is necessary to prevent a serious crime or to prosecute or convict a dangerous criminal, like a terrorist. The ECtHR too is of the opinion that the law that permits surveillance should also address:

the nature of offences which may give rise to an interception order; the definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed.¹³⁹

Surveillance and interception are allowed in the Ethiopian Proclamation to prevent and control terrorist acts. A person who is suspected of terrorism is liable to have been surveilled or their communications intercepted. However, as it has been discussed in Section III (A) and (B), the broad and vague definition of terrorism may pose a problem to set out clearly the categories of people who are liable for such kind of measures. The procedure how and the time limit when a surveillance is conducted are not provided. Nor circumstances of communicating the data to the third party or how they will be destroyed or retained are detailed (except that Article 14(2) says information obtained through interception remain secret). However, since the Proclamation envisages judicial authorization of surveillance and interception measures, courts may not rubber-stamp executive requests. Rather, it should be satisfied that adequate safeguards are provided and must give a direction on how the measures should be undertaken without unduly violating individual freedoms.¹⁴⁰

The ambit of this article only extends to discussing the anti-terrorism laws of Ethiopia, South Africa, and Council of Europe. It narrowly focuses on those rules that impact freedom of expression of individuals. Therefore, though South Africa has laws that allow and regulate surveillance¹⁴¹, it is not purported to be discussed all here, for they rest out of the scope of this piece. On the other hand, the counter-terrorism act of South Africa (Protection of Constitutional Democracy against Terrorist and Related Activities Act 33) does not include provisions that

¹³⁸ Council of Europe Committee of Ministers, Recommendation Rec(2005)10 of the Committee of Ministers to Member States on “Special Investigation Techniques” in Relation to Serious Crimes Including Acts of Terrorism, Article 4.

¹³⁹ *Szabo and Vissy*, *supra* note 134, Para 56.

¹⁴⁰ In *Szabo and Vissy v. Hungary*, the Court expressed its views that it “must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorize, carry out and supervise them, and the kind of remedy provided by the national law. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the “interference” to what is “necessary in a democratic society.” Para. 57.

¹⁴¹ The Regulation of Interception of Communications and Provision of Communications Related Information Act (Act 70 of 2002) (RICA); The Protection of Personal Information Act (Act 4 of 2013) (POPI) ; The Financial Intelligence Central Act of (Act 38 of 2001) (FICA); The Intelligence Services Oversight Act (Act 40 of 1994) (ISOA); The Cyber Crimes and Cyber Security Bill (2015) (CAC); The Electronic Communications and Transactions Act (Act 25 of 2002) (ECTA); The General Intelligence Laws Amendment Act (act 11 of 2013) (GILAB); The Criminal Procedure Act (Act 51 of 1977) (CPA); The Films and Publications Act (Act 65 of 1996) (FPA)

allow surveillance and interceptions. However, it is apt to make a passing remark with regard to the Regulation of Interception of Communications and Provision of Communications-Related Information Act of South Africa (RICA). Unlike the Ethiopian Proclamation but in line with what is envisaged by the ECHR as discussed above, the South African RICA has detail procedures that dictate what should be fulfilled to permit interception. Interception may only be permitted for a designated purpose like foiling terrorism. Prior to granting a warrant to intercept communications, the court should be satisfied that the interception is helpful for the furtherance of the prevention of terrorism. Interception should be held as a last resort when other less intrusive means are tested and failed or if measures other than intervention will not be successful, or will result in unnecessary risk.¹⁴²

IV. CONCLUSION AND RECOMMENDATIONS

This article has discussed the provisions of the Ethiopian Anti-Terrorism Proclamation that shrink the ambit of freedom of expression comparatively with the standards adopted in South Africa and Council of Europe, including the case law of the European Court of Human Rights.

Despite its practical absence, the right to freedom of expression of individuals is guaranteed in Ethiopia by a constitutional dispensation. Content and effect based restrictions are not allowed except if they are in accordance with the law for the protection of the “well-being of the youth, honor, and reputation of individuals, human dignity, and prevention of propaganda of war.” Despite repeated claims of the government, national security, and prevention of disorder and crime are not included in the Constitution as legitimate imperatives to limit freedom of expression. However, the Constitution guides to interpret human and democratic rights in conformity with principles of international human rights laws that Ethiopia has ratified. Moreover, according to Article 9 (4) of the Constitution, all international agreements that Ethiopia has ratified are part of the domestic law. Therefore, it is possible to incorporate national security and prevention of disorder and crime in the jurisprudence as legitimate aims of restricting freedom of expression.

Unlike South Africa and Council of Europe, the Ethiopian Constitution has failed to narrowly restrict the limitations on freedom of expression. The only limitations that are envisaged by the Constitution are “prescribed by law” and a limited number of “legitimate aims” (well-being of the youth, honor, and reputation of individuals, human dignity, and prevention of propaganda of war). It does not prescribe that the limitation be “necessary in a democratic society”, which requires a “pressing social need” and the limitation to be “necessary and proportionate” to the aim pursued. Without such limitation, freedom of expression would be restricted excessively. This is the limitation that entails the evidence adduced by state officials to be “sufficient and relevant”. This criterion tests the magnitude of the limitation. However, the Ethiopian Constitution failed to devise a mechanism to limit the limitation clause itself.

Though prevention of terrorism or protection of national security is not among the legitimate aims provided by the Constitution to limit freedom of expression, the government frequently

¹⁴² Anti-Terrorism Proclamation, *supra* note 3, Article 16(5) (V).

invokes them. The Anti-Terrorism Proclamation has some limitations that run against the international and regional standards of the protection of freedom of expression. The definitional provision of the Proclamation has some vague and broad phrases that are open to abuse against freedom of expression. For example, a protest with a benign motive that restricts public transport or damage property may be labeled as terrorism. However, these acts fall under the ambit of the right to assembly and freedom of expression. If these actions should be prosecuted (if they transcend the limit), they have to be categorized as less serious crimes than terrorism. Considering ordinary offenses as terrorist acts has a chilling effect on freedom of expression.

Additionally, it criminalizes as terrorism acts that interfere in or disrupt public service during a protest, or threatening to damage property if public demands are not answered. Such kind of acts are far from being considered as terrorism in South Africa and the Council of Europe. The definition of South Africa's counter-terrorism act attempted to leave a leeway for some justifiable exercise of the right to freedom of expression, like protest and strike. On the other hand, the Ethiopian Proclamation envisages intention of the wrongdoer, which is stricter than its South African counterpart that criminalizes negligence too.

The Ethiopian Proclamation falls short of the standards provided by the Council of Europe and South Africa's counter-terrorism law. Both prohibit incitement to the commission of terrorism, but the Proclamation went further to criminalize "in/direct encouragement of the commission, preparation and instigation of a terrorist act" committed through a negligent or intentional publication of a statement. The Human Rights Committee has outlawed criminalizing encouragement of terrorism which is far from inciting an immediate lawless action. The criminalization of in/direct encouragement of terrorist acts has repercussion on freedom of expression. This is evident from the fact that many journalists and politicians are prosecuted and convicted for transgressing this vague provision. The English version of Article 6 of the Proclamation that criminalizes in/direct encouragement of terrorist acts does not have a reference to the mental element of the speaker. However, negligent and intentional acts of encouragement of terrorism are punishable under the Amharic version (the binding version of the law). Therefore, a person may be prosecuted for his innocent report or criticism under the guise of indirect encouragement of terrorism, even though she does not intend the action. It is too far to create a rational linkage between a terrorist act and a speech claiming that the expression is an indirect encouragement which is committed negligently. Moreover, rather than evaluating the speech in itself, the law includes a subjective element, which is the audience's ability of understanding the speech as an encouragement.

The media effectively undertake its informative, reporting, critiquing and public watchdog role if and only if the confidentiality of their information and sources is guaranteed. However, the Ethiopian Proclamation obliges any individual, including media or a journalist, to provide the police with any information relevant to the prevention of terrorism or the prosecution or conviction of terrorists. The law does not insulate journalists and whistleblowers from the obligation of divulging their sources and information. The law has a leeway that allows an individual not to be forced to disclose her information if she does have a good cause. Though a court is not empowered to give the warrant to force a journalist to disclose her information or

sources, it may *post factum* consider journalistic privilege as a good cause. However, this privilege must be tested against the public interest. Unlike, South Africa and Council of Europe, Ethiopia has failed to provide how a balance may be struck between these two interests, which are a journalistic privilege and a public interest. Nonetheless, it is apt to leave the discretion to courts to decide on a case-by-case basis.

The right to privacy is necessary for the exercise of the right to hold opinion and freedom of expression. The Ethiopian Proclamation permits the conduct of surveillance and interception of communications of individuals who are suspected of terrorism. The mere existence of laws that allow surveillance and interception violate the right of individuals. However, the right to freedom of expression is not an absolute right. Even though the law keeps silent regarding what type of issues should be examined by the court before permitting interception or surveillance, it is evident from other jurisdictions that the measures should be tailored to safeguard democratic institutions and access vital intelligence. The lack of safeguards to minimize misuse of executive power may be compensated by mandatory requirements that the court should consider before issuing a court warrant. Prior to granting a warrant to intercept communications or conduct surveillance, the court should be satisfied that the measure is helpful for the furtherance of the prevention of terrorism. Interception or surveillance should be held as a last resort when other less intrusive means are tested and failed or if measures other than intervention will not be successful or result in unnecessary risks.

Taking into cognizant the role that diversified views play for societal development and building and sustaining a democratic society, the Ethiopian government should start to live up to its constitutional promises. Human rights should not only be abstract ideals but concrete realities and every right holder should benefit from their constitutional dispensation. The government should change its policy of muzzling every critical voice and stop throwing dissidents into jail. The Ethiopian government should also be committed to ensuring the exercise of the right to freedom of expression. It may not involve in outrightly denying shadow reports, statements made by human rights groups, and recommendations provided by international and regional human rights authorities and peer states. Rather, it should evaluate its human rights performances against the tests set by international human rights standards. And, it should endeavor to improve its human rights track records, including freedom of expression. The government should also engage in reviewing the Proclamation and its anti-terrorism practices so that individuals can fully exercise their right to freedom of expression.

Domestic courts should draw upon the experiences and interpretation of the scope of freedom of expression and its limitations in South Africa and the Council of Europe including EtCHR. For instance, despite the absence of “necessary in a democratic society” test in the Constitution, it ought to be incorporated by courts since it is an accepted standard by international and regional human rights instruments that Ethiopia is a party and human rights authorities that the country assented for and endorsed their establishment. Besides, the test is practically proved effective in regions that are praised for their human rights protection. Moreover, Article 9 (4) and 13 (2) of the Constitution open a way for courts to resort to international and regional standards of human rights protection. Building a democratic system

will remain to be a mere rhetoric that is meant for soliciting aid and political support unless the government is truly committed to respect and protect the right to freedom of expression.

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