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**The compatibility of the crime of ‘encouraging terrorism’ and the right to freedom of expression under the International Covenant on Civil and Political Rights and the Constitution of the Federal Republic of Ethiopia**

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## Summary

Since recent times, the UN Security Council and the General Assembly have adopted a number of resolutions that stress the need for States to comply with their obligations under international law, in particular international human rights law, refugee law, and humanitarian law. Furthermore, the UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism in various occasions has expressed his concerns on the growing trend of States adopting and implementing anti-terrorism legal frameworks that unduly restrict rights guaranteed under international and regional human rights instruments, in particular the right to freedom of expression, association and peaceful assembly. In this respect, the Special Rapporteur has recommended, among others, the need to limit offences related to freedom of expression only to ‘incitement’ and conducts that are ‘truly terrorist’ in their nature. The Special Rapporteur has also emphasised the need to prescribe restrictions on freedom of expression, particularly through criminalisation, in a precise and unambiguous language and the need to avoid applying vague terms.

The thesis primarily seeks to examine the compatibility of Ethiopia’s anti-terrorism legal framework with international and national human rights mechanisms that guarantee the right to freedom of expression. The author has chosen to start the discussion by providing a glimpse of on-going global debates that seek to better understand ‘terrorism’ from the broader conceptual and normative framework as well as developments in international law to regulate i.e., combat, the phenomenon. The choice emanates from the fact that the international legal discourse on defining and combatting ‘terrorism’ predates-and is even fair to assert its significant influence in shaping the Ethiopian anti-terrorism regime. Most importantly a certain level of understanding of the debate at the international fora is unavoidable and greatly assists to attaining a nuanced understanding of the intricacies of the Ethiopian domestic anti-terrorism legal regime. The thesis then proceeds to critically analyse how the Ethiopian anti-terrorism legislation has defined ‘acts of terrorism’ in light of criminal law elements, i.e. the objective and the subjective elements of expressions that have been criminalised.

The thesis underscores that Article 3 of the Anti-Terrorism Proclamation, which defines ‘acts of terrorism’, is over-broad, imprecise and vague and fails to centre ‘spread of fear’ as the objective element of the offences. Similarly, it finds that the offence of ‘encouraging terrorism’ or put more precisely the crime of “...publishing or causing the publication of a statement that may likely be understood to encourage someone to be involved in acts of terrorism...”-

proscribed under Article 6 of the ATP-is manifestly unclear as to whether the crime is an ‘intent’ or ‘negligence’ based crime when read in conjunction with the relevant provisions of the Ethiopian criminal law. It is evidently clear that such uncertainty opens the door wide open for serious fair trial flow concerns and inconsistencies. One of the real implications of such lack of clarity is if in a given case the judge takes the view that the crime is a ‘negligence-based’ crime then it would follow that the standard of proof the prosecutor is required to furnish is significantly higher than if the former understood it to be an ‘intent-based’ crime. Add to this low threshold of proof, the law requires the judge to pass at least 10 and at most 20 years of rigorous imprisonment on a defendant found guilty of the crime, which by no means is justified for a negligent misconduct that does NOT require for the occurrence of or threat to an actual harm to human life and/or property for it to be criminalised. What is more, the lack of clarity in what is exactly criminalised fails short of the expected deterrence role of criminal law as it fails to sufficiently alert citizens the exact degree of care one should take to avoid criminal responsibility. Thus, the thesis calls for appropriate amendments to be made not only to define the crime more precisely but also to re-examine the proportionality and necessity of imposing such a heavy penalty.

After having covered the anomalies at play under both international and domestic law, the thesis provides a summary of how freedom of expression is guaranteed under International Covenant on Civil and Political Rights and the Ethiopian Constitution. In particular, it discusses the jurisprudence of the Human Rights Committee and analyses the text of the Ethiopian Constitution on permissible grounds for limiting/restricting the right to freedom of expression. The thesis finally critically assesses whether or not criminalization of an expression on account of likely encouragement of terrorism is compatible with the international and domestic requirements laid down to restrict the right to freedom of expression.

The legal and textual analysis has revealed that the ‘crime of encouraging terrorism’, as provided under Art 6 of the Ethiopian anti-terrorism legislation runs counter to the constitutional principle of prohibition against ‘content and/or effect based’ restrictions and does not fall under any of the exceptions provided under Art 29 of the FDRE Constitution. The thesis also argues that the vague, imprecise and over-broad features of Art 6 makes it doubtful to assert that it is *provided by law* as per the requirements of Art 19 of the ICCPR. However, the thesis also finds that the Human Rights Committee could find it instructive to further clarify its jurisprudence as to how *precise* a piece of criminal law/provision should or ought to be for it to be considered to satisfy the requirements ‘*provided by law*’. Even conceding that the restriction

under Art 6 can be considered to be '*provided by law*', the thesis argues that in accordance with the existing jurisprudence of the Human Rights Committee there are no logical, contextual or legal reasons to assert that the criminalization and heavy penalty against exercise of freedom of expression imposed under the Ethiopian anti-terrorism legislation achieves none of the legitimate grounds provided under the relevant provisions of the ICCPR for restricting the right to freedom of expression. The thesis also argues for the propriety of imposing a less intrusive measure, short of criminalisation, if due recognition is to be accorded to such a fundamental right as freedom of expression which is widely recognised for its inherent as well as utilitarian amenities for individuals and societies alike to pursue a dignified life.

## BACKGROUND OF THE STUDY

It is quite apparent that the phenomenon of terrorism has become one of the most intensively discussed and hotly debated subjects among scholars (from a wide pool of disciplines), legislatures, politicians, policy makers, military strategists, journalists, and ordinary citizens as well. Despite the intensity of the discussions, the concept and phenomenon of terrorism remains unclear and contentious especially when it comes to defining it in manner that commands consensus. Furthermore, how best to counter the threat of terrorism is elusive in equal measure as the attempt to achieve a reasonable conceptual clarity. On the other hand, the need for counter-terrorism measures to comply with international law, international humanitarian law and international human rights law and standards has now been increasingly recognised.

Consistent with the trend and practice of a number of countries in the world, Ethiopia's legislative body has introduced the "Anti-Terrorism Proclamation No 652/2009". Presumably the proclamation has been motivated with the recognition that its legal framework needs to play a role in preventing and punishing those who are found to be responsible for committing, planning, instigating, supporting and encouraging, *inter alia*, terrorist acts.

Since its promulgation in 2009, and even at its drafting stages, the proclamation has attracted a number of criticisms from human rights groups and scholars for its failure to comply with Ethiopia's obligations under a number of international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), as well as its own constitution.

The right to freedom of expression and information is one of the rights that proclamation is 'accused' of violating. In particular, the newly introduced criminal offence of publishing or causing to publish statements that may likely be understood to encourage someone to be involved in 'acts of terrorism' raises concerns of compatibility when seen in light of the regime of permissible restrictions provided under the FDRE Constitution and the ICCPR, to mention only a few.

Although the central aim of the thesis is to find out whether the 'crime of encouraging' terrorism under the said proclamation is consistent with requirements set under the FDRE Constitution and the ICCPR, the author is of the view that contemporary debates on the concept and phenomenon of terrorism should be taken into account in order to develop a well-rounded and a comprehensive outlook.

## STATEMENT OF THE PROBLEM

The following are the primary research questions the thesis aims to address:

- Is the crime of publishing or causing to publish statements that may ‘likely be understood’ by someone as a direct or indirect encouragement or inducement to commit, prepare or instigate an act of terrorism under Art 6 of the ATP a restriction on freedom of expression under Art 29 of the FDRE Constitution and Art 19 of the ICCPR?
- If Art 6 of the ATP is considered to be a restriction on freedom of expression and information, does the restriction comply with requirements laid under Art 29 of the FDRE Constitution and Art 19 ICCPR to be considered as a permissible restriction?

The thesis also seeks to address following secondary questions that are directly and/or indirectly relevant in addressing the primary questions stated above:

- What are the key contemporary debates relevant to the conceptual and legal aspects of the phenomenon of terrorism?
- What international standards are available to ensure legislative measures to counter terrorism are consistent with State’s obligation to respect and protect human rights, including the right to freedom of expression and information?
- How does the ATP define ‘acts of terrorism’ and the crime of ‘encouraging terrorism’?
- What are the content, scope and restrictions of the right to freedom of expression provided under Art 29 of the FDRE Constitution and Art 19 of the ICCPR?

## LIMITATIONS

The right to freedom of expression and information is guaranteed under a number of international and regional human rights instruments Ethiopia has ratified including the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and People’s Rights, and many others. There are also a number of national legal instruments that protect the right to freedom of expression.

But the thesis is limited to examining Ethiopia’s obligations to respect and protect the right to freedom of expression and the permissible restrictions provided under the FDRE constitution and the ICCPR.



The thesis is also limited to the textual and legal analysis and does not cover how the proclamation is being interpreted and applied by the Ethiopian judiciary, which would have undoubtedly contributed in making the thesis to become more comprehensive. The author's attempt to access a complete record of court decisions has not borne fruit and such exploration unfortunately has to be postponed for the future.

## **Abbreviations**

ATP-The “Anti-Terrorism Proclamation No. 652/2009”

Art.-Article

ACHPR-African Charter on Human and People’s Rights

CTC-Counter-Terrorism committee

CCPR-Committee on Civil and Political Rights

ECHR-European Court of Human Rights

FDRE-Federal Republic of Ethiopia

ICCPR-International Covenant on Civil and Political Rights

IACHR-Inter-American Court on Human Rights

HR-Human Rights Council

OHCHR-Office of the High Commissioner for Human Rights

Sec Res-Security Resolution

UN-United Nations

UNSC-United Nations Security Council

UK-United Kingdom

U.S-United States

VCLT-Vienna Convention on the Law of Treaties

## CHAPTER ONE

### KEY CONTEMPORARY DEBATES AND DEVELOPMENTS ON TERRORISM AND COUNTERING TERRORISM

#### 1.1 Conceptual debates on ‘terrorism’

It is evident that terrorism and counter-terrorism continues to attract complex multi-disciplinary debates, especially since the horrific incident of the 9/11 US attacks. Professor Alex P.Schmid, one of the most recognised authority for his combined scholastic and practitioner expertise in the field of terrorism studies, states that terrorism can be approached from different disciplines such as criminology, political science, war and peace studies, communication studies or religious studies.<sup>1</sup> From this perspective, he identifies the following five frameworks, which can be used to interpret ‘terrorism’:

1. acts of terrorism as/and crime;
2. acts of terrorism as/and politics;
3. acts of terrorism as/and warfare;
4. acts of terrorism as/and communication;
5. acts of terrorism as/and religious crusade/jihad<sup>2</sup>.

Although the overall focus of this thesis is to discuss ‘terrorism’ as an act of crime, with a special emphasis on its relationship with the exercise of freedom of expression in FDRE, the author reasons that it is essential to duly recognise the multifaceted nature of terrorism and the diverse methods of analysis available in studying the phenomenon of terrorism.

Having stated the above regarding the wide ranging avenues of studying terrorism, the author also takes the view that it is essential to say a few words about ‘terror’, as it lies at the core of the term ‘terrorism’. Schmid finds it strange that literature on terrorism has not focused very much on an analysis of ‘terror’ as a state of mind<sup>3</sup>. He explains the near-absence of analysis on

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<sup>1</sup>Alex P.Schmid (ed.), THE ROUTLEDGE HANDBOOK OF TERRORISM RESEARCH, Routledge Handbooks, 2013 p.1

<sup>2</sup>Alex P.Schmid, ‘Frameworks for Conceptualizing Terrorism’. *Terrorism and Political Violence*, (16), 2004. pp 197-221

<sup>3</sup>*Supra note 1*, p2

the experience of being terrorized by asserting that “terrorism does not only produce terror-that terror is perhaps not even the main result of the majority of the members of the target audiences of an act or campaign of terror, certainly when they watch terror from the relative safety of a chair, watching television.”<sup>4</sup>He adds that “terrorists play on our fear of sudden violent death and try to maximize uncertainty and hence anxiety to manipulate actual and prospective victims and those who have reason to identify with them.”<sup>5</sup>

The question why “terrorists” play on society’s fear of sudden violent death is regrettably beyond the scope of this thesis, as its focus is on legal aspects of combatting the phenomenon of terrorism. Thus, the sub-sections below will be limited to discussing the debate and the progress achieved so far in achieving a comprehensive global approach to combat terrorism, in particular the legal aspect of such.

## 1.2 Definitional debates on terrorism

One of the thorniest issues that any researcher on terrorism-related subject would have to confront is how terrorism is and should be defined. Although Sir Jeremy Greenstock stated in quite a simplistic manner “what looks smells and kills like terrorism is terrorism”<sup>6</sup>, Schmid notes that there are literally “hundreds of definitions” and puts the number of definitions from his worldwide survey at 250<sup>7</sup>. He characterizes the effort to arrive at an agreement on the legal definition of terrorism- that dates back to the proposal of the League of Nations in 1937- as ‘elusive’<sup>8</sup>. His view is supported by Lord Carlile, UK’s independent reviewer of terrorism legislation, who states that so far there is “no single definition of terrorism that commands full international approval.”<sup>9</sup>

Despite the lack of agreement on the definition of terrorism, however, it can be said that at the very least it is highly “politicised” term that necessarily carries with it a “pejorative

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<sup>4</sup>*Ibid* The basis for Schmid’s explanation seems to emanate from his preference to approach terrorism primarily as “a certain combination of violence and communication whereby the immediate victims are often civilians and the main addressee of the ‘language of blood’ often a government or its citizens-or, in the case of state terrorism, a section of the public.” (Ibid)

<sup>5</sup>*Ibid*

<sup>6</sup>John Collins, ‘Terrorism’, in J.Collins and R.Glover (eds), *Collateral Language: A User’s Guide to America’s New War*, New York: New York University Press, 2002, pp.168

<sup>7</sup>*Supra Note 1*, p.39

<sup>8</sup>*Ibid*

<sup>9</sup>A Report by Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation, *The Definition of Terrorism: Cm 7052*, London Home Department, March 2007, p.47

dimension”<sup>10</sup>. In a similar line of thought, Philip Herbst elucidates on the use and abuse of the terms ‘terrorism’ and ‘terrorist’ in the following manner:

Carrying enormous emotional freight, *terrorism* is often used to define reality in order to place one’s own group on a high moral plane, condemn the enemy, rally members around a cause, silence or shape policy debate, and achieve a wide variety of agendas... terrorist became the mantra of our time, carrying a similar negative charge as a *communist* once did...Conveying criminality, illegitimacy, and even madness, the application of *terrorist* shuts the door to discussion about the stigmatised group or *with* them, while reinforcing the righteousness of the labellers, justifying their agendas and mobilizing their responses.<sup>11</sup>

The fact that people find it difficult to agree on the meaning or scope of the meaning of the term ‘terrorism’ essentially leads one to conclude that it’s at the very least a “contested concept”<sup>12</sup>, “especially considering that only a few terrorist would describe themselves as a ‘terrorist’ but rather as ‘revolutionary’. ‘freedom fighter’, ‘martyr’, ‘urban guerrilla’, ‘resistance fighter’, or even ‘soldier’”<sup>13</sup>. Aptly put, “one man’s terrorist is another man’s freedom fighter.”<sup>14</sup>

The attempt to define terrorism by the UN dates back to 1972 when an Ad Hoc Committee on International Terrorism was established by GA Resolution 3034.<sup>15</sup> Two decades later, the UN found it necessary to establish a similar and yet different Ad Hoc Committee on Terrorism (pursuant to GA resolution 51/210), which was charged with drafting conventions on various aspects of terrorism, including a Comprehensive Convention that would supplement or replace the existing ‘sectoral’ conventions<sup>16</sup>. After more than a decade of discussions, the Ad Hoc committee has formulated the following definition, contained under the (informal) text of Art 2 of the Draft Comprehensive Convention:

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<sup>10</sup>*Ibid*, p.40

<sup>11</sup>Philip Herbst, *Talking Terrorism: A Dictionary of the Loaded Language of Political Violence*. Westport, CT: Greenwood Press, 2003, pp.163-164.

<sup>12</sup> W.B. Gallie, ‘Essentially Contested Concepts’, *Proceedings of the Aristotelian Society*, 56, 1956, pp. 167-168; William Connolly, *The terms of Political Discourse*. Princeton, NJ: Princeton University Press, 1993, p.10 (Quoted at supra Note 19 above, p.40)

<sup>13</sup>*Supra Note 1*, p.40

<sup>14</sup>*Ibid*, Schmid cautions that although some attribute this statement to US president Ronald Reagan, he himself actually characterized the statement as misleading.

<sup>15</sup>*Ibid*, p.45

<sup>16</sup>*Ibid*, p.51

Any person commits an offence within the meaning of this [the present] Convention if that person, by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment, or
- (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of this [the present] article, resulting or likely to result in major economic loss; when the purpose of the conduct, by its very nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.<sup>17</sup>

As one would naturally expect from the highly politicised and legally complex nature the term terrorism, the above definition has not managed to escape criticism, despite the time and intellectual rigour invested on it. Hellen Duffy argues that at the heart of the outstanding controversy lies on the potential authors of terrorism under the Convention's definition, in particular the 'traditional' dispute regarding national liberation movements.<sup>18</sup> She states that the fact that Art 18 of the draft excludes only 'armed forces' i.e., state forces and not non-state actors from the purview of the above definition has prevented from reaching consensus.<sup>19</sup>

### 1.3 International law of terrorism (?)

The literature on the existence or absence of international law of terrorism displays polarised views on the subject matter. The historical debate hangs around the existence or otherwise of a "discrete prohibition, crime, or concept of terrorism in international law" as Baxter, in 1973, stated that "we have to regret that a legal concept of 'terrorism' was ever inflicted upon us-the term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."<sup>20</sup>

In her work prior to the 9/11 incident, the former President of International Court of Justice Rosalyn Higgins asks if "our study about terrorism is the study of a substantive topic or rather

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<sup>17</sup>*Ibid*

<sup>18</sup>Hellen Duffy, 'The War on Terror' and the Framework of International Law, Cambridge University Press, 2005, p.22

<sup>19</sup>*Ibid*

<sup>20</sup>R.R Baxter, 'A Skeptical Look at the Concept of Terrorism' (1974), 7 Akron Law Review, Issue 2, p. 380

the study of the application of international law to a contemporary problem?”<sup>21</sup> She responds to her question positing that the answer “depends in part upon one’s philosophical approach to international law.”<sup>22</sup> She explains by drawing parallels with how one chooses to posit ‘development’ or ‘environment’ within international law-essentially whether as *new* category of international law or as the application of a *constantly developing* international law to new problems (italics added).<sup>23</sup> In her view, “terrorism” is a term ‘without legal significance and is merely a convenient way of alluding to activities, whether of states or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.’<sup>24</sup>

Apart from the more generalised view of Higgins, the debate on the existence or absence of a distinct international law on terrorism hangs on responding to the question of whether or not there is sufficient clarity around the definition of terrorism under customary international law, which by itself is a controversial matter.<sup>25</sup>

Antonio Cassese is found at forefront of the proponents that forcefully argue the existence of a distinct international customary international law that governs terrorism. Cassese argues that despite the absence of agreement on *treaty rules* that lay down a comprehensive definition of terrorism, the “world community” has reached “widespread consensus on a generally acceptable definition of terrorism” that point to the direction of “a customary rule on the objective and subjective elements of the crime of international terrorism in time of peace.”<sup>26</sup>

However, it is unclear as to exactly who Cassese has in mind with his reference to the “world community”, especially taking into account the enduring lack of consensus between northern and southern nations to come up with a comprehensive definition of terrorism. Further, he reluctantly concedes disagreement continues to exist on a possible exception to such a definition *in time of armed conflict*.<sup>27</sup> He argues that, broadly speaking, terrorism (as per the consensus) consists of the following subjective and objective elements: “(i) acts normally criminalised under any national penal system, or assistance in the commission of such acts whenever they are performed in time of peace; those acts must be (ii) intended to provoke a state of terror in

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<sup>21</sup>Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law*, LSE/Routledge, 1997, p. 13

<sup>22</sup>*Ibid*

<sup>23</sup>*Ibid*

<sup>24</sup>*Ibid*

<sup>25</sup>*Supra note 1*, p. 40

<sup>26</sup>Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, *Journal of International Criminal Justice* 4 (2006), Oxford University Press (2006), 933-958, p. 935.

<sup>27</sup>*Ibid*

the population or to coerce a state or an international organization to take some sort of action, and (iii) are politically or ideologically motivated, i.e., are not based on the pursuit of private ends. “<sup>28</sup>

Ben Saul, on the other hand, casts a serious doubt on Cassese’s assertions on the basis of his investigation of sources of international law, i.e. international and regional treaties and customary international law. After having examined a number of international and regional instruments on terrorism, he concludes: “Despite the many international attempts to define terrorism generically, there’s still no such crime as terrorism in international treaty law.”<sup>29</sup> He states that “some regional definitions are so broad as to be indistinguishable from other forms of political violence, or public order or national security offences.”<sup>30</sup> Likewise, he rejects the argument of terrorism as a customary international crime for being simply “premature”<sup>31</sup>.

Ben Saul’s conclusions find support from Helen who insists that the requirements of “legality” should be kept centre stage in making the assertion that there exists a clear definition of terrorism under customary international law<sup>32</sup>. In this respect, she argues that states bear the non-derogable obligation to respect the principle of legality (*nullum crimen sine lege*), which requires clarity and precision in criminal law<sup>33</sup>. The persistent and similarly worded criticisms against laws that define ‘terrorism’ for lacking a sufficient level of clarity and precision by diverse actors would erode the argument for the existence of a clear rule of customary international law on terrorism (and its constitutive elements).

## 1.4 Brief Overview of UN measures to counter-terrorism and human rights concerns

### UN Global Counter-terrorism Framework

The United Nations Global Counter-Terrorism Strategy, adopted by the General Assembly in its resolution 60/288<sup>34</sup>, is one of the most important initiatives taken by member states to

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<sup>28</sup>*ibid*, p.937. On the other hand and in contrast to Cassese’s assertion, article 2 of the UN Draft Comprehensive Convention (referred to at *Supra Note 17*) does not per se identify ‘political, ideological or religious motivations’ as constitutive elements of ‘acts of terrorism’ and instead states that the ‘purpose’ of the criminalized act must be “...to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”

<sup>29</sup>Ben Saul, DEFINING TERRORISM IN INTERNATIONAL LAW, Oxford Scholarship Online, Jan 2010, p.40

<sup>30</sup>*ibid*

<sup>31</sup>*ibid*, p.50

<sup>32</sup>*Supra Note 18*, p.40

<sup>33</sup>*ibid*

<sup>34</sup> General Assembly Resolution 60/288 (A/60/825), adopted at its Sixtieth session on 20 September 2006.



emphasise the need to ensure human rights and rule of law while countering (fighting) terrorism. The strategy has been described as “the first comprehensive, collective and internationally approved framework for tackling the problem of terrorism worldwide.”<sup>35</sup> Respect for human rights for all and the rule of law forms one of the four pillars of the Strategy<sup>36</sup> and at the same time a component in all the other pillars. The strategy has also been appreciated for its “human security sensitive approach”<sup>37</sup> to prevent and combat terrorism.

### **Relevant UN Security Council Resolutions**

Over a period of 40 years, the UN has adopted 16 international instruments that aim to prevent and suppress terrorism<sup>38</sup>, although, as pointed above, no universal definition of terrorism has not been reached so far either through treaty law or questionably in international customary law. These instruments are ‘sectorial’ in the sense that each of them deals with specific instances or manifestations of terrorism.

Security Council Res 1373<sup>39</sup>, adopted in the immediate aftermath of 9/11 attack against the U.S., remains to be one of the most important and controversial instruments adopted by the UN with respect to prevention and suppression of the threat of terrorism at the international level. After reaffirming that the attack against the U.S. as constituting “a threat to international peace and security”<sup>40</sup>, the Security Council obligated States to “prevent and suppress the financing of terrorist acts”<sup>41</sup> and “criminalize the wilful provision or collection...of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used to carry out terrorist acts.”<sup>42</sup> The resolution also established a “Committee of the Security Council” (subsequently named as the Counter-Terrorism Committee (CTC)),

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<sup>35</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/65/258), para 19.

<sup>36</sup> The full title of section IV is reads as “Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism”. Such formulation is a clear indication of the premium importance that Members States attached to respect for human rights and rule of law in the fight against terrorism.

<sup>37</sup> *Infra Note* 63, p.40.

<sup>38</sup> See <http://www.un.org/en/sc/ctc/laws.html> (Last Accessed on June 29 2015)

<sup>39</sup> Resolution 1373(2001), Adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28 September 2001 (hereinafter referred to as SC Res 1373)

<sup>40</sup> *Ibid*, preamble, 3<sup>rd</sup> para

<sup>41</sup> SC Res 1373, para 1(a)

<sup>42</sup> *Ibid*, para 1(b)

with the task of monitoring the resolution's implementation and obliged ("called upon") member states to report on the "steps taken to implement [the] resolution."<sup>43</sup>

Both the content and practical application Sec Res 1373 has been widely criticised. In terms of its content, the resolution has been criticized for failing to make it explicitly conditional upon Member states to respect international law and in particular human rights law when obliging them to take measures that aim to combat terrorism<sup>44</sup>, such as criminalizing acts of terrorism. Lack of definition of terrorism or acts of terrorism has meant that member states may narrow or widen the scope of this essentially politically contested concept.

The other important criticism against Sec Res 1373 concerns the legitimacy of the UN Security Council to make law beyond its traditional mandate to enforce international peace and security as provided under article 23 of the UN Charter. Citing the definition of what constitutes as 'legislative acts' given by Yemin, Andrea suggests that Sec Res 1373 can be characterised as a legislation<sup>45</sup>, but insists that there are practical considerations that explain why the UNSC has taken upon itself the task of legislating and imposing sanctions against individuals on a world-wide basis.<sup>46</sup>

UN Security Council resolution 1624 (2005)<sup>47</sup> is another important measure that the Security Council has taken when seen in light of the global effort to prevent and fight terrorism through enacting and enforcing domestic legal measures. Among others, the resolution *called upon* Member States "to prohibit by law incitement to commit terrorist act or acts"<sup>48</sup> and to "prevent such conduct"<sup>49</sup> and to report to the Counter-terrorism Committee "on the steps they have taken to implement [the resolution]"<sup>50</sup>

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<sup>43</sup>*Ibid*, para 6

<sup>44</sup>See for example Clemenitine Oliver, *Human Rights Law and International Fight against Terrorism: How do Security Council Resolutions Impact on State's Obligations under International Human Rights Law? (Revisiting Security Council Resolution 1373)*, Nordic Journal of International Law 73:399-419, 2004, p.401

<sup>45</sup>Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: the Quest for Legitimacy and Cohesion*, EJIL Vol.17 no.5, pp 881-919, p.883. The three essential characteristics of legislation are: "they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature that is directed to indeterminate addresses and capable of repeated application in time."

<sup>46</sup>*Ibid*, p.888

<sup>47</sup>UN Security Council Resolution 1624(2005), adopted at its 5261<sup>st</sup> meeting, 14 September 2005.

<sup>48</sup>*Ibid*, para 1(a)

<sup>49</sup>*Ibid*, para 1(b), Italics added.

<sup>50</sup>*Ibid*, para 5

Despite the similarity of Sec Res 1373(2001) and 1624(2005) on their prescription to member states on how to legally respond to terrorism, i.e. criminalization of terrorist acts by the former and prohibition of incitement to terrorism by the latter, they also have important differences. The first difference relates to the legally binding nature of the resolutions. This is because while Sec Res 1373 (2001) makes it clear that the UNSC is acting under Chapter VII of the UN Charter, which apparently makes it binding upon all member states to implement its prescriptions, Sec Res 1624 (2005) contains no reference to Chapter VII, which makes its mandatory/obligatory aspect arguable, though one may not conclusively assert the absolute necessity of express Chapter VII reference for a Security Council resolution to be binding. Secondly, while Sec Res 1373(2001) makes very limited mention of international human rights law<sup>51</sup>, Sec Res 1624 (2005) makes extensive reference to such in its preamble<sup>52</sup> and “stresses” that any measures States take to implement the resolution “comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.”<sup>53</sup> The progress in applying a stronger terminology, i.e., from 'call upon' under Sec Res 1373 (2001) to 'stress' under Sec Res 1624 (2005) offers strong evidence to the claim that the UN Security Council is attaching increased importance to compliance with State's human rights obligations in the context of counter-terrorism measures, though it is regrettable that this has not been ensured under the less contestable obligatory Chapter VII framework.

Commentators also observe progress in integrating human rights considerations in the 'fight against terrorism' by referring to the change of attitude by the CTC, which initially took the “blunt” view that monitoring State’s performance against international conventions such as human rights treaties was outside of its mandate<sup>54</sup>.

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<sup>51</sup>It is only under para 3(f) of the resolution that reference is made to ‘human rights standards’-and not international human rights law per se. It “called upon” States to ensure that measures to prevent abuse of asylum procedures take place “...in conformity with the relevant provisions of national and international law, including international standards of human rights.”

<sup>52</sup>Sec Res 1624 (2001) preamble. The 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> paragraphs of the preamble contain human rights language. In particular, para 5 refers to article 19 of the Universal Declaration of Human rights and ICCPR and that “any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in para 3 of Article 19 of the ICCPR.”

<sup>53</sup>*Ibid*, para 4

<sup>54</sup>*Supra note 45*, p. 1069. This policy ambivalence seems to have been squarely addressed by the recommendation of the 'Policy Working Group on the United Nations and Terrorism', established by UN-Secretary General in October 2001. In its report, which was submitted to the General Assembly and Security Council by the Secretary-General on 06 August 2002, one of the recommendations of the Working Group includes maintenance of dialogue between High Commissioner for Human Rights and the Counter-Terrorism Committee on the importance of ensuring respect for human rights in the implementation of legislation, policies and practices to combat terrorism.

In a similar manner, the UNSC has emphasised States' obligation to protect human rights while countering terrorism two years before the adoption of Sec Council Res 1624 (2005). Sec Council Res 1456 requires that *any measures* (thus including legislative measures) taken by States to combat terrorism must comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.<sup>55</sup>

One of the most solid actions taken by the UN with respect the need for States to comply with their obligations under international law and humanitarian law is the decision to appoint a Special Rapporteur on the promotion and protection of human rights while countering terrorism pursuant to Human Rights Commission Resolution 2005/80.<sup>56</sup> Nonetheless, as is the case with the very nature of special rapporteurs, the effectiveness of the work of the special rapporteur heavily depends on the political will of States themselves since the mandate is limited to making recommendations, providing advisory services or technical assistance terrorism; to gather, request, receive and exchange information; identifying, exchanging and promoting best practices on matters related to promoting and protecting human rights while countering terrorism.<sup>57</sup>

Despite its mandate being limited to making non-mandatory recommendations, which may or may not be followed in practice by member states, reports of the special rapporteur undoubtedly contribute not only to increased awareness of respecting human rights while countering terrorism but also significantly develops jurisprudence in the two areas.<sup>58</sup>

The report of the former Special Rapporteur Martin Schienn entitled "Ten areas of best practices in countering terrorism", submitted to the Human Rights Council on 22 December 2010<sup>59</sup>, is of most relevance to the thesis at hand. The report identifies ten "best practices"<sup>60</sup>, which includes,

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<sup>55</sup> Resolution 1456 (2003), Adopted by the Security Council at its 4688<sup>th</sup> meeting, on 20 January 2003, para 6. There is reason to believe that Res 1456 (2003) may have been influenced by the adoption of General Assembly Resolution 57/219, adopted just a month earlier, with very similar language in respect to States' obligation to comply with their obligation under international law, international human rights law, refugee law and international humanitarian law. This is despite the fact that the Sec Council Res makes no reference to the GA resolution, which is unusual.

<sup>56</sup> Human Rights resolution 2005/80, Adopted (without a vote) at its 60<sup>th</sup> meeting on 21 April 2005, para 14.

<sup>57</sup> Ibid, para 14 (a)-(c).

<sup>58</sup>For an updated and full list of reports of the special rapporteur submitted to the Human Rights Council and the General Assembly see: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx> (Last accessed on 2015-04-06)

<sup>59</sup>A/HRC/16/51, submitted to the Human Rights Council, Sixteenth Session.

<sup>60</sup> The report defines the concept of best practice as "legal and institutional frameworks that serve to promote and protect human rights, fundamental freedoms and the rule of law in all aspects of counter-terrorism." It

*inter alia*, consistency of counter-terrorism *law and practice* with human rights, humanitarian law and refugee law (italics added). With regards to enactment, amendment and interpretation of counter-terrorism laws, the report states that a given counter-terrorism law should be subject to a number of guarantees and procedures that need to be applied by the legislature and the judiciary, including the following:

1. The need to alert the legislature if there are any potential inconsistency with the “purposes and provisions of norms of international human rights and refugee law” binding upon states when proposals are made for new counter-terrorism legislations or amendments on existing legislations,
2. The need for the legislature to review and ensure that the law approved confirms to norms of international human rights and refugee law, either by establishing a specialised body or using any other method;
3. The judiciary is duty-bound to ensuring that laws do not breach norms of international human rights and refugee law binding upon states, and should apply techniques available under the constitution such as:
  - (a) Interpreting the law consistent with the “purposes and provisions of norms of international human rights law” binding upon states;
  - (b) Declaring that part of the law is without legal effect;
  - (c) Declaring that the inconsistent law is to be of no force or effect, either immediately or after a period of time that allows the Government to take “remedial steps”.<sup>61</sup>

The report has also dealt with the concerns of introduction of new offences that potentially endanger the full enjoyment of the right to freedom of expression, namely the crime of incitement to terrorism. The special rapporteur emphasized that the offence must:

- (a) be limited to the incitement to conduct that is *truly* terrorist in nature;

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refers to “...not only what is required by international law, including human rights law, but also includes principles that go beyond these legally binding obligations”, *Ibid*, 5<sup>th</sup> para.

<sup>61</sup>*Ibid*, p. 7

- (b) restrict freedom of expression no more than necessary for the protection of national security, public order and safety or public health or morals;
- (c) be prescribed by law in precise language, including by avoiding reference to vague terms such as “glorifying” or “promoting” terrorism;
- (d) include an actual (objective) risk that the act will be committed;
- (e) expressly refer to two elements of intent, namely intent to communicate a message and intent that this message incites the commission of a terrorist act; and
- (f) preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to “unlawful” incitement to terrorism.<sup>62</sup>

### 1.5 Debate on countering terrorism: Human security vs State security

In addition to and as part of the debate on the appropriate conceptual framework, definitional elements and the existence or absence of consensus in international law to regulate contemporary forms of terrorism, how best to combat terrorism either internationally or domestically is also debatable among scholars, legislatures and policy makers.

Anelli distinguishes contemporary approaches to combat terrorism between the traditional state-centric framework which focuses on the “ability of the state to protect itself” as opposed to a ‘human security’ framework which calls for a focus on ensuring “security and well-being of ordinary people.”<sup>63</sup> In this respect, she draws attention to the need for a paradigm shift, with special focus for African countries, to treat terrorism as a “symptom and not merely a criminal act or an act of war.”<sup>64</sup> She identifies “political marginalization” as one of the “root causes of domestic terrorism in Africa”, highlighting the failure of African political systems to “establish institutions that mediate between [the] state and [the] society.”<sup>65</sup> Anelli emphasises that restrictions on basic human rights, including freedom of expression, speech and association, contribute to frustrations and deprive people of the opportunity to change their governments in a truly democratic process.<sup>66</sup>

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<sup>62</sup> *Ibid*, p.16

<sup>63</sup> Anneli Botha, *Challenges in understanding terrorism in Africa: A human security perspective*, *African Security Review*, 17:2, 28-41, 2008, p. 32- 34

<sup>64</sup> *Ibid*

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid*

To conclude, it is refreshing to note that the academic view for counter-terrorism measures to be modelled in line with 'human security' rather than 'State-security' approach, for its emphasis on ensuring protection of human rights (and hence imposing restrictions only on exceptional circumstances) in order to effectively counter terrorism finds express support in global counter-terrorism framework discussed above<sup>67</sup>, albeit near-complete practical application by State practice .

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<sup>67</sup> Refer to the discussion on sub-section 1.4 above.

## CHAPTER TWO

### **Terrorist acts and crime of encouraging terrorism under the Ethiopian Anti-Terrorism Proclamation No 625/2009: Concerns of definition and criminal liability**

#### **2.1 Introduction**

The objective of this Chapter is to identify and develop an in-depth understanding of some of the most problematic aspects of the Ethiopian Anti-terrorism legislation. One of these problematic aspects relates to how ‘terrorist acts’ are defined since it will impact on the scope of directly criminalized activities as well as having a spill-over effect on the scope of related crimes such as ‘encouraging terrorism’, which is the primary focus of the thesis.

#### **2.2 Brief overview of Anti-terrorism proclamation 652/2009**

The Ethiopian Anti-terrorism proclamation no 652/2009 came into force in August 2009<sup>68</sup>. The proclamation is structured into seven parts, beginning with a preamble, which sets out the object and purpose behind its enactment.

The preamble identifies three values, i.e., ‘peace, freedom, and security’ as values to be protected against the ‘threat of terrorism.’ The values of ‘peace’ and ‘security’ seem to be accorded with significant attention as they are repeated in the second paragraph as values to be protected against ‘terrorism’ both domestically and in the ‘world at large’ while ‘development’ is added to the list of domestic concerns. It then proceeds that the “laws presently in force” in the country are found to be insufficient to “prevent and control terrorism”, presumably referring to the Ethiopia’s Criminal Code, without specifically identifying the deficiencies thereof. The fourth paragraph may be understood to give a clue as to which gaps the proclamation aims to fill in as it makes reference to the necessity of incorporating “new legal mechanisms and procedures to *prevent, control, and foil* terrorism” by “setting up *enhanced investigation and prosecution* systems” (Emphasis added).

The last paragraph of the preamble emphasises the need to cooperate with other ‘governments and people’ of the region as well as the world at large to ‘enforce agreements that have been entered into under United Nations and the African Union’ in order to ‘adequately fight terrorism.’ One of these agreements, presumably relates to Sec Res 1373 discussed in Chapter

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<sup>68</sup>Proclamation No 652/2009, A Proclamation on Anti-Terrorism, Federal Negarit Gazeta of the Federal Democratic republic of Ethiopia, 15<sup>th</sup> Year No. 57, Addis Ababa, 28<sup>th</sup> August 2009 (Hereafter referred to as ‘ATP’ or the proclamation)



I although some argue that the proclamation's enactment cannot be justified on account of the resolution as the latter applies "only to the obligation to cooperate in serious cases of domestic terrorism and has nothing to do with...obligation to pass legislation that regulate domestic terrorism."<sup>69</sup>

Article 2 of the ATP defines key terms used in the proclamation, but allows for contextual interpretation, although it's unclear whether the context should be a cause for narrower or wider interpretation<sup>70</sup>. Despite the prevalent use of the term 'terrorism' as the core element of definitions of some terminologies such as 'proceeds of terrorism' (sub-art 2), 'terrorist organization' (sub-art 4), 'incitement' (sub-art 6), the term itself is not explicitly defined either under part one or other parts of the proclamation.

For instance, "terrorist organization" is defined as:

- a) A group, association or organization which is composed of not less than two members with the objectives of committing acts of *terrorism* or plans, prepares, executes or cause the execution of acts of *terrorism* or assists or incites others in any way to commit acts of *terrorism*; or
- b) An organization so proscribed in accordance with this Proclamation.<sup>71</sup>

Incitement is also defined along the lines of commission of 'terrorism'. Incitement is inducing another person by "persuasion, promises, money, gifts, threats or otherwise to commit an act of *terrorism* even if the induced offence is not attempted."<sup>72</sup>

It may seem logical and reasonably coherent to take the view that the legislature intended to use the terms 'acts of terrorism' and 'terrorist acts' interchangeably. Lack of a separate and explicit definition of the term 'terrorism' may also be another reason to uphold such understanding. However, it's unclear why Art 4(a) doesn't refer to the definition of 'terrorist acts' provided under Art 3 but rather introduces a new terminology, i.e., 'acts of terrorism' for proscribing an organization/association as 'terrorist'. Whether or not these two terms should be understood as interchangeable is relevant for at least two reasons. The first concern relates to

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<sup>69</sup> Wondwossen Demissie Kassa, Examining some of the *raisons D'être* for the Ethiopian Anti-terrorism law, *Mizan Law Review*, Vol.7 No.1, September 2013, p. 64

<sup>70</sup> Art 2(1) begins with the statement applicable to all definitions as: "In this proclamation, unless the context otherwise requires :"

<sup>71</sup> ATP, Art 2(4), (Emphasis added)

<sup>72</sup> ATP, Art 2(6), (Emphasis added)

the lack of a distinct definition of ‘terrorism’, which leaves the door wide open to incorporate acts that do not fall under the definition of ‘terrorist acts’ but would be used to proscribe an organization/association as terrorist-if one takes the view that *acts of terrorism* and *terrorist acts* are not understood to be interchangeable. Secondly, on account of the fact that the notion of ‘terrorism’ is politically charged, as illustrated in Chapter 1 above, while ‘terrorist acts’ are criminal law notions, it’s preferable to understand ‘acts of terrorism’ and ‘terrorist acts’ as interchangeable terms in order to appropriately delineate between criminal acts (which should be punishable) and legitimate but controversial political acts, views or expressions (which should be protected).

The second part of the proclamation can be considered to be the most substantive part of the proclamation as it deals with the proscription of terrorist acts and related crimes from Art 3 to 12. Some of the relevant provisions of this part will be discussed below.

Part 3 of the proclamation, entitled “Preventive and investigative measures” deals with powers of the police, national intelligence and security services. Some of these powers relate to control of premises and movement of people, conducting surveillance, carrying out sudden or covert searches, powers of arrest, detention and duty to give samples as well as duty to give information<sup>73</sup>.

Part 4 deals with evidentiary and procedural rules, including admissible evidences. One of the most controversial provisions relates to article 23 (1) which provides for the admissibility of intelligence report which “does not disclose the source or the method it was gathered.”<sup>74</sup> Although the provision does not explicitly state that evidences gathered through torture or ill-treatment are admissible, it is clear that the prosecutor is not obliged to prove that the evidence in question is not obtained through torture or ill-treatment, thus at the very least and presumably transferring the burden of proof to the defendant, which is widely recognised to be unfair and against the ‘principle of equality of arms.’

Part 5 deals with measures to control terrorist organizations such as the procedure for proscribing and de-proscribing. Both proscribing and de-proscribing procedures are the exclusive realm of parliamentary oversight and judicial review seems to be excluded despite

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<sup>73</sup> ATP, Articles 13 to 22.

<sup>74</sup> ATP, Art 23 (1)

the Constitutionally enshrined right of ‘everyone’ “to bring a justiciable matter to, and obtain a decision or judgment by, a court of law or any other competent body with judicial power.”<sup>75</sup>

Part 6 identifies institutions responsible for following up ‘cases of terrorism’, and establishes a new organ called “National Anti-Terrorism Coordinating Committee.”<sup>76</sup> The proclamation ends with part 7, entitled “Miscellaneous Provisions”, which contains one of the most admirable provisions of the provision, i.e., a ‘promise’ for establishment of victims’ fund<sup>77</sup>, which so far has not materialised at the time of writing this thesis.

### 2.3 Definition of ‘terrorist acts’

Article 3 of the ATP, under the title “Terrorism and Related Crimes”, defines or describes the subjective and objective elements of terrorist acts in the following manner:

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 destabilising or destroying the fundamental political, constitutional or, economic or social institutions of the country:

1/causes a person’s death or serious bodily injury;

2/creates serious risk to the safety or health of the public or section of the public 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-article (1) to (6) of this article;

is punishable with rigorous imprisonment from 15 years to life or with death.

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<sup>75</sup> FDRE Constitution, Art 37

<sup>76</sup> ATP, Art 30

<sup>77</sup> ATP, Articles 32 and 34, respectively

Evidently the definition or description of proscribed ‘terrorist acts’ has attracted widespread criticism from many rights groups such as Human Rights Watch<sup>78</sup>, ARTICLE 19<sup>79</sup> as well as the OHCHR.<sup>80</sup> The criticisms raise similar concerns of the definition being ‘extremely broad’ and ‘ambiguous’, for ‘criminalizing non-violent political dissent’, for its inappropriateness to include property crimes in the concept of terrorism along with its disproportionate punishment, i.e., up to death penalty. ARTICLE 19 reinforces its criticism by reference to the Human Rights Committee’s condemnation of similarly worded definition of terrorist acts employed by countries such as Canada, Iceland, Bahrain, and Australia.<sup>81</sup> In particular the HRC recommended for state parties to “adopt a more precise definition of terrorist acts, so as to ensure that individuals will not be targeted on political, religious or ideological grounds.”<sup>82</sup>

The fact of the matter is that States, including Ethiopia, persist on applying over-broad and ambiguous definition despite equally persistent call for states to uphold their obligation to respect the principle of legality (*nullum crimen sine lege*) that requires clarity and precision in criminal law, as emphasised by scholars such as Helen Duffy discussed in Chapter 1 above<sup>83</sup>. In addition to individual state practices, collective efforts such as the UN Draft Convention on Terrorism have also attracted similar criticisms of applying “dangerously broad”<sup>84</sup> definition of acts of terrorism.

Keeping in mind such criticisms, let us now turn to exploring the requirements to be fulfilled in order for a given act to fall under the definition of acts of terrorism. In this respect, Antonio Cassese’s approach to clarify the ‘subjective’ and ‘objective’ elements of the offence of terrorism briefly discussed in Chapter 1 above are helpful.<sup>85</sup>

### ***A. Objective element***

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<sup>78</sup>[http://www.hrw.org/news/2009/06/30/analysis-ethiopia-s-draft-anti-terrorism-law#\\_Defining](http://www.hrw.org/news/2009/06/30/analysis-ethiopia-s-draft-anti-terrorism-law#_Defining) (Last accessed on 30 Apr. 15)

<sup>79</sup><http://www.article19.org/resources.php/resource/592/en/ethiopia:-article-19-comments-on-anti-terrorism-proclamation> (Last accessed on 30 Apr. 15)

<sup>80</sup><http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12365&LangID=E> (Last accessed on 30 Apr. 15)

<sup>81</sup> *Supra note 79*

<sup>82</sup> Concluding observations of the Human Rights Committee, Canada, UN Doc. CCPR/C/CAN/CO/5, 2 November 2005.

<sup>83</sup> *Supra notes 18 and 19*

<sup>84</sup>[https://www.google.se/search?hl=sv&q=amnsety+international+on+Draft+UN+Convention+on+terrorism&gws\\_rd=cr,ssl&ei=qC1CVbQpiYHLA7nagJgP](https://www.google.se/search?hl=sv&q=amnsety+international+on+Draft+UN+Convention+on+terrorism&gws_rd=cr,ssl&ei=qC1CVbQpiYHLA7nagJgP) (Last accessed on 30 Apr. 15)

<sup>85</sup> See pp 15-16

According to Cassese, the objective element of the definition of acts of terrorism relates to the proscribed *conduct*<sup>86</sup>. Along this line, the *conducts* prohibited under the ATP are those listed from sub-article 1 to 6, and include threatening to commit any one of such proscribed acts as per sub-art 7, both of whom are equally punishable.

Some of these proscribed conducts such as causing a person's death or serious bodily injury, kidnapping or hostage taking are precise and are found in every day criminal law usage. However, conducts such as creating a 'serious risk' to health and safety, 'causing' serious damage to property or causing damage to natural resources, or 'endangering' public service are imprecise, and highly dependent on subjective assessment especially because the ATP nowhere clarifies these terms with the view to assist one in making an objective assessment and instead seems to treat them as self-evident. Of course this is not unique to the ATP since exactly the same imprecise and subjective terminologies are in use elsewhere, for instance in art 2 of the UN Draft Comprehensive convention.

The exact legal implication of adopting broad definition of acts of terrorism is controversial. For instance, in the case of *Gul*<sup>87</sup>, the UK Supreme Court was confronted with the appellant's argument that the Court should narrowly read (apply) the broad definition of the offence of terrorism<sup>88</sup>, which is provided under Section 1 of UK Terrorism Act 2000. In a language very similar to the ATP, Section 1 of the Act proscribes the following conducts (acts):

- (2) Action falls within this subsection if it-
- (a) involves serious violence against a person,
  - (b) involves serious damage to property,
  - (c) endangers a person's life, other than that of the person committing the action,
  - (d) creates a serious risk to the health or safety of the public or a section of the public,
  - or
  - (e) is designed seriously to interfere with or seriously disrupt an electronic system

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<sup>86</sup> *Supra note 26*, p. 938

<sup>87</sup> *R v Gul*, UK Supreme Court, [2013] UKSC 64

<sup>88</sup> The appellant invoked three grounds, one of which is that "...as a matter of domestic law and quite apart from international law considerations, some qualifications must be read into the very wide section 1 of the 2000 Act.", *Ibid*, para 24.

Notwithstanding its rejection of the prosecutor's argument that the "width of the definition of terrorism...was mitigated by the existence of the statutory prosecutorial discretion"<sup>89</sup> as a justification for according a wide meaning to terrorism, the Supreme Court refused to narrow down the definition because "[Parliament] intended it to be very wide"<sup>90</sup>. The Court reasoned that its function is limited to "interpret[ing] the meaning of the definition in its statutory, legal and practical context" and it can narrow down the term's meaning when the [naturally] wide meaning of the legislation conflicts with EHRC (which is not suggested) or any other international obligation of the United Kingdom...<sup>91</sup>It 'reinforced' such view by referring to the Parliament's decision to "leave the definition of terrorism unchanged" after its debate<sup>92</sup>, but nonetheless stated its disagreement with the reasons that justified giving "terrorism" a wide meaning.<sup>93</sup>

It is instructive to note that the UK Supreme Court's decision to reject the Appellant's request for the court to narrow down the uncontested wide meaning of terrorism provided under the UK Terrorism Act is not because it's not problematic for rule of law considerations but rather its limited mandate vis-à-vis the Parliament's overriding legislative mandate, except where legislation in contravention with EHRC or any other international obligation of the UK. However, despite recognising the 'prosecutorial discretion' argument to justify a wide meaning of terrorism risks undermining the rule of law and despite the protection provided for the 'rule of law' principle under the EHRC, it's disappointing that it stopped short of and missed the opportunity of analysing and discussing the relevant EHRCt jurisprudence on the scope, meaning and application of the principle and signatory State's corresponding obligations under domestic criminal justice framework, including through legislative acts-granted that the Appellant has not raised such argument.

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<sup>89</sup> *Supra note 87*, para 38

<sup>90</sup> *Ibid*, para 40

<sup>91</sup> *Ibid*, para 38

<sup>92</sup> *Ibid*, para 39

<sup>93</sup> *Ibid*, para 40. The justification for defining terrorism widely rests on the argument of the prosecutor (and the UK Parliament) is that the width of the definition is "mitigated by the existence of the statutory prosecutorial discretion" embedded in the UK criminal justice system. The Supreme Court, in para 34-36 of the judgment, rejected the 'prosecutorial discretion' argument by stating that such "...was never intended to assist in the interpretation of legislation which involves the creation of a criminal offence or offences. Either specific activities carried out with a particular intention or with a particular state of mind are criminal or they are not." It went on debunking the argument as "intrinsically unattractive" as it amounts to equating 'prosecutorial discretion' with the legislature delegating an "appointee of the executive" to make the decision whether an activity should be treated as criminal for the purposes of prosecution.", which "risks undermining the rule of law" as well as "...Parliament abdicating a significant part of its legislative function to an unelected" official.

The Inter-American Court on Human Rights, on the other hand, was more forthcoming when it dealt with the issue of imprecise, ambiguous and wide definitions of crimes by applying the principle of legality, i.e., *nullum crimen nulla poena sine lege praevia* recognised in Article 9 of Inter-American Convention on Human Rights. In the *Case of Castillo*, the Court stated that “crimes must be classified and described in precise and ambiguous language that *narrowly defines* the punishable offense, thus giving full meaning to the [principle] in criminal law.”<sup>94</sup>(Emphasis added)

### **B. Subjective element**

The subjective element of a definition of terrorist acts relates to the *purpose* of the act<sup>95</sup>. Cassese asserts that a number of international instruments and national laws provide that the objective pursued by terrorists (for committing or threatening to commit one or more of the conducts) may be either to spread fear or to compel a government or an international organization or alternatively to destabilize or destroy the structure of the country. All these three elements can be found included in the first paragraph of article 3 of the ATP, articulated in the following manner:

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 destabilising or destroying the fundamental political, constitutional or, economic or social institutions of the country...

Although the above ATP definition provides for elements of coercion, intimidation, destabilisation or destruction of socio-economic, political and constitutional institutions of the country it is unclear whether these are the *means (methods)* or the *objectives (ends)* of the terrorist who carries out or threatens to carry out one or more of the conducts listed under sub-articles 1 to 6. The literal reading of the article in fact suggests that the ultimate objective of the terrorist is intending to advance a political, ideological or religious cause “*by*”<sup>96</sup>employing these means (methods), i.e., coercing the government or IGO, intimidating the public or by destabilising the socio-economic, political and constitutional institutions.

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<sup>94</sup> Inter-American Court of Human Rights, *Case of Castillo et al. v. Peru*, Judgment of May 30, 1999, para 121

<sup>95</sup> *Supra note 26*, p 940

<sup>96</sup> The provision employs the connector ‘by, which can be taken as suggesting a *means* and *end* relationship between intent to pursue political, ideological and religious goals and producing fear among the public, coercing the government and destroying the ‘socio-economic, political and constitutional’ institutions of the country.

The above mentioned literal reading of article 3 of the ATP is in tandem with Cassese's confusing assertion that "[T]he spreading of deep fear or anxiety is only a *means* for compelling a government or another institution to do (or not to do) something; it is never an end itself."<sup>97</sup> While at first Cassese posits that the objective of the terrorist is to spread fear, intimidate the government or destroy the structure of the country he later on, confusingly, characterises the exact same elements as *means* or *methods*.

Paust, who insists as to the existence of a "generally shared" objective meaning of terrorism like Cassese does, differs with respect to characterising 'spreading of fear or anxiety'-as a means (method) or goal (objective). He argues that a definition of terrorism "must necessarily involve the creation of terror", and rejects criminalization of "mere "intimidation" of some human target or efforts to "coerce", "influence", "disturb", "endanger", or "threaten" such a target" as "overly broad". He goes further and argues that "some forms of coercion, intimidation, or influence over governmental elites are actually preferred in a democracy committed to free speech and assembly and have nothing to do with an intent to produce terror."<sup>98</sup>

Professor Partan shares Paust's argument by making a distinction between "assault on the...government", which he suggests to be permissible, and "assaults on the civilian population", which he regards should be criminalised.<sup>99</sup> He argues that "international law does not outlaw revolution" and adds that terrorism "should not be defined in such a way as to protect governments from assault by the governed."<sup>100</sup>

The choice between centring the intent to 'spread of terror' either as a *means* or an *end* has significant conceptual and practical implications. One of the most important implications concern the propriety of excluding acts such as damage to property, disruption of public services and damage to natural resources that may occur during protests, advocacy or collective actions that do not have the intent to spread fear or even cause harm, which can be adequately prosecuted under relevant civil and criminal law provisions without the need to characterize them as terroristic. Such need is felt and finds expression for instance in a model anti-terrorism

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<sup>97</sup> *Supra* note 26

<sup>98</sup> Jordan J. Paust, *Terrorism's proscription and core elements of an objective definition*, University of Houston, Law Center, 2010, p.58

<sup>99</sup> Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN.L.REV. 697, (1987), P.710(quoting Partan, *Terrorism: An International Law Offense*, 19 CONN.L.REV.751 (1987)

<sup>100</sup> *Ibid*



law proposed to African countries.<sup>101</sup> The model law provides exceptions for acts such as disruption of key communication infrastructures, emergency services or acts prejudicial to public security or national security if such acts are “the result of advocacy, protest, dissent or industrial actions and is not intended to result in the harm or conducts”<sup>102</sup> proscribed under the same model law, i.e. acts involving serious violence against persons, endangering a person’s life, damage to property, use of firearms or explosives, etc.

Setting aside the ATP’s anomaly in failing to centre the spread of fear as the core subjective element of acts of terrorism, the prosecutor is obliged to prove two requisite sets of *mens rea*. The first concerns proving *intent* which is the requisite psychological element of any of the proscribed acts (conducts) such as murder, serious bodily injury, kidnapping or hijacking, i.e. *dolus generalis*. Secondly, the prosecutor has to also prove that the defendant entertained the *specific intent* of ‘coercing the government’, ‘intimidating the public or section of the public’, or ‘destabilising or destroying the fundamental’ socio-economic, political and constitutional institutions of the country i.e., *dolus specialis*.<sup>103</sup> Furthermore, the prosecutor has to provide sufficient details as to the political, ideological or religious “cause” that the defendant was advancing, which can be understood as the  *motive* element of the offence.

## 2.4 Mental and material elements of ‘crime of encouraging terrorism under the ATP

Article 6 of the proclamation criminalizes encouraging terrorism in the following manner:

### 1. 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 the Proclamation is punishable with rigorous imprisonment from 10 to 20 years.

Prior to analyzing the constituent elements of Art 6, it’s important to highlight the misleading discrepancy between the title and the content of the crime. While the title ‘encouragement of terrorism’ may suggest that the crime is about undertaking some positive action that causes

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<sup>101</sup> The African Model Anti-Terrorism Law, Final draft as endorsed by the 17<sup>th</sup> Ordinary Session of the Assembly of the Union, Malabo, 30 June-July 2011,

<sup>102</sup> *Ibid*, Schedule I, model provision art (xl)(a). The model law, under (xl) (b) and (c), also goes to the extent of excluding liberation struggles and acts covered by international humanitarian law, respectively.

<sup>103</sup> *Supra note* 26, p. 949

others to be encouraged and be involved in the commission of at least one of the specified 'acts of terrorism' under Art 3 of ATP, the reading of the content reveals that such causal linkage between the two is very loose because it's sufficient for a given act to be criminalized or initiate prosecution if the Judge or the Prosecutor, respectively, perceives the act to be *likely understood* as direct or indirect encouragement by some or all members of the public. In short, it suffices for the act to be subjectively understood by the judge or the prosecutor that there's a likelihood for someone to be directly or indirectly encouraged to commit one of the criminalized acts of terrorisms and it is unnecessary to establish if the act actually encouraged someone- either directly or indirectly-to commit the latter.

Furthermore, it should be emphasised from the outset that the offence under Art 6 is a 'secondary offence', the primary offence being those acts proscribed under Article 3 of the ATP. In this sense, concerns of imprecision, over-broadness, and ambiguities discussed above with regards to the definition of terrorist acts (primary offences) will necessarily permeate in and directly affect our understanding of the scope of the secondary offence of encouraging terrorism.

#### 2.4.1 Dilemmas on the mental element of the offence of encouraging terrorism

Article 6 of the ATP is silent as to the mental element of the crime of likely encouragement of directly or indirectly encouraging the commission, preparation or instigation of an act of terrorism. This is because apart from criminalising the conduct of publishing or causing the publication of a statement which may likely encourage (directly or indirectly) someone to be involved in an act of terrorism, the provision is unclear as to whether the author's reprehensible conduct should be intended or that his/negligent conduct suffices to establish guilt.

At a glance, Art 36(2) of the ATP may seem to provide guidance in clarifying this dilemma as it provides for the applicability of provisions of the Criminal Code and Criminal Procedure Code.<sup>104</sup> Thus, it will be necessary to investigate the rules applicable under the Ethiopian Criminal Code to establish criminal guilt with regards to the mental element of criminalised acts/conducts. In other words, what mental element should one look for to determine whether and if an accused who performed a certain act/conduct should be found guilty.

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<sup>104</sup> The article, found under Part Seven: Miscellaneous Provisions, states "Without prejudice to the provisions of sub-article (1) of this Article, the provisions of the Criminal Code and Criminal Procedure Code shall be applicable." The preceding article provides for inapplicability of laws inconsistent with the proclamation.

Chapter II of the ECC entitled “Criminal Guilt” sets the rules for mental elements of guilt divided into intention and negligence.<sup>105</sup>

Art 58 describes what criminal intention means, which briefly stated comprises of: committing (performing) of a punishable act; with full knowledge (and ‘intent’-though such expression sounds circular); to achieve a given result Or being aware of his act may cause illegal AND punishable *consequences*, commits it without regard to such consequences may happen<sup>106</sup>.

Article 59 of the ECC deals with ‘guilt by negligence’ and under sub-art (2), the most relevant part to the discussion at hand, sets the rule that offences committed by negligence are liable to be punished “*only if the law so expressly provides*”<sup>107</sup>(Emphasis added). Since as a general rule committing a crime entails punishment, except in cases of criminal irresponsibility, the provision is to be understood as a requirement that the law should expressly state if and when negligence constitutes the mental element of a given conduct, failing which no one may be found guilty of committing a crime of negligence.

From the above one may be inclined to deduce that the crime of ‘publishing or causing the publication of a statement likely to be understood by someone as a direct or indirect encouragement or other inducement to them to commit or prepare or instigate an act of terrorism’ is an intent-based crime, because Art 6 of the ATP does not *expressly* provide for negligence as the mental element of the crime. Such deduction may further be supported by holding the view that non-negligent crimes are (or should be) intention based crimes.

But such blanket conclusion is untenable since clearly, if not stating the obvious, intention as a mental element of a crime has its own meaning and it is quite possible for a non-negligent crime provided under the anti-terrorism proclamation to fall outside the scope of what constitutes an intent-based crime under the Ethiopian criminal law. As will be explained below, such is the unfortunate anomaly Art 6 of the ATP presents with the reader.

that are not expressly stated as negligent-based crime are to be understood as intention-based. if the law doesn’t expressly provide for negligence as a mental element of an act (thus not punishable)

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<sup>105</sup>The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Proclamation No.414/2004 (Hereinafter referred to as ECC). Second para of Art 57 states “A person is guilty, if being responsible for his acts, he commits a crime either Intentionally or by negligence.”

<sup>106</sup> *Ibid*, Art 58 (1)(a) and (b)

<sup>107</sup>ECC

Understanding the crime of encouragement as an intent-based rather than negligence-based crime presents us with another dilemma related to the relevance or meaning of the phrase “likely to be understood” contained in Art 6 of the ATP. The following sub-section will discuss and address this issue.

#### 2.4.2 “Likely to be understood” vis-à-vis Intent to commit a crime

One of the key phrases employed by art 6 of the ATC that holds the key in determining whether or not a given statement is criminalized is if such statement is *likely to be understood* by some or all of the members of the public to be either a direct or an indirect encouragement to commit, plan or instigate an act of terrorism. Thus, the nexus between publishing a given statement (generally a lawful act) and the commission, planning or instigation of an act of terrorism (illegal acts) is the statement's likelihood to be understood by some members of the community as a direct or an indirect encouragement to be involved in one or all of the illegal acts. Given the lack of Art 6 in providing any guidance, hint or objective standard(s) to be applied in ascertaining such likelihood, it remains on the prosecutor's or the judge's purely subjective assessment to bring a criminal charge against a suspect or pass a guilty verdict against a defendant, respectively. In essence, it doesn't matter whether or not the suspect or the defendant intended to- directly or indirectly- encourage someone to commit an act of terrorism so long as the prosecutor or the judge finds the statement to be likely understood as such. This leads us to understand the crime to be a negligence-based crime.

On the other hand, it has been established above that the combined reading of Art 6 of the ATP and Art 59 of the ECC leads one to understand the 'crime of encouragement' as an 'intent-based' crime. In this respect and according to Art 58 of the ECC, “a person intentionally commits an offence when he performs an unlawful and punishable act with full knowledge and intent”<sup>108</sup>. Furthermore, sub-art 3 states that “no person shall be convicted for what he neither knew of or intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions of governing negligence.”<sup>109</sup> Thus the provision makes it clear that awareness and desire to cause harm (as provided for in the specific criminal offence) are the basic constituent elements of an ‘intention-based’ offence.

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<sup>108</sup> *Ibid*

<sup>109</sup> *Ibid*

If and provided the crime of ‘encouraging terrorism’ is to be understood as an intent (rather than negligent) based crime, the phrase ‘likely to be understood’ would render Art.6 incomprehensible if not contradictory. This is because, as briefly indicated above, whether or not the author *desired or was aware* that his publication is likely to be understood as encouraging someone to be involved in terrorism is irrelevant in the assessment of his guilt, despite the crime being an intent-based crime. Had it been the case that the crime is a negligence-based crime, criminalising the act of encouraging terrorism may sufficiently be explained by asserting that an author’s failure to take the necessary care or precaution is reprehensible and should be punished.

Furthermore, given the fact that a certain piece of publication can be understood in many different ways and the fact that provision gives no indication whatsoever as to what kind of statements are presumed to be ‘likely understood’ as encouraging terrorism makes the crime extremely vague, over-broad and fails to forewarn citizens from pursuing a criminal behaviour. As such the ambiguous and overbroad criminalization of ‘encouraging terrorism’ as provided under Art 6 of the ATP runs counter to the principle of legality, which requires, among others, that criminalization of a certain act/conduct must be sufficiently precise and to the extent possible clear and unambiguous.

## CHAPTER THREE

### CONTENT, SCOPE AND LIMITATION REGIME OF THE RIGHT TO FREEDOM OF EXPRESSION UNDER ICCPR AND FDRE CONSTITUTION

#### 3.1 Brief sketch of justifications for the right to freedom of expression

As Wragg notes, four main justificatory arguments can be distilled from the extensive literature on freedom of expression. These arguments are: “participation in a democracy; truth; self-realization (or self-fulfillment); and autonomy.”<sup>110</sup>

The argument from participation in a democracy posits that in order for citizens to be self-governing, they must be free to hear information and ideas that are necessary for decision making<sup>111</sup>. Furthermore, Bork notes that the notion of democratic government “would be meaningless without freedom to discuss government and its policies.”<sup>112</sup> The argument from participation in a democracy to justify special protection for freedom of expression has also been found to be the principal rationale used by the European Court of Human Rights when dealing with cases involving article 10 of the ECHR.<sup>113</sup> The Inter-American Court of Human Rights has also emphasized in several occasions the role of freedom of expression in sustaining democracy, stating that “It [freedom of expression] is indispensable for the formation of public opinion. It is also a *condition sine qua non* for the development of political parties, trade unions, scientific and cultural societies, and in general those who wish to influence the public.”<sup>114</sup>

The argument from truth is thought to predominantly rely on the works of John Stuart Mill. In his classic work *On Liberty*, Mill states:

“Man is capable of rectifying his mistakes by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and argument, to produce any effect on the mind, must be brought before it.”<sup>115</sup>

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<sup>110</sup>WRAGG, PAUL, MARTIN, *Critiquing the UK Judiciary’s Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?* Durham theses, Durham University, 2009, p.53

<sup>111</sup> Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, (New York: Harper, 1948), cited by Wragg, *supra note 110*

<sup>112</sup>Robert Bork, ‘Neutral Principles and Some First Amendment Problems,’ [1971] 47 *Indiana Law Journal* 1, 23.

<sup>113</sup>*Ibid*

<sup>114</sup>Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 70

<sup>115</sup>J. S. Mill, *On Liberty*, (London: Routledge, 1991), (1st. edn., 1859), p.32

Despite its powerful influence since its publication, Mill's theory of course has also been criticized. Baker, for example, asks "why bet that truth will be the consistent or even the usual winner?"<sup>116</sup> On the other hand, Wragg defends Mill's position stating that we should interpret Mill's argument "not as truth *will* be revealed if free debate prevails but rather that truth *can* only be revealed if free debate prevails."<sup>117</sup>

The argument for freedom of expression from self-fulfillment and autonomy is advanced by Redish, who states that self-realization is the 'ultimate value' that the guarantee of free speech serves<sup>118</sup>. This 'one true value' is in fact two values: 'self-development' and 'self-rule'<sup>119</sup>. Self-development allows an individual to realize their full potential in life by developing their powers and abilities<sup>120</sup>. The argument of self-realization as the basis for freedom of expression has also been criticized for its deficiency in establishing the absolute necessity of debate for achieving the values it promotes, as there may be other methods besides debate to achieve them, such as experiences.<sup>121</sup> Furthermore, Barendt notes that 'it is far from clear that unlimited free speech is necessarily conducive to personal happiness.' However, such criticisms can be adequately responded to when one considers a compelling argument that it should be individuals themselves and not the State who should be allowed to decide whether to access the information or not, thus invoking the notion of autonomy<sup>122</sup>. Blasi notes that "unless individuals retain a basic minimum of choice-making capability, they cease to be 'individuals' at all, which therefore significantly reduces the scope for state interference."<sup>123</sup> The importance of freedom of expression to personal development of individuals has also been emphasized by the decision of the African Commission on Human and People's Rights, in the case of *Constitutional Rights Project*, which made the following compelling argument:

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<sup>116</sup>Baker, *Human Liberty and Freedom of Speech*, (Oxford University Press, 1989), p.6

<sup>117</sup>*Supra* Note 105, p. 80

<sup>118</sup>Martin Redish, 'The Value of Free Speech,' (1982) 130 *University of Pennsylvania Law Review* 591, p.596 (Quoted at *Supra* note above 109, p. 83)

<sup>119</sup>*Ibid*

<sup>120</sup>*Ibid*

<sup>121</sup>Frederick Schauer, *Free Speech: A philosophical enquiry*, (Cambridge University Press, 1982), p.57 (Quoted at *Supra* Note above 109, p. 85)

<sup>122</sup>Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) *American Bar Foundation Research Journal* 521. (Quoted at *Supra* Note above, p. 87)

<sup>123</sup> *Ibid*

“Freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and to his participation in the conduct of public affairs in his country.”<sup>124</sup>

To conclude this sub-section, there are convincing arguments to justify minimal interference by the state on the exercise of the right of freedom of expression. These justifications are based on the instrumentality of freedom of expression to the society as a whole (the utility of freedom of expression to establish a democratic society) and for individual members of the society to achieve self-actualization, which requires the full exercise of autonomy by individuals themselves, thus significantly reducing the margin of state interference.

### **3.2 The legal framework for the protection of the right to freedom of expression in FDRE**

The legal framework for the protection of the right to freedom of expression in Ethiopia consists of domestic instruments and international agreements that Ethiopia has ratified and acceded to. Furthermore, it should be noted that there are also other subsidiary legislations such as the “Broadcasting Service Proclamation No.533/2007” and the “Freedom of the Mass Media and Access to Information Proclamation No.590/2008”, that regulate specific aspects of the right as the title of the legislations evince. Nonetheless, this thesis is limited to freedom of expression as enshrined under the 1994 Ethiopian Constitution<sup>125</sup> and international human rights instruments Ethiopia has ratified, primarily that of the ICCPR and ACHPR.

#### **3.2.1 The status of international instruments under the FDRE Constitution**

Whether or not international agreements and instruments, including international human rights instruments have been given higher, equal or lesser status within the FDRE Constitution continue to be the subject of academic debate.

The debate relates to finding the correct understanding of seemingly opposing provisions of article 9(1) and 9(4) of the FDRE Constitution. This is because while article 9(1) establishes the supremacy of the Constitution, article 9(4) provides that “all” ratified international instruments (thus including human rights instruments) are “an integral part of the law of the land.” Emphasizing on literal understanding (and clarity) of the supremacy clause, Adem argues that international instruments including human rights instruments are made ‘subordinate’ to the

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<sup>124</sup>Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria, 13th Annual Activity Report of OAU, 1999-2000, para. 36

<sup>125</sup> Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995 (Hereinafter referred to as FDRE Constitution)



Constitution<sup>126</sup> while Ibrahim argues for the equal or higher status of the former (with the Constitution)<sup>127</sup> on the basis of the interpretation clause under article 13 (2) of the Constitution<sup>128</sup>. Adem counter-backs the interpretation clause argument stating it the Constitution refers only to the *principles* (universality, indivisibility and interdependence) of human rights and not the provisions of these instruments as such.<sup>129</sup>

The author takes the view that the explicit incorporation of international instruments as ‘integral’ part of the law of the land coupled with equally unambiguous provision that requires a large body of Constitution’s provisions (the entire Chapter 3) to be interpreted with reference to international human rights instruments (be it principles or provisions per se) does not at the very least suggest subordinate status of international human rights instruments to the Constitution, if not a superior status. Most importantly, however, there is no logical or juridical basis to distinguish between *principles* and *provisions* human rights instruments since many provisions of international human rights instruments contain principles such as the principle of non-discrimination and of equality, which are widely recognized to have inherent validity in the entire legal corpus of human rights. Furthermore, Adem does not explain why he chose to adopt a narrow and exclusive understanding of the term *principles* contained in the interpretative clause of the Constitution as referring only to universality, indivisibility and interdependence.

### 3.2.2. Freedom of expression under FDRE Constitution

The protection to the right to freedom of expression is to be found under Part Two of the FDRE Constitution entitled “Democratic Rights”, which is found within Chapter 3 of the same entitled “Fundamental Human Rights and Freedoms”. With the sub-title of “Right of Thought, Opinion and Expression”, article 29 of the FDRE Constitution, which contains a total of seven sub-articles, deals with the scope and limitations of these rights.

It is perplexing why the legislatures of the FDRE Constitution chose to categorize “Fundamental Rights and Freedoms” into “Human Rights” (Part One) and “Democratic Rights” (Part Two). At first glance, it may seem to suggest that those rights listed under Part Two,

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<sup>126</sup> Adem Kassie Abebe, HUMAN RIGHTS UNDER THE ETHIOPIAN CONSTITUTION: A DESCRIPTIVE OVERVIEW, Mizan Law Review, Vol.5 No.1, Spring 2011, p.47

<sup>127</sup> Ibid (Citing Ibrahim Idris (2000) ‘The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution’, 20 *Journal of Ethiopian Law* 113)

<sup>128</sup> Article 13(2) reads: “The fundamental rights and freedoms specified in the Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights and International instruments adopted by Ethiopia.

<sup>129</sup> Supra Note 123, p.48

including the right to freedom of expression, are purely democratic right and not as such ‘human rights’, thus afforded with lesser protection. However such view doesn’t hold water when seen in light of the fact that such distinction doesn’t exist in the international corpus of human rights law which largely adopts the universality of all human rights and on account of the FDRE’s construction to include democratic rights under the Chapter entitled Fundamental Rights and Freedoms. Furthermore, there is no basis to consider freedom of opinion and thought (which are part and parcel of freedom of expression) as belonging to democratic rights and not human rights because they are widely recognized to be absolute and as such no derogation or limitation allowed.<sup>130</sup>

Now coming to the scope and limitation of the right to freedom of expression, the FDRE Constitution states the following:

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.<sup>131</sup>

Furthermore, Art 29 (1) provides that “everyone has the right to hold opinions without interference”. Sub article 3 guarantees freedom of expression in the context of ‘media’ and the ‘press’, in which “any form of censorship” is [prohibited] and “access to information of public interest” is guaranteed. Sub-article 4 again deals with freedom of the press, stating that “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.”

Articles 29(6) and 29(7) are perhaps the most crucial provisions of the FDRE Constitution to fully grasp the legal regime for limiting the right to freedom of expression as the combined reading of these provisions clarify the applicable principle, i.e., general rule and the exceptions.

The FDRE Constitution limits the right to freedom of expression in the following manner:

These rights can be limited only through laws which are guided by the principle that freedom of expression and information *cannot be limited on account of the content or effect of the point of view expressed*. Legal limitations can be laid down in order to

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<sup>130</sup>*Infra note* 140, p. 384

<sup>131</sup>FDRE Constitution, Art 29 (2)

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.<sup>132</sup>

The first paragraph of art 29(6) lays down the general rule which prohibits any ‘content or effect based’ limitations on the exercise of freedom expression. In other words, any law that limits freedom of expression for the sole reason of restricting a given content or its effect thereof is unconstitutional and can be said to be void ab initio. However, the 2<sup>nd</sup> and 3<sup>rd</sup> paragraph of the provision exceptionally permit ‘content or effect based’ limitations aimed at protecting the following interests as well as preventing certain types of harms:

- a. well-being of the youth
- b. honor and reputation of individuals, i.e. defamation laws
- c. propaganda for war
- d. public expressions “intended” to “injure human dignity”

In short, it is legitimate for the government to enact laws that aim to protect the above mentioned interests, aims or goals even if these restrictions can be seen as either *content* or *effect* based or the combination of both.

It is quite interesting that the FDRE's general rule against 'content or effect based' restriction on freedom of expression is quite similar with the jurisprudence of the U.S Supreme Court on the First Amendment. And as such a brief discussion of the U.S jurisprudence, albeit a subject that continues to attract hot and unsettled debate, offers guidance in understanding the Ethiopian constitutional regime of limiting freedom of expression.

For instance, it has been asserted that when applying and interpreting the First Amendment’s proscription that Congress shall “make no law...abridging the freedom of speech”<sup>133</sup>, the distinction between content-based and content-neutral restriction on freedom of speech has

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<sup>132</sup> Art 29 (6), FDRE Constitution, emphasise added.

<sup>133</sup>U.S.Constitution Amendment I. The full text provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

been central to the Supreme Court’s jurisprudence for over forty years<sup>134</sup>. The court’s approach to make such distinction lies with the view that content-based speech regulations represent the essence of “thought control” and of “official censorship”, which lie at the core of the First Amendment proscription.<sup>135</sup> Thus, the Court highly disfavors and considers content-based speech regulations as “presumptively unconstitutional” while it subjects content-neutral speech regulations to a “more lenient” First Amendment scrutiny.<sup>136</sup>

In order for a content-based free speech regulation to pass the requirement of “strict judicial scrutiny”, the government must show the following: (a) that the statute serves a “compelling governmental interest”; (b) the statute must be “narrowly-tailored” to achieve that interest; and (c) the statute must be the “least restrictive means” of advancing that interest<sup>137</sup>. On the other hand, if the statute is found to be content-neutral, i.e. does not favor or disfavor a certain view point, it sustains the less stringent requirement if (a) it furthers an important or substantial interest; (b) if such interest is unrelated to the suppression of free expression; (c) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>138</sup>

A comparative legal analysis of the U.S and Ethiopian legal regime on freedom of expression and limitation thereof is beyond the scope and purpose of this thesis. Such endeavor would require strictly adhering to a clearly defined normative and methodological framework against which the two legal systems can be compared and contrasted. Nonetheless, one may, in general, observe the Ethiopian Constitution disfavors ‘content or effect based’ restrictions on freedom of expression for similar reasons of the U.S legal system, i.e., to provide for wider protection of freedom of expression (by avoiding the possibility of ‘taught control’ and official censorship) and concomitantly narrows down the scope of limitations on the right.

Coming now to the discussion on Ethiopia’s Constitutional regime on limiting the right to freedom of expression, art 29 (7) of the FDRE Constitution employs the term ‘*legal limitations*’ which would seem to lay down additional limitation on the right to freedom of expression in addition to Art 29 (6) discussed above. The provision provides:

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<sup>134</sup>*First Amendment-Freedom of Speech-Content Neutrality*-McCullen v. Coakley, 128 HVL 221, Nov 2014, p. 221

<sup>135</sup>John Fee, *Speech Discrimination* 85 BULR 1103, 2005, p.1104 (Citing Ashcroft v. ACLU, 124 s.Ct.2788(2004); Thomas v. Chi.Park Dist., 534 U.S.316, 320-23(2002))

<sup>136</sup>*Ibid*

<sup>137</sup> *Supra note* 134

<sup>138</sup>*Ibid*

Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.

One may be inclined to understand that the provision gives the leeway for the legislature to impose additional grounds for limiting the right to freedom of expression by mere enactment of a piece of legislation. However, such a reading will be manifestly incorrect as the principle laid down in the preceding sub-article makes it crystal clear that freedom of expression can be limited *only through laws*<sup>139</sup> that are not based on content or effect of the expression desired to be limited, with the exception of the above discussed four areas of interests. Thus, instead of providing additional grounds of limitation, the provision should be harmoniously read with the preceding sub-article which clearly prefers a wider scope for free expression and narrower scope of limitations on the same. The provision should be understood to attach liability for anyone who violates lawful and constitutional limitations on freedom of expression, though it is unclear whether such violation triggers criminal, civil or both liabilities.

Having said the above regarding constitutional protection of freedom of expression in Ethiopia, the subsequent sub-section will focus on the scope and limitation of the right as formulated under the ICCPR. As discussed under Sub Section 3.2 of the present Chapter, the validity of understanding ICCPR (and other similar human rights instruments) as forming the legal fabric of Ethiopia to protect and limit freedom of expression is based on the following three considerations:

- (a) FDRE's ratification of the instrument,
- (b) Constitutional incorporation of such ratified instruments as the integral law of the land, and
- (c) Interpretative clause of the Constitution that established reference must be made to the body of international human rights to interpret Chapter 3 of the Constitution, which includes the right to freedom of expression.

On account of space and time limitations, the scope of the discussion is regrettably limited to the ICCPR although attempt will be made to make reference to the case law of the ACHPR, ECHR and IACHR.

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<sup>139</sup>FDRE Constitution, art 29 (6), 1st paragraph

### 3.3. The meaning and scope the right to freedom of expression under ICCPR

The drafting history of ICCPR reveals that some States questioned the inclusion of article 19 because a separate Convention on freedom of expression and information was being drafted at the time<sup>140</sup>. However, a consensus opinion that stressed freedom of expression and information as a ‘fundamental human rights’ and [it is] the ‘touchstone of all freedom which the United Nations is consecrated’<sup>141</sup> finally prevailed and thus the drafting started in earnest. Further, it was stressed that the covenant, “as a general instrument on human rights, could serve as a legal foundation on the basis of which a series of conventions on particular rights could be formulated.”<sup>142</sup>

Article 19 of the ICCPR enshrines the right to freedom of expression in the following manner:

#### Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; 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, through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restriction, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals

This section will attempt to provide a condensed overview of the scope and limitation of the right to freedom of expression by making reference to the case law and general comments of the Human Rights Committee, which is mandated to interpret and apply the Convention.

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<sup>140</sup> Marc J. Bossuyt, GUIDE TO “TRAVAUX PREPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Martinus Nijhoff, 1987, p. 376 (Hereinafter “Marc J. Bossuyt, Guide to *travaux Preparatoires*”)

<sup>141</sup> *Ibid*

<sup>142</sup> *Ibid*

### 3.3.1 The right to freedom of Opinion

The right to freedom of opinion, under article 19 (1), is considered to be an absolute freedom and imposes the obligation on States to refrain from any interference<sup>143</sup>. According to General Comment 34 the right to hold opinion includes all forms of opinion, including “political, scientific, historic, moral or religious nature.”<sup>144</sup> It goes on stating that criminalization, harassment, intimidation or stigmatization of persons for reasons of holding an opinion constitutes a violation of article 19 (1)<sup>145</sup>. Nowak notes that indoctrination, “brainwashing”, influencing the conscious or subconscious mind with psychoactive drugs or other means of manipulation by both States and private parties is an interference with the freedom to hold opinion<sup>146</sup>.

In the case of *Kang v. Republic of Korea*, the Human Rights Committee decided that the detention of the applicant in solitary confinement on the sole basis of his Communist opinion and has been subjected to the “ideology conversion system” constituted a violation of his right to freedom of opinion.<sup>147</sup>

Although holding an opinion is an absolute freedom, its absolute nature ceases once one airs or otherwise manifests one’s opinion<sup>148</sup>.

### 3.3.2 The right to freedom of expression and information

As can be read from art 19(2) the term *freedom of expression* denotes three separate but closely related freedoms to seek, receive and impart information and ideas of all kind. The right is noted to include the “...expression and receipt of communications of every form of idea and opinion capable of transmission to others...”<sup>149</sup> On the other hand, the right to freedom of expression and opinion is not as absolute as the right to freedom of opinion, and is subject to limitations under art 19, paragraph 3, and article 20, which shall be disused in due course.

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<sup>143</sup>Manfred Nowak, U.N. Covenant on Civil and Political Rights CCPR Commentary, 2nd revised ed., 2005, p.442(hereinafter M.Nowak, CCPR Commentary). However, it should be noted that freedom of opinion is not among the list of non-derogable rights under art 4 of ICCPR. Nonetheless, the HRC insisted that “it can never become necessary to derogate from [freedom of opinion] during a state of emergency” (General Comment No. 29 (2001), para.13, cited at infra note 141)

<sup>144</sup>UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, para 9 (hereinafter General Comment 34)

<sup>145</sup>*Ibid*, p.

<sup>146</sup> M.Nowak, CCPR Commentary, p.442

<sup>147</sup> *Ibid*

<sup>148</sup>Sarah Joseph and Melissa Castan, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY*, 3rd Ed, 2013, p.591 (hereinafter Sarah Joseph & Melissa Castan, ICCPR Cases, Materials and Commentary)

<sup>149</sup> *Ibid*, p.593

Paragraph 2 of article 19 also protects all forms of expression and means of their dissemination as can be understood from the term ‘through any other media of his choice’. According to General Comment 34 non-verbal expressions such as images and objects of art are also protected<sup>150</sup>. Furthermore it notes that paragraph 2 embraces political discourse, commentary on one’s own and public affairs, canvassing, discussion on human rights, journalism, cultural and artistic expression, teaching, religious discourse<sup>151</sup>. With regards to expressions that may be regarded as “deeply offensive”, it takes a cautious view stating that although it may be protected such expression may be subject to restriction under art 19, paragraph 3 and article 20<sup>152</sup>.

It can be difficult to clearly delineate whether some forms of expressions fall under the right to freedom of expression (article 19) or the right to freedom of peaceful assembly (article 21), which may have practical implications to determine legitimate restrictions. In the case of *Kivenmaa v. Finland*, the author complained of her arrest for distributing leaflets and unfurling a banner which criticized the human right record of visiting Head of State. The State of Finland argued that article 21 of the Covenant must be seen as the *lex specialis* in relation to article 19 and therefore the expression of an opinion in the context of a demonstration must be considered under article 21, and not article 19. The HRC found breaches on both articles, confirming that non-verbal expression in the form of ‘raising a banner’ was protected under article 19.<sup>153</sup>

With respect to licensing requirement, Nowak notes that the proposal [at the drafting stage]to include a “proviso covering the licensing of radio, film or television enterprises was rejected because of the danger that not only the medium but also contents might be controlled.”<sup>154</sup>

### 3.3.2 (A) Right to seek information

The right to seek information includes not just the passive reception of information but also to *actively* seek information<sup>155</sup>. The adoption of a stronger language in the form of *seek* rather than *gather* information has its own peculiar significance as it denotes State’s intentional desire to “protect active steps to procure and study information and that abuse is sufficiently prevented by the authority to provide for restrictions in para.3.”<sup>156</sup> As opposed to the active term ‘seek’,

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<sup>150</sup> General Comment 34, para 11

<sup>151</sup> Ibid

<sup>152</sup> Ibid

<sup>153</sup> *Kivenmaa v Finland* (412/90), paras 7.4, cited under General Comment 34, para 19.08

<sup>154</sup> M.Nowak, CCPR Commentary, p.446

<sup>155</sup> Ibid

<sup>156</sup> Ibid (Ethiopia was one of the countries who proposed to employ the term “gather” rather than “seek”, see in Marc J. Bossuyt, Guide to *Travaux Préparatoires*, p. 384)



‘gather’ was found to have “a connotation of passively accepting news provided by Governments or news agencies.”<sup>157</sup>

Although it is clear that states have a negative obligation of not interfering with the exercise of seeking information, it is not clear whether they have positive obligation to take measures to make available state or private information<sup>158</sup>. However, the HRC asserts that the “state should proactively put in the public domain Government information of public interest”, in order to *give effect* to the right of access to information<sup>159</sup>. Thus it doesn’t explicitly state that failure to provide such information in the public domain or even failing to take positive steps is considered as interference per se but rather have an instrumental value for the exercise of the right, i.e. give effect. In this respect, it emphasizes the need for states to make effort to ensure “easy, prompt, effective and practical” access to information [of public interest]<sup>160</sup>.

In the case of *SB v Kyrgyzstan*, the author, who was human rights defender, complained that the State’s refusal to let him access information related to persons executed during a particular time constituted a violation of his right to seek and receive information.<sup>161</sup> The HRC found no violation, stating that the author has failed to show why he personally needed the information and as such his claim constitutes inadmissible *actio popularis*.<sup>162</sup>

### 3.3.2(B) Right to receive and impart information

In the case of *Mavlonov and Sa’di v Uzbekistan*, the HRC reasoned that “the public’s right to receive information as a corollary of the specific function of a journalist and/or editor to impart information”<sup>163</sup>. The author, Mr Saidi, complained that the State party’s refusal to register a minority language newspaper violated his right to receive information<sup>164</sup>. The above quoted reasoning was, however, criticized by two of the members of the Committee stating that such a ‘literalist reading’ of the right to receiving information and ideas is ‘unconvincing.’<sup>165</sup> The dissenting opinion states that “the committee’s position would require it to treat every potential recipient of any information or ideas that have been improperly suffered under article 19 as a victim in the same way as the person having been prevented from expressing or imparting the

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<sup>157</sup>Ibid

<sup>158</sup>Ibid, p447

<sup>159</sup>General Comment, para 19

<sup>160</sup>Ibid

<sup>161</sup>*SB v Kyrgyzstan* (1877/09), para 4.2, cited under General Comment 34, para 18.24

<sup>162</sup>Ibid

<sup>163</sup>*Mavlonov and Sa’di v Uzbekistan* (1334/04), para 8.4

<sup>164</sup>Ibid

<sup>165</sup>Ibid

information or ideas.”<sup>166</sup> More specifically, it states the committee’s position would render it to deal with communications “from every reader or viewer or listener of a medium of mass communication that has been improperly closed down or whose content has been improperly suppressed.”<sup>167</sup>

### *3.3.2(C) Freedom of expression and the media*

Although article 19 does not accord a special category of freedom of expression right to the media as such, it is widely acknowledged that enjoyment of the right has its own special importance to the media. In this respect, General Comment 34 states that “a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of expression and the enjoyment of other Covenant rights.”<sup>168</sup> Thus, the media is rightly conceived of having the dual purpose of ‘ensuring’ the exercise of freedom of expression and its instrumental role in the ‘enjoyment’ of other Covenant rights. Furthermore, the media’s right to unhindered and uncensored freedom of expression is closely tied and corresponds with the public’s right to receive media output<sup>169</sup>.

In the HRC’s view, article 19 requires that legislative and administrative frameworks for the regulation of the mass media should be consistent with the provisions of paragraph 3 of the same.<sup>170</sup> Among others, States should avoid imposing onerous licensing conditions and fees and ensure that the licensing regime should be “reasonable, clear, transparent, non-discriminatory.”<sup>171</sup>

General Comment 34 attaches a broad meaning to the term ‘journalist’ to refer to not only the traditional professional full-time reporters and analysts, but also to newly emerging activities such as blogging, and to those who are engaged in self-publication either through the print form, in the internet or elsewhere<sup>172</sup>. In this respect, it asserts that restricting the freedom of movement of journalists, human rights investigators within the country but also including their entry into a country is *normally* incompatible with paragraph 3 of article 19<sup>173</sup>. (Emphasis added)

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<sup>166</sup> Ibid

<sup>167</sup> Ibid

<sup>168</sup> *Supra note 144*, para 13

<sup>169</sup> Ibid

<sup>170</sup> Ibid, para 39

<sup>171</sup> Ibid

<sup>172</sup> Ibid, para 44

<sup>173</sup> Ibid, para 45

### 3.4 Permissible limitations on the right to freedom of expression under ICCPR

Paragraph 3 of article 19 and article 20 provide for permissible limitations for the exercise of the right to freedom of expression, although as discussed under sub-section 3.3.1 above the right to freedom of opinion is absolute and may not be limited under any circumstances.

A study of *the travaux preparatoires* of ICCPR reveals that there were two schools of thought on how to formulate the limitation on the right to freedom of expression now found under article 19 (3)<sup>174</sup>. Finally the proposal for listing a full catalogue of specific limitations was dropped in preference to drafting a brief statement of general limitations.<sup>175</sup> Nowak describes the final agreement as a compromise formula which aims “less at the content than at a *listing of permissible purposes for interference.*”<sup>176</sup> (Emphasis original)

Paragraph 3 of article 19 lays down the following strict ‘prerequisites’ in order for freedom of expression and information to be legitimately restricted:

- (a) Be *provided* by law,
- (b) Serve one of the listed *purposes*, and
- (c) Be *necessary* for attaining that purpose<sup>177</sup>

Thus, any for any restriction on freedom of expression to be legitimate it has to be shown that such restriction serves one of the specified purposes under paragraph 3. Not only should the restriction pursue one of these specified purpose but should also be necessary to achieve such purpose, i.e., it may be the case that a restriction can be understood to serve the identified purpose but may be found to be unnecessary because other less severe measures are available to achieve the purpose. Furthermore, the restriction must be provided by law for it to be legitimate.

The following sub-sections will attempt to briefly discuss how the CCPR applied and interpreted these prerequisites.

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<sup>174</sup> Marc J. Bossuyt, Guide to *Travaux Preparatoires*, p.387

<sup>175</sup> Ibid

<sup>176</sup> M. Nowak, CCPR Commentary, p.457

<sup>177</sup> Ibid, p.458

### 3.4.1 Restriction to be provided by law

It is generally well accepted in international human rights law that any restriction on freedoms and rights must be *provided by law*. Likewise, that any restrictions on freedom of expression must be provided by law is the first principle laid down under Art 19.

Though it may seem clear that a restriction must be provided by law, what constitutes ‘law’ and what qualities an instrument should fulfill to be characterized as such is less clear and has been the subject of controversy amongst legal scholars. It will be beyond the scope this thesis to delve into the multi-faceted and highly contested subject of how to define and what constitutes as ‘law’.

For understandable reasons, the CCPR never attempted to directly address the question of what is ‘law’ in a comprehensive manner. Instead, it approaches the issue on a case by case basis. For instance, in the case of *Robert W. Gauthier v. Canada*<sup>178</sup>, in which the complainant (a publisher of a newspaper) complained a violation of his right to access information, because a temporary pass issued to him gave only limited privilege to access the precincts of the Parliament, the CCPR determined the restriction is imposed by law because it “follows from the law of parliamentary privilege.”<sup>179</sup> The CCPR has also implicitly accepted that laws of contempt of court may qualify to be considered as restriction provided by law.<sup>180</sup> Furthermore, the CCPR determined that restrictions “enshrined in traditional, religious or other such customary laws” are incompatible with the Covenant because any restriction on freedom of expression constitutes “a serious curtailment of human rights”<sup>181</sup>. In this respect, it is evident that the CCPR views the source of law as an important criterion to be considered when interpreting the phrase “provided by law”.

Aside from the source of law criterion to determine the legitimacy of restrictions on human rights in general and freedom of expression in particular, the CCPR attaches equal importance to the substantive quality of ‘law’. Although the violation complained by the author in the case

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<sup>178</sup>Robert W. Gauthier v. Canada, Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999).

<sup>179</sup> *Ibid*, para 13.5

<sup>180</sup> Dissanayake, Mudiyansele Sumanaweera Banda v. Sri Lanka, Communication No.1373/2005, CCPR/C/93/D/1373/2005. The CCPR has not dealt with whether or not the law of contempt court constitutes as ‘law’ but determined that although courts may “exercise a summary power to impose penalties... imposition of a draconian penalty without independent procedural safeguards falls within “arbitrary” deprivation of liberty...”, para 8.2, 8.3 and 8.4)

<sup>181</sup> *General comment 34*, para 24

of *de Groot v. The Netherlands*<sup>182</sup> does not concern the legitimacy of restriction on freedom of expression per se the case is instructive to understand the CCPR's views on the requirement that a law must be sufficiently precise for it to be considered as law. In this case, the complainant claimed a violation of his right to be informed in detail of the nature and cause of the charge against him because the charges brought against him were based on a vague national criminal law provision.<sup>183</sup> He further claimed that the application of this particular law violates the principle of legality because "the text of the article is so vague that it couldn't have been foreseen that it was applicable" to his conduct on account of which he was criminalized by the national courts.<sup>184</sup> The CCPR rejected the author's claim of violation of art 14 of the ICCPR because the national Court of Cassation has already entertained the issue of whether or not the charge and the facts were "sufficiently clear" and the former does not "constitute a final appeal body" and is not in position to challenge the latter's assessment of the facts and evidence<sup>185</sup>. Furthermore, it posited that whether or not the provision allowed the author to foresee the provision's applicability to his conduct is essentially a question of "interpretation of domestic legislation" and only to be determined by national courts and authorities so long as it is not interpreted "arbitrarily" or that "its application amounted to a denial of justice."<sup>186</sup>

Granted that the CCPR emphasized precision of law as an important element for a given body of law to be considered as 'law', it's regrettable that its jurisprudence lacks depth on how precise should a law has to be in order to be considered as "sufficiently precise". In the case discussed above, the Committee's refusal to assess the content of the criminal provision, based on which the complainant was charged and found guilty of, but rather attached the question of precision to the 'facts and charges' brought against the complainant, which are rightly outside of its jurisdiction, effectively prevented it from developing its jurisprudence to provide much needed clarity as to how precise should a law be for it to be deemed 'sufficiently precise'. However, the Committee provided some guidance, though still not adequate, by linking the criteria of sufficient precision with a norm's clarity to "enable an individual to regulate his or her conduct accordingly", without which it may not be characterized as a "law".<sup>187</sup>

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<sup>182</sup>Leonardus Johannes Maria de Groot v. The Netherlands, Communication No. 578/1994, U.N. Doc. CCPR/C/54/D/578/1994 (1995).

<sup>183</sup> Ibid, para 3.1

<sup>184</sup> Ibid

<sup>185</sup> Ibid, para 4.1

<sup>186</sup> Ibid, para 4.3

<sup>187</sup> *Supra note 182*, cited under *General Comment 34*, para 25

### 3.4.2 Purposes of restrictions

The following sub-sections will briefly discuss how each of the purposes of permissible limitations listed under article 19 (3) need to be understood.

#### 3.4.2(A) *Respect of the rights and reputation of others*

The limitation on freedom of expression for the purpose of respecting the rights and reputation of others lies with the recognition that the two may at times “clash” with each other<sup>188</sup>. One such clash may relate to protection of personality and expressions that are considered to be insulting, defaming, or vilifying on the basis of either true or false assertions<sup>189</sup>. General Comment 34 also asserts that ‘rights’ refers to other human rights through not necessarily limited to those found only under the ICCPR<sup>190</sup>.

Limiting freedom of expression to pursue the purpose of respect for the honor and reputation of others have been found to be problematic when applied in the political arena. In particular, the “fundamental importance of [freedom of expression] for the formation of political opinion” can be stripped off if every attack on the good reputation of others must be sanctioned<sup>191</sup>. The compromise solution for this is found in applying the criteria of proportionality and not setting the bar too high on requirements of truth, especially on ‘value-judgments’ not susceptible of proof.<sup>192</sup> The ‘right of reply’ in the event of untrue media statements is also recognized to be a right that counterbalances the dangers of the media in endangering the reputations of individuals.<sup>193</sup>

#### 3.4.2 (B) *Public order (ordre public)*

Public order is a concept with broad implications and is seen as “the sum of rules which ensure the peaceful and effective functioning of the society.”<sup>194</sup> Its inclusion as one of the purposes of limiting the right to freedom of expression was contested on account of its vagueness and far-reaching consequences to unduly limit human rights<sup>195</sup>.

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<sup>188</sup>Sarah Joseph & Melissa Castan, *ICCPR Cases, Materials and Commentary*, p.606

<sup>189</sup> M.Nowak, *CCPR Commentary*, p.462

<sup>190</sup>*General Comment 34*, para 28

<sup>191</sup> M.Nowak, *CCPR Commentary*, p.462

<sup>192</sup>*Ibid*, Nowak makes reference to the judgment of ECtHR of 8 July in *Lingens, para 46*. The Court found that an Australian journalist’s description of a politician’s conduct to be “immoral” and “undignified” are not a violation of article 10 of the ECHR, since the truth of value-judgments is not susceptible of proof.

<sup>193</sup>*Ibid*, p. 463

<sup>194</sup>*Supra note 186*, p.617 (citing the Siracusa Principles)

<sup>195</sup> M.Nowak, *CCPR Commentary*, p.464

Some of the public order limitations on freedom of expression include prohibitions on speech which may incite crime, violence, or mass panic.<sup>196</sup> Nowak cautions that *ordre public* may lead to a complete undermining of freedom of expression-or to a reversal of rule and exception-and proposes for putting in place “particularly strict requirements” to ensure the necessity or proportionality of a given statutory restriction.<sup>197</sup>

Making a public speech during court proceedings may fall under legitimate restriction on freedom of expression and thus tested against pursuing a *public ordre* interest. In this connection, General Comment 34 insists that such a limitation “should not in any way be used restrict the legitimate exercise of defence rights.”<sup>198</sup>

### 3.4.2(C) National security

Restricting the exercise of freedom of expression is applicable “only in serious case of political or military threat to the entire nation.”<sup>199</sup> Instances where national security may legitimately be invoked to limit freedom of expression include a publication that “direct[ly] calls for the overthrow of the government in an atmosphere of political unrest or making propaganda for war” (which also falls under article 20)<sup>200</sup>.

Transmission of ‘official secret’ may also be prohibited to protect national security<sup>201</sup>. In this respect, General Comment 34 emphasizes the need for “extreme care” that treason laws and similar provisions on national security should be compatible with the “strict requirements” of paragraph 3<sup>202</sup>. Such laws should not be used to “suppress or withhold from the public information of legitimate public interest that doesn’t harm national security or to prosecute journalists, researchers, environmental activists, or others, for having disseminated such information”.<sup>203</sup>

In the case of *Kim v Republic of Korea*<sup>204</sup> the HRC the author complained of his conviction under the ‘National Security Law’ for expressing opinions sympathetic to an ‘anti-State organization’, namely the Democratic People’s Republic of Korea (DPRK), with which the

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<sup>196</sup>Supra note 186, p.618

<sup>197</sup> M.Nowak, CCPR Commentary, p.465-466

<sup>198</sup>General Coment 34, para 31

<sup>199</sup> M.Nowak, CCPR Commentary, p.463-464

<sup>200</sup>Ibid, p 464

<sup>201</sup>Supra note 186, p.612

<sup>202</sup>General Comment 34, para 30

<sup>203</sup> Ibid

<sup>204</sup>*Kim v Republic of Korea (574/94)*

State party was in a state of war. The HRC found a violation of freedom of expression because, *inter alia*, it could not be established how the (undefined) ‘benefit’ that might arise for the DPRK from the publication of views similar to their own created a risk to national security and that it is unclear what the nature or extent of such risk is.<sup>205</sup>

#### **3.4.2(D) Public health or morals**

Nowak reports that no article 19 case have addressed the limitation of ‘public health’ and is of only a minor practical relevance in the context of freedom of expression and information<sup>206</sup>.

Limiting freedom of expression for the purpose of protecting public morals, on the other hand, can be problematic because public morals differ widely and there can be no universally applicable common standard to determine limitation’s scope of application.<sup>207</sup> General Comment 22 attempts to resolve potential clash between moral values of different cultures, philosophies and religions by emphasizing the need to conceive the notion of morals ‘beyond a single tradition’ and the necessity that any limitation on this ground should be made “in light of universality of human rights and the principle of non-discrimination.”<sup>208</sup>

#### **3.4.3 Restrictions must be necessary to achieve one of the purposes**

As per Art 19(3) of the ICCPR any restrictions on freedom of expression must not only be provided by law and can only be justified if they serve at least one of the identified purposes discussed above, but also must be found to be necessary to achieve the claimed restriction purpose.

In the case of *Ballantyne and others v. Canada*, the CCPR decided that a restriction which may have pursued to achieve the legitimate purpose of protecting the rights of others is unjustified as such purpose could have been achieved in other ways that do not restrict freedom of expression.<sup>209</sup> Along the same lines, the Committee observed in General Comment No. 27 that restrictive measures must be, among others, “...the least intrusive instrument amongst those which might achieve the protective function...”<sup>210</sup>

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<sup>205</sup> Ibid, para 12.4

<sup>206</sup> M.Nowak, CCPR Commentary, p.466

<sup>207</sup> Ibid (Citing the decision of the HRC in the case of *Hertzberg, et al v. Finland*, which accorded for states a “certain margin of appreciation” to determine public morals)

<sup>208</sup> Cited in *General Comment 34*, para 32

<sup>209</sup> *Ballantyne, Davidson and McIntyre v. Canada*, Communication No.359, 385/89, para 11.4

<sup>210</sup> Human Rights Committee, General Comment No. 27: Freedom of movement (Art.12): 02/11/99. CCPR/C/21/Rev.1/Add.9, General Comment No.27, 2 Nov 1999, para 14



The test of necessity is also directly related to the proportionality of the restriction in comparison to its purpose. The CCPR, in the case of *Marques v. Angola*, stressed that “the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed must be proportional to the value which the restriction serves to protect.”<sup>211</sup>

#### 3.4.4 Prohibition of hate speech and propaganda for war (Article 20)

Nowak describes article 20 as an “alien element” in the system of the Covenant as it does not set forth a specific human right but merely establish limitations on other rights, particularly freedom of expression and information.<sup>212</sup> Article 20 imposes “mandatory” limitation on freedom of expression as it obligates States to “outlaw propaganda for war and vilification of persons on national, racial or religious grounds.”<sup>213</sup>

Applying article 31 (1) of the VCLT, i.e., object and purpose of the treaty, Nowak asserts that prohibition of propaganda for war and advocacy of racial hatred is to be understood only as a response to the incitement to war and racial hatred spurred by the propaganda machinery of the Third Reich<sup>214</sup>. He thus excludes the application of article 20 as prohibiting academic studies of questions of defence or security policy but rather propagandistic incitement roughly comparable to that practiced in the Third Reich<sup>215</sup>.

General comment 11 limits the application of the term ‘war’ only to an act of aggression and excludes propaganda for wars in self defence<sup>216</sup>. However, its failure to define ‘propaganda of war’ is noted to be problematic since it may include war information that precedes, supports, and potentially ignites the start of a war.<sup>217</sup>

With regards to hate crimes, the HRC has noted that article 20 applies only to those based on race, religion, and nationality rather than hate crimes of general nature such as those committed against minorities.<sup>218</sup>

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<sup>211</sup> Communications No. 1128/2002, *Marques v. Angola*, para 6.8

<sup>212</sup> M.Nowak, CCPR Commentary, p.468

<sup>213</sup> *Supra note* 186, p.626

<sup>214</sup> M.Nowak, CCPR Commentary, p.468

<sup>215</sup> *Ibid*

<sup>216</sup> CCPR, *General Comment No. 11, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art 20.)*, 29/07/1983, para 2

<sup>217</sup> Sarah Joseph & Melissa Castan, *ICCPR Cases, Materials and Commentary*, p.628

<sup>218</sup> CCPR, Concluding Observations on the United States (2006) UN doc CCPR/USA/CO/Rev.1, para 25



## CHAPTER FOUR

### COMPATIBILITY OF CRIME OF ENCOURAGING TERRORISM WITH PERMISSIBLE RESTRICTIONS OF THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE ICCPR AND FDRE CONSTITUTION

#### INTRODUCTION

In as far as Art 6 of the ATP explicitly criminalizes a conduct of publishing or a closely related conduct of ‘causing’ a publication, both of which fall under the broader regime of exercise of freedom of expression, it’s straightforward that such criminalization restricts the right to freedom of expression guaranteed under the ICCPR and the FDRE Constitution, among others. What is less clear is whether or not the restriction, by way of criminalization, can be considered as justified when tested against criteria set under the relevant provisions of the ICCPR and the FDRE Constitution.

In addition to making reference to the case law and analysis on the permissible limitation of freedom of expression, this Chapter shall attempt to address the issue of compatibility by drawing on concerns raised and discussed with respect to the definition of ‘terrorist acts’ and the problematic manner in which the crime of encouragement is stipulated under the ATP.

#### 4.1 Compatibility of ‘crime of encouraging terrorism’ vis-à-vis freedom of expression under the FDRE Constitution

From the outset, the author wishes to reiterate his view, discussed under Chapter Three above, that international instruments, including the ICCPR, form not only an “integral part” the FDRE Constitution but also that the latter should be interpreted in line with the former. In this respect, the author has argued above that the view expressed by some scholars that such ‘interpretative supremacy’ is limited to ‘principles’ and does not include the ‘provisions’ of the Constitution can sustain neither juridical nor logical scrutiny.<sup>219</sup>

It follows that the right to freedom of expression should at the very least be interpreted to protect the right in equal measure and may not be understood to provide lesser protection compared to what is provided for under the ICCPR and other relevant regional and international human rights instruments Ethiopia has ratified.

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<sup>219</sup> See discussion on p.40-41 above.

#### 4.1.1 The constitutional rule against 'content or effect based' restriction on freedom of expression and the restriction on freedom of expression under Art 6 of the ATP

This sub-section aims to set the background for the next sub-section which shall attempt to scrutinise whether the limitation on freedom of expression imposed under Art 6 of the ATP meets with the principles and requirements set under the FDRE's Constitution.

Prior to delving into the issue at hand, it will be useful to make a reference to the discussion on the FDRE's constitutional regime on legitimate limitations on freedom of expression. It has been ascertained that as a general rule the FDRE Constitution prohibits limiting freedom of expression on the basis of the content or effect of a given expression but makes an exception to do so on select and specified public concerns, interests or goals. The exception applies to protect well-being of youth, honour and reputation of individuals, prevent injury to human dignity and war propaganda.

On the other hand, the 'well-being of youth', 'human dignity', 'honour and reputation of individuals' have no definitive meaning and may be understood either narrowly or broadly as there is no agreed upon understanding let alone definition. This poses the question of how one strikes the balance in determine the scope of application of the FDRE's general rule vis-à-vis the exceptions in limiting the right to freedom of expression.

The author posits that one way of striking appropriate balance can be through taking due consideration of the widely recognised legal maxim that exceptions to a general rule should have narrower scope of application. Correlated to this, one should also bear in mind the widely recognised interpretative method that restrictions to fundamental human rights should be strictly applied and should not result in undermining the very essence of the right.

The next pertinent issue in investigating the constitutionality of the restriction on freedom expression imposed under Art 6 of the ATP is to determine: (a) if it is content or effect based thus runs counter to the general rule or not and (b) if content or effect based, does it fall within the exceptional rule and thus justified?

So long as Art 6 of the ATP restricts, through criminalization, the publication of expressions the content or 'likely' effect of which relates to terrorism, it is reasonable to agree that the

restriction is content or effect based. As such, if the restriction is to be justified, it must fall under the exception to the general rule of prohibition against content or effect based restriction.

It would be simplistic to conclude the restriction is unconstitutional because terrorism-related content is not to be found in the list of exceptions that the Constitution provides for. This is because the limitation imposed may fall into one of the broad areas of public interests or values that the Constitution provides for exceptions against the general rule.

It follows that one should examine whether terrorism-related content or effect can be read into one of the permissible exceptions. In this respect, however, one should but rule out the applicability of the 'well-being of youth', 'honour and reputation of individuals' from the investigation. The most likely candidates for this examination would thus be 'human dignity' and 'propaganda for war'.

#### **4.1.2 Exceptions to the constitutional rule against content or effect based restrictions**

This sub-section shall discuss whether the limitation imposed under Art 6 of the ATP can be understood to fall under the constitutional exception to impose 'content or effect based limitation on freedom of expression' to protect 'human dignity' or prevention of propaganda for war' as provided under Art 29 (6) of the FDRE Constitution.

##### **A. Applicability of the exception to prohibit content or effect of propaganda for war**

It is clear that 'terrorism' entails some form of violence, including death, serious bodily injury of individuals or widespread destruction of property-a characteristic feature shared by the reality of war. Nonetheless, as highlighted in the first Chapter of this thesis the term 'terrorism' is a highly politically contested concept whereas 'war' is a significantly narrower term, the meaning of which is much less contested<sup>220</sup>. In addition, although 'propaganda' and 'encouragement' may share the element of employing a certain form of medium to influence someone to behave or act in one way or another, the former is narrower than and as such logically impossible for it to encompass the latter. Furthermore, whereas the term 'war' is interpreted to be applied only to an act of aggression and excludes propaganda for wars in self-defence<sup>221</sup>, an act of 'terrorism' is not restricted to an act of aggression or may not be justified even in cases of self-defence.

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<sup>220</sup> It must also be pointed out that the approach to characterise counter-terrorism measures with 'war', as in the often used slogan "War against terrorism", is nowadays widely accepted to be inappropriate both by scholars and policy makers.

<sup>221</sup> See supra notes 214, 215 and 216.

## **B. Applicability of the exception to limit content or effect of expressions intended to injure human dignity**

The author is of the view that perhaps out of the four exceptions Art 29 of the FDRE Constitution envisages, the interest to protect ‘human dignity’ at the cost of restricting freedom of expression is the broadest value and as such providing the best argument for asserting the restriction under Art 6 of the ATP is constitutionally justifiable.

It is noteworthy to remark that despite the significantly broad scope of ‘human dignity’ and whose protection is given premium value to justify restricting one of the most important human rights, the FDRE Constitution provides no indications as to the essence or meaning of the concept or what it implies even in a general sense.<sup>222</sup>

The FDRE Constitution employs the phrase ‘human dignity’ in at least three instances. Art 21 of the same provides for the right of persons held in custody and imprisoned persons the right to be treated in a manner ‘respecting their human dignity’, Art 24 guarantees the right of respect for everyone’s human dignity, reputation and honour, and is similarly included as one of the exceptions to limit the right of assembly, demonstration and petition under Art 30 (2). Furthermore, Art 91 of imposes the duty on the government to ‘support, on the basis of equality, the growth and enrichment of cultures and traditions that are compatible with fundamental freedoms, human dignity...’

It is well known that human dignity is closely associated with the discipline of human rights. For instance, the UDHR’s preamble begins by recognizing the “inherent dignity and of the equal and inalienable rights of all members of the human family” as a foundation of freedom, justice, and peace in the world”<sup>223</sup>. In this sense, the right to freedom of expression rightly belongs to freedoms that ensure human dignity.

It is also well recognised that terrorism negatively impacts on the enjoyment and exercise of human rights, the essence of which pertains to respect for individuals and groups ‘human dignity’. For instance, OHCHR Fact Sheet No. 32 reports that Members States, through Security Council, the General Assembly, the former Commission on Human Rights and the

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<sup>222</sup>Unfortunately, the author has not been able to access the *travaux preparatoires* of the FDRE Constitution, which would have shed some light on the legislators’ intention, rationale and understanding of ‘human dignity’ for it to be included as an exception to the general rule against the prohibition of content or effect based restriction on freedom of expression

<sup>223</sup> UDHR, preamble

new Human Rights Council, have recognised, among others, that “[terrorism] threatens the *dignity* and security of human beings everywhere, endangers or takes innocent lives, creates an environment that destroys the freedom from fear of the people, jeopardizes fundamental freedoms, and aims at the destruction of human rights...”<sup>224</sup> (Emphasis mine). Equally, however, it is generally accepted, as discussed in Chapter 1 of the thesis, that present day States’ counter-terrorism measures have been found to be of concern for the enjoyment of human rights and freedoms under various international law and international humanitarian laws.

Coming back to the issue of the constitutionality of the restriction under Art 6 of the ATP, granted that terrorism ‘injures human dignity’, the question remains whether Art 29 of the FDRE Constitution can be implicitly understood to encompass restrictions on expressions that may ‘likely be understood’ to encourage, directly or indirectly, someone to be involved in terrorism.

It is plausible to argue that encouraging or instigating someone to commit an act that is believed to injure ‘dignity’ of the entire humanity inherently shares the same element of intent to actually commit or attempt to commit an act of terrorism and as such falls into the category of expression that the FDRE Constitution restricts under Art 29. The determinative link in this line of argument, in the author’s view, is the commonality of intent to injure human dignity. Thus, intent (and not negligence) to injure human dignity must be established in order for the constitutional exception on limiting expressions on the basis of its content or effect to be applicable.<sup>225</sup>

The determinative link, however, breaks when one considers that the crime under Art 6 of the ATP is to be understood as a ‘negligence-based’ crime as opposed to ‘intention-based’ crime.<sup>226</sup> As such, the restriction on freedom of expression under Art 6 of the ATP cannot be understood to be encompassed (either explicitly or implicitly) within the realm of exceptions to restrict expression on the basis of its content or effect to protect ‘human dignity’.

To conclude, the author asserts that (a) Art 6 of the ATP restricts the right to freedom of expression; (b) such restriction violates the constitutional principle of prohibition against

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<sup>224</sup> Office of the High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32, p. 7

<sup>225</sup> The relevant part of Art 29 (6) reads as “...public expression of opinion *intended* to injure human dignity shall be prohibited by law” (Emphasis mine)

<sup>226</sup> Most notably, the use of ‘likely to be understood’ and absence of causal linkage between expressions and actual commission or attempt to an act of terrorism under Art 6 of ATP dissipates the element of intent.

content or effect based restrictions; (c) and most importantly the imposed restriction cannot be justified under any of the exceptions which permit restricting the content or effect of a given expression for the purpose of protecting the specified interests or values envisaged under Art 29 of the FDRE Constitution.

## 4.2 Compatibility of ‘crime of encouraging terrorism’ vis-à-vis freedom of expression under the ICCPR

As briefly discussed in Chapter Three of the thesis, any restrictions on freedom of expression and information must pass three mandatory prerequisites for it to be justified under Art 19 of the ICCPR. Namely, restrictions must be *provided by law*; serve one of the listed *purposes* under the same; and must be found to be *necessary* for attaining that purpose. Furthermore, it’s imperative that these prerequisites conclusively. As such, this sub-section shall attempt to analyse whether and if the restriction under Art 6 of the ATP conclusively fulfils these criteria for it be compatible with Art 19 of the ICCPR.

### 4.2.1 Is the restriction under Art 6 of the ATP ‘provided by law’?

Since the ATP has been promulgated by the appropriate law-making body in FDRE there’s no doubt that the restriction under Art 6 of the same fulfils the procedural aspect of ‘law’, i.e. source of law.

What is problematic and relevant to the present analysis, however, is the substantive quality of the restriction under Art 6 of the ATP. In this respect, the CCPR has emphasised that in order for a norm to be characterised as law, it has be “sufficiently precise” and such precision relates to the norm’s ‘clarity in enabling an individual to regulate his or her conduct accordingly’.<sup>227</sup> It’s therefore necessary to examine whether Art 6 is sufficiently precise in criminalising and thus restricting the right to freedom of expression.

In this respect, the analysis should not be confined to the text of Art 6 of the ATP but must take into account Art 3, which defines ‘acts of terrorism’, since the latter is the primary offence for the former. To be more precise, given the offence of encouraging terrorism concerns a conduct that presumably seeks to encourage for acts of terrorism to be committed, the extent to which the primary offence is defined bears direct implications on the analysis of the secondary offence.

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<sup>227</sup> See supra note 144 (*General Comment 34*)



One of the problematic aspects of how Art 3 of the ATP defines ‘acts of terrorism’, discussed under Chapter Two, sub-sections 2.3 and 2.4 of the thesis, concerns its failure to centre ‘spread of fear’ as the core element of such acts of terrorism which resulted in making it overbroad by unduly criminalising acts such as damage to property, disruption of public services, etc. Thus, the secondary offence of likely encouragement of terrorism under Art 6 of the ATP would have to necessarily include the likely encouragement of acts that should have been excluded from the definition of acts of terrorism.

Apart from the direct implications of Art 3 in overly broadening the scope of Art 6 of the ATP, the criminalisation of likely encouragement of terrorism is also infested with its own definitional problems. In this regard, the analysis made in Chapter Two of this thesis has revealed that Art 6 is so overbroad that it criminalises statements (expressions) made by an author who may not have had the intent to encourage someone to be involved in the commission of acts of terrorism-despite the need for the crime to be intent-based. Furthermore, it has been established that the phrase ‘likely to be understood’ renders the offence so vague and imprecise that it fails to sufficiently forewarn citizens from being engaged in criminal conduct, which is one of the most fundamental purpose of criminal law.

In light of the analysis in the foregoing paragraphs, the author concludes that the restriction on freedom of expression under Art 6 of the ATP does not fulfil the test of ‘sufficient precision’ and thus may not be considered as a restriction ‘provided by law’, as required by Art 19 of the ICCPR.

Although the enquiry as to the compatibility of the restriction imposed under Art 6 with Art 19 of the ICCPR stops once it’s established that the former fails to fulfil one of the prerequisites set forth under the latter (since all the requirements must be fulfilled conclusively), the thesis shall analyse the restriction from the remaining two prerequisites with the view to provide a comprehensive academic analysis.

#### **4.2.2 Does the restriction under Art 6 of the ATP serve one of the identified purposes of Art 19 of the ICCPR?**

It is to be recalled that Art 19 of the ICCPR requires for any restriction on freedom of expression to serve one of the four identified ‘purposes, namely to achieve ‘respect for the

rights and reputation of others’, ‘public order (*ordre public*)’, ‘national security’ and ‘public health or morals’<sup>228</sup>.

The author is of the view that of the four purposes listed under Art 19 of the ICCPR, only ‘public order (*ordre public*)’ and ‘national security’ are the relevant tests to analyse Art 6 of the ATP.

It has been established that restrictions on freedom of expression to achieve the purpose of ‘public order (*ordre public*)’ may include prohibitions on speech that may ‘incite crime, violence, or mass panic’<sup>229</sup>. However, it has also been pointed that the broad nature of the purpose may completely undermine freedom of expression and therefore calls for applying ‘strict’ requirements to ensure the necessity and proportionality of the statutory restriction.<sup>230</sup>

In as far as expressions that encourage someone to commit or be involved in the commission of an act of terrorism, the restriction on freedom of expression under Art 6 of the ATP may be understood to be linked with achieving the purpose of ‘public order (*ordre public*). However, it must be pointed out that the purpose relates to expressions that *incite* and not *encourage* crime, violence or mass panic, since the two are completely different offences. Furthermore, the fact that the criminalised conduct Art 6 of the ATP is concerned with the ‘likelihood’ of a given statement to be understood as encouragement (as opposed to a statement which *may* encourage someone to be involved in terrorism), the caution flagged in applying strict requirements of necessity and proportionality with respect to the purpose of ‘public order (*ordre public*)’ should be given due consideration in our analysis.

From the foregoing, the author recognises a reasonably arguable case in asserting the restriction under Art 6 of the ATP serves to achieve the purpose of ‘public order (*ordre public*)’. However, such assertion can be countered when seen in light of the difference between incitement and encouragement offences as well as the need for a narrow application of the purpose lest it completely undermines freedom of expression.

The second relevant purpose to restrict freedom of expression to be considered is achieving ‘national security’. In as far as the phenomenon of terrorism may significantly impact on States’ national security’, statements that encourage someone to commit such acts can be eligible for

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<sup>228</sup> For more detailed discussion, please refer pp 54-55 of the thesis.

<sup>229</sup> *Supra note 196*

<sup>230</sup> *Supra note 197*

restrictions. However, the appropriate application of ‘national security’ as a purpose for restricting freedom of expression is limited to ‘only serious cases of political or military threat.’<sup>231</sup> Furthermore, the ICCPR has reasoned that the ‘nature or extent’ of the risk to national security must be clearly established in order for a restriction of freedom of expression to be deemed serving the purpose of national security.<sup>232</sup> In this respect, the fact that Art 6 of the ATP is formulated so broadly as to include statements that may **only** likely be understood to encourage someone to commit acts that may not necessarily have any real risk to national security falls short of the high standard put in place to justify restricting the right for the purpose of national security. For instance, acts such as causing damage to property or public services even in circumstances where such was not even intended may not be construed as ‘serious cases of political or military threat’, though undoubtedly such may cause disruptions or damage to a certain extent a country’s economy.

#### 4.2.3 Is the restriction under Art 6 of the ATP *necessary* to achieve one of the purposes under Art 19 of the ICCPR?

Assuming, for the sake of discussion, the restriction under Art 6 of the ATP fulfils the requirements of *provided by law* and serves to achieve one of the *purposes*, this sub-section shall inquire if such restriction is *necessary* to achieve one of those purposes.

The CCPR has established that a restriction on freedom of expression may be deemed *necessary* only if it can be shown that it is the ‘least intrusive’ measure amongst other measures which might achieve the purpose, and that it must be proportional to the purpose pursued.<sup>233</sup> In this regard, taking into account the crime of likely encouragement of terrorism is directly concerned with an act of persuasion, urging or influencing someone to behave or act in a certain manner, it’s doubtful that criminalization is the last option. For instance, the government may make use of extensive educational, awareness raising and other methods to deter individuals from being influenced, persuaded, convinced or commit themselves in getting involved with terrorism. Further, it’s presumably unclear whether such kinds of less intrusive methods have been tried and found to have failed-at the very least the preamble doesn’t assert such.

In addition to the extremely intrusive measure of criminalization, Art 6 of the ATP imposes 10 to 20 years of rigorous imprisonment. Undoubtedly, imprisonment for such extended period is a particularly harsh encroachment on the exercise of the right to liberty, among others. As such,

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<sup>231</sup> *Supra* note 199

<sup>232</sup> *Supra* note 203

<sup>233</sup> *Supra* note 210

the harshness of the measure that restricts freedom of expression raises serious concerns of proportionality.

## **CONCLUDING REMARKS**

The textual and legal analysis of Art 3 of the ATP, which defines ‘acts of terrorism’, has revealed that the provision employs overly broad, vague and imprecise terms and most disturbingly criminalises acts such as destruction of property or disruption of public services, which may have been committed without a criminal or terroristic intent to spread fear. The analysis on the crime of encouragement, provided under Art 6 of the ATP, has also revealed that the failure to expressly state ‘intent’ as the mental element of the crime and the problematic usage of the phrase ‘likely to be understood’ has made it contradictory as well as overly-broad that it fails to forewarn citizens from being engaged in the proscribed conduct.

Furthermore, the thesis has examined whether or not the restriction on freedom of expression under Art 6 of the ATP complies with the requirements set under the FDRE Constitution and the ICCPR. The thesis has discussed the rule against ‘content or effect’ based restrictions provided under the FDRE Constitution and the exceptions to this rule that allow the FDRE to restrict expressions on the basis of their content or effect. It has been determined that the restriction under Art 6 of the ATP violates the constitutional rule against content and effect based restrictions and does not fall under any of the exceptions for it to be justified.

Secondly, the thesis has discussed requirements set under Art 19 of the ICCPR for States to restrict the right to freedom of expression, namely that it should be provided by law, must serve to achieve one of the identified purposes and must be found necessary to achieve the purpose. In this respect, the thesis has concluded that the restriction under Art 6 of the ATP fails to fulfil the cumulative requirements of Art 19 of the ICCPR rendering the restriction unjustified.

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