Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective

Hiruy Wubie*

1. Introduction

Terrorist attacks can affect almost all sets of rights in different contexts.[1] Not to mention terrorism's devastating impacts on various sets of human rights, the fact that it destroys 'freedom from fear' makes it clear that any terrorist act is inherently irreconcilable with human rights concerns.[2] The destruction of the freedom from fear of the targeted population is a common denominator for the multifaceted negative implications that terrorism has on a variety of human rights.[3] The international duty of states to protect human rights violations obliges them to take the necessary steps to prevent terrorism and punish its perpetrators. It is based on this broad premise that the legitimacy of effective counterterrorism measures rests. Legislative response is one of the modalities to prevent human rights violations arising from terrorism.

Based on the conviction to protect the right of the people to live in peace, freedom and security from the threat of terrorism,[4] the Ethiopian parliament adopted the Anti-Terrorism Proclamation. The legislative organ was also concerned to avoid or minimize the damaging consequences of counter-

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* LL.B, LL.M, Lecturer and Head of the Legal Aid Center, University of Gondar, School of Law. This article is a refined version of part of my LL.M thesis. I am grateful to the anonymous assessors of the JEL for their constructive comments which helped me develop this article.

[1] Progress Report submitted by the Special Rapporteur on Terrorism and Human Rights, UN DOC E/CN.N/Sub.2/2001/31 par. 102

[2] Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counterterrorism, Fact Sheet No. 32, p. 7.

[3] This is discernable from the wordings of the two leading human rights Covenants, i.e. the ICCPR and ICESCR, while mentioning the 'freedom from fear' in their preambles. For example, paragraph 4 of the ICCPR reads as "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and **freedom from fear** (emphasis added) can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights." We can plausibly infer from these wordings that 'freedom from fear' is not even just a mere right but the ideal goal that could be reached upon respecting each set of rights. By affecting this ideal goal, terrorism endangers the whole body of human rights recognized in the two covenants.

[4] Anti-Terrorism Proclamation, Proc. No. 652/2009, Federal Negarit Gazeta, 15th Year No. 57, (hereinafter cited as the Anti-Terrorism Proclamation), Preamble, para. 1.

terrorism measures meant to be addressed by the Proclamation. That is why the aspiration to balance individual liberty and public security is stated as one of the objectives of Ethiopia's anti-terrorism law.[5]

The major objective of this research is to explain the positive and negative implications of the law from a human rights point of view and assess its compatibility with the Ethiopian constitution. In view of this objective, it makes a positivist legal analysis regarding the human rights friendliness or otherwise of the anti-terrorism law. Moreover, it makes use of interviews with pertinent professionals so as to show the various arguments stated in this paper.

The human rights friendliness or otherwise of any law could not be determined by a mere exploration of the law. It also depends on the way the law is applied in practice. This is more pertinent in case of laws which, in many jurisdictions, are prone to abuse due to political reasons of which anti-terror laws are worth mentioning. The case of Ethiopia's anti-terrorism law is no exception in this regard. There are contending arguments expressed in various state owned[6] and private media[7] about the human rights friendliness

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[5] A document that explains Ethiopia's draft anti-terrorism proclamation, an unpublished document in the Library of the Ethiopian Parliament (Original document in Amharic, Translation mine), p.13.

[6] See for example, Zemen Megazine (State Owned), Ethiopian Press Organization, July 2011 issue, See also, Ethiopian State Television Special Program about Anti-Terrorism in Ethiopia named 'Akeldama' broadcasted on the 27th of November 2011, See also, Ethiopian Television News, September 17,2011. A number of terrorist suspects, of which there are political activists and journalists, are detained as per the anti-terrorism law. The major theme of most of these and other media releases by state owned medias is an explanation that the anti terrorism law is being implemented in a human rights friendly manner without bypassing fundamental rights and freedoms of terrorist suspects and preventing human rights violations which could have been materialized had the allegedly planned terrorist acts been committed.

[7] See for example, Fethe Amharic News Paper, Issues 163-186, September 2011- May, 2012, See also, Anita Powell, *Ethiopia Reporter Flees, Other Opposition Arrested*, Associated Press, as accessed on September 15, 2011, See also, Haile Mulu and Yemane Negash, The Counter-terrorism Campaign Terrifying the Opposition, The Reporter, Amharic News paper (translation mine), Wednesday 7th September 2011. Most articles in the private press media tend to have a position that the anti-terrorism law is being unduly utilized by the government to silence political opposition and there are also allegations of violations of the rights of terrorist suspects.

or otherwise of the practice in proscribing and prosecuting suspects of terrorism charges. This research does not dare to explore the practical aspects of the anti-terrorism law from a human rights perspective. It is believed that a combined study of the law and the practice is a broad area worth being explored in a wider separate research for which this study, along with others, could serve as a basis.

This article begins with elucidating justified limitations and suspensions on human rights while countering terrorism contending that should a state need to counter terrorism for the sake of human rights, it shall do so within the bounds of the limitation and derogations recognized by the Ethiopian constitution and human rights instruments to which Ethiopia is a party. Then it goes on elucidating the positive and negative impacts of Ethiopia's anti-terrorism law from a human rights perspective and wraps up with recommendations for the adoption of necessary amendments.

2. Justified Limits on Human Rights While Countering Terrorism

There seems to exist a widespread attitude that terrorism justifies partial neglect to human rights concerns in order to curb the danger that it poses to the society at large.[8] National security concerns have long been challenges on human rights protection. Not few states often view human rights as a competing interest with or an interest that compromises national security.[9] This kind of understanding is so devastating and groundless that it contradicts the very evolution of the notion of human rights. By now, it has just become a common knowledge that international human rights standards came after the untold miseries of World War II to serve as guarantees for the continuation of the human race from the then and forthcoming insecurities. Hence, nothing can justify the position that the exercise of human rights

[8] See for example, John Ip., *Comparative Perspectives on the Detention of Terrorist Suspects*, Transnational Law and Contemporary Problems, Vol.16, 2006-2007. See also, M. Shamsul Haque, *Government Responses to Terrorism: Critical Views of their Impacts on People and Public Administration*, Public Administration Review, Vol.62, Special Issue: Democratic Governance in the Aftermath of Sep. 11,2001, 2002.

[9] See for example, William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 Harvard Human Rights Journal, 2004, p. 251. It is further stated that "promoting human rights has long been viewed as a luxury, to be perused when the government has spare diplomatic capacity and national security is not being jeopardized." See also, Jacob R. Lily, *National Security at What Price?: A Look into Civil Liberty Concerns in the Information Age under the USA Patriot Act of 2001 and a Proposed Constitutional Test for Future Legislation*, Cornell Journal of Law and Public Policy, Vol. 12, 2002-2003,pp. 448-471. Jacob's article gives a detailed analysis based on historical evidences showing how national security claims erode civil liberties especially in times of crisis and instability.

might affect national security. In fact, it furthers national security interests.[10] In this section, we will see the justified limits on human rights while combating terrorism.

To begin with, it is not acceptable to consider human rights protection as something that is incompatible with the process of countering terrorism. In fact, it has been rightly contended that *'effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of states' duty to protect individuals within their jurisdiction.'*[11] Counterterrorism has to reconcile the necessity of combating terrorism with the constitutional, legal and ethical demands of a democratic state.[12]

Counterterrorism is a manifestation of state's duty to protect human rights. But, it is often used as a pretext for human rights violations.[13] It is not an easy task to identify when it has ceased to be a protection scheme and began to unduly sabotage human rights. This section aims at avoiding the dilemma [14] in this regard. While commenting on justified incursions on human rights in countering terrorism, Emanuel Gross contends that *'we must refrain from clinging to the false illusion that in situations of serious and imminent terrorism threats it is possible to protect the individual's privacy as if that individual were living in a utopian state of peace and tranquility.'*[15] It is not wise to think that things should remain the same even with serious and imminent problems posed by terrorism. Something has to be done to address terrorist threats

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[10] This does not mean that the interests of national security and human rights protection do always coincide. In such cases, international human rights has its own way to deal with the scenario. We have the notions of restrictions and derogations. When one speaks of human rights standards, it is always understood that we have this schemes in place. A national security claim to intrude human rights protection is at all times baseless if it tries to use means other than the ones already built within the international human rights architecture.

[11] U.N. Fact sheet No 32, Supra note 3 at 23.

[12] Gregory M. Scott et al, *21 Debated Issues in World Politics*, Pearson Education Inc., 2004, p.152

[13] See infra, forthcoming discussions for the details.

[14] See, Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Edinburgh University Press, 2005, p. 2. Michael Ignatieff shows this dilemma saying that *"when democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terror requires violence. It may also require coercion, deception, secrecy and violation of rights."*

[15] Emanuel Gross, *The Struggle of A Democracy Against Terrorism – Protection of Human Rights : The Right to Privacy Versus the National Interest – the Proper Balance*, Cornell International Law Journal, Vol.37,2004, p.88.

without transgressing international human rights standards.

International human rights law has its own schemes that could be used in times when it is not possible to protect human rights in a manner similar with ordinary times. Hence, there are flexibilities built into the international human rights legal framework.[16] These are restrictions on certain rights and in a very limited set of exceptional circumstances and derogations from certain human rights provisions.[17] Both have to be managed in a way that goes along with international human rights standards. They are not allowed to be put-in-place at all times and in all places in a similar magnitude. Restrictions are often justified by the protection of others whereas derogations are just *'lesser evils'* that a democracy may commit when it genuinely believes that it faces the greater evil of its own destruction.[18] Whether the limits of counterterrorism measures on human rights are justified or not has to be seen from this perspective.

One major feature that distinguishes restriction and derogation is the former may be perpetually applied provided that legal requirements are met, whereas derogations are seasonal suspension of the exercise of some rights which will be withdrawn once the exigencies requiring the same are dealt with. The other basic difference is that derogations are put in place only in emergency situations while restrictions are applied both in normal and emergency situations.[19] These fundamental differences are also discernable from the Ethiopian constitution which incorporates perpetual restrictions on almost all rights whereas it ordains that derogations shall only temporarily suspend or limit[20] some rights in situations of public emergency proclaimed by law.

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[16] U.N. Fact sheet No 32, Supra note 3 at 23.

[17] Ibid

[18] Michael Ignatieff , Supra note 15 at 2.

[19] See, Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, Mizan Law Review, Volume 3, Number 2, page 314. Tsegaye explained the major difference between restrictions, suspensions and derogations in the following manner. "Restrictions circumscribe the manner, or place, and the extent to which rights can be enjoyed or exercised in a particular set of circumstances, often in normal times. Suspension leads to temporary non-application of one or more rights because of an unusual difficulty in which a state finds itself. Derogation refers to the possibility of acting in a manner deviating from the accepted standards of behavior vis-à-vis rights. It entails acting like there are no human rights at all. The latter two come into play in extra-normal situations."

[20] Derogations may require suspension of some rights during the emergency period or the limitation of the rights in a manner much wider and different from ordinary limitations put in place by way of restrictions for normal times.

Restrictions on rights are built into human rights instruments. In fact, the restrictions of one's right might be the rights of the other. Hence, a number of rights, as recognized in the various international human rights instruments, are not free from restrictions. There are, however, other rights that can in no way be restricted. Though it is not the object of this paper to make thorough discussions on this issue, it seems imperative to mention some rights just as examples. From among the rights that might be restricted for a genuine reason is the right to liberty and security of the person. The International Covenant on Civil and Political Rights (ICCPR) ordains that there are legitimate instances of restrictions that may be imposed on the right to liberty and security of the person.[21] On the contrary, there are rights that cannot be restricted. A prominent right of such nature is the right not to be subjected to torture.[22] States may not restrict the exercise of rights whose restriction is not permissible whereas they may put restrictions on the rights falling in the list of rights upon which restrictions are permissible.

While imposing restrictions on the limitable rights, states have to make sure that their measures go-in-line with the requirements of international human rights law standards. Limitations, if they are to come, must be prescribed by law, in the pursuance of a legitimate purpose, and must be necessary and proportional.[23] Not to go to the details, a limitation or restriction on human rights for counterterrorism purposes is legitimate only if it fulfils the requirements. As Richard A. Posner explains it well, the scope of a right must be calibrated by reference to the interests that support and oppose it.[24] A limitation's legitimacy in specific cases can better be judged on a case by case basis. However, it shall always be borne in mind that a democracy shall

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[21] See generally, The International Covenant on Civil and Political Rights, Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 2200A(XXI) of December 1966, entry into force 23 March 1976, art. 9(1)-(5).

[22] See, Id. art. 7. It reads as *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."* The consent requirement does not relate to torture in general but only to the specific case of medical or scientific experimentation.

[23] See, Human Rights Committee, General Comment No. 31 Para. 6 and, United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa principles on the Limitation and Derogation of provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

[24] Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Oxford University Press, 2006, P. 31. Richard A. Posner further contends that the scope of a constitutional right has to keep changing as the relative weights of liberty and safety change. Id. P.40.

always have a perpetual optimal balance between security and liberty with a view to ensure that anti-terror laws do not unduly bypass the domain of rights under the guise of legitimate restrictions.

Derogations from certain set of rights are permissible so long as the requirements of human rights law are fulfilled. In periods of extreme exigencies, states may derogate from their duties in international human rights law so as to respond to the needs of the circumstances.[25] This is dictated by necessity. The fact that democracy is not only concerned with the rights of the individual but also equally committed to the security of the majority[26] justifies derogations in such situations. Nevertheless, derogations themselves are limited by law and have to fulfill stringent requirements stated in international human rights instruments to which Ethiopia is a party.[27] The discussion about derogations should not be understood to mean that terrorism is like temporary exigencies often dealt with through derogations. Terrorism is no more temporary. But still temporary situations caused by terrorism may require temporary measures. In short, nothing other than perpetual balancing between rights and security through restrictions and/or temporary derogations for exceptional exigencies can be justified in human rights standards.

True, counter-terrorism measures have to be taken by states so as to prevent

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[25] See, Supra note 18 art. 4. The ICCPR ordains that

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant through the intermediary of the Secretary General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

[26] Michael Ignatieff , Supra note 15 at 8.

[27] See, Supra note 18, Art. 4(2) of the ICCPR provides a list of non derogable rights and other stringent requirements that have to be fulfilled so that a state can justifiably apply derogations. .

and prosecute human rights violations caused by terrorist acts.[28] However, as a manifestation of state duty for human rights protection, counterterrorism measures shall always be loyal to human rights. Failure in this regard is nothing but self-refuting with the promised goal of such measures. Hence, a counterterrorism measure that suspends or restricts the application of human rights and fundamental freedoms has to be exercised within the bounds of the international human rights standards.[29] Whether a counterterrorism campaign's negative impacts on human rights are irreconcilable with international human rights or not depends on an evaluation of whether they fall within the restriction/derogation formula of the human rights instruments. Any negative impact of a counterterrorism measure that falls out of the ambit of the aforementioned lesser evil exceptions is, irrespective of any diplomatic words that anyone might use to justify it, is a clear violation of human rights that should not be tolerated. The various negative human rights implications of the Ethiopian anti-terrorism law have to be seen in this context.

3. The Impacts of the Anti-Terrorism Proclamation on Human Rights Protection

In the essence of effective counterterrorism laws lies the need to strike a balance between securing protection of human rights from abusive terrorist attacks and ensuring that the responses thereto do not bypass recognized human rights standards. The aspiration to balance individual liberty and public security is stated as one of the objectives of Ethiopia's anti-terrorism law.[30] Despite this pronounced ambition of the lawmaker, the law has both positive and negative impacts on human rights protection. The overall

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[28] Jonathan Cooper, *Countering Terrorism, Protecting Human Rights: A Manual*, Office for Democratic Institutions and Human Rights, OSCE/ODIHR, 2007, P.15. The duty of states is stated in the following manner *'international and regional human rights law makes clear that states have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks. This stems from the general duty of states to protect individuals under their jurisdiction against interference in the enjoyment of human rights. More specifically, this duty is recognized as part of states' obligations to ensure respect for the right to life and the right to security.'*

[29] See for example, David Dyzenhaus, *Schmitt V. Dicey: Are States of Emergency Inside or Outside the Legal Order?* , Cardozo Law Review, Vol. 27, No. 5, March 2006, pp. 2005-2039. To stress on the indispensability of using state of emergency with due care, it has been noted that a state of emergency is brought into being by law and has to be exercised only within the limits of the law.

[30] Explanation on Ethiopia's draft anti-terrorism proclamation, (unpublished document in the Library of the Ethiopian Parliament. Original document in Amharic, Translation mine), p.13.

impact of the Proclamation on human rights protection is, therefore, a cumulative effect of the opportunities it provides and the challenges it poses.

3.1 The Strongholds of the Proclamation for Human Rights Protection

The anti-terrorism Proclamation has positive roles to play for the betterment of human rights protection. This article identified three positive sides in this regard. Of these three, the first one refers to the overall impact of a separate anti-terrorism legislation for a better efficacy of counterterrorism measures while the latter two are its specific features that could be seen as positive measures from the perspective of Ethiopian ordinary criminal law and procedure.

3.1.1 It is a Manifestation of State Duty to Protect the Rights of Citizens

Terrorism has far-reaching direct and indirect harmful consequences on human rights protection. In response to this challenge, states have a right and a duty to prevent and control terrorism. This is not a novel duty but a manifestation of the duty imposed on states in the various international human rights covenants. As an acceding state to major human rights treaties such as the ICCPR and ICESCR, Ethiopia has the duty to prevent the violations of human rights irrespective of their sources. The Vice Chairperson of the Legal and Administrative Affairs Standing Committee of the Ethiopian Parliament, Ato Hailu Mehari, affirms that the determination to protect human rights from violations emanating from terrorism was the prominent reason why the law was enacted.[31] It seems obvious to say that terrorism poses a serious challenge to human rights protection that a state party to human rights covenants has to respond to.

Ethiopia has real threats of terrorism.[32] With this background, it would be a mistake if the government fails to take positive measures that can minimize the risk of human rights violations emanating from terrorist acts or threats thereto. In line with this, the anti-terrorism Proclamation is meant to provide the government with the necessary legislative and administrative framework

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[31] Interview with, Ato Hailu Mehari, Vice Chairperson of the Legal and Administrative Affairs Standing Committee of the House of Peoples' Representatives, on 7 December 2009.

[32] Mehari Taddele Maru, *The Threat of Terrorism and its Regional Manifestations*, A Paper Presented for the Counter-Terrorism International Conference, Riyadh, February 5-8, 2005, p. 16. See also, Charles Goredema and Anneli Botha, *African Commitments to Combating Organized Crime and Terrorism: A Review of Eight NEPAD Countries*, African Human Security Initiative, 2004, pp. 64-69.

geared towards preventing and controlling terrorism.[33] Needless to explain, this is a step ahead to prevent violations of human rights.

A research conducted before the Proclamation's enactment identified that the Ethiopian judiciary, public prosecutor and police did not have the requisite human and material competence to investigate and prosecute terrorism cases.[34] Given the complexity of terrorism cases and their organized character, it is imperative that the justice system has to build its capacity to effectively deal with such cases. An incompetent justice system cannot be expected to effectively prosecute terrorism cases; nor can it be expected to avoid human rights violations in the course of investigation and prosecution. If, for example, the police are not equipped with modern methods of investigation, it is more likely that they may resort to inhuman and degrading treatments of suspects of terrorism or even witnesses thereof. The enactment of the Proclamation might be a deriving force for the government to enhance the capacity of the various actors in cases of terrorism.[35] Though some of the provisions have negative implications on human rights protection in themselves[36], the Proclamation creates state capacity to deal with terrorism cases with increased efficiency.

The following are the noteworthy areas that depict the Proclamation's role in increasing state capacity to effectively deal with terrorism related cases. It prohibits incitement to terrorism[37] wider than what is provided in ordinary

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[33] See, Supra note 5, The Anti-Terrorism Proclamation, Preamble, para. 3.

[34] Hashim Tewfik (Ph.D), *Judicial Capacity to Counter Terrorism in Ethiopia*, May 14, 2007, Addis Ababa, Ethiopia, Unpublished paper at 42-52.

[35] Cf. Interview with Ato Mulugeta Ayalew, the Federal Ministry of Justice, Deputy Assistant General Attorney. Former Head Justice Bureau Head of Amhara Regional State, on 18 December 2009. Ato Mulugeta said that since the anti-terrorism law provides guidelines on the competence of prosecutors who can handle terrorism cases, capacity problems might be resolved accordingly. See also, Interview with Commander Muluwork Gebre, Federal Police Commission, Anti-Terrorism and Organized Crimes Directorate Director, on 31 December 2009, Commander Muluwork Gebre contends that the proclamation assists the Federal Police Commission in furthering its mandate to prevent and punish terrorism. See also, Interview with Ato Demoze Mammie, Ethiopian Human Rights Commission, [the then] Deputy Chief Commissioner, on 21 December 2009. Ato Demoze said that though the Commission has done nothing so far, they have plans to create public awareness on the law. This might play a part in solving capacity and attitudinal problems.

[36] See infra, discussions in the next section of this paper on the challenges of the proclamation on human rights protection.

[37] Supra note 5, The Anti-Terrorism Proclamation, Art. 6.

criminal cases. It has to be borne in mind that incitement to terrorism mainly through the media may lead to world's most heinous atrocities, as it did in many parts of the world in different periods of history. With this background in view, leaving aside the debates on the permissibility or otherwise of the Proclamation's extent of prohibiting encouragement of terrorism for further discussions, the prohibition of incitement to terrorism plays a vital role in minimizing the possible occurrence of terrorism cases.

The preventive and investigative measures provided in the Proclamation[38] such as protection of individuals exposed to terrorist attacks and other preventive measures provided for in the law have a positive role to play in enhancing the capacity of the government to prevent terrorist acts ahead of their commission. In relation to this, the coordinated institutional operations of the concerned stake holders that the Proclamation envisages[39] is also very important in increasing the efficacy of the country's counter-terrorism measures and thereby contribute positively for human rights protection that would have been resulted from preventable terrorist acts. The provision of the Proclamation on protection of witnesses[40] also assists in the process of prosecuting perpetrators, which is one among the remedies that a state can afford to victims of human rights violations in terrorism cases. In most cases, terrorist crimes are perpetrated in group. Hence, in the absence of protection schemes for witnesses, it may be a pious wish to find someone ready to testify against a suspected terrorist.

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[38] Id. Arts. 13-22.

[39] Id. Arts. 28-30.

[40] Id. Art. 32 Protection of Witnesses

1. Where the court, on its own motion or on an application made by the public prosecutor or by the witness, is satisfied that the life of such witness is in danger, it may take the necessary measure to enable the withholding of the name and identity of the witness. The measures it takes may in particular, include:
    a. holding of the proceedings at a place to be decided by the court;
    b. avoiding of the mention of the names and addresses of the witnesses in its orders, judgments and in the records of the case;
    c. issuing of any directions for securing that the identities and addresses of the witnesses are not disclosed; and
    d. ordering that all or any of the proceedings pending before the court shall not be published or disseminated in any manner.
2. Any person who contravenes any decision or order issued under sub-article (1) of this Article shall be punishable with rigorous imprisonment from five to ten years and with fine from Birr 10,000 to Birr 30,000.

The terrorist groups' proscription process envisaged in the Proclamation is not free from critics. However, setting this aside for a latter discussion, the fact that the law aspires to control and outlaw terrorist organizations is a prominent means to combat terrorism and hence prevent human rights violations which they could have caused. Jonathan Cooper contends that "*one way of combating terrorism is to outlaw organizations that promote or foster it. By controlling these organizations, whether by confiscating their finances and other resources, or curbing their publicity, it may be possible to minimize and control the threat of terrorism.*"[41] As could be seen from the readings of the pertinent provisions of the anti-terrorism Proclamation regarding proscription,[42] the Proclamation plays a vital role to prevent terrorism by outlawing terrorist organizations and freezing their property.

Starting from its preamble, the anti-terror proclamation pronounces the aspiration of the Ethiopian government to prevent and control terrorism. The fact that terrorism is prevented and controlled is of a decided role in preventing human rights violations, which are the natural consequences of the occurrence of terrorism. This, however, should in no way be abused so as to justify or excuse impermissible limits on human rights under the guise of protecting human rights from terrorism.

3.1.2 It Provides a Scheme of Compensation for Victims of Terrorism

It has been established that terrorism is a serious violation of various human rights, such as the right to life, bodily integrity, freedom of movement, etc. and the state has a duty to protect the victims from the long lasting effects of the violations of rights. The ICCPR ordains that states have an international obligation to ensure that any person whose rights or freedoms as recognized in the covenant are violated shall have an effective remedy.[43] The mere fact that the perpetrators of the violation of the rights are prosecuted for the offence committed can in no way qualify to be referred to as an effective remedy which the ICCPR envisages. Payment of compensation for victims of human rights violations is a notion that is gaining prominence especially in contemporary human rights activism.[44] Hence, compensation in kind or monetary terms has to be implemented to pursue for an effective remedy.

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[41] Jonathan Cooper, Supra note 29, at 216.

[42] See infra, discussions in 3.2.2 on issues related to proscription. The pertinent provisions of the proclamation are reproduced therein.

[43] The International Covenant on Civil and Political Rights, Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 2200A(XXI) of December 1966, entry into force 23 March 1976, Art. 2(3) (a).

[44] See generally, Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System,*

The Ethiopian Anti-terrorism law has a praiseworthy stand on the issue of compensation for victims of human rights violations arising from terrorism. The Proclamation ordains that proceeds of terrorism[45] or property[46] of a terrorist organization or a terrorist shall be forfeited by the government and shall eventually be transferred to the terrorism victims fund to be established in accordance with it.[47] This is a positive measure to remedy human rights violations and consequently for human rights protection in general.

It could be argued that the compensation of victims of crimes are not unique characters of the Anti-Terrorism Proclamation within the Ethiopian criminal justice system. True it is; the Criminal Code of Ethiopia envisages a possibility whereby victims of crimes may be entitled to compensation for damages.[48] Although the Code visualizes an alternative to make the compensation payable from the proceeds of the crime and other sources,[49] the payment of compensation in the Criminal Code principally depends on the capacity of perpetrator to make the damage good. The anti-terrorism law, on the other hand, comes up with a scheme whereby all proceeds of terrorism or property of a terrorist organization or a terrorist shall be consolidated into the Terrorism Victims' Fund. This is a prudent solution to guard the interests

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Vanderbilt Law Review, Vol. 57, 2004, pp. 2211-2238. See also, Elke Schwager, *The Right to Compensation for Victims of an Armed Conflict*, Chinese Journal of International Law, Vol. 4, No. 2, 2005, pp. 417-439, See also, Catherine E. Sweetser, *Providing Effective Remedies to Victims of Abuse by Peace Keeping Personnel*, New York University Law Review, Vol. 83, 2008, pp. 1643-1677.

[45] Supra note 5, The Anti-Terrorism Proclamation, Art. 2(2) "Proceeds of Terrorism" means any property, including cash, derived or obtained from property traceable to a terrorist act, irrespective of a person in whose name such proceeds are standing or in whose possession or control they are found.

[46] Id. Art. 2(1) "Property" means any asset whether corporeal or incorporeal or movable or immovable, and includes deeds and instruments evidencing title to or interest in such asset such as bank accounts.

[47] Id. Art. Art. 27(1) and (4).

[48] The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Art. 101. It is provided that where a crime has caused considerable damage to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be ordered to make good the damage or to make restitution or to pay damages by way of compensation.

[49] Id. Art. 102(1). It is provided that where it appears that compensation will not be paid by the criminal or those liable on his behalf on account of the circumstances of the case or their situation, the court may order that the proceeds of the sale of the articles distrained, or the sum guaranteed as surety, or a part of the fine or of the yield of the conversion into work, or confiscated property be paid to the injured party.

of victims whose perpetrators have no sufficient fund to make good the damage suffered. This makes the law of vital importance in ensuring the remedies for the victims of violations of human rights arising from terrorism cases.

The Proclamation, however, has postponed the establishment of the Terrorism Victims Fund until the Council of Ministers, which is empowered to issue regulations necessary for the implementation of the Proclamation,[50] issues a regulation on the matter.[51] So far, the Council of Ministers has not issued the anticipated regulation. It has to be reckoned that the Council shall take the matter seriously and issue the regulation as soon as possible. Failure in this respect might be a challenge on the state's duty to ensure an effective remedy to victims of terrorism and curtail the positive role of the Proclamation for human rights protection.

3.1.3 It Fixes the Maximum Period to Remand Suspects for Investigation

Undeniable as it is, the Proclamation's stipulation[52] that a terrorist suspect might be detained for four months without a criminal charge for the purpose of investigation is not perfectly compatible with international human rights standards. The ICCPR unequivocally provides that *"any one who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."*[53] As a state party to the ICCPR, Ethiopia has the duty to enforce this provision. One may say, it does not seem reasonable to argue that a four months period after detention, which actually is the maximum period possible for detention without charge, is as prompt as what the ICCPR demands.

However, when seen from Ethiopia's perspective, the fact that the Proclamation fixes the maximum period to remand a suspect of a terrorist crime for further investigation is a praiseworthy feature of the law[54] for the

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[50] Supra note 5, The Anti-Terrorism Proclamation, Art. 37.

[51] Id. Art. 34.

[52] See infra, the provision of the proclamation in later discussions of 3.2.6.

[53] Supra note 22, ICCPR, Art. 9(2). See also, Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, Federal Negarit Gazeta, Year 1, No. 1 (hereinafter referred to as the FDRE Constitution), Art. 19(1).

[54] See also, The Minutes of Public Discussions made by the Legal and Administrative, Foreign, Defense and Security Affairs Standing Committees of the Ethiopian Federal Parliament with Concerned Stake Holders, 24 June 2009, p. 7. Unpublished Document located in the Documentation Center of the Ethiopian Federal Parliament, original document in Amharic, Translation mine.

betterment of human rights protection. The four months maximum period of remand might, albeit arguably[55], be considered to be inconsistent with the required promptness to inform the arrested person of the charges.

I argue that the Proclamation's positive aspect in cases of remand has to be subjectively considered within the domain of the Ethiopian criminal justice system. The hitherto applicable provision of the Criminal Procedure Code of Ethiopia in remand cases has been subject to criticism as it failed to fix the maximum period within which the police have to finalize investigation. It simply demands that *"No remand shall be granted for more than fourteen days on each occasion"*[56] without saying anything about the maximum period as of which the court shall deny remand of the case for investigation. Hence, in cases covered by the ordinary criminal procedure, detention without a charge has no legally recognized limits and there have been cases whereon suspects were detained even for years without a charge.[57]

The Proclamation made a commendable change[58] in cases of remand that has positive roles for the betterment of the human rights protection of terrorist

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[55] The reason for disagreements in this respect could be the fact that the ICCPR only says the arrested person charge has to be 'promptly' informed of the charge without determining the time frame thereto. The fact that the Human Rights Committee of the ICCPR said *"delays must not exceed a few days"* as mentioned in paragraph two of *General Comment No. 08: Right to liberty and security of persons (Art. 9) : . 06/30/1982.* can only serve to strengthen the allegation that the proclamation allows four months pretrial detention is against the guarantee of promptness required by the ICCPR. It can not be a legal basis to say that the four months period necessarily bypasses the guarantee provided by the international covenant since this interpretation is not a binding one and the ICCPR does not clearly spell the time frame that makes a pre-trial detention a violation.

[56] The Criminal Procedure Code Proclamation 1961, Imperial Ethiopian Government Proclamation No. 185 of 1961, Negarit Gazeta, Art. 59(3).

[57] See for example, Interview with Ato Aderajew Teklu, a former public prosecutor in North Gondar Zone of the Amhara Regional State, on 14 and 16 December 2009. See also, Interview with Ato Yirdaw Abebe, formerly a Public Prosecutor in North Gondar Zone of the Amhara Regional State and currently a Public Prosecutor of the Region's Anti-Corruption Commission, December 3 2009. Both of them experienced many cases of detention without charge, even for more than a year.

[58] As it has been stated above, it has to be reckoned that this positive contribution made by the Proclamation is labeled as such but by taking a subjective consideration up on comparing it with the ordinary criminal procedure that applies in other cases in Ethiopia. This author believes that, in objective standards, the four months remand period is 'unacceptably' longer and might be considered to have bypassed Article 9(2) of the ICCPR. However, in a legal system where there is no legally stipulated clear limitation of the period of pre-trial detention and where practices show unduly

suspects. It provides that the Court, before which a suspected terrorist is presented, may remand the suspect for investigation for a minimum of twenty eight days in each occasion; provided, however, that the total time shall not exceed a period of four months.[59] This legal stipulation minimizes the possibility whereby terrorist suspects might be subjected to an indefinite pre-trial detention[60] that inevitably affects the rights of the suspect.

3.2 The Downsides of the Proclamation from the Perspective of Human Rights Protection

The Anti-Terrorism Proclamation of Ethiopia has been a subject of controversy from its draft stage to its entry into force. International human rights organizations, such as Amnesty International and Human Rights Watch, opposition political party leaders and the private media have been, and still are, expressing their worries about the Proclamation. The opposing voices differ from case to case.[61] It is not the objective of this section of the article to ponder on all concerns of the opposing voices. It is rather limited to exploring the challenges the law, as is, poses to human rights protection. With this objective in view, we will evaluate the provisions of the Proclamation that, in one way or another, have harmful effects on human rights protection.

While exploring the Proclamation's negative impacts on the various rights recognized in international human rights covenants, mainly the ICCPR, and the Ethiopian Constitution, this article does not favor to treat each and every right in its own. It is believed that this is not appropriate to assess the Proclamation's compatibility with holistic human rights standards. Hence, it is opted that the article explores the negative impacts of the provisions of the Proclamation by taking the most important ones that have cross-cutting

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excessive pre-trial detentions, the fixed four month period for terrorism cases is better than 'other' cases if not perfectly in line with international human rights standards. I believe that, in choice of evils situation, the lesser evil is always the better.

[59] Supra note 5, The Anti-Terrorism Proclamation, Art. 20(1) and (3).

[60] We have indefinite pre-trial detention in other cases covered by the ordinary criminal procedure laws of Ethiopia since there is no a time-bound limitation for maximum periods of remand.

[61] See for example, a news paper article by Harego Bensa, *Government has Grand Duty of Protecting its Peoples from Terrorism*, The Reporter, Published Weekly by Media and Communications Center, Saturday 11 July, 2009. During discussions on the law in its draft stage, one opposition political party leader has been quoted referring "the draft bill as terrifying as terrorism itself".

implications in human rights protection at large. However, specific reference would be made in case of rights more directly affected by the proclamation.

3.2.1 Unwarrantedly Broad and Vague Definition of Terrorism

Defining terrorism is a controversial subject matter both at local and international levels.[62] It has been estimated that there are well over 100 different definitions of terrorism in the scholarly literature.[63] This mainly stems from political and ideological differences.[64] While commenting on the use of the terms 'terrorists' and 'terrorist acts', Ben Saul argued that they are open to widely differing interpretations and may facilitate rights violations.[65] This skeptical attitude is in no way groundless. In fact, analysis of more than 500 State reports to the Counter Terrorism Committee, established by Security Council Resolution 1373 revealed that there were states with very broad or vague definitions.[66] The vagueness and broadness of the definitions cast doubt on the compatibility of the respective anti-terrorism laws with human rights standards.

The problem of a vague and very broad definition of terrorism is not just something whose effects can end up curtailing a single human right. It rather has cross-cutting human rights implications by making the law susceptible to abuse. It is a basic tenet of the principle of legality that a criminal legislation should not be vague and should define the ambit of a prohibited conduct with reasonable precision.[67] Failure in this respect makes laws volatile and prone to be tuned for abuses of human rights. In the Ethiopian context, given the politically sensitive aspect of terrorism, much care should have been taken in defining its prohibited acts so as to prevent potential abuses of an

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[62] See for example, David E. Long, *Coming to Grips with Terrorism After 11 September*, Brown Journal of World Affairs, Vol.8, 2001-2002, p. 38. David E. Long contends that "the question what is terrorism is an easy question that is not easy to answer."

[63] C. A. J. Caody, *Terrorism and Innocence*, The Journal of Ethics, Vol. 8, No. 1,2004, p.38.

[64] Dr. Keith Suter, *September 11 and Terrorism: International Law Implications,* Australian Journal of International Law, 2001, p.27. See also, Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, Cardozo Law Review, Vol. 27, No. 5, March 2006, pp. 1987-2004.

[65] Ben Saul, *Definition of "Terrorism" in the UN Security Council: 1985 – 2004,* Chinese Journal of International Law (2005), Vol. 4, No. 1, p. 20.

[66] Ibid.

[67] E. Steyn, *The Draft Anti-Terrorism Bill of 2000: the Lobster Pot of the South African Criminal Justice System?*, South African Journal on Criminal Justice, Vol. 14, 2001, p. 184.

antiterrorism law and not to betray the lawmaker's declared commitment[68] to appropriately balance individual liberty and public security.

Before commenting on the broad and vague characters of the definition of 'terrorist acts' in the Ethiopian Anti-Terrorism Proclamation, let us just have a look at the provisions of the law verbatim. Article 3 of the Proclamation[69] defines[70] '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 destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:*
>
> 1. *causes a person's death or serious bodily injury;*
> 2. *creates serious risk to the safety or health of the public or section of the public;*
> 3. *commits kidnapping or hostage taking;*
> 4. *causes serious damage to property;*
> 5. *causes damage to natural resource, environment, historical or cultural heritages;*
> 6. *endangers, seizes or puts under control, causes serious interference or disruption of any public service; or*
> 7. *threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article:*
>
> *is punishable with rigorous imprisonment from 15 years to life or with death.*

The above stated definition is blamed by various commentators as having features of being unwarrantedly broad and indefensibly vague.[71] It has been

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[68] See, A document that explains Ethiopia's draft anti-terrorism proclamation, an unpublished document in the Library of the Ethiopian Parliament (Original document in Amharic, Translation mine), p.13.

[69] Supra note 5, The Anti-Terrorism Proclamation, Art. 3.

[70] It is customary to provide definitions in the second article of proclamations in the drafting traditions of Ethiopian proclamations. As a departure from this tradition, the anti terrorism proclamation provides the definition in Article 3. In fact, even this article does not directly state that it is providing a working definition to 'acts of terror'. However, it is understood that the definition provided therein is the working definition in applying the proclamation.

[71] See for example, Human Rights Watch, Analysis of Ethiopia's Draft Anti-Terrorism Proclamation, March 9, 2009, p. 3.

commented that "*the draft proclamation*[72] *provides an extremely broad and ambiguous definition of terrorism that could be used to criminalize non-violent political dissent and various other activities that should not be deemed as terrorism*".[73] Broadness and vagueness in definition could expectedly serve as a spring board wherefrom abuses of human rights and fundamental freedoms emanate. An opposition party leader vehemently argued that the prominent origin of the human-rights-unfriendly aspects of the Proclamation is the blatantly broad and vague definition of terrorism.[74]

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[72] Though this comment refers to the draft and not the final legislation, there have been not many substantial changes that the Proclamation made from the draft's definition of terrorist acts. The only commendable change made from the draft is the requirement of seriousness in relation to 'bodily injury', 'risk to the safety or health of the public or a part thereof', 'damage to property', 'interference or disruption of public services'. The requirement of seriousness is, however, regrettably not mentioned in relation to 'damage to natural resource, environment, historical or cultural heritages'.

For a purpose of comparison, let us see the provision of the draft in this regard.

Art. 3. Terrorist Acts

1. Whosoever, for the purpose of advancing political, religious or ideological cause; and with the intention of:
    a. coercing or intimidating the government'
    b. intimidating the public or section of the public or
    c. destabilizing or destroying the fundamental political, constitutional, economic or social institutions of the country;
    i. causes a person's death or bodily injury
    ii. creates risk to the safety or health of the public or section of the public;
    iii. commits kidnapping or hostage taking;
    iv. causes damage to property;
    v. causes damage to natural resource, environment, historical or cultural heritages;
    vi. endangers, seizes or puts under control, causes interference or disruption of any public service;

    is punishable with 15 years of imprisonment to death
2. Whosoever threatens to commit any of the acts stipulated under Sub Article 1 of this Article,

    Is punishable in accordance with Sub Article 1 of this Article.

[73] Human Rights Watch, Supra note 72.

[74] Interview with, Ato Lidetu Ayalew, [the then] President of the Ethiopians' Democratic Party, Conducted on the 18th of November 2009. But see, Supra note 37. The [then] Deputy Chief Commissioner of the Ethiopian Human Rights Commission Ato Demozie Mammie contends that the problem of definition should not be given much weight if the government is democratic in character.

A. Analysis of the Unwarrantedly Broad Aspects of the Definition

The broader a definition of terrorism is the more likely that counterterrorism measures might be susceptible to abuse and the consequent human rights violations. That is why the United Nations' Special Rapporteur on Human Rights and Counterterrorism holds that the concept of terrorism should be limited to acts committed with the intention of causing death or serious bodily injury, or kidnapping and the taking of hostages, and not property crimes.[75] Based on this frame of reference, one can easily point out the unwarrantedly broad and vague elements of the definition of terrorist acts that the Anti-Terrorism Proclamation adopts.

Let us first consider one manifestation of the broadness of the element of the definition that makes it a terrorist act if one 'causes damage to natural resource, environment, historical or cultural heritages'. As has been stated above[76], this is the only definitional element that the Proclamation failed to make an amendment from its draft in requiring the damage caused to be a serious one. This makes the provision overtly simplistic in that even cutting or threatening to cut a single tree, which is unarguably damage to natural resource, might, literally speaking, be considered an act of terrorism, provided that other elements are fulfilled. This is decidedly pointless. What kind of damage to natural resource, environment, historical or cultural heritages justifies the labeling of the act that causes the damage a terrorist act even when it is done with intent to advance political, religious or ideological motives? The law is silent in this regard.[77] It should have been qualified in a manner that restricts the domain of acts that potentially fall within the ambit of the definition. I believe that the failure in this respect makes the domain of the offence much broader than any reasonable person can expect a terrorism offence to include.

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[75] See, Ethiopia: Amend Draft Terror Law; Proposed Counterterrorism Legislation Violates Human Rights, http://www.hrw.org as accessed on 30 June 2009.

[76] See Supra note 73.

[77] But See, Mattew Taylor, *Effective Counter-Terrorism: A Critical Assessment of European Union Responses,* Quaker Council for European Affairs, 2007, pp.6-7 and Common Wealth Secretariat, Draft Model Legislation on Measures to Combat Terrorism, 2002. The European Union and the Common Wealth's definitions of terrorism qualify the type of damage on natural resources that could be considered as a terrorist act in their respective manners. While the former requires that 'the release of dangerous substances, or causing fires, floods or explosions should have an effect of endangering human life' whereas the latter limits the means of damage requiring that the damage has to expose the public or a part thereof to dangerous, hazardous, radio active or harmful substance, a toxic chemical, a microbial or other biological agent or toxin.

We can also consider a second element of the terrorism definition that depicts the unwarrantedly broad aspect. It makes it a terrorist act, punishable with rigorous imprisonment from 15 years to life or with death, if one endangers, seizes or puts under control, causes serious interference or disruption of any public services provided that it fulfils other requirements stated in the definition. The Proclamation defines "public services" as electronic, information communication, transport, finance, public utility, infrastructure or other similar institutions or systems established to give public service.[78] The element of the terrorist acts' definition in issue has been commented to be too broad to constitute a terrorist act and it might be utilized to punish political dissent.[79]

Criminalizing an act that is not inherently violent or which is unlikely to cause serious damage to the life, bodily integrity or property of a person does not seem to be a defensible one in cases of anti-terrorism legislations.[80] It is this conviction that made some other jurisdictions to reconsider their earlier drafts and provide an exemption for advocacy, protest, dissent or industrial action that is not intended to cause serious physical harm to a person or a serious risk to the health and safety of the public or a section of the public.[81]

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[78] Supra note 5, The Anti-Terrorism Prclamation, Art. 2(7).

[79] Human Rights Watch, Supra note 72 at 4. True it is this comment refers to the draft and not the final Proclamation. Nonetheless, the only amendment that the final Proclamation made is requiring seriousness of the interference or disruption of public services. But see, supra note 32, Ato Hailu Mehari contends that this will not affect peaceful protests as what is envisaged is acts done in pursuance of the goals of a terrorist organization. However, I would argue against Ato Hailu's assertion as the proclamation envisages every one and not necessarily a member of an organization that is proscribed as a terrorist organization.

[80] See generally, Human Rights Council, 10th session, Agenda item 3, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Mission to Spain, 16 December.2008. The standards of the United Nations Special Rapporteur on Terrorism and human rights support this argument and denounce contrary stipulations.

[81] See for example, Jude McCulloch, *'Counter-terrorism', Human Security and Globalization-from Welfare to Warfare State?*, Current Issues in Criminal Justice, Vol. 14, 2002-2003, p.285. Jude McCulloch mentioned that due to public pressure, the Australian government amended its original anti-terrorism legislation that unduly curtails the right to political protest by the use of non-violent means of oppositions such as civil disobedience. In the final legislation, political protest that is not intended to cause serious physical harm to a person or a serious risk to the health and safety of the public or a section of the public are exempted from being considered as terrorist acts. This could serve as a model for other jurisdictions,

This approach by the Australian[82] law[83] could be taken into account so as to amend the anti-terrorism law to make it more friendly to human rights. For instance, the Commonwealth Draft Model Legislation expressly provides that disruption of any services which is committed in pursuance of a protest, demonstration, or stoppage of work, shall be deemed not to be a terrorist act unless the act is intended to result in endangering a person's life, causing serious bodily harm, serious damage to property or serious risk to the health or safety of the public or a part thereof.[84] The European Union common definition of terrorism also follows a similar trend.[85] Resolution 1556 of the Security Council of the UN also indirectly defines terrorism in a similar manner.[86]

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including the Ethiopian case, if there is a real commitment not to unduly curtail the right political protest under the guise of preventing terrorism.

[82] I am taking Australia as an example since Ethiopian State Television Special Program about Anti-Terrorism in Ethiopia named 'Akeldama' broadcasted on the 27th of November 2011 mentioned that Australia is one among the four democratic countries from where the Ethiopian anti-terrorism law is allegedly taken 'verbatim'.

[83] Section 100.1 of the Australian Criminal Code defines a terrorist act as

"an action or threat of action' which is done or made with the intention of

- ✓ advancing a political, religious or ideological cause; and
- ✓ coercing or influencing by intimidation, the government of the Common wealth, State or Territory or the government of a foreign country or intimidating the public or a section of the public.

Action will only be defined as a terrorist act if it:

- ✓ causes serious physical harm or death;
- ✓ seriously damages property;
- ✓ endangers a person's life;
- ✓ creates a serious risk to public heath or safety; or
- ✓ seriously interferes with, seriously disrupts, or destroys, an electronic system.

Action will not be a terrorist act if it is advocacy, protest, dissent or industrial action and is not intended to cause serious physical harm or death, endanger the lives of others or create a serious risk to the public heath or safety.

[84] Common Wealth Secretariat, Supra note 78 Art. 3.

[85] Mattew Taylor, Supra note 78 Sub-article D. It limits the criminalization of disrupting public services. It provides that "causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss."

[86] Resolution 1566(2004), Adopted by the Security Council at its 5053rd meeting, on 8 October 2004. It states that for a criminal act to be labeled as terrorist it has to be "committed with the intent to cause death or serious bodily injury, or taking of hostages…"

The Ethiopian Anti-Terrorism Proclamation, on the contrary, fails to qualify serious interference or disruption of public services and other acts that might be labeled as terrorist acts, which inevitably makes the domain of its application extremely broad. An opposition political party leader expressed his fear that there is no guarantee to preclude the use of this provision to punish an inherently peaceful political demonstration which might cause the interruption or disruption of public services sought by the law.[87] I believe it is convincing that the mere fact of causing serious interruption or disruption of public services or other acts which are not directed against life or serious destruction of property shall not constitute terrorism. It should have been qualified with its consequences. It is the failure in this respect that makes the prohibition so broad that it might end up criminalizing inherently non-violent forms of political or other demonstrations. This might make the public frightened not to take part in public, most notably political, demonstrations and consequently hold back exercise of the right to participate in public affairs.

B. Analysis of the Vague Aspects of the Definition

Let us consider the ambiguous aspects of the definition. We will explore the vagueness of the definition by taking two elements that prominently display its vagueness. These are 'coercing the government' and 'destabilizing or destroying the fundamental…social institutions of the country'. These two are taken as examples since I believe that they can better display the definition's vagueness.

'Coercing the government' up on committing or threatening to commit any of the six offences stated in Article 3 is an element of the definition of a terrorist act. The phrase 'coercing the government' is not easily determinable.[88] It may not be possible to determine whether a certain act fulfils this requirement or not. The indeterminate aspects of the phrase mentioned can better be seen by the use of hypothetical cases.

Assume the government failed to pay salaries or make an increase thereof to employees of the Ethiopian Telecommunication Corporation[89] and the aggrieved employees warned government officials to disrupt

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[87] Interview with Lidetu Ayalew, Supra note 75.

[88] Parliamentary Minute, Supra note 55 at 5. In the minutes of this discussion, it has been commented that the phrase 'coercing the government' is not clear and demands further explanation.

[89] The Corporation is owned and run by the government and it is the only telecom service provider in the country.

telecommunication services[90] unless their demands are fulfilled and the services of the Corporation are made open to the private sector[91] believing that this would ultimately solve the problem. I do not want to dwell on the issue as to the legality of the action taken in the hypothetical case. Let us simply think whether the action constitutes a threat to 'coerce the government' assuming that the disruption they sought fulfils the seriousness requirement that the Proclamation demands. I believe that such kinds of actions are minor expressions of dissatisfaction and shall in no way be considered acts of terrorism. It seems indefensible to consider a workers' strike as a terrorist act. However, there is no guarantee that a strict application of the Proclamation might not lead one to another conclusion. This shows the magnitude of the inherent vagueness of the definition provided.

In relation to the above stated element, we can also raise issues as to the magnitude of acts that have the potential to 'coerce the government'. Does every act that aspires to 'coerce the government' fulfill the requirements of the law or do we need to adopt standards? This dichotomy can be made clear by the use of a hypothetical example. Suppose an individual is aggrieved by the way a local government administration[92] functions and commits serious bodily injury against a local official believing[93] that his action would change the administration for better. Does the action of this person have the required magnitude so as to be considered as an act that coerces the government? I believe that this kind of action, though unarguably criminal, cannot have the capacity to 'coerce the government' in the strict sense[94]. No doubt, it is an attempt to coerce a government body but I believe that the act has no capacity to do so and the government will not normally be factually coerced in this case.[95] However, it is not unrealistic to predict that a judge might

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[90] According to the definition provided for in the Proclamation this constitutes a 'public service' and hence falls within the ambit of the Proclamation's application.

[91] This might be considered as an ideological motive sought in the proclamation. It has to be reckoned that the degree of government involvement in the economy is one of the divisive ideological subjects for political actors in Ethiopia and beyond.

[92] This is refereed to as *'Kebele'* Administration in the Amharic Language.

[93] No doubt about it, this is an unacceptable belief and the act is indefensibly criminal. However, it is not possible to make everyone believe in a conventional manner.

[94] The Anti-Terrorism Proclamation Art. 2 (9). It defines "government" means the federal or a state government or a government body or a foreign government or an international organization.

[95] If one tends to argue that the mere intention suffices, it would be pointless as such kind of interpretation punishes ideas rather than acts. At this point, it would be wise to refer to the general principle of causation as enshrined in the Ethiopian Criminal

consider the same act as an act of terrorism since the law is silent on the magnitude of an act that can coerce the government. This shows the vagueness of the definition provided in the Proclamation.

Similarly, the other element of the definition that reads as 'destabilizing or destroying the fundamental…social institutions of the country' has inherent vagueness making application of the definition of terrorism an indeterminable one. I believe that the fundamentality of the social institution that is destabilized or destroyed is not easy to identify. It might seem silly to argue committing any of the offences enumerated in the Proclamation intending to advance political, religious or ideological cause by destroying a family, which is conventionally regarded as a fundamental social institution of a country, is a terrorist crime. Nevertheless, a literal reading of the text of the Proclamation's definition of terrorist acts might lead one to such an awkward conclusion, which cannot convince any one with reasonable understanding of terrorism. What constitutes the fundamental economic or social institutions of the country? It is not something that can certainly be known and there has to be a clear definition to avoid this problem.

The broadness and vagueness of a definition of terrorism makes an anti-terrorism law inclined to inconsistent applications and potential abuses which inevitably affect human rights protection. An over-broad definition of terrorism is a harsh security strategy that infringes rights without adding a value for their protection.[96] It has been appropriately commented that "a narrower definition of terrorism would not only minimize threats to civil liberties, but would also help focus limited resources on the most serious

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Code, which specialized criminal legislations, including the Anti-terrorism proclamation shall comply with, unless there is a special amendment made for the purpose of the proclamation. The Anti-terrorism proclamation is silent in this regard. Article 24(1) of the Criminal Code provides the following:

> Article 24 – Relationship of Cause and Effect
>
> 1. In all cases where the commission of a crime requires the achievement of a given result, the crime shall not be deemed to have been committed unless the result achieved is the consequence of the act or omission with which the accused person is charged.
>
> This relationship of cause and effect shall be presumed to exist when the act within the provisions of the law would, **in the normal course of things (emphasis added)**, produce the result charged.

[96] Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh; or Proportionate Security Strategies in Canada and Britain*, Cardozo Law Review, Vol. 27,No. 5, March 2006, p.2219.

threats."[97] Even setting aside the human rights impacts of a broad and vague definition, given the resource constraints the country has and the expected expenditure that counterterrorism requires, it would have been better had the law been focused on cases of terrorism that speak for themselves.

The indeterminacy of the definition makes the law highly inclined to misuse. This more likely affects the free exercise of fundamental rights and freedoms[98]such as freedom of expression, demonstration and assembly since it is not as such easy to identify which act constitutes terrorism and which one does not. In fact, this is a common denominator of many of the downsides of the Proclamation from the perspective of human rights protection. Generally, the more indeterminate a definition of terrorism is the more likely for it to be used so as to curtail the free exercise of legitimate rights, especially those with political features, for fear of terrorism charges.

3.2.2 Absence of Judicial Involvement in the Proscription[99] Processes and its Effect on Individual Liability

Customarily, the executive is often times not friendly with or at least not a renowned defender of human rights. It is not unusual for human rights activists to blame the executive as the author of human rights violations in many occasions. In such cases, democracy provides us the other two organs of government to have a close look at and, if necessary, condemn the decisions of the executive and thereby preventing it from violating human rights using the state machinery it has. Hence, adherence to separation of powers and appropriate check and balance could be seen as an indication of a government's adherence to human rights norms.[100]

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[97] Ibid.

[98] See, Interview with Lidetu Ayalew, Supra note 75. Ato Lidetu Ayalew contends that the indeterminacy of the definition gives unwarrantedly broad discretion of interpretation and thereby making the law prone to abuse.

[99] See Zemen Megazine, Supra note 7, The Ethiopian parliament has already proscribed five groups as terrorists in Ethiopia. These include three local political groups namely Ginbot 7, Ogaden Peoples Liberation Front (ONLF) and Oromo Liberation Front (OLF) and two foreign Islamic groups namely Al-Qaeda and the Somalia based Al-shabab. There are debates about the appropriateness or otherwise of this proscription and the fairness of the procedure followed by the parliament. The effect of the proscription on individuals who are members of such groups before and after proscription remains to be a bone of contention. In a related fashion, the effect of proscription on other individuals who have relations other than membership to such groups is still not settled. However, it is not the object of this article to dwell into practical issues which deserve a separate study.

[100] Rosemary Foot, *Human Rights and Counterterrorism in Global Governance: Reputation and Resistance, Global Governance,* Vol.11, 2005, p.292.

Judicial and legislative control over the executive is required for sound government functioning. This skeptical attitude towards the executive is not groundless. Since terrorism is a volatile concept, there has to be a system so as to minimize the risk of abuse and strike a balance between countering terrorism and protecting the rights of all including terrorist suspects. The fact that Ethiopia's Anti-Terrorism law has made proscription and its effects on individual members totally out of the reach of the judiciary[101], I believe, has negative impacts on human rights protection.[102]

The Proclamation provides the following in relation to the procedure to be followed in proscribing terrorist organizations[103] within its part five that provides measures to control terrorist organizations and property:

> *Article 25. Procedure of Proscribing Terrorist Organization*
>
> 1. *The House of Peoples' Representatives shall have the power, upon submission by the government, to proscribe and de-proscribe an organization as terrorist organization.*
> 2. *Any organization shall be proscribed as terrorist organization if it directly or indirectly:*
>   a. *commits acts of terrorism;*
>   b. *prepares to commit acts of terrorism;*
>   c. *supports or encourages terrorism;*
>   d. *is otherwise involved in terrorism.*

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[101] Cf. Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, Oxford University Press, 2002, P. 50. Clive Walker stated that there is a similar trend in England's Anti-Terrorism legislation. It was commented that the Terrorism Act 2000 remains steadfastly executive in terms of the activation of proscription. The Secretary of State may by order add or remove an organization from a list of terrorist organizations.

[102] But see, Interview with Hailu Mehari, Supra note 32. Ato Hailu Mehari contends that as the House of Peoples' Representatives represents the Nations, Nationalities and Peoples of Ethiopia; there is no wrong in mandating it to the proscription. He goes on arguing that since the House is a democratic entity, it is not wise to be skeptical that it might unduly use its power. See also, Interview with Demoze Mamie, Supra note 37. Ato Demoze praises this proscription process. Nevertheless, I argue against them as the issue at hand is whether the House can exercise powers on justicable matters but not whether it is democratic or not.

[103] See, Supra note 5, The Anti-Terrorism Proclamation, Art. 2(4). It provides that "terrorist organization" means:

> a. a group, association or organization which is composed of not less than two members with the objective of committing acts of terrorism or plans, prepares, executes or cause the execution of acts of terrorism or assists or incites others in a way to commit acts of terrorism; or
> b. an organization so proscribed as terrorist in accordance with this Proclamation.

3. *Where any organization is proscribed as terrorist in accordance with sub-article (1) and (2) of this Article, its legal personality shall cease.*
4. *The body that administers the terrorism victims fund to be established in accordance with this Proclamation shall assign a liquidator to the organization the legal personality of which has ceased pursuant to sub-article (3) of this Article, and enforce the process of the liquidation.* [104]

The absence of judicial involvement in the process of proscription or de-proscription and the effects thereof on individual members of the concerned organization certainly violates the citizens' right of access to justice. The FDRE Constitution ordains that *"everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power."*[105] No one could reasonably argue that the House of Peoples' Representatives has judicial powers whatsoever.[106] Neither can it be denied that the proscription process has justiciable elements in it. It suffices to mention the effects of proscription.

Besides the consequent freezing and forfeiture of the property of the proscribed terrorist organization[107], the fact that any form of participation by individuals in a proscribed terrorist organization is an independently punishable crime makes the justiciable feature of the proscription process an incontestable one. Hence, it could be said that the Proclamation violates the right of access to justice by precluding judicial involvement in determining the effects of the proscription process.

Freedom of association is constitutionally recognized as it is stated that *"every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited."*[108] It is obvious that establishing an association with terrorist missions or a promotion thereof is illegal making its prohibition lawful and justified. However, it is equally sound and acceptable that the legality or not of an association shall be ascertained by an independent judiciary; not by the law making organ, which obviously favors the majority. The Anti-Terrorism law,

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[104] Id. Art. 25.
[105] Supra note 53, The FDRE Constitution, Art. 37(1).
[106] See, Id. Art. 79(1). It is provided that "judicial powers, both at Federal and State levels, are vested in the courts."
[107] It has to be reckoned that a grouping of even two persons might be deemed as such.
[108] Supra note 53, The FDRE Constitution, Art. 31.

however, provides a scheme whereby the legality or otherwise of an association could be determined without judicial involvement, at any stage. This denies the association and its members the right to access court-administered-justice and thereby affects their freedom. Members might be frightened in joining associations as a subsequent proscription by the majority in the parliament might make their mere membership a crime.[109]

The negative human rights implications of the absence of judicial involvement in the proscription are not just limited to the organizations *per se*. It also affects members of the proscribed organization on an individual basis. The fact that the organization in which someone is a member is proscribed makes the member thereof punishable for a crime of participation in a terrorist organization[110] and be subjected to rigorous imprisonment from 5 to 10 years. I believe that especially the phrases that criminalize membership and participation in any capacity for the purpose of a terrorist organization are susceptible to abuse and the judiciary should have had a say at least in determining the criminal intent of those charged for being a member of a proscribed organization. This seems absent as the law currently stands.

It is an established fact that everyone has the right to be a member of any association unless the association is clearly against the law. Suppose someone joins a certain organization firmly convinced that the activities the organization undertakes are lawful and participates in purely peaceful aspects of the organization. However, if the organization, to which our 'innocent' example is a member, is proscribed as a terrorist organization, the 'innocent' person is liable to a minimum of 5 years rigorous imprisonment as the requirement of the law i.e. membership or participation, in any capacity, to a proscribed organization is met. This looks absurd.

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[109] But see, Interview with Hailu Mehari, Supra note 32. Ato Hailu argues that the law will not affect freedom of association as every one has to be confident in joining a peaceful organization. If the organization is really a peaceful one, there is no possibility of being punished.

[110] Supra note 5, The Anti-Terrorism Proclamation, Art. 7. Participation in a Terrorist Organization

1. Whosoever recruits another person or takes training or becomes a member or participates in any capacity for the purpose of a terrorist organization or committing a terrorist act, on the basis of his level of participation, is punishable with rigorous imprisonment from 5 to 10 years.
2. Whosoever serves as a leader or decision maker in a terrorist organization is punishable with rigorous imprisonment from 20 years to life.

If it is not a slip of the pen, in a parliamentary document that explains the Draft Anti-Terrorism Proclamation, there was a requirement of intention for one to be punished for participation in a terrorist organization.[111] This requirement of intention is, however, absent in both the draft and the final Proclamation. There is nothing that prevents one, who, even with innocent belief, becomes a member and/or participates, in any capacity, in pursuance of the objectives of an organization that is proscribed as a terrorist one, from being persecuted for terrorism. It would have been sensible had membership alone been made punishable only in so far as the accused has become a member once the organization is proscribed as a terrorist one. Therefore, the absence of judicial involvement in the process of proscription is of paramount implications from the perspective of such 'innocent' individuals.

The envisaged proscription makes the power of courts a symbolic one. They have no role whatsoever in challenging the decision to proscribe or de-proscribe an organization as a terrorist one. It has to be borne in mind that the FDRE Constitution gave the power of constitutional interpretation to the House of the Federation but not to courts of law.[112] Hence, courts cannot declare unconstitutional whatever is decided by any organ of government including the parliament.[113] Therefore, it may not be constitutionally permissible to directly empower courts to check the excess of powers by the executive or the legislative organs. However, nothing should have prevented courts of law from considering individual cases of members of proscribed organizations to determine whether they are criminally responsible for their involvement in the proscribed organization. Otherwise, it would mean that the parliament is deciding on individual criminal responsibility.

From the individual's perspective, it seems that courts cannot go to the merit of considering the unlawfulness of the acts that someone commits if it is proved that he is a member or participated, in any capacity, for the purpose of the proscribed organization.[114] By proscribing a given organization as a

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[111] A Short Explanation to the Draft Anti-Terrorism Proclamation, an unpublished document located in the Documentation Center of the Ethiopian Parliament, Original Document in Amharic, Translation Mine p. 15.

[112] Supra note 53, The FDRE Constitution, Art. 83.

[113] See generally, Consolidation of the House of the Federation and Definition of its Powers and Responsibilities, Proclamation No. 251/2001.

[114] But see, Interview with, Ato Amare Amogne, Judge, Federal Supreme Court, 9 December 2009. Ato Amare contends that it does not mean that a member will be punished for his membership alone unless it is proved that in becoming a member of the organization he has intended to cause the wrongs done. It is only a member who has actually done the specified acts of terrorism who is liable to punishment.

terrorist one, the Parliament is making members punishable for their mere membership as membership alone in any capacity is an independently punishable crime. Generally, there is no clear demarcation between the powers of the lawmaker and that of courts, if at all any, in the process of prosecuting alleged terrorists.[115] With all the above stated reasons, I argue that the absence of judicial participation in the proscription and especially the effects thereof, has negative consequences from a human rights perspective since courts of law are expected to be defenders of human rights.

3.2.3 It Might be Used to Punish Political Dissent[116]

Among criticisms against anti-terrorism laws, all over the world, the allegation that they might be inappropriately used to punish political dissent is the most prominent one.[117] In fact some commentators even questioned the appropriateness of the focus given to anti-terrorism measures alleging that they are being misused to pursue political missions by red-herring the public with the mostly echoed effects of terrorism.[118]

However, I [this author] would argue that as the law appears now, there is no further requirement if it is proved that some one is a member of an organization that is proscribed as terrorist.

[115] See, Ibid. Ato Amare said that regulations are needed to bring clarity on the procedure to be followed in bringing court cases before and/or after the proscription. See also, Supra note 37. While commenting on whether investigation begins before proscription, Ato Mulugeta contends that some form of pre-formal investigation is indispensable as there is a need to establish a case to the satisfaction of the Parliament to decide on the issue. I argue that this has to be resolved by a regulation that clearly demarcates the mandates of courts before and/or after proscription by the Parliament.

[116] See, Supra notes 7 and 8 for the debate on whether or not the government is actually using the anti-terrorism to silence political opposition. In consequence of the terrorism charges against a number of journalists and members of the opposition, some people argue that the law is being used to silence political opposition. On the contrary, the government denies such allegations and contends that it has never used the law to silence political opposition whereas membership to political parties could not be a defense to evade criminal prosecution. This paper does not dare to examine practical issues which, as already indicated above, is an area which deserves a separate study.

[117] See for example, Ben Saul, *Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law*, Australian Year Book of International Law, Vol. 25, 2006, p.20. See also, Noah Bialostozsky, *The Misuse of Terrorism Prosecution in Chile: The Need for Discrete Consideration of Minority and Indigenous Group Treatment in Rule of Law Analyses*, Northwestern Journal of International Human Rights, Vol. 6, 2007-2008, p.83.

[118] See for example, Carol K. Winkler, *In the Name of Terrorism: Presidents on Political Violence in the Post-World War II Era*, State University of New York Press, 2006, p.2.

The Anti-Terrorism Proclamation has been criticized by international human rights activists and the domestic opposition and private media for its susceptibility to be used for the purpose of punishing political dissent.[119] The government, on its part, denies the plausibility of this accusation. During public discussions of the Proclamation in its draft stage, officials of the government maintained that the law has no negative impact in the peaceful functioning of political parties.[120]

In a press briefing on this issue, Ato Meles Zenawi, the late Ethiopian Prime Minister, reiterated the position of his government. He said that political difference ought to be resolved by political means; that is perfectly correct; which means, if that is the position the opposition accepts, political differences will not take the form of terror and therefore the Proclamation will not affect those with a different political opinion.[121] True, gone are the days when it was thought that was appropriate to use any means to get to state power. However, it has to be stressed that not all inappropriate methods of acquiring state power are cases of terrorism.

Despite the government's optimistic statements on the issue at hand, I would argue that there are genuine concerns to argue that there is no guarantee that can prevent the government in power from using the Proclamation to attack its political opponents. It is an age-old purpose of laws to limit arbitrary power of government. This does not necessarily mean that governments are irresponsible actors. However, neither is it plausible to expect the government to put a limit on its power based on its volition. This is why we need laws to check undue practices by the government, and obviously other actors. Irrespective of the degree of political commitment not to use the Proclamation for punishing political dissent, the system can in no way be immune from such criticism unless it has legal schemes meant to pursue this commitment.

Carol K. Winkler contends that in the case of the United States of America on an empirical level more Americans have died from crossing the street than from being victims of terrorist attacks, that only six Americans have died as a result of chemical or biological terrorism since 1900, and that no American has ever died from an act of nuclear terrorism.

[119] See for example, Human Rights Watch, Supra note 72.

[120] Parliament Document, Supra note 69 at 10. It was stated that "the Proclamation is not meant to deal with the relations between the opposition and the government; it is rather meant to stand for peace."

[121] Melaku Demissie, Arguments on Anti-Terrorism Law, the Reporter (English), Published Weekly by Media and Communications Center, Saturday 04 July 2009.

The Proclamation has two inherent weaknesses that make it vulnerable to be abused so as to silence political opposition. These two weaknesses have been the focus of analysis in the preceding two downsides of the Proclamation. Though the above stated weaknesses have cross-cutting effects on various categories of human rights, their negative impacts on manifestations of the right to protest is a noteworthy one which demands separate treatment due to the fact that terrorism is not a purely legal concept but rather with political hybrids.

It has been noted earlier that some of the elements of the offence of 'terrorist acts' in the Proclamation are unduly broad. Notable in this regard could be the fact that it criminalizes 'serious interference or disruption of public services' as a terrorist act irrespective of whether human life has been lost, bodily integrity seriously endangered or grave loss or destruction has resulted from such interference. Since demonstrations are the prominent ways of pursuing political protest, mainly in critical times, the broader aspect of the definition, in one way or another, is more likely to curtail peaceful political demonstrations.

Incontrovertibly, interruption or destruction of public services is a criminal activity and its perpetrators deserve the appropriate punishment. However, there is no justified reason for it to constitute a crime of terrorism on its own. In our case, if an organization is proscribed, it will immediately lose its legal personality and cannot lawfully operate. This has deterrence effects on peaceful political protests as there is a possibility for protests to result in the public service interruption or disruption sought by the law[122] and the whole activity be regarded as a 'terrorist act' making the organizing party susceptible to proscription. Any undue limitation on the right to protest, the functional part of the right to political participation, is of far-reaching harmful consequences on human rights protection.

The weakness of the Proclamation manifested in denying judicial involvement in the process of proscription of terrorist organizations also best depicts the problem of the absence of judicial control not to let the law be used to silence political opposition. It has been mentioned earlier that an organization will be proscribed as a terrorist one based on the proposal by

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[122] See, Interview with Lidetu Ayalew, Supra note 75. Ato Lidetu Ayalew further contends that these and other features of the Proclamation suggest that the law was made not just for protection of innocent victims of terrorism, which he argues shall be the only focal point of the law as they have no way to protect themselves, but to protect the government which has well-entrenched capacity to protect itself from any attack.

the government and an endorsement thereof by the House of Peoples' Representatives. In current Ethiopian reality, the party which leads the executive, and the one which is supposed to propose proscription, has 99.6% of the seats in the House. It will have no problem in getting an approval of the proposed proscription from the House.[123] Hence, in the absence of any form of judicial involvement, there is nothing that can prevent the government from proscribing any organization as a terrorist one.[124] The unchallenged dominance that the leading political party has in the House places the conviction not to use the Proclamation for political purposes in the mercy of the leading political party, not in a legally regulated scheme that prevents abuse.

The only option that an aggrieved political party has in such cases would be questioning the constitutionality of the decision of the House. However, even the House of the Federation, which is mandated to constitutional interpretation, is a political entity and hence may not be immune from the critics that one may have over the Parliament.[125] Therefore, I argue that the absence of judicial involvement, in all the stages of the proscription process might potentially be used to silence political opposition.

3.2.4 Evidentiary Rules Bypassing Constitutional Guarantees of Human Rights

The need to incorporate new legal mechanisms and procedures to gather and compile sufficient information and evidences in order to bring perpetrators of terrorist acts to justice[126] is one among the statements of reason of the proclamation. A parliamentary document that gives brief explanation of the provisions of the Proclamation stated that the existing legal regime in Ethiopia regarding evidentiary matters are not sufficient to control terrorism

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[123] In my personal observations so far, I never heard of a bill proposed by the executive that failed to get the approval of the Ethiopian parliament.

[124] See, Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights and Development*, Suffolk Transnational Law Review, Vol. 20, 1996-1997, p. 51. Professor Minasse Haile criticizes the Ethiopian Constitution for not being friendly with the principle of separation of power.

[125] Supra note 53, The FDRE Constitution, Art. 61(3). The Constitution ordains that "Members of the House of the Federation shall be elected by the State Councils." In current Ethiopian realities, in all the State Councils, the leading political party is either the one which controls the Council or has partnership with the ethnically organized political parties controlling the regions' State Councils. It is this political feature of the House of the Federation that affects its pragmatic potential in dealing with the claims of aggrieved political parties with the degree of neutrality that is demanded in such cases.

[126] Supra note 5, The Anti-Terrorism Proclamation, Preamble, par. 4.

and bring perpetrators to justice demanding the law maker to provide new rules of evidence.[127]

Article 23 of the Anti-Terrorism Proclamation provides that:

> *Without prejudice to the admissibility of evidences to be presented in accordance with the Criminal Procedure Code and other relevant legislations, the following shall be admissible in court for terrorism cases:*
>
> 1. *intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered;*
> 2. *hearsay or indirect evidences;*
> 3. *digital or electronic evidences;*
> 4. *evidences gathered through interception or surveillance or information obtained through interception conducted by foreign law enforcement bodies; and*
> 5. *confession of a suspect of terrorism in writing, voice recording, video cassette or recorded in any mechanical or electronic device.*[128]

Among admissible evidences listed in the Proclamation, the one which makes an intelligence report on terrorism admissible without a need to disclose the source or the method it was gathered seems, at least apparently, contrary to the constitutional rule that excludes evidences obtained under coercion. The Constitution commands that *"persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible."*[129] The fact that the law admits intelligence reports without a need to disclose the method of collection thereof might enable the intelligence officials to bypass the constitutional guarantee not to use torture to obtain evidences. It has to be borne in mind that this kind of technique is becoming rampant in many countries in relation to terrorism cases.[130] Coupled with the capacity problems of the police to investigate terrorism cases[131], it is not unwise to be skeptical of the way that this provision is going to be implemented.

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[127] A Short Explanation to the Draft Anti-Terrorism Proclamation, an unpublished document located in the Documentation Center of the Ethiopian Parliament, Original Document in Amharic, Translation Mine p. 10 and 11.

[128] Supra note 5, The Anti-Terrorism Proclamation, Art. 23.

[129] Supra note 54, The FDRE Constitution, Art. 19(5).

[130] See, Human Rights Council of the UN, 10th session, Agenda item 3, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 4 February 2009, p. 7.

[131] Hashim Tewfik, Supra note 36 at 42-44.

It might be argued that the Proclamation does not specifically make evidences obtained by coercion admissible. On the contrary, since revising evidentiary rules is among the statement of reasons of the Proclamation stated in the preamble, something significantly different from the existing legal regime might have been sought. Irrespective of what has been sought by the law, it is a clear case that contradicts with the Constitution if intelligence report that fails to disclose its method of collection is made admissible, especially in cases when the suspect claims to have been tortured.[132] I recommend the constitutionality of this provision of the Proclamation has to be challenged.

The FDRE Constitution unequivocally establishes the right of accused persons to have full access to any evidence presented and examine witnesses testifying against them.[133] The fact that the anti-terrorism law provides that hearsay or indirect evidences are admissible might collide with the principles of fair trail recognized by the Ethiopian Constitution. The admissibility of hearsay and indirect evidences as well as intelligence reports failing to disclose the source or method of gathering seriously offends the defendants' right to confrontation of the prosecution case. This may undermine the reliability of the court's verdict and likely give rise to miscarriage of justice.

3.2.5 5Undue Restriction on Freedom of Expression

The Proclamation's subjective criminalization of encouragement of terrorism[134] makes the domain of the prohibited act indeterminate and might unduly restrain the lawful exercise of freedom of expression especially through the media. Undeniable as it is, unregulated use of the media might make it susceptible to abuse by persons of terrorist agenda to nurture a

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[132] I am aware of the argument that it may not be unconstitutional if the law just turns the burden of proving the existence of torture or other forms of coercion from the government to the suspected individual.[see for example, supra note 32, Ato Hailu Mehari had this opinion] But I would argue that this kind of scheme is in no way acceptable as the right at stake is freedom from torture, which is an absolute right and it is not practically an easy affair for an individual suspect prove the fact of his being coerced to the satisfaction of the court.

[133] Supra note 54, The FDRE Constitution Art, 20(4).

[134] Supra note 5, The Anti-Terrorism Proclamation, Art. 6. Encouragement of Terrorism

Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.

culture of violence and spread terror.[135] Exceeding its limits, freedom of expression might be abused and add fuel to the fire. This has to be legally regulated.[136] However, care should be taken not to violate the essence of the freedom under the guise of fighting terrorism.

The Proclamation criminalizes not only clear cases of direct or indirect encouragement of terrorism through the media[137] but also any thing that is likely to be understood as such by the public or a part thereof for whose consumption the publication was made. Coupled with the above commented vagueness and broadness of the definition, the subjective consideration in deciding whether an expression is an encouragement of terrorism might result in an unprincipled limitation on the freedom. As the law appears on its face, in so far as there is a possibility for the expression to be understood by members of the public as a direct or indirect encouragement of terrorism, it is legally possible to punish the expression without enquiry into the objective plausibility that the expression is a clear case of encouragement of terrorism. This subjectivity makes the domain of the offence indeterminate. The more indeterminate a criminal offence is the more likely for it to be abused.

The FDRE Constitution stipulates that freedom of expression can be limited only through laws which are guided by the principle that the freedom cannot be limited on account of the content or effect of the point of view expressed.[138] In apparent contradiction with this principle, the Proclamation employed a purely subjective criterion that is meant to control the effect of the point of view expressed by the media. This subjective consideration is likely to erode the constitutional commitment to provide legal protection to the press, as an institution, so as to ensure operational independence and its capacity to entertain diverse opinions.[139] In the public debate about the law, it

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[135] See for example, Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response*, Frank Cass Publishers, 2005, p.174-183.

[136] See, Supra note 22, ICCPR, Art. 19 (3).

[137] But see, Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Art. 19, Global Campaign for Free Expression, International Standards Series, November 1996. Principle 6 provides that expression may be punished as a threat to national security only if a government can demonstrate that: the expression is intended to incite imminent violence, it is likely to incite such violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

[138] The FDRE Constitution, Art. 29(6).

[139] Id. Art. 29 (4).

was noted that the way the provision of the law is framed might embarrass citizens not to exercise their freedom of expression.[140]

3.2.6 Other Human Rights Concerns

In this section, we will focus on exploring other human rights concerns that could be raised in relation to the Proclamation. Three concerns of human rights are explored. An argument against the generic denial of bail in terrorism cases is the first one to be explored. The not-unlikely unprincipled use of the surveillance and interception mandates by the security personnel is also commented as there has to be a scheme not to let the mandate used in cases when it is not indispensable. Finally, this article reflects on the fate of suspects of terrorism against whom a charge has not been instituted at the expiry of the four month maximum period of remand.

The denial of bail right[141] for suspects of terrorism cases is one of the critiques that one might mention against the Proclamation. It is provided that *"if a terrorism charge is filed in accordance with this proclamation, the court shall order the suspect to be remanded for trial until the court hears and gives decision on the case."*[142] There are arguments that this kind of generic denial of bail has unconstitutional elements. The theme of the argument is that the Constitution provides that a court may deny bail only in exceptional circumstances prescribed by law[143] but not a total legislative denial of bail in specified offences. In fact, a case[144] with similar contents regarding the anti-corruption special procedure and rules of evidence (Amendment) proclamation has been submitted to the Council of Constitutional Inquiry and it was maintained that the stipulation is constitutional. It declared that there is no need for constitutional interpretation and rejected the case.[145] It is only a final decision

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[140] See, Parliamentary Document, supra note 55 at 6.

[141] But see, Wondwossen Demissie (ed.), *Human Rights in Criminal Proceedings: Normative and Practical Aspects*, Reflective Analysis of Procedural and Evidentiary Aspects of the Ethiopian Anti-terrorism Law, Ethiopian Human Rights Law Series Vol. III, Addis Ababa University, Faculty of Law, 2010, pp. 51-54. Wondwossen argues that the issue of bail has not specifically been addressed in the anti-terrorism proclamation. There is an obscurity regarding the fate of the arrested terrorist suspect until a terrorist charge is instituted against him/her. However, the proclamation specifically denies conditional release once a terrorist charge has been established.

[142] Supra note 5, The Anti-Terrorism Proclamation, Art. 20 (5).

[143] Supra note 54, The FDRE Constitution, Art. 19(6).

[144] Council of Constitutional Inquiry, Recommendation on the constitutionality of the proclamation that prohibits bail in crimes of corruption, unpublished document located in the House of the Federation.

[145] See generally, Council of Constitutional Inquiry Proclamation, Proc. No. 250/2001, Federal Negarit Gazeta, Year 7, No. 40.This comprises professional experts that have the mandate to recommend on constitutional interpretation issues submitted to the

by the House of the Federation that serves as a precedent for other similar constitutional matters.[146] Therefore, it is not impossible for one to expect another decision by making an application for the case of the anti-terrorism law.

Without prejudice to the issue of constitutionality, I would argue that it would have been better had not all cases of terrorism been non-bailable offences. Not all offences stipulated in the Proclamation are serious so as to justify denial of bail. False threat of terrorism[147], failure to disclose terrorist acts[148] and failure to provide information about a lessee[149] that are punishable with rigorous imprisonment from three to ten years on account of breach of duty to cooperate[150] may be prominent examples in this regard. It does not seem justified to treat all the offences specified in the Proclamation alike. It would have been better had grave offences of terrorism that are deemed non-bailable been specified. In fact, we have a similar legislative trend in

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House of the Federation and submit the recommendation for the House of the Federation for a final decision. Article 17 (3) of the proclamation provides that "if the Council, after investigating the case submitted to it, finds that there is no need for constitutional interpretation, it may reject the case and inform of its decision thereof to the concerned party."

[146] Consolidation of the House of the Federation and Definition of its Powers and Responsibilities, Proclamation, Proc. No. 251/2001, Federal Negarit Gazeta, Year 7, No. 41, Art. 11(1).

[147] Supra note 5, The Anti-Terrorism Proclamation, Art. 11 False Threat of Terrorist Act

Whosoever while knowing or believing that the information is false, intentionally communicates or makes available by any means that a terrorist act has been or is being or will be committed, is punishable with rigorous imprisonment from 3 to 10 years.

[148] Id. Art. 12. Failure to Disclose Terrorist Acts

Whosoever, having information or evidence that may assist to prevent terrorist act before its commission, or having information or evidence capable to arrest or prosecute or punish a suspect who has committed or prepared to commit an act of terrorism, fails to immediately inform or give information or evidence to the police without reasonable causes, or gives false information, is punishable with rigorous imprisonment from 3 to 10 years.

[149] Id. Art. 15. Information about a Lessee

1. Whosoever leases a house, place, room, vehicle or any similar facility shall have the duty to register in detail the identity of the lessee and notify the same to the nearest police station within 24 hours.
2. Any person, who lets a foreigner live in his house, shall have a duty to notify the nearest police station within 24 hours, about the identity of the foreigner and submit a copy of his passport.

[150] Id. Art. 35.

Ethiopia[151] and it would have been better to follow a similar trend for cases of terrorism. I believe that it is still possible to make amendments to effect changes in this regard.

Given the danger terrorism poses on the well being of the public at large, it is legally acceptable to put in place legitimate and permissible restrictions on personal rights in appropriate circumstances. With this understanding, I would argue that the fact that the Proclamation mandates the security personnel to intercept or conduct surveillance on various modalities of communication up on getting court warrant[152] is legitimate. In fact, it might make the security personnel able to prevent crimes of terrorism ahead of their commission and thereby preventing the would-be negative implications on human rights protection.

I believe the surveillance and interception sought by the Proclamation does not bypass constitutionally provided restrictions on the enjoyment of the right to privacy which permit legitimate restrictions in compelling circumstances meant to protect national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedom of others.[153] It is meant to protect an overarching interest that deserves protection. However, care should be taken not to let this mandate be abused by using it in cases whose gravity does not justify the interception and surveillance sought by the law. In fact, this would be a matter of judicial activism in that the judiciary has to question the merits of each case. But still, it would have been better had the law provided guiding considerations[154] to

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[151] The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proc. No. 434/2005, Federal Negarit Gazeta, Year 11, No. 19, Art. 4(1) limits non-balilable corruption cases based on the gravity of the offence stating that it is only persons charged with a corruption offence punishable for more than 10 years imprisonment who can not be released on bail. This provision repeals the provision of the Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation that ordains that any person who is arrested on suspicion of having committed a corruption offence [irrespective of its gravity] shall not be released on bail.

[152] Supra note 5, The Anti-Terrorism Proclamation, Art. 14(1).

[153] Supra note 54, The FDRE Constitution, Art. 26(3).

[154] Supra note 5, The Anti-Terrorism Proclamation, Art. 18. The Proclamation provides such kind of guidelines in case of warrant given to conduct covert search. It is provided that: The court on the basis of the information presented to it by the applicant (the police), may give covert search warrant by having into consideration:

a. the nature or gravity of the terrorist act or the suspected terrorist act; and
b. the extent to which the measures to be taken in accordance with the warrant would assist to prevent the act of terrorism or arrest the suspect.

grant court warrant or refuse to do so considering whether the compelling circumstances sought by the Constitution are fulfilled. In the absence of clearly stated guidelines, there is a probability whereby the legitimate mandate might be used for illegitimate cases and thereby unduly restricting the privacy rights of citizens beyond the permissible limits of the law. Yet, it is praiseworthy that the Proclamation provides that information obtained through interception shall be kept in secret.[155]

This article mentioned earlier the four month period of remand to detain a suspect of terrorism for investigation purposes before charge as a positive contribution of the Proclamation when seen from subjective Ethiopian legal reality. However, there are genuine human rights concerns that have to be seen with due attention. Nothing has been said regarding the fate of the suspect when investigation is not over after the lapse of the four month period of remand. The police might potentially indefinitely detain suspects of terrorism even after the expiry of the four month limitation. It is not very uncommon for the police in Ethiopia to detain a suspect even defying a court order for the release of the same.[156] Hence, something concrete should be there to prevent the police from detaining the suspect indefinitely.

The Proclamation simply ordains that no remand shall be given after the lapse of the four month period. The fate of the suspects up on expiry of such period is not clearly stated. Some argue that the suspect shall not be released free and has to be conditionally released on bail[157]; others argue that the court should only close the file of remand and it is up to the detained person to challenge the legality of his detention by invoking *habeas corpus*[158]; still others contend that the case has to be closed for-good and the suspect has to be released forthwith[159] as no case has been established against him. This

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[155] Id. Art. 14(2).

[156] See, Interviews with Aderajew Teklu and Yirdaw Abebe, Supra note 58. Ato Aderajew and Ato Yirdaw confirmed this mentioning real cases. See also, Siye Abrha, *Freedom and Justice in Ethiopia*, Signature Book Printing, 2009, P. 92. (Original book in Amharic entitled 'Netsanetna Dagninet Be'Ethiopia', translation mine). This is a famous case of corruption allegation against a former MP and Minister of Defense of Ethiopia. The book evidenced detention after a court decided release on bail of the suspect.

[157] Interview with Ato Berihu Tewoldebirhan, Federal Public Prosecutor, on 14 November, 2009.

[158] Interview with Amare Amogne, Supra note 114.

[159] Interview with Mulugeta Ayalew, Supra note 37. Ato Mulugeta Ayalew has this stand.

uncertainty might be a cause for human rights abuses as the police might indefinitely detain suspects.

I believe that the law has to be given effect. If the suspect remains in custody or is only conditionally released, the Proclamation's limitation of the period of investigation to four month time becomes meaningless. Nor is it acceptable to resort to *habeas corpus* which, I believe, works for a person whose detention has not come to the attention of a court of law.[160] Therefore, if the four month period expires without a criminal charge, the case shall be closed and the suspect has to be released, at least conditionally, forthwith. Otherwise, the police would be indifferent towards diligence in investigating cases of terrorism. Judicial activism geared towards protecting the rights of suspects up on adopting human-rights-friendly interpretation of the pertinent legal instruments is priceless to solve the problem.

The negative features of the Proclamation have either real or potential negative impacts on human rights protection. The ones with real negative impacts are those which directly place undue restrictions on human rights. The case of freedom of expression might be an example in this regard. Those which I referred as having potentially negative impacts on human rights are the ones which are susceptible to be used to curtail the whole process of human rights protection. The indeterminacy of the definition and minimized role of the judiciary might fall in this category. Though terrorism has to be prevented and punished, this should not be done at the expense of human rights that the prevention of terrorism is meant to protect. This is clearly against the premise of fighting terrorism. To use the words of Michael Ignatieff, freedom itself must set a limit to the measures we employ to maintain it.

4. Conclusion and Recommendations

The anti-terrorism law shall not be a source of violations of human rights, for whose protection it was necessitated. The anti-terrorism law has praiseworthy positive roles for the furtherance of human rights protection. Its most important positive feature is enabling the country to effectively prevent

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[160] Cf. Civil Procedure Code of the Empire of Ethiopia of 1965, Decree No. 52 of 1952, Art. 179(2) provide that an illegally detained person shall be released by virtue of habeas corpus where the court is satisfied that the restraint is unlawful. This shows that what the law envisages are cases which the court was not aware of. In our case, however, the court is fully aware of the unlawful detention since it is the one that closed the file of the remand and the detention would henceforth be unlawful. It does not seem justified to expect the suspect reappear by virtue of a habeas corpus application as it is possible to decide on the issue right there.

and punish terrorism. Secondly, the fact that the law envisages the establishment of a Terrorism Victims' Fund is praiseworthy in that it introduced the concept of compensation to victims of human rights violations, which has hitherto been not well-organized, or even totally absent, in Ethiopia. I recommend a prompt establishment of the fund by a regulation. Thirdly, the law fixed the maximum period of remand to prevent unlimited pre-trial detention.

Coming to its downsides, this article identified a number of real and potential threats to human rights protection emanating from the Proclamation. The first one is a common denominator for all the threats. The law provides an unwarrantedly broad and vague definition of terrorist acts. This makes the domain of the offence an indeterminate one and highly susceptible to abuse by state actors. I recommend the definition of 'terrorist acts' in the Proclamation has to be amended so as to avoid its unwarrantedly broad and indefensibly vague elements. It is possible to take lessons from the recommendations of United Nation organs, and that of other jurisdictions.

The second major problem is mandating the Parliament the power to proscribe and de-proscribe terrorist organizations and deny judicial role in at least examining particular cases. Proscription in the Proclamation is not just a symbolic declaration. It has irreversible implications on the fate of the organization and its members. The absence of judicial involvement violates citizens' right to access court-administered-justice recognized in the Constitution. I recommend the constitutionality of the proscription process envisaged by the proclamation be considered. Moreover, an amendment has to be made not to punish individuals for their mere membership to proscribed organizations in the name of punishing participation in a terrorist group. It is possible to differentiate mere membership before and after proscription. It is only when one becomes a member cognizant of an organization's terrorist missions that membership alone can defensibly be a terrorist act. Coupled with the definitional indeterminacy, this could make the law susceptible to abuses that could punish non-terrorist political dissent. A regulation has to be issued to make clear the mandates of the parliament and that of courts of law in the process of prosecuting terrorist organizations and members thereto. The effect of proscription in the conduct of court cases shall especially be addressed.

The fact that the Proclamation makes admissible terrorism-related intelligence report (that does not disclose its source or the method used) and hearsay and indirect evidences might be a source of abuse. This is contrary to the constitutional principle that excludes evidences obtained by torture and

might tempt the police to resort to torture. It may also limit the right of defendants to confront evidences and witnesses against them and thereby causing miscarriage of justice. The law also restricts the exercise of freedom of expression not by using objectively verifiable standards but by subjective considerations. It prohibits freedom of expression if it is likely to be understood by the addressees of the expression as a direct or indirect encouragement of terrorism. Given the definitional problems mentioned earlier, this predominantly subjective thought might give rise to an unprincipled restriction on freedom of expression. This unprincipled restriction should be rendered unconstitutional.

The capacity of the police, public prosecutors, the judiciary, the national intelligence and security service and other stake holders has to be strengthened for the better. This assists much for the efficacy of the country's counterterrorism measures without unduly violating human rights. It is only when we have well-organized police and judicial system that human rights would better be protected. A police force without the required competence to investigate terrorism cases is more likely to resort to inhuman treatments against suspects or witnesses in terrorism cases. Above all, there has to be a higher degree of judicial activism to prevent abuse of human rights in terrorism-related cases. Judges should always act as human rights defenders by adopting human-rights-friendly interpretation of the provisions of the Proclamation and other criminal legislations including provisions of the Criminal Code and procedure. It is only when the judiciary is active in defending human rights that we can be assured that the potential abuses of the Proclamation by government forces is not something worrisome.