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**The Impact of Terrorism and Counterterrorism  
on Human Rights Protection: The United Nations'  
Response and Ethiopian Experience**

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**Addis Ababa University  
School of Graduate Studies  
Faculty of Law  
January 2010**

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**Submitted in Partial Fulfillment of the Degree of Master of Laws  
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**Addis Ababa University  
School of Graduate Studies  
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## **Approval Sheet by the Board of Examiners**

**Title: The Impact of Terrorism and Counterterrorism on Human Rights Protection: The United Nations' Response and Ethiopian Experience.**

I, Hiruy Wubie, hereby certify that this research paper is my original work. Works of others included in this paper are properly cited.

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**Addis Ababa, Ethiopia**

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# Chapter One

## 1. General Introduction

### 1.1. Background of the Problem

Terrorism has already become a prominent factor in shaping the political strategy of states. This has gained momentum mainly after the 11 September 2001<sup>1</sup> tragedy that led to the destruction of the World Trade Center in New York and thereby able to grasp the attention of world politics. It was mainly after this incident that the United Nations and its member states came up with comprehensive strategies to combat terrorism. The legislative response to terrorism is among the thorny issues.

Irrespective of disagreements on the actual meaning and domain of terrorism, the international community has a unanimous voice at least in condemning terrorism for its damaging impacts on human rights. This is a genuine concern. Yet, the counterterrorism measures that states adopt are often subjects of sound critics for their damaging repercussions on human rights protection. In not few occasions, various states use counterterrorism as a pretext to silence their political opponents and to unduly restrict the human rights and fundamental freedoms of individuals.

According to a research by the African Human Security Initiative, Africa is a continent with the second most terrorist casualties in the world, after Asia. This study assesses Ethiopia's situation as being in a state of various tensions which makes it among intermediate threat countries of the continent. One may also mention various reasons to argue that Ethiopia faces real threat of terrorism. This threat must have triggered the government to enact a separate anti-terrorism law.

Years have already lapsed since the anti-terrorism law is expected to be tabled in the Ethiopian parliament. Finally, it was in August 2009 that it came into force. This law

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<sup>1</sup> Commonly referred to as 9/11.

was a subject of controversy from its draft stage to being finally endorsed by the law maker, and even thereafter. The anti-terrorism law is enacted to supplement the ordinary criminal legal system of the country which is condemned for its inadequacy to effectively handle cases of terrorism. On the contrary, though I do not subscribe to it, there are arguments that the law has no purpose to serve but empowering the government to silence political opposition. The indispensability of the law is therefore not something that one can take for granted.

This research paper entitled: The impact of terrorism and counterterrorism on human rights protection: the UN Response and Ethiopian experience is meant to reflect on the tension between terrorism and counterterrorism on the one hand and human rights protection on the other. Having made conceptual discussions on terrorism and counterterrorism and their impacts on human rights, it reflects on the salient responses that the United Nations made towards the dilemma. With this framework in hand, it shows the Ethiopian experience focusing on the anti-terrorism law. The positive and negative repercussions of the law on human rights protection are articulated in light of international and domestic human rights instruments and the over all legal system of Ethiopia.

## **1.2. Statement of the Problem**

These days, it is not uncommon to hear about different groups who are indulged in acts of terror<sup>2</sup> with a view to achieve their respective objectives. It is already a concern of the contemporary media releases that such terrorist acts are claiming the lives and property of innocent citizens. This is a clear case of violation of human rights. However, when politicians speak of terrorism, it is often considered as a political offence. But above all, an act of terror is a source of violation of human rights and has to be considered as a breach of international human rights conventions.

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<sup>2</sup> It has to be recalled that there is no universal definition to what constitutes an act of terror. However, there is a prima-facie agreement that it involves the use of violence in pursuance of a group's ideological objective.

The fact that terrorism involves the use of violence makes it a real cause for the violation of human rights. It claims the lives and property of innocent people. This unquestionably violates the civil, political and economic rights of victims of terrorism. This calls for counterterrorism measures to be taken. On the other hand, counterterrorism strategies adopted by states are often subjects of critics that they are becoming serious impediments on the enjoyment of human rights. On both sides of the spectrum, it is human rights that remain to be in a state of relegation. This is precisely the reason why the General Assembly of the United Nations urged states to strike a balance between countering terrorism and respecting human rights.

It is often rightly contended that the basis for the fight against terrorism within the framework of the United Nations is intergovernmental cooperation with the objective of jointly prosecuting perpetrators. The intergovernmental cooperation is, however, curtailed by political reasons. This is precisely why the international community has not been able to agree on a comprehensive convention against terrorism. This does not, however, mean that it, within the framework of the United Nations, has not been able to come up with international conventions regarding terrorism. As of 1963, members of the United Nations have adopted thirteen international conventions wherein a number of terrorist crimes are individually defined.

The problem of terrorism and particularly the atrocities committed on 9/11 in New York shocked the international community into action against terrorism. Among other things, the actions of the international community include enactment of local legislations to fight terrorism. Such legislations are, in most cases, subjects of criticism as they are often blamed for adopting broad definitions to 'acts of terror'. It is often commented that such legislations are likely to cause serious impediments on the enjoyment of human rights. Though the United Nations urged member states to strike a balance between combating terrorism and respecting rule of law and individual freedom, this seem to be a pious wish as laws on terrorism, in not few jurisdictions, appear to be highly intrusive on individual rights and freedoms.

It is not uncommon to hear innumerable untold miseries on the lives of human beings due to terrorist attacks. The problem is that, not many commentators focus on its direct and indirect human rights consequences. It is the political repercussions of such terrorist attacks that are often written in bold. This paper dares to evaluate terrorism from the perspective of the human rights anarchy it creates. Apart from the clear direct negative impacts of terrorism on human rights, which attract the media and many people are concerned with, this paper argues that the indirect consequences of terrorism have more far-reaching negative consequences than the direct ones.

In short, both terrorism and counterterrorism measures have negative impacts on human rights protection. It could be said that the efficacy of an anti-terrorism legislation could be measured with its effectiveness in balancing the interests of justice and human rights. This is what divides states and prominent non-state actors on human rights, who are involved in human rights advocacy. In fact, in theory, states agree with what human rights activists propagate for. Nonetheless, it is not uncommon for states to focus on the campaign to combat terrorism and relegate human rights concerns as subsidiary issues. This paper concretizes the impact that terrorism and counterterrorism measures have on human rights protection.

Though the United Nations generally condemn the use of anti-terrorism laws for political ends, it is not easy to identify whether a given anti-terrorism legislation has bypassed the limit and unduly hampers human rights protection. This paper is devoted to explore this issue and come up with plausible standards, discernable from international human rights instruments, to judge the acceptability of a given anti-terrorism legislation.

It has to be noted that states are at international duty to fight terrorism as it is a direct form of human rights violations, *inter alia*, by claiming the lives and property of its victims. Yet, the genuine concern to combat terrorism is susceptible to abuse. It is often contended that states use counterterrorism as a pretext to punish various forms of political dissent. Moreover, there are cases where states mistreat an accused that is

suspected of being involved in an allegedly terrorist activity. It is often commented that both terrorism and counterterrorism measures may negatively affect human rights protection. This research proves the veracity of the allegation in this regard.

Ethiopia has recently adopted an anti-terrorism law. One among the statement of reasons of the Proclamation is that the laws currently in force in Ethiopia are unable to prevent and control terrorism. It is stated that, this calls for a need to enact a law on terrorism. This can not be taken for granted. It has to be analyzed in light of the provisions of the 2005 Criminal Code of Ethiopia and other criminal legislations. A question has to be asked whether adopting a separate law on terrorism is inevitable to serve the purpose of combating terrorism. This paper responds to this issue.

There are arguments that the Proclamation defines terrorist acts in an allegedly broader and vague manner. In a report issued about the law in its draft stage, Human Rights Watch commented that the definition is too broad that it seems that it might have been intended to suppress all forms of political dissent against the government in power, under the guise of preventing terrorism. It is commented that the law is not compatible with the understanding that non-violent acts shall not be considered as acts of terror. This paper analyses the veracity or not of such kinds of criticisms.

Another prominent point of contention against the anti-terrorism law is the process of proscribing terrorist organizations. The Proclamation mandates the Ethiopian parliament to proscribe and de-proscribe an organization as terrorist organization. Once it is proscribed as such, it shall forthwith lose its legal personality and be banned from any legal transaction whereas its properties shall be forfeited by the government and be consolidated with Terrorism Victims Fund. The constitutionality of the proscription process and its potential risk on human rights protection are issues that are not yet addressed, at least to my knowledge, by any one so far. This paper reflects on this issue.

The allegedly broad and ambiguous definition to terrorist acts in the Proclamation is not limited to the article that defines terrorist acts. It also appears in many other provisions of the same. As a case in point, Article 6 criminalizes encouragement of terrorism. As the provision comes up with a subjective criterion in determining whether a given expression is an encouragement of terrorism or not, one might question the extent of its application. This paper views the problem from the perspective of freedom of expression as recognized in international human rights instruments and the Ethiopian constitution.

Another notable issue of concern regarding the anti-terrorism law is what it ordains about admissibility of evidences. It ordains that ‘intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered...shall be admissible in court for terrorism cases.’ This provision has to be taken seriously and that it is not unwise to be alert that it may counter the constitutional guarantee of exclusionary rule for evidences obtained under coercion. This paper comments on the Proclamation’s evidentiary provisions from a human rights perspective and their constitutionality.

The tension between terrorism and human rights need to be given the proper concern it demands. Before embarking on criticisms on Ethiopia’s counterterrorism measures, and particularly the anti-terrorism law, it seems wise to evaluate the extent of the danger that terrorism poses on human rights in Ethiopia and the entire world. This could serve as a springboard to assess the proportionality of the stipulations made by the anti-terrorism law. Hence, this paper devotes a part to generally assess the terrorism threat in Ethiopia.

### **1.3. Objectives of the Study**

The general objective of this research paper is to elucidate the interplay between terrorism, human rights and counterterrorism measures, to concretize what the United Nations propose as a solution in this respect and evaluate Ethiopia’s experience in

bridging the gap between the interests at stake up on identifying plausible standards.

In precise terms, the following are the objectives of this research:

- Elucidate whether there is a tension between terrorism, counter terrorism measures and human rights;
- Prove the veracity of the allegation that both terrorism and counter-terrorism measures negatively affect human rights;
- Reflect on the salient responses that the United Nations has made with regard to the tension between anti terrorism measures and human rights;
- Elucidate the Ethiopian experience using the anti-terrorism Proclamation;
- Point out the positive and negative impacts of the anti-terrorism Proclamation on human rights protection;
- Provide recommendations based on the findings of the research as inputs for the revision of the anti-terrorism Proclamation in Ethiopia.

#### **1.4. Significance of the Study**

Terrorism is not a problem of any single nation on the globe. It is rather a problem of the international community at large. The causalities that it causes are endangering the safety and security of states. But, even more than that, it is making the innocent victims devoid of the human rights protection schemes that they enjoy by virtue of international and domestic human rights instruments. Despite this fact, most states are interested not on the human rights problems that terrorism causes but to the political consequences of the same. This research is important to see the impact of terrorism and counter terrorism measures from the perspective of human rights protection.

Counter terrorism strategies are usually fashioned to seek a political solution to terrorism and thereby relegating human rights concerns in countering terrorism. Though the United Nations urged its member states to strike a balance between combating terrorism and respect for rule of law and individual freedom, it is not an easy venture to examine whether a given jurisdiction has balanced the two interests in a plausible manner. This research is important to determine standards that would help

in an appraisal of a legal system's efficacy in this respect.

As it has been stated hereinbefore, Ethiopia is categorized in a group of countries with potential risks of terrorism. The anti-terrorism law has a number of provisions that apparently look like impediments on the enjoyment of individual freedom and human rights. This paper determines whether the various provisions of the anti-terrorism law go in line with domestic and international human rights standards. Above all, this research may serve as a spring board for future researchers to explore the tension between terrorism and human rights in the Ethiopian context, which has hitherto not been well-articulated based on scholarly considerations.

### **1.5. Research Methodology**

Legal and theoretical analysis of the interplay between terrorism, human rights and counterterrorism is made. A comparative study is also used as a research method in pursuance of this research paper's objective. For that purpose, both primary legal materials i.e. legislations and secondary materials like books, journals and other articles are used. The concepts of terrorism and counterterrorism are looked at from the perspective of human rights. Analysis is made on international and domestic human rights instruments so as to reflect on the impact of terrorism and counterterrorism on human rights protection.

This research reflects on the United Nation's response on the tension between terrorism and counter terrorism measures and human rights. To that end, international conventions, resolutions of the General Assembly, the Security Council and the United Nations Commission on Human Rights are considered. Moreover, other official statements of the United Nations' organs are taken into account.

Coming to the case of Ethiopia's dilemma in balancing interests of combating terrorism and human rights, the recently adopted anti-terrorism Proclamation is the focal point of the discussion in this paper. The Proclamation is seen from the

perspective of international and domestic human rights instruments. It is as well seen from the perspective of other pertinent laws of the country.

With a view to assess the volatile aspect of the Proclamation in the Ethiopian political context, interview is conducted with an opposition political party leader. Interviews are also made with a representative of the legal and administrative affairs standing committee of the Ethiopian parliament, judges of courts of law, public prosecutors at both regional and federal levels, an official of the Ministry of Justice, and officials of the Ethiopian Human Rights Commission and the Federal Police Commission.

Regarding materials appropriate for the accomplishment of the objectives of this research, library undertaking in AAU Libraries, ECA Library, African Union Library and Resource center is made. Papers presented in various conferences are also used. The web is also a prominent source of materials used in this research.

## **1.6. Limitations of the Study**

This research could not be expected to come up with a hard and fast strategy on how to balance combating terrorism and respecting rule of law and individual freedom. It would rather make potentially viable recommendations based on the apparent contradiction between the two interests. These recommendations are prone to be context-bounded and may have subjective elements involved. This is because the subject matter of terrorism versus human rights is not a lucid one over which one can easily draw certain points to evaluate the efficacy of a legal system. Measuring the efficacy goes beyond the standards as they are. Among other things, it demands political commitment, a well-entrenched rule of law and juridical activism.

This paper provides conceptual discussions on terrorism and counterterrorism. However, these discussions are just limited to the human rights implications of both terrorism and counterterrorism. These concepts have a lot to be said about from the perspective of other disciplines. This is not the focus of this paper. With regard to

counterterrorism measures, the legislative responses thereto are the prominent focus of this paper. In the case of the Ethiopian experience, not all legislative responses to terrorism are the focus of this paper. The focus is the recently legislated anti-terrorism law. It would have been better had discussions and comments on the anti-terrorism law been substantiated with court cases. However, no case has so far been prosecuted in accordance with the new anti-terrorism law and hence this research is not corroborated with real court cases.

I would say doing a research on the topic of terrorism, especially from the perspective of human rights, is a tough task. Access to documents and other relevant data was made challenging, and in some cases impossible, due to unwarrantedly extended bureaucracy [which I thought to be intentional]. In the course of this research, I faced a number of challenges. Due to the perceived politicized features of the issues addressed in this paper, there was a manifest lack of cooperation in different organs of government and opposition political parties whose opinions are relevant for the betterment of this paper. I was unable to get data showing the terrorism threat in Ethiopia; I failed to make planned interviews with some officials of the government and opposition political parties. Moreover, a number of my interviewees were very skeptical of the issues I want to address in the paper. A clear instance to show their skepticism could be their refusal to sign on the annexed interview-sessions I had with them. I was forced to delete valuable conversations that we had off-the-record as some of them insisted that they do not want to be cited as such.

## Chapter Two

### 2. Conceptual Underpinnings on Terrorism and Human Rights

#### 2.1. Introduction

In this chapter, the very concept of terrorism is dealt with relative detail so as to shed light on its interplay with human rights concerns. Having regard to the contentious character of the term terrorism, more focus is made on the divergent ways of defining it along with the potential repercussions of different modalities of defining the term on human rights concerns. A brief historical account is also made to highlight the chronology of events displaying the antecedents of modern-day- terrorism.

Obvious as it is, conceptual clarity, if at all it is possible to be achieved, on issues of terrorism is not an end in itself, at least, for the purpose of this research. Hence, having made definitional discussions and distinguishing terrorism from allegedly similar concepts, this chapter embarks on dealing with the impact that terrorism or terrorist acts have on human rights protection. By so doing, this research opts to see the impact of terrorist acts on human rights protection from various angles.

#### 2.2. Terrorism in Different Epochs of History: A Brief Overview

To begin with the etymological roots of the word terror, it is derived from the Latin verb *terrere* meaning to cause to tremble, and *deterre* which means to frighten from.<sup>3</sup> The etymological root of the word terror lies in the essence of any discourse about terrorism. No one dares to deny that the desire to create a state of fear within a given

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<sup>3</sup> Mary Buckley and Rick Fawn, *Global Responses to Terrorism: 9/11, Afghanistan and Beyond*, Routledge Taylor & Francis Group, 2003, p. 27

community lies in the heart of terrorism-proper, even in the context of the international community's failure to have a universally accepted definition of terrorism.

In an attempt to trace the historical beginnings of the use of terror, one would find it evident that it has existed as far back as history has been recorded.<sup>4</sup> Terrorism has been transformed over the courses of history; and it will continue changing. Though we can trace the beginnings of the use of terror to such ancient times, the idea of terrorism as a conscious political tactic traces its origin back to the late eighteenth century wherein modern age of revolutions, notably that of France, began to create a systematic link between the use of terror and the then political philosophies. At that time, terrorism was applied to the intimidating practices of the French government in power whereas today's terrorism has undergone major evolution so that, by now, it seems to be mainly applied to actions by individuals, or groups of individuals.<sup>5</sup>

The terrorism of one era differs from that of the other. It is, therefore, not a surprise that following World War II, terrorism techniques substantially changed and began to employ hijackings of civil aviation air craft which was made a common occurrence and consequently push towards a need to adopt an International Convention against the Taking of Hostages, which came into being only at 1979.<sup>6</sup> The justified need to achieve self determination rights from colonial subjugation is by and large a common denominator of most 'terrorist' missions in this period. The use of popular uprisings, often taking forms ranging from sporadic terrorism to large scale guerrilla warfare

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<sup>4</sup> Harry Henderson, *Global Terrorism, Revised Ed.*, Facts on File Inc., 2004, p.10. It mentions the fact that the massacre of inhabitants of a captured city was a common feature of warfare until the last few centuries as a proof of the use of terror's ancient existence. One may, however, legitimately dissent that this kind of practice better labeled as a war crime than terrorism *per se* in modern day parlance.

<sup>5</sup> Ibid. It was further noted that French revolutionaries such as Robespierre embraced terror as a tool for political transformation as part of a total revolution in society. See also, Thomas M. Franck and Bert B. Lockwood, Jr, *Preliminary Thoughts Towards an International Convention on Terrorism*, The American Journal of International Law, Vol.68, No. 1, Jan.1974, p.73. In this article, it is noted that the reason why state-terrorism is not an issue is that we already have a sufficient legal regime to regulate state conduct and there is no need of duplication, in this regard, by adding state terrorism into the column.

<sup>6</sup> Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions on Domestic Legislation*, Boston College International and Comparative Law Review, Vol.29, Winter 2006, P.3.

was the frequently used tactics.<sup>7</sup> It was a period where guerrilla warfare techniques and terrorism were more or less inseparably intertwined.<sup>8</sup>

Multinational terrorism<sup>9</sup> reached its climax in the late 1960s and early 1970s involving close cooperation between small terrorist groups in many countries.<sup>10</sup> Setting aside the debate as to the legitimacy of referring the then movements as acts of terrorism, it could be said that this period witnessed the recorded beginnings of cooperation between terrorist groups. There are many historical evidences that the then cold war fueled the said movements. Notable in this regard is the Soviet Union's support to a number of terrorist movements, or liberation movements depending on one's view point, in different parts of the world.<sup>11</sup> The United States also supported similar movements as a manifestation of the then proxy-war strategy.<sup>12</sup>

The terrorism that began in the early 1990s differs from that of the 1960s and 1970s. This modern variety of terrorism comes from a mix of religious affiliation intertwined with political ideology and geo-political goals.<sup>13</sup> A number of commentators often refer to the terrorism that comes after the late nineteenth century as the 'new terrorism'.<sup>14</sup> Walter Laquer vehemently argued that what is called the 'new terrorism' is fundamentally different from 'traditional terrorism', which used to exist before the late 1990s. He contends that the 'new terrorism' is hard to deal with as its claims are not easily determinable unlike the goals of 'traditional terrorism', which may for

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<sup>7</sup> Supra note 4 at 12

<sup>8</sup> See infra, discussions on distinguishing terrorism from allegedly similar concepts for the difference between terrorism and guerrilla warfare.

<sup>9</sup> Terrorism techniques employed for the purpose of enabling the various multinational groups to attain self determination rights.

<sup>10</sup> The allegation whether such practices should be treated under the ambit of terrorism remains to be contentious as there are genuine political and historical debates to counter such a holding.

<sup>11</sup> Supra note 4 at 14.

<sup>12</sup> See infra discussions about the politically manipulated character of terrorism.

<sup>13</sup> Supra note 6

<sup>14</sup> But see, 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.162. Winkler contends that the credibility of the Bush administration's claims that terrorism was new is questionable. This strategy, what Winkler called the labeling strategy, was rather successful in supporting the administration's insistence that the nation confronted a new enemy and new response options are consequently justified.

instance be gaining independence or getting rid of foreigners from local soil.<sup>15</sup> The views of modern day terrorist groups like the Al-Qaeda that Israel and the United States is inherently Satanic and have to be destroyed<sup>16</sup> might have prompted Laquer to say that the claims of the 'new terrorism' are not easily determinable. Despite the divergent positions on the essence of modern-day-terrorism, there is no doubt that states justify their new styles of counterterrorism strategies by the alleged novelty.

Having passed in the aforementioned courses of a historic route, modern-day-terrorism has reached at a very complicated level. It has become easy to cause innumerable damages on the public without a need to make a physical confrontation.<sup>17</sup> The so called cyber terrorism best signifies the magnitude of the problem that modern terrorism poses. In general, the fight against terrorism is now more complicated as, by virtue of its nature, the state, while countering terrorism, has to face an invisible enemy<sup>18</sup> that is hard to differentiate from lawful citizens.

Before winding up this section of the paper, let us have a brief look at a generalized chronology of terrorist events in different courses of history. In the 1940s, 1950s and 1960s, there has been a lesser magnitude of terrorist events as compared to the decades thereafter.<sup>19</sup> The quantity of terrorist events increased in numbers in the 1970s, 1980s and 1990s.<sup>20</sup> From 2000 to 2004, the terrorist events increased in an alarmingly progressive manner.<sup>21</sup> The increasing trend of terrorist events mainly after 2001, where the international community commits itself for a hitherto unknown global consensus to the fight against terrorism, is puzzling in that it may trigger one to question where does the wrong lie?

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<sup>15</sup> See generally, Walter Laquer, *The New Terrorism*, New York, Oxford University Press, 1999.

<sup>16</sup> Supra note 4 at 16.

<sup>17</sup> See generally, Michael L. Hummel, *Internet Terrorism*, The Homeland Security Review, Vol.2, No. 2, 2008

<sup>18</sup> See generally, Chadwick M. Graham, *Defeating an Invisible Enemy: the Western Super-Powers' Efforts to Combat Terrorism by Fighting Illegal Migration*, Transnational Law and Contemporary Problems, Vol. 14, 2004-2005.

<sup>19</sup> See the detail records of chronologically recorded terrorist events in Supra note 4 at 111-113.

<sup>20</sup> Id. at 114-136

<sup>21</sup> Id. at 137-147

### 2.3. Defining Terrorism

It may seem strange to say that there is a problem of defining terrorism. Though not in a systematic manner, it is often rightly contended that most people have a vague idea or impression of what terrorism is.<sup>22</sup> It could be said that terrorism is a familiar concept for everybody's mind yet mainly illusory. It is like something which one claims to know very well but unable to concretize its meaning. Due to its inconsistent, yet, frequent use, some analysts equate the term terrorism with other key strategic concepts such as 'revolution', 'imperialism' and 'democracy' alleging that despite their frequent use, none of them have a universally agreed one-sentence definition.<sup>23</sup>

It has been noted that a description and understanding of terrorism is easy i.e. unlawful or threatened use of violence against individuals or property to coerce and intimidate governments or societies for political, religious or ideological objectives.<sup>24</sup> To use the words of David E. Long, the question what is terrorism is an easy question that is not easy to answer.<sup>25</sup> What is often claimed to be lacking is a more precise, concrete and truly explanatory definition of the word.<sup>26</sup>

It has been estimated that there are well over 100 different definitions of terrorism in the scholarly literature.<sup>27</sup> We still have many more by different organs of government world wide. For example, in the United States, the Federal Bureau of Investigation,<sup>28</sup> the Department of Defense,<sup>29</sup> and the State Department<sup>30</sup> have adopted their own

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<sup>22</sup> David J. Whittaker(Ed.), *The Terrorism Reader, 2<sup>nd</sup> ed.*, Routledge Taylor & Francis Group,2003,p.5.

<sup>23</sup> Supra note 3

<sup>24</sup> Jakkie Cilliers and Kathryn Sturman, *Africa and Terrorism: Joining the Global Campaign*, Institute for Security Studies, 2002, p.5.

<sup>25</sup> David E. Long, *Coming to Grips with Terrorism After 11 September*, Brown Journal of World Affairs, Vol.8, 2001-2002, p. 38.

<sup>26</sup> Supra note 22

<sup>27</sup> C. A. J. Caody, *Terrorism and Innocence*, The Journal of Ethics, Vol. 8, No. 1,2004, p.38.

<sup>28</sup> Supra note 22 at 3. It defines terrorism as "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."

<sup>29</sup> Ibid. It defines terrorism as "the calculated use of violence or the threat of violence to inculcate fear, intended to coerce or intimidate governments or societies as to the pursuit of goals that are generally political, religious or ideological."

definitions emphasizing on their own preferred areas of concern. It has been appropriately commented that the official definitions reflect institutional positions<sup>31</sup> of the defining entity. This best portrays how defining terrorism is often made with one's own perspectives and convictions and so inhibiting the process of an all-embracing definition that gains the support of the international community at large.

The inability of the international community to agree on a single and all-binding definition of terrorism is principally attributable to multifaceted political considerations of the states acting in the international plane.<sup>32</sup> There are concerns as to whether terrorism is inherently tied with non-state actors or there may be instances of what is called state terrorism. A huge number of analysts on the area inseparably intertwine terrorism with non-state actors. In fact, being perpetrated by a sub-national group or a non-state entity is often cited as a defining feature of terrorism.<sup>33</sup> It may be the desire not to be indulged in such controversies that urged the terrorism conventions adopted hitherto to only speak of individual, not state or group, conduct.<sup>34</sup> The fact that Security Council Resolution 1566 avoids specifying the type of entities that engage in the terrorism it addresses, might strengthen the above proposition that due to the debate in the issues, many defining features of terrorism are left open to the states to stay away from political controversies. The often cited axiom "one person's terrorist is the other person's freedom fighter" underlies the politically divergent stands of states with various positions. Pin pointing on the crux of the matter, it has been said that the task of formulating a universal definition has been complicated by the freedom-fighter-terrorist dilemma.<sup>35</sup>

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<sup>30</sup> Ibid. It defines terrorism as "premeditated, politically motivated violence perpetuated against the noncombatant targets by sub national groups or clandestine agents, usually intended to influence an audience."

<sup>31</sup> Ibid

<sup>32</sup> 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.

<sup>33</sup> See for example, Supra note 22 at 9

<sup>34</sup> Supra note 6 at 18.

<sup>35</sup> Sebastian de Brennan, *The Internationalization of Terrorism: Winning the War, While Preserving Democratic Rights—A Balance Gone Wrong*, Australian Journal of International Law, Vol.11, 2004, p.70

The theme of the problem lies in that whereas some states are keen to see that all sorts of politically motivated acts of terror be condemned, still others firmly believe that there could be a justified reason to resort to such a scenario. The latter view used to be, albeit obliquely, favored by the United Nation's support for self determination movements in the aftermath of the World War II and the following years of independence. This is precisely why some commentators blamed the United Nations for taking an ambivalent position towards terrorism. On the one hand it condemns terrorism and on the other support self determination struggles, which often rely on 'terrorist' techniques.<sup>36</sup> This ambivalent position of the United Nations is a created by the desire to harmonize the interests of states on both sides of the argument.<sup>37</sup>

By now, the issue of self determination is not as sounding as it used to be decades before in the realms of the United Nations. Yet, states are not able to reach at an all-binding definition. While every state, at least in words, condemns terrorism and there are considerable amounts of United Nations General Assembly and Security Council resolutions condemning the same, it is a paradox that there is no single internationally binding definition of terrorism. This would inevitably affect the efficacy of the fight against terrorism. This makes one to question time and again as to what is the miracle that prevents the international community to adopt one and pursue its global counterterrorism strategy with relative convenience.

In a journal article focusing on the theme 'desperately seeking for a definition of terrorism', Sami Zeidan says that the difficulty of defining terrorism lies in the risk it

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<sup>36</sup> See for example, Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response*, Frank Cass Publishers, 2005, p.190.

<sup>37</sup> Ibid. It is mentioned that the ambivalence can best be seen in the title of a study by the then United Nations Secretary General Kurt Waldheim following the Munich Olympics massacre in 1972 that aspires to strike a balance between the two opposing states' positions on the issue of terrorism and whether its perpetrators should be considered guilty. The study was entitled "Measures to Prevent International Terrorism which Endangers or takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Terrorism Which Lie in Misery, Frustration, and Grievance and Despair, and which Cause Some People to Sacrifice Human Lives Including Their Own, in an Attempt to Effect Radical Changes." The title itself tells the story of United Nation's ambivalence towards the then allegedly terrorist movements. It has to be reckoned that the title of the above study was subsequently used as a title of the then United Nations General Assembly resolutions such as 44/29 and 42/159.

entails of taking positions.<sup>38</sup> States often classify the acts of their enemies as acts of terrorism whereas they remain silent when the same kind of act is perpetrated by an entity that has some sort of ideological or other form of allegiance with them. This shows the extent how terrorism is used in a politically fickle manner and oftentimes objectivity lacks in defining the same.

For instance, it is not uncommon to witness the Eritrean government praising the activities of Ethiopian political groups which the Ethiopian government consider as terrorist groups and the vice versa. We can mention several examples of similar character in the different parts of the conflict-ridden world. In the same fashion, Sami Zeidan argues that, left to its political meaning, terrorism easily falls prey to change that suits the interests of particular states at particular times. The Taliban and Osama bin Laden were once called freedom fighters (*mujahidden*) and backed by the CIA when they were resisting the Soviet occupation of Afghanistan. Now they are on top of the international terrorist lists of the government of the United States.<sup>39</sup>

With the aforementioned variable aspects related to defining terrorism in view, it is no wonder that coming up with a universally acceptable definition of terrorism is not an easy task. This research will not aspire to make good the definitional deficiency. Nonetheless, a workable definition that can be used as a minimum standard to domestic definitions of terrorism is badly needed.

### **2.3.1. The Importance of an Accepted Definition**

Despite the alleged inability of the international community to come up with a universally applicable definition of terrorism, all stake holders are still desperately looking for one. This is justified by the far reaching positive role of coming up with a universally workable definition. Stressing on this valuable endeavor, Sebastian de Brennan said that if intellectuals, practitioners, or members of our civilization do one

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<sup>38</sup> Sami Zeidan , *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, Cornell International Law Journal, Vol.36,2003-2004,p.491.

<sup>39</sup> Id. at 492

good thing in the next few years, it would be to develop a generally accepted and workable definition of terrorism.<sup>40</sup>

We can see the importance of defining terrorism upon forwarding two major justifications that highlight on its significance. To start with its international significance, adopting an internationally workable definition is of paramount importance in shaping states' understanding of the magnitude of the problem of terrorism.<sup>41</sup> Evident as it is, terrorism does not originate in one country, its practitioners are not based in one country, its victims are not found in one country and the response to it must therefore involve all.<sup>42</sup> This necessitates the need to have harmony between states in dealing with terrorism. Otherwise, no state can be safe at all times from terrorism so long as every state has its share of the responsibility in combating terrorism. The existence of an internationally acceptable definition enables each state to understand terrorism very well and thereby assist in making things easier for inter-state cooperation to deal with the danger posed against the entire world.

In dealing with the problem of terrorism, the international community follows an approach of creating a web of overlapping national criminal jurisdictions to outlaw terrorist acts rather than creating a comprehensive international regime.<sup>43</sup> In this regard, a universally accepted definition is priceless in that it harmonizes the operation and interaction of the overlapping domestic criminal jurisdictions by facilitating extradition<sup>44</sup>, enhancing intelligence sharing and international

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<sup>40</sup> Supra note 35 at 71.

<sup>41</sup> Supra note 6 at 3.

<sup>42</sup> Supra note 35 at 75.

<sup>43</sup> Supra note 6 at 5. It is stated there that it is this move of creating mutually reinforcing local jurisdictions that justifies the exclusion of terrorism from the jurisdiction of the International Criminal Court.

<sup>44</sup> If states are bound with an internationally applicable definition of terrorism, there would be no problem in apprehending terrorists in their territory and, without legal complications, extradite the same to a state that can legitimately exercise jurisdiction over them and thereby denying a safe haven to terrorists.

cooperation.<sup>45</sup> A common definition provides a sufficient “least common denominator” jurisdiction worldwide.<sup>46</sup>

Secondly, adopting an internationally applicable definition plays a significant role in delimiting state response to terrorism and perhaps distinguish lawful from unlawful responses.<sup>47</sup> There seem to be present a destructive trend to adopt terrorism legislations using a very broad definition to terrorism that will potentially be abused by government authorities as a convenient means to stifle legitimate protest.<sup>48</sup> Fostering a culture of tolerance and peaceful settlement of disputes in a democratic manner is vital in addressing the root causes of terrorism.<sup>49</sup> Given this fact, a blatant move to adopt an unwarrantedly wide definition of terrorism fabricates terrorism in spite of managing it. There is a pressing need to adopt a universal definition of terrorism that goes in line with international human rights responsibilities of states.

Unlike international law, where the lack of a comprehensive and clear definition is not fatal, a domestic anti-terrorism statute must necessarily provide a precise definition of terrorism.<sup>50</sup> In a domestic set up, whereon we have well-entrenched executive machinery, it is virtually impossible to leave the task of defining terrorism. As is stated above, the danger is that such a definition is prone to abuse by the government. It has to be reckoned that the effectiveness and fairness of a domestic anti-terrorism legislation hugely depends on whether there is a clear definition of terrorism.<sup>51</sup> Failure in this regard, is a bad signal that makes one to expect the inevitable negative impacts of the law on human rights protection.

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<sup>45</sup> Supra note 6 at 5

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> See for example, Luz Estella Nagle, *Global Terrorism in Our Own Backyard: Colombia's Legal War Against Illegal Armed Groups*, *Transnational Law and Contemporary Problems*, Vol.15,2005-2006,pp.29-30

<sup>49</sup> See infra, the discussions on the different modalities of effectively countering terrorism.

<sup>50</sup> Supra note 6 at 21. This does not, however, mean that adopting an internationally accepted definition is just a luxury. It is rather meant to stress on the practical possibility of not having an international definition whereas a domestic one, whatever its kind may be, is bound to exist.

<sup>51</sup> Id. at 5

In the endeavor of coming up with an acceptable definition of terrorism that do not unduly intrude international human rights guarantees, an internationally agreed upon definition is priceless as it would have the effect of preventing human rights insensitive governments<sup>52</sup> from pursuing their political ends in the pretext of fighting terrorism. This is precisely why it is important to have a definition of terrorism that makes non-terrorist revolutionary protest occur and be morally legitimate. Especially in the context of the current “war against terrorism”, where there are a variety of governments throughout the world that are using the anti-terrorist campaign to deal with all internal and secessionist opposition-and to deal with it drastically,<sup>53</sup> the value of a precise binding definition is invaluable.

### **2.3.2. Distinguishing Terrorism from Allegedly Similar Concepts**

It is not unusual for one to confuse terrorism with various acts allegedly claimed to be similar but indeed different from it. Such confusion might take one to an undesired perception of the essence of terrorism. To avoid this, let us distinguish terrorism from political violence, guerrilla fighting and other ordinary crimes. This avoids a red-herring problem of missing the track in realizing the basics of terrorism. It would also be a standard to evaluate state practices that might treat these allegedly similar notions in the same way with terrorism, mainly due to political reasons.

Political violence is often unduly equated with terrorism. Considering the concept of terrorism as a synonym for political violence is a misuse of the term in a scene where it does not perfectly match.<sup>54</sup> If we treat all forms of political violence as cases of terrorism, we are reinforcing terrorism not to be abated despite the international campaign to counter it. Though it may take different forms, political violence is not something that can be avoided. Hence, the unwarranted treatment of various forms of

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<sup>52</sup> In fact, let alone states with unimpressive track records in human rights protection, those who claim to be champions in the field are not immune from such a critic. In fact, they have arguably more appalling experiences in this regard perhaps, among other things, due to the magnitude of the problem in their context.

<sup>53</sup> Supra note 27 at 40

<sup>54</sup> Supra note 3

political violence<sup>55</sup> as acts of terrorism makes the pledge to combat terrorism an endless task which denounces the very basics of democracy i.e. leaving ample room for peaceful political struggle. This is why various human rights activist organizations argue that pressure to include all hostilities by rebel groups in domestic armed conflicts is too broad to be considered as an act of terrorism.<sup>56</sup>

There could be instances where alleged forms of political violence perfectly qualify to be regarded as terrorist acts. This is not a questionable matter. But in no way should anyone associate political violence *per se* with acts of terrorism. Leaving the details for a further discussion in the later part of this paper, for the time being, it has to be borne in mind that it is a blunder to associate terrorism with political violence. Terrorism has to be judged by its own parameters.

The second concept that is unduly associated with terrorism is guerrilla warfare. It has been acknowledged that terrorism is often confused or equated with, or treated as synonymous with guerrilla warfare.<sup>57</sup> Undeniably, terrorism and guerrilla warfare have a number of commonalities as they make use of similar tactics i.e. assassination, kidnapping, bombings of public gathering places, hostage taking and the likes for similar purposes i.e. to intimidate or coerce.<sup>58</sup> These commonalities, however, can and should not justify a move to lump them together as one and the same.

There is a fundamental difference between terrorism and guerrilla warfare. In its most widely accepted usage, guerrilla warfare refers to a numerically larger group of armed individuals, who operate as a military unit, attack enemy military forces, and seize and hold territory, which may be temporary, and exercise some form of sovereignty or control over a defined geographical area and its population.<sup>59</sup> In contrast, terrorists do not often aspire to seize or hold territory and rarely exercise direct control or

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<sup>55</sup> An act of political violence may, however, be regarded as a terrorist act whenever it satisfies the defining elements of the latter.

<sup>56</sup> See for example, Siobhan Dowd, *Anti-Terrorism, Writers and Freedom of Expression*, International Pen Writers in Prison Committee, 2003, p.15, [www.internatpen.org](http://www.internatpen.org) as accessed on April, 2009.

<sup>57</sup> *Supra* note 22 at 8

<sup>58</sup> *Ibid*

<sup>59</sup> *Ibid*

sovereignty either over population or territory.<sup>60</sup> The degree to which it relies on fear distinguishes terrorism from both conventional and guerrilla warfare.<sup>61</sup>

In short, there is a remarkable difference between terrorism and terrorists on the one hand and guerrilla warfare and the militants thereof on the other. Not all forms of political dissent, including those involving an armed struggle, do constitute an act of terrorism. The unwarranted synonymy between the two is often made with a view to suppress armed political struggles. Nonetheless, the two notions stand on their own tracks and acts of terrorism are not the same with armed conflicts.<sup>62</sup>

It is also imperative to distinguish terrorism and terrorist acts from ordinary crimes and the criminals thereof. Terrorists commit specific crimes which are chargeable in the ordinary criminal process. Despite this fact, however, there is a well-established international trend to consider terrorism and terrorists as a special category of crime and criminals. There are two distinguishing features between terrorism and ordinary crimes. Firstly, terrorists commit crimes with a broader political, religious or ideological objective in view whereas ordinary criminals are prominently motivated by personal or group interest that are, in most cases, monetary and retributive.<sup>63</sup> The second and the most significant difference between the two is that unlike terrorism, the ordinary criminal's violent acts are not intended to have consequences beyond the act itself<sup>64</sup>, which lies in the essence of terrorism and terrorists. For terrorists, the actual crimes committed may not be ends in themselves but means to an end; the end being creating a state of fear and intimidation in the minds of the public and government officials and pursue their strategies accordingly.

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<sup>60</sup> Ibid

<sup>61</sup> Supra note 48 at 25

<sup>62</sup> See, Astrid J. M. Delissen and Gerard J. Tanja (Eds.), *Humanitarian Law of Armed Conflict Challenges Ahead*, Martinus Nijhoff Publishers, 1991, p.571. This book has the details on the issue. To state the prominent argument, it contends that "the entire system of the laws of war is founded on the basic distinction between combatants and civilians, between lawful acts of combatancy and punishable war crimes. Without accepting these basic categories, the whole system becomes unworkable. Consequently, the humanitarian law applicable in armed conflicts cannot apply, even by analogy, to peacetime terrorism." Id. at 573.

<sup>63</sup> Supra note 22 at 9

<sup>64</sup> Ibid

### 2.3.3. 'Indispensable' Elements of a Terrorism Definition

It is most often said that no universally (or even widely) accepted definition of terrorism exists at international law.<sup>65</sup> Yet, it has as well been addressed that there is no doubt on the significant merits of an internationally agreed upon definition of terrorism that can serve as a minimum threshold to judge on the legitimacy or not of domestic anti-terrorism legislations' definition of terrorism. This part of the paper aims at pin pointing the generally agreed upon defining features of terrorism that are bound to exist in a piece that dares to define the same.

With an apparent contradiction from the more conventional understanding that there lack an international consensus on the definition of terrorism, there are scholars who contend that the pillars of terrorism's defining features have a more or less universal acceptance. For example, Reuven Young contends that "*terrorism' has a core, objectively determinable meaning at international law, and that one can discern such a definition from the existing sources of international law relating to terrorism.*"<sup>66</sup> Likewise, Buckley M. and Fawn R. argue that there exists a near universal acceptance of the terminology used to describe the form of behavior to be condemned or prohibited in the whole body of international resolutions, conventions and agreements dealing with aspects of prevention, suppression and punishment of acts of terrorism.<sup>67</sup>

It has been contended that despite its prior exclusive use as a pejorative political term of stigmatization, "terrorism" is increasingly used as a legal term and therefore should be accompanied by a discrete meaning.<sup>68</sup> The adoption of the international conventions against terrorism plays a vital role in making the need for a plausible definition of terrorism a pressing one than ever before. Clear as it is, the international conventions form part of international law. The fact that terrorism comes within the ambit of international law makes its defining features discernable from the concerned

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<sup>65</sup> See for example, Supra note 6 at 2.

<sup>66</sup> Ibid

<sup>67</sup> Supra note 3

<sup>68</sup> Supra note 6 at 4

sources of international law i.e. international conventions and protocols concerning terrorism and resolutions of the various United Nations (UN) organs.

Though Security Council resolution 1373 is referred to as the cornerstone of the organization's counterterrorism strategy,<sup>69</sup> it regrettably failed to provide a definition to terrorism. On the contrary, though not expressly framed as a definition thereto, resolution 1556 of the Security Council has come up with lists of terrorist acts which can never be justified. Ben Saul refers the resolution 1556's description of terrorism as a working definition of the same.<sup>70</sup> This is shared by the United Nations' Special Rapporteur on Terrorism as it reaffirms that *'while the existing international legal framework does not provide for a comprehensive definition of the concept of terrorism, the cumulative characterization of a terrorist crime, as elaborated by the Security Council in its resolution 1566 (2004), represents an effort to confine counter-terrorism measures to offences of a genuinely terrorist nature.'*<sup>71</sup> Resolution 1566 defines, albeit obliquely, terrorism in the following manner:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological racial, ethnic, religious or other similar nature.<sup>72</sup>

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<sup>69</sup> See *infra*, chapter four of this paper for detailed analysis on this point.

<sup>70</sup> Ben Saul, *Definition of "Terrorism" in the UN Security Council: 1985-2004*, Chinese Journal of International Law, Vol. 4, No. 1, 2005, p.24.

<sup>71</sup> 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, p.6.

<sup>72</sup> Resolution 1566(2004), Adopted by the Security Council at its 5053<sup>rd</sup> meeting, on 8 October 2004, par. 3.

The mention of the Special Rapporteur that the definition provided in resolution 1556 signals an effort to limit counterterrorism measures to offences of a genuinely terrorist character unquestionably demonstrates that the definition<sup>73</sup>, provided there, has the purpose of setting standards for domestic jurisdictions in their domestic definitions of terrorism. Based on the definition in resolution 1556, the Special Rapporteur identified three conditions that any offence defined in a domestic law as a terrorist crime should met.<sup>74</sup> These conditions are indispensable elements of a legitimate definition.

The first element is that a definition of terrorism has to refer to acts committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages.<sup>75</sup> It is important to stress on the *mens rea* requirement and the need for the injuries specified to be serious ones. This delimits state actions geared towards punishing non-violent political and other movements. Secondly, the act must be committed for the purpose of provoking a state of terror, intimidating a population, or compelling a government or international organization to do or abstain from doing any act.<sup>76</sup> It has to be reckoned that it is the motive behind it that makes terrorism special. And finally, it has to be corresponding to all elements of a serious crime as defined by the law.<sup>77</sup> It is in no way defensible to consider minor offences fall in the domain of terrorism. The Special Rapporteur's concern is that an unduly extended definition of terrorism is a signal for a forthcoming encroachment against the human rights of terrorist suspects, and the public at large.

A definition of terrorism has to strike a balance between encompassing all forms of terrorism and not penalizing acts or omissions that are not genuinely terrorist in character. With the aforementioned standards in view, it seems imperative to look at definitions that could be considered as models in this regard. This does not, however, mean that these definitions are immune from critics.

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<sup>73</sup> It has to be reckoned that the resolution fails to admit that it is defining terrorism when it states the types of terrorist acts that are not acceptable for any reason.

<sup>74</sup> Supra note 71

<sup>75</sup> Ibid

<sup>76</sup> Ibid

<sup>77</sup> Ibid

The texts of the draft comprehensive convention on terrorism being prepared in the aegis of the UN, the European Convention and the Common Wealth model legislation are accordingly reproduced in the following paragraphs. The UN draft comprehensive convention on terrorism defines, though there are serious disagreements between states on the point, terrorist acts from the point of view of a person who can be considered terrorist. It reads as:

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

- a) death or serious bodily injury to any person; or*
- b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or*
- c) damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.<sup>78</sup>*

The European Union common definition of terrorism as set out in the 2002 Council 'Framework for Combating Terrorism' lays down that terrorist acts are offences committed with the aim of:

*'...seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation'.*

*The following shall be deemed to be terrorist offences:*

- a) attacks upon a person's life which may cause death;*
- b) attacks upon the physical integrity of a person;*
- c) kidnapping or hostage taking;*

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<sup>78</sup> UN General Assembly, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth session (28 January-1February 2002), doc. A/57/37.

- d) *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;*
- e) *seizure of aircraft, ships or other means of public or goods transport;*
- f) *manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;*
- g) *release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;*
- h) *interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;*
- i) *threatening to commit any of the acts listed in (a) to (h)*<sup>79</sup>

The Commonwealth secretariat has also issued draft model legislation on measures to combat terrorism and define terrorism as:

- 1) *[A]n act or omission in or outside [country name] which constitutes an offence within the scope of a counter terrorism convention; or*
- 2) *[A]n act or threat of action in or outside [country name] which--*
  - a) *involves serious bodily harm to a person;*
  - b) *involves serious damage to property;*
  - c) *endangers a person's life;*
  - d) *creates a serious risk to the health or safety of the public or a section of the public;*
  - e) *involves the use of firearms or explosives;*
  - f) *involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to—*
    - I) *any dangerous, hazardous, radioactive or harmful substance;*
    - II) *any toxic chemical;*
    - III) *any microbial or other biological agent or toxin;*

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<sup>79</sup> Matthew Taylor, *Effective Counter-Terrorism: A Critical Assessment of European Union Responses*, Quaker Council for European Affairs, 2007, pp.6-7

- g) *is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;*
  - h) *is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;*
  - i) *involves prejudice to national security or public safety; and is intended, or by its nature and context, may reasonably be regarded as being intended to:*
    - I) *intimidate the public or a section of the public; or*
    - II) *compel a government or an international organization to do, or refrain from doing, any act [and*
    - III) *is made for the purpose of advancing a political, ideological, or religious cause.]*
- 3) *[A]n act which—*
- a) *disrupts any services; and*
  - b) *is committed in pursuance of a protest, demonstration or stoppage of work, shall be deemed not to be a terrorist act within the meaning of this definition, so long and so long only as the act is not intended to result in any harm referred to in paragraphs, (a), (b), (c) or (d) of subsection (2).<sup>80</sup>*

In conclusion, there are standards that a definition of terrorism, mainly in a domestic set up, has to fulfill. These standards are meant to put a limitation on state arbitrary definition of terrorism that is likely to include acts that are not genuinely terrorist in character. The fact that these standards are reproduced in several multilateral conventions and model legislations is a further proof of the fact that the aforementioned standards are applicable in a relatively consistent way. These model definitions that are, relatively speaking, deemed to be within the bounds of an acceptable definition of terrorism are useful for us to make comparisons with the definition accorded to terrorism in the Ethiopian anti-terrorism law in the later parts of this paper.

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<sup>80</sup> Common Wealth Secretariat, Draft Model Legislation on Measures to Combat Terrorism, 2002.

## **2.4. Impact of Terrorism on the Protection of Human Rights**

As has been dealt in detail with in the preceding parts of this research, though details vary, most definitions agree that terrorism is a psychological tactic: the use or threat of non-combatant violence to intimidate people and those who govern them into adopting desired political measures.<sup>81</sup> As a principally psychological tactic, the effects of terrorism are in no way limited to victimization of the ‘unlucky’ direct innocent victims by the use of illegitimate methods.

This part of the research explores the direct and indirect, the immediate and far-reaching consequences of terrorism on human rights protection. In place of investigating terrorism’s impact on human rights protection from the perspective of particular human rights, which would be stating the obvious, it approaches the problem from a slightly different perspective. Having stated its most apparent impact on human rights protection, due emphasis is given for the indirect, yet arguably, devastating effects of terrorism on issues related to human rights protection.

### **2.4.1. The Direct Impact of Terrorism on Human Rights Protection**

Since terrorism, properly defined, inevitably involves arbitrary killings of innocent citizens and serious destruction of civilian property, it is as easy to identify its direct impact on human rights as is a shining star visible in a dark night. It is, however, puzzling that, in not few cases, terrorists themselves claim that their measures are ultimately meant to address human rights concerns.<sup>82</sup> As is discussed hereinbefore, justifying the means with the end was prevalent in the aftermath of World War II. This can in no way be defensible by now in the age of human rights and peaceful settlement of any dispute. A thought that existed in an era preceding the epoch

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<sup>81</sup> Supra note 25

<sup>82</sup> See, Ben Saul, *Defending ‘Terrorism’: Justifications and Excuses for Terrorism in International Criminal Law*, Australian Year Book of International Law, Vol. 25, 2006, p.187.

wherein human rights flourishes is in no way acceptable to go along with the changed perspective on human rights that achieved global consensus.

If it is considered in a deeper perspective, one can seldom find a single human right that would not be affected by terrorist attacks. The progress report of the United Nations Special Rapporteur on Terrorism and Human Rights points out that ‘there is probably not a single human rights exempt from the impact of terrorism.’<sup>83</sup> But it would be unwarrantedly detailed, and in fact stating the obvious, if we pledge to make comments on each and every human right whose protection is curtailed by terrorism.<sup>84</sup> Even with this concern, however, this research mentions the impact of terrorism on three rights that are more directly affected than others. These are the right to life, property and the general right to freedom from fear. I believe that, they are models showing terrorism’s direct negative impact on all human rights.

Every one has an inherent right to life protected by law and no one shall arbitrarily be deprived of his life.<sup>85</sup> From the innocent victims’ perspective, nothing is as arbitrary as terrorist acts that just come out of the blue and violate rights. At this juncture, it is worth to comment on the argument of some commentators that terrorist acts are just heinous crimes but not always, strictly speaking, a human rights violation. They argue that, under international law, states, not people, commit human rights violations and it may be appropriate to speak of such violations only where a state fails to suppress terrorism, or is complicit with terrorist networks.<sup>86</sup> Nonetheless, I would say, whoever the perpetrator is, terrorist acts are always grave breaches of human rights.

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<sup>83</sup> Progress Report submitted by the Special Rapporteur on Terrorism and Human Rights, UN DOC E/CN.N/Sub.2/2001/31 par. 102

<sup>84</sup> For a detailed descriptive analysis on each human rights concerns, See, Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counterterrorism, Fact Sheet No. 32, pp. 30-56.

<sup>85</sup> 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.6(1).

<sup>86</sup> See for example, Dinah Pokempner, *Terrorism and Human Rights: the Legal Framework*, Terrorism and International Law: Challenges and Responses, Contributions Presented at the “Seminar on International Humanitarian Law and Terrorism” Organized by the International Institute of Humanitarian Law, Sanremo, 24-26 September, 2002, pp. 19-29 (Unpublished, ICRC Ethiopia, Documentation Center).

It is in no way dubious that acts of terrorism, regardless of the identity of the perpetrator, amount to grave breaches of human rights and hence hamper human rights protection, which is a process not to let human rights behind in every course of life. In fact, there are commentators who argue that let alone to argue on the crystal clear fact that terrorism violates human rights, indiscriminate acts of terrorism against a targeted group of population qualify to be regarded as crimes against humanity and genocide, as defined in the Rome Statute of the International Criminal Court, and hence justify the application of the principle of universal jurisdiction.<sup>87</sup>

It is common that, many a times, terrorist attacks target the destruction of property. In not few occasions has terrorism so far claimed countless assets of citizens in various parts of the world. This is a clearly unjustified violation of the internationally recognized right to property.<sup>88</sup> Apart from this, upon placing the security of the targeted population at peril, terrorism has profound impacts on the right to property of the same as it hampers peaceful functioning of life and diminishes the capacity to generate property, as compared to the case had there been no security risks.

The 'freedom from fear' of the public at large, mainly in areas where terrorism is a rampant experience, is a fundamental right that is put in peril owing to terrorism. The right to enjoy 'freedom from fear' is stressed in the preambles of both the International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR).<sup>89</sup> In the same fashion with the Covenants, while pointing out the negative impacts of terrorism on human rights protection, the Office of the United Nations High

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<sup>87</sup> See generally, James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Back Door to Universal Jurisdiction*, UCLA Journal of International Law and Foreign Affairs, Vol. 7, 2002-2003, pp. 169-199. But see, Supra note 82 at 177-226. Ben Saul generally contends that there are various justifications for allegedly terrorist movements, notably those with the goal to achieve self determination, and international law has to be responsive to these genuine concerns. This suggests that it is not acceptable to regard them as unjustified struggles, let alone to be labeled as crimes against humanity or genocide.

<sup>88</sup> See, The Universal Declaration of Human Rights, 1948, Art. 17.

<sup>89</sup> See, ICCPR Preamble, par. 4 and ICESCR Preamble, par. 4

Commissioner for Human Rights correctly holds that terrorism creates an environment that destroys the freedom from fear of the people.<sup>90</sup>

The destruction of the freedom from fear of the targeted population could be said to be a common denominator for the multifaceted negative implications that terrorism has on a variety of human rights.<sup>91</sup> The fact that terrorism can happen at any given point in time, even in times of deep sleep and entertainment when no one can plausibly expect harms to be done, makes it of overarching consequences in eroding the liberty of the targeted group and thereby paralyze the very basics of human rights protection i.e. the need to have a peaceful and predictable atmosphere to enjoy every set of rights.

Terrorism has multifaceted negative consequences on human rights protection. Its effects are, however, in no way limited to the overtly recognizable miseries that the media and the general public often give emphasis to. Paul R. Pillar rightly contends that the direct physical harm inflicted on people and property by terrorist attacks is the most obvious but by no means the only, or even the most important cost to our endeavors in human rights protection.<sup>92</sup> The reason that makes the direct impacts to feature out as a prominent one is just because deaths and injuries can be counted and property damage can be assessed<sup>93</sup> with a relative ease and convenience than the meandering impacts of terrorism on human rights protection. Hence, it is proper to give due emphasis for terrorism's indirect harmful impact on human rights protection.

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<sup>90</sup> Supra note 84 at 7.

<sup>91</sup> This is discernable from the wordings of the two Covenants 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.

<sup>92</sup> Paul R. Pillar, *Terrorism and U.S. Foreign Policy*, Brookings Institution Press, 2001, p. 18.

<sup>93</sup> Ibid

#### **2.4.2. Terrorism's Indirect Impact on Human Rights Protection**

It has been stated above that terrorism's harmful consequences are not limited to its directly noticeable impact on human rights of victims. With a more devastating impact, we have noteworthy negative implications, albeit obliquely, on the endeavor for the protection of human rights. The following paragraphs are destined to show the indirect negative impacts of terrorism on human rights protection.

To begin with, terrorism affects human rights protection by distorting public opinion and making the public believe that our rights are inherently contradictory with security concerns. In connection with this, Michael Ignatieff contends that terrorism harms the basics of human rights primarily by making a majority of citizens believe that their inherent liberties are a source of weakness rather than strength.<sup>94</sup> The guarantee of human rights protection hugely depends on public conviction on the inherently innate nature of human rights. If this conviction is lacking in the minds of both policy makers and the public at large, it is not unwise to profess that the dark age of human rights is coming back, after being buried decades before.

The abovementioned public insensitiveness and being pessimistic about civil liberties as sources of insecurity in the age of terrorism makes things easier for irresponsible governments to gain substantial public support to repressions of various types in the name of terrorism.<sup>95</sup> The trauma of fear that recent terrorist attacks create in the minds of the general public make it denounce the fundamentals of its commitment to basic human rights upon placing legitimate restrictions on governments. If governments are left excused on account of terrorism, human rights protection would be at odds in a much more devastating altitude than the direct consequences of terrorism. While the former has cross-cutting impact on the very basis of human rights, the latter is limited to certain instances of violation whose effects are restricted to the event it self, without significant implication on the attitude of the public.

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<sup>94</sup> Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Edinburgh University Press, 2005, p.59.

<sup>95</sup> Ibid

As a case in point that terrorism affects human rights protection by making the public supportive to unjustified government actions, Kam C. Wong has the following to say on the discriminatory process of racial profiling. Kam C. Wong stated that before the 9/11 attacks, about eighty percent of the American Public thought it was wrong for law enforcement to use racial profiling. However, after the shock of the incident, sixty percent favored racial profiling, “at least as long as it was directed at Arabs and Muslims.”<sup>96</sup> A simple inquiry into American history about the hard-fought battle to achieve racial equality may enable one to know the place of the norm against racial profiling in the history of that nation. It is astonishing that this hard-fought attitude is being betrayed due to the danger posed by terrorism. I believe this best displays the long-lasting negative implications of terrorism on human rights protection.

Terrorism has far-reaching negative consequences on the economy of the targeted state. Dinah Pokempner affirms this impact of terrorism. It is argued that terrorism usually has repercussions on the economy of victim states either through discouraging trade and investment or shifting state resources to battling terrorism. Consequently, economic and social rights such as education, health care and others would be jeopardized.<sup>97</sup> Especially for underdeveloped countries like Ethiopia, where foreign direct investment is very crucial to the poverty reduction campaign within the bounds of the intractable poverty circle, the fact that terrorism discourages trade and investment has fundamental negative implications on the enjoyment of economic and social rights. Needless to explain, the weaker the country’s economy is, the more vulnerable are the rights in issue. Terrorism takes its share of the blame in this regard.

The next negative effect of terrorism on human rights protection that is worth being mentioned is that it serves as a pretext to widen executive powers in the name of fighting terrorism and thereby unduly intruding against basic human rights. This trend has especially become more evident following the terrorist attacks of 9/11. It has been commented by many human rights scholars and activists that mainly after that

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<sup>96</sup> Kam C. Wong, *The USA Patriot Act: A Policy of Alienation*, Michigan Journal of Race and Law, Vol.12, 2006-2007,p.198.

<sup>97</sup> Supra note 86 at 22

incident, the assumption that modern, legitimate statehood increasingly entailed the protection of human rights came under serious challenge in many parts of the world.<sup>98</sup> Leaving the details for discussions in the next chapter, the fact that terrorism has gained prominence indirectly affects human rights as human rights insensitive states take this as a pretext to neglect human rights concerns.

Finally, the Office of the United Nations High Commissioner for Human Rights states that '*terrorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations and other international instruments: respect for human rights; the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.*'<sup>99</sup> These factors have profound impacts that have crosscutting implications in the whole process of human rights protection that rests on the preservation of the rule of law principle. Moreover, in not few occasions do terrorists become beyond the reaches of the law and thereby denounce the basics of rule of law.<sup>100</sup>

To summarize this chapter, it mainly focuses on conceptual matters. This chapter begins with showing the growing trend of terrorism from early periods of history to its post-modern contemporary features. A detailed analysis has been made on issues related to definitional ambiguities in describing terrorism and terrorists stressing on the overarching importance of delimiting the definition thereto based on international standards. Finally, the chapter focuses on showing the multifaceted negative repercussions that terrorism has on human rights protection.

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<sup>98</sup> Rosemary Foot, *Human Rights and Counterterrorism in Global Governance: Reputation and Resistance*, Global Governance, Vol.11, 2005, p.292.

<sup>99</sup> Supra note 84 at 7. See also, Ibrahim A. Gambari, United Nations Under-Secretary-General for Political Affairs, A Multilateral Response to Terrorism, p.3. [www.un.org/depts/dpa](http://www.un.org/depts/dpa) as accessed on June, 2009.

<sup>100</sup> See for example, Supra note 48 at 79. It is mentioned here that in Columbia, where we have well-organized terrorist groups with principally drug dealing goals, the justice machinery fears to prosecute someone with an alleged link with the terrorist groups operating there as their agents, not unexpectedly, kidnap or kill the investigator, judge or any other person connected thereto. This shows how terrorism goes to the level of anarchy.

## **Chapter Three**

### **3. Countering Terrorism vis-à-vis Human Rights Protection**

#### **3.1. Introduction**

In the previous chapter, we have seen terrorism is fundamental challenge to human rights protection. Given the fact that modern-day-terrorism has reached a complicated level, it has become evident that it cannot be successfully managed in the absence of domestic commitment and international cooperation geared towards a successful counterterrorism strategy. The international community in general and individual states in particular is under a pressing international duty to control terrorism. This is not a novel duty but a manifestation of their commitments in international human rights instruments whose protection is now at risk by the danger terrorism creates.

In this chapter, counterterrorism is viewed from a human rights perspective. Both the failures and successes of counterterrorism strategies have magnificent implications on human rights protection. The success of the strategies is of much help to herald a dawn of human rights protection as violations arising from terrorism will, at least, be reduced in magnitude. On the contrary, the failure signals that human rights would continue to be at odds not just because terrorism still persists but as well human rights would be violated in the name of fighting terrorism and to gain political benefits, not for genuine concerns of human rights protection, out of the campaign.

With a view to explore the above stated theme, counterterrorism is defined, its different modalities are explored and a detailed analysis is made to identify the various impacts of counterterrorism measures on human rights protection. It has to be stressed that the legitimacy of counterterrorism measures, notably anti-terrorism legislations, has to be seen within the broader perspective to strike a balance between combating terrorism and protecting human rights in the process.

### 3.2. The Meaning and Relevance of Counterterrorism Measures

Counterterrorism measures refer to the whole set of activities that the international community of states undertake to put a limit, and if possible, totally prevent terrorism and the resulting casualties. Harry Henderson defined counterterrorism as the attempt to prevent terrorism or at least reduce its frequency and severity.<sup>101</sup> A successful counterterrorism strategy calls for the need to adopt concerted mechanisms both at the national and international level.

Counterterrorism measures have enormous relevance in the contemporary world. The use of such measures is indispensable if we love to see the negative impact of terrorism on human rights is abated. 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.

The UN underscored the justified relevance of counterterrorism measures. It is stated that '*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.*'<sup>102</sup> If a state fails to take adequate measures to protect human rights from terrorist attacks, it bears responsibility for the violation. Hence, an effective counterterrorism is part of a state's human rights duties.<sup>103</sup> As a manifestation of state duty for human rights protection, counterterrorism measures shall always be loyal to human rights protection. Failure in this regard is nothing but self-refuting with the promised goal of counterterrorism measures.

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<sup>101</sup> Supra note 4 at 22.

<sup>102</sup> See, Supra note 84 at 8.

<sup>103</sup> Jonathan Cooper, *Countering Terrorism, Protecting Human Rights: A Manual*, Office for Democratic Institutions and Human Rights, OSCE/ODIHR, 2007, P.15.

### **3.3. Different Modalities for an Effective Counterterrorism Strategy**

Just as terrorism takes different forms, so does counterterrorism measures. Before embarking on dealing with modalities of countering terrorism, it shall always be remembered that the general objective of any method of combating terrorism is and should always be neutralizing terrorist groups and individuals.<sup>104</sup> The goal of any counterterrorism measure is to put an end to or limit the casualties that occur as a result of terrorist attacks. For this purpose, nothing is as effective as neutralizing terrorist individuals and groups i.e. making them believe that their misdeeds are unacceptable crimes in the age of democracy and human rights. Hence, all counterterrorism efforts have to be geared towards this goal.

When one speak of the various modalities of countering terrorism, it varies from general mechanisms to specific measures that governments take to deal with the problem of terrorism. The latter are too detail to be dealt one by one and they inevitably vary from one jurisdiction to the other. Hence, in this paper, the focus is on the general mechanisms that states have to undertake to implement a successful counterterrorism strategy. In the following pages, we have some prominent strategic methods that assist in the increased efficacy of a given counterterrorism strategy, irrespective of the jurisdiction where it is going to be applied.

#### **3.3.1. Addressing the Root Causes to Terrorism**

Even in the absence of an internationally accepted definition of terrorism, no body doubts that terrorists often have political, religious or ideological origins, which may or may not be genuine. In situations where the terrorists have an internationally acceptable genuine concerns to fight for<sup>105</sup> there is no need to waste our times in a pointless exercise that merely brings perpetrators to justice. It is better to look for a

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<sup>104</sup> Supra note 22 at 272.

<sup>105</sup> There is no doubt that the genuineness or not of their struggle is a contentious matter and it mainly boils down to be determined by politics.

compromise and entertain the basics of their desires. This does not, however, mean that perpetrators have to be sent unasked and their groundless claims shall always be entertained. Depending on the justice system in each country, no perpetrator shall be left free. Yet, it is still commendable to stress on preventive tasks of addressing the root causes to terrorism.

Regarding politically motivated terrorist attacks and the viable responses thereto, Michael Ignatieff contends that *'if terrorism is a form of politics, it needs to be fought with the force of argument and not the force of arms. A campaign on terror that is not guided by a clear political strategy, to win support for democratic government and drain support from terrorists, is bound to fail.'*<sup>106</sup> In other words, a democratic government shall principally prove that it has a moral legitimacy to condemn the terrorists. Many a times, terrorists claim to represent causes and grievances and speak in the name of millions.<sup>107</sup> Hence, it would be wise to make the floor open for a peaceful political dialogue and a group that resorts to terror in such a scenario will have little or no public support as it lacks genuine moral ground to justify, at least from the perspective of its sympathizers, its misdeeds.

In a similar fashion with politically motivated terrorism, religiously motivated terrorism can better be solved by addressing the root causes i.e. manifest religious inequality and subjugation of one by the other. Having made an inquiry as to the causes of religiously motivated terror, Jessica Stern concludes that alienation and humiliation of a certain group are reasons among grievances that give rise to *'holly war'* in religious context.<sup>108</sup> In general, in all cases of terrorism, it is only by the elimination of the root causes that the international community can predictably hope to succeed in substantially reducing, if not putting an end to, terrorism and its causalities.<sup>109</sup>

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<sup>106</sup> Supra note 94 at 82.

<sup>107</sup> Ibid

<sup>108</sup> See generally, Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill*, Harper Collins Publication, 2003.

<sup>109</sup> Charles P. Weber, *Terror, Terrorism, and the Human Condition*, Palgrave Macmillan, 2004, p. 105.

Addressing the root causes to terrorism is like going half way in combating terrorist attacks. However, not in all cases can we expect terrorist attacks to stop the moment the legitimate root causes are addressed. It is a pious wish to expect some mindless terrorists to quit their terrorist agenda. Nor is it true to say that we have unaddressed genuine root causes behind every terrorist attack. Nevertheless, leaving the extreme cases aside, addressing the root causes has to be the first preventive weapon that a democracy should use to settle terrorism-related problems.

### **3.3.2. Strengthening International Cooperation**

In most cases, terrorism has an international character. The mere fact that a state has put-in-place effective counterterrorism strategies can not secure that it is free from terrorist threats. If terrorist groups have somewhere to flourish, they can at any time attack any state.<sup>110</sup> For instance, it is only through an international cooperation that the mobility of terrorists can better be checked.<sup>111</sup> As could be inferred from the adoption of thirteen conventions against terrorism under the auspices of the United Nations and the numerous resolutions of its organs,<sup>112</sup> states have long understood the importance of international cooperation to effectively deal with terrorism.

### **3.3.3. Enacting Domestic Anti-Terrorism Legislations**

To state the obvious, international law has no effective enforcement mechanisms. Had it not been for the existence of local laws enforcing internationally agreed upon standards, rights in the international plane would have remained pious wishes without implementation. The same is true for the state duty to prevent terrorism and protect its

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<sup>110</sup> The 9/11 terrorist attacks best signify this truth. It is after this incident that the United States government comes to understand the strategic importance of an international cooperation to effectively implement counterterrorism strategies. If terrorism can not be won by the super power of the world, acting in isolation, it is not wise to expect other states to succeed in the process. This underscores the inevitable necessity of strong international network and cooperation to better handle the problem.

<sup>111</sup> See generally, Susan Ginsburg, *National Security Efforts to Disrupt the Mobility of Terrorists*, Loyola University Chicago International Law Review, Vol. 2 issue 2, 2004-05. It has to be reckoned that facilitated mobility lies in the heart of a successful terrorist attack in the international plane.

<sup>112</sup> See infra, the detailed discussions on this point in the next chapter of this paper.

citizens there from in different ways including, but not limited to, prosecuting perpetrators. Perpetrators could be prosecuted either by use of ordinary criminal law or a specific legislation to that effect.

Terrorism is a specialized form of criminality which presents peculiar difficulties in terms of policing and criminal process such as remote organization, capacity to intimidate and sophistication.<sup>113</sup> In different jurisdictions, and notably the Ethiopian legal system, it is not unusual to address crimes of special character in a separate legislation. Owing to the special character of terrorism offences, it demands a specialist response to overcome the difficulties posed for normal detection methods and processes within ordinary criminal justice.<sup>114</sup> It has to be stressed that there is nothing wrong in enacting a separate anti-terrorism law. A problem can be said to exist only if such legislation becomes too unfriendly with human rights protection concerns.<sup>115</sup> In short, the enactment of special anti-terrorism laws assists in the process of effectively dealing with crimes with a terrorist mission.

#### **3.3.4. Other Modalities Needed for the Efficacy of Counterterrorism**

As counterterrorism is always a process, it needs other techniques to be adopted for the betterment of its efficacy. Along with any method that is used to combat terrorism, human rights considerations shall always remain intact. Any strategy has to be pursued without unduly transgressing the proper balance between the need to protect human rights of the alleged terrorists and the general public. What is certain is that human rights are not an optional extra or luxury to any counter-terrorism strategy; human rights must be at the core of that strategy.<sup>116</sup> It is only this way that any counterterrorism strategy can prove its efficacy.

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<sup>113</sup> See, Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, Oxford University Press, 2002, p. 13.

<sup>114</sup> Ibid

<sup>115</sup> I am arguing so because, regarding Ethiopia's new anti-terrorism law, I heard many opinions from the public, the opposition parties and the private media that the law, as it is, do not bake any bread for the general public and it is pointless to be enacted as a separate legislation.

<sup>116</sup> Supra note 103 at 21.

Harry Henderson mentioned four very important strategies that foster the efficacy of counterterrorism. The first is applying refined intelligence schemes as the first line of defense against terrorists by finding out who they are and what they are up to.<sup>117</sup> The cleverness of the intelligence needs to have human rights protection in view. The more organized a country's intelligence is the greater the possibility to acquire the necessary information without curtailing human rights guarantees. Other strategies that he mentioned are improving the protection of infrastructures that the public uses and terrorists conventionally focus on,<sup>118</sup> controlling weapons of mass destruction not to let irresponsible actors possess them and giving due concern for cyber terrorism, which might be the next prominent front in the battle against terrorism.<sup>119</sup>

### **3.4. Justified Limits on Human Rights While Countering 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.'*<sup>120</sup> Counterterrorism has to reconcile the necessity of combating terrorism with the constitutional, legal and ethical demands of a democratic state.<sup>121</sup>

Counterterrorism is a manifestation of state's duty to protect human rights. But, it is often used as a pretext for human rights violations.<sup>122</sup> 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<sup>123</sup> in this regard.

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<sup>117</sup> Supra note 4 at 23.

<sup>118</sup> This refers to areas with high public mobility such as entertainment and transportation sites.

<sup>119</sup> Supra note 4 at 24-30.

<sup>120</sup> Supra note 84 at 23.

<sup>121</sup> Gregory M. Scott et al, *21 Debated Issues in World Politics*, Pearson Education Inc., 2004, p.152

<sup>122</sup> See infra, forthcoming discussions in this chapter for the details.

<sup>123</sup> See, Supra note 94 at 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*

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.'*<sup>124</sup> 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 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.<sup>125</sup> These are restrictions on certain rights and in a very limited set of exceptional circumstances and derogations from certain human rights provisions.<sup>126</sup> 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. They are just *'lesser evils'* that a democracy may commit when it genuinely believes that it faces the greater evil of its own destruction.<sup>127</sup> Whether the limits of counterterrorism measures on human rights are justified or not has to be seen from this perspective.

Restrictions on rights are built into the human rights law architecture. 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 devoid of restrictions. There are, however, other rights that can in no way be restricted. Though it is not the object of this paper to make through 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

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*defeating terror requires violence. It may also require coercion, deception, secrecy and violation of rights."*

<sup>124</sup> 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.

<sup>125</sup> Supra note 84 at 23.

<sup>126</sup> Ibid

<sup>127</sup> Supra note 94 at 2.

ICCPR ordains that there are legitimate instances of restrictions that may be imposed on the right to liberty and security of the person.<sup>128</sup> On the contrary, there are rights that can in way be restricted. A prominent right of such nature is the right not to be subjected to torture.<sup>129</sup> Therefore, 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.<sup>130</sup> Not to go to the details, a limitation or restriction on human rights for counterterrorism purposes is legitimate, only if it fulfils the requirements. A limitation's legitimacy in specific cases can better be judged on a case by case basis.

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.<sup>131</sup> This is dictated by a necessity. The fact that democracy is not only

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<sup>128</sup> See generally, Supra note 85 art. 9(1)-(5).

<sup>129</sup> 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.

<sup>130</sup> See, Human Rights Committee, General Comment No. 31 Para. 6 and, Siracusa principles on the limitation and derogation of provisions in the international covenant on Civil and Political Rights. (E/CN.4/1985/4, annex) as cited in Supra note 83 at 23.

<sup>131</sup> See, Supra note 85 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

concerned about the rights of the individual; it is equally committed to the security of the majority,<sup>132</sup> justifies derogations in such circumstances. Nevertheless, it has to follow stringent requirements and there are non-derogable rights that can in no way be suspended even in such situations.<sup>133</sup> Hence, a counterterrorism measure that suspends the application of human rights and fundamental freedoms has to be exercised within the bounds of the international human rights standards.<sup>134</sup>

When succinctly expressed, 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 limitation/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 politicians might use to justify it, a clear violation of human rights that the international community should not tolerate.

### **3.5. The Negative Impact of Counterterrorism on Human Rights Protection**

Preventing and fighting terrorism is a tough task. It is not uncommon for states to follow a wrong path vowing that their measures are meant to address terrorism. Irrespective of the magnitude of the danger that terrorism poses on national and international security and human rights, a state cannot overreact if it claims to be bound by the international human rights covenants. Especially in the aftermath of the 9/11 terrorist attacks, there seem to be a general trend in the international community of states to curtail human rights in the name of fighting terrorism.<sup>135</sup>

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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.

<sup>132</sup> Supra note 94 at 8.

<sup>133</sup> Art. 4(2) of the ICCPR has a full list of such rights.

<sup>134</sup> See generally, 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.

<sup>135</sup> See for example, John Ip., *Comparative Perspectives on the Detention of Terrorist Suspects*,

Politicians often claim to justify their misdeeds on human rights by recalling blatant neglects of human rights by the terrorists themselves. But it has been precisely commented that *'the neglect terrorists show for human rights is irrelevant for the question, how much human rights terrorists deserve themselves?'*<sup>136</sup> Moreover, the danger of overreacting to terrorism is not just limited to affecting the human rights of the terrorist; it as well has far-reaching negative consequences on the human rights of the rest of the society<sup>137</sup> whom a state aspires to protect upon countering terrorism. In the subsequent discussions, we will focus on exploring the major negative repercussions of counterterrorism measures on human rights protection.

### **3.5.1. Minimized Role of the Judiciary**

Respecting the principles of democracy is of great relevance for the protection of human rights. One such principle is separation of powers and the consequent check and balance between the three branches of government. 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.

The counterterrorism measures in the aftermath of 9/11, however, make the use of the check and balance guarantee for the protection of human rights something that is not easy to attain. Governments are invoking security concerns to unduly expand

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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.

<sup>136</sup> Supra note 62 at 581.

<sup>137</sup> Colin Warbrick, *The European Convention on Human Rights and the Prevention of Terrorism*, The International and Comparative Law Quarterly, Vol. 32, No. 1, 1983,p.84.

executive powers, mainly at the expense of judicial powers.<sup>138</sup> It is often rightly claimed that the looming terrorist threats are being taken as excuses to justify the minimized role of the judiciary to check executive power.<sup>139</sup>

A writer named Rosemary Foot said that a government's adherence to human rights norms depends, unsurprisingly, on the vibrancy of a country's civil society and on whether there is rule of law and separation of powers, especially an independent judiciary.<sup>140</sup> High profile judicial supervision over counterterrorism events in "real time" is vital to accentuate the role of law in the decision making process within the executive government and enable human rights activists to effectively challenge the executive's policies and actions.<sup>141</sup> Owing to its susceptibility to executive abuse, counterterrorism is a clear case when the judiciary is badly needed to check the powers of the executive. A blatant move to unduly restrict the role of the judiciary in the process of countering terrorism will inevitably have an irreparable damage on human rights of suspected terrorists and the general public or a section thereof that is regarded by the state officials as sympathizers of the alleged terrorists.

The negative repercussion of this trend on human rights protection is overarching and may not perfectly be addressed in this paper. Succinctly stated, its impact is so widespread that the problem can be better known when we encounter each case. Unchecked executive powers lead a state to nothing but totalitarian governance. As a case in point, a renowned official of the British government had once said that "*judicial review of administrative action had 'become a lawyers' charter' which prevents the state from 'protecting the majority from the minority'.*"<sup>142</sup> Having seen the wordings of this speech, it is expected that one might guess it to be a speech from

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<sup>138</sup> See, David C. Vladeck, *Litigating National Security Cases in the Aftermath of 9/11*, Journal of National Security Law & Policy, Vol.2, 2006-2008, pp.165-193. See also, Supra note 94 at 59.

<sup>139</sup> See, Heidee Stoller et al, *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, Yale Law and Policy Review, Vol. 22, 2004,p.224. Cf. Jude McCulloch, *Contemporary Comments: Australia's Anti-Terrorism Legislation and the Jack Thomas Case*, Current Issues in Criminal Justice, Vol. 18,2006-2007, p.364

<sup>140</sup> Supra note 98 at 304.

<sup>141</sup> Yuval Shany, *Israeli Counterterrorism Measures: Are They "Kosher" Under International Law?* P.96 in the unpublished document cited above in supra note 84.

<sup>142</sup> David Pannick, *Human Rights in the Age of Terrorism*, Israel Law Review, Vol.36, 2002,p.2.

a government official in an undemocratic state. This shows how counterterrorism is taken to disguise government norms that are in perfect contradiction with democratic principles and conventional judicial role which consequently makes human rights violation an easy affair. If the world's most prominent democratic states are marching against the judiciary's independence in the pretext of countering terrorism, one can easily imagine the magnitude of the problem in underdeveloped democracies.

### **3.5.2. Using Counterterrorism to Silence Political Opposition**

The volatile political nature of terrorism makes political protest suffer more in the name of fighting terrorism. Many governments take the counterterrorism campaign as an opportunity to attack their political opponents and punish political dissent even though it may not be violent.<sup>143</sup> In not few occasions do some states create artificial offences to prosecute their political opponents. The use of counterterrorism as a pretext is successful in this regard as it often gives the state prosecutorial advantage in various ways that differ from one legal system to the other.<sup>144</sup> This comes from the fact that most anti-terrorism legislations tilt towards enabling the justice machinery to easily prosecute suspected terrorists than do ordinary criminal justice.

The right to protest plays an important role in free and democratic societies, providing individuals and groups with an opportunity to influence government action through

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<sup>143</sup> See for example, Supra note 82 at 20. Ben Saul illustrates many cases to justify the so called opportunism that states use to punish all forms of political dissent in the pretext of fighting terrorism. This was explained in the following manner: "Some States have deployed the international legitimacy conferred by Council authorization to define terrorism to repress or de-legitimize political opponents, and to conflate them with Al-Qaeda. Thus, China bluntly characterizes Uighur separatists in Xinjiang as terrorists; Russia asserts that Chechen rebels are terrorists, even though many are fighting in an internal conflict; and India seldom distinguishes militants from terrorists in Kashmir. In Indonesia, insurgencies in Aceh and West Papua have been described and combated as terrorism, as have a Maoist insurgency in Nepal and an Islamist movement in Morocco. Predictably, Israel has identified Palestinians with Al-Qaeda, with Ariel Sharon calling Arafat "our Bin Laden"."

<sup>144</sup> See for example, 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. It is stated here that in Chile, the government has long been in conflict with the indigenous people named the Mapuche that often resist government take-over of their land for investment purposes. For long, the government has tried to take members of this group to jail but often in vain. However, the use of the Terrorism Act has enabled Chile to convict dozens of Mapuche for terrorist crimes.

means other than the electoral process.<sup>145</sup> The right to protest is a functional part of the right to political participation, which is a cardinal principle of democracy. Any form of limitation on this right, is of far-reaching negative effects on human rights protection. The use of this scheme is one among the tools that citizens are expected to challenge undue government practices curtailing human rights protection.

An attack on the free exercise of this right in the name of countering terrorism decidedly affects the betterment of human rights protection. Governments often use different strategies to curtail the exercise of political protests.<sup>146</sup> Counterterrorism measures have created a glorious opportunity for irresponsible governments to pursue their political agenda in the pretext of fighting terrorism, which undeniably has a public purpose in view. As has been noted in the second chapter, various human rights defenders rightly contend that pressure to include all hostilities by rebel groups in domestic armed conflicts is too broad to be considered as an act of terrorism<sup>147</sup> as it is often meant to attack political dissent within the umbrella of fighting terrorism.

Political dissent suffers more from counterterrorism measures. To start with the simple one, even questioning the legitimacy of counterterrorism laws might fall within such umbrella. The campaign against political protest is often carried out by making a domestic definition of terrorism encompass modalities of political protest.<sup>148</sup> The fact that totalitarian regimes do not distinguish between political opposition and criminal activity makes political protest a center of the fight against

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<sup>145</sup> Christopher Dunn, *Balancing the Right to Protest in the Aftermath of September 11*, Harvard Civil Rights-Civil Liberties Law Review, Vol. 40, 2005, p.328.

<sup>146</sup> Id. at 330. It is mentioned that there are three noteworthy strategies in this regard. The first one is the doctrine of prior restraint according to which the government totally bans the exercise of political protest. The second one is government denial of a permit which may be considered as tacit prevention. The third one is what is called the "time-place-manner" restrictions.

<sup>147</sup> Supra note 56

<sup>148</sup> 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 if there is a real commitment not to unduly curtail the right political protest under the guise of preventing terrorism.

terrorism.<sup>149</sup> In such cases, political protests will be carried out with the spirit of fear of government incursions in the pretext of combating terrorism and this inevitably weakens the strength of political dissent.

The other far-reaching negative consequence of shrinking the peaceful political space is that it may provoke violent struggles. It was rightly noted that the repression of dissent in the pretext of countering terrorism may turn people away from more peaceful forms of political protest towards violent expressions of dissatisfaction.<sup>150</sup> It is evident that poorly conceived counter-terrorism policies and practices, especially those that are drafted too broadly, or applied too forcefully, can compound resentment and therefore be counter-productive.<sup>151</sup> Addressing the root causes to terrorism is a fruitful modality of preventing terrorism ahead. Contrarily, using counterterrorism to pursue the government's political agenda by punishing political dissent inevitably reinforces terrorism as the root cause to terrorism is aggravated, let alone addressed.

### **3.5.3. The National Security Pretext to Set-Aside Human Rights**

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.<sup>152</sup> 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

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<sup>149</sup> Id. at 287

<sup>150</sup> Id. at 290. Jude McCulloch says that '*when words are banned, hands make their move.*'

<sup>151</sup> Supra note 103. The forceful and targeted application of counterterrorism measures against political opposition is likely to regenerate terror as in most cases rebel groups aspire to use undemocratic governance so as to drain public support from the government. Moreover, in most cases, politically motivated terrorist groups are more equipped and organized and their unreserved move towards terror is likely to cause innumerable damages on the public at large.

<sup>152</sup> 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.

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 might affect national security. In fact, it furthers national security interests.<sup>153</sup>

The tendency to pit the ideas of liberty and security against each other is identified as one of the major side effect of contemporary counterterrorism measures.<sup>154</sup> This is a problem of failure to appreciate the strategic correlation between countering terrorism and preserving national security. Human rights standards are perfectly compatible with a genuine protection of national security concerns while fighting terrorism.<sup>155</sup> Respect for human rights is, in fact, by far very important at a time when national security is jeopardized.<sup>156</sup> It could be said that the tendency to invoke national security concerns as an excuse to unduly ignore human rights concerns is a continuum of the blatant move to expand the coercive power of the executive branch of government that conventionally deals with national security affairs.

#### **3.5.4. Other Harmful Consequences of Counterterrorism Measures on Human Rights Protection.**

There are a number of human rights that are considered to be affected by the fight against terrorism. An attempt to explore specific impacts of counterterrorism campaigns on each particular human right might be stating the obvious that adds no significant merit for our discussion. What is important is to show the generally

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<sup>153</sup> This does not mean that the interests of national security and human rights protection do always coincide. In such cases, international human rights have its own way to deal with the scenario. We have the notions of restrictions and derogations. When one speak 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.

<sup>154</sup> Supra note 103.

<sup>155</sup> Ibid. It is acknowledged that “*the international human rights framework is ... applicable in dealing with the terrorist threat, from addressing its causes, to dealing with its perpetrators, to protecting its victims, to limiting its consequences.*”

<sup>156</sup> Nsongurua J. Udombana, *Battling Rights: International Law and Africa’s War on Terrorism*, African Year Book of International Law, Vol. 13, 2005, p. 119. Nsongurua argues that “*anti-terrorism measures and human rights need not be mutually exclusive, since both are concerned in the defense or procurement of an objective goal.*”

unpleasant mood that the counterterrorism measures impose on human rights protection. Yet, it would be worthwhile to take sample human rights and show how they are affected by the process meant to combat terrorism.<sup>157</sup>

Let us consider counterterrorism's impact on freedom of expression and the right not to be subjected to torture and inhuman and degrading treatment as examples to show the severity of the problem and the need to react against this counterproductive campaign. This does not mean that these are the only prominent rights that are often affected in the name of fighting terrorism. They are just samples to show the trend.

Freedom of expression is often named as the '*champion of all rights*'. This is precisely because without which it may not be possible to enjoy many of the other rights protected by human rights standards.<sup>158</sup> It is the medium through which one can challenge other violations of his/her rights. Therefore, any restriction on freedom of expression should be subject to very close scrutiny and must be convincingly established.<sup>159</sup> However, there is an increasing tendency that states consider the exercise of freedom of expression very seriously and in most cases even comments on anti-terrorism legislations might undeservedly fall within the ambit of prohibited speech.<sup>160</sup> It may not be easy to realize when a given expression ceases to be a freedom and become a punishable act of encouraging terrorism. It is expected that this might give an opportunity to human rights insensitive governments to dismantle the private media and consequently bring a dark age to human rights protection. I think it would be waste of time and space to justify the inherent link between a well-organized media and the prevalence of human rights protection.

The right not to be subjected to torture and inhuman and degrading treatment is the other fundamental human rights whose protection remains to be at odds during the

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<sup>157</sup> See, Supra note 84 for a detailed description of the problem on a case by case basis from the perspective of specific human rights considerations.

<sup>158</sup> Supra note 103 at 220.

<sup>159</sup> Ibid.

<sup>160</sup> Id. at 221.

process of countering terrorism.<sup>161</sup> The right not to be tortured is an absolute right that “*no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*”<sup>162</sup> This shows that terrorist attacks or threats thereto can in no way justify the use of torture in the process of combating terrorism.<sup>163</sup> Such a use transgresses international human rights obligations.

However, state intelligence officials are often blamed for using torture during investigations of suspected terrorists while countering terrorism. The Guantanamo detention center might be a case in point. In connection with this, the United Nations’ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, reports that it has noticed that lack of oversight and political and legal accountability has facilitated illegal activities, including the use of torture, by intelligence agencies and that such unlawful conduct may have been condoned or even secretly directed by government officials.<sup>164</sup> This shows how counterterrorism is dismantling states’ commitments to human rights protection.

Before winding up discussions on the negative implications of counterterrorism measures on human rights protection, let us consider some other consequences of the same on human rights, albeit in an oblique manner. The first one is counterterrorism’s budgetary expenditure and its impact on human rights protection. It is true that states

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<sup>161</sup> See for example, Supra note 135. In his article John Ip. comparatively explores the detention of terrorist suspects in four jurisdictions. Among other things, the Guantanamo detention center and its various methods are commented as unfounded in the era of human rights when the right to be free from torture and inhuman and degrading treatment is an absolute right.

<sup>162</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984, Entry into Force, 26 June 1987, art.2(2).

<sup>163</sup> See also, The Cleveland Principles of International Law on the Detention and Treatment of Persons in Connection with the “ Global War on Terror.”, Principle 3 ordains that “*nothing in the “ Global War on Terror” justify violating prohibition on committing acts of torture or cruel, inhuman or degrading treatment.*”

<sup>164</sup> 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, 4 Feb. 2009. See also, Steven P. Lee(ed.), *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory*, Springer, 2007.

invest a lot of money in pursuance of their counterterrorism objectives.<sup>165</sup> With the obvious lack of budgetary expenditures, prominently in underdeveloped states, this would indirectly have an impact on state expenditure to the realization of human rights notably that of economic, social and cultural rights, which principally depend on a state's economic potentials.

Another indirect consequence of the global counterterrorism campaign relates to the relations between the economically strong democratic nations and aid-dependent undemocratic nations with respect to issues of human rights protection. In most cases, the developed world, most prominently the United States and the European Union, attach human rights conditions before lending a hand for economic and other supports. Setting aside this strategy's demerits for the time being,<sup>166</sup> it could be said that this might trigger human rights insensitive governments to try their best to meet the conditions.

The above-stated trend is however drastically affected after the beginning of the comprehensive fight against terrorism. As a case in point, it has been argued that the developed countries make the fight against terrorism a primary agenda of their foreign relations and thereby giving space for blatant disregard of human rights by authoritarian regimes so long and so long only as they cooperate in the fight against international terrorism.<sup>167</sup> Indisputably, this harms human rights protection.

Counterterrorism measures have still other negative consequences on human rights protection.<sup>168</sup> However, the once mentioned above, suffice to serve the objective of

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<sup>165</sup> See, Supra note 92. See also, Wafula Okumu and Anneli Botha (eds.), *Understanding Terrorism in Africa: Building Bridges and Overcoming the Gaps*, Institute for Security Studies, 2008, pp. 36-49.

<sup>166</sup> There are commentators who genuinely condemn such practices mainly because the developed countries often use the aid not to help the needy but to further their strategic goals.

<sup>167</sup> See for example, Supra note 24 at 14.

<sup>168</sup> See for example, Makau Mutua, *Terrorism and Human Rights: Power, Culture and Subordination*, Buffalo Human Rights Law Review, Vol. 8, 2002, pp.1-13. It is argued that one does not need to make a through research to identify that the fight against terrorism creates a dichotomy within the international community of states. The "either with us or against us" policy of the Bush administration in the United States has brought a profound impact in dividing countries of the world to either of the camps. Makau Mutua blames the United States and its European allies for subordinating all other

this section of the chapter i.e. exploring the harmful consequences of counterterrorism measures on human rights protection. A close look at the issues in this and the previous chapter is made in the last chapter of this paper from the perspective of Ethiopia's new anti-terrorism legislation.

By way of summarizing this chapter, it could be said that counterterrorism measures are not alien to human rights protection; they are in fact manifestations of state obligations to protect their citizens from human rights violations arising from terrorism. As manifestations of state duty to take positive actions in pursuance of human rights protection, counterterrorism measures shall always be compatible with the state's human rights obligations. This could effectively be done by striking the appropriate balance between the need to combat terrorism and remain committed to human rights protection at all times. It has to be reckoned that freedom itself must set a limit to the measures we employ to maintain it.<sup>169</sup>

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interests and questions, no matter how important and urgent, to a new international security-driven order geared toward the elimination of global terrorism. Stating it in succinct terms, Makau Mutua views counterterrorism measures as a continuum of Eurocentric indoctrination of international norms which in effect casts a doubt on the universality of human rights by eliminating any opportunities for a robust dialogue on the scope of human rights, their cultural relevance and the strategies for their enforcement.

<sup>169</sup> See, *Supra* note 94 at 145.

## **Chapter Four**

### **4. The United Nations' Response to Prevent Human Rights Abuses Emanating From Terrorism and Counterterrorism**

#### **4.1. Introduction**

Since terrorism has international characters, it could not be effectively dealt with unless there is an international cooperation that harmonizes states' policies and laws to deal with it in a coordinated manner. In this chapter, the response of the UN with respect to protecting human rights from terrorism and misguided counterterrorism strategies are explored. To this end, the United Nations' comparative advantage to harmonize international efforts in protecting human rights while fighting terrorism is emphasized, its guiding principles for its counterterrorism strategies are assessed and the efforts that its organs made so far are elucidated. Moreover, a brief overview of the thirteen international terrorism conventions is made so as to better understand the United Nations' underlying jurisprudence in the area.

#### **4.2. The United Nations' Indispensable Role in Countering Terrorism and its Shortcomings**

Terrorism is not something that just occurs within the boundaries of a given state. It often has international characters. Its international character is manifested in various forms such as the crossing of international borders by the terrorists, the nationality of the perpetrator or the victim and the target.<sup>170</sup> It is this international character of terrorism that calls for the inevitability of international cooperation between and among states to effectively deal with the matter. The aim of this section is to show the comparative advantage of the United Nations organization as an indispensable actor in the process of combating terrorism.

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<sup>170</sup> Supra note 6 at 5.

The issue of countering terrorism has already been a matter of both regional and international concern. We have numerous regional cooperations to deal with terrorism that have reached the level of adopting multilateral conventions geared towards preventing and punishing terrorism.<sup>171</sup> All these regional cooperations and the conventions thereof are principally meant to address terrorism concerns at a regional level. They can in no way substitute<sup>172</sup> the indispensable role that the United Nations has to play in this regard. The United Nations has a comparative advantage from any other entity to effectively handle terrorism matters in the international plane.

Ibrahim A. Gambari, the United Nations' Under-Secretary-General for Political Affairs, identified four basic reasons justifying the comparative advantage of the United Nations for the better efficacy of a coordinated international counterterrorism campaign. The first comparative advantage is its being an essential forum for building a universal coalition and for establishing the global legitimacy needed to underpin a long-term response to terrorism.<sup>173</sup> As the most widely acknowledged international organization of states in the world, there is no organization that can better handle a universal alliance of states to fight terrorism than the United Nations, with a legitimate ground of so doing. As terrorism is already identified as a real threat to international peace and security,<sup>174</sup> the United Nations has a legitimate ground to respond thereto. This is discernable from the purposes of the organization as stated in the Charter of the United Nations.<sup>175</sup>

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<sup>171</sup> The following are the prominent ones in this regard. The OAU Convention on the Prevention and Combating of Terrorism, 1999, Adopted at Algiers on 14 July 1999, Treaty on Cooperation among the State Members of the Commonwealth of Independent States in Combating Terrorism 1999, Done at Minsk on 4 June 1999, The European Convention on the Suppression of Terrorism, Concluded at Strasbourg on 27 January 1977, Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance, Concluded at Washington on 2 February 1971, Registered by the Organization of American States on 23 October 1986, The South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism.

<sup>172</sup> In fact, they are not meant to do so.

<sup>173</sup> Supra note 99 at 1. See also, Wolfgang S. Heinz and Jan-Michael Arend, *the International Fight against Terrorism and the Protection of Human Rights: With Recommendations to the German Government and Parliament*, German Institute for Human Rights, 2005, P. 10.

<sup>174</sup> See infra, discussions on the Security Council resolutions.

<sup>175</sup> See, The United Nations Charter, Art. 1(1). It states the purposes of the United Nations. Among these purposes, one is "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of

Ibrahim A. Gambari mentioned the setting of international norms<sup>176</sup> as the second comparative advantage of the United Nations in making the global counterterrorism campaign effective. The thirteen international conventions adopted in the auspices of the United Nations or of its agencies and which have become the corner stone of a 'global norm' against terrorism are prominent manifestations of the organization's comparative advantage in the process of setting of international norms.<sup>177</sup> Undeniably, globally consensual norms on terrorism have a vital role in coordinating individual state efforts and making the whole counterterrorism strategy fruitful.

The capacity and willingness of the United Nations, via its organs, to give support and assistance to member states for them to enhance their capacity in fighting terrorism is the third comparative advantage.<sup>178</sup> Aid to legal drafting as well as the ratification and implementation of international instruments against terrorism are the noteworthy areas of capacity building that the United Nations is able to give support for states.<sup>179</sup> The fourth one is the political role it plays in conflict zones around the world as a broker and consolidates peace settlements that have a clear and direct value in bringing normality and productivity back to large areas that could otherwise become incubators for terrorism.<sup>180</sup> Since addressing the root causes to terrorism by nurturing a culture of dialogue and tolerance has a lot to serve in combating terrorism in advance, the United Nations has a creditable potential to contribute in this regard.

Based on the aforementioned reasons, it could legitimately be said that the United Nations plays an indispensable role in the fight against terrorism.<sup>181</sup> Its role is not just

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*acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."*

<sup>176</sup> Supra note 99 at 1.

<sup>177</sup> Ibid

<sup>178</sup> Ibid

<sup>179</sup> Ibid

<sup>180</sup> Ibid

<sup>181</sup> See, John Dowd AO and Nicole Abadee: *The September 11 Terror Attacks: An Australian Response*, Australian Int'l Law Journal, 2001, p.5. It is stated that "the United Nations is uniquely positioned to respond to the international crisis following the terror attacks on September 11." This is mainly because of the demanding situation to respond to the threat of terrorism in a coordinated manner.

limited to the international plane. It rather extends to the domestic arena by creating globally consensual norms on terrorism, building individual state's capacity to combat terrorism and other positive roles. It is based on this conviction that the United Nations has taken the issue of terrorism seriously and began to respond to the unwarranted human rights implications of both terrorism and counterterrorism.

Despite its strengths mentioned above, the United Nations has a number of weaknesses in relation to fostering human rights protection while countering terrorism. The first one is its inability to adopt an internationally binding definition of terrorism. The second notable weakness of the United Nations system in relation to terrorism and counterterrorism and the pledged conviction to give due concern for human rights protection in the process of fighting terrorism, stems from the often cited weakness of the international legal system i.e. absence of well-entrenched law enforcement mechanisms. Though the various organs of the United Nations issued a number of resolutions reaffirming the organization's commitment to ensure human rights protection in the process of countering terrorism, the problem of enforcement will continue to be a challenge as there is no guarantee that the pledges in the various resolutions would be implemented in various jurisdictions. In not few cases, international obligations boil down to be determined just by the willingness of states.

### **4.3. A Brief Overview of the Terrorism Conventions Adopted in the Auspices of the United Nations**

Though there is no an internationally agreed definition of terrorism, it is mentioned in the second chapter that there are scholars who consider the indirect definition of terrorism in Security Council Resolution 1566 as a working definition of terrorism, at least for the purposes of the organization. While enumerating a list of criminal acts that it deems to be unjustifiable, the resolution provides that such crimes shall *“constitute offenses within the scope of and as defined in the international*

*conventions and protocols relating to terrorism.*”<sup>182</sup> This shows the importance of the international terrorism conventions and protocols in shaping the jurisprudence of the United Nations towards terrorism. Hence, these treaties are of vital importance to better understand the United Nation’s legal framework in combating terrorism.

So far, we have thirteen international conventions and protocols relating to terrorism adopted within the aegis of the United Nations. This has been cited as a sign to show the progress in the efforts of the United Nations’ efforts in devising treaties against terrorism.<sup>183</sup> This has a great relevance for the efficacy of the counterterrorism process as the treaties, once ratified by states, would be part and parcel of the domestic laws of the ratifying state.

In this section, the salient features of the thirteen international treaties on terrorism are explored. The conventions or protocols are not discussed in the order of their importance in shaping the United Nations’ jurisprudence in the discipline but just in order of the dates of their making. Deviating from the chronology of the conventions and protocols, the protocols are discussed along with the conventions to which they supplement and conventions dealing with related matters are treated together.

The Convention on Offences and Certain other Acts Committed on Board Aircraft is the first of the international conventions relating to terrorism. It is meant to be applied with respect to offences committed on board of an aircraft while in flight provided that the aircraft is not in use for military, customs or police services.<sup>184</sup> It aims at protecting the safety of the aircraft, or of persons or property therein.<sup>185</sup> This is discernable from the provision that the Convention applies not just in respect of offences against penal law but includes acts which without being offences in themselves may or do jeopardize the safety of the aircraft or of persons or property

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<sup>182</sup> Resolution 1566 (2004), Adopted by the Security Council at its 5053<sup>rd</sup> meeting on 8 October 2004, Art. 3.

<sup>183</sup> Supra note 32 at 30.

<sup>184</sup> The Convention on Offences and certain other acts committed on board aircraft , Signed at Tokyo on 14 September 1963, Registered by the International Civil Aviation Organization on 22 December, 1969, Art.1(4).

<sup>185</sup> Id. Art. 6(1)(a).

therein or which jeopardize good order and discipline on board.<sup>186</sup> It is also worthy to mention that save for exceptional cases, the provisions of the Convention shall not be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.<sup>187</sup> Hence, the Convention aims at the protection of the human and property interests alone and that could not be used for political, racial or religious considerations.

The Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention) is the second of the conventions. The prominent among the statement of reasons of the Hague Convention is the consideration that unlawful acts of seizure or exercise of control of an aircraft jeopardize the safety of persons and property and seriously undermines the confidence of the public in the safety of civil aviation.<sup>188</sup> It is to be reckoned that undermining public confidence is a prominent element of modern-day-terrorism. The Convention makes it punishable to use force, a threat thereto or any other form of intimidation to seize or attempt to control an aircraft or to be an accomplice thereto.<sup>189</sup> The Convention obliges its signatory state to prescribe severe penalties in its criminal law.<sup>190</sup> The rest of the provisions revolve around issues of exercising jurisdiction and facilitating extradition.<sup>191</sup>

The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention) is the third terrorism-related international convention. The Montreal Convention has a protocol named the Montreal Protocol. In a similar fashion with the above mentioned conventions, these two also principally focus on securing the safety of civil aviation. The unique aspect of the Montreal Convention and Protocol is that they focus on an unlawful and intentional offence

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<sup>186</sup> Id. Art. 1(a) and (b).

<sup>187</sup> Id. Art. 2. The exceptions thereto are when such authorization is required for the safety of the aircraft or of persons or property on board and the legitimate application of criminal jurisdiction by a state in whose name the aircraft is not registered as stipulated in Art. 4 of the Convention.

<sup>188</sup> The Convention for the Suppression of unlawful seizure of aircraft, Signed at The Hague on 16 December 1970, Preamble, para. 1.

<sup>189</sup> Id. Art. 1.

<sup>190</sup> Id. Art. 2

<sup>191</sup> See generally, Id. Arts. 4 -10

that is likely to cause serious injury or death committed against a person at an airport or a serious damage or disruption of services and facilities of an airport.<sup>192</sup>

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including diplomatic agents is concerned with the protection of top state and government officials and agents of international organizations.<sup>193</sup> An intentional murder, kidnapping or other attack on the person or liberty of the protected person and a violent attack on the premises or property of the same are the noteworthy acts criminalized by the convention.<sup>194</sup>

The International Convention against the Taking of Hostages makes the taking of hostages, in order to compel a state, an international intergovernmental organization, a natural or juridical person or group of persons, a grave criminal act that state parties to the convention should prescribe appropriate penalties in their laws.<sup>195</sup> A hostage is said to be made if one seizes or detains and threatens to kill, to injure or to continue to detain another person with a view to compel a state or some other person.<sup>196</sup>

The Convention on the Physical Protection of Nuclear Material is committed to prevent severe damages that an intentional unlawful receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material which causes or is likely to cause death or serious injury to any person or substantial damage to property.<sup>197</sup> The most recent of the international terrorism-related conventions i.e. the International Convention for the Suppression of Acts of Nuclear Terrorism has to be seen in

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<sup>192</sup> See, Convention for the suppression of unlawful acts against the safety of civil aviation, concluded at Montreal on 23 September 1971, Art. 1 and Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the Montreal Convention, concluded at Montreal on 24 February 1988, Art. 2.

<sup>193</sup> For the details, see, Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, adopted by the General Assembly of the United Nations, at New York, on 14 December 1973, Art. 1.

<sup>194</sup> Id. Art. 2.

<sup>195</sup> International convention against the taking of hostages, adopted by the General Assembly of the United Nations on 17 December 1979, Arts. 1 and 2.

<sup>196</sup> Id. Art. 1.

<sup>197</sup> Convention on the physical protection of nuclear material, adopted at Vienna on 26 October 1979 and opened for signature at Vienna and New York on 3 March 1980, Art. 7.

conjunction with this. Expressed in succinct terms, it criminalizes the use of possession of nuclear materials and the use thereof to cause death or serious bodily injury or property damage or to compel any one in any manner by any person.<sup>198</sup> Leaving other details aside, it could be said that the two conventions are of much help to prevent weapons of mass destruction from reaching in the hands of terrorist groups and the terrible consequences thereof. As has been stated in the previous chapter, this prevention has a lot to contribute for the efficacy of counterterrorism.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol thereto are meant to address the threat and intimidation that targets the safety of maritime navigation. In the same manner with the above mentioned treaties for the safety of civil aviation, the one related to maritime navigation exclude attacks against ships that are being used for warship, naval auxiliary and police purposes from their scope of applications.<sup>199</sup> All unlawful and intentional acts that are likely to affect the safety of maritime navigation and persons related thereto and oblige state parties to prescribe appropriate penalties thereto in there criminal laws are criminalized.<sup>200</sup>

The Convention on the Making of Plastic Explosives for the Purpose of Detection is a treaty that is meant to prevent terrorist acts committed by the use of plastic explosives. To this end, it obliges states parties to limit the use of plastic explosives only for authorities performing military or police functions.<sup>201</sup> It could be said that this Convention dares to prevent terrorist acts by using strict control of one of its notable methods.

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<sup>198</sup> International convention for the suppression of acts of nuclear terrorism, New York 14 September 2005, Art. 2.

<sup>199</sup> Convention for the suppression of unlawful acts against the safety of maritime navigation, concluded at Rome on 10 March 1988, Art. 2.

<sup>200</sup> See generally, Id. Arts. 3 and 5 and the Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the Continental Shelf, concluded at Rome on 10 March 1988, Arts. 2 and 3.

<sup>201</sup> See generally, Convention on the making of plastic explosives for the purpose of detection, Done at Montreal, 1 March 1991.

The International Convention for the Suppression of Terrorist Bombings ordains that its states parties are obliged to prosecute or extradite and assist in the criminal investigation by another state of a person who unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury of persons or a destruction of facility or system that results in or is likely to result in major economic loss.<sup>202</sup> The Convention demands states parties to adopt such measures, which might include a domestic legislation, to ensure that no political, philosophical, ideological, racial, ethnic or religious considerations could justify acts intended to provoke a state of terror in the general public or a part thereof.<sup>203</sup>

The International Convention for the Suppression of Financing of Terrorism provides that a person who directly or indirectly, provides or collects funds with the intention or knowledge that the fund or a part thereof is to be used to carry out an act specified in the previous terrorism-related conventions or any other act intended to cause the death or serious bodily injury to an innocent person<sup>204</sup> so as to intimidate a population or compel a government or an international organization to do or to abstain from doing any act.<sup>205</sup>

As general features of the thirteen conventions, it could be said that they are primarily concerned with international terrorism by the acts of individuals. They also are common in that they aspire to see the prosecution of perpetrators either by the exercise of jurisdiction by states or facilitating extradition. The fact that they treat accomplices or participants of a terrorist act to be punishable is also something that is worth being mentioned.

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<sup>202</sup> The international convention for the suppression of terrorist bombings, New York, December 15, 1997, Art. 2.

<sup>203</sup> Id. Art. 5.

<sup>204</sup> Being innocent refers to either being a civilian or any other person not taking an active part in the hostilities in a situation of armed conflict.

<sup>205</sup> International convention for the suppression of financing of terrorism, New York, December 9 1999, Art. 2(1).

## **4.4. The United Nations' Organs and their Responses to Terrorism and Counterterrorism Measures**

There are commentators who consider the General Assembly of the United Nations as the 'soft United Nations', meaning that it could not take effective measures to implement its decisions, while the Security Council as the 'Hard' one.<sup>206</sup> That is cited as a justification to those who argue that terrorism has been relegated until the 9/11 incident. Nicholas Rostow argues that 9/11 changed the way the United Nations treats the issue of terrorism in a rather different and serious manner.<sup>207</sup> The increased involvement of the Security Council in terrorism cases is a manifestation of the changed response. Here is an overview of the resolutions of the General Assembly, and the Security Council and the activities of the United Nations High Commissioner for Human Rights and assess their relevance in assisting human rights protection.

### **4.4.1. The Role of the General Assembly's Resolutions**

As a supreme organ of the United Nations, the General Assembly has issued a number of resolutions that deal with the violations of human rights arising from both terrorism and counterterrorism measures. It was in 1972 that the General Assembly passed its first resolution concerning terrorism. As of that time, the Assembly took the leadership to eliminate international terrorism.<sup>208</sup> The fact that it established an ad hoc committee on terrorism in 1972 is a manifestation of its leadership role.<sup>209</sup> In this section, a focus is there on the contributions of the Assembly's resolutions for the betterment of human rights protection in relation to terrorism and counterterrorism.

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<sup>206</sup> Martii Koskeniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EJIL, 1995, P.325, As cited in Ben Saul, *Definition of "Terrorism" in the UN Security Council: 1985 – 2004*, Chinese Journal of International Law (2005), Vol. 4, No. 1, p.141.

<sup>207</sup> See Generally, Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since September 11<sup>th</sup>*, Cornell International Law Journal, Vol. 35, 2001-2002, pp. 479-489.

<sup>208</sup> Supra note 6 at 6.

<sup>209</sup> M.K. Nawaz and Gurdip Singh, *Legal Control of International Terrorism*, Indian Journal of International Law, Vol. 17, 1977, p.66. It was, however, noted that due to ideological problems, the committee failed to make a significant progress.

As the Assembly has issued a number of resolutions concerning terrorism, it would be unfeasible to claim to give a detailed account of each resolution. Hence, we would focus on five resolutions of the same i.e. Resolutions 56/160, 57/219, 58/187, 59/191 and 59/195 that have a prominent contribution for human rights protection.<sup>210</sup> These prominent resolutions have a lot to contribute for human rights protection.

General Assembly resolutions have now taken a firm stand on condemning terrorism irrespective of the motivation thereto. It is to be reckoned that in the post World War II era, the United Nations was at least tolerant to ‘terrorist’ acts committed in pursuance of ‘genuine’ objectives. This ambivalence towards terrorism might create a prima-facie approval of some terrorist acts based on their motivations. This, however, is not acceptable from a human rights perspective as the international community of states has an obligation for securing human rights protection even in times of emergency. In line with this, the sample resolutions of the General Assembly provide their unequivocal condemnation of acts, methods and practices of terrorism wherever and by whoever committed regardless of the motivation thereto.<sup>211</sup> This is a great achievement as terrorism will have no legitimate room of application.

Apart from their unequivocal condemnation of all forms of terrorism, the General Assembly resolutions ordain that every state must ensure that any of its counterterrorism measures shall comply with obligations under international human rights law.<sup>212</sup> As has been elaborated in the previous chapter, a counterterrorism measure can be said to comply human rights standards only in so far as it is exercised

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<sup>210</sup> See for example, Isanga Joseph, *Counter-terrorism and Human Rights: The Emergence of a Rule of Customary International Law from U.N. Resolutions*, Denver Journal of International Law and Policy, Vol. 37, No. 2, 2009, p. Here the five resolutions are named as such.

<sup>211</sup> See, Human Rights and Terrorism, Resolution 56/160, Adopted by the General Assembly (A/RES/56/160) Art.3, Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Resolution 57/219, Adopted by the General Assembly (A/RES/57/219) Preamble, para. 9, Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Resolution 58/187, Adopted by the General Assembly (A/RES/58/187) Preamble, para. 12, Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Resolution 59/191, Adopted by the General Assembly (A/RES/59/191), Preamble, para. 10 and Human Rights and Terrorism, Resolution 59/195, Adopted by the General Assembly (A/RES/59/195) Art. 1.

<sup>212</sup> See, A/RES/56/160, Preamble, para. 22, A/RES/57/219, Art. 1, A/RES/58/187, Art. 1, A/RES/59/195, Art. 1, A/RES/59/195, Preamble, para. 23.

within the bounds of limitation or derogation of rights as enshrined in international human rights covenants. Resolutions of the Assembly contribute for human rights protection which is susceptible to abuse in the name of fighting terrorism.

The Assembly's resolutions also contribute for human rights protection upon urging states to enhance international cooperation and take seriously the views of the various treaty bodies in concerns related to counterterrorism measures.<sup>213</sup> There is a positive correlation between enhancement of regional and international cooperation and decreasing the prevalence of terrorism which in turn makes human rights protection better. In addition, the treaty bodies of the various international human rights covenants are known for their generous interpretations of human rights law provisions. The fact that states are being urged to take such interpretations into account may, at least in theory, make their measures human rights friendly.

#### **4.4.2. The Role of the Security Council's Resolutions**

The Security Council issued a number of resolutions condemning acts of terrorism as real threats to international security. It is, however, not the object of this paper to make a deeper analysis of the Council's resolutions. A focus will only be made on the provisions of the resolutions with respect to human rights protection in light of terrorism and counterterrorism. The resolutions' role in focusing on human rights protection might be seen from two perspectives. The first is their role in combating terrorism and thereby preventing human rights violations arising there from whereas the second is the role they play in guiding states to conduct counterterrorism measures in a way that respects the bounds of international human rights standards.

The Council issued a number of resolutions that condemn acts of terrorism as threats to international peace and security.<sup>214</sup> These resolutions require the international

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<sup>213</sup> See generally, the text of the above stated resolutions.

<sup>214</sup> See, Resolution 1455(2003), Adopted by the Security Council at its 4686<sup>th</sup> meeting, on 17 January 2003. Resolution 1617(2005), Adopted by the Security Council at its 5244<sup>th</sup> meeting, on 29 July 2005, Resolution 1624(2005), Adopted by the Security Council at its 5261<sup>st</sup> meeting, on 14 September 2005,

community of states to combat terrorism irrespective of its motivations. This has a lot to contribute for the betterment of human rights protection which would be at odds with the continued existence of terrorist attacks and threats thereto.

There are also Security Council Resolutions ordaining that terrorism should be fought without affecting human rights. In this regard, Isanga Joseph names resolutions 1456, 1535, 1624, 1373 and 1566 as notable resolutions.<sup>215</sup> Since resolution 1373 is the corner stone of the United Nations' counterterrorism efforts,<sup>216</sup> its focus, albeit indirectly, on human rights is of great relevance. It calls upon all states to take measures in conformity with international standards of human rights.<sup>217</sup> It also established the Counterterrorism Committee (CTC) to monitor its implementation.<sup>218</sup> The CTC, however, declared that "*while it does take human rights seriously, and has engaged in a dialogue with various human rights bodies, the tasks of monitoring adherence to human rights obligations in the fight against terrorism falls out side of its mandate.*"<sup>219</sup> This might cast a doubt on whether states would seriously take human rights standards.

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Resolution 1269(1999), Adopted by the Security Council at its 4053<sup>rd</sup> meeting, on 19 October 1999, Resolution 1440(2002), Adopted by the Security Council at its 4632<sup>nd</sup> meeting, on 24 October 2002, Resolution 1822(2008), Adopted by the Security Council at its 5928<sup>th</sup> meeting, on 30 June 2008, Resolution 1267(1999), Adopted by the Security Council at its 4051<sup>st</sup> meeting, on 15 October 1999, Resolution 1465(2003), Adopted by the Security Council at its 4706<sup>th</sup> meeting, on 13 February 2003, Resolution 1452(2002), Adopted by the Security Council at its 4678<sup>th</sup> meeting, on 20 December 2002, Resolution 1526(2004), Adopted by the Security Council at its 4908<sup>th</sup> meeting, on 30 January 2004, Resolution 1787(2007), Adopted by the Security Council at its 5795<sup>th</sup> meeting, on 10 December 2007, Resolution 1566(2004), Adopted by the Security Council at its 5053<sup>rd</sup> meeting, on 8 October 2004, Resolution 1618(2005), Adopted by the Security Council at its 5246<sup>th</sup> meeting, on 4 August 2005, Resolution 1625(2005), Adopted by the Security Council at its 5261<sup>st</sup> meeting, on 14 September 2005, Resolution 1456(2003), Adopted by the Security Council at its 4688<sup>th</sup> meeting, on 20 January 2003, Resolution 1377(2001), Adopted by the Security Council at its 4413<sup>th</sup> meeting, on 12 November 2001, Resolution 1450(2002), Adopted by the Security Council at its 4667<sup>th</sup> meeting, on 13 December 2002, Resolution 1735(2006), Adopted by the Security Council at its 5609<sup>th</sup> meeting, on 22 December 2006, Resolution 1373(2001), Adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28 September 2001, Resolution 1438(2002), Adopted by the Security Council at its 4624<sup>th</sup> meeting, on 14 October 2002.

<sup>215</sup> Supra note 210.

<sup>216</sup> Eric Rosand, *Security Council Resolution 1373, The Counter-Terrorism Committee and the Fight Against Terrorism*, American Journal of International Law, Vol. 97, 2003,p.333.

<sup>217</sup> Resolution 1373(2001), Adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28 September 2001, Art. 3(f).

<sup>218</sup> Id. Art. 6.

<sup>219</sup> Supra note 216 at 340.

Resolution 1566 also plays a role in human rights protection. Besides acknowledging acts of terrorism as serious impairment on the enjoyment of human rights<sup>220</sup> it attempts, though only indirectly, to define what constitutes terrorism.<sup>221</sup> This definition has a considerable importance for human rights protection by preventing abuses arising from the unprincipled and dangerous devolution of discretionary powers for states to define terrorism on their own.<sup>222</sup> The resolution can therefore be helpful in lowering the possibility of adopting an unwarrantedly broad definitions of terrorism meant to curtail human rights protection at the domestic level.

Resolutions 1456 and 1624 are also notable in that they require states to ensure that any measure to combat terrorism complies with their duties in international human rights law.<sup>223</sup> In most cases, the resolutions use general terminology requiring states to comply with their human rights obligations in combating terrorism. A state can be said to have bypassed its human rights obligations in the name of fighting terrorism if any of its acts can not be justified by either the limitation or derogation of rights as stipulated in international human rights conventions.

#### **4.4.3. The Role of the United Nations High Commissioner for Human Rights**

The Office of the United Nations High Commissioner for Human Rights is mandated to various activities that foster human rights protection. It is obliged to adopt a comprehensive approach towards terrorism focusing on the impact of terrorism on human rights protection.<sup>224</sup> As a manifestation of its endeavor to assist policy makers and other concerned parties in developing a vision of counterterrorism strategies that

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<sup>220</sup> Resolution 1566(2004), Adopted by the Security Council at its 5053<sup>rd</sup> meeting, on 8 October 2004, Preamble, par. 8.

<sup>221</sup> Id. Art. 3. The definition is cited in the second chapter of this paper.

<sup>222</sup> Ben Saul, *Definition of "Terrorism" in the UN Security Council: 1985 – 2004*, Chinese Journal of International Law (2005), Vol. 4, No. 1, p.161.

<sup>223</sup> Resolution 1456(2003), Adopted by the Security Council at its 4688<sup>th</sup> meeting, on 20 January 2003, Art. 6. and Resolution 1624(2005), Adopted by the Security Council at its 5261<sup>st</sup> meeting, on 14 September 2005, Preamble, par. 2 and Art. 4.

<sup>224</sup> See, Human Rights and Terrorism, Resolution 59/195, Adopted by the General Assembly (A/RES/59/195), Art. 17.

are fully respectful to human rights, the Office published a digest of jurisprudence that assist the process of harmonization of counterterrorism laws and practices in different jurisdictions.<sup>225</sup> This has been welcomed by the General Assembly, which requests the Office to update and publish the digest in periodic terms.<sup>226</sup>

The mandates of the Office of the High Commissioner and their contribution for the betterment of human rights protection in fighting terrorism is reiterated in different resolutions of the General Assembly. For an undistorted understanding of the mandates, let us state the provisions of the resolutions in verbatim.<sup>227</sup> The resolutions request the Office to make use of the existing mechanisms to:

- Examine the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources;
- To make general recommendations concerning the obligations of states to protect and promote human rights and fundamental freedoms while taking actions to counter terrorism;
- To provide assistance and advice to states, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism, as well as to relevant United Nations bodies.

The mandates of the Office of the High Commissioner are of great relevance for the betterment of human rights protection in the process of combating terrorism.

Various United Nations organs played their respective roles for the pronounced aim to protect human rights in the context of fighting terrorism. Of these organs, we have considered that of the above three. But there are still other organs that have responded

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<sup>225</sup> See generally, the United Nations Office of the High Commissioner for Human Rights, *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights While Countering Terrorism*.

<sup>226</sup> See, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Resolution 58/187, Adopted by the General Assembly (A/RES/58/187), Art. 5.

<sup>227</sup> See, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Resolution 57/219, Adopted by the General Assembly (A/RES/57/219), Art. 3, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Resolution 58/187, Adopted by the General Assembly (A/RES/58/187), Art. 8, *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Resolution 59/191, Adopted by the General Assembly (A/RES/59/191), Art. 11.

to human rights concerns related to terrorism and counterterrorism.<sup>228</sup> However, in most cases, the commitments of the various organs are content-wise similar and it would be a duplication of the same thing if we consider everything in detail.

#### **4.5. The United Nations' Guiding Principles in Countering Terrorism**

In this section, we will focus on exploring the basic guiding principles of the United Nations in countering terrorism and their contribution for the betterment of human rights protection. In this context, the United Nations' counterterrorism strategy is adopted with five basic guiding principles that are meant to assist for the efficacy of the strategy and *ipso-facto* contribute a lot for human rights protection. These principles are five in number and are sometimes referred to as the five D's.

The first principle is to dissuade disaffected groups from choosing terrorism as a tactic to achieve their goals.<sup>229</sup> Upon solving disputes only in peaceful terms, the United Nations aspires to address the root causes to terrorism. This was stated in the plan of action of the United Nations global counterterrorism strategy.<sup>230</sup> Though it might seem ideal, a perfect compliance with this strategic principle is of great relevance for the efficacy of counterterrorism measures and thus for human rights protection.

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<sup>228</sup> The activities of the Human Rights Commission / Council (this is because there are measures taken before and after the Human Rights Commission is transformed into the Human Rights Council) of the United Nations and the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism, appointed by the Commission on Human Rights in April 2005, are notable in this context.

<sup>229</sup> Supra note 99 at 2 and Supra note 103 at 38.

<sup>230</sup> The United Nations Global Counter-Terrorism Strategy, Resolution 60/288, Adopted by the General Assembly (A/RES/60/288), Annex, Plan of Action. The first element of the plan of action is about measures meant to address the conditions conducive to the spread of terrorism which include the promotion of dialogue between parties to conflicts, the best possible use of the capacities of the United Nations in areas such as conflict prevention, negotiation, mediation, conciliation, judicial settlement, rule of law and peace keeping and peace building.

To deny terrorists the means to carry out attacks is the second guiding principle.<sup>231</sup> This could be done by coordinating the efforts of various states to prevent and combat terrorism. Member states of the United Nations pledged that besides to refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities by themselves, they also undertake to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts by strengthening inter-state cooperation to that effect.<sup>232</sup> The third and the fourth guiding principles are to deter states from supporting terrorists and to develop state capacity to prevent terrorism.<sup>233</sup> Needless to explain, both assist a lot to prevent terrorism and consequently contribute a lot for the betterment of human rights protection.

To defend human rights in the struggle against terrorism is the fifth guiding principle of the United Nations.<sup>234</sup> As has been discussed hereinbefore, the issue of human rights lies in the heart of the resolutions of the various organs of the United Nations. In fact, it is often contended that neglect for human rights while countering terrorism is a misguided approach that exacerbates the problem rather than cooling it down. In short, one can say while the first four principles are meant to prevent challenges on human rights protection arising from terrorism *per se*, the fifth one is destined to prevent human rights abuses made in the name of countering terrorism.

To conclude, whatever is the role to be played by the United Nations, it is not immune from the inherent enforcement-related problems of international law. Hence, there is an overwhelming need to adopt effective counterterrorism measures in a domestic setup that do not unduly curtail human rights protection. The next chapter focuses on exploring Ethiopia's new anti-terrorism legislation and its strongholds and downsides from the perspective of ensuring human rights protection.

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<sup>231</sup> Supra note 99 at 2 and Supra note 103 at 38.

<sup>232</sup> Supra note 230.

<sup>233</sup> Supra note 99 at 2 and Supra note 103 at 38.

<sup>234</sup> Ibid.

## **Chapter Five**

### **5. An Appraisal of Ethiopia's Anti-Terrorism Law from a Human Rights Perspective**

#### **5.1. Introduction**

In the previous chapters, we have seen the impacts of both terrorism and counterterrorism measures on human rights protection and the United Nations' responses thereto. With all what has so far been discussed in view, in this last chapter of the paper, we made an assessment of Ethiopia's, recently enacted, anti-terrorism legislation from the point of view of human rights protection issues.

The chapter begins with an assessment of the terrorism threat in Ethiopia, which is of vital importance to appreciate real concerns of the state to respond to the threat upon using legitimate methods. Next to that, a brief background discussion of the anti-terrorism Proclamation is made so as to reflect on the necessity of the law. Finally, the positive and negative aspects of the law are explored from a human rights perspective along with comments and recommendations that are felt essential for the betterment of human rights protection in countering terrorism in Ethiopian context.

#### **5.2. A Brief Assessment of the Terrorism Threat in Ethiopia**

Understanding the gravity of the problem of terrorism or a threat thereto is of vital importance to make a critical appraisal of an anti-terrorism law in a given jurisdiction. However, it would be a pious wish if we dare to give a full-fledged assessment of the terrorism threat in Ethiopia in this paper.<sup>235</sup> Hence, we will only make a brief assessment of the threat just to let the readers of this research keep in mind the state of affairs within which one has to comment on the legitimacy or not of the provisions of the counter terrorism legislation that is recently put in place in Ethiopia.

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<sup>235</sup> In fact a deeper analysis of the problem of terrorism and an empirical study of the issue is also not within the domain of this paper.

In 2004, the African Human Security Initiative made a survey of the threat of terrorism in eight African states and classified them into three categories namely: high threat assessment, intermediate threat assessment and low threat assessment.<sup>236</sup> It categorizes Ethiopia along with Nigeria and South Africa with an intermediate threat assessment to terrorism.<sup>237</sup>

In a paper presented in a counterterrorism international conference, Mehari contends that the horn of Africa is a potent source of terrorism.<sup>238</sup> Regarding the Ethiopian situation, he argued that for almost a decade before 9/11, Ethiopia suffered successive terrorist acts and may, in the future, continue to be a target.<sup>239</sup> He argued that something has to be done to make Ethiopia and the horn at large free from the terrorism threat for which Ethiopia is keenly interested.<sup>240</sup> Though the Federal Police Commission official, whom I interviewed, failed to provide me with the relevant data, he affirms the fact that Ethiopia faces imminent two-fold terrorist threats i.e. international and local terrorism.<sup>241</sup>

The veracity or not of an assessment of a terrorism threat might, however, be questioned. Different organs might have their own parameters in assessing threats to terrorism depending on which they may reach at varying conclusions.<sup>242</sup> However, what seems certain is the fact that Ethiopia can in no way be immune from the threat of terrorism. In fact, there are indicators of serious threats of terrorism, which might be potent sources of severe terrorism cases if they are not duly controlled.

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<sup>236</sup> See generally, 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.

<sup>237</sup> Ibid. Algeria, Kenya and Uganda were referred to as countries where there is a high threat assessment whereas Ghana and Senegal were countries with low threat assessment to terrorism.

<sup>238</sup> 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.

<sup>239</sup> Id. at 17.

<sup>240</sup> Id. at 18.

<sup>241</sup> Interview with Commander Muluwork Gebre, Federal Police Commission, Anti-Terrorism and Organized Crimes Directorate Director, on 31 December 2009. (See the annex for the details)

<sup>242</sup> See for example, [www.nationmaster.com](http://www.nationmaster.com), as accessed on November 2009, for facts and statistics concerning terrorism in Ethiopia in comparison with other countries of the world.

In the following paragraphs, we will consider different factors that indicate the looming terrorism threats in Ethiopia. It could be said that we have three potential sources of terrorism that might play a role in intensifying the terrorism threat in Ethiopia. This does not, however, mean that this is an exhaustive list of the real and potential terrorism threats to Ethiopia. But, I believe, these three are among the prominent grounds wherefrom terrorism-related problems that threaten Ethiopia might come from.

Firstly, the fact that Ethiopia is located in the Horn of Africa and its land borders are unusually porous, even by African standards<sup>243</sup> could be cited as a prominent factor that contributes to the problem of terrorism in Ethiopia. Especially, Eritrea and Somalia are noteworthy for escalating the terrorism threat in Ethiopia. It is often alleged that Eritrea backs any anti-Ethiopian government movement<sup>244</sup> often irrespective of the methods used and the consequences thereof. This is a potential source of intractable terrorism problems and the threats thereto in Ethiopia.

Terrorism threats emanating from the unstable<sup>245</sup> Somalia are also worth being noted here. The fact that this problem has domestic element, or at least a claim thereto, somehow intensifies the problem. The Somali-based Al Itihad Al Islamiya, which claims to have a goal to create an Islamic Somali state incorporating Ethiopia's Somali population and region,<sup>246</sup> took the responsibility for a series of bomb attacks in Ethiopia.<sup>247</sup> These are just examples.

The contemporary religious dynamics in Ethiopia is also a prominent factor that has a lot to contribute to escalating the terrorism threat in Ethiopia. Though Ethiopia is

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<sup>243</sup> Robert I. Rotberg(ed.), *Battling Terrorism in the Horn of Africa*, The World Peace Foundation, 2005, p. 94. It has further been commented that "*the Horn of Africa serves as the back door to the troubled Persian Gulf, the source of much of today's international terrorism.*" Needless to explain, this by itself proves the allegation that Ethiopia faces a real danger of terrorism.

<sup>244</sup> See, Id. at 101. See also, Supra note 241. Commander Muluwork affirms this allegation.

<sup>245</sup> Not to use the often cited axiom to refer Somalia as a stateless country.

<sup>246</sup> Supra note 243 at 101.

<sup>247</sup> Al-Qaeda's Threat to Ethiopia, The James Town Foundation, [www.jamestown.org](http://www.jamestown.org) as accessed on November 2009.

known for preserving a higher degree of religious tolerance in the past, religious tensions are already becoming thorny sources of conflicts in recent times.<sup>248</sup> It is more likely that religious tensions give rise to the undue use of violence to pursue the interest of one group at the expense of the other, which is nothing but a form of terrorism. It is possible to mention different instances of religious terrorism<sup>249</sup> in different parts of Ethiopia. This, however, is not the objective of this paper. However, just to show the gravity of the problem, it is enough to reckon the recent atrocities on Christians and destruction of their Church and personal properties, while they were conducting religious rituals, in the Muslim-dominated areas of Jimma and Ilu Ababora of Ethiopia by fanatic Muslims allegedly linked to international terrorists.<sup>250</sup>

Medhane contends that there are several factors that contribute for the growing religious tensions in Ethiopia. He mentioned foreign influences that have played significant roles for the growing militancy in the religious fabrics of the country.<sup>251</sup> The institutionalized and foreign-financed *Wahabi* movement that is backed by foreign elements, notably Saudi Arabia,<sup>252</sup> is a prominent source and manifestation of the problem.<sup>253</sup> As a solution to this, he recommends Ethiopianization of religions in terms of culture and leadership alleging that the recently escalating religious tensions were minimal in the past owing to the unique styles of Ethiopian Muslims and

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<sup>248</sup> Medhane Tadesse, *Religion, Peace and the Future of Ethiopia*, 1<sup>st</sup> National Conference on Federalism, Conflict and Peace Building, May 5-7, 2003, Addis Ababa, p.1.

<sup>249</sup> Meaning the use of violence to terrorize followers of a certain religion and pursue one's religious interests by force. See *infra*, discussions on the definition of terrorist acts in Ethiopia's anti terrorism law. Religious motivation is one among the recognized deriving factors for committing terrorist acts.

<sup>250</sup> See generally, Tekalign Fanta, *Managing Religious Conflicts: A Study of the Legal Framework with Particular Reference to the 2006 Muslims-Christians Conflict in Oromiya*, Addis Ababa University, Faculty of Law, Unpublished LL.M Thesis pp. 97-147. It has been noted that problems of administration, neutrality, lack of secular and fair treatment among religions [at the local level], lack of tolerance are the prominent internal causes of the conflict whereas foreign influence that politicizes Islam and the consequent establishment of a radical Islamic Sect known as *Kawariya* or *Kawari* are cited as the noteworthy external factors that led to the conflicts in issue.

<sup>251</sup> *Supra* note 248 at 8. He argued that the unregulated freedom of religious activism, following the 1991 change of government, coupled with the heavy involvement of external actors and the continuing widespread poverty in the country seem to have dramatically impacted on the religious equilibrium that has existed for many hundred years which the new Christian churches and the Muslims took advantage thereof.

<sup>252</sup> See, *Supra* note 243 at 97.

<sup>253</sup> *Supra* note 248 at 8. It is noted that their focus being controlling Mosques and structures of the Islamic Supreme Council and targeting the youth, the extremists have controlled more than half of the Muslims in places such as Wollo and Jimma.

Western Christians that somehow differs from their respective religious colleagues in Arabia or Western Europe.<sup>254</sup> The recently witnessed change of loosing the long-existed unique 'Ethiopian styles' is a green light that might indicate the declining moments of religious tolerance in Ethiopia.

Another factor that is cited to fuel religious tensions in contemporary Ethiopia, which is a potential source of religiously motivated terrorist acts, is the perception of the Ethiopian Orthodox Christians to consider Islam and new Christian denominations as being inimical and dangerous to their tradition, cultural identity and independence.<sup>255</sup> He further noted that unless something is done to curb the danger, this Ethiopian age-old conservatism could not easily reconcile with sudden religious shocks and it is a risky venture.<sup>256</sup> The perception to consider other religious groups as enemies of the state might be a fatal ground for future terrorist ventures.

Medhane also contends that the unregulated<sup>257</sup> freedom of religion at national level seem to have provided regional authorities the freedom to support the expansion of specific faith to which they subscribe which, coupled with the historical dominance of Islam and new Christian denominations in the peripheral areas of Ethiopia, could be used for pushing exclusivist ethno-political agendas.<sup>258</sup> Tekalign Fanta has a similar stand on this issue as he argued that local authorities in the religious conflict zones of the Oromiya regional state played a role in intensifying the problems to pursue their own interests,<sup>259</sup> which might be religious or political. Though religious conflicts are not terrorism, it has to be stressed that unless positive steps are taken to avert future dangers of similar character, this trend inevitably escalates religiously motivated terrorism in Ethiopia, in the years to come.

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<sup>254</sup> Id. at 3-6. It is argued that the Ethiopian Elements are helpful to avoid extremism in each religion and promote inter-religious tolerance and mutual understanding.

<sup>255</sup> Id. at 2.

<sup>256</sup> Id. at 12.

<sup>257</sup> I do not feel comfortable to say that it is totally unregulated. It would have been better had it been said that the issue of religion has not been properly addressed.

<sup>258</sup> Supra note 248 at 10.

<sup>259</sup> Supra note 250 at 108.

Ethnic based conflict is the third potential potent source of terrorism in Ethiopia. In connection with this, in his article entitled “*Ethiopia: Governance and Terrorism*” in Robert I. Rotberg’s edited book, David H. Shinn contends that “*internal ethnic threats to stability might be potent sources for terrorist elements to emerge.*”<sup>260</sup> Despite the merits of guaranteeing self determination rights to the various ethnic groups, care should be taken not to let this fundamental right be implemented in a manner that destroys peaceful inter-ethnic relations which in turn serves as a fertile ground for ethnically targeted acts of terrorism. In fact, there are signs that ethnic based conflicts<sup>261</sup> are Ethiopia’s challenges.<sup>262</sup> These conflicts display some features of terrorism in that the parties in conflict often resort to homicide and arson so as to intimidate one another’s group with a more likely objective of pursuing their respective demands. Much more than the exact harms done so far, prevalent conflicts are ideal breeding grounds for terrorists with an alleged group interest.

Succinctly expressed, Ethiopia is facing terrorism threats due to various factors which could be summarized into three i.e. political enmities with the Eritrean government and Somalia’s extremists, which assist domestic terrorist groups<sup>263</sup>, religious extremism and intolerance and unregulated or poorly handled ethnic conflicts.

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<sup>260</sup> Supra note 243 at 99.

<sup>261</sup> But see, Jon Abbink, *Ethnicity and Conflict Generation in Ethiopia: Some Problems and Prospects of Ethno-Regional Federalism*, Journal of Contemporary African Studies, Vol. 24, No. 3, 2006, pp.390-397. He argued that it is not appropriate to refer these conflicts as fundamentally “ethnic” since they are more often the result of rivalry over state resources than of irreconcilable ethnic differences and many of such conflicts are prominently about administrative boundaries.

<sup>262</sup> See for example, Dereje Feyissa, *The Experience of Gambella Regional State*, David Turton (ed.), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, 2006, pp.208-230. It provides an account of the ethnically targeted clash that occurred in the region and caused severe casualties. Dereje stated the following: “In 1992, a series of violent confrontations erupted between the Anywaa and the Nuer, (the two politically dominant ethnic groups constituting the region) which lasted until 2002. These clashes cost the lives of many people, destroyed entire villages and produced thousands of internally displaced people. Since 2003, there has been renewed tension between the Anywaa and highlanders (members of ethnic groups other than the five ‘indigenous’ ethno-linguistic groups of the region constituting a sizable population of the region, i.e. 24 percent, without formal political recognition), which culminated in the killings of hundreds of Anywaa in Gambella town on 13 December 2003.”

<sup>263</sup> It has to be reckoned, however, that, so far, there is no group that is formally proscribed as a terrorist organization in Ethiopia.

Coupled with other factors, it is the incidence and potential of terrorist attacks and threats thereto that demanded the enactment of the anti terrorism law in Ethiopia.<sup>264</sup>

### **5.3. Background and an Appraisal of the Need to Enact Ethiopia's Anti-Terrorism Law**

Few years lapsed since the anti-terrorism law is expected to be tabled in the parliament. In September 2008, President Girma Woldegiorgis mentioned that the law is expected to be issued by the parliament in that year. But, it is in January 2009 that the draft law, having 39 articles, was disseminated to some European and American diplomats in Ethiopia. In a report issued in March 10, 2009, Human Rights Watch predicted that the draft would be tabled in the Ethiopian parliament in March, 2009. But it is only in June 2009 that the draft law is approved by the Council of Ministers and referred to the Parliament. Finally, the Anti-terrorism Proclamation entered into force on 28 August 2009 up on its publication in the Federal Negarit Gazeta.<sup>265</sup>

Discussions about the need to enact the anti-terrorism law was felt essential as there were media debates as to the theoretical necessity of enacting the law between the ruling and opposition parties. There were opposition leaders who questioned the very essentiality of the law *per se*.<sup>266</sup> In the essence of this allegation lies the claim that the existing criminal legal regime is sufficient to deal with terrorism cases.<sup>267</sup>

In an attempt to make an appraisal of the reasons for the enactment of any law in Ethiopian legislative drafting techniques, it is imperative for one to have a close look at the preamble of the proclamation. Preambles are the statement of reasons part of

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<sup>264</sup> See *infra*, the forthcoming discussions of the succeeding section of this chapter for a detailed discussion on the statement of reasons of Ethiopia's anti-terrorism law.

<sup>265</sup> Anti-Terrorism Proclamation No. 652/2009, (hereinafter cited as the Anti-Terrorism Proclamation) Art. 38.

<sup>266</sup> 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. It has been noted that (I also has a personal knowledge of this fact) there were opposition party leaders who have been arguing that terrorism is not a problem to Ethiopia.

<sup>267</sup> *Ibid*. However, it has to be reckoned that not all opposition parties had questioned the necessity of adopting a separate anti-terrorism legislation. The Ethiopian Democratic Party might be an example in this regard.

Ethiopian legislations. Hence, we will make an appraisal of the five statements of reason in the anti-terrorism Proclamation (hereinafter referred to as the proclamation). Of the five reasons mentioned, the first two and the fifth one refer to the defining features of terrorism and counterterrorism in general while the third and fourth ones are, in one way or another, concerned with the inefficacy of the hitherto existing legal regime in Ethiopia to effectively deal with terrorism cases.

The first reason mentioned in the Proclamation to justify the necessity of the special anti-terrorism legislation is that “*the right of the people to live in peace, freedom and security has to be protected, at all times, from the threat of terrorism.*”<sup>268</sup> The veracity of this statement could be inferred from the discussions made in the third chapter of this paper that considers counterterrorism measures, including anti-terrorism laws, as manifestations of state duty to protect the rights of its citizens.

The second justification is the conviction that “*terrorism is a danger to the peace, security and development of the country and a serious threat to the peace and security of the world at large.*”<sup>269</sup> This has been established in our earlier discussions. The fifth justification is mentioned as follows: “*Whereas in order to adequately fight terrorism, it is necessary to cooperate with governments and peoples of our region, continent and other parts of the world that have anti-terrorism objectives and particularly, to enforce agreements that have been entered into under the United Nations and the African Union.*”<sup>270</sup> The fact that the Proclamation ordains the establishment of a National Anti-Terrorism Coordinating Committee comprising the notable stakeholders and the overall institutional architecture that it envisages might be meant to foster international cooperation in fighting terrorism.<sup>271</sup>

In connection with the commitment to enforce international conventions, it has to be reckoned that Ethiopia has either signed or ratified the majority and fully incorporated

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<sup>268</sup> The Anti-Terrorism Proclamation, Preamble, para. 1.

<sup>269</sup> Id. Preamble, para. 2.

<sup>270</sup> Id. Preamble, para. 5.

<sup>271</sup> Id. Arts. 28-30.

four of the international and regional conventions regarding terrorism.<sup>272</sup> The conventions ratified by Ethiopia are integral parts of the law of the land<sup>273</sup> and hence a positive measure is needed for their implementation. As a member state of the United Nations, Ethiopia is expected to enforce Security Council Resolution 1373.<sup>274</sup> One such positive measure is enacting an anti-terrorism law that encompasses all the offences criminalized in the international conventions to which Ethiopia is a party.

The theme of the third and fourth justifications for the Proclamation's enactment lies in the alleged inadequacy of the legal regime that existed till its enactment to effectively deal with terrorism cases. The enactment of the Proclamation that separately deals with terrorism "*has become necessary to legislate adequate legal provisions since the laws presently in force in the country are not sufficient to prevent and control terrorism.*"<sup>275</sup> The veracity of this allegation has to be seen from the perspective of the hitherto in force criminal legal regime in Ethiopia.

Despite pointing out the 1949 Penal Code's failure to properly address crimes born of

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<sup>272</sup> Hashim Tewfik (Ph.D), *Judicial Capacity to Counter Terrorism in Ethiopia*, May 14, 2007, Addis Ababa, Ethiopia, Unpublished paper, pp.35,36, 39 and 40. Hashim mentioned that until 2007 Ethiopia has ratified and adopted the following international conventions on terrorism: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, International Convention for the Suppression of Terrorist Bombings, OAU Convention on the Prevention and Combating of Terrorism, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, International Convention Against the Taking of Hostages, Protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, supplementary to the convention for the suppression of unlawful acts against the safety of civil aviation, Cooperation Agreement with Republic of Turkey in Fighting Against International Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, International Terrorism and Organized Terrorism. He also mentioned that the following four conventions are fully incorporated into the Ethiopian legal system: Convention on Offences and Certain Other Acts Committed on Board Aircraft, Convention for the Suppression of Unlawful Seizure of Aircraft, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation-supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. See also, Supra note 236 at 73.

<sup>273</sup> Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995(hereinafter cited as the FDRE Constitution), Art. 9(4).

<sup>274</sup> See supra in chapter four, discussions about the resolutions of the Security Council of the United Nations. Resolution 1373 is the corner stone of the United Nation's counterterrorism strategy and it requires states to prevent and suppress terrorism.

<sup>275</sup> The Anti-Terrorism Proclamation, Preamble, para. 3.

complexities of modern life<sup>276</sup>, the current leading criminal legislation of the country i.e. the Criminal Code of 2004, failed to address terrorism, which has become a challenge of modern times, as a separate crime. True it is the Criminal Code has come up with a list of crimes which its predecessor failed to incorporate and which are covered by the international instruments ratified by Ethiopia.<sup>277</sup> However, it has serious limitations<sup>278</sup> in that it can not enable the country to effectively prevent and prosecute terrorism cases. Dr. Hashim Tewfik identified seven reasons to justify that the criminal code is not adequate to effectively deal with terrorism cases.<sup>279</sup>

The Code failed to have a specific provision dealing with terrorism. A public prosecutor, who has worked for more than two years in prosecuting terrorism-related cases and was in charge of the famous 'Ginbot 7' Case, note the Code's manifest inadequacy to effectively prosecute terrorism cases.<sup>280</sup> This failure necessitates the anti-terrorism law.<sup>281</sup> I am in favor of this stand. The hitherto laws were not just inadequate but silent in providing the defining elements of terrorism cases.

A separate criminalization of terrorist acts is demanded by Security Council

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<sup>276</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia, 2004, Preface, para. 2.

<sup>277</sup> See, Dereje Zeleke Mekonnen (Ph.D), *Report of the Study on the Laws Relevant to Countering Terrorism in Ethiopia*, IGAD Capacity Building Programme Against Terrorism (ICPAT), November 2006, p. 5. Dereje contends that the scope of the provisions of the Criminal Code is sufficiently wide to cover most of the crimes covered by international instruments ratified by Ethiopia. Part II, Book III of the Criminal Code's special part has four categories of crimes wherein a list of specific crimes is listed. The categories are: crimes against the state or against national or international interests, crime against public security, peace and tranquility, crimes against the freedom and security of communications and crimes against personal liberty.

<sup>278</sup> But see, Id. at 4 and 11. Dereje contends that the legal regime that existed in Ethiopia prior to the anti-terrorism proclamation is fairly sufficient and comprehensive to effectively counter terrorism. He said that most of the legal provisions relevant to counter terrorism are interspersed within the criminal code. For him the noticeable gap of the law was its failure to criminalize financing of terrorism.

<sup>279</sup> Supra note 272 at 37. Absence of a clear provision criminalizing acts of terrorism as such, inadequate penalties incompatible with the heinous nature of the crimes, failure to criminalize an act of bombing a place of public use, a state or government facility, a public transportation system or an infrastructure facility, failure to criminalize acts of threat to kill or injure a hostage in order to compel a third party to do or abstain from doing any act, failure to criminalize financing a terrorist act as a separate crime, failure to criminalize acts of nuclear terrorism and acts committed with the purpose of coercing a government or a group to abstain from having a particular stand point are among the serious limitations of the Criminal Code that Dr. Hashim identified.

<sup>280</sup> Interview with Ato Berihu Tewoldebirhan, Federal Public Prosecutor, on 14 November, 2009. See also, 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.

<sup>281</sup> Ibid.

Resolutions and the international terrorism-related conventions. Moreover, I would argue that the mere fact that the Criminal Code incorporates most of the terrorist crimes stipulated in international conventions does not make it a sufficient one. What is more important is an express provision with the defining features of terrorism as a whole; and not just particular crimes. It is the motive behind that differentiates terrorism from ordinary crimes. A law that fails to make such a distinction can in no way be said to be sufficient to deal with terrorism cases. Owing to the unique aspects they have, terrorism crimes often demand a separate law that deals with the problem within the permissible limits of international human rights law standards.

The sophistication of terrorism cases i.e. the foreign elements that are often involved therein and the long lasting threat or intimidation that terrorism is meant to cause are among the factors that support the need to adopt a separate law.<sup>282</sup> Moreover, the fact that counterterrorism laws are, by themselves, manifestations of state duty to prevent its citizens from the overarching direct and indirect impacts of terrorism on human rights protection is another factor that justifies an independent law. Not to go to the details, a separate law is important to assure the organized and coordinated efforts of the various stake holders to effectively prevent and punish terrorism. This could be inferred from the broad surveillance and interception mandates that anti-terrorism laws of different jurisdictions grant to the executive unlike cases of ordinary crimes.

The fourth justification for the enactment of the Proclamation is concerned with the necessity of the separate legislation to equip the justice machinery, notably the National Intelligence and Security Service and the Police, to have extended mandates in relation to information gathering and evidence collection. It is mentioned in the preamble that *“it has become necessary to incorporate new legal mechanisms and procedures to prevent, control and foil terrorism, to gather and compile sufficient information and evidences in order to bring to justice suspected individuals and organizations for acts of terrorism by setting up enhanced investigation and*

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<sup>282</sup> Cf. Supra note 272 at 41. Dr. Hashim Tewfik argues that it is imperative to have a separate legal regime for the prevention and combating of terrorism cases.

*prosecution systems.*”<sup>283</sup> There are genuine human rights concerns regarding the constitutionality of the Proclamation’s provisions regarding the admissibility of evidences. They would be explored in a latter part of this paper.

In a research made before the Proclamation’s enactment, it was identified that the Ethiopian judiciary, public prosecutor and police do not have the requisite human and material competence to investigate and prosecute terrorism cases.<sup>284</sup> Given the complexity of terrorism cases and their organized character, it is imperative that the justice system has to update its capacity to effectively deal with such cases. An incompetent justice system can not 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 it may resort to inhuman and degrading treatments against 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.<sup>285</sup>

In general, the hitherto existing legal regime was insufficient to deal with terrorism. Apart from the manifest non-existence of terrorism as a separate crime, the Criminal Code is devoid of any special attention that a terrorism case demands. Therefore, I firmly believe in the importance of the anti-terrorism law. Nonetheless, the fact that the law is important to fill the legislative gaps in addressing terrorism cases can in no way justify it to adopt measures that affect human rights protection, bypassing the limits envisaged in human rights covenants and the Ethiopian Constitution.

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<sup>283</sup> The Anti-Terrorism Proclamation, Preamble, para. 4.

<sup>284</sup> Supra note 272 at 42-52.

<sup>285</sup> Cf. Supra note 280. 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, Supra note 241, 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, 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.

## **5.4. The Impacts of the Anti-Terrorism Proclamation on Human Rights Protection**

In this section, we would explore the positive and negative consequences that originate from the anti-terrorism Proclamation and affect human rights protection for better or for worse. This research identified both positive and negative impacts of the Proclamation on human rights protection issues.

As it has been stated time and again in the previous chapters of this paper, 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.<sup>286</sup> Therefore, despite the serious challenges it poses on human rights protection, the Proclamation is in no way inherently irreconcilable with human rights concerns. That is why this research dares to reflect on both its positive and negative aspects from a human rights perspective. The overall impact of the Proclamation on human rights protection is, therefore, a cumulative effect of the opportunities it provide and the challenges it pose.

### **5.4.1. 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 research 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.

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<sup>286</sup> 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.

#### **5.4.1.1. It is a Manifestation of State Duty to Protect the Rights of Citizens**

To state the obvious, terrorism poses a serious challenge on human rights protection. As has been discussed in the second chapter of this paper, the existence of terrorism has far-reaching direct and indirect harmful consequences on human rights protection. In response to this challenge, it has been mentioned in the third chapter that 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 to prevent the violations of human rights irrespective of the sources thereto. In an interview that I made with 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.<sup>287</sup>

It has already been noted that Ethiopia has predictable threats to terrorism. With this background in view, 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 geared towards preventing and controlling terrorism.<sup>288</sup> Needless to explain, this is a step ahead to prevent violations of human rights.

Though some of the provisions have negative implications on human rights protection in themselves<sup>289</sup>, 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

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<sup>287</sup> 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.

<sup>288</sup> See, The Anti-Terrorism Proclamation, Preamble, para. 3.

<sup>289</sup> See *infra*, discussions in the next section of this chapter on the challenges of the proclamation on human rights protection.

related cases. It prohibits incitement to terrorism.<sup>290</sup> It has to be borne in mind that incitement to terrorism mainly through the media has been the eve of our world's most heinous atrocities. With this background in view, setting aside the debates on the permissibility or not 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<sup>291</sup> 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<sup>292</sup> is also very important in increasing the efficacy of the country's counterterrorism measures and thereby contribute positively for human rights protection that would have been resulted from poorly managed security concerns. The provision of the Proclamation on protection of witnesses<sup>293</sup> 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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<sup>290</sup> The Anti-Terrorism Proclamation, Art. 6.

<sup>291</sup> Id. Arts. 13-22.

<sup>292</sup> Id. Arts. 28-30.

<sup>293</sup> 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.

I unequivocally object the terrorist groups' proscription process envisaged in the Proclamation. However, setting aside the reservations 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 arising there from. 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.*"<sup>294</sup> As could be seen from the readings of the pertinent provisions of the anti-terrorism Proclamation regarding proscription,<sup>295</sup> the Proclamation plays a vital role to prevent terrorism by outlawing terrorist organizations and freezing their property.<sup>296</sup>

Expressed in succinct terms, the objectives and provisions of the Proclamation generally aspire 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 in the banner of protecting rights from terrorism.

#### **5.4.1.2. It Provides a Scheme for Compensation to Victims of Terrorism**

It has been established that terrorism is a serious violation of human rights 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

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<sup>294</sup> Supra note 103 at 216.

<sup>295</sup> See infra, discussions in the next chapter on issues related to proscription. The pertinent provisions of the proclamation are reproduced therein.

<sup>296</sup> See also, Proclamation on Prevention and Suppression of Money Laundering and the Financing of Terrorism. This is a special proclamation recently passed by the House of Peoples' Representatives that is not yet promulgated in the official legal magazine i.e. Federal Negarit Gazette. The fact that it aspires to prevent and suppress terrorist financing is of vital importance in ensuring that the state can better prevent organized terrorism.

have an effective remedy.<sup>297</sup> 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.<sup>298</sup> Hence, compensation in kind or monetary terms has to be implemented to pursue for an effective remedy.

The Ethiopian anti-terrorism Proclamation 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<sup>299</sup> or property<sup>300</sup> 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.<sup>301</sup> 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, in our case those which involve human rights violations, are not unique characters of the Anti-Terrorism Proclamation within the Ethiopian criminal legal system. True it is; the Criminal Code of Ethiopia envisages a possibility whereby victims of crimes may be entitled to compensation for damages.<sup>302</sup> However, although the Code visualizes an alternative

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<sup>297</sup> ICCPR, Art. 2(3) (a).

<sup>298</sup> See generally, Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, *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.

<sup>299</sup> 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.

<sup>300</sup> 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.

<sup>301</sup> Id. Art. Art. 27(1) and (4).

<sup>302</sup> *Supra* note 276 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.

to make the compensation payable from the proceeds of the crime and other sources,<sup>303</sup> 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 of victims whose perpetrators have no sufficient fund to make good the damage suffered. This makes the Proclamation of vital importance in ensuring the remedies for the victims of violations of human rights arising from terrorism cases.

The Proclamation, however, waits for 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,<sup>304</sup> issues a regulation on the matter.<sup>305</sup> 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.

#### **5.4.1.3. It Fixes the Maximum Period to Remand Suspects for Investigation**

Undeniable as it is, the Proclamation's stipulation<sup>306</sup> 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. The ICCPR unequivocally ordains that "*any one who is arrested shall be informed, at the time of arrest, of the*

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<sup>303</sup> 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.

<sup>304</sup> The Anti-Terrorism Proclamation, Art. 37.

<sup>305</sup> Id. Art. 34.

<sup>306</sup> See *infra*, the provision of the proclamation in later discussions of this sub-topic.

*reasons for his arrest and shall be promptly informed of any charges against him.*<sup>307</sup>

Ethiopia has duty to enforce this provision. 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 Ethiopian 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<sup>308</sup> for the betterment of human rights protection. I argue that the Proclamation's positive aspect in cases of remand has to be subjectively considered within the domain of the Ethiopian criminal legal system.

The hitherto applicable provision of the Criminal Procedure Code of Ethiopia in remand cases was subject to criticism as it failed to fix the maximum period within which the police has to finalize investigation. It simply ordained that "*No remand shall be granted for more than fourteen days on each occasion*"<sup>309</sup> 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.<sup>310</sup>

The Proclamation made a commendable change<sup>311</sup> in cases of remand that has positive roles for the betterment of the human rights protection of terrorist suspects. It

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<sup>307</sup> ICCPR, Art. 9(2). See also, The FDRE Constitution, Art. 19(1).

<sup>308</sup> 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.

<sup>309</sup> The Criminal Procedure Code Proclamation 1961, Imperial Ethiopian Government Proclamation No. 185 of 1961, Art. 59(3).

<sup>310</sup> 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. (See the annex for the details)

<sup>311</sup> 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 of the ordinary criminal procedure that applies in other cases in Ethiopia

ordains that the Court, before whom 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.<sup>312</sup> This legal stipulation minimizes the possibility whereby terrorist suspects might be subjected to an indefinite detention that inevitably affects the rights of the suspect.

#### **5.4.2. 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 coming into force. A number of commentators, international human rights organizations, opposition political party leaders and the private media have been, and still are, expressing their skeptical attitude towards the Proclamation. The opposing voices differ from case to case.<sup>313</sup> It is not the object of this part of the paper, and in fact the paper as a whole, to ponder on all concerns of the opposing voices. It is rather limited to exploring the damaging externalities of the Proclamation on issues of 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. Though many of the issues might have political features, the issues are viewed from a purely academic perspective and should in no way be considered as political in essence.

While exploring the Proclamation's negative impacts on the various rights recognized in international human rights covenants and the Ethiopian Constitution, this paper 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 human rights standards. Hence, it is opted that the paper explores the negative impacts of the provisions of the Proclamation by taking the most important ones that have cross-cutting implications in human rights protection at large.

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<sup>312</sup> The Anti-Terrorism Proclamation, Art. 20(1) and (3).

<sup>313</sup> See for example, Supra note 266. 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".

#### 5.4.2.1. Unwarrantedly Broad and Vague Definition of Terrorism

As has been discussed earlier, defining terrorism is a divisive subject matter. 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.<sup>314</sup> 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.<sup>315</sup> The vagueness and broadness of the definitions in play cast a doubt on the compatibility of the respective anti-terrorism laws with human rights standards.

The problem of a vague and very broad definition to 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 amenable 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.<sup>316</sup> Failure in this respect makes laws volatile and prone to be tuned for abuses of human rights. In the Ethiopian context, given the politically volatile aspect of terrorism, much care should have been taken in defining its prohibited acts so as to prevent potential abuses of an antiterrorism law and not to betray the law maker’s commitment<sup>317</sup> 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 in verbatim. Article 3 of the Proclamation<sup>318</sup> defines ‘terrorist acts’ in the following manner:

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<sup>314</sup> Supra note 222 at 20.

<sup>315</sup> Ibid.

<sup>316</sup> 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.

<sup>317</sup> See, Supra note 286.

<sup>318</sup> The Anti-Terrorism Proclamation, Art. 3.

*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.<sup>319</sup> It has been commented that “the draft proclamation<sup>320</sup> provides an extremely broad and ambiguous definition of

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<sup>319</sup> See for example, Human Rights Watch, Analysis of Ethiopia's Draft Anti-Terrorism Proclamation, March 9, 2009, p. 3.

<sup>320</sup> 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;

*terrorism that could be used to criminalize non-violent political dissent and various other activities that should not be deemed as terrorism”.*<sup>321</sup> 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.<sup>322</sup>

### **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 amenable to abuse and the consequent human rights violations. This is the reason 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.<sup>323</sup> 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. In the following paragraphs, we will explore these aspects of the Proclamation’s definition by taking two of its elements as prominent manifestations thereof.

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,

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- 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.

<sup>321</sup> Supra note 319.

<sup>322</sup> Interview with, Ato Lidetu Ayalew, President of the Ethiopians’ Democratic Party, Conducted on the 18<sup>th</sup> of November 2009. But see, Supra note 285. The Deputy Chief Commissioner of the Ethiopian Human Rights Commission contends that the problem of definition should not be given much weight if the government is democratic in character.

<sup>323</sup> See, Ethiopia: Amend Draft Terror Law; Proposed Counterterrorism Legislation Violates Human Rights, <http://www.hrw.org> as accessed on 30 June 2009.

environment, historical or cultural heritages'. As has been stated above<sup>324</sup>, 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 a single tree, which is unarguably damage to natural resource, might literally speaking be considered as an act of terrorism. This is decidedly pointless. What kind of damage to natural resource, environment, historical or cultural heritages justifies the leveling of the act that causes the damage to be a terrorist act? The law is silent in this regard.<sup>325</sup> 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.

The second element of the terrorism definition that depicts the unwarrantedly broad aspect is the one which 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" means electronic, information communication, transport, finance, public utility, infrastructure or other similar institutions or systems established to give public service.<sup>326</sup> 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 geared towards punishing political dissent.<sup>327</sup> In following paragraphs, we will explore the allegedly broad aspect of the element of the definition in issue.

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<sup>324</sup> See Supra note 320.

<sup>325</sup> But See, Supra notes 79 and 80. 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.

<sup>326</sup> The Anti-Terrorism Proclamation, Art. 2(7).

<sup>327</sup> Supra note 319 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 286, 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

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.<sup>328</sup> 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.<sup>329</sup> More precisely, 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.<sup>330</sup> The European Union common definition of terrorism also follows a similar trend.<sup>331</sup>

The Ethiopian Anti-Terrorism Proclamation, on the contrary, fails to qualify serious interference or disruption of public services that might be labeled as a terrorist act, which inevitably makes the domain of its application unwarrantedly 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.<sup>332</sup> I believe it is convincing that the mere fact of causing serious interruption or disruption of public services shall not constitute terrorism. It should have been qualified with its consequences. It is the failure in this respect that makes

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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.

<sup>328</sup> See, Supra notes 74-78. The standards of the United Nations Special Rapporteur on Terrorism and human rights support this argument and denounce contrary stipulations.

<sup>329</sup> See for example, Supra note 148.

<sup>330</sup> Supra note 80 Art. 3.

<sup>331</sup> Supra note 79 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."

<sup>332</sup> Supra note 322.

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 vague and potentially ambiguous aspects of the definition. We will explore the vagueness of the definition by taking two elements that prominently display its vagueness. These two 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.<sup>333</sup> 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<sup>334</sup> and the aggrieved employees warned government officials to disrupt telecommunication services<sup>335</sup> unless their demands are fulfilled and the services of the Corporation are made open to the private sector<sup>336</sup> believing that this would ultimately solve the problem. I do not want to dwell into 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

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<sup>333</sup> Supra note 308 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.

<sup>334</sup> The Corporation is owned and run by the government and it is the only telecom service provider in the country.

<sup>335</sup> 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.

<sup>336</sup> This might be considered as an ideological motive sought in the proclamation.

requirement that the Proclamation demands. I believe that such kinds of actions are minor expressions of dissatisfaction and shall in no way be considered as 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 with the way a local government administration<sup>337</sup> functions and commits serious bodily injury against a local official believing<sup>338</sup> 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, can not have the capacity to 'coerce the government' as a broader legal entity<sup>339</sup>. 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.<sup>340</sup> However, it is not unrealistic to predict that a judge might consider the same act as an

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<sup>337</sup> This is referred to as '*Kebele*' Administration in the Amharic Language.

<sup>338</sup> 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.

<sup>339</sup> 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.

<sup>340</sup> 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 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.

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.

In a similar fashion with the above mentioned element, 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 becoming Devil’s Advocate if one argues that 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 can not 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.

Expressed in succinct terms, the broadness and vagueness of a definition of terrorism makes an anti-terrorism law amenable 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.<sup>341</sup> 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 threats.”<sup>342</sup> 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.

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<sup>341</sup> 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.

<sup>342</sup> *Ibid.*

The downsides of the Ethiopian Anti-Terrorism Proclamation in this regard make it highly susceptible to abuse of human rights.<sup>343</sup> 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 persecution for terrorism cases.

#### **5.4.2.2. Absence of Judicial Involvement in the Proscription Process**

As it has been noted in the third chapter of this paper, it is not unwise to think that the executive is often times not friendly with or at least not a renowned defender of human rights. Hence, adherence to separation of powers and appropriate check and balance is an indication of a government's adherence to human rights norms.<sup>344</sup> For a sound governmental functioning, there has to be judicial and legislative control over the acts of the executive. This skeptical attitude towards the executive's handling of terrorism cases is not groundless. As it has been stated time and again, terrorism is a volatile concept that is easily amenable to abuse and this calls for putting-in-place a well-entrenched system so as to minimize the risk of abuse and effectively handle blatant cases of terrorism, which not only violate human rights but might even have the capacity to destabilize state functioning. The fact that Ethiopia's Anti-Terrorism Proclamation has made proscription out of the reach of the judiciary<sup>345</sup>, I believe, has negative impacts on human rights protection.<sup>346</sup>

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<sup>343</sup> See, Supra note 322. Ato Lidetu Ayalew contends that the indeterminacy of the definition gives unwarrantedly broad discretion of interpretation and thereby making the law amenable to abuse.

<sup>344</sup> Supra note 141.

<sup>345</sup> Cf. Supra note 113 at 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.

<sup>346</sup> But see, Supra note 287. 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, Supra note 284. Ato Demoze praises this proscription process. Nevertheless, I argue against them as the issue at hand is whether the House can exercise powers on justiciable matters but not whether it is democratic or not.

The Proclamation provides the following in relation to the procedure to be followed in proscribing terrorist organizations<sup>347</sup> within its part five that provide 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.*
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.*<sup>348</sup>

Before embarking on considering the negative impacts of the proscription process on human rights protection, let us consider whether the stipulation is in accordance with the Ethiopian Federal Constitution. The power to proscribe and de-proscribe terrorist organizations could not be inferred from the constitutional provision that lists down the powers and functions of the House of Peoples' Representatives. The Constitution mandates the House of Peoples' Representatives primarily to legislate laws in all

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<sup>347</sup> See, 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.

<sup>348</sup> Id. Art. 25.

matters assigned by the Constitution to Federal jurisdiction.<sup>349</sup> The power to proscribe and de-proscribe terrorist organizations could not be considered a legislative one.

From among the powers and functions of the Ethiopian Parliament envisaged in the FDRE Constitution, its power to proclaim a state of war on the basis of a draft law submitted to it by the Council of Ministers<sup>350</sup> may, though unacceptably, be perceived to have some sort of similarity with the power to proscribe and de-proscribe terrorist organizations in the Anti-Terrorism Proclamation. Nevertheless, though there are some jurisdictions that follow the war-model<sup>351</sup> in responding to terrorism, no such indication exists in the Ethiopian case and it is crystal clear that the Ethiopian law envisages the criminal persecution model to deal with terrorism cases. Therefore, the Ethiopian Parliament's constitutional mandate to proclaim a state of war in no way justifies the constitutionality of its power to proscribe and de-proscribe terrorist organizations in the Anti-Terrorism Proclamation.

There are jurisdictions that consider much of the purpose of proscription to be symbolic. They argue that proscription is a symbolic declaration to "*express society's revulsion at violence as a political strategy as well as its determination to put a stop to it.*"<sup>352</sup> This could be acceptable only in so far as the proscription is practically symbolic without externalities that have bearings on rights established in international covenants and domestic human rights instruments including the Constitution. With this general understanding, it is reasonable to argue that the proscription process envisaged in Ethiopia's Anti-Terrorism Proclamation is not just symbolic.<sup>353</sup> As would be explored in the forthcoming paragraphs, it has real impacts on rights. It is however puzzling that, at least as it appears in the minute of parliamentary public

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<sup>349</sup> The FDRE Constitution, Art. 55(1).

<sup>350</sup> Id. Art. 55(9).

<sup>351</sup> The United States' declared war on terror and the often cited "either with us or against us" discourse is notable in this regard.

<sup>352</sup> Supra note 113 at 61. It is mentioned that the symbolic purpose of proscription is especially evident in Britain.

<sup>353</sup> But see, Supra note 322. An opposition political party leader, Ato Lidetu Ayalew, said that there is no wrong in labeling an organization as a terrorist one by the House of Peoples' Representatives had the definition the Proclamation provided for "terrorist acts" been a legitimate one. He said that "there is no problem in the labeling as the punishment still lies within the domain of courts of law."

discussions, nothing has been said about the proscription process during the debates over the provisions of the Proclamation.<sup>354</sup> Irrespective of the essence of proscription sought by the Proclamation, I argue that the house has no constitutional mandate to proscribe and de-proscribe terrorist organizations. I believe this issue has to be resolved by constitutional interpretation.

Setting aside the issue whether the House has a constitutional mandate of so doing, the proscription process envisaged by the Proclamation violates human rights on its own and also creates an atmosphere that human rights protection is endangered. The absence of judicial involvement in the process of proscription or de-proscription certainly violates the citizen's 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.*"<sup>355</sup> No one could reasonably argue that the House of Peoples' Representatives has judicial powers whatsoever.<sup>356</sup> 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<sup>357</sup>, 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 the proscription process. Though not immune from critics over constitutionality, it would have been better had, at least the power to de-proscribe a proscribed terrorist organization, been reserved to courts of law.

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<sup>354</sup> Supra note 287. I also have witnessed, in my private observation of media broadcasts of the debates of the various political parties, that the issue of proscription has not been questioned.

<sup>355</sup> The FDRE Constitution, Art. 37(1).

<sup>356</sup> See, Id. Art. 79(1). It is provided that "judicial powers, both at Federal and State levels, are vested in the courts."

<sup>357</sup> It has to be reckoned that a grouping of even two persons might be deemed as such.

The absence of judicial involvement in the proscription may also be seen from the perspective of freedom of association. The FDRE Constitution recognized freedom of association providing 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.*”<sup>358</sup> It is crystal-clear that establishing an association with terrorist missions or a promotion thereof can in no way be justified within the constitutional boundary. Hence, there is no wrong in destroying such kinds of organizations. However, it is equally sound and acceptable that the legality or not of a given association shall be ascertained by an independent judiciary; not by the law making organ, which obviously favors the majority. The Anti-Terrorism Proclamation, however, provides a scheme whereby the legality of an association could be determined without judicial involvement. 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.<sup>359</sup>

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 to which someone is a member is proscribed, makes the member thereof punishable for a crime of participation in a terrorist organization<sup>360</sup> 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

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<sup>358</sup> The FDRE Constitution, Art. 31.

<sup>359</sup> But see, Supra note 287. 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.

<sup>360</sup> 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.

organization are susceptible to abuse.

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 some one 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.

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.<sup>361</sup> This requirement of intention is, however, absent in both the draft and the final Proclamation. In this case, there is nothing that prevents one, who, even with sincere 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.

In some cases, 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 reckoned that the FDRE Constitution gave the power of constitutional interpretation to the House of the Federation but not to courts of law.<sup>362</sup> Hence, courts can not declare the unconstitutionality of whatever

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<sup>361</sup> 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.

<sup>362</sup> The FDRE Constitution, Art. 83.

is decided by any organ of government including the parliament.<sup>363</sup>

From the individual's perspective, courts can not go to the merit of considering the unlawfulness of the acts that some one does if it is proved that he is a member or participated, in any capacity, for the purpose of the proscribed organization.<sup>364</sup> By proscribing a given organization as a terrorist one, the Parliament is making members punishable for their mere membership. Generally, there is no clear demarcation between the powers of the law maker and that of courts in the process of prosecuting alleged terrorists.<sup>365</sup> With all the above stated reasons, I argue that absence of judicial participation in the proscription has negative consequences from a human rights perspective since courts of law are expected to be defenders of human rights.

#### **5.4.2.3. It Might be Used to Punish Political Dissent**

From 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.<sup>366</sup> 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.<sup>367</sup> As has been discussed in the third chapter of this paper, the probability

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<sup>363</sup> See generally, Consolidation of the House of the Federation and Definition of its Powers and Responsibilities, Proclamation No. 251/2001.

<sup>364</sup> 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. 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.

<sup>365</sup> 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 280. 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.

<sup>366</sup> See supra, detailed discussions regarding this issue in chapter three of this paper.

<sup>367</sup> See for example, Supra note 14 at 2. 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.

of using counterterrorism to silence political opposition is a prominent one.

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.<sup>368</sup> 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.<sup>369</sup>

In a press briefing on this issue, Ato Meles Zenawi, the 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.<sup>370</sup> True it is gone are the days when it was thought that it is appropriate to use any means to get 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 legally stipulated 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 precisely why we need laws to check undue practices by the government, and obviously other actors. Hence, it has to be underlined that irrespective of the degree of political commitment not to use the Proclamation for punishing political dissent, the system can in no way be immune

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<sup>368</sup> See for example, Supra note 319.

<sup>369</sup> Supra note 308 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."

<sup>370</sup> Melaku Demissie, Arguments on Anti-Terrorism Law, the Reporter, Published Weekly by Media and Communications Center, Saturday 04 July 2009.

from such criticism unless it has legal schemes meant to pursue this commitment.

The Proclamation has two inherent weaknesses that make it amenable to be abused so as to silence political opposition. These two weaknesses have been the focus of deliberation 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 unwarrantedly broad. Notable in this regard is 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 political demonstrations.

Incontrovertibly, interruption or destruction of public services is always 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 can not 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<sup>371</sup> and the whole activity be regarded as a ‘terrorist act’ making the organizing party susceptible to proscription. As has been noted in chapter three, any undue limitation on the right to protest, the functional part of the right to political

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<sup>371</sup> See, Supra note 322. 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.

participation, is of far-reaching harmful consequences on human rights protection.

The weakness of the Proclamation manifested by 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 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 originate the bill by virtue of the Proclamation, has a majority of the seats in the House and it will have no problem in getting an endorsement from the House.<sup>372</sup> 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.<sup>373</sup> 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.<sup>374</sup> Therefore, I believe that the absence of judicial involvement in the proscription process might potentially be used to silence political opposition.

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<sup>372</sup> In my personal observations so far, I never heard of a bill proposed by the leading political party that failed to get the approval of the Ethiopian parliament.

<sup>373</sup> 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.

<sup>374</sup> 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.

#### 5.4.2.4. Evidentiary Rules Bypassing Constitutional Guarantees of Human Rights

One among the statement of reasons of the Proclamation is the need to incorporate new legal mechanisms and procedures to gather and compile sufficient information and evidences in order to bring to justice perpetrators of terrorist acts.<sup>375</sup> 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 and bring perpetrators to justice demanding the law maker to provide new rules of evidence.<sup>376</sup>

The Anti-Terrorism Proclamation provides the following regarding evidences that are admissible in a court of law for terrorism cases:

*Article 23-Admissible Evidences*

*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.<sup>377</sup>*

From among the list of admissible evidences listed in the Proclamation, the one which makes an intelligence report on terrorism admissible without a need to disclose the

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<sup>375</sup> The Anti-Terrorism Proclamation, Preamble, par. 4.

<sup>376</sup> Supra note 361 at 10 and 11.

<sup>377</sup> The Anti-Terrorism Proclamation, Art. 23.

source or the method it was gathered seems, at least apparently, contrary to the constitutional rule that excludes evidences obtained in an illegal manner. The Constitution ordains 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.*”<sup>378</sup> 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.<sup>379</sup> Coupled with the capacity problems of the police to investigate terrorism cases<sup>380</sup>, it is not unwise to be skeptical of the way that this provision is going to be implemented.

It might be argued that the Proclamation do not specifically make evidences obtained by coercion admissible. However, it has to be reckoned that revising evidentiary rules is a notable one among the statement of reasons of the Proclamation and something significantly different from the existing legal regime must 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.<sup>381</sup> I recommend the constitutionality of this provision of the Proclamation has to be considered by the House of the Federation.

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<sup>378</sup> The FDRE Constitution, Art. 19(5).

<sup>379</sup> See, 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, 4 February 2009, p. 7.

<sup>380</sup> Supra note 272 at 42-44.

<sup>381</sup> 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 287, 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.

#### 5.4.2.5. Undue Restriction on Freedom of Expression

The Proclamation's subjective criminalization of encouragement of terrorism<sup>382</sup> 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 culture of violence and spread terror.<sup>383</sup> Exceeding its limits, freedom of expression might be abused and add fuel to the fire. This has to be legally regulated.<sup>384</sup> However, care should be taken not to violate the essence of the freedom under the banner of fighting terrorism.

The Proclamation criminalizes not only clear cases of direct or indirect encouragement of terrorism through the media<sup>385</sup> 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.

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<sup>382</sup> 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.

<sup>383</sup> Supra note 36 at 174-183.

<sup>384</sup> See, ICCPR, Art. 19 (3).

<sup>385</sup> 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.

The FDRE Constitution ordains 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.<sup>386</sup> In apparent contradiction with this principle, the Proclamation employed a purely subjective criterion that seems to aspire 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.<sup>387</sup> In the public debate about the law, it was noted that the way the provision of the law is framed might embarrass citizens not to exercise their freedom of expression.<sup>388</sup>

#### 5.4.2.6. 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 is used in cases when it is not indispensable. Finally, the paper reflects on the fate of suspects of terrorism upon whom a charge has not been instituted at the expiry of the four months maximum period of remand.

The denial of bail right 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.*”<sup>389</sup> 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

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<sup>386</sup> The FDRE Constitution, Art. 29(6).

<sup>387</sup> Id. Art. 29 (4).

<sup>388</sup> See, supra note 308 at 6. This was commented in the Minutes of the Parliament.

<sup>389</sup> The Anti-Terrorism Proclamation, Art. 20 (5).

only in exceptional circumstances prescribed by law<sup>390</sup> but not a total legislative denial of bail in specified offences. In fact, a case<sup>391</sup> 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.<sup>392</sup> It is only a final decision by the House of the Federation that serves as a precedent for other similar constitutional matters.<sup>393</sup> Therefore, it is not impossible for one to expect another decision by making an application for the case of the anti-terrorism law.

Setting aside 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<sup>394</sup>, failure to disclose terrorist acts<sup>395</sup> and failure to provide information about a lessee<sup>396</sup> that are punishable with rigorous imprisonment from three to ten

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<sup>390</sup> The FDRE Constitution, Art. 19(6).

<sup>391</sup> 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.

<sup>392</sup> See generally, Council of Constitutional Inquiry Proclamation No. 250/2001. This comprises professional experts that have the mandate to recommend on constitutional interpretation issues submitted to the 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.”

<sup>393</sup> Supra note 363 Art. 11(1).

<sup>394</sup> 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.

<sup>395</sup> 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.

<sup>396</sup> 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.

years on account of breach of duty to cooperate<sup>397</sup> 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 Ethiopia<sup>398</sup> 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<sup>399</sup> is not illegitimate. In fact, it might make the security personnel able to prevent crimes of terrorism ahead of their commission and thereby preventing the would-be resultant 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.<sup>400</sup> 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,

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<sup>397</sup> Id. Art. 35.

<sup>398</sup> The Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005, Art. 4(1) limits non-bailable 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.

<sup>399</sup> The Anti-Terrorism Proclamation, Art. 14(1).

<sup>400</sup> The FDRE Constitution, Art. 26(3).

it would have been better had the law provided guiding considerations<sup>401</sup> to 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.<sup>402</sup>

This paper mentioned earlier the fixed four months 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 months 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.<sup>403</sup> 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 months 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 for free and has to be conditionally released on bail<sup>404</sup>; 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

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<sup>401</sup> 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.

<sup>402</sup> Id. Art. 14(2).

<sup>403</sup> See for example, Supra note 310. Ato Aderajew confirmed this. (See the annex for the details)

<sup>404</sup> Supra note 280. Ato Beriheru has this stand.

by invoking a claim of habeas corpus<sup>405</sup>; still others contend that the case has to be closed for-good and the suspect has to be released forthwith<sup>406</sup> as no case has been established against the him. This 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 a four months time becomes meaningless. Nor is it acceptable to resort to habeas corpus cases which, I believe, works for a person whose detention has not come to the attention of a court of law.<sup>407</sup> Therefore, if the four months period expires without a criminal charge, the case shall be closed for-good and the suspect has to be released 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.

Succinctly expressed, it could be said that though the Proclamation has features that would help in protecting violations of human rights, there are serious failures that might potentially result in violations of rights. The indeterminacy of the definition of 'terrorist acts', absence of judicial involvement in the process of proscribing terrorist organizations, the likelihood that the law might be used to punish political dissent, the evidentiary rules that, though arguably, bypass constitutional limits and the undue restriction on freedom of expression are notable in this regard.

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<sup>405</sup> Supra note 364.

<sup>406</sup> Supra note 280. Ato Mulugeta Ayalew has this stand.

<sup>407</sup> 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.

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 cited earlier, freedom itself must set a limit to the measures we employ to maintain it.

## **6. Conclusion and Recommendations**

Despite persistent attempts to come up with an internationally accepted and binding definition of terrorism, the international community has not yet proved to be successful. The necessity of such a definition is far beyond academic reasons. An internationally accepted definition of terrorism is priceless. Besides harmonizing attempts to fight terrorism at an international level, it might serve as a standard to control state abuse of anti-terrorism laws, which might be a cause for human rights violations. Among other things, it is the absence of international agreement that many states cite as an excuse for the definitional problems of the domestic laws they adopt.

Terrorism has direct and indirect far-reaching negative impacts on human rights protection of which it is only the former that grasp the attention of the media and the public at large. There is no right that is immune from the peril of terrorism. Above all, terrorism affects the basics of human freedom as it destroys rule of law and seriously hampers the freedom from fear of the public at large. Though not easily identifiable as compared with the direct ones, the indirect negative consequences of terrorism on human rights are, I would say, much more devastating than the former. They affect not just the rights of the victims of a given case of terrorism but the overall public attitude and government capacity towards securing human rights protection in the context of terrorism and counterterrorism.

International human rights oblige states to protect their citizens from terrorism. It is this premise that justifies the necessity of adopting counterterrorism strategies. However, irrespective of the magnitude of the terrorism threat, a state can not adopt a measure that is inherently irreconcilable with international human rights and the flexibilities built into its architecture. Any thing beyond this is nothing but violation of human rights. This shall in no way be tolerated. Yet, despite relentless condemnation of abusing counterterrorism for political interests, many states are often blamed to have taken it as a means to pursue their political agenda. The unprincipled way of defining terrorism in domestic laws contributes a lot to make

counterterrorism measures human-rights-unfriendly. Fighting terrorism is often taken as an excuse to take-away the powers of the judiciary and unduly restrains rights without judicial involvement. The perplexing truth is that it is human rights that remain at odds both due to terrorism and the measures meant to respond thereto.

Since terrorism has international character and it is serious threat to international peace and security, the United Nations has an indispensable role in responding to the damaging human rights consequences of both terrorism and counterterrorism. Besides being an international forum of discussions to harmonize domestic anti-terrorism laws and shaping the international jurisprudence, the United Nations play a pivotal role in making domestic terrorism-related legal regimes to be human-rights-friendly. Gone are the days when the United Nations used to have an ambivalent position towards terrorism. All its organs unequivocally condemn acts of terrorism irrespective of the motivation thereto and its place of commission. In fact, defending human rights in the struggle against terrorism is among its guiding principles in countering terrorism. The problem is that resolutions and decisions at the international level lack well-entrenched enforcement mechanisms to secure their practical applicability.

Ethiopia has an international duty to prevent and counter terrorism. Besides this, it has serious threats to terrorism to which it has to respond. The hostile neighborhood with Eritrea and Somalia, the looming threats of religious terrorism and ethnic-based conflicts are among the reasons that make Ethiopia's threat to terrorism an imminent one. With all these potential threats of terrorism and the various terrorist acts that the country has suffered, it seems imperative for it to respond to the problem.

One way of responding to the problem is enacting an anti-terrorism law that is meant to effectively prevent and counter terrorism. Apart from the international obligation that the country has undertaken, the inadequacy of the hitherto existing criminal laws of the country to effectively prevent and counter terrorism has been the prominent deriving force for the enactment of the recently adopted anti-terrorism law. The pre-anti-terrorism law legal regime in Ethiopia was inadequate to effectively deal with

cases of terrorism with the required emphasis they demand. Though a number of terrorist acts were criminalized, the motivation thereto and the defining features of terrorism, were left unaddressed; and still others were not mentioned. The then legislative gap in addressing cases of terrorism makes the anti-terrorism law an indispensable one both to increase efficiency in preventing and punishing terrorism and prevention heinous violations of human rights arising there from.

The necessity of the anti-terrorism law, however, can in no way justify it to come up with restrictions and limitations on human rights that are not justified by the lesser evil formulas built into the international human rights architecture i.e. restrictions for lawful purposes and derogations during a state of emergency. The anti-terrorism law shall not be a source of violations of human rights, for whose protection it was necessitated. Though the law has serious problems with respect to human rights protection, it is in no way inherently irreconcilable with human rights. This research identified the law's positive and negative impacts on human rights protection.

The most important positive feature of the Proclamation is that it enables the country to effectively prevent and punish terrorism. It has to be reckoned that counterterrorism is a manifestation of state duty and failure in this respect might have been attributable to the government. The fact that the law aspires to increase the capacity of the justice machinery, its lists of provisions meant to prevent terrorism ahead of its commission and the deterrence effect that it has on potential terrorists might increase state efficiency to respond thereto.

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. The problem is that the regulation for the establishment of the fund has not yet been issued which makes the role of the law in this regard a meaningless one.

The third positive aspect identified in this paper is the fact that the law fixed the maximum period of remand to a four months period. Though a four months period might not be as prompt as what human rights instruments require for a criminal charge to be instituted, it is commendable when compared with Ethiopian standards applicable in other criminal proceedings. In the Criminal Procedure Code, there is no end date specified in law for a criminal charge to be instituted after detention which facilitates indefinite detention without charge. It is this subjective consideration that makes the Proclamation's fixed period of remand a creditable one.

Coming to its downsides, this paper 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. A minor damage to natural resources and a mere serious interference to public services, without causing death or bodily injury, are punishable with at least fifteen years rigorous imprisonment. Moreover, the defining features of a crime of terrorism are mentioned in a way that one can not be sure as to which instances are acts of terrorism and which are not. This makes the domain of the offence an indeterminate one and highly susceptible to abuse by state actors.

The second prominent problem is that the law mandates the Parliament the power to proscribe and de-proscribe terrorist organizations. There is no judicial involvement at all at any stage of proscription or de-proscription. This paper argues that the House is not constitutionally mandated to do so and the mandate it is given is unconstitutional. Moreover, the absence of judicial involvement violates human rights in its own and is a potential source of other abuses. Proscription in the Proclamation is not just a symbolic declaration. It has irreversible implications on the fate of the organization and the members thereto. That is why this paper argues that the absence of judicial involvement in the proscription violates citizen's right to access court administered justice recognized in the Constitution. A case against freedom of association has now become out of the reach of the judiciary. Individual members are punishable for a

minimum of five years rigorous imprisonment for the mere fact of becoming a member, before or after proscription, of a proscribed organization.

This paper contends that there is no legally stipulated guarantee to prevent the government from using the anti-terrorism law for the purpose of silencing non-terrorist political opposition. The proscription by the law maker is to be initiated by the executive. In current Ethiopian reality, the party that constitutes the executive has an unchallenged majority in the parliament and it will have no difficulties in labeling its political opponents as terrorist organizations. I believe that the present government is not so irresponsible that it will abuse its powers in such a way. However, laws and check and balance schemes are needed not just because governments are irresponsible but because they have to be there to avoid abuse of powers in tempting times. Had the judiciary been involved in the process of proscription, it would have legally prevented the executive from doing whatever it is pleased to do.

In addition to the above mentioned problems of the Proclamation that have cross-cutting impacts on human rights protection, this research identified other problems that unduly restrict human rights and be causes of abuse. The fact that the Proclamation makes admissible terrorism-related intelligence report that does not disclose the source or the method it was gathered might be a potent source of abuse. The admissibility of such evidences is contrary to the constitutional principle that excludes illegally obtained evidence and might trigger the police to resort to torture and other forms of inhuman treatment.

It 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. Coupled with the definitional problems mentioned earlier, this predominantly subjective thought might give rise to an unprincipled restriction on freedom of expression. Moreover, denial of bail to all cases of terrorism, irrespective of their gravity and the unresolved fate of suspects of

terrorism when the investigation is not finalized after the four months period of investigation are the other concerns on human rights that this paper has identified.

Based on the findings of this research, the following are my notable recommendations that have to be implemented for the betterment of human rights protection in the context of terrorism and counterterrorism in Ethiopia. I believe that terrorism can effectively be controlled by addressing its root causes. A legislative response to terrorism can not be effective in its own. It has to be corroborated with a coordinated effort by various actors to make sure that the society at large vehemently condemns the use of terror to pursue any agenda. In line with this, the government has to employ efficient conflict resolution schemes so that religious and ethnic conflicts will not be breeding grounds for future terrorism. However, not all cases of terrorism are results of imprudent government functioning and the following recommendations are relevant to make the country's counter terrorism measures more effective.

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 up on 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 assure that the potential abuses of the Proclamation by government forces is not something worrisome.

Ethiopia is obliged by human rights instruments to ensure an effective remedy for human rights violations. However, this commitment is betrayed as compensation to victims of violations is not well-developed, and arguably absent. A mere punishment of perpetrators of the violation is in no way an effective remedy. Though the regulation thereto has not yet been issued, the anti-terrorism Proclamation come up with a commendable change in this regard. It envisages the establishment of a fund so as to compensate victims. The regulation for the establishment of Terrorism Victims' Fund has to be issued as promptly as possible. It is only this way that the law can legitimately be said to have contributed a lot for better remedies in cases of human rights violations arising from acts of terrorism.

This paper identified a number of negative aspects of the Proclamation on human rights protection. Some of them have been named as having unconstitutional elements while others demand simple amendment. Hence, I would recommend that constitutional interpretation has to be made on the following issues: Whether the Parliament is constitutionally mandated to proscribe and de-proscribe terrorist organizations, whether the proscription process that the Proclamation envisages is compatible with the Constitution and notably the right of access to justice as ordained in the latter, whether evidentiary rules ordained in the Proclamation are constitutional, whether the subjective restriction on freedom of expression is constitutional. I believe that all these cases are unconstitutional and recommend there unconstitutionality be declared. This contributes a lot for the betterment of human rights protection in the context of terrorism and counterterrorism in Ethiopia.

Apart from the above-mentioned issues that require constitutional interpretation, I recommend that the following provisions of the Proclamation have to be amended so as to make the latter human rights friendly. 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 stated in this paper.

An amendment has to be made not to make individuals punishable 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.

Not all cases of terrorism shall be considered as one and the same. There has to be an amendment so as to limit the non-bailable crimes of terrorism based on their gravity. Moreover, if the parliament is decided to have a constitutional mandate to proscribe and de-proscribe terrorist organizations, a regulation has to be issued to make clear its mandates 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. Failure in this respect might result in unanticipated problems in prosecuting terrorism cases.

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