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**IMPLICATIONS OF THE ANTI-TERRORISM  
LAW OF ETHIOPIA ON FREEDOM OF  
EXPRESSION AND THE MEDIA**

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**May, 2016**

**IMPLICATIONS OF THE ANTI-TERRORISM LAW OF  
ETHIOPIA ON FREEDOM OF EXPRESSION AND THE  
MEDIA**

**Thesis**

**Submitted in Partial Fulfilment of the Requirements for the Degree  
of Master of Laws (LLM) at the School of Law, Addis Ababa  
University**

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## Thesis Approval Page

This thesis titled “*Implications of the Anti-Terrorism Law of Ethiopia on Freedom of Expression and the Media*” by Mr. Molaligne Tsegaye is approved for the degree of Master of Laws (LLM).

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I, the undersigned, have been supervising this thesis. I declare that this paper is original and has not been presented for a degree in any other university. All sources of materials used have been properly recognized.

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## **Acknowledgments**

I owe a great deal of gratitude to my advisor, Dr. Yared Legesse, for his guidance and invaluable comments and directions on this work.

I also extend my genuine gratitude to Ejigayehu Kassahun, my wife, who has been by my side during difficult times.

Finally, those who faithfully consented to be part of this research deserve my appreciation.

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## **List of Abbreviations/Acronyms**

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ATP</b>	Anti-Terrorism Proclamation
<b>CECPT</b>	Council of Europe Convention on the Prevention of Terrorism
<b>CPCT</b>	OAU Convention for the Prevention and Combating of Terrorism
<b>EBA</b>	Ethiopian Broadcasting Authority
<b>EBC</b>	Ethiopian Broadcasting Corporation
<b>ECHR</b>	European Court of Human Rights
<b>ESAT</b>	Ethiopian Satellite Television
<b>EU</b>	European Union
<b>FDRE</b>	Federal Democratic Republic of Ethiopia
<b>FOE</b>	Freedom of Expression
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>NISS</b>	National Intelligence and Security Services
<b>OAU</b>	Organization of the African Unity
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>UNSC</b>	United Nations Security Council
<b>US</b>	United States (of America)

## Abstract

*With the coming into power of the Transitional Government of Ethiopia in 1991, freedom of expression and free press had gained a relatively free space for the first time in the history of the country. However, this promising environment entered its gloomy age especially after the 2005 election and the coming into force of the Anti-Terrorism Proclamation in 2009. This thesis explores the implications of the ATP on freedom of expression and media freedom and thereby evaluates the share of the Proclamation to this down-spiral in the Ethiopian media landscape. By doing so, the paper tries to analyze the Ethiopian context of balancing state security and FOE as manifested in the ATP.*

*The paper argues that with some of its broadly crafted provisions and a questionable mechanism of proscribing terrorist organizations, the Anti-Terrorism Proclamation goes beyond the acceptable limits in restricting freedom of expression and media freedom. In reaching to this assessment, the paper employs the tests of ‘legality’ and ‘precision’, ‘legitimate aim’, and ‘necessity’, standards developed by international human rights jurisprudence, to evaluate the appropriateness or otherwise of restrictions on human rights.*

*Findings show that the Anti-Terrorism Proclamation have a large share to the shrinking media environment in Ethiopia. According to finding of this paper, since the introduction of the Proclamation, the media in general and the private press in particular is experiencing difficulties. Journalists are facing threats, intimidation and detentions. They are repeatedly being charged for crimes of terrorism. The scary nature of some of its provisions and the way the law is being enforced have resulted to a heightened form of self-censorship among journalists—to the level that they do not discharge their proper journalistic activities. The law is also being used to stifle critical voices against the government. Therefore, the problematic areas of the law should be amended to avoid the law’s ill-effects on freedom of expression and media freedom.*

**Keywords:** *Terrorism, freedom of expression, media freedom, human rights, political dissent, encouragement of terrorism*

# Chapter One

## 1. Introduction

### 1.1. Background of the Study

Freedom of expression (hereinafter referred as FOE) is a fundamental human right recognized under the Universal Declaration of Human Rights (UDHR)<sup>1</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup> and other human rights instruments.<sup>3</sup> The right, basically, includes “freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers”.<sup>4</sup> It comprises the freedom to “freely disseminate one’s opinion about ideas, rules and institutions, political, social and economic conditions”.<sup>5</sup> The right is so indispensable in any democratic society for without which, the democratic process becomes muted.<sup>6</sup>

Regardless of its importance, however, FOE is being severely limited especially after the September 11 terrorist attack in the United States of America (US) under the guise of subverting terrorism.<sup>7</sup> Following this event, the ‘war on terror’ has affected the notion and scope of FOE. Throughout the world, many states have enacted counterterrorism laws that grant states broad authority to prohibit and punish expressions which they consider to have links with acts of terror.<sup>8</sup> Currently, the impact of these legislations on human rights in general and FOE in particular is a hotly debatable issue in the global discourse of human rights.

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<sup>1</sup> The Universal Declaration of Human Rights, 1948, Article 19, at [www.un.org/en/universal-declaration-human-rights/](http://www.un.org/en/universal-declaration-human-rights/). [Last accessed on 16 August 2015]

<sup>2</sup> The International Covenant on Civil and Political Rights, 1966, Article 19, at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. [Last accessed on 16 August 2015]

<sup>3</sup> See, for example, The African Charter on Human and Peoples’ Rights (ACHPR), 1981, Article 9, at <http://www.achpr.org/instruments/achpr/> [Last accessed on 17 August 2015], European Convention on Human Rights, 1953, Article 10 at [www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf). [Last accessed on 17 August 2015]

<sup>4</sup> See, *supra* note 2, Article 19(1).

<sup>5</sup> Vincenzo Zeno-Zenocovich, *Freedom of Expression: A Critical and Comparative Analysis*, Routledge-Cavendish, New York, [2008], p. 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counterterrorism (Fact Sheet No. 32)*, [2007], p.9, at [www.ohchr.org/Documents/Publications/Factsheet32EN.pdf](http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf) [Last accessed on 21 April 2016].

<sup>8</sup> Shawn Marie Boyne, ‘Free Speech, Terrorism, and European Security: Defining and Defending the Political Community,’ *Pace Law Review*, [2010], Vol. 30, No. 2, p. 421.

Like any other human right, FOE can be subjected to limitations as far as such restrictions are proscribed by law and meet some other necessary prerequisites.<sup>9</sup> Particularly, those laws restricting the right must conform to international human rights norms and standards related with FOE and should not go to the extent of jeopardizing the right itself.<sup>10</sup>

In the Ethiopian context, as provided under the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter referred as “the Constitution”), the right cannot be restricted on account of the content or effect of the opinion being expressed. Under the Constitution, this right can only be limited by laws having the purpose of “protecting the well-being of the youth and the honor and reputation of individuals.”<sup>11</sup> The Constitution also envisages restriction of expressions containing “a propaganda for war” or those “intended to injure the human dignity.”<sup>12</sup>

Though the clear line of demarcation between expressions that amount to a danger to national security and decent criticism of government remain uncertain, it is an established principle at the international legal fora that FOE can be limited by laws for concerns of *national security* and *public peace*<sup>13</sup> (Emphasis mine). Keeping the vagueness and over elasticity of the interests of *public order* and *national security*, they are perhaps the most fundamental interests to be protected.<sup>14</sup> Public security is a social value of the highest order, upon which the protection of all human rights, indeed our whole way of life, depends.<sup>15</sup> Of such laws that restrict FOE through justifications of public interest and order and national security are counterterrorism laws.

Nowadays, the global move towards limiting expressions that seeks to support terrorism, terrorist acts, and terrorist organizations is being given emphasis.<sup>16</sup> The impetus for such global trend in this area was the United Nations Security Council (UNSC) Resolution 1624 (2005), which specifically calls upon all states to adopt such measures as may be necessary and appropriate and

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<sup>9</sup> See, for example, *supra* note 2, Article 19 (3) and Article 20. We will see the details of these standards in Chapter three.

<sup>10</sup> Malcolm Evans & Rachel Murray (eds.), *African Charter on Human and Peoples’ Rights: The System in Practice*, 2<sup>nd</sup> ed., [2008], p. 221.

<sup>11</sup> The Constitution of the Federal Democratic Republic of Ethiopia, 1995, *Federal Negarit Gazzeta*, Proc. No. 1, 1<sup>st</sup> year, No. 1, Article 29(6),

<sup>12</sup> *Ibid.*

<sup>13</sup> *Supra* note 8.

<sup>14</sup> Center for Law and Democracy, *Freedom of Expression: Standards and Principles, Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression*, [2009], p. 5, at 1. at [www.icnl.org/research/trends/trends6-1.pdf](http://www.icnl.org/research/trends/trends6-1.pdf) [Last accessed on 12 August 2015].

<sup>15</sup> *Ibid.*

<sup>16</sup> United Nations Security Council Resolution 1624, 2005, para. 1 at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/510/52/PDF/N0551052.pdf?OpenElement>. [Accessed on 23 August 2015]

in accordance with their obligations under international law to “prohibit by law incitement to commit a terrorist act or acts.”<sup>17</sup>

Ethiopia has followed this global trend of combating terrorism through legislating a special law specifically dealing with the offence of terrorism. The country’s move to adopt a national legislation on the subject was preceded by the adoption of the Organization of the African Unity (OAU) Convention on the Prevention and Combating of Terrorism (CPCT) which shows African states’ commitments towards understanding the danger and messy effects of terrorism.<sup>18</sup> Being located in the volatile and most terrorism-prone region of east Africa, Ethiopia has been a victim of both internal and external terrorist attacks.<sup>19</sup> There have been bombings of hotels, restaurants, government buildings, and public transportation and assassination attempts against officials since the current government taken power in 1991.<sup>20</sup> The above-mentioned legal developments and bitter practical experiences it has gone through awakened Ethiopia to adopt the Anti-Terrorism Proclamation (hereinafter referred as “the ATP”).<sup>21</sup> The ATP has under its Article 6 put restrictions on FOE by criminalizing direct or indirect ‘encouragement’ to terrorism and other forms of inducement to the commission, preparation or instigation of an act of terrorism.<sup>22</sup> It has also established peculiar rules on investigation and prosecution of crimes of terrorism including the use of surveillance.<sup>23</sup>

## 1.2. Statement of the Problem

The tension between FOE and restriction by the government of the freedom for concerns of national security and public peace is perhaps a manifestation of the typical conflict between the rights of citizens and the power of the state in democratic societies.<sup>24</sup> Countries are nowadays

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<sup>17</sup> *Ibid.*

<sup>18</sup> OAU Convention on the Prevention and Combating of Terrorism, 1999, at <https://treaties.un.org/doc/db/Terrorism/OAU-english.pdf>. [Last accessed on 20 December 2015].

<sup>19</sup> David H. Shinn, ‘Ethiopia: Governance and Terrorism’, ‘in’, Robert I. Rotberg (ed.), *Battling Terrorism in the Horn of Africa*, Virginia, Brookings Institution Press, Washington D.C., [2005], p. 94.

<sup>20</sup> *Ibid.*

<sup>21</sup> A Proclamation on Anti-Terrorism, 2009, *Federal Negarit Gazzeta*, Proc. No. 652, 15<sup>th</sup> year, No. 57.

<sup>22</sup> *Id.*, Article 6

<sup>23</sup> *Id.*, Articles 14 and 22.

<sup>24</sup> Lawrence McNamara, ‘Counter-terrorism Laws: How They Affect Media Freedom and News Reporting’, *Westminster Papers in Communication and Culture*, [2009], Vol. 6. No. 1, p. 27.

criminalizing expressions having the effect of spreading terrorist ideology through enacting counterterrorism laws.<sup>25</sup>

As part of the global awakening towards issuing a special law on terrorism, Ethiopia has enacted the ATP to counter the problem of terrorism. While it may be legitimate to criminalize incitement and support to terrorism or acts of terrorism, there are concerns that the use of vague terms such as ‘indirect encouragement’ and ‘other inducements’ in the law may create a vast horizon for the government to arbitrarily use the law to silence dissident opinions. It is contentious as to whether these limitations are compatible with the relevant provisions of the Constitution, international human rights treaties, interpretations of the international human rights treaty bodies and the guidelines and documents that have been adopted or issued in relation to the subject of counterterrorism and FOE.

The ATP has frequently been quoted by domestic opposition groups<sup>26</sup> as well as global human rights advocates<sup>27</sup> for having a chilling effect on media freedom. There are concerns that the wordings it prefers to use in criminalizing incitement, encouragement and support to terrorism are vague and broad.<sup>28</sup> Such an approach is criticized for restricting free public discussion and access to information of citizens.<sup>29</sup> The issue as to how the right of the public to be informed on matters of public sphere and the fear of prosecution of those who are reporting such terrorist acts and threats are balanced under the ATP is contentious. The investigative techniques adopted in the ATP and their implications on the right to FOE, on freedom of the mass media, and freedom of information is also worth investigating.

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<sup>25</sup> Ben Saul, *Research Handbook on Terrorism and International Law*, Edward Elgar Publishing Limited, UK [2014], p. 1.

<sup>26</sup> See for example, <https://www.youtube.com/watch?v=Nr76bQEtnlA> [Last accessed 24 May 2016]. Also see, [http://www.capitalethiopia.com/index.php?option=com\\_content&view=article&id=897:press-in-exile-an-ethiopian-reality&catid=49:feature&Itemid=48](http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=897:press-in-exile-an-ethiopian-reality&catid=49:feature&Itemid=48) (Last accessed 24 May 2016).

<sup>27</sup> See generally, Human Rights Watch Reports on Ethiopia at <https://www.hrw.org/africa/ethiopia> [Last accessed 26 May 2016]; Reporters without Borders, ‘World Press Freedom Index 2015’, 2015, at <https://rsf.org/en/ethiopia> [Last accessed on 23 May 2016]; Article 19, ‘Comment on Anti-Terrorism Proclamation of Ethiopia’, 2010, at <https://www.article19.org/data/files/pdfs/analysis/ethiopia-comment-on-anti-terrorism-proclamation-2009.pdf> [Last accessed on 23 May 2016]; UN Office of the High Commissioner for Human Rights, ‘UN experts urge Ethiopia to stop using anti-terrorism legislation to curb human rights’, 2014, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E> [Last accessed on 23 May 2016]; and *Supra note* 181.

<sup>28</sup> See generally *supra note* 26.

<sup>29</sup> *Ibid.*

As explained in the below preliminary literature review, little has been studied so far on the implications of this law on media freedom and FOE. This paper will explore the relationship between the ATP and its implication on media freedom and FOE. In general terms, the paper concerns on the Ethiopian context of balancing state security and FOE as manifested in the ATP. It will evaluate the legitimacy and appropriateness of the legal and practical barriers to FOE brought about by the ATP in light of tests developed by the international and national human rights jurisprudence. It will explicate the practical implications of the law on FOE and media freedom. By doing so, this work will contribute towards elaborating the scope of restrictions on expressive freedom under the ATP and shade a light on the degree of acceptable limitations to this right based on justifications of public order and national security. Most importantly, the paper will add a value to the discourse of counterterrorism and FOE in the Ethiopian context by, among others, uncovering the practical implications of the law on the exercise of FOE and media functioning.

### **1.3. Research Questions**

The primary research question this study seeks to address is whether the ATP has gone too far in restricting FOE thereby creating undue constraints on expressive freedom. This being the main issue to be addressed, the following questions will also be deliberated in the paper.

- a) Is there, after all, something about terrorism which justifies more stringent restrictions on FOE than those regarded as appropriate to limit the freedom in other contexts?
- b) What constitutes legitimate restrictions on FOE and what should be the scope of such limitations?
- c) Did the ATP put disproportionate or otherwise unacceptable restrictions on FOE?
- d) What practical implications has the ATP brought about as reflected in judicial interpretations and prosecution practices?
- e) What is the perception of Ethiopian journalists towards the ATP?
- f) What are the practical implications of the ATP on media freedom and FOE?
- g) What guidance can be given on balancing media freedom, freedom of information, and the risk of harm to State security?

### **1.4. Preliminary Literature Review**

The relationship between FOE and State security has been a hotly debated issue under international law. Countries have been adopting counterterrorism laws having a restrictive effect

of FOE for concerns of State security and public order. The literature on the ill effects of such counterterrorism laws have focused on the human rights implications of such legislations. While restriction on expressive freedom remain legitimate and necessary for the life of a polity, the scope of such restrictions and the proper balance between state security and FOE has been a bone of contention among scholars on the area.

Toby Mendel<sup>30</sup> has found difficult to clearly determine what kinds of expressions are detrimental to the public peace and order thereby deserve a restriction. However, he noted that there are extreme social views, religious views and racist attitudes having potential for harming national security and public peace.<sup>31</sup> He stated that counterterrorism laws should be treated in this context.<sup>32</sup>

Ian Cram noted that it is against the autonomy of a citizen to intrude into his/her expressive freedom and such intrusion may lead citizens to feel alienated from the public discourse.<sup>33</sup> Since democracy rests on the individual's autonomy to self-govern themselves, it needs a government which is responsive to the values and opinions of each individual.<sup>34</sup> Therefore, restriction on FOE will diminish the very existence of a democratic value to influence the outcome of public discourses through ideas and arguments.<sup>35</sup> Alexander MeikleJohn has characterized this kind of government not ushered by public discourse and opinions as an 'alien government'—established by some self-chosen group without consent of others.<sup>36</sup> He is suspicious of the justification of a danger to state security to limit expressive freedom for lack of any empirical evidence to support the claim.<sup>37</sup> He prefers for the state to use its means to promote democratic values than fabricate new prohibitions on expressive freedom.<sup>38</sup> For him, these positive supports of the state are more productive and are less likely to produce a sense of alienation among the dissident. However, this

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<sup>30</sup> Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles', *Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression*, [2010], p. 7, at <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf> [Last accessed on 25 April 2015].

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Ian Cram, *Terror and the War on Dissent: Freedom of Expression in the Age of Al-Qaeda*, Springer, Berlin Heidelberg, [2009], pp. 18-22.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Alexander MeikleJohn, *Freedom of Speech and its Relation to Self-Government*, New York, Harper Brothers Publishers, [1948], p. 5.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

assertion of Alexander Meiklejohn's fails to consider the special nature of crime of terrorism and its compelling character. It is very much open to doubt to believe that the current problem of terrorism can be averted through positive supports he proposed and the pre-existing system of criminal law.

The overriding issue in the discourse of counterterrorism is the nature and scope of legislative limitations on FOE under the guise of preserving national security and other public interest concerns. The restriction on FOE is often being made through enacting national counterterrorism laws. In her book titled *The Consequences of Counter Terrorism*,<sup>39</sup> Martha Crenshaw observed that definition of terrorism as a criminal offence is one form of restricting FOE through counterterrorism laws. Such definitions are usually expansive to encroach up on the constitutionally protected FOE.<sup>40</sup>

In this regard, reports of various international human rights organizations and the domestic ones reiterated that the definition of terrorism under Article 3 of the ATP is overbroad.<sup>41</sup> Hiruy agrees with this understanding and pointed out the elements of the definition that show its over-broadness.<sup>42</sup> In defence of such criticisms, the government repeatedly said that the law is a direct replica of counterterrorism legislations of developed jurisdictions such as the United Kingdom (UK), US, and the European Union (EU) model law.<sup>43</sup> Wondewossen found, after assessing international and regional standards as well as national laws which are cited to be sources of the ATP, that the definition of terrorism under the ATP is partly broad and partly narrow.<sup>44</sup> While

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<sup>39</sup> Martha Crenshaw, *Explaining Terrorism: Causes, Processes and Consequences*, Routledge, Abingdon, [2011], p. 48.

<sup>40</sup> *Ibid.*

<sup>41</sup> See, for example, Human Rights watch, 'An Analysis of Ethiopia's Draft Anti-Terrorism Law Updated', [2009], at [http://www.hrw.org/sites/default/files/related\\_material/Ethiopia%20CT%20Law\\_%20Analysis%20June%202009\\_2.pdf](http://www.hrw.org/sites/default/files/related_material/Ethiopia%20CT%20Law_%20Analysis%20June%202009_2.pdf) [Last accessed on 15 December 2015]. Also see, Article 19, 'Comment on Anti-Terrorism Proclamation', [2009], of Ethiopia at <http://www.article19.org/data/files/pdfs/analysis/ethiopia-comment-on-antiterrorism-proclamation-2009.pdf>. [Last accessed on 15 December 2015]

<sup>42</sup> Hiruy Wube, 'Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective', *Journal of Ethiopian Law*, [2012], Vol. 25 No.2, pp. 43-46.

<sup>43</sup> During a discussion of the law in its draft form it was indicated that the definition part is directly copied from the anti-terrorism law of the UK, the US and the European Model Law. Federal Democratic Republic of Ethiopia, 3<sup>rd</sup> House of Peoples Representatives [2008/2009], '4<sup>th</sup> year Adopted Proclamations, Public Discussions and Recommendations', Volume 7, p.116-117. Also see, <https://www.youtube.com/watch?v=BGA5x5GDarY>. [Last accessed on 10 May 2015]. In his address to the parliament, the late Prime Minister Meles Zenawi also said that the law is "copied word by word from anti-terrorism laws of the UK, US and EU model law." (translation mine)

<sup>44</sup> For an analysis of elements of broadness and narrowness in the definition of terrorism under the ATP, see generally, Wondewossen Demissie, 'The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its

Hiruy's article is about compatibility of the substantive and procedural provisions of the ATP on human rights in general, Wondewossen's article focuses on explaining the broadness and narrowness of the definition of terrorism under Article 3 of the ATP. Hence, both works do not address the appropriateness or otherwise of restrictions under the ATP on FOE and its practical implications on media functioning, a theme which this research is devoted to.

Apart from the definition of terrorism, there are also elements in counterterrorism legislations which directly target certain kinds of expressions. Under Article 6 of the ATP, publishing or causing the publication of statements that are likely to be understood by some or all of the audience as a direct or indirect encouragement or other inducement to commit acts of terrorism is criminalized.<sup>45</sup>

Simret Zedie observed that the ATP is over-broad to encroach up on the right to FOE guaranteed under the Constitution and international instruments ratified by Ethiopia.<sup>46</sup> She found that the law falls short of fulfilling the prerequisites set by the human rights jurisprudence for limiting FOE; i.e. being provided by law, have legitimate purpose and necessary in a democratic society.<sup>47</sup>

However, the limitation with Simret's paper is that it entirely focuses on illuminating the implications of Article 6 of the ATP on FOE without giving regard to the effects of other provisions of the law (such as Articles 7 and 25) on FOE and media freedom. Moreover, Simret's analysis is entirely theoretical and fails to address the practical implications of the ATP. Hence, this paper attempts to fill this the gap by expounding implications of Article 6 and other provisions of the ATP on FOE and media freedom and exploring the law's practical implications.

Melhik Abebe, in her research work on the impacts of the ATP on the right to democracy and political pluralism, found that the law has been increasingly used by the government as a tool to suppress political dissent and to silence critical voices.<sup>48</sup> As the paper is focused on examining

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Compatibility with Regional and International Counterterrorism Instruments', *Mizan Law Review*, [2014], Vol. 8, No.2.

<sup>45</sup> *Supra note 21*, Article 6.

<sup>46</sup> Simret Zewdie, Proscription of Encouragement of Terrorism in Ethiopia: Analysis of its Consistency with Freedom of Expression, LLM Thesis, University of Oslo, [2010], 'Unpublished', pp. 47-53.

<sup>47</sup> *Ibid.*

<sup>48</sup> See generally, Melhik Abebe, Counter-terrorism and the suppression of political pluralism: An examination of the Anti-terrorism Proclamation of Ethiopia, LLM Thesis, University of Ghana, [2010], 'Unpublished'.

the impact of the law on political pluralism, it does not give due regard to the law's effects on FOE and media freedom.

By way of conclusion, some of the above literatures touch upon the discourse on the relationship between counterterrorism laws and human rights in the Ethiopian context. However, some have not specifically addressed the implications of the ATP on FOE and media freedom. Most relevant is Simret's paper which, however, is entirely theoretical; totally focusing on Article 6 of the ATP; and which does not touch up on the practical implications of the law on FOE and media freedom. Hence, among others, this thesis purports to fill the gap by exploring the practical implications of the relevant provisions of ATP on FOE and media freedom. It is undeniable that the subject is yet to be developed to encompass contemporary trends and explain the legal ambiguities surrounding the provisions in the various counterterrorism legislations, including the ATP.

### **1.5. Objectives of the Study**

The main purpose of this research is to explore the impact of the ATP on FOE and media freedom and test its compatibility with the Constitution and international human rights instruments ratified by Ethiopia. The research will investigate whether the ATP is detrimental to the respect and protection of media freedom and FOE. In particular, the research has the following specific objectives:

- Inquiring the international and regional human rights standards and counterterrorism instruments in order to provide information about the international norms and obligations on the subject.
- Exploring the approaches in other jurisdictions in balancing state security concerns and the protection of FOE and media freedom.
- Analyzing the compatibility of the provisions of the ATP with the existing human rights norms and standards on FOE and media freedom.
- Investigating the implications of the ATP on media freedom and FOE.

### **1.6. Scope of the Study**

This research aims to explore the nature and extent of restrictions imposed by the ATP on media freedom and FOE. It will give due emphasis to analyzing the legal intrusion made against expressive freedom and freedom of the press under the counterterrorism law of Ethiopia and its

justifiability. The paper will make a critical look at the existing modest attempts by other jurisdictions to strike a balance between preserving national security and public order (through issuing and enforcing counter-terrorism legislations) on one hand and FOE and media freedom on the other. Apart from analyzing national laws, I will explore international legal instruments and other relevant documents applicable to Ethiopia in the area under consideration. Selected court cases and prosecution patterns will be analyzed in an attempt to discern the implications of the law on expressive freedom. It will explore the practical implications of the law on journalists and media houses.

In this paper, term “media” is employed to include both traditional and modern means of communicating information and opinion. The traditional media refers to the mainstream broadcast and print media and the modern ones are electronic materials such as websites. It is also important to note the paper gives much focus to the domestic traditional media sector. Therefore, due to methodological and resource related constraints, the paper will not give emphasis to other media sectors including it does not include smaller and community based media organizations and internet based journalism (including blogging and social media). This is due to methodological and resource related constraints.

### **1.7. Methodology**

The paper reviews the relevant theoretical literature related to counterterrorism and FOE. Also, it is corroborated by an analysis of comparative experiences in balancing the two seemingly conflicting interests of countering terrorism and FOE. In doing so, secondary sources such as legal instruments, books, journals, and judicial decisions are consulted. Also, some domestic court cases and prosecution practices are analyzed.

The thesis employs semi-structured interviews to solicit primary information and views from journalists, editors, lawyers and officials in the relevant media regulatory organ of the government. The selection of those participants follows a purposive sampling method. Journalists and editors working in both private and state-run print and broadcast media organizations are interviewed. The researcher also interviewed lawyers involved in the prosecution or litigation of terrorism related cases. The interviews are to be made through face-to-face contacts.

## Chapter Two

### 2. Justifications, Content and Scope of FOE and Media Freedom

#### Introduction

FOE is one of the basic human rights recognized under national constitutions across the world and international as well as regional human rights instruments.<sup>49</sup> It is mostly characterized as a moral right, entailing predominantly negative duties on the state.<sup>50</sup> This does not mean that the state have no positive obligations. This is rather to mean that, similar to other civil and political rights, the obligation of the state to respect FOE outweighs by and large.<sup>51</sup> Therefore, the government should take a stance of ‘evaluative neutrality’ in which the government lets free expressions which sometimes are even detrimental to its functioning.<sup>52</sup>

FOE demands the free in-and-out flow of ideas and information of any kind.<sup>53</sup> Needless to say, it is vital to the exercise of other rights such as freedom of assembly and association and the exercise of the right to vote.<sup>54</sup> Without the free exercise of FOE and media freedom, freedom of assembly and demonstration are inconceivable. As will be discussed in this chapter, FOE is imperative to political participation and free flow of ideas concerning every corner of life of a polity.<sup>55</sup>

As part of their commitment to FOE and press freedom, governments are responsible to create a level field for the free functioning of the media. On the other hand, however, we should not overlook the limitations on FOE as well as the media’s responsibilities to their audience, their profession and the democracy that enables their functioning.<sup>56</sup>

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<sup>49</sup> See for example, *supra* note 1, 2, and 3.

<sup>50</sup> For a good understanding of this categorization, see generally, Isaiah Berlin, Two Concepts of Liberty: Text delivered to the Clarendon Press, [2013], at [http://berlin.wolf.ox.ac.uk/published\\_works/tcl/](http://berlin.wolf.ox.ac.uk/published_works/tcl/) [Last accessed on 17 August 2015].

<sup>51</sup> Larry Alexander, *Is there a Right of Freedom of Expression*, Cambridge University Press, Cambridge, [2005], pp. 4-5.

<sup>52</sup> *Id.*, p. 12.

<sup>53</sup> *Supra* note 5, p.1.

<sup>54</sup> Human Rights Committee General Comment 34, 2011, para 4 at [www.ohchr.org/english/bodies/hrc/docs/gc34.pdf](http://www.ohchr.org/english/bodies/hrc/docs/gc34.pdf). [Last accessed on 13 June 2015]

<sup>55</sup> *Supra* note 5, p. 1.

<sup>56</sup> Raphael Cohen-Almagor, *The Scope of Tolerance: Studies on the Costs of Freedom of Expression and Free Press*, Routledge Publishers, London, [2006], p.7.

Before directly indulging ourselves into the discussion on FOE, it is essential to have a glimpse of scope of protected expressions. The right protects various forms of expressions such as conversations, print in all forms, broadcasts, film, video, dramatic performances, recordings, and all electronic communications.<sup>57</sup> Yet, it should be noted that identifying conducts that are within the ambit of the protection of freedom of speech are far from being plainly identifiable but also critical.<sup>58</sup> Nevertheless, the traditional conception of FOE as referring only to written and spoken expression has now changed to encompass a wide array of communications. And hence, in the words of Larry Alexander, FOE is essentially freedom of communication, “and that there are *no a priori* limits on the media of communication that such freedom encompasses.”<sup>59</sup>

As implicated above, one of the forms through which FOE is manifested is the press. Freedom of the press is all about asserting FOE by means of the press.<sup>60</sup> Hence, freedom of the press is not a separate freedom independent from FOE, so to say. The protection of the means, i.e. mediums through which expression of opinions is conducted, is instrumental to the exercise of the right to FOE. The substance is nearly worthless and purposeless without the container. Therefore, asserting the freedom of the media is a synthetic formula for asserting the FOE through various means of communications.

This chapter discusses, *albeit* briefly, the concept and scope of FOE with its underlining justifications.

## **2.1. Theoretical Justifications for FOE**

The call for FOE and media freedom has gained momentum since 300 years ago.<sup>61</sup> This appeal has been grounded upon concrete foundations and justifications. Most theories justifying FOE are philosophical, political and individual.<sup>62</sup>

The theories range from the so called constitutive theories of ancient Greeks and Immanuel Kant to the instrumental justifications of John Stuart Mill, Oliver Wendell Holmes and Alexander

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<sup>57</sup> Harry Melkonian, *Freedom of Speech and Society: A Social Approach to Freedom of Expression*, Cambria Press, New York, [2012], p.1.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Supra note* 51, p.8.

<sup>60</sup> *Supra note* 5, p 8.

<sup>61</sup> Mark Pearson, ‘Freedom of the Media—a rhetoric or reality’, Bond University Publications, [2002] p.1 at [http://epublications.bond.edu.au/hss\\_pubs/243](http://epublications.bond.edu.au/hss_pubs/243) [Last accessed on 10 January 2015]

<sup>62</sup> *Supra note* 57, p.101. Accordingly, free speech’s role in the search of the truth shows its philosophical aspect, its essentiality to democracy is indicative of its political aspect and the individual character of free speech is manifested in its vitality to human dignity and personal self-fulfillment.

Meiklejohn and others. Generally speaking, the majority of the theories revolve around justifying free speech based on its role in the ascertainment of truth, the promotion of individual dignity and effective governance.<sup>63</sup> A new addition to the above highlighted traditional justifications is the one framed by Harry Melkonian which is called a sociological/social/ theory of FOE. This theory propounds that FOE is necessary for the well-functioning of a society as a unit—that “communication is essential or the social organism can no longer function.”<sup>64</sup> With all its imperfections<sup>65</sup> the classification of the theories as instrumental and constitutive theories is adopted here. The discussion below only highlights the major and mostly cited traditional justifications. The motive is not to give a full picture of the theories but to give a glimpse of the major thoughts on the area so that the discussion here will serve as a spring-board for subsequent sections.

### **2.1.1. Instrumental Justifications**

Instrumental justifications focus on grounding the need FOE based on its purpose in attaining a particular goal such as the pursuit for the truth and the promotion of democracy and self-governance.

The instrumentality of FOE in the search for truth is one of the most traditional and widely known justifications which is well expounded mainly in the writings of John Stuart Mill.<sup>66</sup> It is “premised on the consequentialist assumption that an open market place of ideas will lead to more knowledge and on the utilitarian assumption that more knowledge serves the public interest.”<sup>67</sup> It is based on the assumption that truth will be better ascertained and people are better off with more information and knowledge.<sup>68</sup>

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<sup>63</sup> *Supra note 54*, p. Xii.

<sup>64</sup> *Id.*, 53.

<sup>65</sup> *Id.*, p. 99.

<sup>66</sup> John Stuart Mill, *On Liberty*, The Floating Press, Auckland, New Zealand, [209], p. 12. Mill’s formal elucidation of the truth theory has, of course, got inspiration from earlier work of John Milton who resisted censorship by the England Crown of publications and advocated that freedom of speech contributed to knowledge. Other philosophers such as Benedict de Spinoza and John Locke are also ardent proponents of the theory of truth as a reason for freedom of speech. For more see, *supra note 54*, pp. 102-103.

<sup>67</sup> Frederick Schauer, ‘The Role of the People in First Amendment Theory’, *California Law Review*, [1986], Vol. 74, No. 3, p. 769.

<sup>68</sup> As stated in *supra note 57*, regarding the pursuit of truth as a justification, Spinoza contended that there is no absolute truth and is subject to change. He, therefore, asserted that “the value of freedom of expression lay in the process of debate and exchange of ideas rather than in some idealized concept of discovering the truth.” For Spinoza what is more important is the thinking process reflected by the discussion rather than the idealistic assumption of finding the truth. Larry Alexander (*supra note 51*, p. 129) tried to cure this concern of Spinoza, by

The search for the truth theory was later manifested in the dissenting opinion of the US Supreme Court's Justice Oliver Wendell Holmes in terms of the market place of ideas.<sup>69</sup> In his dissenting opinion in *Abrams v. US*, Justice Holmes joined by Justice Brandies pronounced that the competition of ideas in a marketplace of ideas produces the best test to truth.<sup>70</sup>

Moreover, FOE is justified based on its purpose in opening a door for democratic decision making through allowing free and open citizen participation at all levels which further promotes collective self-governance/self-determination.<sup>71</sup> Democracy and FOE are reinforcing to each other. To use the words of Ronald Dworkin "it is not possible to understand one in the absence of the other."<sup>72</sup> FOE in well-functioning democracy facilitates citizen participation in matters of public interest, expands political choices, allows for formation of majorities and majority rule (through allowing free communication of ideas between individuals to form a collective mind), curtails corruption and maladministration and promotes stability.<sup>73</sup> Put succinctly, FOE empowers people "to exercise control and to hold elected officials accountable."<sup>74</sup>

The promotion of virtue is another importance of FOE proposed by theorists. This is based on the view that free expression creates conducive environment for the cultivation of certain virtues that are essential to the success of democracies. For example, it leads to the development of tolerant attitudes towards other's beliefs, other's criticisms insults and offensive statements which are in-turn vital to a peaceful co-existence in a democracy.<sup>75</sup>

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submitting that "there are specific truths and "right answers" to specific truth-seeking questions and these specific truths may be found to be important. Then, it would follow that if (1) a government interferes with the search for the answer to a particular question—a particular truth—and if (2) obtaining the answer to that specific question is viewed as very important, then (3) the regulation is unjustified unless (4) the other values served, or "truths" revealed, by the regulation are equally important as obtaining the answer to that particular question."

<sup>69</sup>*Abrams v. US*, US Supreme Court, 1919, at <https://supreme.justia.com/cases/federal/us/250/616/case.html> [Last Accessed on 12 July 2015]

<sup>70</sup> *Supra* note 57, p. 106.

<sup>71</sup> *Ibid*, p. 110. According to Harry Melkonian, the democratic necessity of an informed citizenry calls for freedom of expression. He added, unregulated "public discourse" in formulating the public opinion on which the legitimacy of democratic decision making is based requires freedom of expression—an open space for citizens to entertain various alternatives and make an informed choice from among the available options.

<sup>72</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, p. 354, cited in *supra* note 57, p 118.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Id.*, 132.

### **2.1.2. Constitutive theories**

Constitutive approaches emphasize that FOE is intrinsically good in furthering individual self-fulfillment and autonomy.<sup>76</sup> The theory is usually contained in arguments of self-expression, self-realization and self-fulfillment which are themselves attached to human dignity. The centrality of the theory is that FOE is “part of what it is to be a person speaking is part of what it is to be a person, and restrictions on that expression of personhood by the State are simply wrong, even if the public interest would be served by those restrictions.”<sup>77</sup>

There are some consequentialist elements to this theory too. But, inquiries into the consequences cannot override protected acts /such as FOE/ in times where valuing the acts comes into conflict with the public interest.<sup>78</sup> Accordingly, people are entitled to the right regardless of its desirability or consequences.<sup>79</sup>

## **2.2. The Human Right to FOE: Content and Scope**

### **2.2.1. International and Regional Human Rights Standards on FOE**

#### **2.2.1.1. The UDHR and ICCPR**

The juridical genesis of FOE as a human right goes back to the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in 1948. In crediting the right to FOE as a basic human right, Article 19 of UDHR states:

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.”*<sup>80</sup>

In similar vein, the International Covenant on Civil and Political Rights (ICCPR) recognizes the freedom to hold opinions and FOE in its Article 19.<sup>81</sup> It can be inferred from Article 19(1) of the ICCPR that the freedom to hold opinions cannot be abridged or restricted in any way under any circumstance.<sup>82</sup> The provision makes no qualification to the forms of opinions. All sorts of

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<sup>76</sup> *Id.*, pp. 9-10.

<sup>77</sup> *Supra note 67*, p. 772.

<sup>78</sup> *Id.*, p. 770.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Supra note 1*, Article 19.

<sup>81</sup> *Supra note 2*, Article 19.

<sup>82</sup> *Supra note 54*.

opinions including political, scientific, historic, moral or religious are protected under the provision.<sup>83</sup>

Paragraph 2 of the Article 19 declares that “everyone shall have the right to freedom of expression....”<sup>84</sup> The provision defines the scope of FOE, *albeit* non-exhaustively, to include “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or any other media of his choice.”<sup>85</sup> It protects all modes of expression including their means of dissemination.<sup>86</sup>

As we can infer from the wordings of the Article 19 of both the UDHR and the ICCPR the right to diverse, pluralistic media and equitable access to the means of communication as well as the media are key components of the right to FOE.<sup>87</sup> Furthermore, FOE under ICCPR and UDHR implicitly embraces, among others, the unfettered right to hold opinions and the right to express and disseminate any information and ideas, the right to have access to information, the right to practice and express ones culture including the right to use the language of one’s choice, and the right to be free from undue restrictions on the exercise of right to free expression.<sup>88</sup> To sum up, the two instruments recognize the right to FOE in almost a similar manner. The only difference lies in the fact the unlike the UDHR, the ICCPR clearly provides for the appropriate grounds in order to limit the exercise of the right to FOE.

#### **2.2.1.2. African Charter on Human and Peoples’ Rights**

The African Charter on Human and People’s Rights (aka. the *Banjul* Charter) recognized the right to FOE “in the least elaborate manner and with its characteristically disconnecting claw back.”<sup>89</sup> Its Article 9 of the Charter provides:

*1. Every individual shall have the right to receive information.*

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<sup>83</sup> *Id.*, para 9. It is also set out under paragraph 10 of this same General Comment that freedom to express entails a concomitant freedom not to express.

<sup>84</sup> *Supra note 2*, Article 19(2).

<sup>85</sup> *Ibid.*

<sup>86</sup> For further elaborated examples of protected expressions and means of expressions, see, *supra note 54*, para. 12. It says all forms of expression and the means of their dissemination including spoken, written and sign language and such non-verbal expression as images and objects of art and means of expressions such as books, newspapers, pamphlets, posters, banners, dress and legal submissions are protected under Article 19 (2). The protection also extends to all forms of audio-visual as well as electronic and internet-based modes of expression.

<sup>87</sup> Michelin R. Ishay, *The History of Human Rights, University of California Press, Oakland*, [2008], pp. 3-4.

<sup>88</sup> *Id.*, p 97.

<sup>89</sup> Gedion T. Hassebon, ‘The apologetics for constitutionalism and fundamental rights: freedom of expression in Ethiopia- a comparative study’, LLM Thesis, Central European University, 2009, ‘Unpublished’, p 15.

2. *Every individual shall have the right to express and disseminate his opinions within the law.*

Article 9 of the Charter contains the right to receive information and to express one's opinion. However, the provision puts prior legal prescription as an excuse for restriction of the rights. This limitation to the rights has been severely criticized for opening a venue for governments to subjugating the exercise of the rights to domestic law, thus weakening the content and scope of the rights.<sup>90</sup> This "claw-back" clause is so broad to open a door for abuse.

However, this concern over the impact of "claw-back" clauses is somewhat mitigated through the introduction of tests of proportionality, necessity, and legitimate aim by the African Commission on Human and Peoples' Rights. The Commission made clear in its decisions that the above limitation clause should not be understood as giving a green light for national laws to set aside the right to express and disseminate one's opinion guaranteed under international instruments.<sup>91</sup> Legal limitations on those rights may be proper only if they passed through the tests of proportionality, necessity, and legitimate aim.<sup>92</sup> Most importantly, the limitation should not go against the object and purpose of the overall instrument and may not erode a right such that the right itself becomes illusory.<sup>93</sup> The African Commission reiterated that blanket restrictions on FOE amounts to violating Article 9(2).<sup>94</sup> Its mandate under Articles 60 and 61 of the Banjul Charter to interpret the provisions of the Charter in light of international human rights jurisprudence is helpful in this regard.

Under Article 45(c) of the Banjul Charter, the African Commission is mandated to "...*formulate and lay down rules and principles aimed at solving legal problems relating to human and*

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<sup>90</sup> Frans Viljoen, 'Human Rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness', *South African Journal of International Affairs*, [2011], Vol. 18, No. 2, pp. 200-201.

<sup>91</sup> See, for example, *Civil Liberties Organization (In respect of the Nigerian Bar Association) v Nigeria*, African Commission on Human and Peoples' Rights, 2000, in Christof Heyns & Magnus Killander, *Compendium of Key Human Rights Documents of the African Union*, 5<sup>th</sup> ed., Pretoria University Law Press, Pretoria, 2013, p. 255. In its statements concerning freedom of association, the Commission noted "... *in regulating the use of this right, the competent authorities should not enact provisions which should limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.*"

<sup>92</sup> *Infra*, Chapter Three of this thesis.

<sup>93</sup> See, *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, African Commission on Human and Peoples' Rights, 2002, in *supra* note 91, pp. 258-262.

<sup>94</sup> *Amnesty International and Others v Sudan*, African Commission on Human and Peoples' Rights, 2002, in *supra* note 91, pp. 227-228.

peoples' rights and fundamental freedoms upon which African governments may base their legislation.” The Declaration of Principles on Freedom of Expression in Africa was developed in pursuance to this provision.<sup>95</sup> The Declaration strengthened the jurisprudence of the Commission regarding the interpretation of FOE by expanding and elaborating the meaning and scope of the Article 9.<sup>96</sup> It is echoed under the Preamble to the Declaration that “...laws and customs that repress freedom of expression are a disservice to society.” Accordingly, the Declaration gives a trace on the preconditions that must be met for restricting FOE.<sup>97</sup> The Charter does not make a specific reference to media freedom and freedom of the press. By doing so, the Declaration has tried to close this gap of the *Banjul* Charter by giving due emphasis to broadcasting and print media thereby bolstering the realm of Article 9 of the Charter.

## 2.2.2. The National legal Framework

### 2.2.2.1. The FDRE Constitution

The Constitution have recognized FOE and freedom of the press in an elaborated manner.<sup>98</sup> Most significantly, the Constitution recognized freedom of thought, opinion and expression under Article 29,<sup>99</sup> in the section covering democratic rights. In addition to recognizing the right to

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<sup>95</sup> The African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa, 2002, at <http://www.daneprairie.com> [Last accessed on 16 May 2015].

<sup>96</sup> *Ibid.* Under Principle I (1) of this document freedom of expression is understood as including “...the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers.” Hence the definition is made to be in line with international standards. The Preamble also elaborates the scope of the right to address the various forms and means of expressions which tend to expand with the advent of new technologies and communication tools.

<sup>97</sup> *Ibid.* Principle II (2) of this same document stated that any restriction on freedom of expression should be “...provided by law, serve a legitimate interest and necessary in a democratic society.”

<sup>98</sup> Gedion Timotiwos, ‘Freedom of Expression in Ethiopia: The Jurisprudential Dearth’, *Mizan Law Review*, [2010], Vol. 4, No. 2, p.204.

<sup>99</sup> *Supra Note 11, Article 29.* The Article provides:

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

FOE, the Constitution stipulated that its chapter three (a chapter within which the right to FOE is included) should be interpreted “in a manner conforming to the principles of the UDHR, International Covenants on Human Rights<sup>100</sup> and international instruments adopted by Ethiopia.”<sup>101</sup> Therefore, the meaning and interpretation of human rights provisions included under Chapter Three of the Constitution (including FOE) should be understood in light of the ICCPR, the *Banjul* Charter and other human rights instruments ratified by Ethiopia.<sup>102</sup>

That being said, the relevance and implication of the characterization of rights in the Constitution as “human” and “democratic” has been attracting hotly debates among writers on Ethiopian law. Article 10 of the Constitution states that ‘Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.’ Under its sub-article 2, it provides that “Human and democratic rights of citizens and peoples shall be respected.”<sup>103</sup> These provisions may lead to the inference that (a) ‘human rights and freedoms’ are inseparable to the very existence of a human being and are universal and inviolable and (b) ‘democratic rights’ are derived from the political status of a person—by the reason that he/she belonged to the political commune—and hence, are not natural rights.<sup>104</sup> Article 10 of the Constitution also seems to attach particular importance to ‘human rights and freedoms’ which are characterized as ‘inviolable and inalienable’ compared to ‘democratic rights’ which are simply to be ‘respected.’<sup>105</sup> “This was also the view of the President of the then Transitional Government of Ethiopia and Chairperson of the Council of

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

<sup>100</sup> Apparently, this phrase seems to refer to the ICCPR and the ICESCR.

<sup>101</sup> *Supra* note 11, Article 13 (2). It should be noted that in its latter phrase, the Constitution simply refers to adopted instruments, irrespective of their ratification. This led to the understanding among some scholars that this particular provision is referring to “*principles*,” rather than the provisions included in the instruments. Regarding this, see, for example, Adem Kassie, ‘Human Rights under Ethiopian Constitution: A Descriptive Overview’, *Mizan Law Review*, [2011], Vol. 5, No 1, p. 48.

<sup>102</sup> Regarding the status of international instruments ratified by Ethiopia, it is stipulated under Article 9(4) that such instruments shall form part of the law of the land. However, issues of hierarchical relationships between the Constitution and ratified instruments and also, but less intensely, between national laws and these instruments has not been settled yet. With respect to the hierarchy between the Constitution and international instruments ratified by Ethiopia, some argue that Article 9(1) of the Constitution is clear in declaring its supremacy over all other laws including international instruments. Whereas others argue that the cumulative reading of Article 9(4) and 13(2) gives us a glance that those international instruments have a status higher than, or at least equal to provisions incorporated under chapter three of the Constitution. For a brief discussion on the above stands, see generally, Takele Soboka, ‘The Monist Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia, 2009 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1408842](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408842). [Last accessed on 13 May 2015].

<sup>103</sup> *Supra* note 11, Article 10(2).

<sup>104</sup> *Supra* note 98, p. 208.

<sup>105</sup> *Ibid.*

Representatives of the Transitional Government of Ethiopia which finally won the support of the majority.”<sup>106</sup>

The above elucidation implies that the right to FOE and freedom of the press are given by the government; they reserved only to citizens; and can be freely limited by the government. This directly contradicts with the widely held conviction that all human rights are endowed with equal protection and are interdependent, inviolable and inseparable.<sup>107</sup> Indeed, many believe that the classification under the constitution is unwarranted and lacks practical significance.<sup>108</sup> This is clearly an assertion which vilifies the value of international human rights instruments that unequivocally stipulated the human right to FOE and defies the very idea inserted under Article 13(2) of the Constitution.

#### **2.2.2.1.1. Limitations under the FDRE Constitution**

FOE under the Constitution is not an absolute right and is rather subject to limitations provided under sub-Articles 6 and 7 of Article 29. Under sub-Article 6, there are grounds and preconditions for limiting FOE and sub-Article 7 puts the consequences of surpassing such proper limitations. It says “any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.” The separate reading of this provision would give an apparent suggestion that any limitation is proper so long as prescribed by law.<sup>109</sup> Such kind of reading would amount to curtailing the overall sense of the right and would make putting grounds of limitation under sub-Article 6 meaningless.<sup>110</sup> Therefore, the two sub-Articles (sub-Articles 6 & 7) should be read cumulatively and sub-Article 7 should be understood as complementary to the preceding sub-Article.<sup>111</sup>

Sub-Article 6 stipulates illegitimate grounds of limiting FOE and put grounds for restricting the right. In the beginning, it makes clear that FOE can only be limited by law. However, it also puts

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<sup>106</sup> *Id.*, p.209.

<sup>107</sup> *Ibid*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Id.*, pp. 213 & 214. According to Gedion, if all limitations prescribed by law are to be considered legitimate, then this would make stipulating legitimate grounds of limiting freedom of expression under sub-Article 6 meaningless. This will be contrary to the principle of positive interpretation. Resorting to principles of international human rights by virtue of Article 13(2) of the Constitution is also helpful in this regard. These principles require that we reject a reading of sub-Article 7 in a manner that legitimizes all limitations of freedom of expression prescribed by law. Therefore, sub-Article 7 should be seen as complementing sub-Article 6. Hence, a legal limitation against FOE should conform to the standards of Article 6.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

a further qualification by stating that laws cannot restrict FOE on account of the content or effect of the point of view expressed. Thus, we can say that the Constitution prohibits both “content based” limitations and limitations based on the effect of the view point expressed. Here, it doesn’t seem plausible to argue that all content based legal restrictions are banned, especially, when we read it with the next clause which allows for restrictions aimed at protecting the well-being of the youth. Hence, from the overall understanding of the provision and looking at the jurisprudence of other jurisdictions, as will be discussed in the subsequent sections, expressions with obscene content and those encouraging or glorifying crimes including terrorism can be restricted by law.

Another important principle incorporated under sub-Article 6 of Article 29 is the prohibition of restricting FOE on account of the view point expressed. From this, one can say that terrorism related speeches are criminalized because they are believed to have the effect of instigating, encouraging or assisting acts of terrorism.<sup>112</sup> If so, how can we reconcile criminalization of terrorism related expressions with the Constitutional stipulation that prohibits restrictions on account of the viewpoint expressed? How can we make a logical connection between a certain expression and the occurrence of a certain act? How should we understand this Constitutional stipulation?

There are two countervailing interests here. Each requiring a balance. One is the protection of FOE from unreasonable interference by the State, and the other is the possible chaos and instability that may occur as a result of ‘unregulated’ FOE. Acknowledging the possibility of exceptions to the Constitution’s prohibition of limitations on account of the effect of the viewpoint expressed would be the possible way-out to this dilemma.<sup>113</sup> These exceptions to the rule will permit effect based limitation in relation to expression or speech having some predetermined effects including encouragement and/or otherwise promotion of terrorist acts.<sup>114</sup> It is an established jurisprudence under international law and national systems that expressions that amount to glorification or encouragement of terrorism or terrorist acts or incitement thereto are criminalized. Therefore, such expressions are made out of the ambit of protection by the law.

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<sup>112</sup> *Supra note 43*. This concept is visible from the document prepared for public discussion on the draft Anti-Terrorism Proclamation.

<sup>113</sup> *Supra note 98*, p 216.

<sup>114</sup> *Ibid.*

However, it is not such easy to set clear standards and parameters as to what types of expressions amount to glorification, encouragement or incitement to terrorism. In the US, for example, the Supreme Court in *Brandenburg v. Ohio* case ruled that incitement can only be proscribed when the speaker intends to cause imminent unlawfulness and such unlawfulness is imminently likely to occur.<sup>115</sup>

However, we should bear in mind that such “effect-based” limitations are exceptions and should be construed narrowly.<sup>116</sup> “The view to be expressed must be such that there is *a reasonable and demonstrable likelihood* for it to cause religious or ethnic violence in the *foreseeable future* for it to be legitimately limited.”<sup>117</sup>

Sub-Article 6 also provides that limitations on the right to FOE can be imposed “in order to protect the well-being of the youth, and the honour and reputation of individuals.”<sup>118</sup> Furthermore, the third clause of sub-Article 6 stated that “any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law”<sup>119</sup> thereby making them permissible grounds of restricting FOE. The legislature is authorized and also mandated to enact laws that restrict FOE with a view to protect national peace and human dignity.

As can be understood from the wordings of sub-Article 6, the list of permissible grounds of restricting FOE is only illustrative.<sup>120</sup> However, new grounds of limitations not stipulated under sub-Article 6 can only be legitimate if drawn up in line with the Constitution and international human rights instruments adopted by Ethiopia. It should also be noted that such permissible grounds of limitation should be interpreted narrowly because the Constitution sets the principle that FOE cannot be limited on account of the content and effect of the viewpoint expressed.

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<sup>115</sup> See, *Brandenburg v. Ohio*, US Supreme Court, 1969, at <https://supreme.justia.com/cases/federal/us/395/444/case.html> [Last Accessed on 04 August 2015]. In this case, the Court abandoned its previous ‘*clear and present danger*’ test and developed “the incitement of imminent lawless action” as a standard for determining the justifiability of restrictions on freedom of expression. The Court stated that “the constitutional guarantees of free speech and press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

<sup>116</sup> *Supra note* 98, p.217.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Supra note* 11, Article 29(6).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Supra note* 98, p. 219.

### **2.2.2.2. The Ethiopian Anti-Terrorism Proclamation**

The Anti-Terrorism law of Ethiopia, which is the main concern of this paper, is a new addition to the traditional regulatory framework on FOE and media freedom.

There are provisions and extensive executive powers stated in the law which have significant impacts on the exercise of FOE and the working of media houses. The major points of concern in the ATP include its criminalization of incitement and encouragement to terrorism irrespective of the direct or indirect nature of such acts and extensive investigative powers given to the law enforcement authorities which may amount to significant restrictions on FOE and media activities.

## **2.3. Restrictions on FOE and Media Freedom through Counter-Terrorism Laws**

### **2.3.1. The Aptness of Restrictions through Counter-Terrorism Laws**

The relationship between human rights (particularly FOE) and counter-terrorism activities of governments has been a major area of discussion and confusion. Since the US declared the “war on terror”, parliaments have been enacting new offences in the ‘inchoate mode’ and criminalizing preparatory activities including the ‘encouragement’ and ‘glorification’ of terrorist activities which entail serious restrictions on the FOE and on media freedom.<sup>121</sup> With the advent of these new counterterrorism legislations, terrorist speeches, advocating for terrorism, spreading terrorist material on the internet and other similar conducts are widely criminalized.<sup>122</sup> This move has attracted scholarly debates on the aptness of restricting FOE to ‘prevent’ future commission of an offence of terrorism and the delimiting boundaries between the two FOE and prevention of terrorism.

Some say that countering terrorism and protecting human rights are not antithetical to each other, necessitating compromise or trade-off.<sup>123</sup> They argue that the international human rights system has already acknowledged limitations on these rights, but based on carefully crafted and

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<sup>121</sup> Francesca Galli, ‘Freedom of thought or ‘thought-crimes’? Counter-terrorism and freedom of expression’, ‘in’ Aniceto Masferrer & Clive Walker, (eds), *Counter-Terrorism, Human Rights and Rule of Law: Crossing Legal Boundaries*, Edward Elgar Publishing Limited, Cheltenham, [2013], p. 106.

<sup>122</sup> Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution*, Hart Publishing, Portland, USA, [2008], p. 81.

<sup>123</sup> Report of Security Legislation Review Committee of the Commonwealth of Australia, 2006, p 39, at [http://www.aph.gov.au/parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=pjcis/securityleg/report/report.pdf](http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/report/report.pdf) [Last accessed on 02 September 2015].

construed limitation clauses which have their own defined scope.<sup>124</sup> They further assert national security interests and fundamental rights of individuals has already got a delicate balance under the international human rights system.<sup>125</sup>

Nonetheless, with the current growing threat of terrorism and the greater use of communication tools by terrorists, the restriction of FOE and media freedom and criminalization of acts amounting to ‘encouragement’ or ‘glorification’ of terrorism through counterterrorism laws seems an almost settled issue.<sup>126</sup>

Literatures show the media and terrorism sometimes have a sort of symbiotic relationship.<sup>127</sup> This relationship can be implicated from the communicative function of terrorism.<sup>128</sup> It is sometimes said that “terrorism is an ‘expressive’ violence.”<sup>129</sup> Because terrorists want to instil fear and spread terror, they often make effective use of the media and other kinds of communication tools to the furtherance of their goals.<sup>130</sup> Media reporting of terrorism is said to have given the ‘oxygen of publicity’ for terrorists.<sup>131</sup> Therefore, since terrorism is sometimes an expressive conduct as explained above, limiting the scope of FOE to respond to the challenges posed by terrorism is found to be legitimate.<sup>132</sup>

Currently, subverting terrorism and protecting national security interests are legitimate ground of limiting human rights in general and FOE and media freedom in particular even though the scope of such restrictions is still debatable. Yet, it is reiterated in various resolutions of the United Nations General Assembly (UNGA) and the UNSC that counterterrorism activities of States should not contradict with the respect for human rights and fundamental freedoms.<sup>133</sup>

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<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Supra note* 122, p. 108.

<sup>127</sup> See, for example, *supra note* 123, p 74.

<sup>128</sup> *Id.*, p .24. According to Stefan, terrorists use victims of violence as mediums to transmit messages to the targeted population—and to instil fear, get attention, and propagate and get ears to their propaganda. Their actions against victims of terrorist acts have only a symbolic value—a form of communication. This is what we mean by the communicative function of terrorism.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Paul Wilkinson, ‘The Media and Terrorism: A Reassessment’, *Terrorism and Political Violence* (Online Journal), Vol. 9, No. 2, p. 51, at <http://dx.doi.org/10.1080/09546559708427402>. [Last accessed on 03 January 2016].

<sup>132</sup> See generally, *Ibid.*

<sup>133</sup> UN General Assembly, UN Counterterrorism Strategy, 2006, at [www.un.org/en/terrorism/ctitf/pdfs/A%2066%20762%20English.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/A%2066%20762%20English.pdf) [Last accessed on 30 June 2015]. Also see, *supra note* 16.

### 2.3.2. Offences of Encouragement, Incitement, and Glorification of Terrorism under International Instruments

Due to a growing use of incitement, encouragement and glorification for the spread of the crime of terrorism, international instruments are increasingly calling for criminalization of those acts by domestic legislations. The UNSC Resolution 1373 (2001), issued under Chapter VII of the UN Charter, among other things requires States to criminalize, through domestic laws, acts of participation in the planning, preparation or perpetration or supporting of terrorist acts and to prosecute anybody involved in those criminal acts.<sup>134</sup> This resolution is binding on every State member to the UN.<sup>135</sup> However, the lack of definition of terrorism in the resolution is often cited as a major setback of the instrument.<sup>136</sup>

Another important milestone in the criminalization of incitement and encouragement to terrorism is the UNSC 1624 (2005).<sup>137</sup> Under its preamble, it clearly denounces “incitement of terrorist acts” and “attempts at the justification or glorification (*apologie*) terrorist acts that may incite further terrorist acts.”<sup>138</sup> Accordingly, it calls up on States to “prohibit by law incitement to commit terrorist act(s)” and “prevent such conduct” through adopting measures which may be necessary and appropriate and in accordance with their obligations under international law, particularly international human rights law.<sup>139</sup> The resolution did not specify the definition for terrorism or incitement, thereby leaving states with a wide discretion to craft their domestic laws as it suits them.<sup>140</sup> Nevertheless, the Resolution states that such measures should be in line with international human rights law, most importantly Article 19 of the UDHR and Article 19 of the

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<sup>134</sup> UN Security Council Resolution 1373, 2001, (Paragraph 2(e) at [http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf). [Last accessed on 05 September 2015].

<sup>135</sup> Charter of the United Nations, 1945, Article 24, at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>. [Last accessed on 04 September 2015]. The UN Charter conferred to the Security Council various powers for the purpose of discharging its duties for the maintaining international peace and security. As terrorism is seen as one of the threats to international peace and security, in enacting Resolution 1373 (2001), the Security Council is acting within its mandate of maintaining international peace and security. Resolution 1373 (2001) is binding upon all member States, pursuant to Article 25 of the UN Charter, because it was issued under the mandatory provisions of Chapter VII of the Charter.

<sup>136</sup> See, Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, Cambridge University Press, New York, [2001], p.2. Kent Roach argues that the lack of guideline definition for terrorism in the resolution helped states justify repressive laws that can be used against political opposition in the fashionable grab of antiterrorism.

<sup>137</sup> See, *supra* note 16.

<sup>138</sup> *Id.*, Preamble, para 4.

<sup>139</sup> *Id.*, Paragraph 1.

<sup>140</sup> *Supra* note 136. Kent Roach argues that such open space (discretion) for states would lead to the use of offences of incitement of terrorism for attacking legitimate dissent.

ICCPR.<sup>141</sup> Therefore, restrictions on FOE “should only be such as provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR.”<sup>142</sup>

The Resolution further gives protection to the media by recognizing its positive role in “promoting dialogue and broaden understanding, and in promoting tolerance and coexistence, and in fostering an environment which is not conducive to incitement of terrorism.”<sup>143</sup> Be that as it may, the language of the resolution is “exhortatory,” which means that unlike Resolution 1373(2001), its provisions do not constitute a binding decision within the terms of article 25 of the UN Charter.<sup>144</sup> But the resolutions are clear signals which shows that the UN believes in the prohibition of incitement to terrorism and adheres this as an effective strategy of countering terrorism.<sup>145</sup>

Under Article 20(2) of the ICCPR, States parties are obliged to criminalize the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>146</sup> Looking into this provision, one can obviously extend its applicability to advocacy for terrorism. This is because terrorism-related advocacies are often manifested through spreading racial or religious hatred so as to breed violence and chaos.<sup>147</sup> Therefore, the ICCPR is the first and foremost legal way-out available for States to criminalize incitement to terrorism.

At the regional level, the OAU Convention on the Prevention and Combating of Terrorism (CPCT) defined the offence of terrorism to include “*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)*

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<sup>141</sup> *Supra note 16*, Preamble paras 4 &6.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Id.*, Preamble para 13.

<sup>144</sup> Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism*, Springer Publishing, Berlin, [2010], p.59.

<sup>145</sup> Daphen Barak-Erez & David Scharia, ‘Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law’, *Harvard National Security Journal*, [2011], Vol. 2, p.23.

<sup>146</sup> *Supra note 2*, Article 20. It allows prohibitions by law of any propaganda for war and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

<sup>147</sup> See, Human Rights Committee General Comment 11, 1983, para 1 at [www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf](http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf) [Last accessed on 03 September 2015]. The above can be inferred from of the Committee’s opinion which underscored a need for legislative proscriptions making it clear that propaganda and prohibited advocacy are contrary to public policy, and providing for an appropriate sanction in times of violation.

to(iii).”<sup>148</sup> States are required to enact new legislations which criminalize acts of terrorism as listed in the Convention and other instruments.<sup>149</sup>

One common characteristics of all the above highlighted standards is the fact that the prohibitions they provided are of preventive/proactive/ nature. To constitute an offence, the act incited need not be committed.

### **2.3.2.1. Forms of Encouragement, Incitement and Glorification**

There are offences of direct or indirect encouragement and incitement to terrorist act(s) which are reflections to the ‘prevent’ approach to terrorism.<sup>150</sup> As a matter of theoretical discourse, we can see three categories of terrorism-related expressions—terrorist threats, incitement to terrorism and the glorification or apology of terrorism.<sup>151</sup>

#### **2.3.2.1.1. Communication of Terrorist Threats**

As Fredrick Schauer noted, “behind every suicide bomber is a wily agitator, and behind every suicide bomb (or airplane) is someone who provided instructions for how to make it.”<sup>152</sup> Although there is no a hard and fast law making it an offence to engage in terrorist threatening or to utter a terrorist threat, there are court rulings and legal interpretations that can lead to the assertion that they constitute an offence of terrorism under national jurisdictions.<sup>153</sup> In the US, for example, a vast volume of cases involving “threats” were entertained by lower courts.<sup>154</sup> However, the US Supreme Court has not yet developed a comprehensive standard specifically dealing with terrorist threats.<sup>155</sup> Be that as it may, the Supreme Court has stated in *Watts v.*

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<sup>148</sup> *Supra note 18*. Article 1(3)(b) mentions terrorist acts as including “(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 delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State.”

<sup>149</sup> *Id.*, Article 2(a)&(c).

<sup>150</sup> Clive Walker, ‘Militant Speech about Terrorism in a Smart Militant Democracy’, *Mississippi Law Journal*, [2011], Vol. 80, No. 4, p. 1405.

<sup>151</sup> *Supra note 122*, p.100.

<sup>152</sup> Frederick Schauer, ‘The Wily Agitator and the American Speech Tradition: Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism’, [2005], *Stanford Law Review*, Vol. 57, pp. 2157, 2167–68.

<sup>153</sup> *Supra note 122*, p. 101.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

*United States*<sup>156</sup> and *Virginia v. Black*<sup>157</sup> that “true threats” are not constitutionally protected.<sup>158</sup> In *Virginia v. Black*, “true threats” are defined to encompass “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat.”<sup>159</sup> The “true threats” standard a preceding standard to the “imminent lawless action” standard developed by the court in *Brandenburg v. Ohio*.<sup>160</sup>

According to Stefan Sottiaux, the democratic necessity test is a legitimate ground to avoiding threatening speeches out of the ambit of constitutional protection.<sup>161</sup> Therefore, speeches related to terrorist threats constitute expressions which have no Constitutional protection.<sup>162</sup>

#### 2.3.2.1.2. Incitement to Terrorism

Various legal systems including Ethiopia have laws criminalizing incitement to terrorism. The OAU CPCT included incitement to terrorism within the definition of “terrorist acts” and obliges State parties to criminalize incitement to terrorism under their domestic criminal laws.<sup>163</sup> Also, the 2005 Council of Europe Convention on the Prevention of Terrorism (CECPT) obliges the Parties to criminalize “public provocation to commit a terrorist offence (...) when committed unlawfully and intentionally”.<sup>164</sup>

In dealing with issues of incitement, the US Supreme Court developed the “imminent lawless action” standard in the case *Brandenburg v. Ohio*. The Court’s ruling implied that statements which objectively urge terrorist action are out of the ambit of constitutional protection where the incited terrorist action is imminent and likely to occur.<sup>165</sup> Expressions outside the scope of the “imminent lawless action” standard are, therefore, constitutionally protected. This is a clear show

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<sup>156</sup> *Watts v United States*, US Supreme Court 1969, at <https://supreme.justia.com/cases/federal/us/394/705/case.html>. [Last accessed on 20 October 2015].

<sup>157</sup> *Virginia v Black*, US Supreme Court, 2003, at <https://supreme.justia.com/cases/federal/us/538/343/case.html> [Last accessed on 20 October 2015].

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Supra note* 118.

<sup>161</sup> *Supra note* 122, p. 102.

<sup>162</sup> *Ibid.*

<sup>163</sup> See Para 1(3)(b) and Para 2.

<sup>164</sup> Council of Europe Convention for the Prevention of Terrorism, 2005, Article 5(1), at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/196>. [Last accessed on 14 January 2016]. Article 5(1) states that “the distribution or otherwise making available a message to the public with the intent to incite the commission of a terrorist offence” amounts to public provocation to commit a terrorist offence.

<sup>165</sup> *Supra note* 122, p. 104.

to the disparity between the US and the EU free speech jurisprudence. While the requirement of imminence and likelihood of illegal action in the *Brandenburg* test left a very narrow room to outlawing incitement to terrorism, the EU took a clear stand toward criminalizing incitement to terrorism.<sup>166</sup>

Unlike the *Brandenburg* test, the EU free speech and counterterrorism jurisprudence leaves a relatively wider space for regulation of speech advocating or glorifying terrorism. Presenting proofs that the speaker subjectively intended to incite terrorism and that terrorist action is imminent and likely to occur is not necessary in the EU jurisprudence.<sup>167</sup> In determining whether or not an expression will be interpreted as inciting terrorist acts, the EU standard takes into account circumstances surrounding to that particular expression (in addition to the content of the expression itself).<sup>168</sup> Yet, the European Court of Human Rights (ECHR) has expressed in its various decisions that such limitations should be construed narrowly.<sup>169</sup> In its decisions, the court reiterated that citizens are free to criticize and denounce the State's counterterrorism law and policy.<sup>170</sup>

#### 2.3.2.1.3. Glorification and Apology of Terrorism

Glorification and apology of terrorism which is expressed through acts of praise, support or justifying of terrorism is another area of state regulation in an effort to countering terrorism. Following the 2005 London Bombings, the United Kingdom adopted a 'glorification of terrorism' offence.<sup>171</sup> Even though the EU counterterrorism convention do not require states to criminalize encouragement and apology of terrorism, the Strasburg Court has dealt with cases related with the matter. For instance, in *Zana v Turkey*<sup>172</sup> the court mentioned pressing social need as a reason in upholding the conviction of an influential politician who publically supported

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<sup>166</sup> *Ibid.*

<sup>167</sup> *Id.*, p. 105.

<sup>168</sup> *Ibid.*

<sup>169</sup> See, for example, *Yagmurdereli v Turkey*, European Court of Human Rights, 2002, para 52, at <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-563503-565618&filename=003-563503-565618.pdf>. [Last accessed on 15 January 2016] Also see, *Öztürk v Turkey*, European Court of Human Rights, 1999, para 66, at <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-60456&filename=001-60456.pdf&TID=thkbhnilzk>. [Last accessed on 15 January 2016].

<sup>170</sup> *Ibid.*

<sup>171</sup> See, UK Terrorism Act 2006, Section 1, at [www.legislation.gov.uk/ukpga/2006/11/contents](http://www.legislation.gov.uk/ukpga/2006/11/contents). [Last accessed on 12 February 2016]. It prohibits the glorification of terrorism, "if members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances."

<sup>172</sup> *Zana v Turkey*, European Court of Human Rights, 1997, at [http://hudoc.echr.coe.int/eng#{"dmdocnumber":\["695992"\],"display":\["0"\]}](http://hudoc.echr.coe.int/eng#{). [Last accessed on 12 February 2016].

a terrorist organization. Whereas in *Öztiirk v Turkey*<sup>173</sup> a ‘moral support’ to an alleged terrorist expressed in a biography was considered as protected expression by the court. The main differentiating factor between these two cases are the surrounding circumstances and the probable consequences of the expressions.<sup>174</sup> In *Halis v Turkey*<sup>175</sup> the Court overturned the conviction of an applicant who was convicted of reviewing a problematic book written by a leader of a terrorist organization. In deciding that the review of an article do not amount to encouragement or incitement to violence, the court reasoned that the applicant is merely exercising his journalistic activities.<sup>176</sup>

In the US, the Supreme Court is very cautious in differentiating between advocacy of abstract doctrine and advocacy of concrete action. While in the advocacy of concrete action the advocacy urges taking a terrorist action now or in the future, advocacy of abstract doctrine it about making someone believe in something.<sup>177</sup> And now, under the *Brandenburg* test,<sup>178</sup> the mere abstract discussion, support or praise of dangerous and harmful ideas and conduct, including terrorist violence, cannot be prohibited speeches under the First Amendment unless they amount to incitement to imminent lawless action that is likely to occur.

## Conclusion

As illuminated in the foregoing discussion, FOE is a fundamental human right recognized under the Constitution and international bill of rights. The right protects various forms of expressions including print in all forms, broadcasts, film, video, dramatic performances, and recordings. As FOE is the “substance” and media is the “container” or the means through which the right is manifested extending the protection to the means is inviolable.

The chapter discussed the two commonly cited cluster of theories justifying FOE—instrumental and constitutive theories. While the first relies upon justifying FOE from the perspective of its

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<sup>173</sup> *Supra* note 169 (*Öztürk v Turkey*).

<sup>174</sup> *Supra* note 122, p. 109.

<sup>175</sup> *Halis v Turkey*, European Court of Human Rights, 2005, at [http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-67917&filename=001\\_67917.pdf&TID=thkbhnlzk](http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-67917&filename=001_67917.pdf&TID=thkbhnlzk). [Last accessed on 12 February 2016].

<sup>176</sup> *Ibid.* In the opinion of the court, ‘freedom of expression requires that care be taken to dissociate the personal views of the writer of the commentary from the ideas that are being discussed or reviewed even though these ideas may be considered offensive to many or even to amount to an apologia for violence.’

<sup>177</sup> *Supra* note 120, p. 108.

<sup>178</sup> *Supra* note 158.

use in achieving certain goals, the latter advocates that the right should be respected because it is intrinsic to human nature.

FOE has got its first juridical life through the UDHR which was latter followed by its illustrated recognition under the ICCPR and plenty of other international and regional instruments. It has also got a robust place under the Constitution. Both under international human rights instruments and the Constitution, the right is subject to restrictions as far as such limitations fulfil the standards of being provided by law, made with legitimate aim, and necessary in a democratic society. The chapter has discussed in detail the legitimate grounds of proscribing limitations on FOE which are clearly put under the Constitution and the ICCPR.

Nowadays, FOE is being widely restricted through national counterterrorism laws mainly for concerns of national security and public order. This particular subject have been an area of discussion and confusion among writers. Of particular importance here is the criminalization through anti-terrorism laws of encouragement, incitement, and glorification of terrorism and other aspects of those laws having a direct or indirect bearing on FOE and media freedom. There are different approaches and judicial interpretations in relation to regulating terrorism related expressions. The difference in the jurisprudence of the US and the EU in that regard is a typical example. While the US have a relatively wider standard to include hostile expressions into the protected speech regime, that may not be the case in the EU. Still, in both jurisdictions, the intent of the author and the surrounding circumstances are important in determining whether a certain expression falls out of the ambit of the protected speech regime. Also, in both cases, the right of individuals to criticize and denounce the counterterrorism agendas of the State and its other policies is guaranteed. There is also a consensus in both jurisdictions that limitations to FOE should be interpreted very narrowly.

## Chapter Three

### 3. FOE and Media Freedom in the Anti-Terrorism Law of Ethiopia

#### Introduction

In the previous chapter, we have said FOE is a limitable right and we have seen that counter-terrorism legislations are being widely used to limit the scope of the right. As we have tried to highlight, international instruments urged and called upon states to respond to the growing threat of terrorism, among others, through criminalization of incitement to and glorification of terrorism.<sup>179</sup> Accordingly, these instruments require states to incorporate a crime of incitement of terrorism in their domestic criminal laws without failing their obligations under international human rights law and humanitarian laws.<sup>180</sup> Furthermore, incitement to terrorism is considered inimical to the protection and promotion of human rights including freedom from fear and the right to life, to mention but few.<sup>181</sup> Therefore, criminalization of incitement to terrorism is considered protection of human rights by other means.

As part of discharging its international responsibility, Ethiopia enacted the ATP which criminalizes, *inter alia*, terrorist acts, rendering support to terrorism and encouragement of terrorism.<sup>182</sup> The ATP also introduced procedures for proscription of terrorist organizations.<sup>183</sup> These and other substantive and procedural provisions of the ATP has drawn skepticism and criticisms from commentators, opposition groups and human rights organizations of both domestic and international. Human Rights Watch has been a major critic of the law and particularly Article 6 since at its drafting stage.<sup>184</sup> Amnesty International and Article 19 are also

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<sup>179</sup> See, *supra* note 18; *supra* note 147; and *supra* note 164. We've also said that the ICCPR also obliges states to criminalize the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and this is highly related to the regulation by law of terrorism related expressions.

<sup>180</sup> *Ibid.*

<sup>181</sup> Freedom from fear is mentioned in the preambles of the ICCPR and the International Covenant on Economic Social and Cultural Rights, (ICSECR) 1966. Under the ICCPR, it is considered as a cornerstone for the enjoyment of other civil and political rights.

<sup>182</sup> *Supra* note 21, Article 3. The ATP under Article 3 stipulates terrorist and related acts. Its Article 4 criminalizes acts of planning, preparation, conspiracy, incitement or attempting to commit any of the acts stipulated under sub articles (1) to (6) of Article 3. As stipulated under Article 5 the crime of "rendering support to terrorism" is committed when any person, "knowingly or having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organization" performs any of the acts stated under sub-Articles (a) to (f) of Article 5(1) and Article 5(2). The ATP also criminalize direct and indirect encouragement of terrorism under Article 6.

<sup>183</sup> *Id.*, Article 25.

<sup>184</sup> *Supra* note 41. Also see, Amnesty International, Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia, 2011, at [www.amnestyusa.org/sites/default/files/afr250112011en.pdf](http://www.amnestyusa.org/sites/default/files/afr250112011en.pdf) [Last accessed on 15 April 2016].

ardent critics of the ATP by claiming that it has a chilling effects on the FOE and the media freedom in the country.<sup>185</sup> The increasing prosecution and conviction of journalists and others under the ATP has been attributed to the catch-all nature of its provisions.<sup>186</sup> On the other spectrum, the government defends the law by pointing out that it is enacted solely to prevent and subvert terrorism and is “copied” from jurisdictions with developed jurisprudence.<sup>187</sup>

This chapter explores the restrictions on FOE under the ATP and the justifiability of those limitations in light of international standards. In doing so, the discussion benefits from comparative analysis of the experience of other countries—particularly countries from where the ATP is said to have been “copied.”

### **3.1. Offence of Encouragement of Terrorism**

The highly controversial provision introduced by the ATP in relation to encouragement of terrorism is Article 6 which reads:

“Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.”<sup>188</sup>

Initially, the provision was crafted in a slightly different manner. The draft of the proclamation presented for reading to the HPR had put the provision in the following words:

“Whosoever writes, edits, prints, publishes, publicizes, disseminates, shows, makes to be heard by any promotional statements encouraging, supporting or advancing terrorist acts stipulated under Article 3 of this Proclamation, or the objectives terrorist organization; is punishable with rigorous imprisonment from 10 to 20 years.”<sup>189</sup>

As can be seen from the wordings, there is a difference in the elements of the offence in the first the draft and the finally adopted document of the Proclamation. It is apparent from the readings of the above two terminologies that the indirect encouragement or other inducement part of the

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<sup>185</sup> *Ibid.*

<sup>186</sup> *Supra note 43.*

<sup>187</sup> See, the late PM’s Speech before the parliament in *Supra note 43.*

<sup>188</sup> *Supra note 21, Article 6.*

<sup>189</sup> See the draft Anti-Terrorism Law explanation document in *Supra note 43.*

office was inserted later after the parliamentary deliberations on the draft. In relative terms, the draft seems to clearly indicate the elements of the offence and the acts that may constitute the crime under Article 6.

In the following sections, we will closely analyze the elements of the offence of encouragement of terrorism stipulated under the ATP.

### **3.1.1. Publication/Causing the Publication of Statements**

The core of the *actus reus* in the offence of encouragement to terrorism under Article 6 is publication of one's statement (or causing another to publish on the person's behalf). Here, it is crucial to question: what constitutes 'statements?' and what does 'publication' mean under the ATP? The ATP gives no definition to these terms. It does not specify as to what forms of publications are prohibited. Should it necessarily be in written or oral form or does it also include publications through electronic means? It also does not address the forms of prohibited statements. This is an apparent legal lacunae which may create problems during implementation. Unlike the ATP, the UK's Terrorism Act 2006 (hereinafter "TA 2006") defines 'statement' to include a communication of any description, including one without words consisting of sounds or images or both.<sup>190</sup> What constitutes "publishing" is also provided under the same TA 2006 as including provision of a statement by electronic means and by other means capable of making it accessible to the public.<sup>191</sup>

The offence under Article 6 requires that the statement should be addressed to "members of the public." The wording "public" indicates that statements made in private conversations are out of the ambit of Article 6. To fall under this provision, the statement must be given either at a forum open to all or a segment of the public. The offence does not require that all members of the public to whom a statement is published are likely to be affected. It seems that the likelihood of the statement to directly or indirectly encourage "some" or "multiple" persons suffices to constitute the offence under Article 6.

There may be cases where the targeted public does not actually access it—and, therefore, is not likely to be affected by it. As regards the issue of accessibility of the statement by the targeted public, the ATP is not as such concerned as to whether or not the publications are made in a

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<sup>190</sup> *Supra* note 171, Section 20(6).

<sup>191</sup> *Id.*, Section 20(2) and (4).

manner accessible to the public so that the latter would perhaps be encouraged to commit acts of terrorism. What is essential is only publication (or causing the publication) of a statement which may directly or indirectly encourage the public to whom it is published.

One may ask as to who is “the public to whom” a statement may be published? This may refer to the supposed audience of a certain media establishment or for individual cases it may refer to the person(s) to whom the speaker is uttering publically. The question is, what if that problematic publication is not made in a manner which the supposed audience would not access it? What number of targeted audiences are required satisfy “the public to whom it is published” element?

Apart from the above, the absence of definition of the term “publication” complicates the problem we just raised. It is to mean that so far as the law is not clear as to what “publication” means, it would be difficult for the judge to assess the capability of the publication to reach to a certain audience. For example, radio and television broadcasts are capable of reaching to the audience. Therefore, in such cases, mere publication of problematic statements which may directly or indirectly encourage the audience to commit or prepare to commit acts of terrorism constitutes the offence under Article 6. The problem is with regard to other forms of publication whose accessibility could be limited.

Blackstone’s Dictionary defines publication as “the act of declaring or announcing to the public.”<sup>192</sup> If we take this as a working definition, perhaps there are many forms of publication, having differing possibilities of accessibility by the public. Accordingly, one may think of forms of publications with least possibilities of accessibility to the public—but still there is a supposed audience. The proclamation leads to the assertion that mere publication of the above stated kinds of statements qualifies to the offence of encouragement to terrorism regardless of the possibility of accessibility by the public to whom those publications are addressed. Here we should bear in mind that we are not bothering about the actual influence of the statement on the targeted public. For that matter, it is irrelevant whether the targeted public is in fact encouraged by the statement or not. Rather, what we treated above is the possibility where there is no targeted public or the statement is made in a way the targeted public couldn’t access it or the statement didn’t reach the targeted public.

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<sup>192</sup> Black’s Law Dictionary, 8<sup>th</sup> ed., s.v. “publication”.

### **3.1.2. Likelihood of Being Understood as a Direct or Indirect Encouragement or other Inducement**

Another crucial element of the offence is that the published statement must be likely to be understood by members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism. The statement need not be directly related to the commission, preparation or instigation of acts of terrorism listed under the proclamation. It is also irrelevant whether any person is in fact encouraged or induced by the statement. By doing so, the law disregards any requirement of a connection between the incitement and a particular terrorist crime contrary to the concept under the normal criminal law.<sup>193</sup>

Under the ATP, there is no guideline as to what kinds of statements are likely to be understood by the public to whom they are published as an indirect encouragement or other inducement to the commission, preparation, or instigation of terrorist acts. Unlike the ATP, UK's TA 2006 clarifies as to what is to mean by statements that are likely to be understood by members of the public as indirectly encouraging them to commission or preparation of acts of terrorism. TA 2006 of the UK gives guidelines on what constitutes indirect encouragement to include every statement which "glorifies the commission or preparation...of such acts" and statements "from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances."<sup>194</sup> By providing such interpretative guidelines, the TA 2006 simplifies the determination of statements that may indirectly encourage the public. This is to be determined looking into both the contents of the statement as a whole and the circumstances and manner of its publication.<sup>195</sup>

Another critical loophole in the ATP is that it does not require that account be taken of the contents as a whole and the circumstances and manner of publication. The law does not as such differentiate academic writings and terrorism sympathizing and inflammatory articles on a similar subject. Since it does not give regard to the context of the publication and its overall content, purely academic writings may end up being encouragement to terrorism per Article 6 of

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<sup>193</sup> The Criminal Code of the Federal Democratic Republic .of Ethiopia, 2004, *Federal Negarit Gazzetta*, Proc. No. 414, Article 36.

<sup>194</sup> *Supra note* 171, Section 20(2).

<sup>195</sup> *Id.*, Section 1(4).

the ATP. There is, in fact, a difference in how academic works on an issue and a radical and inflammatory pamphlet are likely to be understood.<sup>196</sup> In this regard, the UK's TA 2006 (section 1(4)) puts an interpretative guideline by stating that how a statement is likely to be understood must be determined having regard both to "the *contents of the statement as a whole and the circumstances and manner of its publication.*"<sup>197</sup>

### **3.1.3. To the Commission, Preparation or Instigation of an Act of Terrorism**

The offence requires that the publicized statements must be in a nature that the public to whom it is published is likely to be directly or indirectly encouraged (or be used as any other inducement) to the commission, preparation or instigation of an act of terrorism. The ATP defines acts of terrorism under Article 3. According to Article 3, acts of terrorism are committed where an individual or a group with the intention of advancing a political, ideological or religious cause coerces the government, intimidates the public or section of the public or destabilizes or destroys the fundamental political, constitutional or economic or social institutions of the country by committing acts listed under Article 3(1) to (7).<sup>198</sup> This definition is often criticized for being over broad in some aspects.<sup>199</sup> Due to the broadness of the definition of acts of terrorism under the ATP, the offence of encouragement covers a wide range of conducts including publishing a statement which is likely to indirectly encourage someone to threaten to commit acts specified under Article 3(1) to (6) and to commit property crimes.

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<sup>196</sup> *Supra* note 150, p. 1418.

<sup>197</sup> *Supra* note 171, Section 1(4).

<sup>198</sup> *Supra* note 21, Article 3. Article 3 provides: "Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:

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

2/ creates serious risk to the safety or health of the public or section of the public;

3/ commits kidnapping or hostage taking;

4/ causes serious damage to property;

5/ causes damage to natural resource, environment, historical or cultural heritages;

6/ endangers, seizes or puts under control, causes serious interference or disruption of any public service; or

7/ threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article; is punishable with rigorous imprisonment from 15 years to life or with death."

<sup>199</sup> See generally, *Supra* note 41. Also see, *Supra* note 39, pp. 43-49. Hiruy Wubie said the ATP's failure to qualify as to what constitutes a serious interference or disruption of any public service and its listing of causing damage to natural resources or the environment in the list of terrorist acts without limiting its scope makes the definition of terrorism broad. He also discussed areas where the definition show a degree of vagueness. He picked up two elements from the definition (i.e. 'coercing the government' and 'destabilizing or destroying the fundamental...social institutions of the country') to exemplify the vagueness in the definition of terrorist acts.

### 3.1.4. The Required *mens rea*

The ATP is not explicit in stating the required mental element for the offence under Article 6. Under the FDRE Revised Criminal Code, all the legal, mental and material elements need to be fulfilled to say that a crime is committed.<sup>200</sup> As regards the mental element, it may be committed intentionally or negligently each having its own sub-categories.<sup>201</sup> Needless to say, the general principles of criminal code particularly those setting the essential elements of a crime (i.e. the requisite mental, material, and legal ingredients) are applicable for offences of terrorism too. To satisfy the mental ingredient of the offence of encouragement of terrorism under Article 6, the person publishing such a statement must either intend—at the time of publication—that the statement to be understood in the way just described, or be reckless as to whether or not it is likely to be understood in that way. It criminalizes both in cases where the defendant intended to encourage or incite and where he was merely reckless as to whether an offence might be provoked.

Yet, the *mens rea* requirement under Article 6 can be perceived as broader in comparison to the standard under the general Criminal Code discussed above. After all, as stated in the previous section, the offence of incitement under the Criminal Code requires connection between the incitement and the commission of the crime incited (and the crime incited should at least be attempted) unlike Article 6 which doesn't require so. Moreover, the criminalization of indirect encouragement makes the ATP even broader. A person who recklessly cause the publication of a statement which may indirectly encourage a section of the public may be liable to the punishment under Article 6 of the ATP. He need not advocate an act of terrorism, but what is required is being merely reckless that the statement which he caused to be published indirectly cause another to be instigated towards the commission of terrorist acts.

In contrast to the ATP, incitement to terrorism in other jurisdictions such as the UK clearly puts the required *mens rea* and/or the available defenses to the accused.<sup>202</sup> In his comments on the required *mens rea* for the offence of incitement to terrorism under the Article 5 of the CECPT, Martin Scheinin emphasized that the offence “should expressly refer to two elements of intent: namely intent to communicate a message and intent that this message incite the commission of a

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<sup>200</sup> *Supra note* 193, Article 23(2).

<sup>201</sup> *Id.*, Articles 58-59.

<sup>202</sup> See especially, *Supra note* 171, Section 1(6) which puts as a defence the lack of intention on the part of the author to directly or indirectly encourage or induce the commission, preparation or instigation of acts of terrorism.

terrorist act.”<sup>203</sup> He also noted that the offence must include “an actual (objective) risk that the act incited will be committed.”<sup>204</sup> Under the TA 2006, in the case of recklessness, it is a defence for a person to show that the statement “neither expressed his views nor had his endorsement”; and that it was clear, in all the circumstances that “it did not express his views and...did not have his endorsement.”<sup>205</sup> The newly enacted Canadian Bill-51 is also less broad in criminalizing terrorism related speech.<sup>206</sup> It proscribes speech that advocates terrorism as opposed to the ATP which criminalizes even statements that do not advocate terrorism if it likely to indirectly encourage others to commit terrorist acts.

To sum up, one can infer from the wordings of Article 6 that the ATP criminalizes both advocacy for terrorism and a simple accidental publication of a statement which is understood by some members of the public as encouraging to commit terrorist acts. Unlike the ATP, the Australian counterterrorism law clearly exempts advocacy, protest, dissent or industrial action from the ambit of definition of terrorist acts.<sup>207</sup> Canada’s Criminal Code under section 83.01(1)(b)(ii)(E) incorporated similar exemptions for ‘advocacy, protest, dissent or stoppage of work’ that is not intended to cause death or serious bodily harm by the use of violence, endanger a person’s life or cause a serious risk to public health or safety. Both exemptions indicate that Australia and Canada are more sensitive to the dangers of protests and strikes being branded as terrorism than the United Kingdom which has no such exemption.<sup>208</sup>

### **3.2. Threats of terrorist acts**

The ATP, under Article 3(7) proscribed threats of terrorist acts. The ATP simply criminalized threats of terrorist acts regardless of whether they are “true” or “false.” The Ethiopian courts are yet to encounter a case on this matter. On a matter related to threats, the US Supreme Court in

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<sup>203</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Martin Scheinin), Ten areas of best practices in countering terrorism’, 2010, para 31 at <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx> [Accessed on 12 May 2016]. Martin Scheinin is former Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Supra* note 171, Section 1(6).

<sup>206</sup> <https://openparliament.ca/bills/41-2/C-51/> [Accessed on 13 of April 2016].

<sup>207</sup> The Australian Criminal Code, Section 100.1(3), 2004, at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/cca1995115/sch1.html](http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html) [Accessed on 13 of April 2016].

<sup>208</sup> Kent Roach, ‘A Comparison of Australian and Canadian Anti-Terrorism Laws’, *UNSW Law Journal*, 2007, Vol. 30, No. 1, p. 57.

*Virginia v. Black* decided that only “true threats” are not protected under the First Amendment.<sup>209</sup>

### **3.3. Proscription of Terrorist Organizations under the ATP**

It is obvious that the identification of terrorist organizations is the first step that should be done before taking any measure against terrorism related organizations and individuals affiliated with terrorists. Proscription /designation/ of groups and organizations (that employ violence and terror as a means for achieving their goals) as terrorist organizations /groups/ is also used by jurisdictions as a mechanism of identification.<sup>210</sup> It is a justifiable limitation on FOE as per ICCPR and also our Constitution which allow for limitations in the interest of national security, public safety, and the protection of the rights and freedoms of others.<sup>211</sup> Proscription is also justified pursuant to Ethiopia’s positive obligations under international and regional instruments to prevent and subvert terrorism. Furthermore, the prevention of terrorism is seen as protecting human rights by other means.<sup>212</sup>

Keeping in mind the critiques on the specifics, the proscription of terrorist organizations is one of the counterterrorism strategies introduced by the ATP. Under the ATP, an organization that “commits acts of terrorism,” “prepares to commit acts of terrorism,” “supports or encourages terrorism” or “in otherwise involved in terrorism” can be proscribed as a terrorist organization.<sup>213</sup>

Article 25 of the ATP states that the House of Peoples’ Representatives (HPR) is empowered to proscribe and de-proscribe an organization as a terrorist organization upon the submission by the government. So far, the HPR has proscribed three domestic political groups namely the *Oromo*

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<sup>209</sup> See the discussion about “true” threats in *Supra note 156*.

<sup>210</sup> *Supra note 122*, p. 159.

<sup>211</sup> See, Articles 19(3) of ICCPR and Article 29(6) of the Constitution.

<sup>212</sup> *Supra note 16*. The preamble of the Resolution states that “*incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights...and must be addressed urgently and proactively by the United Nations and all States.*” See also, Office of the United Nations High Commissioner for Human Rights, ‘Human Rights, Terrorism and Counterterrorism’, Fact Sheet No. 32, p. 23. [www.ohchr.org/Documents/Publications/Factsheet32EN.pdf](http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf) [Last accessed on 21 April 2016]. This document reiterated that ‘*effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of states’ duty to protect individuals within their jurisdiction.*’

<sup>213</sup> *Supra note 21*, Article 25.

*Liberation Front* (OLF), *Ginbot 7* (now renamed *Arbegnoch Ginbot 7*), and *Ogaden Peoples Liberation Front* (ONLF) and two foreign Islamic groups namely *Al-Qaeda* and *Al-shabab*.<sup>214</sup>

### **3.3.1.1. Support or Encouragement of Terrorism as a Ground of Proscription**

The proscription of organizations that “supports or encourages terrorism” “or in otherwise involved in terrorism” is the concern of this paper as this would have implications on expressive freedom of individuals and their associational freedom. While the reasons for proscribing organizations may be agreed upon, putting broad proscription grounds would be precarious.

Regarding the proscription of organizations based on support and encouragement of terrorism, the Special Rapporteur explained that national proscription laws should be based on reasonable grounds to believe that the organization has knowingly carried out, participated in or facilitated a terrorist activity.<sup>215</sup> When we see the ATP’s proscription provisions, there is no mechanism installed to verify whether the illegal activities of the organization are done knowingly or as an official policy. In the absence of inclusion of such qualification, the ATP is simply ascribing responsibility on an organization to scrutinize and follow-up the private activities of its members.<sup>216</sup> This would be a serious encroachment on the FOE of an organization. The expressive freedom of the organization would be curtailed based on such illusive standards.

### **3.3.1.2. Crime of Membership or Participation**

Being a member or participating in any capacity in a proscribed terrorist organization is a crime under Article 7 of the ATP. Therefore, a member could potentially be prosecuted merely because their organization “supports or encourages terrorism” or “in otherwise involved in terrorism”—even if the support or the encouragement or the involvement did not result in a terrorist act; and even if the person supporting or encouraging terrorism did not intend to cause terrorism.

Non-violent political groups and groups involved in terrorism may sometimes have a symbiotic relationship.<sup>217</sup> That is, non-violent political groups may sometimes support groups involved in terrorism and *vice versa*.<sup>218</sup> This support may be manifested through explicitly encouraging, legitimatizing, or excusing the terrorist acts of groups involved in terrorism or it may extend an

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<sup>214</sup> See, [https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/07/ethiopia\\_0.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/07/ethiopia_0.pdf) [Last accessed on 10 April 2016].

<sup>215</sup> *Supra note* 203, para 35.

<sup>216</sup> *Supra note* 150, p. 1413.

<sup>217</sup> *Supra note* 122, p. 174.

<sup>218</sup> *Ibid.*

indirect support, for instance “by failing to condemn violence as a political method, or by offering terrorist groups access to the media to facilitate the dissemination of their ideological aims.”<sup>219</sup> This means that setting non-violence as an organizational policy does not by itself save an organization from proscription.

Coming to the ATP, its criminalization of mere membership to a proscribed organization and its conformity with the FOE of individuals is questionable.<sup>220</sup> Adding to this, the crime of “participating in any other capacity” seems to aim to encompass non-members who showed support (intentionally, negligently or as a matter of coincidence) to a terrorist organization.

As per Article 7, speaking or writing or expressing in any other way an opinion which in one way or another supports or confirms the ideals, goals, and methods of a terrorist organization may fall under the crime of “participation in a terrorist organization”—because being a supporter may be taken as a “capacity” as stated in the offence. The offence does not require that the crime be committed intentionally and/or with knowledge of the organization’s illegal activities. The requirement of intention was included in the document that explains the Draft Anti-Terrorism Proclamation, but latter omitted in both the draft and the final proclamation.<sup>221</sup> This lack of requirement of intention implies that an individual who accidentally or negligently becomes a member of a terrorist organization or showed a “support” in a manner shown above without having knowledge of the criminal activities of that organizations may be held liable to punishment. This contradicts with the individuality of guilt principle of criminal law apart from encroaching upon the right to FOE.<sup>222</sup>

Be that as it may, the expanded power of prosecution given to the government under Articles 25 and 7 of the ATP, enables it to collectively punish members of groups for actions of other members beyond their control. It is also a misapplication of criminal law to trivial harm, when criminological policy presupposes that criminal law should be reserved for the most serious social harms.<sup>223</sup> Ben Saul argues that “while it may be legitimate to ban groups that actively

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<sup>219</sup> *Ibid.*

<sup>220</sup> It should be noted here that being a member of an organization is one manifestation of the exercise of freedom of expression as expressions through conduct, sign or any other way are within the ambit of the right.

<sup>221</sup> See, *Supra note* 43 (the Explanation to the Draft Anti-Terrorism Proclamation), p. 15.

<sup>222</sup> See, *Supra note* 193, Article 41.

<sup>223</sup> Ben Saul, ‘Speaking of Terror: Criminalizing Incitement to Violence’, *UNSW Law Journal*, [2005], Vol. 28, No. 3, p. 879.

engage in or prepare for terrorism, it is not justifiable to ban whole groups merely because someone in the group praises terrorism.”<sup>224</sup> As we have seen above, threat of terrorist acts and direct and indirect encouragement of terrorism are criminalized under the ATP. And here, the law is purporting to punish a third person for the statements of another—merely because these two persons belong to the same group—regardless of whether the statements are directly connected to any actual offence. This will be a serious encroachment upon the requirement of legal certainty.

The absence of judicial review or the lack of established rules for legislative review of the proscription decision exacerbates the problem and poses a serious threat to FOE.<sup>225</sup> This problem is worsened by the fact that there is little parliamentary check on the activities of the executive given the composition of the parliament.<sup>226</sup> As we said before, it is the government (the executive branch) that proposes for proscription of an organizations and then the HPR approves it. Given that the executive is often cited as a suspect for violation of rights,<sup>227</sup> ATP should have established an effective review procedure as part of the check and balance mechanism manifested in any democratic system. Or the ATP should have given the HPR the power to regularly review the list so that organizations which are no longer engaged in prohibited acts would be de-proscribed. In the absence of such mechanisms, the law is simply leaving the executive with an excessive open space thereby exposing for abuse.

Similar to Ethiopian ATP, both Canadian and Australian anti-terrorism laws allow for proscription of terrorist organizations, yet with some variations in the specifics. While Canada does not have specific laws that enable a group to be proscribed as a terrorist group on the basis that it or its members advocate or praise terrorism, Australian law allows organizations to be proscribed on the basis that they ‘advocate the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)’.<sup>228</sup> However, as opposed to the ATP, both the Canada and the

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<sup>224</sup> *Ibid.*

<sup>225</sup> See for instance, *Supra note* 203, para 35. It provides that domestic proscription laws should incorporate provisions allowing applications for de-listing and should give a right to appeal for judicial review of the proscription decision.

<sup>226</sup> See for example, <http://www.bbc.com/news/world-africa-33228207> [Last accessed 24 February 2016]. In the recent election, EPRDF, the ruling coalition, won every single seat in the House of Peoples’ Representatives. As the executive and the parliament are from the same party, EPRDF, it is fair to assume that there would be little or no check on executive actions.

<sup>227</sup> *Supra note* 42, p. 49.

<sup>228</sup> *Supra note* 136, p. 83.

Australian counter-terrorism laws stipulated the procedures for de-proscription and have set up a mechanism of regular review of the proscription decision either through judicial review or legislative review.

### **3.4. Justifiability of the Restrictions on FOE under the ATP**

As explained under chapter two, FOE is a limitable right. The Constitution provides that FOE and of the press can be limited by law issued in pursuance of protecting the well-being of the youth, and the honor and reputation of individuals. It also puts prohibition of propaganda of war and the public expression of an opinion that affects human dignity as permissible grounds of limitation. The ICCPR under Article 19 (3) stipulates the respect of the rights and the reputation of others, the protection of national security or of public order, or of public health or morals and prohibition of propaganda for war as permissible grounds of limitations. Article 20(2) is another available option under the ICCPR to the proscription of incitement to terrorism.<sup>229</sup> In relation with this, the committee reiterated that the restriction grounds stated under Article 20 must comply with Article 19 (3).<sup>230</sup>

By doing so, the ICCPR and the Constitution stipulated permissible grounds of limitations. However, there are further qualifications to the restriction of the right. Restrictions on FOE are permissible so long as they are provided by law, issued in pursuance of legitimate purpose, and are necessary and proportional.<sup>231</sup> Any limitation on human rights must also be proportional<sup>232</sup> and not implemented in a manner that jeopardizes the right itself.<sup>233</sup>

More relevant to this discussion is the Human Rights Committee's view that counter-terrorism measures should be compatible with Article 19(3).<sup>234</sup> It stated in clear language that offences of "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying" or "justifying" terrorism should be clearly defined to ensure that they do not lead to

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<sup>229</sup> Article 20(2) of ICCPR imposes a positive duty upon states to proscribe incitement to discrimination, hostility, or violence through the advocacy of national, racial or religious hatred. It is reasonable to presume that such proscription would capture conduct amounting to incitement to terrorism.

<sup>230</sup> *Supra* note 54, para 50.

<sup>231</sup> Article 19(3) of the ICCPR and 29(6) of the Constitution. Also see *Supra* note 54, para 22.

<sup>232</sup> *Supra* note 54, para 34. The Human Rights Committee reaffirmed that any limitation on FOE must be appropriate to achieve their protective function and "they must be the least intrusive instrument amongst those which might achieve their protective function." It also stated that such proportionality should be observed not only in enacting a law restricting FOE but also in the course of implementation. It further noted that the form of expression at issue and the means of dissemination should be taken into account in determining proportionality.

<sup>233</sup> *Id.*, para 21.

<sup>234</sup> *Id.*, para 46.

unnecessary or disproportionate interference with freedom of expression.<sup>235</sup> It also emphasized the media's crucial role in informing the public about acts of terrorism and demands safeguards against undue restriction restrictions on its operation.<sup>236</sup> Subsequently, it declares that "journalists should not be penalized for carrying out their legitimate activities."<sup>237</sup>

In this sub-section, we are going to test the compatibility of the restrictions on FOE introduced by the ATP with the limitation clauses of the Constitution and the ICCPR.

### **3.4.1. Legality and precision**

The first condition pertaining to the legality of the measure requires that any interference on the FOE should be prescribed by law—a national law which is adequately accessible to the public and sufficiently foreseeable.<sup>238</sup> The prohibition must be framed in such a way that the law is adequately accessible to enable individuals to have a proper indication of how the law limits his/her conduct should be formulated with sufficient precision so that the individual can regulate his/her conduct.<sup>239</sup> Apart from this, precision is vital for those charged with the execution of the law to "ascertain what sorts of expression are properly restricted and what sorts are not."<sup>240</sup>

Stating the obvious, the offence of encouragement of terrorism, the procedures for proscription of terrorist organizations and the crimes associated with it are prescribed under the ATP which is a formally issued law. Thus, seen in its face, it satisfies the requirement of prescription by law. However, there are skepticisms regarding the foreseeability of the law itself. Particularly, the over-elasticity nature of the offence of "indirect encouragement" and "other inducement" makes the law a bit uncertain, thereby leaving in vain the requirement of foreseeability and precision.<sup>241</sup> As we have seen in our previous discussions, the ATP is not as such clear in stating the kinds of speeches proscribed. It also does not provide for the requisite *mens rea* for determining the commission of the offence of encouragement. These and other aspects of the ATP (discussed in the previous section) makes it imprecise, vague, and at times silent on some important matters so that expression of alternative political views and purely journalistic activities may get in the trap. Hence, particularly the offence under Article 6 lacks the requirement of sufficient foreseeability

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<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

<sup>238</sup> *Id.*, para 25.

<sup>239</sup> *Supra note* 145, p. 638.

<sup>240</sup> *Supra note* 57, para 25.

<sup>241</sup> *Supra note* 46, p. 48.

because a reasonable person cannot foresee with sufficient precision what is punishable under the proclamation on the basis of encouragement of terrorism.<sup>242</sup> Therefore, it is difficult to say that the offence of encouragement of terrorism provided in the ATP fully satisfies the test of “provided by law.”

Similarly, the part of the ATP making support or encouragement of terrorism as a ground of proscribing terrorist organizations lacks the requisite precision as discussed above. Moreover, as discussed above, the crime of membership and participation in the proscribed terrorist organizations under the ATP also lacks legal certainty.

### **3.4.2. Legitimate aim**

The second test to the appropriateness of the limitations is whether or not such limitative laws are enacted in pursuance of one or more legitimate aims exhaustively listed under the Constitution and the ICCPR.<sup>243</sup> The protection of the honor and reputations of others, wellbeing of the youth, prohibition of propaganda of war, which may include protection of national security and prohibition of public expression intended to injure human dignity are the permissible grounds of limiting FOE and press freedom. To the extent that restrictions on FOE are imposed in order to prevent and suppress terrorism which is a threat to the life and property of individuals and to national security of a country, the purpose is clearly legitimate.<sup>244</sup> Since terrorism is inimical to the rights of others, the protection of the rights of others also serves as another legitimate purpose of the law in limiting FOE and press freedom through proscribing encouragement of terrorism.<sup>245</sup> Moreover, indoctrination and brainwashing of the youth—often executed through the media and other forums—are usually used by terrorists to recruit the future terrorists and suicide bombers.<sup>246</sup> Hence, the ATP is enacted in pursuance of the legitimate aims provided under the Constitution and ICCPR.

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<sup>242</sup> *Supra* note 46, p. 49

<sup>243</sup> See, Article 29(6) of the Constitution and Article 19(3) of ICCPR.

<sup>244</sup> *Supra* note 122, p. 43. He asserted that the legitimate aims most relevant to the fight against terrorism are in the interest of national security, the prevention of disorder or crime, and the protection of the rights and freedoms of others. Therefore, the limitation of freedom of expression as part of preventing or suppressing terrorism is considered to be made in pursuance of a legitimate aim, leaving other tests unconsidered.

<sup>245</sup> *Supra* note 16.

<sup>246</sup> Jeff Lewis, *Language Wars: The Role of the Media and Culture in Global Terror and Political Violence*, Pluto Press, London, 2005, p.8.

### 3.4.3. Necessity

Necessity in a democratic society is the third prerequisite for an interference against FOE to be justified.<sup>247</sup> The standard of necessity in a democratic society serves to determine the legitimacy of the relationship between the interference and its purpose. As clarified by the ICCPR, a state invoking a legitimate ground for restriction of FOE “must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>248</sup> It stated that such restrictions must be directly related to the specific need on which they are predicated and must be the least intrusive means possible for protecting the intended legitimate objective.<sup>249</sup> Thus, restrictions must not be overbroad.<sup>250</sup> By doing so, the Committee makes principle of proportionality one of the central elements of necessity. The test of proportionality usually have three implicit sub-principles: capability of the measure to achieve the (legitimate) aim pursued, the absence of other less restrictive measure to achieve the relevant purpose, and the existence of a reasonable balance between the limiting measure and the aim pursued.<sup>251</sup>

Coming to the ATP, a question remains as to whether its limitations on FOE passes through the test of proportionality and its manner of balancing between the limiting measure and the aim pursued. Article 6 of the ATP which criminalizes indirect encouragement or other inducements is overbroad—a kind of catch all strategy. This makes it difficult to establish a direct and immediate connection between the expression and the threat (the purported objective). In this respect, therefore, the law fails to satisfy the test of necessity.

Besides, the test of necessity requires that there should be a reasonable balance between the limiting measure and the aim pursued. Thus, legitimate aims stated above should not be pursued

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<sup>247</sup> Cumulative reading of the Constitution with the Article 19 of the ICCPR and its interpretations indicates the country should live up to the terms of this test too.

<sup>248</sup> *Supra note 54*, para 35.

<sup>249</sup> *Supra note 54*, para 22. See also, UN Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ (Frank La Rue), 2011, para 36 at [www.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf) [Last accessed on 21 October 2015]. The Special Rapporteur said the protection of national security or countering terrorism cannot be used to justify restricting the right to expression unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

<sup>250</sup> *Supra note 54*, para 34.

<sup>251</sup> *Supra note 54*, 34, para 34.

at the cost of disproportionately limited FOE. The over-breadness of the offence of encouragement to terrorism (especially indirect encouragement), its lack of clarity on important issues including the essential *mens rea* element and the severe punishment prescribed for the offence makes it a disproportionate limitation on FOE.<sup>252</sup> These deficiencies in the provision establishing the offence may lead to the curtailment of legitimate dissident political expressions which the incumbent considers unpleasant. Therefore, not only the offence itself inflicts disproportional cost on FOE, but also its application may lead to an anticipated result. This indicates that it fails to satisfy the proportionality test which is intrinsic in the test of necessity.

As a general conclusion, the limitations on FOE manifested in the ATP are prescribed by law except that there elements of impreciseness in the offence of encouragement to terrorism. We can say that the law is there in pursuance of legitimate aims including the preservation of national security and the protection of the well-being of the youth. There is also a rational link between the pursued objectives and the proscription of encouragement to terrorism. However, the limitation fails to satisfy the test of proportionality or proper balance between the pursued objectives and the FOE—i.e. the latter is severely limited for disproportionate protection of the other interests (the legitimate aims).

## **Conclusion**

In the foregoing chapter, we have discussed about criminalization of encouragement of terrorism and its compatibility with relevant international instruments. We have noted that by criminalizing encouragement of terrorism, Ethiopia is discharging its responsibility under international law.

However, the problem comes with close reading of the contents of the provision establishing the offence of encouragement of terrorism, Article 6. From the beginning, unlike its UK counterpart, the law does not give clear meaning to the terms “statements” and “publication” which are cores of the *actus reus*. Moreover, the provision is not concerned as to whether or not the publications are made in a manner accessible to the public so that the all or some members of the public would perhaps be encouraged to commit acts of terrorism. Adding to this, unlike the UK’s TA 2006, the has ATP left no clue as to what statements are likely to be understood by members of the public as indirectly encouraging them to the commission or preparation of acts of terrorism.

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<sup>252</sup> See, *Supra note* 46, p. 56.

Under the ATP, there is no statement requiring that account is not taken of the contents of the statement as a whole and the circumstances and manner of publication in determining the commission or otherwise of the offence of indirect encouragement of terrorism. The confusion and vagueness surrounding the provision is exacerbated by the over-broad definition of terrorism provided under Article 3 of the ATP. Furthermore, in contrast to other jurisdictions which the ATP is “copied” from, the offence under Article 6 does not clearly put the necessary *mens rea* requirement and/or the possible defenses for the accused. While other jurisdictions such as the EU and the UK terrorism laws clearly aimed to punish advocacy of terrorism, there is a possibility that simple accidental publications (regardless of the mental state of the publisher) may lead to criminal punishment under the ATP.

Also, Article 3(7) of the ATP criminalizes threats of terrorist acts without giving regard to their truthfulness or otherwise. Moreover, there are conditions and procedures for proscription of terrorist organizations under the ATP. Whilst proscription of terrorist organizations is a commendable counterterrorism strategy, the procedure and standards introduced under the ATP have problems. Its implication on FOE is that: first, support or encouragement of terrorism is put as a ground of proscription and second, mere membership or association to these proscribed organizations gives rise to criminal liability. We would say that support or encouragement of terrorism as a ground of proscription is so broad and it should have been corroborated with details of what constitutes such acts. In the absence of such, it could be used to stifle legitimate expressions. Since the law stipulates the crime of membership or participation is increasingly being used to prosecute journalists and government critics, the conditions of the proscription and its procedures have a direct bearing on FOE in the country.

Finally, the chapter tested the justifiability or otherwise of restrictions on FOE under the ATP. Restrictions are legitimate so long as they fulfill the requirements of legality and precision, issued in pursuance of legitimate purpose, and are necessary in a democratic society. We have said that the offence of encouragement of terrorism is provided by law even though it lacks precision. As the ICCPR committee make proportionality a standard to assess the necessity requirement, we said that the crime of encouragement of terrorism falls short of meeting the precondition of being necessary in a democratic society. Yet, the ATP have a legitimate aim of protecting national security, public order and the well-being of the youth

## Chapter Four

### 4. The Impact of the ATP on FOE and Media Freedom

#### Introduction

Ethiopian media houses have been expressing their concern on the restrictions allegedly imposed by the ATP on their journalistic activities. They have complained that the law will essentially curtail their ability to report on matters of terrorism and security and their overall activities.<sup>253</sup> Its implementation has, of course, triggered a lot of worry and skepticism. On the other hand, the government reiterated about the law's friendliness to human rights and "proper" journalistic activities.<sup>254</sup> The distrust among commentators over the law and its effects runs wide and deep.

It is crystal clear that media plays a crucial role in communicating information and knowledge including on issues relating to terrorism and security. In the course of doing their journalistic activities, for example, journalists may come in contact with people who have actual or perceived links with proscribed terrorist organizations. There are echoed concerns over the government's response to such transactions. There are reports of prosecution under the ATP merely because journalists made contacts with individuals and organizations perceived to have terrorist motives. If these concerns are found to be true, as will be investigated in this chapter, we can say that the ATP's effect on journalistic activities goes to the heart of the very ideals of FOE which is a founding brick for democratic culture, to say the least.

Moreover, there is a quandary between the ethical principle of confidentiality of journalistic sources and the legal obligation to disclose such information which may be necessary for the prevention or investigation of terrorist activities. We will see how these and other aspects of the ATP practically or potentially affect the ability of the media to investigate and report on matters of public interest, especially in this case, on issues related to terrorism and security.

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<sup>253</sup> See for example, opposition political parties denouncing the ATP at <https://www.youtube.com/watch?v=Nr76bQEtnlA> [Last accessed 24 May 2016]. Also see, [http://www.capitalethiopia.com/index.php?option=com\\_content&view=article&id=897:press-in-exile-an-ethiopian-reality&catid=49:feature&Itemid=48](http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=897:press-in-exile-an-ethiopian-reality&catid=49:feature&Itemid=48) (Last accessed 24 May 2016).

<sup>254</sup> See for example, the former Prime Minister of Ethiopia, Meles Zenawi, defending the ATP at <https://www.youtube.com/watch?v=BGA5x5GDarY>. [Last accessed on 10 May 2015].

It is also important to note that the perception among journalists about the law might have significant implications on the way the media organizations do their work. Hence, in this chapter, we will see how the ATP as it is and its implementation affected media freedom.

This chapter explores the concerns over the ATP and also attempts to test the viability or otherwise of these concerns with empirical evidences. In doing so, it will first attempt to show an overview of the media landscape in Ethiopia. Then, its implications as manifested in some selected judicial interpretations and prosecution practices will be highlighted. After that, the paper proceeds to investigating as to how and to what extent the ATP and its implementation restricted FOE and activities of the media. As stated in the beginning, the paper focuses on the domestic “traditional” media sector which consists mainly of the print and broadcast media.

#### **4.1. Overview of the Media Landscape in Ethiopia**

In Ethiopia, the majority of the media houses having broader outreach to the public are state owned or controlled.<sup>255</sup> Terje Skjerdal characterized the Ethiopian media structure as state-control pluralism.<sup>256</sup> Still, there have been few private newspapers and magazines focusing and circulating mainly in Addis Ababa and major regional cities.<sup>257</sup> Of course, their number was good following the years after the Transitional Government of Ethiopia.<sup>258</sup> Especially before the 2005 election, the number of the print media was relatively higher and they were operating under a relatively free environment.<sup>259</sup> However, the following years after the 2005 election have marked a sharp decline in the number of print media establishments and on the other hand the number of exiled and imprisoned journalists continue lifting upwards.

The Ethiopian Broadcasting Authority (EBA) has regulatory power over all media activities in Ethiopia.<sup>260</sup> According to the EBA, there are 17 licensed newspapers and 16 licensed magazines.<sup>261</sup> Most of them focus on the political, economic, and social affairs in the country.<sup>262</sup>

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<sup>255</sup> Human Rights Watch, ‘Journalism is Not a Crime: Violations of Media Freedom in Ethiopia’, 2015, p .11 at <https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia> [Last accessed on 26 May 2016].

<sup>256</sup> Terje Skjerdal, ‘Ethiopia: Media and Journalism’, 2014, p. 3, at [http://www.landinfo.no/asset/2902/1/2902\\_1.pdf](http://www.landinfo.no/asset/2902/1/2902_1.pdf) [Last accessed on 25 April 2016].

<sup>257</sup> *Supra note 255.*

<sup>258</sup> *Supra note 256.*

<sup>259</sup> European Union, ‘EU Observer Mission in Ethiopia, Preliminary statement,’ 2005, at [www.kaeup.com/newsImages/Archive/EU-Pre-state-May17.pdf](http://www.kaeup.com/newsImages/Archive/EU-Pre-state-May17.pdf) [Last accessed on 25 April 2016].

<sup>260</sup> Broadcasting Proclamation, *Federal Negarit Gazzeta*, Proc. No. 178, 5<sup>th</sup> year, No. 62, Article 7.

<sup>261</sup> Interview with Deressa Terefe, Mass Media Inspection and Capacity Building Directorate Director at Ethiopian Broadcasting Authority, 9 September, 2015.

A printing giant in the country that can consistently print newspapers is the state-run *Birhanena Selam* even though there are other small state-run and private printing houses. There are also radio and television stations currently operating in Ethiopia. Given the fact that licensing and operation of broadcast/electronic media is highly state regulated, if not restricted, government critics and dissenting voices tend to prefer the print media platforms, i.e. newspapers and magazines.<sup>263</sup> Television broadcast license is not given to private applicants and it is under government's complete monopoly.<sup>264</sup>

There is also increasing use of the internet in recent years. However, its reach is mostly restricted to major cities. The Internet is increasingly used as a source of news and information and to communicate and convey ideas especially among the young and educated.<sup>265</sup> Therefore, its accessibility and impact is yet to be expanded. As our focus in this paper is more of on the so called traditional media (i.e. newspapers, magazines, radio and television), we are not going to analyze the implications of the law on the internet platform.

Ethiopia ranked 142<sup>nd</sup> in the 2015 international press freedom index released by the Paris-based Reporters without Borders.<sup>266</sup> The ranking is made through measuring laws and practices that affect the capacity of journalists to report news. The rank shows the crackdown on FOE and the deteriorating media environment in Ethiopia. In its recent (2016) annual report on political rights and civil liberties, Freedom House categorized Ethiopia into the “not free” list.<sup>267</sup>

Now, a question to pose is why this least rank in press freedom assessments? Why are some journalists who have been working in the private media fleeing the country? What repercussions, if any, the ATP has brought about to the Ethiopian media landscape and what share does it have

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<sup>262</sup> *Ibid.*

<sup>263</sup> See for example, [http://www.capitalethiopia.com/index.php?option=com\\_content&view=article&id=897:press-in-exile-an-ethiopian-reality&catid=49:feature&Itemid=48](http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=897:press-in-exile-an-ethiopian-reality&catid=49:feature&Itemid=48) (Last accessed 24 May 2016). Most participants also told the researcher that the private press is relatively preferable for them to write critical articles against the government because of the relatively loose regulation by the government.

<sup>264</sup> See, <http://wainfo.com/index.php?view=article&catid=52%3AAnational-news&id=14760%3AAuthority-to-digitize-existing-analog-tv-broadcast&format=&Itemid=291>. [Last accessed 21 May 2016]

<sup>265</sup> *Supra note* 255, p. 12. Also see, *Supra note* 256, p. 3.

<sup>266</sup> Reporters without Borders, ‘World Press Freedom Index 2015’, 2015, at <https://rsf.org/en/ethiopia> [Last accessed on 23 May 2016].

<sup>267</sup> Freedom House, ‘Anxious Dictators, Wavering Democracies: Global Freedom under Pressure (Freedom in the World 2016)’, at [https://freedomhouse.org/sites/default/files/FH\\_FITW\\_Report\\_2016.pdf](https://freedomhouse.org/sites/default/files/FH_FITW_Report_2016.pdf) [Last accessed on 23 May 2016].

to the aforesaid problems? What environment has the ATP created in the Ethiopian traditional media sector? The following sections are dedicated to addressing these and related issues.

## **4.2. A Glimpse of Judicial Interpretations and Prosecution Practices**

### **4.2.1. Some Judicial Interpretations**

In the last close to seven years of its adoption, many charges under the ATP have been brought and verdicts passed against journalists and others working in the media sector. Generally, whilst most of these charges are based on alleged participation of the accused individuals in a terrorist activity or terrorist organization, the *actus reus* in some of these charges largely rests upon what these individuals have written on newspapers and magazines as well as on the internet platform.<sup>268</sup> Let us now see judicial interpretations on charges presented under the ATP.

In *Federal Public Prosecutor v Elias Kifle and Others*,<sup>269</sup> the Federal High Court convicted *Reeyot Alemu* (the 5<sup>th</sup> defendant) for violating Article 3(6) and/or Article 4 and Article 7(1) of the ATP and Article 684(2) of the Criminal Code. According to the court, there was a clandestine terrorist group<sup>270</sup> organized and run by *Elias Kifle* (1<sup>st</sup> defendant) and *Zerihun G/Egziabher* (2<sup>nd</sup> defendant). The charge states that this group have relationships with proscribed terrorist organizations, mainly *Ginbot 7*. *Reeyot Alemu* was convicted of participating in this clandestine terrorist group by serving as a source of information through articles she was writing to “Ethiopian Review,” an online website administered by *Elias Kifle* (the 1<sup>st</sup> defendant), and communicating photos of inciting posts (mainly an Amharic word “*beqa*”) in different places.

According to the understanding of the court, the money she was receiving in *lieu* of the articles she wrote to the “Ethiopian Review” was actually used to undertake terrorist activities inside Ethiopia through the clandestine group they allegedly established. Therefore, her articles were counted as evidences to show her association with a terrorist group and the alleged conspiracy to instigate the public to undertake terrorist activities. The defendant, through her defence witnesses,

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<sup>268</sup> See for example, *Federal Public Prosecutor v. Solyana Shimelis and Others*. FDRE Federal High Court, 2014, Criminal Case No. 154050. [Unpublished]; *Federal Public Prosecutor v. Getachew Shiferaw*, FDRE Ministry of Justice, 2016, File No. 414/2008. [Unpublished]

<sup>269</sup> *Federal Public Prosecutor v Elias Kifle and Others*, FDRE Federal High Court, 2012, Criminal Case No. 112199. [Unpublished] (See Annex 1)

<sup>270</sup> According to the court, this clandestine group is organized in order to perpetrate acts of terrorism including inciting the public to commit terrorist acts and disrupting public services including electricity and telecom lines. The court found that all the defendants were collaborating in inciting the public to terrorist activities through writing the word “*beqa*” (an Amharic word to mean “enough”) in different public places and making it a subject of news coverage.

contended that the money was given as a payment for her articles featured on “Ethiopian Review.” During cross examination, the court asked the defence witnesses as to who was sending the money and the motive behind. The court explained that the witnesses’ testimonies failed to stand the cross examination and thus, concluded that the prosecution evidences are not rebutted. However, on appeal, the Supreme Court criticized this interpretation of the High Court and turned the conviction on this specific count because it lacks clarity about the source of the money and the specific purpose it was sent.<sup>271</sup> Therefore it lifted the conviction under Article 684 of the Criminal Code.

To prove the defendant’s involvement in terrorist activity through writing inciting words (the word “*beqa*”) in public places and communicating such to the 1<sup>st</sup> defendant, the prosecution presented witnesses. The first prosecution witness testified that he (with his friend who is the 3<sup>rd</sup> prosecution witness) was writing in public places an Amharic word “*beqa*”. His testimonies also indicate that someone has promised them to pay money for writing a similar word in other regional towns though he does not disclose who instructed them. Second prosecution witness also gave his testimony which is similar to the first and indicated the 3<sup>rd</sup> prosecution witness was the one paying the money for their services. The third prosecution witness testified that it was *Zerihun G/Egziabher* (2<sup>nd</sup> defendant) who was instructing him to write “*beqa*” in different public places a task which he started with the other two witnesses. At one instance, while meeting with *Zerihun*, he said he was with *Woubishet Taye* (3<sup>rd</sup> defendant). A picture of the word “*beqa*” written in different public places allegedly through the sponsorship of the 1<sup>st</sup> defendant and a written material titled “solidarity movement for new Ethiopia.”<sup>272</sup>

In the analysis of the court, *Elias Kifle* (1<sup>st</sup> defendant) is put as a connecting factor between *Reeyot Alemu* and proscribed terrorist organizations. However, to the opinion of the writer, the court should have gone far in demanding for more evidences to clearly show the terrorist motives of the “clandestine group.” It should be sufficiently clear as to how sending pictures of inciting words to someone else can prove the existence of motive to perpetrate terrorist activity. Also little has been said in the case to establish the connection between the 1<sup>st</sup> defendant and *Ginbot 7*,

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<sup>271</sup> *Federal Public Prosecutor v. Reeyot Alemu*, FDRE Federal Supreme Court, 2012, Criminal Appeals Case No. 77654. [Unpublished]. (See Annex 2)

<sup>272</sup> Both the Federal High Court and the Federal Supreme Courts said nothing about the content of this written material. The Supreme Court stated “this is the stance being advocated by the illegal group” without specifically referring to the name of the group and its missions.

a proscribed terrorist organization. Assuming that the 1<sup>st</sup> defendant is a member of a proscribed terrorist organization, does this by itself show beyond reasonable doubt that the 5<sup>th</sup> defendant knew this relationship of the 1<sup>st</sup> defendant? The evidences produced to show that the 1<sup>st</sup> defendant works for *Ginbot 7* are mainly the news and commentaries posted on “Ethiopian Review” covering the activities the above terrorist organizations, sometimes in glorifying manner. Leaving the legality of featuring such news and commentaries, one can question the adequacy of such evidences to prove his membership or association with this terrorist organization. While the evidences presented appear to be examples of individuals exercising their right to freedom of expression and association, this indicates that there is a room to consider critical articles against the government as unlawful activities, thereby illegitimately restricting FOE.

On appeal, the Federal Supreme Court confirmed the High Court’s stance that the 5<sup>th</sup> defendant works for a terrorist organization without being a member. To the opinion of the court, she was serving for a proscribed terrorist organization through using the 1<sup>st</sup> defendant as a bridge. From the opinion of the Supreme Court, it seems that it prefers to focus on proscribed terrorist organization rather than a clandestine terrorist group mentioned in the charge and the judgment of the Federal High Court. The Supreme Court turned the conviction under Article 684 of the Criminal Code and Article 4 of the ATP for lack of proof beyond reasonable doubt. Therefore, it cancelled the conviction of the defendant under two counts and confirmed her conviction under Article 7(1) of the ATP.

From the above, one can notice that the judicial interpretations failed to clarify the murky area of the ATP that is blurring the contours between decent journalism and encouragement of terrorism as well as participation in a terrorist activity. In interpreting the elements of the offence of participation in a terrorist organization, the courts created more confusion than elucidation. The court’s interpretations has rather spawned so many questions and gaps some of them raised above. Apart from the law’s vagueness and broadness, the judiciary’s inability or unwillingness to properly weigh the evidences presented and its failure to adhere to the general standard of criminal guilt (i.e. proof beyond reasonable doubt) makes the problem even worse.

#### 4.2.2. Appraisal of Some Prosecution Practices

Under the ATP, once an individual is in custody for alleged crime of terrorism, there is no right to bail and may stay in custody at least for 28 days.<sup>273</sup> This can be criticized for being against the constitutional right of presumption of innocence and other basic due process rights.<sup>274</sup> Alemayehu Anbessie, a journalist working for Addis Admass weekly Amharic newspaper, said the police could use this space to send a chilling message for journalists working in the private press.<sup>275</sup> By detaining without charge, he said, the government wants to tell other fellow journalists that their fate is going to be the same if they dare to be critical against the government.<sup>276</sup> According to his assessment, this practice has in fact forced journalists to often avoid covering controversial stories for fear of reprisals by the government.<sup>277</sup>

In April 2014, six bloggers and three journalists were detained and charged (under Article 4 of the ATP) for planning, preparing, conspiring, inciting or attempting to commit any of the crimes listed under Article 3 of the ATP.<sup>278</sup> In this charge, Asmamaw Hailegiorgis, the ex-editor of the popular *Addis Guday* Magazine, was accused of setting up a secret terror group with the other defendants and creating links with *Ginbot 7* as well as taking various trainings with a view to promoting the public to incite violence. The accusation against him also includes “assisting, organizing and taking a training of message encryption called ‘Security in Box’ in an attempt to conceal the groups’ lines of communication from government agents. To probe these allegations, the prosecution produced evidences most if not all of which are articles published in the now defunct *Addis Guday* Magazine. Similar allegations, except the accusations based on taking the “Security in Box” training, were also brought against other co-defendants, Edom Kassaye and Tesfalem Woldeyes. Likewise, most of the documentary evidences presented against Edom and Tesfalem are articles written by the defendants. While the accusations were based on those published articles, it is still difficult to demonstrate a *linear* connection between those articles

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<sup>273</sup> *Supra* note 21, Article 20(3).

<sup>274</sup> Given that the police is not necessarily required to show that there are reasonable grounds to believe the suspect have violated the ATP, there is a possibility that the police may accidentally or deliberately detain an innocent individual for alleged violation of the ATP. In such instances, the suspect may spend months in jail without a charge. Hence, there is a potential for abuse of the ATP by law enforcement officers.

<sup>275</sup> Interview with Alemayehu Anbessie, Journalist working for Addis Admass weekly Amharic newspaper, on 5 September, 2015.

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*

<sup>278</sup> See, <https://trialtrackerblog.org/case/> [Last accessed on 26 May 2016].

and the crime under Article 4 of the ATP. All the nine are now released after more than a year and two months of incarceration.<sup>279</sup>

In *Federal Prosecutor vs Abubeker Ahmed and Others* the charge sheet included an accusation which allege that Abubeker and 28 others have committed crimes stated under Articles 3(1)(2)(4)(6) and 4 of the ATP by establishing ‘extremist’ Islamic media outlets with the mission to advancing their ultimate goal of constituting an Islamic government in Ethiopia.<sup>280</sup> Under the charge, Yesuf Getachew (the 18<sup>th</sup> defendant and a journalist who used to write on the now defunct *Yemuslimoch Guday* Newspaper) is specifically implicated in the above allegation. According to the charge, the said media allegedly have the aim of inciting Muslims to commit acts of terrorism. The evidences presented to prove this specific allegation were articles published in the electronic and print media. Yet, the charge was not presented under Article 6.

More recently, the FDRE Ministry of Justice have presented terrorism charges against Getachew Shiferaw, former of *Negere Ethiopia Newspaper* (Semayawi Party’s Official Press), for alleged violation of Article 7(1) of the ATP.<sup>281</sup> He is accused participating in the terrorist activities of Ginbot 7 (a proscribed terrorist organization) through communicating information to Ethiopian Satellite Television (ESAT), a diaspora based media organization allegedly run by members of the proscribed terrorist organization. The charge sheet narrates, the accused have been communicating information to ESAT through social media platforms such as facebook and also using cell-phones. The information the accused has allegedly been communicating to ESAT includes detention of students in Debre Markos and Dire Dawa and news concerning protests of Muslims in Addis Ababa.

In an interview, a prosecutor working in the department of the Ministry of Justice specifically delegated with prosecuting terrorism charges said that prosecutors do not often present charges under Article 6 for its over-broadness and lack of the requisite precision.<sup>282</sup> For him, it is rather convenient to prepare charges by demonstrating the accused’s connections with proscribed terrorist organizations or other groups with terrorist motives (i.e. to establish crimes of

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<sup>279</sup> <http://www.theguardian.com/world/2015/jul/09/ethiopia-releases-journalists-bloggers-obama-zone-9> [Last accessed on 26 May 2016].

<sup>280</sup> *Federal Public Prosecutor v. Abubeker Ahmed and Others*, FDRE Federal High Court, Criminal Case No. 124754. [Unpublished]

<sup>281</sup> *Federal Prosecutor v. Getachew Shiferaw*, FDRE Ministry of Justice, 2016, File No. 414/2008. [Unpublished]

<sup>282</sup> Interview with Abebe Akalu (pseudonym), Federal Prosecutor for Terrorism Crimes, 25 December 2015

participation and membership) even though the evidences to be presented may largely depend on what the accused has written on various media platforms.<sup>283</sup> Regarding the over-broadness and vagueness of Article 6, Temam Ababulgu<sup>284</sup> noted:

“Because the crime under Article 6 lacks clear *mens rea* element, determining whether a certain statement is likely to indirectly encourage members of the public to commit acts of terrorism is open to the subjective assessment of law enforcement officers, prosecutors and judges handling the case.”<sup>285</sup>

Hence, this lack of precision seems be one reason why most of the charges against journalists are prepared under crimes of membership and participation by attempting to connect them to one or more of the proscribed terrorist organizations. The wording of the provision is even making it difficult for prosecutors to prepare charges based upon Article 6. Temam Ababulgu opined that crimes of membership and participation under the ATP are currently being used to prosecute journalists who expressed their views critical of the government.<sup>286</sup>

### **4.3. Restrictive Effects on the Private Media**

#### **4.3.1. Crackdown on Private Newspapers and Magazines**

The Ethiopian media system has experienced tremendous changes since the downfall of the *Derge* regime. The aftermath of this regime change has marked an unprecedented development in terms of opening a space for the private media.<sup>287</sup> However, later on most of these press outlets were doomed to fail, owing principally to government interference.<sup>288</sup>

The years following the much contested 2005 election have marked a downward spiral in the development of the private media in Ethiopia. As mentioned above, it is after the 2005 election that the government started enactment of laws having direct or indirect limitative effects on the exercise of FOE and media freedom—the ATP being one. With the introduction of ATP, it has

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<sup>283</sup> *Ibid.*

<sup>284</sup> Interview with Temam Ababulgu, Lawyer (he represented the defendants in *Federal Prosecutor v. Abubakar Ahmed and Others*), on 26 December 2015.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> To mention but few, magazines such as ‘*Tsedey*’, ‘*Hibir*’, ‘*Ifoyta*’, ‘*Tobiya*’ and ‘*Ruh*’ and newspapers including ‘*Eyita*’, ‘*Addis Dimts*’, and ‘*Addis Tribune*’ were the forerunners for the private press establishments during the Transitional Government. In the subsequent five years, about 200 newspapers and 87 magazines were operating, each differing in area of focus and coverage. For more, see, Shimelis Bonsa, ‘The State of Free Press in Ethiopia’, in Bahru Zewde and Siegfried Pausewang (eds.), *Ethiopia: The Challenge of Democracy from Below*, Elanders Gotab Publishing, Stockholm, 2002, p. 184.

<sup>288</sup> *Id.*, p. 185.

been claimed that pressure kept on mounting on the editorial freedom and self-censorship of journalists—especially those in the private media sector.<sup>289</sup> According to reports of human rights bodies, the jailing and intimidation of journalists and state inspection and control on the private media has been escalating following the enactment of the ATP.<sup>290</sup> There are frequent allegations that the government is using the law to stifle the private media and silence political critics.<sup>291</sup>

#### **4.3.1.1. Jailing and Intimidation of Journalists**

According to the report by Human Rights Watch, since 2010, at least 60 journalists fled the country and another 19 languish in prison.<sup>292</sup> The share of the ATP in bringing about this deteriorating environment has been very large as can be discerned from the testimonies of the affected journalists.

Endalkachew Tesfaye, an exiled activist and blogger, said “*people are afraid of writing critical articles. They even try to scare me and warned me of severe consequences if he cannot stop writing articles critical of the government. The ATP is increasingly being used to silence critical voices.*”<sup>293</sup>

Simegnish ‘Lily’ Mengesha noted that the harassment, intimidation and warning by the intelligence personnel has pushed her to flee Ethiopia.<sup>294</sup> Betre Yacob, an exiled journalist, said “journalists are getting arrested for expressing their opinion for doing their job and the ATP is being used to intimidate and arrest journalists.”<sup>295</sup> Dawit Solomon, a journalist in exile, said “we were beaten, we were harassed, they pointed on us a gun and they warned us ‘if we didn’t stop

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<sup>289</sup> See for example, Human Rights Watch Reports on Ethiopia at <https://www.hrw.org/africa/ethiopia> [Last accessed 26 May 2016]. Also, interview with Tamiru Tsige, Assistant Editor of Reporter Amharic, on 11 September 2015.

<sup>290</sup> See, Article 19, ‘Comment on Anti-Terrorism Proclamation of Ethiopia’, 2010, at <https://www.article19.org/data/files/pdfs/analysis/ethiopia-comment-on-anti-terrorism-proclamation-2009.pdf> [Last accessed on 23 May 2016]; Committee to Protect Journalists (CPJ), ‘Under Cover of Security, Governments Jail Journalists’, 2012, at <https://www.cpj.org/2013/02/attacks-on-the-press-misusing-terror-laws.php> [Last accessed on 23 May 2016]; UN Office of the High Commissioner for Human Rights, ‘UN experts urge Ethiopia to stop using anti-terrorism legislation to curb human rights’, 2014, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E> [Last accessed on 23 May 2016]; and *Supra note* 181.

<sup>291</sup> *Ibid.*

<sup>292</sup> *Supra note* 255, p.1.

<sup>293</sup> Article 19, ‘Freedom of Expression at Risk in Ethiopia: a documentary’, 2014, at <http://www.ethiotube.net/video/29339/Must-Watch-Article-19-Documentary--Freedom-of-expression-at-risk-in-Ethiopia-January-2014> [Last accessed on 23 May 2016].

<sup>294</sup> Simegnish (Lily) Y. Mengesha, ‘Too Scared to Post: Freedom of Expression under Ethiopia’s Anti-Terrorism Legislation’, 2015, at <http://www.ned.org/events/too-scared-to-post-freedom-of-expression-under-ethiopia-anti-terrorism-legislation/> [Last accessed on 23 May 2016].

<sup>295</sup> Human Rights Watch, ‘Media Decimated in Ethiopia’, 2015, at <https://www.youtube.com/watch?v=TPo3E8h-PaM> [Last accessed on January 12, 2016].

our duties in the newspaper in the magazines or in the website they will kill us and they warned to kill my wife my children.”<sup>296</sup> Had he stayed, he said, he would have been charged under the ATP.<sup>297</sup>

Addis Neger, a private Amharic weekly newspaper which was highly popular especially among the urban elite, was forced to close following alleged threats and intimidation from security and intelligence officials.<sup>298</sup> The exiled editors of the newspaper allege that the government was planning to present terrorism charges against them under the ATP.<sup>299</sup> Following to the closure of the newspaper and exile of the editors, the government has in fact brought charges of terrorism against the editors of the newspaper.<sup>300</sup>

#### **4.3.1.2. Threats Leading to Closure of Media Houses**

More recently, on August 4, 2014, the Ministry of Justice has brought charges against one newspaper (*Afro Times*) and five magazines (*Jano*, *Fact*, *Enqu*, *Lomi*, and *Addis Guday*). It was before their arrest that most of the journalists and editors working in those medias fled the country following a the statement by the Ministry accusing the aforementioned periodicals of “engaging in incitements that could undermine national security, encouraging and glorifying and encouraging terrorism, inciting ethnic and racial hate, and defaming public officials and institutions.”<sup>301</sup> The magazines were among the highest selling magazines in the country.<sup>302</sup> Subsequently, the magazines and the newspaper have stopped publication.

Before the release of the above statement by the Ministry of Justice, in February 2014, there was a ‘study’ by the Ethiopian Press Agency and the Ethiopian News Agency, both state-run media

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<sup>296</sup> <https://www.youtube.com/watch?v=TPo3E8h-PaM> [Last accessed on January 12, 2016].

<sup>297</sup> *Ibid*

<sup>298</sup> <https://www.frontlinedefenders.org/node/2286> [Last accessed on January 1, 2016]. Before the exile of the journalists and its closure, there was a smear campaign against ‘*Addis Neger*’ newspaper and its editors in a state-run newspaper of ‘*Addis Zemen*’ linking the newspaper with terrorism. Articles on this opinion page of the newspaper are usually taken seriously by journalists the private media because there is a belief that the writers are government officials. See for example, <https://www.youtube.com/watch?v=TPo3E8h-PaM> [Last accessed on January 13, 2016]. Zerihum Mulugeta, an exiled journalist said he left the country soon after his name appeared on ‘*Addis Zemen*’ because he knew he would end up behind bars had he stayed in Ethiopia.

<sup>299</sup> *Ibid*.

<sup>300</sup> *Ibid*.

<sup>301</sup> <http://hornaffairs.com/en/2014/08/04/ethiopia-magazines-newspaper-criminal-charges/> [Last accessed on 1 January, 2016]. In August 2014, the Ministry of Justice formally charged editors of the 5 magazines and 1 newspaper allegedly for inciting the public for violence and endangering the constitutional order. Hence, even though alleged violation of the ATP was mentioned in the Ministry’s press release, the formal charge didn’t accuse the suspects for crimes of terrorism.

<sup>302</sup> *Ibid*.

houses, on the three months news and articles published in seven magazines.<sup>303</sup> It focused on assessing the publications by these magazines that tend glorify negativities on the government and the repetitiveness of such stories or articles within the abovementioned period. The ‘study’ covered publications issued from September 11, 2014 to November 10, 2014. Following this assessment, the ‘study’ released that encouragement or incitement and support to terrorism through articles published in the abovementioned private magazines and newspapers has been prevalent.<sup>304</sup> Articles published in these magazines and newspapers about international awards given to journalists convicted under the ATP were presented as evidences to probe their alleged involvement in encouraging and/or inciting terrorism.<sup>305</sup> It is based on this ‘study’ that the Ministry of Justice released the above statement and subsequently brought charges against those five magazines and one newspaper.<sup>306</sup>

Some of the exiled journalists who used to work with those defunct magazines perceived this move by the government as deliberate intimidation and threat on the private media in order to stop them from criticizing the government.<sup>307</sup> They considered it as an indirect order from the government to close their media establishments.

#### **4.3.1.3. Fear of Possible Prosecution**

Journalists use different sources of local, national and international nature to do their works. They may employ methodologies such as interviewing, researching government documents and referring different media reports of national or international character. In the course of discharging their professional duties, journalists may sometimes come in contact with informants having real or perceived links with proscribed terrorist organizations or other groups allegedly having terrorist motives. They may make personal contacts for interviews or they may use

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<sup>303</sup> The ‘study’ assessed ‘*Jano*’, ‘*Lomi*’, ‘*Addis Guday*’, ‘*Fact*’, ‘*Enqu*’, ‘*Konjo*’, and ‘*Liya*’ magazines.

<sup>304</sup> For instance, the following magazines were accused by the ‘study’ for alleged encouragement of terrorism: ‘*Konjo*’ magazine for 42 times, ‘*Enku*’ magazine for 30 times, ‘*Liya*’ magazine for 25 times, ‘*Fact*’ magazine for 50 times, ‘*Lomi*’ magazine for 130 times, ‘*Addis Guday*’ magazine for 18 times, and ‘*Jano*’ magazine for 35 times. <http://www.tigraionline.com/articles/ethiopian-press-trends.html> [Last accessed on 1 January, 2016] and <http://hornaffairs.com/am/2014/01/16/full-text-ethiopia-private-magazines-analysis/> [Last accessed on 1 January, 2016]

<sup>305</sup> Ibid.

<sup>306</sup> <http://hornaffairs.com/en/2014/10/08/ethiopia-three-publishers-sentenced-to-3-years-in-prison/> [Last accessed on 23 May 2016].

<sup>307</sup> See, <https://cpj.org/blog/2014/08/new-charges-against-ethiopian-publications-further.php> [Last accessed on 23 May 2016].; and Gizaw Taye, Editor of the now defunct ‘*Lomi*’ Magazine and Afro Times Newspaper, Interview with Dawit Kebede of ‘*Awramba Times*’, at <http://www.awrambatimes.com/?p=12316> [Last accessed on 23 May 2016].

mediums such as telephone, fax, or email. As a matter of principle, there is no limitation as to the kind of stories they may feature and the identity of their informants or interviewees as far as they are discharging their professional duties.

During interviews with journalists and editors working in the private media, they displayed their fears that they may be subjected to detention or criminal sentence under the ATP if they dare to cover controversial topics and produce stories critical of the government.<sup>308</sup> Their fear originates especially from the broad and vague crime of encouragement stated under Article 6.

Getachew Worku, Managing Editor of *Ethio Mihidar* Newspaper, says “the ATP has brought a state of fear among journalists working in Ethiopia.”<sup>309</sup> He believes that the law is “an instrument of abuse crafted by the government to silence critical voices and it is doing its purpose so far as people are preferring silence from being detained for terrorism charges.”<sup>310</sup>

They also mostly avoid informants unknown to them for fear of being prosecuted for having terrorist links. As they have little or no opportunity to know whether or not their informants have perceived or actual links to the proscribed terrorist organizations, they mostly prefer to avoid important news because they don’t know the identity of their informants. Because of this, according to Getachew Wroku, the journalists give much focus to the identity of the informant /or the source of the news/ than the content of the news itself.<sup>311</sup>

Another journalist (who spoke on condition of anonymity) shared his experience where he covered a controversial political topic and subsequently threatened by a person claiming to be from the intelligence office.<sup>312</sup> He said to have been told to either stop covering such topics or will be prosecuted under the ATP for working with individuals having links with proscribed organizations.

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<sup>308</sup> Interview with Abel Kebede (pseudonym), Journalist at Ethiopian Broadcasting Corporation (EBC), on 28 April 2016; Interview with Alemu Abebe (pseudonym), Journalist for FM Addis 97.1, on 21 April 2016. Also see, *supra* note 286.

<sup>309</sup> Interview with Getachew Worku, Managing Editor of *Ethio Mihidar* Newspaper, on 24 November 2015.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

<sup>312</sup> Interview with Samson Gobebo (pseudonym), Journalist who writes for one of the Amharic magazines, on 24 April 2016.

Edom Kassaye, a journalist whose charges were dropped after detained for one year and two months, told to CBS News that she is afraid of writing anything since after her release.<sup>313</sup> She said to have been abused in prison.<sup>314</sup>

Normally, it should have been their professional responsibility to receive information from various sources and after making the necessary verification as to the trustworthiness of the information, publish such. However, after the enactment of the ATP, most of the journalists in the private media do not dare to contact with sources unknown to them because of fear of prosecution under the ATP as these sources may have direct, indirect, or perceived links with terrorist organizations. This gloomy environment of fear among journalists in the private media is clearly hampering the public's right to know on matters of its concern.

Most of the journalists I spoke to thought that their phone calls and other correspondences are strictly monitored by the government. They said such fear has hindered them from conducting their journalism freely. It is also the researcher's own personal observation that some of the journalists who are part of this research have been restraining themselves from responding to the questions and were hesitating in expressing their views openly.

#### **4.4. The Pressure for Self-censorship**

It is the traditional role of the media to inform the public about what is happening at local, national and international levels, thereby promote citizen empowerment and democratic culture. However, the playground of the media has never been free everywhere. Equally old to the development of mass media is the practice of censorship and self-censorship.<sup>315</sup> While censorship from the perspective of government *vis-a-vis* media relationship is an act of direct intervention by the former to restrain the latter from publishing something, self-censorship is a kind of self-restraint practiced by the media itself or its journalists by themselves in order to avoid possible sanction or punishment without being specifically told or ordered to do so by a government authority or any other external censor.<sup>316</sup> In this section, our focus is to treat the impact of the ATP in stirring self-censorship among journalists and media houses through instilling fear of negative state interference.

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<sup>313</sup> See, [www.cbsnews.com/news/ethiopian-bloggers-speak-out-on-imprisonment/](http://www.cbsnews.com/news/ethiopian-bloggers-speak-out-on-imprisonment/) [Last accessed on 24 May 2016].

<sup>314</sup> *Ibid.*

<sup>315</sup> Greg Simons and Dmitry Strovsky, 'Censorship in Contemporary Russian Journalism in the Age of the War against Terrorism: A Historical Perspective', *European Journal of Communication*, [2006], Vol. 21, No. 2, p. 190.

<sup>316</sup> *Id.*, p. 198.

Apart from ethnic and religious issues, matters which in one way or another could be linked to terrorism are sensitive areas where journalists in both government and private media prefer to refrain from giving coverage. Interviews with journalists working in both private and state-run media houses revealed that they practice a high form of self-censorship owing partly to the fear of being prosecuted under the ATP. Of course, comparatively, the fear runs deep in the private media sphere. Most of participants of this research, particularly journalists working in the private media, believe that covering sensitive security matters or news relating to proscribed terrorist organization would bring costly consequences on their life and liberty. Since the Article 6 of the ATP is too broad to cover critical stories as acts of encouragement of terrorism, many of the interviewees explained that they want to stay away from covering stories that could possibly be interpreted in such a way.

Those working in the state media are already being muffled by internal administrative chains that do not allow them a space to exercise flexibility in covering news or writing articles on terrorism related cases.<sup>317</sup> The state owned media often present only matters which are not critical to the government and which rather reinforce the agenda of the government.<sup>318</sup> In an interview with the editor of a state owned press, *Addis Zemen*, many of their journalists prefer to refrain from covering controversial political topics let alone freely writing or speaking about terrorism and state security.<sup>319</sup> From the interview with the editor, it can be inferred that what the journalists are avoiding is writing about terrorism related issues in support of the government's agenda. This indicates the level of fear journalists have developed about touching anything about terrorism. There are also private media establishments which tend to cover relatively "soft" matters with occasional coverage to limited and very cautiously selected political issues.<sup>320</sup> The level of self-censorship is high in these media organizations too.<sup>321</sup> Hence, despite the difference in the degree, the fear of possible prosecution under the ATP and the practice of self-censorship exists in both the private and state-run media sphere.

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<sup>317</sup> *Supra note* 308.

<sup>318</sup> *Supra note* 282.

<sup>319</sup> Interview with Fekadu Mola, Vice Chief Editor of *Addis Zemen* Newspaper, on 14 December 2015.

<sup>320</sup> *Supra note* 285, p.188.

<sup>321</sup> Interview with Tamiru Tsige, Assistant Editor of Reporter Amharic, on 11 September 2015; *supra note* 275; *supra note* 309.

True, the media should not in any way be used as tool for terrorist motives. Media responsibility is an important aspect of media functioning in a democratic society. The media has been seen to be used for evil purposes (*'Radio Television Libre des Mille Collines'* of Rwanda in mind). However, this should in no way lead to undue restrictions on media functioning and result in unacceptable self-censorship. This would be in conflict with the public's "right to know" which every media is destined to serve. At times, it may happen that the interest of the government is at odds with the interest of the public. It is the media's responsibility to adhere to the interest of the public; but failure to observe the interest of the government should not necessarily lead to restraint on media operations. The media and journalists have every right to stand at odds with government policies and strategies including government policy on state security and terrorism. In this regard, the ATP is being considered as a legislative instrument that breed fear among journalists and imposed self-censorship up on them, thereby putting impediments to their ability of serving the public interest.

Interviews with journalists and editors confirmed the existence of industry guidelines for the media on how to cover stories concerning terrorism in a 'responsible' manner. These guidelines are part of the ethical principles of journalism which every journalist should uphold. Apart from that, many of the media organizations have editorial policies that are used by their journalists in reporting crisis situations and security related issues. These are a couple of examples to the existence of media self-regulation. In the existence of such, aggravated self-censorship arising from the ATP is unnecessary burden for journalists.

Especially, journalists working in the private media sector mentioned the ATP as an impediment to accessing multiple sources of information. They practice self-censorship both in selecting the informants and covering stories. Because they think that any contact with proscribed organizations or their members could result to prosecution under the ATP, they usually opt not to publish important news/analysis regarding these organizations and their activities. In this regard, one of the interviewees remembers the time when the newspaper he is working in failed to publish a news article about the merger of two armed groups fighting to overthrow the

government, through the publication of the news was in the public interest.<sup>322</sup> In this regard, the ATP has discouraged journalists' ability to use sources of various kind.

#### **4.5. The ATP and Protection of Journalistic Sources**

There are times where the government may require disclosure of information from the media. When the government believes that information relevant to the investigation of a crime is in the hands of the media, it may require the media to disclose such.

The US Supreme Court in *Branzburg v. Hayes*<sup>323</sup> held that the First Amendment privilege (and the principle of confidentiality of sources) cannot generally protect reporters from being compelled to testify before grand juries. A more recent case on the matter is Judith Miller's case, where the US Supreme Court declined Miller's petition for writ of certiorari,<sup>324</sup> thereby making the decision rendered by the Court of Appeals for the District of Columbia Circuit<sup>325</sup> which rejected Miller's privilege from testifying before grand juries a final interpretation. Another decision by the same court, Court of Appeals for the District of Columbia Circuit, in *Zerilli v. Smith*<sup>326</sup> set a two-step precondition for compelling reporters to testify about confidential information before grand juries. One, the information sought must go to "the heart of the matter" and not be merely marginally relevant; and two, other reasonable alternative sources of information must be exhausted first.<sup>327</sup>

In *Goodwin v. United Kingdom*,<sup>328</sup> the European Court of Human Rights established tests of necessity and proportionality as preconditions for requiring journalists to disclose confidential information. This is a more straightforward and shielding interpretation of freedom of expression even as compared to the above-mentioned decisions of the US courts.

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<sup>322</sup> Interview with Milkessa Melga (pseudonym), a journalist working in one of the private magazines in Ethiopia, on 04 September 2016.

<sup>323</sup> *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972), at <https://supreme.justia.com/cases/federal/us/408/665/case.html> [Last accessed on 12 September 2016].

<sup>324</sup> In Re: Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (2005), *cert. denied*, 125 S. Ct. 2977 (2005), at <http://law.justia.com/cases/federal/appellate-courts/F3/438/1138/598275/> [Last accessed on 12 September 2016].

<sup>325</sup> In Re: Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), at <http://law.justia.com/cases/federal/appellate-courts/F3/397/964/474679/> [Last accessed on 12 September 2016].

<sup>326</sup> *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), at <http://law.justia.com/cases/federal/appellate-courts/F3/413/53/616817/> [Last accessed on 12 September 2016].

<sup>327</sup> *Ibid.*

<sup>328</sup> *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 484, at <http://worldii.org/eu/cases/ECHR/1996/16.html> [Last accessed on 12 September 2016].

Coming to the ATP of Ethiopia, it imposes a duty on any individual to disclose, upon request, information which the requesting police reasonably believes to have relevance to the prevention or investigation of terrorism cases.<sup>329</sup> This gives a green light for security officers to require journalists to handover their sources and any other information they have. The only precondition to compel disclosure of confidential information is the subjective reasonable belief on the part of the investigating police that such evidence would be relevant to the prevention or investigation of a crime of terrorism. The police need not sought other means of getting the information nor is it necessary to prove that getting the information is more compelling than respecting the ethical principle of confidentiality of sources. Also, the extent of relevance of the information sought does not matter. When seen in light of these concerns, we can argue that the confidentiality of sources is more prone to abuse in the context of the ATP. This coupled with the overarching surveillance powers of the National Intelligence and Security Services (NISS)<sup>330</sup> makes the matter even worse.

This is not to say that everything coming to the knowledge of a journalist should be kept confidential. The concern here is that the law gives a rather overarching power to law enforcement officials through which they may unnecessarily intrude into journalistic activities. Under the ATP, journalists may be compelled to release the identity of informants or any other information even in cases where the commission of terrorist activities is not a possibility. To avoid unnecessary intrusion, the law could have, at least, put clear standards under which journalists have the duty to disclose their sources or other information they may have. For example, for cases of preventive investigations, the law should have put reasonable possibility of commission of the crime as a standard. Moreover, the potential relevance or otherwise of the evidence requested for the prevention or investigation of terrorism crime shouldn't have been left to the subjective assessment of the requesting police officer.

It follows as a matter of logic that sources concerned about keeping their identities secret may think twice before providing information to journalists who may be compelled to reveal them. This, in turn, essentially curtails the ability of the media from effectively covering matters of public interest and thereby limiting the exercise of the right to FOE and press freedom. Moreover, such broad duties of disclosure under the ATP will result to loss of integrity in the face of their

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<sup>329</sup> *Supra* note 21, Article 22.

<sup>330</sup> *Id.*, Article 14.

sources. Mostly, apart from official government sources, security and terrorism related investigative stories usually relay on sources who perhaps prefer anonymity for various reasons including personal safety concerns. Therefore, in view of the above, we can argue that the law will create serious repercussions on FOE and especially on investigative journalism, typology of journalistic practice recently being advocated by government officials as being a ‘proper form of journalistic practice’. To the journalists who were interviewed by the researcher, this is an imminent threat to investigative journalism and the development of the Ethiopian media market.<sup>331</sup>

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<sup>331</sup> *Supra note 322.*

## Conclusion and Recommendations

Given the contemporary threat of terrorism and the greater use of communication tools by terrorists, the restriction of FOE and media freedom and the criminalization of acts amounting to ‘encouragement’ or ‘glorification’ of terrorism through counterterrorism laws is essential to respond to the threat. In is in light of this that the UNSC Resolutions (Resolution 1624(2005) and Resolution 1373(2001)) and the OAU Convention call up on states to combat terrorism by, for example, criminalizing incitement or glorification of terrorism. Seeing in the face of it, putting restrictions on FOE is also allowed under the Constitution and the ICCPR. Hence, the mere promulgation of the ATP containing restrictions on FOE is not a problem *per se*.

The problem argued in this paper is that the ATP has gone too far in restricting FOE and media freedom. It has unduly restricted the freedom by incorporating some over-broad and vague provisions. Its broadness starts with its failure to require criminal fault relating to the act that causes any of the harms or risks included in the listing. This is one point where the law blurred the boundary between decent political protests and critiques from acts of terrorism thereby opening a door for misuse. Another very controversial part of the law having far-reaching implications on the state of FOE and media freedom in the country is its provision (Article 6) proscribing direct or indirect encouragement of terrorism. The concern is not the proscription of encouragement of terrorism, but the catch-all phrases and vague terms employed in crafting the provision. First, the provision fails to give guidance as to what it means by “publications” or “statements”. Second, it does not give guidance on what kinds of statements are likely to be understood by the public to whom it is published as an indirect encouragement or other inducement to the commission, preparation or instigation of terrorist acts. Thirdly, the law lacks the requisite *mens rea* element necessary for criminal guilt. Hence, under the ATP, simple accidental publication without any motive of glorifying or encouraging terrorism in any other way may lead to criminal conviction. Also, the law’s use of support or encouragement of terrorism as a ground of proscribing terrorist organization and the way the offence of membership and participation in a terrorist organization is crafted is also one problematic area of the law.

In assessing the acceptability or otherwise of the restrictions under the ATP, we have employed the standards based upon the Constitution and the ICCPR and adopted by the African

Commission on Human and Peoples' Rights and the Human Rights Committee. These tests are: 'legality and precision', 'legitimate aim', and 'necessary in a democratic society'. Any law restricting human rights including FOE should cumulatively satisfy these three tests. According to the assessment in this thesis, Article 6 fails to meet the test 'provided by law' as it lacks the requisite legal precision in referring acts constituting the offence of terrorism. This problem of lack of sufficient legal precision also applies to Article 3 and Article 7 as well as Article 25 of the ATP. In relation to the requirement of 'legitimate aim' we said the law is, of course, promulgated in pursuance of important legitimate aims such as protecting the well-being of the youth, human dignity, the prohibition of propaganda for war and the protection of public order and national security. Yet, the provisions of the ATP restricting FOE fail to satisfy the 'proportionality' or 'necessity' test because they severely restricted FOE in a manner disproportionate to the interests it claims to protect. It was said that the proscription of encouragement of terrorism and/or introducing very vague offences of terrorism or proscription procedures is not the least restrictive means to attain the legitimate aims. Hence, as they fail to satisfy the three commutative tests, the thesis concluded that the provisions restricting FOE under the ATP violate the ICCPR and the Constitution.

This thesis further asserts that such over-broadness in the language of some provisions in the ATP creates a wide possibility for arbitrary application of the provisions to curtail decent criticisms against the government including honest journalistic activities. The problem is worsened by the limited safeguards in the ATP against misuse of its provisions to suppress legitimate critical voices and the very infant democratic culture in the country. Of course, its implementation has been even worse to journalists and media houses. This thesis affirmed that the fear of misuse of the law for political ends has, of course, materialized. Interviews with participants and analysis of various documents including court cases and prosecution charge sheets revealed that the media in Ethiopia is operating under a very restrictive environment arising partly from the implementation of the ATP. Journalists have been subjected to detentions and print media houses closed. Intimidations and threats against journalists critical of the government by government security and intelligence is common. Apart from that, the law is seen by most of the participants of this research as an instrument of abuse by the government which deliberately designed to control the free exercise of FOE and media freedom. This has contributed to the growing heightened form of imposed self-censorship among journalists.

Despite the variation in the degree, journalists working in both the private and the state-owned media in Ethiopia are practicing this form of self-censorship.

Due to the relatively loosened regulation of the press, compared to the broadcast media, most of the journalists who want to be critical of the government prefer the press instead of the broadcast media. At the same time, that is also the forum where journalists have suffered the most. After the coming into force of the ATP, press houses vanished from the market and journalists fled the country owing largely to the fear of persecution under the ATP and the strict government scrutiny on their activities and the growing intimidation.

Restraining those who sensationalize and glorify terrorist activities and those who show support in any way to such evil activities may be legitimate. This is also the practice in other foreign jurisdictions we have discussed despite the variation in regulating the scope of terrorism related speeches and the approaches in outlawing them. Yet, such legitimate interests should not be used as a pretext to make illegitimate intrusion on FOE and media freedom. To avoid unacceptable interference against FOE, the US, the EU and other jurisdictions have developed safeguards. We do not find such safeguards under the ATP. Because of the over-breadness of the provisions of the ATP limiting FOE, the media's inviolable right to discuss on issues regarding terrorist activities and their sources/motives is severely restricted. This regresses the already minimal political pluralism and democratic culture in the country.

Moreover, enjoining journalists to disclose their sources might help prevent terrorist acts. However, the blanket permissions given to the police under the ATP to order disclosure and the lack of national standards to give guarantee that this power would not be abused is of a great concern. The state's wide discretion to order journalists to disclose their sources and disregards the journalists' ethical responsibility of confidentiality. Due to this, potential sources would prefer to refrain from handing over information for fear of disclosure of their identity. This would seriously imperil the free flow of information necessary in a democratic society.

Based on the findings of this research, it is imperative to make the following recommendations regarding the ATP and its implications on FOE and the media.

- Article 6 of the ATP should be amended to avoid unnecessary and unacceptable encroachment on the exercise of decent journalistic activities. The murky areas of the law should be clarified in sufficient manner.
- The definition of terrorist acts under the ATP should be amended in a manner that clearly set guidelines on the required mental element in relation to the particular criminal acts.
- Public prosecutors should not invoke crime of membership and participation in a terrorist organization (i.e. Article 7 of the ATP) expansively in a manner that could lead to stifle proper journalistic activities. Charges under this provision should comply with the criminal law principle of individuality of guilt by sufficiently showing the role of the accused in a particular criminal enterprise.
- The ATP should adopt a new provision on the judicial or legislative review of decisions on the proscription or de-proscription of organizations or groups.
- The law gives a green light for investigating police officers to compel journalists to disclose whatever confidential information they have. As this opens a door for abuse, the law should be amended to find a delicate balance between FOE and state security.
- The courts should adhere to the required “beyond reasonable doubt” criminal law standard in convicting journalists charged under the ATP. They should require clear and credible evidence which prove the guilt of the accused beyond a shadow of doubt.
- Generally, the government should open up itself for a pluralistic media culture in the country and it should not in any way use the ATP to dismantle the media and proper journalistic activities.

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