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**The Anti-Terrorism Laws of Ethiopia and Kenya vis-à-vis
International Due Process of Law Standards: A Comparative Analysis**

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**A Thesis submitted to Addis Ababa University College of Law and Governance
Presented in Partial Fulfillment of the Requirements for the Degree of
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School of Graduate Studies

This is to certify that the thesis prepared by Dagnachew Mekonnen, entitled Counter-Terrorism Laws of Ethiopia and Kenya vis-à-vis Due Process of Law: A Comparative Analysis submitted in partial fulfillment of the requirements for the Degree of Master of International Law complies with the regulations of the University and notes the accepted standards with respect to originality and quality.

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Acknowledgment

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List of Abrevations

UN	United Nations
US	United States of America
UK	United Kingdom of Britain and Northern Ireland
EU	European Union
HRD	Human Right defenders
SC	United Nations Security Council
GA	United Nations General Assembly
ICCPR	International Covenant on Civil and Political Rights
CAT	Convention against Torture and other Cruel, Inhuman and Degrading Treatment
UDHR	the 1948 Universal Declaration on Human Rights
ICC	International Criminal Court
ICJ	International Criminal of Justice
ACHPR	African Charter on Human and Peoples Right
AU	African Union
IGAD	Intergovernmental Authority for Development
EPRDF	Ethiopian People's Revolutionary Democratic Party
CT	Counter-Terrorism
CTC	Counter Terrorism Committee
CTED	Counter Terrorism Directorate
HPR	House of Peoples' Representative

HOF House of Federation

CTC Counter-Terrorism Committee

ATP Ethiopian Anti-Terrorism Proclamation

Ethiopia the Federal Democratic Republic Of Ethiopia

Kenya the Republic of Kenya

SC Security Council

S/Res. Security Council Resolution

Sec Section

STB the 2003 Kenyan Suppression of Terrorism Bill

PTA the Kenyan Prevention of Terrorism Act, 2012

SLAA the Security Laws Amendment Act of Kenya, 2014

ATP the 2009 Ethiopian Anti-Terrorism Proclamation

HOA Horn of Africa

Art Article

CTED Security Council's Counter-Terrorism Executive Directorate

CTITF Counter-Terrorism Implementation Task Force

NISS National Intelligence Service

US PATRIOT Act

CPC Criminal Procedure Code

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Plagiarism Declaration

I, the undersigned declare hereby that this thesis is my original work. Where other people's works have been used, references have been provided, and in some cases, quotations made. In this regard, I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the LLM Degree in International Law.

Name _____ signature _____ Date _____

Acknowledgment

I would like to express my sincere gratitude to Mr. Mohammed Habib for his unreserved constructive professional advice which was very indispensable in the realization of this work. With the same tone, it is with a great appreciation that I would like to remember and acknowledge Mizane Abate (PHD) for his advices on the some technical issues and consideration of problems that I faced during the process.

List of Abbreviations

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US	United States of America
UK	United Kingdom of Britain and Northern Ireland
EU	European Union
HRD	Human Right defenders
SC	United Nations Security Council
GA	United Nations General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICJ	International Criminal of Justice
ACHPR	the 1981 African Charter on Human and Peoples Right
AU	African Union
IGAD	Intergovernmental Authority for Development
EPRDF	Ethiopian People's Revolutionary Democratic Party
CT	Counter-Terrorism
CTC	Counter Terrorism Committee
CTED	Counter Terrorism Directorate
HPR	House of Peoples' Representative
HOF	House of Federation
CTC	Counter-Terrorism Committee
ATP	Ethiopian Anti-Terrorism Proclamation

Ethiopia	the Federal Democratic Republic Of Ethiopia
Kenya	the Republic of Kenya
SLAA	the 2014 Kenya Security Laws (Amendment) Act
SC	Security Council
S/Res.	Security Council Resolution
Sec	Section
STB	the 2003 Kenyan Suppression of Terrorism Bill
PTA	the Kenyan Prevention of Terrorism Act, 2012
SLAA	the Security Laws Amendment Act of Kenya, 2014
ATP	the 2009 Ethiopian Anti-Terrorism Proclamation
HOA	Horn of Africa
Art	Article
CTED	Security Council's Counter-Terrorism Executive Directorate
CTITF	Counter-Terrorism Implementation Task Force
NISS	National Intelligence Service
CPC	Criminal Procedure Code
DG	Director General of the Federal Police
UN Charter	United Nations Charter, San Francisco, 1945
UDHR	Universal Declaration of Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Abstract

Counter-Terrorism Laws of Ethiopia and Kenya vis-à-vis Due Process of Law: A Comparative Analysis

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Addis Ababa University, 2017

States are required, under international law, to ensure due process of law while taking actions against terrorist acts. The obligation to observe due process of law involves the duty to comply with a number of requirements necessary to ensure protection of the rights of the accused persons for allegedly committing certain terrorist acts.

Since such a requirement applies to different national contexts, it would be necessary to select some specific countries to investigate how much those states are serving due process standards which is required under international law. Accordingly; Ethiopia and Kenya have been studied for the purpose of demonstrating the enforcement of globally applicable standards in their specific national contexts. The two countries are selected because of their common regional geopolitical context in the Horn of Africa. It is known that Horn of Africa is one of the regions of the world which have been exposed to recurring terrorist attacks. Furthermore, as compared to the other Horn of African countries, Ethiopia and Kenya appears to be relatively more strongly committed to contribute towards fighting terrorism.

While taking note of the positive attitude of these two Horn of African countries towards complying with their obligations in fighting terrorism, the critical examination of the status of compliance with their obligation in ensuring due process in the course of fighting terrorism is relevant. Accordingly, part of the finding of the research shows that Kenya's laws are relatively more relevant to serve the purpose of due process as required under the applicable international legal instruments. Thus; some suggestions are advanced with a view to upgrade the Ethiopian legal regime for the purpose of ensuring due process and related obligations.

Chapter One

A General Framework of the Research

1.1. Introduction

This chapter sheds light on the over-all structure of the thesis, with a focus on the background, the research problem, objectives, research questions, scope and organization of the chapters. It also deals with the significance and limitations of the study, and review of the existing literatures in relation to the study.

1.2. Background

Terrorism is a contemporary global threat which is causing untold human suffering. It seems to be assumed that lack of accommodating political space or certain forms of discriminatory practices against a distinct religious, ethnic or political groups might cause resort to terrorist acts. While such apparently aggrieved social groups may justify their actions, mostly involving indiscriminate killing, kidnapping, intimidation of innocent civilians, international law considers such actions strictly illegal and intolerable. There are several conventions, declarations and resolutions which have been put in place with the intention to discourage and suppress terrorist acts. To this effect, peace loving nations, including UN Member states, are required to contribute towards combating terrorism acting within the global international legal framework. Indeed, the international community has responded to it through concerted global actions aiming either to reduce or rid of the threat.

On the other hand, the international community has shown interest in safeguarding the observance of universal human rights norms, including the principles of rule of law and due process in the course of enforcing those actions necessary to combat terrorist acts.

From historical point of view, terrorism was first addressed internationally in 1937 when the League of Nations prepared the Convention for the Prevention and Punishment of Terrorism.¹ But the proliferation of taking legal and diplomatic measures has shown rapid

1. Latasha Turney Harris, *the Development of a United Nations Counter Terrorism Policy: A pragmatic approach to the problem of a definition of Terrorism*, University of Helsinki, Faculty of Law, May 2014, pp.6-7

progress after 9/11 US terrorist attack.² Many UN resolutions require states to criminalize acts of terrorism and cooperate in the global counter-terrorism effort. With the same purpose, the SC has also adopted several resolutions³ having the characteristics of either hard or soft law. All resolutions of the UN and the SC remind states to insure that their counter-terrorism measures are in line with international law.⁴

It is understood that there is an obligation on states to protect individuals within their jurisdiction from terrorists.⁵ Practically speaking, the purpose for which counter-terrorism laws are enacted and the manner in which they are applied shows various differences among world nations. In this respect, the lack of a universally accepted definition of terrorism has enhanced the possibility of human rights violations under the guise of counter-terrorism, and negatively impacts the ability of the international community to respond to fight terrorism. The problem becomes worse when it is coupled with lack of adequate judicial oversight on counter-terrorism measures. So, one may assume that some governments may tend to wipe out any form of public dissent under the guise of fighting terrorism.

Thus, understandably, the protection of human right has attracted the attention of many human rights activists due to the risks involved in counter-terrorism measures.⁶ The US

2. Javier Rupérez, *the UN's Fight against Terrorism: Five Years after 9/11*, ARI 83/2006 (6 September 2006), available at <http://www.un.org/terrorism/ruperez-article.html>

3. See for e.g. S/Res.1373 (2001), S/Res.1456 (2003), S/Res.1566 (2004) and others

4. Office of the United Nations High Commissioner for Human right, "Human right, Terrorism and Counterterrorism," Fact Sheet No. 32, p. 20, available at <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

5. ICCPR, Arts 1-3

6. Gabriella Blum, and Philip Heymann, *Law and Policy of Targeted Killing, Volume 1*, Fellows of Harvard College June 27, 2010 pp.156 available on <https://fas.org/irp/eprint/machon.pdf>

Following the 9/11 attack, the Bush administration justified these measures, claiming that the terrorist threat generated "a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians." Former President Bush concluded that "this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war." The United States has claimed that the "War on Terror" is different from any previous armed conflict and as result of this terrorists would not have the status of "enemy-combatants" against their protection under the Geneva Convention: lawful and unlawful combatants. By changing the term, US policy indicates that international law applicable during armed conflict does not apply to the detainees accused of terrorism despite of the fact that human right law are always applicable and being a terrorist will not take away protections of the Geneva Convention

response to 9/11 terrorist attacks and its “War on Terror” policies and measure can show how counter-terrorism policy will affect human right. This policy has put in veil international conventions, including the Geneva Conventions and the Convention against Torture. Although terrorism constitutes a unique and complex threat to security, measures taken must also comply with international law and should not violate fundamental human rights in general and due process of law in particular.

Despite its destructive effect, to date, there is no consensus on the definition of terrorism. But, in response to frequent terrorist attacks, states are deeply involved in the criminalization of terrorist acts with the objective of punishing such acts based on their extraordinary laws which have empowered investigation and prosecution authorities with broad powers. But, investigation and prosecution of all offences in general and terrorism in particular need follow some basic rights of the suspects which are found under international instruments.

A comparative analysis, among anti-terrorism laws of different states would be conducted effectively from due process of law perspectives as the core right under international human right law. Both anti-terrorism laws and international human right have a common concern in protecting due process rights of individuals. In this regard, many international instruments impose, among other things, a duty on states to strictly follow due process of law during prevention, apprehension, investigation and prosecution of suspects.⁷

Various resolutions of the UN and the SC underline the protection that must be accorded to human rights during the enacting and enforcing states’ counter-terrorism laws. In this respect, the standards to conduct a comparative analysis between national anti-terrorism laws are due process of law principles which are enshrined under international instruments and other relevant practices having binding effect on states. Thus, the compliance of national laws with such instruments and practices would be the standard to provide the analysis.

Yet, there is not a comprehensive convention on terrorism at the international level, and it is amid this reality that states are resorting to adopt international treaties on certain specific

7. See for example *S/Res.1624(2005)* adopted on 14 September, 2005

manifestations of terrorism like hostage taking, high jacking and others.⁸Moreover, owing to the severity of the crime, states have been enacting national anti-terrorism law which criminalizes perpetrators to protect their nationals and property from the devastating consequences of terrorist acts. It is with the same purpose that the two strongest states in the Horn of Africa, Ethiopia and Kenya, have proclaimed counter-terrorism laws and embarked to take serious measures accordingly.

1.3. Statement of the Problem

As is known, there are a number of international conventions, declarations and resolutions adopted by, among others, UN organs, such as the Security Council and the General Assembly, imposing obligations upon states to contribute towards combating terrorism. Although there has not yet been a unified definition of the term, terrorism, such international legal instruments have identified some specific acts as terrorist acts. Accordingly, states are required to ban and fight such terrorist acts complying with the existing international instruments which are applicable for this very purpose.

Indeed, several states have complied with this international legal obligation in different ways. One of the approaches being followed by such states is enacting domestic anti-terrorism laws which incorporate the provisions of the provisions of the existing international instruments which are found relevant within their respective national context.

Ethiopia and Kenya may be recognized as part of those countries showing a significant level of commitment to contribute to the global fight against terrorism. Indeed, both countries have domestic laws, which are already in force, and containing provisions relevant for the purpose of implementing their obligation in the fight against terrorism.

However, there is a second dimension in the applicable international legal regime against terrorism. This is the fact that the same international legal instruments require states to properly observe due process of law while engaging in the fight against terrorism. In this regard, states have the obligation to insure their respective anti-terrorism laws incorporate and implement aspects of the existing international legal regime imposing obligation to ensure due process of law.

8. Upendra D.Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, *Denv.J.Int'l L.&Pol'y* Vol.37:2009, pp.657-658 available at djilp.org/wp-content/uploads/2011/08/Acharya-Final.pdf

The two countries, selected to be the subject matters of this research project, seem to attract doubt and uncertainty concerning to uphold the principle of due process of law. There could be a number of reasons for such uncertainty. The Horn of Africa, where the two neighbouring countries are situated, is known not only for recurrence of terrorist attacks but also for wider violation of human rights. Most of the countries of the region are frequently criticized by international and regional organizations, such as the UN and EU, for poor human rights records.

Consequently, the anti-terrorism laws of some of these countries seem to have failed to attract wider domestic support. For example, there are several criticisms against the Ethiopian anti-terrorism proclamation. The proclamation has neither defined relevant terms of the law, nor provides clearly defined provisions which could have been free from vagueness and broadness. The proclamation is also challenged, among other things, on the fact that it unreasonably restricts the right to be released on bail bond, and the right to appeal in case of declared organizations as terrorists contrary to due process of law. Moreover, there are also concerns that the right to a fair trial and the principles of checks and balance are not effective as the courts are not empowered to interpret the constitution and oversee unconstitutional acts of the legislative and executive.

Likewise, there were concerns on Kenya's Security Laws Amendment Act, 2015 (SLAA) and the 2012 Prevention of Terrorism Act (PTA), on the grounds of inconsistency with the country's 2010 Constitution and other international obligations like ICCPR and the 1951 Convention relating to the Status of Refugees.

1.4. Research Objectives

The study has a general objective of examining the counter-terrorism laws of Ethiopia and Kenya to provide a comparative analysis of their compliance with the existing international anti-terrorism legal framework, and due process of law as a basic safeguard against human rights violations. Moreover, the followings are set to be specific objectives of the study:

1. To evaluate the compliance of the counter-terrorism laws of the two states with international due process standards as enshrined under the relevant instruments?
2. Identify good practices that the two states would learn each other.

1.5. Research Questions

On the basis of the above mentioned general and specific objectives, the research will address the following research questions:

1. Do the anti-terrorism laws of Ethiopia and Kenya comply with the standards set by the applicable international legal instruments in ensuring due process of law?
2. What are the relative areas of strength and limitations of the laws of the two countries, as we see them from a comparative perspective?
3. To what extent the existing international legal instruments, applicable in the fight against terrorism, require states to ensure due process of law?
4. Whether there could be good practices offering comparative lessons for each state?

1.6. Scope of the Research

This research is only confined to the comparative analysis of the counter-terrorism laws of Ethiopia and Kenya with a special focus on the procedural aspects of due process of law as required by relevant international instruments. The basic standard to conduct the analysis is due process of law as enshrined under the relevant international human rights instruments. The purpose of the research is to evaluate whether or not the two anti-terrorism laws Ethiopia and Kenya are in compliance with such standards of international instruments.

1.7. Limitation of the Research

Due to time, page limitation and financial constraints, the researcher could not go further to include comparative analysis on the practical implementation of the two laws. Hence, only the compliance of such laws, not the actual practice, with due process of law, and their significance in providing good practice to each other are, inter alia, discussed.

1.8. Significance of the Research

This research is significant to critically assess the counter-terrorism laws of Ethiopia and Kenya through the mirror of international legal framework on counter-terrorism and human rights to recommend legal solutions from international law perspectives, and to identify best practices that those states would learn each other.

Given the poor record of institutional practices in the Horn of Africa, including Ethiopia and Kenya, this study has unique relevance, to show whether or not international

conventions ratified by these states, as a mark of commitment to promote counter-terrorism, are really enforceable for the purpose of ensuring due process of as required by the same international legal instruments.

1.9. Methodology of the Research

Since the study is not the appreciation of facts on the ground, it is typically concerned with assessing only the two states' counter-terrorism laws from due process of law perspectives, and thus different literatures, national and international instruments in connection with terrorism will be the major source. Therefore, the research is doctrinal in type and qualitative methodology is applied. Accordingly, the two states' relevant legal frameworks in relation to counter-terrorism would be studied, best practices will be researched and finally the way out would be recommended based on the applicable due process of law standards.

1.10. Literature Review and Introductory Concepts

1.10.1. Review of the Existing Literature

There have been several research works conducted with the aim of assessing the Ethiopian and Kenyan anti-terrorism legal regime individually to check their compliance with fundamental human rights and freedoms. In this respect, many of the researchers asserted, among other thing, the fact that the absence of a definition of terrorism in general and the broadness of the constituent elements of "terrorist act" has a serious impact on the legitimate exercise of human rights.⁹

Sabine von Schorlemer¹⁰ has underlined the necessity of striking a balance between human rights and security. He adds that as the war on terrorism is simultaneously both a security and human rights concern, it has to be pursued with full respect for international law and human rights.

Helen Duffy on her part has claimed that the willingness and ability of the international community to hold 'to account' states, and individuals, who violate fundamental

9. *Infra note 12-15*

10. Sabine von Schorlemer, *Human Rights: Substantive and Institutional Implications of the War Against Terrorism*, Professor of International Law, EU Law and International Relations, School of International Studies, University of Dresden, PP 280-281

international norms, whether through ‘terrorism’ or in the name of counter terrorism, is therefore a crucial aspect of the challenge that has to be upheld, to ensure that the obligation to counter terrorism is duly carried out without adversely affecting other responsibilities under international law.¹¹

Dersolgni Yeneabat has asserted that the definition of terrorism under ATP is still uncertain. As a result, the punishments for offences which are apparently similar are not proportional, limitation on the freedom of expression are found unwarranted, and restrictions on political dissents turned to be unjustified or grossly excessive.¹²

At the international level, as Wondwossen Demissie,¹³ has argued the SC Resolution 1373 does not require states to pass legislation on domestic terrorism. Consequently, he argued that the reason given by Ethiopia that ATP is adopted in response to the call of the SC is not valid. Moreover, he also mentioned that the Criminal Code of the country does not incorporate provisions that punish every act or intention of terrorists compared to ATP, which criminalizes many specific acts and gives enhanced power to the police and security officials (the emphasis is mine).¹⁴

Shimels Hailu on his part asserted that after studying the practical implementation of the law on the ground, ATP has been used to silence critics and punish political dissents, HRD and the media.¹⁵ According to Shimels, ATP has the effect of reducing procedural requirements which the police should exhaust to insure due process before he is about to detain the suspect (the emphasis is mine). According to Shimels, the 2009 Ethiopian Anti-Terrorism Proclamation serves the government as a legal cover to impair the protection and promotion of human rights, and to this end, ATP over empowers the police with unlimited power of arrest, search and seizure.

11. Helen Duffy, *The “War On Terror” and the Framework of International Law*, Cambridge university press, Cambridge, UK, 2005, pp 542

12. Dersolegn Yeneabt, *Assessing Controversial Issues of the Ethiopian Anti-Terrorism Law: A Special Focus on Substantive Matters*, *Journal of Law, Policy and Globalization*, ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.40, 2015 2015, pp 60-68, available at www.iiste.org/Journals/index.php/JLPG/article/viewFile/24838/25441 accessed 26/06/2017

13. Wondwossen Demissie, *Examining Some of the Raisons D’être or the Ethiopian Anti-Terrorism Law* *Mizan Law Review* Vol. 7 No.1, September 2013, pp 66

14. Id

15. Shimels Hailu, *Ethiopian Anti-Terrorism Law and Human Rights Nexus: An Appraisal*, Addis Ababa University school Of Graduate Studies, Addis Ababa, December 2014, PP 25

Charles Lenjo Mwazigh¹⁶ has stressed the relevancy of courts to ensure checks and balance in the fight against terrorism, scrutinize all measures that might have negative impact on civil liberties, and the revision of laws that are not in line with human rights.

As can be easily noted from the discussion above, the central issues revolve around either on the impacts of states' counter-terrorism laws on human and political rights, or the consequences of the broad definition of terrorist acts on the enjoyments of rights, and the relevancy of an independent judicial system to insure the compatibility of states' anti-terrorism laws with international standards.

This thesis critically examines the validity and otherwise of the existing opinions in relation to the anti-terrorism laws of Ethiopia and Kenya based on the relevant international legal framework. Including the above writers, no one has considered the relevancy of conducting comparative analysis on the Ethiopia's ATP and the Kenya's PTA where there are more or less the same conditions in terms of vulnerability to terrorist acts due to their geographical location in the notoriously volatile Horn of Africa region, and their comparative positive commitment in combating terrorism in the Region while many of the states of the region are either indifferent or fragile. Hence, this thesis will examine and provide comparative analysis of the anti-terrorism laws of Ethiopia and Kenya based on the existing legal framework on counter-terrorism on the one hand, and due process of law on the other hand, as a safeguard against human rights violations.

1.10.2. Terrorism and Human Right Nexus

Despite its common usage, the attempt to define terrorism could not be realized because of the existence of contradicting and diversified ideological interests among the international community.¹⁷ Disagreement over the definition of terrorism dwells on not only technical

16. Charles Lenjo Mwazighe, *Legal Responses to Terrorism: Case Study of the Republic of Kenya*, Naval Postgraduate School, December 2012, PP 88

17. Office of the United Nations High Commissioner for Human rights, *Terrorism and Counter-terrorism Fact Sheet No. 32* PP 5-7
available at www.ohchr.org/Documents/Publications/Factsheet32EN.pdf accessed on 1-23-2017

issues in drafting, but also it is the result of ideological and jurisprudential differences over its constituting elements.¹⁸

The UN General Assembly under GA/Res 49/60 has conceptualized terrorism in terms of:

*“criminal acts intended or calculated to provoke a state of terror in the general public...for political purposes” and that such acts “are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.”*¹⁹

Despite many attempts, the subjective nature of its elements, and the existence of varied interests to exclude freedom fighter, anti-colonial uprisings, or other non serious violence from the definition of terrorism, there is not yet agreed definition of terrorism.²⁰

The absence of uniform and universal definition of terrorism on the one hand and the adoption of outrageous domestic anti-terrorism acts on the one hand, has the potential to open the door to human rights violations under the guise of counter-terrorism. These situations are even worse in developing countries where strong justice institutions are lacking..

It was stressed that combating terrorism should target all of its forms and manifestations with the duty to make sure that any measure taken to combat terrorism should comply with all obligations of states under international law.²¹ The SC has stressed the necessity of international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism.²² It also warns that every state has the duty to refrain from organizing, instigating, assisting or

18. Ben Saul, *Defining ‘Terrorism’ to Protect Human right*, University of Sydney Law School Legal Studies Research Paper No. 08/125 October 2008, pp 15

available at fride.org/download/WP20_DefinTerro_ENG_feb06.pdf accessed on 1-23-2017

19. *Declaration on Measures to Eliminate International Terrorism*, GA Res, 49/60 (1994), Art 1(2) available online at

www.un.org/documents/ga/res/49/a49r060.htm

20. *Supra* note 8, Upendra D. Acharya, pp.657-658

21. *Supra* note 7

22. *Id*

participating in terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts.²³

After 9/11 US terrorist attack, the SC has considered terrorism as a threat to international peace and security.²⁴ Accordingly, as per its mandate to maintain international peace and security, the SC has resorted to order states, to criminalize acts of terrorism in their territory and take necessary measures thereof.²⁵ The SC has also recognized the inherent right of individual or collective self-defence as a legitimate response to terrorist actions.²⁶

The effectiveness of any counter-terrorism measure depends on how well terrorism is defined and how counter measures on terrorism are in line with human rights and due process of law.²⁷ The absence of a definition of terrorism represents a serious limitation on the states' ability to combat terrorism. It might have resulted in counter-terrorism measures outside the scope of international law.²⁸ Terrorism as international crime should have been given definitions so that any measure by individual states to that effect would be conducted based on explicit principles and guidelines.

When we consider the various attempts of definition, there is no consensus on what elements should be fulfilled to conclude that the offence of terrorism is committed. In addition to this, there is also ongoing debate on whether freedom fighters or self-determination struggles are terrorist acts or not.²⁹ However, despite the absence of binding

23. *Id*

24. *S/Res.1373 (2001)*, Adopted by the Security Council at its 4385th meeting, on 28 September 2001

25. *Id*

26. *S/Res. 1368(2001)*

27. *See SC/Res.1624 (2005)*, Adopted by the Security Council at its 5261st meeting, on 14 September 2005. The Resolution provided that states must ensure that counter-terrorism measures should comply with all of their other obligations under International Law, in particular International Human right Law. Human right Council, on its part, adopted Decision 2/112 (2006) to entitled *Persons Deprived of Liberty in the Context of Counterterrorism Measures in which it is urged to ensure that persons deprived of liberty regardless of the place of arrest or of detention benefit from the guarantees to which they are entitled protection against torture, cruel, inhuman or degrading treatment or punishment, the review of their detention and fundamental judicial guarantees.*

28. *Supra note 8*

29. *Supra note 18, Ben Saul*

definition of the term, the proliferation of terrorist attack has obliged both UN and SC to encourage states to enact anti-terrorism laws at the national level.³⁰

To sum up, the lack of definition of terrorism has two undesirable consequences: firstly in the absence of a universal definition of terrorism, it's likely that some states might create broad definitions to evasively criminalize legitimate acts. Secondly, the application of such laws would be subject to misuse and as a result, there might be a gross violation of human rights under the pretext of fighting terrorism.

1.11. Structure of the Thesis

This paper has four chapters. Chapter one deals with the nature of the problems involved in counter terrorism in its legal aspect in general, and the relevancy of providing comparative analysis of the counter-terrorism laws of Ethiopia and Kenya in particular. It also reviews the existing literature in the area of counter-terrorism laws, and introduces basic concepts concerning the nature and definition terrorism on the one hand and the existing relationship between counter-terrorism and human rights on the other hand.

In chapter two, the international and regional legal and institutional framework in which counter-terrorism as a legal concept operates is deeply discussed. In this regard, the various resolutions of the UN and the SC are dealt both as world policy towards terrorism, and as a source of international law in the area of counter- terrorism. The roles of the AU and IGAD is also mentioned as the main theme of the paper is to provide comparative analysis of the counter-terrorism laws of Ethiopia and Kenya which are found in the IGAD region in the Horn of Africa.

While chapter three deals with the concept of due process of law in terms of its procedural and substantive aspects, chapter four which is the main part of the research, addresses, among other things, the nature of Ethiopia's and Kenya's Counter-terrorism laws based on due process standards as enshrined under international instruments having binding effect on Ethiopia and Kenya. Finally, in chapter four, the author of the paper concludes the paper and provides recommendations.

30. Supra note 24,S/Res.1373 (2001)

Chapter Two

International Legal Framework for Regulating Counter-Terrorism

2.1. Introduction

This chapter focuses on the identification of legal instruments which are either directly related to counter-terrorism or indirectly relevant by covering some aspects of counter-terrorism actions. As a global organization, the UN system will be the primary focus area that this chapter would focus on. Thus, conventions and declarations adopted by UNGA, resolutions enacted by UNSC, and acts of other organs will be covered. Hence, the overall purpose of the chapter is to show the extent to which counter-terrorism has attracted the attention of the global law making institutions. In this respect, African Union's counter-terrorism instruments are covered as a regional arrangements recognized as a part of the global framework monitoring international peace and security.³¹

2.2. Brief Analysis of International Counter-Terrorism Legal Framework

Counter-terrorism as a legal concept is not a full-fledged and comprehensive concept; rather it can be taken as a growing body of international law which lacks clearly defined elements due to its complexity and the existence ideological differences among states. However, it provides the framework under which national counter-terrorism measures should take place, and installs the blueprint for states to cooperate in combating terrorism.³² International law which could regulate counter-terrorism exists within the general framework of international law including of international criminal law, international humanitarian law, international human rights law and refugee law, and all of such laws underline the protection of human right both in its procedural and substantive context.³³

31. *The Charter of the United Nations, San Fransico, 1945, Chapter VI, Art 52-54, available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed on 1-23-2017*

32. *Supra note 24. SC/Res.1373 (2001) is adopted based on Chapter VII of the UN Charter and it takes terrorism as a major threat to international peace and security, thus member states of UN have the duty to take legislative and other practical measures to criminalize acts of terrorism, and cooperate in the prevention and apprehension of terrorist to justice.*

33. *See S/Res 1456 (2003), Art 6: the resolution imposes upon states to ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human right, refugee, and humanitarian law.*

The broader legal and institutional framework of countering terrorism can be fetched from UNGA and SC resolutions. Moreover, other bodies of the UN have their own contribution. For instance, the International Court of Justice (ICJ)³⁴ can be helpful in combating terrorism by providing advisory opinions³⁵ on legal questions requested by SC and UNGA.³⁶ It is also possible to fight terrorism through the jurisdiction of the International Criminal Court (ICC) when terrorist acts constitute war crimes, crimes against humanity, or genocide.³⁷ There are also other UN subsidiary organs which play their own role, subject to their jurisdiction, in the fight against international terrorism. However, this chapter deals only with the legal framework within UNGA and SC as they have direct relevance in countering terrorism, and the AU system as it has concerns on Ethiopia and Kenya as members of the union.

2.3. Counter-Terrorism Legal Framework under the UN System

The UN Charter is a basic global legal framework for regulating relations among states.³⁸ It has included supremacy clause under which member states are strictly obliged to adhere to their obligations under the charter in preference to other obligations under international law.³⁹

The main purposes of UN are revolving around the maintenance of international peace and security and the protection and promotion of human right.⁴⁰ With this end, it sets out necessary measures to keep universal peace and solve international problems of a humanitarian nature.⁴¹ Likewise promoting the respect for human rights and fundamental

34. *Supra Note 31, UN Charter, Chapter IV, Art 65: the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.*

35. *Advisory opinions have been sought on a range of issues including the legal consequences of the construction of a wall in the Occupied Palestinian Territory, the legality of the threat or use of nuclear weapons, and reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory opinions are on binding but provide weighty legal authority on questions of international law.*

36. *Supra note 34*

37. *Rome Statute of the International Criminal Court, entered into force on 1 July 2002, Art 5-8*

38. *see supra note 31, UN Charter*

39. *Id, Art 103: the Charter contains a supremacy clause which states “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”*

40. *Id, Art 1*

41. *Id*

freedoms for all without any form of distinction and harmonizing the actions of nations in the attainment of these common ends is also the other main purpose of the UN.⁴²

The GA is the supreme organ of the UN with the power to discuss any matters within the scope of the Charter,⁴³ and make recommendations on the general principles of cooperation for maintaining international peace and security unless the SC is handling the case and recommendations are provided or are going to be provided by such organ.⁴⁴ So far the GA has not come up with a comprehensive convention on the definition of terrorism due to lack of consensus on its scope.⁴⁵ As a result of this, it has preferred to adopt resolutions and recommendations which could only be taken as soft law and guidelines for counter-terrorism measures.

The GA has also agreed and adopted the non-binding Global Counter-Terrorism Strategy, which would enhance national and international efforts to counter-terrorism.⁴⁶ Accordingly, the strategy has stressed, the taking of practical, individually and collectively measures that intend to address the conditions conducive to the spread of terrorism, to prevent and combat terrorism, to build states' capacity to prevent and combat terrorism and to strengthen the role of the UN system in this regard, and to ensure respect for human right for all and the rule of law as the fundamental strategy to fight combat terrorism.⁴⁷

The GA has also adopted a number of resolutions relating to terrorism, which provide useful sources of soft law and have high political importance even though they are not legally binding.⁴⁸

41.*Id.*, Arts 10 & 97

42.*Id.*, Art 1

43.*Id.*, Art 9 & 10

44.*Id.*

45.*The GA has also adopted a number of resolutions relating to terrorism which provide useful sources of soft law with high political importance even though they are not legally binding*

46.*See United Nations Global Counter-Terrorism Strategy, 2006, available at www.un.org/terrorism/strategy-counter-terrorism.shtml*

47.*Id.*

48.*See General Assembly Resolution 60 (288) on United Nations Global Counter-Terrorism Strategy, September 2006. It has the purpose of coordinating all counterterrorism activities within the UN system into a common single framework, and to this end it put special emphasis on the CTED and CTITF. The GA is scheduled to review progress on the strategy in September of 2008, adding urgency and incentive for UN agencies, member states, and other actors to show progress on its implementation.*

Moreover, the GA has organized committees assigned to address the global fight against terrorism. In this respect, among the various Committees, while the Third Committee⁴⁹ deals with enhanced social and human right issues, and addresses terrorism accordingly, the Sixth Committee is entrusted for the consideration of legal.⁵⁰ There is also an Ad Hoc Committee established by GA Res. 51/210 with the task to elaborate the various conventions of UN relating to terrorism.⁵¹

2.3.1. UN Legal Instruments Regulating Counter-Terrorism

Since terrorism is a global challenge to international peace and security, the UN in general and SC in particular have the proper mandate to adopt legal and other necessary measure. The UN Draft Convention on terrorism provides that:

*...any person commits an offence if he by any means, unlawfully and intentionally, causes death or serious bodily injury to any person, or serious damage to public or private property resulting or damage to property likely to result in major economic loss, when the purpose of the conduct is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.*⁵²

49. See online at www.un.org/ga/third/index.shtml, accessed on 1-23-2017

50. See online at www.un.org/ga/sixth/index.shtml, accessed on 1-23-2017. The Committee has prepared, in 1994, the Declaration on Measures to Eliminate International Terrorism which defined terrorism, among other things, as “criminal acts” that are unjustifiable “wherever and by whomever committed”.

51. See online at

<https://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf> accessed on 1-2-2017. This Committee is mandated, among other things, to elaborate an International Convention for the Suppression of Terrorist bombings, an International Convention for the Suppression of the Financing of Terrorism and an International Convention for the Suppression of Acts of Nuclear Terrorism, to supplement related existing international instruments which were later adopted by GA.

52. Draft Comprehensive Convention against International Terrorism, Art 2 available at

<https://www.ilsa.org/jessup.unterrorism>, accessed on 5 May 7, 2017. Accordingly, 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

This definition lacks of precision.⁵³ It includes not only action causing death or serious bodily injury, but also “serious damage to public or private property” and any damage that is likely to result in major economic loss.⁵⁴ There are arguments that the draft convention fails to properly protect those who are in a legitimate liberation struggle while providing legal protection to those exercising unlawfully forces.⁵⁵

The Convention also requires states to deny refugee status to those individuals whom there are serious reasons that they have been involved in activity within the definition of terrorism contained in the Convention.⁵⁶ However, despite the absence of a full-fledged legal framework, there are efforts to exhaustively apply the existing applicable international legal framework from the relevant conventions and resolutions adopted by UN organs, other international laws relevant to counter-terrorism and jurisprudence.

For instance, among other international instruments, the 1999 International Convention for the Suppression of the Financing of Terrorism has conceptualized acts of terrorism as:

*...collecting funds with the knowledge that the fund will be used to carry out one or more specified offences or any other act intended to cause death or serious bodily injury to any other person who is not taking an active part in the hostilities, to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*⁵⁷

Moreover, the Convention on Offences and Certain Other Acts Committed On Board Aircraft, 1963,⁵⁸ the Convention for the Suppression of Unlawful Acts against the Safety of Civil

53. The scope of these provisions is problematic from a human right point of view, in particular as concerns the principle of legality enshrined in Article 15 ICCPR and Article 7 ECHR. Draft Article 2 highlights the tension between the security and the human right approach: the broad definition of terrorism creates potential difficulties with freedom of expression, freedom of association, fair trial rights and private life.

54. Jonathan Cooper, *Countering Terrorism, Protecting Human right*, OSCE/ODIHR 2007, Warsaw, Poland pp.24

available at www.osce.org/odihr ISBN © 83-60190-49-6 accessed on 1-3-2017

55. *Id*

56. *Supra* note 46

57. See <https://unodc.org/tldb/pdf/ratification-status-no-access-rtf> accessed on 1-5-2017. Accordingly, both Ethiopia and Kenya are State Parties to the Convention.

58. The Aircraft Convention applies to acts affecting in-flight safety, authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe he has committed or is about to commit such an act, where necessary to protect the safety of the aircraft, and

Aviation,1971⁵⁹,International Convention against the Taking of Hostages, 1979⁶⁰,the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,1988⁶¹,and the International Convention for the Suppression of Terrorist Bombings, 1997⁶² are some the conventions that address only specific manifestations of terrorism.

2.3.2. Security Council Resolutions on Counter-Terrorism

It is obvious that the SC is entrusted with maintaining international peace and security as per the purposes of the UN Charter.⁶³ To this end, the Council adopts binding and non-binding resolutions.⁶⁴ As a matter of fact, terrorist acts are threats to international peace and security. Hence, the Council has the responsibility to take any necessary measures, including legislative measures to tackle international terrorism.⁶⁵

However, states' response depends on the nature of the resolutions. If the resolution is adopted pursuant to chapter VII of the UN Charter to maintain international peace and

requires contracting states to take custody of offenders and to return control of the aircraft to the lawful commander.

59.The Civil Aviation Convention requires state parties to make it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft, to place an explosive device on an aircraft, to attempt such acts, or to be an accomplice of a person who performs or attempts to perform such acts,

60.Hostages Convention provides that “any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a state, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage.

61.Maritime Convention makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation, to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship, to place a destructive device or substance aboard a ship, and other acts against the safety of ships.

62.Id. Terrorist Bombing Convention creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.

63. See UN Charter, Chapter VII Article 39. Accordingly the SC is mandated to determine the existence of any threat to the peace, breach of the peace, or act of aggression and make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security

64. See UN Charter, Art 25 and 48

65. See S/Res 1373 (2001), the SC reaffirmed that the attacks, like any act of international terrorism, constitute a threat to international peace and security.

security, states' observance and compliance are mandatory.⁶⁶ On the other hand, if the resolution is of a recommendation nature, it does not require immediate compliance; rather it serves as a policy direction like GA resolutions. In this respect, the SC/Res.1373/2001, SC/Res.1267/1999 and subsequent modifying resolutions and SC/Res.1456/2003,inter alia, are obligatory resolutions of the SC which require immediate state compliance.

Among the mandatory resolutions of the SC, the SC/Res.1373/2001⁶⁷obliges states to criminalize and prosecute acts of terrorism, prevent the financing of terrorism, freeze terrorist assets, deny safe havens for terrorists, and prevent the movement of by checking the identity of papers and travel documents. This resolution is the most comprehensive in addressing counter-terrorism resolution.

Likewise, the SC/Res.1267/1999⁶⁸ requires all states to freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply arms and military equipment to any individual or entity associated with Al-Qaida and Osama bin Laden.⁶⁹

Moreover, SC/Res.1456/2003 demands the compliance of states' counter-terrorism measures with international law, in particular with human right, refugee and humanitarian law. It emphasizes the relevancy of an enhanced dialogue and understanding among civilizations not to the target different religions and cultures, and underlines the need to be resolved regional conflicts and other global issues.

With the same end, the Council has adopted resolutions which established Committees like the Al-Qaida and Taliban Sanctions Committee,⁷⁰ the Counter-terrorism Committee (the "CTC"), and Counterterrorism Executive Directorate (CTED).⁷¹ In this respect, while the CTC is mandated to monitor and supervise the implementation of the relevant SC

66. See UN Charter, Chapter XII

67. See SC/Res. 1373(2001), preamble. It is adopted in accordance with chapter VII of the UN Charter

68.This resolution is also adopted under chapter VII of the Charter of the United Nations, available at

https://www.coe.int/.../Money_Laundering/.../moliua2_Klaudio_Guidelines_UNSC_Res

69. See Chapter 1.2.1 (b) on the 1267 Committee.

70. See S/Res. 1267 (1999)

71.While the Al-Qaida and Taliban Sanctions Committee deals with only specific terrorism instances in association with the 9/11 US attack, the rest Committees have a normative concern in the fight against terrorism

resolutions by member states⁷², the CTED aims at enhancing the CTC's ability to monitor the implementation of resolution 1373 (2001) through technical assistance, and closer cooperation with international organizations.⁷³ Likewise the 1540 Committee is mandated to prevent weapons of mass destruction from reaching in the hands of non-state actors by compiling information.⁷⁴

3.4. African Union Counter-Terrorism Legal Framework

Under the African Union Legal Framework, the 1999 OAU Convention on the Prevention and Combating Terrorism⁷⁵, the AU Counter-Terrorism Plan of Action (2002), and the 2004 AU protocol to the convention to the 1999 OAU Convention have addressed extradition rules, the exchange of information, capacity building, and other elements aimed at strengthening cooperation in the area of counterterrorism.

The 1999 Convention on the Prevention and Combating Terrorism has not defined terrorism. But, similar to other international conventions it has preferred to define a terrorist act. According to the conventions a terrorist act means:⁷⁶

(a) Any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

(i) Intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles, or (ii) Disrupt any public service, the

72. The CTC is adopted with the purpose enhancing the implementation of the all resolution of the SC in relation to fighting international terrorism.

73. See S/Res 1535(2004)

74. See S/Res 1540(2004), available at www.disarmament2.un.org/Committee1540/index.html

75. The OAU Convention on the Prevention and Combating of Terrorism, 1999, adopted on 1 July 1999, entered into on 6 December 2001. Both Ethiopia and Kenya are State Parties to the Convention. It was adopted in reaction to the 1998 al Qaida strikes in Nairobi and Dares Salaam. Inter alia, it requires states to become parties to the international treaties relating to SC/res.1373(2001) available at

<https://OAU/AU/Treaties>.

76. OAU Convention on the Prevention and Combating of Terrorism, 1999, Art, 1(3)

delivery of any essential service to the public or to create a public emergency, or (iii) Create general insurrection in a State,

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

Moreover, the 1999 Convention has mentioned clearly certain acts that would not be considered as terrorist acts.⁷⁷ The people's liberation struggle or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces would not be considered as terrorist acts.⁷⁸ The convention also underlines that political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.⁷⁹

Likewise the 2004 AU Protocol was adopted with the aim of enforcing international conventions and relevant decisions of the UN to combat terrorism, including resolution of the SC.⁸⁰ The main purpose of this protocol is to enhance the effective implementation of the 1999 Convention and to give effect to article 3 (d) of the Protocol Relating to the Establishment of the Peace and Security Council of the AU, on the need to coordinate and harmonize continental efforts in the prevention and combating of terrorism in all its aspects, as well as the implementation of other relevant international instruments.⁸¹

77. *Id*,Art.3(1)

78. *Id*

79. *Id*,Art.3(2)

80. *Protocol to the OAU Convention on the Prevention and Combating of Terrorism,2004, preamble*

81. *Id*, Art 2(2)

Chapter Three

Obligation to Observe Due Process and Countering-Terrorism

3.1. Introduction

States have the obligation to promote and protect human rights under their jurisdiction with full concern to due process of law.⁸² Hence, Counter-terrorism measures should be employed as tools to protect human right against terrorism, and thus it must be controlled. Discriminatory and abusive counterterrorism measures may lead to another marginalization and radicalization which in turn creates a conducive environment for the spread of terrorism. Therefore, the main international standards to provide for comparative analysis of the counter-terrorism laws of Ethiopia and Kenya could be relevant international human right instruments and other conventions that directly or indirectly have concerns in due process of law in the counter-terrorism legal regime.

3.2. The Notion of Due Process of Law

Due process of law has two aspects: substantive and procedural.⁸³ On the one hand, its substantive aspects deal with the laws governing the rights and duties by which the legal provisions set a limit for their application. It asks the question whether or not the government's deprivation of a person's life, liberty or property is justified by sufficient reasons.⁸⁴ In this regard, a particular law may be challenged on the grounds of constitutionality, vagueness, ambiguity, and reasonability or discrimination. The first written document that has directly addressed the question of due process of law is Magna Carta.⁸⁵ It has provided that: "No freemen shall be taken or imprisoned . . . or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land. To no

82. See e.g. ICCPR, Art 2, CAT, Art 2, ACHPR, and Art 1.

Ethiopia and Kenya are State Parties to ICCPR, CAT, ACHPR, and the 1951 Refugee Convention See the list of states that has ratified the instrument online on www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf accessed -on 15-2-2017

83. See "*Daniels v. Williams*, 474 U.S. 327,337 (1986) (Stevens, J., concurring) (Due Process Clause contains "a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.'")

84. Erwin Chemernisky, *Substantive Due Process*, *Touro Law Review*, (vol.15), pp. 1501

85. Amos N. Guiora, *Due Process And Counterterrorism*, *Emory International Law Review*, Vol. 26, 2012 26.pp.167

one will we sell, to no one will we refuse or delay, right or justice.”⁸⁶Likewise, the Fifth Amendment to the US Constitution underlines that no person shall be deprived of "life, liberty, or property without due process of law."⁸⁷

On the other hand, the procedural aspect of due process of law deals with the implementation of substantive due process of law. It is concerned with the mode of application. Therefore, it asks whether the government has followed the proper procedures like the presence of fair trial, the right to be heard and redress while it takes away the life, liberty or property of human beings.⁸⁸ International law demands that all criminal laws are expected to uphold both aspects of due process of law.⁸⁹

Therefore, while the substantive due process of law controls the way in which government can restrict individual freedoms, the procedural aspect ensures a certain minimum amount of process that is due before a person is deprived of his "life, liberty, or property."⁹⁰

Due process rights emanate from either legal instruments or state practices. In this regard, Ethiopia and Kenya are State Parties to international instruments which include, inter alia, ICCPR, CAT and ACHPR which demands due process safeguards against states' official actions.⁹¹ Moreover, many of the provisions of their constitutions have contained both substantive and procedural due process rights.⁹²

Everyone has the protection against the arbitrary deprivation of his life, liberty and security.⁹³ Moreover, everyone has the right to protection against arbitrary arrest and the right to be informed the reasons for his arrest.⁹⁴ This right includes the right to appear before the competent court without delay to ensure the lawfulness of the arrest and decide either to remand for investigation or release on bail bond.⁹⁵ Arrested persons have, among other

86. *Magna Carta (1215), Chapters 39 &40*

87. Micah Wyatt, *Designating Terrorist Organizations: Due Process Overdue*, *Golden Gate University Law Review*, Volume 39, 2009 pp.233-234

88. *Id*

89. *Id*

90. Erwin Chemernisky, *Substantive Due Process*, *Touro Law Review*, (vol.15), pp. 501

91. *Supra* note 82

92. *FDRE Constitution, Arts 17-22, the Constitution of the Republic of Kenya, Arts 47-51*

93. *UDHR, Art 1, ICCPR, Art 6, ACHPR, Art 4*

94. *See for e.g. ICCPR, Art 9*

95. *Id*

things, the right to equality before courts, fair trial by independent court, presumption of innocent, protection against torture and humanly treatment, prompt access to the charge free of fee, adequate notice, time and facilities to prepare their defense, access to counsel of their choice, speedy trial, examination of evidences produced against them, prohibition against self-incrimination, the right to bail, access to interpreter, appeal, review of judgment, protection against double jeopardy, prohibition against the retroactive effect of law.⁹⁶

Due process rights are responses to undemocratic governments who might use the criminal justice system as a means of imposing their arbitrary rule either by putting their enemies and political opponents into jail or through execution or take away their property.⁹⁷ As a consequence of such facts, judicial oversight over states' counter-terrorism measures is a necessary condition to check states' compliance with international human rights standards and due process of law in particular.

It is understood that like, counter-terrorism measures might negatively impact human rights. However, counter-terrorism should not be conducted in a way that it would be additional threat to human right.

3.3. Analysis of Due Process Standards

3.3.1. Protection against Arbitrary Executions

Everyone has the right to life, liberty and security of his person.⁹⁸ But as a matter of practice, like some states' shoot-to-kill and war on terror policies as an alternative to arresting and bringing the suspect to justice might have negative implication on due process of law.⁹⁹ It is a common knowledge that before states resort to the use of a deadly force against a person suspected on account committing terrorist acts, all available measures to arrest him must be exhausted.¹⁰⁰ Therefore, arbitrary execution of terrorist represents serious threats to the right to life and due process of law. Such practices are contrary to the necessity, proportionality and alternative test requirements before the taking of one's life.

96. UDHR, Arts 5, and 7-10, ICCPR, Art 14

97. *Supra* note 90

98. UDHR, Art 1, ICCPR, Art 6, ACHPR, Art 4

99. *Supra* note 6, Gabriella Blum, and Philip Heymann

100. ICCPR, Art 4

The protection against arbitrary deprivation of life is non-derogable even in a state of emergency threatening the life of the nation.¹⁰¹ Therefore, state parties should take measures to prevent arbitrary killing by their own security forces, their law must strictly control, and limit the circumstances in which a person may be deprived of his life. Hence, to comply with international human right law, the use of lethal force must fall within those narrow cases in which the deprivation of life cannot be considered arbitrary.¹⁰²

3.1.2. Absolute Prohibition against Torture

Everyone has the protection against torture and other cruel, inhuman or degrading treatment.¹⁰³ This protection is an absolute right having the status of *jus cogens* norms.¹⁰⁴ Moreover, it is non-derogable right, even in a state of emergency that could claim the life of the nation.¹⁰⁵ However, states might use torture as a means to solicit information concerning the proposed terrorist acts. The adoption of counter-terrorism policies and methods which allows any form of torture and other treatments to elicit information from suspects is absolutely prohibited, and any evidence obtained accordingly is not acceptable.¹⁰⁶

However, in practice states may disregard their erga omnes obligation of abolishing torture when they face security threats. In this respect, they might exclude the application of relevant human right instruments to individuals outside of their territory.¹⁰⁷ However, such acts are not acceptable as states' are duty bound to respect and protect human within its power or effective control, even if not situated within its territory.¹⁰⁸ Similarly, the

101. ICCPR, Arts 4(2) and 6(1)

102. In general, in order to be considered lawful, the use of lethal force must always comply with the principle of necessity required for self-defense or for the defense of another's life. It must be in line with the principle of proportionality, and non-lethal tactics for effecting arrest must be exhausted if possible.

103. UDHR, Art 5, ICCPR, Art 7

104. see <https://en.wikipedia.org/wiki/United-Nations-Convention-against-Torture>, accessed on 3-4-2017

105. ICCPR, Art 4 (2), CAT, Art 2(2), and also see the General Comment No. 29 given by Human Rights Committee available on resourcelists.kent.ac.uk/items/D3C62D63-2C9F-6093-0DD0-2504A9D93AB.html

106. CAT, Art 15

107. Available at <https://www.amnesty.org/download/Documents/72000/amr510102006en.pdf> accessed on 2 may 2017

108. See for e.g. ICCPR, Art 2, and Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion) Summary of the Advisory Opinion of 9 July 2004,

International Court of Justice has stated that while the jurisdiction of states is primarily territorial, the rights enshrined in the ICCPR extend to acts done by a state in the exercise of its jurisdiction outside its own territory.¹⁰⁹ Regarding the conditions of detention, practices such as the use of secret, incommunicado detention, prolonged solitary confinement and similar measures aimed at causing stress, may amount to torture, cruel, inhuman or degrading treatment.

States are duty bounded to ensure that the full range of legal and practical safeguards to prevent torture is available, including guarantees related to the right to personal liberty, security, and to due process rights. These are, for instance, the right arrested or detained persons to be brought promptly before a judge and to be tried within a reasonable time or to be released on bail. This right also includes the right to promptly challenge the lawfulness of one's detention before a court.

Moreover, the Human Right Committee, in its general comment No. 29, has confirmed that this right is to be protected at all times, including during a state of emergency. Additionally, detainees must be given regular access to medical doctors and legal counsel. Finally, states are also required to make open their detention centers to allow regular access and visit by independent monitoring of.¹¹⁰ The establishment of an international Sub-Committee on Prevention of Torture with a mandate to visit places of detention in states parties and the duty to set up national preventive mechanisms which could allow access to prisoners is an additional value to ensure states' are compliance with their duty to abolish torture and related treatments.¹¹¹

3.1.3. Protection against Arbitrary Interference in Liberty and Security

All persons are protected against the unlawful or arbitrary interference with their liberty.¹¹² This protection covers criminal proceedings in particular and other areas in which the state

available on https://sydney.edu.au/law/slr/slr27_4/Friedman.pdf accessed on 12-02-2017

109. Id

110. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts 1, 3 and 4: the entry into force of the Protocol on 22 June 2006 is a significant development towards ensuring the practical protection of detainees against torture and other cruel, inhuman or degrading treatment.

111. Id

112. ICCPR, Art 7, UDHR, Art 5, ACHPR, Art 6, CAT, Art 2

would violate the liberty and security of persons. In practice, in their effort to counter-terrorism, states have adopted measures which have an impact on the liberty of persons.¹¹³ In this regard, one may witness administrative detention to prevent a person from committing a terrorist offence in various capacities.¹¹⁴ There may be also control orders to impose conditions on a person, short of detention, to prevent that person from committing a terrorist offence in its various levels, and such may include the detention of a person awaiting determination of immigration or refugee status.¹¹⁵ There may be also detention to conduct compulsory hearings to gather intelligence about terrorist activities.¹¹⁶

To counter terrorism, a state can detain persons suspected of committing a terrorist act. However, when a measure involves the deprivation of an individual's liberty, there is a duty to make sure that strict compliance with the right to liberty and security of persons, the right to recognition before the law and the right to due process are not violated.¹¹⁷ Hence, any counter-terrorism measure should provide, among other things, a means for judicial oversight, insure the right to challenge the lawfulness of detention before a judicial authority, and the right to a fair hearing as a minimum standard.¹¹⁸

3.1.4. Protection Against Arbitrary Interference on Privacy

Many international human right instruments prohibit unlawful interference with privacy unless otherwise provided by the law.¹¹⁹ Secret, massive and indiscriminate surveillance would not be justified by counter-terrorism unless such interferences are authorized by law, strictly necessary and proportionate to a legitimate aim.

However, due to lack of transparency and judicial oversight, counter-terrorism laws have the potential to violate the right to privacy. In this respect, the US Patriot Act (2001) had

113. See *Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32*, available on

www.ohchr.org/Documents/Publications/Factsheet32EN.pdf

114. *Id*

115. *Id*

116. *Id*

117. *Supra* note 110

118. *Id*

119. UDHR, Art 12, ICCPR, Art 17, United Nations Convention on Migrant Workers Article 14, UN Convention on the Protection of the Child, Art 16

empowered US security officers with extensive surveillance techniques, for intelligence purposes, to be employed to combat terrorism without judicial oversight.

Likewise, the UK Terrorism Act in section 44 had broadly permitted public searches and seizures of persons suspected of terrorism and it's so broad that police had authority to stop and search almost anyone.¹²⁰ Counter-terrorism policies should be clear not to adversely affect the legitimate exercise of rights. Therefore, restrictions, for the sake of combating terrorism, on the right to privacy should be adequately clear, precise and necessary in a democratic society, proportionate to the real advantage gained, and it should be in line with international law.¹²¹

3.1.5. Protection against Unlawful Extradition

As a matter of their duty to cooperate internationally in the fight against terrorism states may extradite, individuals suspected of terrorist acts, to the state of origin or another state. But extradition agreements are subject to the obligation to make sure that the states seeking transfer would treat those individuals in a manner compatible with international human rights instruments that the right to dignity, the right of everyone to recognition before the law and the right to due process and other rights are respected.¹²²

The 1951 Refugee Convention clearly stated that the state “shall not expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or

120. *Gillan and Quinton vs. UK*, the European Court of Human right ruled that UK's Terrorism Act 2000 empowered security officers with stop and search powers without reasonable suspicion is a violation of the right to privacy. The Court held that "the powers of authorization and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, 'in accordance with the law' and it follows that there has been a violation of Article 8 of the European Convention on Human right (ECHR) which entered into force on 3 September 1953.

121. European Commission for Democracy through Law, *Report on counter-terrorism measures and human Rights adopted by the Venice Commission ,83rd Plenary Session, Venice, 4 June 2010, pp.7* available at [www.un.org/en/sc/ctc/special meeting/2011/docs/coe/coe-cdl-ad-2010-022-e.pdf](http://www.un.org/en/sc/ctc/special%20meeting/2011/docs/coe/coe-cdl-ad-2010-022-e.pdf) accessed on 12-4-2017

122. *The 1951 Convention relating to the Status of Refugees adopted on 28 July 1951 and entered into force on 22 April 1954, Art 33(1)*. Ethiopia has signed the convention and in 10 November 1969, and ratified it in 10 November 1969, likewise Kenya has signed the convention 16 May 1966, ratified it in 13 November 1981.

her] life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.”¹²³

In addition to the Refugee Convention, article 7 of the ICCPR has by implication imposed the duty to protect the liberty of refugees and asylum seekers. In this regard, Human Rights Committee has confirmed that this provision includes an obligation not to expose individuals to the danger of torture or other degrading treatment upon return to another country by way of extradition.¹²⁴ Similarly the Human Rights Committee has underlined that article 2 of the Covenant imposed upon an obligation on states “not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm ... either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”¹²⁵

However, one might witness that states’ violation of such obligation through diplomatic arrangements and other agreements which they used to justify the return or irregular transfer of individuals suspected of terrorist acts to countries where they may face a real risk of torture or other serious human rights abuse.¹²⁶

3.1.6. Profiling and the Principle of Non-Discrimination

All human beings are born free and equal in dignity and rights.¹²⁷ Equality and non-discrimination are the building blocks of human rights, they are taken as customary international laws since international and national human right instruments have included these rights as the basic human rights law.¹²⁸ In relation to counter-terrorism, the Committee on the Elimination of Racial Discrimination underlined that the principle of non-

123. *Id*, Art.33(1)

124. *Human Rights Committee, General Comment No. 20 (1992)*

125. *Id*, *General Comment No. 31, paragraph 6*

126. *Human rights Council, Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 2 June 2008 available on www.refworld.org/pdfid/484d121a2.pdf accessed on 12-4-2017

127. *UDHR, Art 1 and 2, ICCPR, Art 26, Human Rights Committee, General Comment N° 29 (2001) on states of emergency (Art 4), paragraph 8 and 16*

128. *Inter-American Court of Human Rights, Advisory Opinion OC-18/03 on the juridical condition and rights of the undocumented migrants, 17 September 2003, paragraph 101* available on www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf

discrimination cannot be limited since it has become a norm of jus cogens.¹²⁹ States are also duty bound to make sure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, or national or ethnic origin, and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.¹³⁰

Profiling may be adopted as a mechanism of countering terrorism through the use of indicators to identify a high-risk persons or objects. However, there is a high risk that security officers might use their profiling power in a discriminatory manner.¹³¹ Therefore, profiling as a system to counter-terrorism, should be in due compliance with the principles of necessity, proportionality, and non-discrimination.¹³²

3.1.7. The Right to Fair Trial

Human rights would be better protected against politically motivated and outrageous counter-terrorism measures had effective due process law and the right to a fair trial is duly installed. Any individual suspected of terrorism has the same protection to anyone suspected of committing other offences.¹³³ Therefore, suspects have, entitlements which includes the right to be presumed innocent, the right to a hearing with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, and the right to have a conviction and sentence reviewed by a higher tribunal satisfying the same

129. Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law*, Norwegian Centre for Human Rights, University of Oslo, 2004 para.207

available www.jus.uio.no/smr/english/about/programmes/china/.../Article_LWW_2004.pdf

130. *The Committee on the Elimination of Racial Discrimination*, General Recommendation No. 30 (2004)

131. See at

<https://www.bostonglobe.com/metro/2017/02/09/read-ruling...travel-ban/.../story.html> accessed on 10 February 2017. The US Executive Order has banned all individuals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering into the state. This order is against the principle of non-discrimination which is one of the basics of human rights. Accordingly, both the lower and appellate courts of the state have suspended the Order. A federal appeals court in San Francisco has refused to reinstate President Donald Trump's ban on travelers from seven predominantly Muslim nations and a panel of three judges from the 9th U.S. Circuit Court of Appeals declined to block a lower-court ruling that suspended the ban and allowed previously barred travelers to enter the U.S.

132. European Network Against Racism (ENAR), 'Factsheet 40: Ethnic Profiling', (ENAR, June 2009), pp. 5, available on

cms.horus.be/files/99935/MediaArchive/pdf/FS40%20-%20ethnic%20profiling.pdf

133. *Id*

standards under various human right instruments.¹³⁴ The revised general comment notes that the right to a fair trial and to equality before the courts and tribunals is a key element of human rights protection and serves to safeguard the rule of law by procedural means.¹³⁵

3.1.8. The Principle of Legality

The principle of legality prohibits the imposition of criminal liability on acts which doesn't constitute an offence under national or international law, at the time when the act was committed.¹³⁶ It needs to protect human right against retroactive, broad, and vague penal law provisions.¹³⁷ Accordingly criminal provisions should be clear and precise enough to create certainty of the law and ensure and avoid possible manipulation.¹³⁸ Overly vague or broad definitions of terrorism may be used by states as a means to cover peaceful acts to protect inter alia labor rights, minority rights or human rights or, more generally, to limit any sort of political opposition.

134. *Human Rights Committee, General Comment No. 13 (1984), see also ICCPR, Art 14: All persons should be equal before the courts and tribunals, that in criminal or civil cases everyone has a right to a fair and public hearing by a competent, independent and impartial tribunal, that everyone charged with a criminal offence should have the right to be presumed innocent until proved guilty according to law, and that everyone convicted of a crime should have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law.*

135. *See Human Rights Committee, General Comment No. 32, and Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), available onhrlibrary.umn.edu/gencomm/hrcom32.html accessed 03-3-2017*

136. *Id, Art 15, UDHR, Art 11*

137. *Dan Meagher, The Principle of Legality as Clear Statement Rule: Significance and Problems, Sydney Law Review, 2014, pp. 420*

138. *Id*

Chapter Four

Analysis of the Anti-Terrorism Laws of Ethiopia and Kenya

4.1. Introduction

It is known that states have the responsibility to protect human rights which includes, among other things, the duty to fight international terrorism to protect human suffering from terrorist acts.¹³⁹ Likewise, there is also another responsibility, under international counter-terrorism instruments, to make sure that their anti-terrorism laws and actions are in compliance with international human rights standards.¹⁴⁰ The standards contained under such instruments are used to check the compliance of counter terrorism measures with due process of law as enshrined under relevant instruments.

Since anti-terrorism laws introduce certain limitations on the legitimate exercise of certain human rights and freedoms through the introduction of new investigation procedures and techniques, due process of law plays a role which is of a paramount importance as the key standard within international instruments to provide a comparative analysis of different counter-terrorism laws. Therefore, due process of law as enshrined under international treaties ratified by Ethiopia and Kenya, and customary international law,¹⁴¹ would be used as the standard provide a comparative analysis over the two states' anti-terrorism laws.

Hence, it is necessary to remind some of the various international instruments that both Kenya and Ethiopia are state parties which includes, among other things, ICCPR, CAT, ACHPR, and the 1951 Refugee Convention¹⁴² are the most relevant in relation to counter-

139. See UN charter, Art 1(3) UDHR, Preamble, ICCPR, Art 2, CAT, Art 2, and S/Res 1456(2003): the SC has declared that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.

140. *Supra* note 135

141. David Weissbrodt, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, University of Minnesota Law School, 2011, pp. 348, available online at scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1370&context=faculty...2011 accessed on 15-2-2017

142. See *supra* note 82, Ethiopia and Kenya are State Parties to ICCPR, CAT, ACHPR, and the 1951 Refugee Convention

terrorism laws.¹⁴³ Moreover, due process rights which are enshrined under the 1995 FDRE Constitution and the 2005 Constitution of the Republic of Kenya could also serve as additional standards so long as they are in line with international standards.

Compared to other states in the region, Ethiopia and Kenya have stable governments, and they are the major actors in the prevention of international terrorism under IGAD.¹⁴⁴ Both states are vulnerable to international terrorism as a result of their geographical location within the volatile region.¹⁴⁵

On the other hand, in the area of counter-terrorism, they have also ratified the 1999 OAU Convention on the Prevention and Combating of Terrorism,¹⁴⁶ the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.¹⁴⁷ In response to the call of the Security Council¹⁴⁸ on the one hand, and in reaction to terrorist threats they have been suffering, the two states have adopted and implemented their own domestic anti-terrorism laws.

Both Ethiopia and Kenya are members of the UN, AU, IGAD, and several other international and Regional organizations. Therefore, these states have the responsibility to incorporate the various resolutions of the UN and SC and other counter-terrorism conventions in relation to terrorism into their domestic laws.

143. See online at ib.ohchr.org/.../KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_An, accessed -on 15-2-2017

144. *Supra* note 13, Wondwossen Demissie

145. *Id*

146. See *supra* note 75, both Ethiopia and Kenya are State Parties to the 1999 OAU Convention. In this regard Ethiopia has signed and ratified the Convention on 24/09/1999 and ratified on 24/02/2003 respectively.

147. See *supra* note 75, both Ethiopia and Kenya are State Parties to the Protocol Relating to the Establishment of the Peace and SC of the African Union which was adopted on 9 July 2002.

148. see e.g. S/Res.1373(2001). see also the 1997 International Convention for the Suppression of Terrorist Bombings, the 1998 Resolution 1189, the 1999 UN resolution 1267, the 1999 International Convention for the Suppression of the Financing of Terrorism, the 2001 UN resolution 1373, and the 2006 UN Counter-terrorism Strategy.

4.2. The Anti-Terrorism Legal Framework of Ethiopia

As mentioned under section 4.1 above, due to internal and external factors, Ethiopia has articulated the idea of enacting anti-terrorism law. Externally, there was an urgent pressure from the SC requiring the country to adopt a national law to fight terrorism that has troubled the world especially after the 9/11 US terrorist incident. Consequently, Ethiopia has promulgated a controversial counter-terrorism proclamation in 2009. The need to discharge the country's international obligation to fight terrorism and the protection of human rights against terrorist attacks were provided as the justifications for the enactment of the ATP.¹⁴⁹

The proclamation provides that the primary purpose of the proclamation is to ensure the protection of human rights of the people from the threat of terrorism.¹⁵⁰ However, there were debates over the necessity of anti-terrorism law among politician in the country. The ruling party argued that the existence of clear and present danger of terrorism in Ethiopia coupled with the inadequacy of ordinary criminal laws to deal with this reality and the country's obligation under international instruments necessitates the enactment of a new counter-terrorism legislation.¹⁵¹

On the other hand, representatives of opposition political parties have expressed their concern that the government might use the law as a weapon to stifle dissents, and argue that although there have been incidents of terrorist attacks, the existing criminal justice framework is sufficient enough to prevent terrorism and handle terrorist cases (the emphasis is mine).¹⁵²

In addition to the ATP, the country has adopted certain specific laws that aim to control the financing of terrorism. In this respect, the Prevention and Suppression of Money Laundering and the Financing of Terrorism Proclamation no. 780/2013 can be mentioned. This proclamation was enacted with the purpose of adopting a comprehensive legal framework to prevent terrorism and fulfill the country's international obligation by

149.ATP, Preamble

150.Id

151.Supra note 13,WondwossenDemissie

152.Id

suppressing the financing of terrorism.¹⁵³ The following discussion will briefly focus only on some of the main relevant provision of the proclamation.

4.2.1. Definition of Terrorist Acts

The proclamation defines only terrorist act, not the concept terrorism. Accordingly, coercing the government, intimidating the public or destroying the fundamental political, constitutional and social institutions of the country by killing a person or causing serious body injury, creating serious risk to the safety or health of the public, kidnapping or hostage taking, seriously damaging property, causing damage to natural resource, environment, historical or cultural heritages, endangering, seizing or putting under control, causing serious interference or disruption of any public service, or threatens to commit any of the above acts to advance once own political or religious ideology is a terrorist act.¹⁵⁴

This definition has been continued to be a subject of controversy among politicians since the time the proclamation was in its draft form. It is a preliminary knowledge that the proclamation has defined a terrorist act broadly without any exception.¹⁵⁵ Moreover, as per article 3 (6) of the Proclamation, a terrorist act would include anything that causes “serious interference or disruption of any public service”. Acts that do not involve violence or injury to people, such as property crimes and disruption of public service might be construed as terrorist acts.¹⁵⁶ This definition has risks on legitimate, non-violent and dissent movements which would have certain implications on public transport or communication systems.¹⁵⁷ Likewise, the phrase “coercing the government” suffers from of lack clarity in regard to its magnitude to be easily understood.¹⁵⁸ It is possible to raise different questions based on this particular phrase of the law. This broad definition also affects the interpretation of other parts of the proclamation.

153.ATP, Preamble

154.ATP, Art 3(1)

155.Id: the definitions contains broad terms like “coercing the government”, “damage to the natural resource”, threatening to commit the above acts “and the likes as can be seen from the definition. Such terms should have been further qualified or an exception clause should have been included to protect the legitimate exercise of human rights and freedoms.

156.Article 19, Comment on Anti-Terrorism Proclamation 652/2009 of Ethiopia, 2009, available online at <http://www.article19.org/publications/law/legal-analyses.html>

157.Id

158.Supra note 12, Dersolegn Yeneabat pp. 61

4.2.2. Criminalization of Terrorist Acts and Related Crimes

The proclamation criminalizes, inter alia, Terrorist Acts, Planning, Preparation, Conspiracy, Attempt and Incitement to commit a terrorist act.¹⁵⁹ However, it inadvertently imposes the same penalty for those complete acts and incomplete acts without considering the graveness of the offences.¹⁶⁰ Moreover, the acts of planning, preparation, conspiracy, attempt, and incitement to commit terrorist acts are neither defined nor stipulated in terms of their constituting elements.

Moreover, supporting Terrorist, Encouraging Terrorism, Participation in a Terrorist Organization, Possessing or Using Property for Terrorist Act, Possessing and Dealing with Proceeds of Terrorist Act, Inducing or Threatening Witness and Destroying Evidence, False Threat of Terrorist Act, and Failure to Disclose Terrorist Acts are criminalized by ATP.¹⁶¹ All these offences are, in one or another way, flawed as they are conceptualized in terms of terrorist act whose definition is vague and over broad.

To state one example, Encouragement Terrorism is over broadly criminalized. The publishing of a statement which would be understood as a direct or indirect encouragement or other inducement to the commission or preparation or instigation of an act of terrorism is regarded as a criminal act without adequate precision as to the acts which would constitute Encouragement Terrorism.¹⁶² Thus, it negatively impacts freedom of expression¹⁶³ which would not be limited except by laws guided by the principle that freedom of expression cannot be restricted on account of the content or effect of the point of view expressed. Therefore, ATP has gone unreasonably and uncritically to punish “indirect encouragement or other inducement” beyond the ambit of the ICCPR and the constitution.

159.ATP, Art 4

160.Id, Art 3 and 4

161.Id, Art 5-12 respectively

162.Id, Art 6

163.ICCPR, Art 19 , FDRE Constitution, Art 29

It is criticized that the restriction on the freedom of expression as provided under article 6 of the ATP suffers from lack of ‘sufficient precision’, and it could not be recognized as a legitimate restriction ‘provided by law.’¹⁶⁴

4.2.3. Investigation of Offences under ATP

ATP distinguishes between sudden and covert searches. A covert search requires a court-approved warrant should a police officer has reason to believe that a terrorist act has been or is likely to be committed.¹⁶⁵ But, a sudden search of body and property may be authorized without any judicial oversight should the DG of the Federal Police has reasonable suspicion that a terrorist act will be committed. This is a broad discretionary power which gives uncontrolled power to the DG without any clearly defined conditions that would justify a search and seizure without warrant.¹⁶⁶

Likewise, the National Intelligence and Security Service (NISS) has the power to enter into any premises to install and intercept communication after obtaining a court warrant.¹⁶⁷ Thus, the officers of the institution can, with court warrant, enter into any premise in secret to enforce the interception or install and remove instruments enabling the interception.¹⁶⁸ In fact, there is a duty to hold information obtained through surveillance, but there is no liability in case of breach of this duty. Moreover, the NISS or the police may, without the requirement of court warrant, gather information through surveillance in order to prevent and control acts of terrorism.¹⁶⁹

Moreover, should a police officer believe that a terrorist act will be committed in a particular place, he may destroy property or restrict movement without any defined pre-conditions¹⁷⁰. Those who fail to cooperate with the police are subject to three to 10 years’ imprisonment.¹⁷¹ The police also have the power to order any government institution, bank, or a private organization or an individual to provide information or evidence which the

164. Kinetibeb Arega, The compatibility of the crime of ‘encouraging terrorism’ and the right to freedom of expression under the International Covenant on Civil and Political Rights and the Constitution of the Federal Republic of Ethiopia, Faculty of Law, Lund University, 2015 pp.65, see also ICCPR, Art.19

165. Id, Art 17

166. Id, Art 16

167. Id, Art 14

168. Id, Art 14(1)

169. Id, Art 14(3)

170. Id, Art 13

171. Id, Art 35

police officer reasonably believes could assist to prevent or investigate terrorism cases, without any warrant.¹⁷²

ATP allows arrest without warrant in cases where a police reasonably suspects that the person is committing or has committed a terrorist act.¹⁷³ In this regard, there is a constitutional duty that the suspect who in custody be brought before a court within 48 hours and informed of the reasons for his arrest.¹⁷⁴In this respect, ATP has distorted the 48 hour rule as it permits additional investigation periods that ranges from 28 days which extends up to 112 days.¹⁷⁵

Providing a statutorily-permitted period of 112 days whereby individuals may be detained without charge is likely to lead to even further abuse. Crime investigation in relation to terrorist acts under the proclamation entails denial of release on bail and the suspect remains in custody till a final decision on the merits of the case be will be rendered.¹⁷⁶ Thus, a person suspected of committing any of the offences, even ordinary provisions like harbouring of suspects, is dimly denied his right bail

4.2.7. Rules of Evidence

The proclamation has adopted the admissibility of hearsay, and other indirect evidences in court without any limitation.¹⁷⁷ Moreover, an official intelligence report can also be admitted no matter how the report does not disclose its sources or the methods it was gathered.¹⁷⁸ This rule violates the right of the accused person to examine and cross-examine any evidence presented against them.

4.2.8. Designation of Terrorist Organizations

ATP has mandated the HPR with the power to designate any organization as a terrorist if it is directly or indirectly involved in committing terrorist acts as defined under article 3 of the

172.Id, Art 22

173.Id, Art 19

174. FDRE Constitution, Art 19(3)

175.Id, Art 20(3)

176.Id, Art 20(4)

177.Id, Art 23(2)

178.Id, Art 23(1)

proclamation.¹⁷⁹ This is unconstitutional due to the fact that the constitution has mandated only ordinary courts with judicial power.¹⁸⁰

4.3. The Counter-Terrorism Legal Framework of Kenya

As discussed in section 4.1, because of internal and external factors, Kenya has stepped to take measures by adopting anti-terrorism laws.¹⁸¹ Accordingly, the 2003 STB, the 2012 PTA and the 2015 Security Laws Amendments Act (SLAA) are the country's legislative responses to terrorism. In 2003; Kenya introduced the most controversial counter -terrorism bill in response to the 1998 US Embassy and the 2003 Kikambala bombings.¹⁸² These incidents have alarmed the state to take a legal action against terrorists that put a question about the adequacy of the country's existing criminal justice system.¹⁸³

4.3.1. The 2003 Suppression of Terrorism Bill (STB)

The 2003 STB contradicts with several international human rights instruments as many of the provisions of the bill were arbitrary and characterized by the lack of judicial scrutiny, thus international human rights organizations and local interested groups expressed their deep concern in a bid to either amend or totally withdraw the Bill, and it was never enacted into law.¹⁸⁴

The bill defined terrorism as the use or threat of action where the action used involves serious violence against a person and serious damage to property, and other specified acts to influence the government or to intimidate the public with the purpose of advancing a political, religious or ideological cause.¹⁸⁵ The use or threat of action which involves the use of firearms, explosives, and other weapons of mass destruction constitute terrorism irrespective their purpose.¹⁸⁶ This definition was too broad, petty offences may constitute the offence of terrorism, and thus it was open to misuse for political purposes. Likewise, as the term "influence" was over broad, any legitimate action which is used to influence the

179.Id, Art 25(2)

180.FDRE Constitution, Art 78

181.Supra note 167&147

182.Supra note 16, Charles Lenjo Mwazighe, pp. 3

183.Id pp. 8

184.Supra note 16, Charles Lenjo Mwazighe, pp. 101

185.The Kenyan Suppression of Terrorism of Bill 2003, Clause 3

186.Id

government might be construed as terrorism. Therefore, various basic rights, including freedom of expression, public demonstration, strike, and public disobedience and the likes may be in curtail.

In addition, the bill empowered the Cabinet Minister to designate an organization as a terrorist organization without any judicial oversight if it is proved that the organization is involved in terrorism.¹⁸⁷ Moreover, the bill punishes a person who has joined a terrorist organization without knowledge.¹⁸⁸ In this respect, unless he disproves that either organization is not a declared terrorist or proves it is not involved in the activities of the organization, he would be liable.¹⁸⁹

The bill also allows search and seizure of any premises without warrant if there are reasons to believe the commission of an offence under the Act.¹⁹⁰ To this end, a member of the security office may, if necessary, use reasonable force against a suspect under Act without any form of liability.¹⁹¹

The Bill mandates the police officer to detain a suspect incommunicado up to 36 hours after arrest without access to any person upon reasonable suspicion that access to any person would interfere with evidences.¹⁹² Moreover, judging the existence of reasonable grounds remains only in the hands of a police officer, and there was no any redress mechanism to challenge the legality of his arrest within 36 hours. This is a clear violation of the prohibition against arbitrary detention contrary article of 9 ICCPR.¹⁹³

187.Id, clause 9, Part III

188. Id, Clause 10

189.Id

190.Id, Clause 40

191.Id: the bill provides that only a government medical officer has access to the suspect.

192.Id, Clause 30(1): it provides that where any person is arrested under reasonable suspicion of having committed any offence under any of the provisions of Parts II, III and IV of this Act, a police officer, subject to this section, direct that the person arrested be detained in police custody for a period not exceeding thirty- thirty-six hours from his arrest, without having access to any person other than a police officer of or above the rank of inspector or a government medical officer and, in any such case, that person shall be detained accordingly.

193. Id

The worst of all the provisions is the immunity of police officers against their actions during the prevention and investigation of the offences under the Bill.¹⁹⁴ This immunity is contrary to the ICCPR, CAT, ACHPR, and other instruments which promotes the right to redress,¹⁹⁵ and the prohibition against torture, and other cruel, inhuman or degrading treatment or punishment.¹⁹⁶

4.3.2. The Prevention of Terrorism Act, 2012

4.3.2.1. Definition of Terrorist Acts

PTA defines only terrorist acts, but it has an exception clause which would insulate legitimate exercise of rights from criminalization. An act or threat of action which includes the use of violence against a person, or results in serious damage to property with the aim of intimidating the public or a section of the public, or compelling the government or an international organization to do or refrain from doing any act, or destabilizing the political or social institutions of a country, or an international organization is defined as a terrorist act.¹⁹⁷ However, it has excepted an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work not to be a terrorist act unless it is calculated to result in any one of the harms mentioned above in paragraph (a) (i)-(iv).¹⁹⁸

4.3.2.2. Designation of Terrorist Organizations

The Act empowers the Inspector-General to recommend to the Cabinet Secretary to the effect that an order be made to declare an entity as terrorist.¹⁹⁹ Secretariat declares if there are reasons to believe that an entity has committed or is prepared or attempted to commit,

194. *Supra* note 185, Clause 40. The Bill provides that: a member of the police force, customs or other officer who uses such force as may be necessary for any purpose, in accordance with this Act shall not be liable in any criminal or civil proceedings for having, by the use of force, caused injury or death to any person or damage to or loss of any property.

195. ICCPR, Art 2 (3)

196. *Id*, Art 7

197. PTA, Clause 2, the Bill provides the definition of “terrorist act” as an act or threat of action (a) which (i) involves the use of violence against a person, (ii) endangers the life of a person (iii) creates a serious risk to the health or safety of the public or a section of the public, (iv) results in serious damage to property and (b) which is carried out with the aim of (i) intimidating or causing fear amongst members of the public or a section of the public, or (ii) intimidating or compelling the Government or an international organization to do or refrain from doing any act, or (iii) destabilizing the religious, political, constitutional, economic or social institutions of a country, or an international organization.

198. *Id*

199. *Id*, Part II, section 3

or participated in any other forms of a terrorist entity.²⁰⁰

Declaring an organization as a terrorist entity is contrary to freedom of association,²⁰¹ and thus it contravenes the rights enshrined under international law unless there is judicial oversight.²⁰² An entity which is declared as a terrorist entity according to the Act loses its legality, but and it can seek both administrative and judicial review to challenge the legality of the order.²⁰³

4.3.2.3. Investigation of Offences under PTA

The Act provides that the Inspector-General can seize any property and apply, within 72 hours, to the High Court for an order to detain that property if he has reasonable grounds to believe that the property has been used for the purpose of committing a terrorist act.²⁰⁴ Then the court notifies by notice to the public to call any person who might have an interest in the property. It could not decide in favour of the application except on reasonable grounds to believe that the property has been, or is being used for the purpose of committing an offence under this Act.²⁰⁵

The police officer can, upon reasons, arrest without warrant that a person is committing an offence under Act.²⁰⁶ But, a suspect cannot be detained more than 24 hours after arrest unless he is produced before a court and remand order is given, or there is no judge or magistrate in the court rule on the case, or there exists force majeure to produce the suspect before a Court within the 24 hours.²⁰⁷

A police officer who needs further remand to detain the suspect is required to apply in writing supported by affidavit to state the nature of the offence and the evidence thereof, the investigation conducted and to be conducted, and the reasons for further remand.²⁰⁸ Moreover, the court would not hear an application for remand unless a copy of

200.Id

201. See for example ICCPR, Art, 22

202. Id, Art 14, the 2010 Constitution of the Republic of Kenya, Art,50

203. Supra note 199, Section 3

204. Id, section 37

205. Id, paragraph 3

206. Id, Section 31

207. PTA, Art 32

208. Id, Art 33

the application is served to the suspect.²⁰⁹ There is also a time limit that the suspect could not be detained more than 90 days.²¹⁰

The Act allows police officers to intercept conversations but upon the leave of the High Court.²¹¹ In addition, the court has the duty not to issue the order except it is satisfied that the information sought by the police is relevant to investigate the offence, and thus the interception of communications is limited only to the investigation of the commission of offences terrorism, and.²¹² Consequently, intercepting communications other than permitted by the court is criminalized and entails either an imprisonment up to 10 years or a fine up to 5,000,000 shillings or to both.²¹³

4.3.2.4. Criminalization of Terrorist Acts and Related Offences

The Kenyan PTA criminalizes, inter alia, the Commission of a Terrorist Act, Soliciting and Giving of Support to Terrorist Groups or for the Commission of Terrorist Acts, Provision of Weapons to Terrorist Groups, Direction in the Commission of a Terrorist Act, Acts Carried out for the Commission of a Terrorist Act in Foreign States, Promotion of Offences under this Act, Conspiracy to Commit Offences under this Act, Membership of Terrorist Groups, Incitement, Kidnapping and Hostage Taking, Collection of Information, and other miscellaneous offences.²¹⁴

The punishments for the afro mentioned offences seem proportional compared to the seriousness of the offences. In this regard, while the punishments for the commission terrorist acts is serious and ranges from 30 years imprisonment to life and capital punishment, other offences like conspiracy and incitement to commit terrorist acts face less punishment which is in fact higher compared to the harbouring of terrorist and the duty to disclose information.

The Kenyan PTA has contained provisions which are directed against international terrorism. In this regard, PTA punishes a person who is outside of Kenya and conspires with a person in Kenya to carry out a terrorist act in any place out of Kenya as long as the

209. *Id*

210. *Id*, Art. 33(10)

211. *Id*, Art 36

212. *Id*

213. *Id*, Art 36(6)

214. *Id*, Arts 4-37

act act constitutes an offence in Kenya.²¹⁵ Likewise, the Act criminalizes a person who, being in Kenya, knowingly promotes, recruits members to association of persons whose objective is the commission of a terrorist act, accumulates any weapons, trains military exercises or movements, and other specified acts for the purpose of carrying out or facilitating the commission of a terrorist act in a foreign State.²¹⁶

4.3.3. The Kenyan Security Laws Amendment Act, 2014 (SLAA)

Due to the proliferation of terrorist attacks, Kenya enacted, in addition to the PTA, the Security Laws Amendment Act No.19 of 2014 (SLAA) which amended almost all other acts on national security matters.²¹⁷ But, the Act faced challenges on the grounds of unconstitutionality and non-compliance with international conventions.²¹⁸ It introduced, among other things, the following provisions in relation to counter-terrorism and human right paradox.

1. The Act limits freedom of expression and the media for the purposes of prohibiting the publication of materials which would likely to cause public alarm, incitement to violence or disturb the public peace.²¹⁹ It is an offence for a person who publishes insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb the public peace.²²⁰
2. In proceedings against terrorism, the suspect may not be informed of evidences before the trial provided that disclosing such evidences may facilitate the commission of other

215.Id, Art 23(1)

216.Id, Art 21

217. See the Judgment of the Kenyan High Court Constitutional and Human Rights Division on SLAA as per Petition No.628 of 2014 and No.630 of 2014 and Petition No.12 of 2015 between the applicant Coalition for Reform and Democracy (Cord) and Kenya National Commission on Human Rights versus Respondent Attorney General, available on www.judiciary.go.ke/.../Court%20Decisions/Press%20Summary%20-%20Security%2... Accessed on 17-2-2017

218.Id, see also the Kenyan Constitution, Art 2(5) and (6) which has underlined the applications of general principles of international law and conventions ratified by Kenya to be part and parcel of the laws of Kenya.

219.SLAA, section 12

220. Id

offences, or it is not in the public interest to disclose such evidence, or it is believed that such might influence witnesses.²²¹

3. The act limits the right to bail as a bail right granted by the subordinate court could be suspended for a period not exceeding fourteen days if the Director of Public Prosecution has indicated his intention to apply for review of the order.²²²
4. Section 26 of the SLAA which introduced Section 26A to the Evidence Act has waived the right to remain silent violated.
5. Section 48 of SLAA has introduced Section 18A to the 2006 Refugee Act that limits the number of refugees and asylum seekers permitted to stay in Kenya not to exceed 150,000 persons unless the National Assembly varies this number.

However, political parties, human right institutions and individuals have challenged the SLAA before the High Court of Kenya on the ground of unconstitutionality and non-compliance with international law, and it was decided as follows.²²³

1. Section 12 of SLAA which introduced Section 66A of the Penal Code is unconstitutional for violating freedom of expression contrary to articles 33 and 34 of the Constitution,
2. Section 16 of SLAA which introduced Section 42A of CPC is unconstitutional as it violate the right of an accused person to be informed in advance of the evidence produced against him as provided under Article 50(2) (j) of the Constitution,
3. Section 20 of SLAA which introduced Section 364A to the CPC is unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution,

221. *Id* section 16

222. *Id* section 20

223. *Supra* note 217. Accordingly, Petition No. 628 of 2014 was lodged by the Coalition for Reform and Democracy popularly (CORD), a coalition of political parties with representation in the National Assembly and Senate. The Kenya National Commission of Human Rights (KNCHR) was the 2nd petitioner in Petition No. 630 of 2014. KNCHR is a constitutional commission established pursuant to the provisions of Article 59 of the 2010 Constitution of Kenya. The 3rd petitioner was Samuel Njuguna Ng'ang'a, an Advocate of the High Court and a citizen of Kenya who filed Petition No. 12 of 2015 alleging that the violated his constitutional rights and freedoms.

4. Section 21 of SLAA which introduced Section 379A to the CPC is constitutional and does not violate the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1)(h) of the Constitution,
5. Section 26 of SLAA which introduced Section 26A to the Evidence Act is unconstitutional for violating the right to remain silent during proceedings as guaranteed under Article 50(2)(i) of the Constitution, and
6. Section 48 of SLAA which introduced Section 18A to the 2006 Refugee Act is unconstitutional for violating the principle of non-refoulment as recognized under the 1951 UN Convention on the Status of the Refugees, which is part of the laws of Kenya by dint of Article 2 (5) and (6) of the Constitution. Moreover, recently the court declared unconstitutional, and banned the executive order to close the Dadaab Refugee Camp on the ground that the order is in violation of the refugees' right.²²⁴

4.4. Comparative Analysis of the Two Countries' Counter-Terrorism Laws

4.4.1. Definition of Terrorist Acts and Principle of Legality

The 2012 Kenyan PTA has witnessed major improvements in reducing vague words and clauses. The definition has considered only acts that could justify the magnitude of the acts of terrorism. To this end, the Act has expressly excluded acts committed in pursuance of a protest, demonstration, or industrial action from the scope terrorist acts. The definition given to a terrorist act contains specific details of each act that are helpful to make clear terrorist acts from other ordinary crimes. Moreover, any possible misuse of the definition would be safeguarded by constitutional Courts, which are the main independent guardians of human rights.

To the contrary, the Ethiopian ATP is full of vague and broadly words without any exception clause to the legitimate exercise of rights. As a result, against the principle of legality, ATP puts unreasonable and unnecessary restrictions on the freedom of expression and association. Moreover, the criminalization of the acts in connection with terrorists is over, general and imposes the same punishment for offences whose harshness differs to a

224. Available at

altwire.utne.com/...dadaab-refugee-amp.../44726a414b6f634e4a70743258494d425, accessed on 9/3/2017

large extent.²²⁵This problem is further aggravated by the absence of independent institutions to rule on the constitutionality of legislations which violates basic human rights. It is the HoF, a political organ which is full of members of political parties, which is entrusted to rule on the constitutionality of legislations and other actions.²²⁶

4.4.2. Investigation of Terrorist Acts and other Offences

The Kenyan PTA provides wide procedural safeguards to property rights in relation to search and seizure. Search and seizure warrant would not be issued unless the police justify the availability of reasonable grounds that the property has been, or is being used for the purpose of committing an offence under the Act. Moreover, the court notifies the public to call any person having a counter claim over the detained property. Then, the property would not be further detained unless the court finds reasonable grounds. However, there is no similar protection to protect property rights under the ATP. Rather, the DG of the Federal Police has uncontrolled discretionary to order sudden search of body and property without any judicial oversight and any clearly defined conditions that would justify a warrantless search and seizure.²²⁷

The Kenyan PTA has not any limitation on the right to defend a criminal charge. But, the Ethiopian ATP has seriously restricted the absolute right to defend by introducing hearsay, intelligence report and other indirect evidences as admissible evidences without even any qualification.²²⁸ To be worse, intelligence reports are admissible without any disclosing its sources or methods it was gathered.²²⁹

The way the right to privacy had been limited by PTA, were under strict judicial scrutiny. However, the SLAA has allowed interception without court warrant. Thus, police officers can intercept conversations without a court order.²³⁰ This Act has repealed the provision of PTA which requires the court to insure the duty not to issue the order unless there are reasons to believe that the information is necessary for the investigation of the offence. Moreover, the SLAA has eroded the compliance clause that PTA provided that any acts of

225. See ATP, Arts 3&4

226. FDRE Constitution, Art 62(1)

227. Id, Art 16

228. Id, Art 23(2)

229. Id, Art 23(1)

230. Id, Art 36

violation of the conditions of the court's interception order, is punishable either to imprisonment up to 10 years or a fine up to 5,000,000 shillings or to both.²³¹ To the contrary, under the ATP, though there is a court warrant requirement and a prohibition not to intercept communications others than permitted by the court, there is not any liability to ensure compliance with the law.²³² In this regard, ATP provides better protection to the right to privacy had there been any penalty clause to ensure compliance with the law. On the contrary, the SLAA has taken away the safeguards that PTA provided.

4.4.3. The Right to Fair Trial before Independent Courts

The right to a fair trial is a broad concept founded on the presumption of innocence principle. Thus, with the view of maintaining balance between the parties, independent courts are indispensable to decided over cases that fall under their jurisdiction.

In Ethiopia, the power to interpret the constitution and decide on the constitutionality of legislations, actions and decisions of any government organ is not given to independent courts. Rather, this power is given to the HoF which is composed of individuals who represent their political party.²³³ So the right to fair trial before independent court is not guaranteed in Ethiopia as far as constitutional interpretation is concerned. But, this right is fully guaranteed in Kenya as the constitution granted courts with the jurisdiction to interpret the constitution and quash of any legislation, decision, order or action which are not in compliance with the constitutions. As a result of this, as it is discussed under section 4.4 many provisions of the SLAA which were in conflict with several human rights instruments and the Constitution of Kenya, were quashed. There would not be such practice in Ethiopia as there are not independent courts in charge of ruling on the constitutionality government actions and legislations.

4.4.4. The Right to a Speedy Trial

It is given that accused persons have the right to a speedy trial within a reasonable time.²³⁴ However, in Ethiopia, a person suspected of violating the ATP, could be detained for 112 days under the guise of investigation.²³⁵ Likewise, the Kenyan PTA allows a total of 90

231. *Id*, Art 36(6)

232. *Supra note 169*

233. *FDRE Constitution, Art 61*

234. *ICCPR, Art 9/3/ACHPR, Art 7/1/*

235. *ATP, Art 20(3)*

days.²³⁶ But, unlike ATP, the PTA guarantees the right to bail in this proceeding.²³⁷ Hence, while both laws, ATP and PTA, could use as preventive detentions, PTA has the way out to avoid this practice as suspects have the right to bail. To the contrary, in Ethiopia, courts have not the power to release the suspect on bail bond not only with the first 122 days of investigation but also during the formal trial process. Moreover, it is not clear what would be the orders of the court in cases where the 122 days remand is lapsed and the suspects are neither prosecuted nor exonerated from prosecution.

Moreover, in both cases, since the time given to remand for investigation is unreasonably long, it might have risks in letting the police to delay the case under the guise of investigation. In addition, the litigation after investigation also takes its own time, adding to the delay of justice. In this respect, both the ATP and PTA are not in line not only with international law, but also with the Constitutions of the two states as far as speedy trial is concerned.²³⁸

4.4.5. The Right to Absolute Prohibition against Torture

Persons under custody may be tortured by state officials for confession²³⁹ contrary to the CAT.²⁴⁰ There is no doubt as to the prohibition of torture and the inadmissibility of evidences obtained thereof.²⁴¹ In this respect, several international instruments and the constitutions of Ethiopia and Kenya prohibit not only torture but also the admissibility of evidences obtained accordingly.²⁴² It is also understood that prolonged remand to custody and lengthy interrogation amount to mental and psychological torch. In this regard, ATP allows an extensive remand period that ranges from 28 days to 112 days.²⁴³ The more time the suspect remained under custody, the more mental and psychological suffers he would feel. Therefore, there is a high probability that under prolonged detention without trial the suspect will be compelled to confess to escape strict detention and prolonged interrogation.

236. PTA, Art 33/10/

237. *Id*, Art 33/4/

238. See FDRE Constitution, Art 19(4) and Kenyan Constitution, Art 52/2/(e)

239. CAT, Art 1, ICCPR, Art 7/1/

240. *Id*

241. ICCPR, CAT, ACHPR, FDRE Constitution, Art 19/5/, the 2010 Kenyan Constitution, Art

242. *Id*

243. 175

4.4.6. Protection against Self-Incrimination

An accused person has the right to be presumed innocent until proved guilty according to law.²⁴⁴ But, ATP has made admissible any written or oral statement given to the police without any procedural safeguards.²⁴⁵ There is no any precautionary requirement during interrogation like the attendance of his legal counsel.²⁴⁶ Moreover, the proclamation has not any provision concerning the probative value of confession, nor the country has evidence law regulating the factors that must be complied to interrogate suspects and take their statements as evidence. Therefore, while ATP makes the statement of the accused admissible without any safeguard against possible abuses, there is no similar provision in the PTA. To the contrary, the Evidence Act of Kenya prohibits the admissibility confession unless it is made before a judge, a magistrate or a police officer above the rank of inspector other than the investigating police, and a third party of the suspects' choice.²⁴⁷

4.4.7. The Right to Bail and the Right to Defend

The right to bail and defend are highly interconnected which emanates from the principle of the presumption of innocence. As suspects are presumed to innocent they may be released upon certain conditions from custody so that they can collect the defense. Moreover, the right to appeal can be taken as the extension of the presumption of innocence.

In spite of this reason, Unlike the Kenyan PTA, ATP absolutely prohibits the right to bail.²⁴⁸ All offences under the proclamation, including minor criminal acts like failure to disclose terrorist acts, breach of duty to co-operate.²⁴⁹ Such offences are not comparable in severity with the offences of committing terrorist acts or preparation, conspiracy, plan, incitement and attempt to commit terrorist acts inter alia.²⁵⁰ To the contrary, the Kenya PTA doesn't

244. ICCPR, Art 14/2/, ACHPR, Art 7/1/

245. *Id.*, Art 19 and 20

246. *Miranda v. Arizona*, 384 U.S. 436, 457 (1966), (In his majority opinion, Chief Justice Warren wrote: ... the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.)

247. *The Evidence Act of the Republic of Kenya*, Art 25A(1)

248. ATP, Art

249. See ATP, Arts 10-12, these offences are punishable less than 10 years imprisonment

250. *Id.*, Arts 3-9

prohibit the right to be released on bail bond. The deprivation of the right to bail contradicts with many international instruments ratified by Ethiopia. The right to be released on bail is one of the general principles of international criminal law which would not be totally banned except on certain exceptional cases as provided under ICCPR and FDRE constitution.²⁵¹ So the absolute prohibition on the right to bail violates not only international instruments like ICCPR but also the country's constitution.²⁵² It is also contravenes the presumption of innocent which is the basis of other due process rights and one of the fundamental principles of international criminal law that compliance is strictly required as per article 14(2) of ICCPR.

Likewise, the anti-terrorism law of Ethiopia denies the right to full access to intelligence reports produced in support of the charge.²⁵³ Intelligence reports are introduced as admissible evidence; it prohibits the disclosure and examination of the sources and methods used to gather such evidence. This is a violation of international human right instruments which dictates the absolute right to full access of evidences to examine and disprove a criminal charge.²⁵⁴ Therefore, such limitation disables the accused not to defend the charge brought against him.²⁵⁵ So it is impossible to defend the legality and the credibility of the evidence.²⁵⁶ On the other hand the Kenyan PTA doesn't infringe the right to full access to evidences presented against the accused.

In addition, ATP declares the admissibility of hearsay evidences²⁵⁷ which is not acceptable in many jurisdictions, including Kenya on the ground that it doesn't warrant the right of the accused to examine the witness. This is even worse in Ethiopia where there is a lack of evidence rule that would govern the probative value of evidences.²⁵⁸ So, the weight to be given to the evidence is left to the discretion of judges, and letting such wide discretionary power to the court without any legal safeguards highly restricts the right to defend. In this regard, it is clear that ATP violates not only international instruments like ACHPR and

251. ICCPR, Art 9(3) and FDRE Constitution, Art 19(6)

252. *Id*

253. ATP, Art 23 (1)

254. ACHPR, Art 7(1), ICCPR, 14(3) FRDRE Constitution, Art 20(4)

255. FDRE Constitution Art 20(3) (4)

256. ATP, Art 23(1)

257. *Id*, Art 23(2)

258. ICCPR, Art 14

ICCPR but also the country's constitution.²⁵⁹ On the other hand, under the Kenyan PTA is in line with due process of law as defined under international instruments and the country's 2010 Constitution.

4.4.8. Designation of Terrorists and the Right to Appeal

The designation of an organization as a terrorist is typically a judicial function. Empowering a political organ with such jurisdiction has serious negative consequences. It is inevitable that a decision of a political organ would not be free from political and ideological biases. It is amid this fact that the anti-terrorism laws of Ethiopia and Kenya have given the power to proscribe terrorists to the HPR and the Cabinet Secretary respectively. But, unlike ATP, the Kenyan PTA the proscription of an organization as a terrorist entity is subject to review by the courts.

While the Ethiopian ATP totally takes away the constitutional judicial power of the courts,²⁶⁰ the Kenyan PTA empowers courts to review, by way of appeal, the proscription decision of the Cabinet Secretary.²⁶¹ Moreover, the proclamation has not established any procedure to defend the proscription and to revoke the decision. Likewise, there is no any appeal procedure against the decision of the HPR. However, under the Kenyan PTA, even though the power to declare entities as terrorists is left to the executive, it is subject to review by the High Court of Kenya.²⁶² Moreover, there are procedures to be followed to defend the proscription and to revoke the decisions.²⁶³

The right to take an appeal against a decision is also one of the absolute rights provided under the various international instruments²⁶⁴ and the FDRE Constitution.²⁶⁵ In general, it is clear that ATP violates international instruments like ICCPR and ACHPR in respect of the right to appeal which is one of the core elements of due process of law. In this regard, PTA is more progressive compared to ATP as the Kenyan courts have the appellate jurisdiction either to uphold or quash the proscription decision of the Cabinet Secretary.

259. *Supra note 253*

260. *FDRE Constitution, Art 79*

261. *Kenyan Constitution, Art 159(1)*

262. *PTA, Art 3*

263. *Id*

264. *ICCPR, Art 14(5)*

265. *FDRE Constitution, Art 20(6)*

Chapter Five

Conclusion and Recommendations

5.1. Conclusion

The absence of a binding definition for the term terrorism has been posing a serious problem to evaluate the compliance of individual states' counter-terrorism laws with their international commitments. In this regard, there is neither customary international law, nor uniform state practice governing counter-terrorism actions. It has to be noted that "terrorism" as a legal concept is a newly emerging international law concept, and as a result, there is not of a uniform state practice in defining terrorism. Hence, as a matter of practice, states have left defining terrorism, rather they resort to mention, criminalize and punish terrorist acts which are some of its manifestations. But the problem still exists as the definition of terrorist acts also contains subjective elements that in turn lead to interpretations which would be again misused for political purposes.

Hence, the international framework relating to terrorism is not a comprehensive framework, rather it is fetched from certain specific conventions which addresses only specific acts like terrorist bombing, kidnapping, the financing of terrorism and the like and, other general purpose UNGA and SC instruments in the area of international criminal law, human right, refugees and the laws of war which provide the broader context within which counter-terrorism activities should take place.

Despite the deadlock in adopting a binding definition, internal and external factors have forced states to look for enacting their own national anti-terrorism laws. Externally, the SC has noted terrorism as a threat to international peace and security, and accordingly, it passed S/Res.1373 (2001) that obliges member states to adopt national anti-terrorism laws which would criminalize acts of terrorism. Since this resolution is adopted as per chapter VII of UN Charter, compliance is mandatory and states are required to respond accordingly. In this regard, there have been proliferations of national anti-terrorism laws in response to the call of the SC.

However, the authorization by the SC upon on sates to take legislative and other practical measures to combat terrorism would not relieve states from their obligations to observe due process under other international laws. Hence, the observance of due process of law as the

core principle under human rights discourse is also another mandatory requirement that needs states' compliance.

Therefore, the duty to fight terrorism is not left to the total discretion of the individual states. It is known that the basic justifications of combating terrorism are the protection of human rights and national security. In this regard, the protection of human right should not be compromised in the interest of national security, but it must be balanced and within the standard limits. All most all counter-terrorism instruments have underlined the duty of individual states to ensure that their legislations are in compliance with international law, including international human rights law, international criminal law, international humanitarian law and international refugee law.

A comparative analysis of states' counter-terrorism laws would be better conducted based on how each states' anti-terrorism laws have incorporated their obligations to observe the basic international human right instruments in general and due process of law in particular as one of the requirements treaty obligations and customary international law. Hence, it is based on due process rights that a comparative analysis of the anti-terrorism laws of Ethiopia and Kenya would be provided. Accordingly, in many respects as the deep analysis of chapter four reveals, the Kenyan PTA is more progressive than the Ethiopian ATP in terms of the clarity of its definition of "terrorist acts" and other procedural safeguards which it has recognized and awarded to the suspects of terrorists. The definition of a "terrorist act" under the PTA has an exception clause so that any petty offences would not be inadvertently prosecuted under the Act. The Ethiopian ATP falls short to comply with the country's international and constitutional obligations in respect of protecting individuals' against any arbitrary interference in the rights of life, liberty and property. The judiciary lacks the jurisdiction to interpret the constitution, which is the grand law at the national level. Consequently, since courts are not allowed to decide on the constitutionality of acts of the government, the right to trial before independent courts is at risk in cases ascertaining the constitutionality of some actions of the government is necessary.

Moreover, the Kenyan PTA provides such procedural safeguards: the proscription of an entity as a terrorist is subject to judicial review, suspects of "terrorist acts" have the right to bail, and the punishment for each offence within the act is more or less proportional to the level of severity.

Likewise, search and seizure is under strong judicial scrutiny, the protection against incommunicado detention, the institutionalization of independent courts with full judicial power to interpret the constitution and proven impartiality in practice,²⁶⁶ clear accountability in cases of misuse of official duties by security forces, the production of 3rd party of the suspect's choice during interrogation as means to avoid possible torture and forced confessions, inter alia, are some of the strong sides of the Kenya's counter-terrorism legal regime. Therefore, it is possible to conclude that PTA complies with international law in general and due process of law standards.

On the other hand, under the Ethiopian anti-terrorism law, the power of the police to seize a property used to carry out terrorist acts, the power to detain suspects, the power to enter into any premises and install surveillance instruments, are more or less conducted under the supervision of the court, but with lenient safeguards compared to PTA.

Compared to the Kenyan PTA, ATP has contained several provisions which contradict not only with international human rights instruments, but also with the country's constitution. To begin with, it denies a declared terrorist entity's right to appeal before independent courts, absolutely prohibits the right to bail, allows personal surveillance without a court order, erodes the right to examine intelligence reports which are brought as evidence to support the criminal charge, introduces hearsay which highly restricts the right of the accused to defend the charge, provides no safeguard mechanism adopted against possible torture and forced confessions.

In addition to the above limitation, Ethiopian courts lack the mandate to interpret the constitution. The constitution contains more or less similar human rights like other international instruments that become part of the law of the land as per article 9(4) of the constitution. Thus, courts cannot decide on the constitutionality of ATP and other legislations. Hence, the right to trial before independent courts is taken and given to the HoF unlike the Kenyan Constitution, which empowers the Constitutional and Human Rights Division of the High Court of Kenya to interpret the constitution. The constitutional interpretation power of HoF is contested on two basic reasons. In the first place, members of

the House might not be legal professionals or they might be non-professionals at all. In this regard, there might be arguments that the Constitutional Enquiry, which is composed of mainly legal professionals as eight out of the eleven members are necessarily legal experts, complements the legal profession but its role is limited to forwarding recommendations to the House. Moreover, no matter how the Constitutional Enquiry would be assumed that it has the capabilities to entertain the case, it neither rules the final decision nor independently constituted as ordinary courts. In the second place, the decision of the house has the risk to be politically motivated, and there would be biases in favour of the majority party that has the greatest number of seats in the House.

PTA has reduced the broad definition of terrorism that negatively affects political protests, mass protest, industrial action and other forms of violence. It has revoked 2003 STB which makes possible the proscription of an organization as a terrorist without due process of law and any form of redress by way of appeal. Similar to the Ethiopian ATP, it declares the establishment of a fund as a redress mechanism for innocent persons and entities affected in the process of combating terrorism.

The Kenyan PTA also has rehabilitated the presumption of innocence, which was about to be eroded under the draft STB. Moreover, wide and intrusive investigative powers of the law enforcement agencies and officers was restricted in the interest of due process rights of individuals, and thus any form of misuse of official duty would be subjected to punishment. Seizure and confiscation of property in relation to terrorism are possible only through due process of law. Moreover, incommunicado detention of suspects that the STB intended to beyond the constitutionally recognized timeframe within which one must be brought before a court of law was avoided.

In general, the researcher from his comparative analysis of the two laws concludes that while PTA violates due process rights and other substantive human rights, the Kenyan PTA is more progressive and the way it has introduced restrictions can be justified as reasonable and necessary in a democratic society. Therefore, Ethiopia should consider the relevancy of taking good lessons from the Kenyan PTA. On the other hand, the court warrant requirement during communications interception under the ATP could be taken as a good practice that the Kenyan Security Laws Amendment Act should have included as a judicial safeguard against possible arbitrary interference on the right to privacy.

5.2. Recommendations

5.2.1. Amendment of the Ethiopian Anti-Terrorism Proclamation

The researcher recommends that the controversial Anti-Terrorism Proclamation should be amended in a way it would fully respect due process in the prevention, investigations, prosecutions and adjudication of terrorist acts. This law directly or indirectly impacts several substantive human rights like freedom of association and expression. Moreover, several provisions of the ATP are in violations of the applicable international human rights instruments which are incorporated into the law of the land by dint of article 9 (4) of FDRE constitution. In this regard, it has suspended relevant provisions of the constitution and human right instruments in regard to speedy trial, the right to bail, and the right to appeal before an independent court in case of an organization designated as a terrorist. Likewise, due to the fact that the law gives broad and less controlled power to the police during the investigation, the protections against arbitrary deprivations of rights is at stake. The definition of “terrorist acts” in turn is broad, vague and without any qualification or exception. In general compared to Kenyan PTA, ATP can be said the most reactionary as it shields many human rights recognized by international instruments.

Hence, ATP should be amended in such a way that the right to appeal in case of organizations designated as terrorists, the right to speedy trial and the right to full access to evidences in case of intelligence reports (both the means that the evidences are collected and the sources thereof should be disclosed to the suspect or if there are security interest to not to disclose the same it should not be produced as evidence) would be respected.

Moreover, the total prohibition of the right to bail is not only unconstitutional as per the country’s constitutions but also it contravenes relevant international instruments like ICCPR which guarantees the right to bail in principle. Therefore, the country should consider the amendment of ATP in such a way that the right to bail would not be totally banned except on some conditions that there are reasonable grounds to belief that the accused would not appear before the court.

5.2.2. Amendment of the Constitution

As stated above, empowering independent courts with the power to rule on the constitutionality of government actions, as can be noted from the experience of Kenya, and

ensuring effective checks and balance between the three organs of the government, is a necessary requirement for the effective protection of human rights. In this regard, the High Court of Kenya has quashed several provisions of SLAA which were found contrary to the right to freedom of expression, the right to remain silent, the right to bail and the likes on the ground that they contradict with the constitution of Kenya and other international conventions. Moreover, recently, the court has also proved its independence when it quashed the order of the Executive to close the Dadaab Refugee Camp on the ground that it violates the 1951 Refugee Convention. Therefore, Ethiopia should consider a constitutional amendment to the effect that the interpretation of the constitution and the power to check the compliance of legislations, other official actions and measures with it would be bestowed to independent courts. In this regard, since the interpretation of the FDRE Constitution involves the whole members of the federation, the jurisdiction to interpret the constitution and rule on the constitutionality of issues should be given to the Federal High Court of Ethiopia on the following three reasons. In the first place, it is presumed that it has competent judges to adequately investigate the cases compared to the Federal First Instance Courts. Secondly, it should not be given to the Federal Supreme Court since there would not be any other court to take an appeal against its decision.

5.2.3. Amendment of the 2014 Kenyan SLAA

The Kenyan SLAA should be amended in a way that the right to privacy would have adequate legal protection under judicial scrutiny. The Act has unreasonably and without any judicial safeguard allowed the police and other security bodies to intercept communications without first securing a court warrant. In this regard, except personal surveillance, ATP obliges the police and other security bodies to effect a court approved warrant before communication interception is conducted. Therefore, so as to better protect the right to privacy, the SLAA should be amended so that the right to privacy would be better protected against arbitrary, unreasonable and unnecessary interference by the police and other bodies affiliated to the executive.

..... the end.....

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This is to certify that the thesis prepared by Dagnachew Mekonnen, entitled “The Anti-Terrorism Laws of Ethiopia and Kenya vis-à-vis International Due Process of Law Standards: A Comparative Analysis” is submitted in partial fulfillment of the requirements for the Degree of Master of Public International Law complies with the regulations of the University and notes the accepted standards with respect to originality and quality.

Signed by the Examining Committee:

Advisor_____ Signature _____Date_____

Examiner_____ Signature_____ Date_____

Examiner_____ Signature _____Date_____