

ETHIOPIA'S ANTI-TERRORISM LAW

A TOOL TO STIFLE DISSENT

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FEDERAL NEGARIT GAZETA

OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

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<p>ያንዱ ዋጋ Unit Price</p>	<p>ነጋሪት ጋዜጣ ፖ.ሜ.ቁ. ፱፬፩ Negarit G. P.O.Box 80001</p>	



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Abstract

The government of Ethiopia routinely uses its vague and overly broad anti-terrorism law to stifle freedom of expression and political opposition. This is the conclusion reached by the United Nations, the world's leading democracies, international human rights organizations, and numerous other groups. This report compiles and elaborates on the extensive factual and legal findings of the law's critics, as well as the Ethiopian government's misuse of the law. The conclusions these critics have reached are both inescapable and correct: the flawed anti-terrorism law must be revised and its misuse by the government stopped.

Introduction

Ethiopia's highly controversial anti-terrorism law, Proclamation No. 652/2009,¹ was enacted in 2009. In the course of deliberations over the law, some members of the Ethiopian parliament, as well as human rights organizations, journalists, and others, expressed grave concerns that the law contained an overly broad and vague definition of terrorism, gave the police and security services unprecedented new powers, usurped citizens' constitutional rights, and shifted the burden of proof to the accused.

Those fears have proven to be well founded. During the six years since the enactment of the law, people from all walks of life have been found to be "terrorists" or are awaiting trial as such. Political opponents of the administration have been kidnapped from other countries and brought to Ethiopia to stand trial under the law. Some have been charged with crimes for actions that took place before the law even took effect.

Many of those charged report having been tortured, and the so-called confessions that have been obtained as a result have been used against them at trial. In 2013, Human Rights Watch released the report, *They Want a Confession*, detailing extensive evidence of torture and forced confessions in Ethiopia's notorious Maekelawi prison.² The report provides harrowing testimonies from thirty-five former detainees at Maekelawi prison (where most political prisoners are taken as they await trial) and their family members. Interrogations, isolation, arbitrary detention, dire conditions, and torture are common. The report describes detainees being tortured in order to force confessions, extract information, and obtain signatures on false documents. It notes that detainees are not always aware of what they are signing—either because documents are in Amharic, or because the detainees are not allowed to see the documents they are signing.³

Moreover, both on its face and as applied, the law violates international human rights law, as well as modern criminal justice and due process standards. In short, the law is a tool of repression, designed and used by the Ethiopian government to stifle its critics and political opposition, and criminalize the robust discussion of matters of enormous public interest and importance.

These are not simply the conclusions of human rights groups or the lawyers who have authored this report, as the long list of those who have sharply criticized the Ethiopian government for the content and misuse of its anti-terrorism law includes the U.N. Commissioner for Human Rights, the U.N. Special Rapporteur on Counter-Terrorism and Human Rights, the U.N. Special Rapporteur on Human Rights Defenders, the U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, the U.N. Special Rapporteur on the Independence of Judges and Lawyers,⁴ the African Commission on Human and People's Rights,⁵ and the governments of the United States⁶ and the United Kingdom,⁷ as well as the European Union.⁸

While legitimate anti-terrorism laws have been enacted in a number of countries, these critics of Ethiopia's anti-terrorism law have detailed—as will be described throughout this report—how it goes beyond these other laws in criminalizing behavior that ordinarily would and should be considered a legitimate exercise of the rights to freedom of expression and association.⁹

This report will summarize many but by no means all of the findings of the critics of the law, as well as identify specific legal authority that supports critics' claims that Ethiopia's anti-terrorism law violates international human rights law, and is inconsistent with modern criminal justice legal standards. But first it will tell the stories of just a small number of those unjustly targeted by the law.

Examples of Ethiopia's Misuse of Its Anti-Terrorism Law

ZONE 9 BLOGGERS



In April 2014, nine Ethiopian journalists and bloggers were arrested, accused of working with international human rights organizations and “using social media to create instability in the country.”¹⁰ Six were associated with the blogging collective “Zone 9,” launched in 2012 with the slogan, “We Blog Because We Care.” The name refers to the eight zones of the notorious Kality prison where political prisoners are held, and to the rest of Ethiopia, a place the bloggers feel is increasingly an extension of the prison, with ever-greater restrictions on freedom.¹¹ Zone 9’s articles are frequently critical of the government’s policies.

Three days before the arrests, the bloggers announced that, after a seven-month hiatus, they would resume writing.¹² Three months after their arrest, in July 2014, the group was charged with receiving financial, strategic, and ideological support from two banned opposition groups, Ginbot 7 and the Oromo Liberation Front.¹³ In July 2015, five of the defendants were released in advance of President Obama’s visit to Ethiopia.¹⁴ Abel Wabela, one of the remaining four bloggers, was beaten so badly after refusing to give a false confession that he lost hearing in one ear.¹⁵ In October 2015, the remaining four bloggers were acquitted of the anti-terrorism charges after spending 18 months in prison, when the court found that the prosecution had not proved its case, and that there was no case against the defendants.¹⁶ While three have been freed, one blogger remains in custody on sedition charges.¹⁷



OKELLO AKWAY OCHALLA

In 2003, a brutal massacre of hundreds of Anuak people took place in Gambella province.¹⁸ Mr. Okello Akway Ochalla, the governor of Gambella and an Anuak

himself, fled Ethiopia and obtained Norwegian citizenship along with his family. He was openly critical of the government’s role in the 2003 massacre and the ongoing human rights abuses in the Gambella region.¹⁹ While traveling in South Sudan in March 2014, he was arrested by the Ethiopian Intelligence Service and forcibly taken to Ethiopia to face terrorism charges.²⁰ It appears that Okello’s rendition to Ethiopia took place without a lawful request for extradition by the Ethiopian government to either South Sudan or Norway.²¹

Okello is accused of coordinating two terrorist groups and plotting terrorist activities. Neither of the groups that he allegedly has leadership of are on the government’s official list of terrorist organizations, or international terror lists.²² Despite this, the Ethiopian government continues to detain, arrest, and charge individuals for allegedly having contact with any of these groups, effectively claiming any group that opposes the government can be prosecuted as a terrorist organization. Okello’s trial is ongoing, and the government has presented two witnesses, neither of whom has provided testimony that Okello has taken part in any terrorist activities.²³ Instead, the heart of the prosecutor’s case appears to be a “confession” that Okello allegedly signed while in solitary confinement at the Maekelawi prison.²⁴



PASTOR OMOT AGWA

In March 2015, Pastor Omot Agwa was detained by the Ethiopian authorities at the airport in Addis Ababa with six others, while attempting to travel to Nairobi to attend an international conference.

After six months in Ethiopia’s notorious Maekelawi prison, Pastor Omot and two others—Ashinie Astin and Jamal Oumar Hajele—were charged under the anti-terrorism law under the claim that the workshop they were trying to attend was a terrorist meeting.²⁵ The “terrorist meeting” was, in fact, a workshop organized by Bread for All, a Protestant development organization from Switzerland, in conjunction with the indigenous group Anywaa Survival Organization and the international group GRAIN,²⁶ to exchange experiences about food security issues between Ethiopian indigenous communities and international groups.²⁷



Pastor Omot had been an interpreter for the World Bank Inspection Panel in the Gambella region in 2014, when the panel investigated and reported on claims that funding for Ethiopia's "Promoting Basic Services" program had led to forced evictions and widespread human rights abuses.²⁸ A week after the report was released, Pastor Omot notified international colleagues that he feared for his life and that threats were being made against him by Ethiopian security forces. Very shortly thereafter, he was arrested.²⁹



REEYOT ALEMU

In June 2011, journalist Reeyot Alemu was arrested at the high school where she was teaching English.³⁰ Reeyot was a columnist for the weekly publication *Feteh*, where her articles were frequently critical of the Ethiopian government.

She was initially accused of several terrorist activities and sentenced to 14 years in prison. However, after an appeal her conviction was lessened to promoting terrorism and her sentence was reduced to five years.³¹ The last column she wrote before her arrest questioned the legitimacy and support held by the Ethiopian government, and likened the ruling party to former Libyan leader Muammar Qaddafi.³²

In a letter written from Kality prison, Reeyot recounted not having access to her lawyer until the investigation against her had finished, physical abuse, government attempts to extract false confessions, and denial of proper medical attention.³³ Reeyot was released from prison in July 2015, ahead of President Obama's visit to Ethiopia.³⁴ During her time in prison, she was awarded the Courage in Journalism Award by the International Women's Media Foundation, and the UNESCO-Guillermo Cano World Press Freedom Prize.³⁵



ANDARGACHEW "ANDY" TSEGE

In June 2014, Mr. Andargachew "Andy" Tsege, a U.K. citizen, was arrested while changing planes in Yemen and "resurfaced" two weeks later in an Ethiopian prison.³⁶ He has long been a respected and outspoken critic of the Ethiopian government.

In 1979, he fled the oppressive Derg regime and sought asylum in the U.K.,³⁷ where he completed his studies at the University of Greenwich and became a British citizen.³⁸ In recent years, Andargachew

helped form Ginbot 7, an Ethiopian political organization with a mission to create "a nation wherein each and every Ethiopian enjoys the full respect of its democratic and human rights."³⁹ The group was named after the date of the 2005 elections in Ethiopia, in which mass protests for free, democratic elections were met with violence.⁴⁰ The group is one of three domestic organizations (the others are the Oromo Liberation Front and the Ogaden National Liberation Front)⁴¹ that have been banned by the government and declared terrorist organizations.⁴² However, none are considered terrorist organizations by the United States,⁴³ Australia,⁴⁴ or the United Kingdom,⁴⁵ nor were they listed on the Consolidated United Nations Security Council Sanctions List.⁴⁶

In 2009, the government alleged that Ginbot 7 staged a failed coup, and Andargachew was sentenced in absentia to death for his connection with the group.⁴⁷ It was on the basis of this charge that he was arrested in June 2014.⁴⁸ For the next 14 months, he was held at an undisclosed location in solitary confinement⁴⁹ and was denied regular communication with U.K. officials or his family. In July 2014, an edited video was released of Andargachew "confessing" to a number of charges. According to the U.K.-based organization, Reprieve, in the video, "he appears gaunt and disoriented, and to have noticeably lost weight. Screaming can be heard in the background."⁵⁰ In September 2015, he was moved and his location was revealed: the notorious Kality prison.⁵¹



ESKINDER NEGA

In September 2011, while picking up his young child from school, journalist Eskinder Nega was arrested.⁵² Eskinder launched the newspaper *Ethiopia* in 1993. After the paper was shut down by the Ethiopian authorities, he and his wife opened a publishing

house that printed newspapers critical of the government.⁵³ Eskinder has had his journalist license revoked and has been detained at least seven times by the authorities, including for his reporting following the violence surrounding the 2005 elections.⁵⁴ The 2011 arrest came after he published an article criticizing the government's use of the anti-terrorism law to arrest journalists.⁵⁵

In June 2012, Eskinder was finally sentenced to 18 years in prison, ironically, under the very law he had criticized.⁵⁶ He was accused of having connections with Ginbot 7, and for suggesting that a movement like the Arab Spring could take

place in Ethiopia.⁵⁷ Since his arrest, Eskinder has received two prestigious international awards: PEN America’s “Freedom to Write” prize and the World Association of Newspapers and News Publishers “Golden Pen of Freedom.”⁵⁸ Both cite his bravery and commitment to truth.



BEKELE GERBA

In August 2011, Mr. Bekele Gerba was arrested by the Ethiopian authorities under the anti-terrorism law.⁵⁹ Bekele was an English teacher at Addis Ababa University, and the deputy chairman of the Oromo Federalist Democratic Movement (OFDM), one of Ethiopia’s largest opposition groups.⁶⁰ He was arrested under the suspicion that he was a member

of the Oromo Liberation Front (OLF), an accusation that Amnesty International says is “frequently used to silence members of the Oromo political opposition.”⁶¹

Four days before he was arrested, Bekele had met with a delegation from Amnesty International.⁶² The delegation reported being photographed by security officials while leaving Bekele’s office. On the same day that Bekele was arrested, the delegation was told by Ethiopian authorities to leave the country.⁶³ Bekele was later interrogated about the content of the meeting.⁶⁴ He was finally convicted in November 2012, after a trial that human rights groups say was “marred with irregularities” and was sentenced to eight years in prison.⁶⁵ After an appeal, his term was shortened to less than four years, and he was released in July 2015, in advance of President Obama’s trip to Ethiopia.⁶⁶

Ethiopia's Anti-Terrorism Law Violates the Right to Freedom of Expression and the Principle of Legality

A. THE LAW'S BROAD, VAGUE, AND FLAWED DEFINITION OF TERRORISM VIOLATES THE RIGHT TO FREEDOM OF EXPRESSION

Ethiopia's anti-terrorism law is premised on an extremely broad and vague definition of terrorist activity. It is a definition that permits the government to repress internationally protected freedoms and to crack down on political dissent, including peaceful political demonstrations and public criticisms of government policy.⁶⁷ Worse still, it permits long-term imprisonment and even the death penalty for "crimes" that bear no resemblance, under any credible definition, to terrorism.

"Terrorist acts" are punishable by "rigorous imprisonment from 15 years to life or with death," and are defined as follows:

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, cause 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.⁶⁸

Although there is no single internationally accepted definition of terrorism, the term generally refers to the use of violence against civilians for political ends. By contrast, the broad and ambiguous definition of terrorist acts under Ethiopia's law can be used to criminalize acts of peaceful political dissent that result in "disruption of public services"—as public demonstrations sometimes do. A non-violent march that blocked traffic could qualify as a terrorist act. The law might also permit prosecutions on terrorism charges for minor acts of violence committed in the context of political

activism (e.g. a political protestor who damages a police car or breaks the window of a government building).

An individual need only "threaten to commit" any of the relevant acts, including property crimes and "disruption of public service," to be prosecuted as a terrorist. The definition of terrorist acts thus potentially encompasses many legitimate acts of protest and political dissent, or minor crimes at most. As critics have pointed out, the anti-terrorism law may therefore stifle legitimate political debate about issues of great concern and importance to Ethiopian citizens.

The overly broad definition of terrorist acts has implications for other parts of the law as well. For example, a "terrorist organization" is defined as "a group, association or organization which is composed of not less than two members with the objective of committing acts of terrorism or plans, prepares, executes acts of terrorism or assists or incites others in any way to commit acts of terrorism," or "an organization proscribed in accordance with this proclamation."⁶⁹ As noted above, the definition of "acts of terrorism" could include acts of political dissent. Therefore, a group of two or more individuals who engage in peaceful political protest could be deemed a "terrorist organization," and membership in the group deemed a crime.

The law also contains broad and ambiguous language prohibiting material support for terrorism. Those providing "moral support or . . . advice" or "provid[ing] or mak[ing] available any property in any manner" to an individual accused of a terrorist act could be deemed a terrorist supporter under the law.⁷⁰ Coupled with the broad and ambiguous definition of terrorist acts, these provisions open the door to a wide range of ways in which individuals seeking to express political dissent could find themselves prosecuted for terrorism. For example, someone who advised or even just offered water and food to a political protestor might be charged with terrorism under this provision. Similarly, someone who held a sign used in a non-violent political protest that blocked traffic could arguably be found guilty of possession of property used to commit a terrorist act.

Ethiopia's anti-terrorism law makes it a crime to publish or cause 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."⁷¹ Such a provision violates the right to freedom of expression under international law because the definition of "terrorist act," as discussed earlier, does not conform with international standards.⁷²

This provision is problematic because it criminalizes speech, ambiguously described as "encouraging," "advancing," or "in support" of terrorist acts, even if there is no direct incitement to violence.⁷³ Individuals who merely speak in favor of any of the broadly defined "terrorist acts" could be convicted for encouraging terrorism. For example, students participating in a peaceful demonstration seeking to influence government policy, or even someone merely voicing support for such a demonstration without participating, could be convicted of terrorism. While "encouragement" and "inducement" are vague terms, the law goes even one step further by criminalizing "indirect encouragement or other inducement," a term so vague as to be without meaning.

The definition of terrorism includes many acts that do not involve violence or injury to people, such as property crimes and disruption of public services. The U.N. Special Rapporteur on Counter-Terrorism and Human Rights and others have stated that the concept of terrorism should be limited to acts committed with the intention of causing death or serious bodily injury, or the taking of hostages, and should not include property crimes. Indeed, permitting the death penalty for property crimes would violate the requirement under international law that the death penalty only be imposed for the "most serious crimes."⁷⁴

Under the Johannesburg Principles, a set of principles on freedom of expression and national security developed by a group of experts from around the world and endorsed by the U.N. Special Rapporteur on Freedom of Opinion and Expression, restrictions on freedom of expression in the name of national security may be imposed only where the speech was intended to incite imminent violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence:

[E]xpression may be punished as a threat to national security only if a 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.⁷⁵

The Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights, along with her counterparts at the U.N., the Organization for American States, and the Organization for Economic Co-operation and Development, has called for countries to adopt definitions of terrorism that ensure that they do not criminalize speech that does not directly incite violent activities:

The definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.⁷⁶

The Ethiopian anti-terrorism law's definition of terrorism has already implicitly been found to violate international human rights law by the U.N. Human Rights Committee, which has been strongly critical of states that have adopted similar language to that found in Ethiopia's law.⁷⁷ For example, in 2005, the Committee found that the definition of terrorism in the Canadian Anti-Terrorism Act 2001, which is quite similar to Ethiopia's definition, was overly broad. The Committee recommended in its Concluding Observations that:

[Canada] should adopt a more precise definition of terrorist offences, so as to ensure that individuals will not be targeted on political, religious or ideological grounds, in connection with measures of prevention, investigation and detention.⁷⁸

More recently, the Committee found that similar language in the Australian Anti-Terrorism Act (No. 2) 2005 violated international human rights norms and recommended its amendment:

The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant. In particular, it should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences.⁷⁹





Ethiopian army soldiers monitoring Suri people during a ceremony organized by the government in Kibish.

The breadth of the Ethiopian definition of terrorist acts becomes clear when compared to the definition adopted by the European Union in its Common Position on the application of specific measures to combat terrorism.⁸⁰ The Common Position generally requires that a “terrorist” act must endanger life or health, although causing extensive destruction to infrastructure may qualify if likely to result in major economic loss. While these provisions are themselves not immune from criticism, their definitions contain a minimum threshold of gravity and a level of precision that is absent from Ethiopia’s anti-terrorism law.

Ethiopia is unfortunately not the first country to misuse its anti-terrorism law to repress fundamental freedoms. As noted by U.N. Secretary General Kofi Annan in 2003, “We are seeing an increasing use of what I call the ‘T word’—terrorism – to demonize political opponents, to throttle freedom of speech and the press, and to delegitimize legitimate political grievances.”⁸¹

Under international law, it is well recognized that human rights, including free expression, must be respected in the fight against terrorism, and cannot be arbitrarily limited. For example, the U.N. Security Council has stated:

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.⁸²

The U.N. Human Rights Commission has issued resolutions reminding nations to “refrain from using counter-terrorism as a pretext to restrict the right to freedom of opinion and expression in ways which are contrary to their obligations under international law.”⁸³ This requirement has similarly been recognized by the African Union.⁸⁴

B. ETHIOPIA’S ANTI-TERRORISM LAW VIOLATES THE PRINCIPLE OF LEGALITY

Ethiopia of course has the right and indeed the duty to protect its citizens from the grave consequences associated with terrorism. However, as the U.N. human rights mechanisms have repeatedly observed, states should not purport to fulfill this duty by enacting measures that contravene their obligations under international human rights law. Neither should anti-terror laws be deployed so as to undermine fundamental rights such as freedom of expression, association, or assembly.⁸⁵

As discussed earlier, Ethiopia’s anti-terrorism law has consistently been criticized for its breadth and lack of precision, notably because the definition of “terrorist acts” in Article 3 encompasses conduct that does not amount to the infliction of damage to property, let alone death or personal injury. Such lack of precision may also contravene the principle of legality, or *nullum crimen* principle, which is recognized as a fundamental rule of international criminal, humanitarian, and human rights law.

The rule has two key aspects. First, no person can be prosecuted for conduct that was not characterized as criminal

at the time it was committed, or else the non-retroactivity principle is violated. This will be discussed below.

Second, criminal offenses must be defined in a way that is sufficiently foreseeable, accessible, and precise. The fundamental problem with Ethiopia's anti-terrorism law is that due to its staggering breadth and vagueness, an ordinary citizen cannot conform his or her conduct to the law because it is impossible to know or even predict what conduct may violate the law and subject that citizen to grave criminal sanctions.

The authors are not the first to point out this major deficiency in the law. In its 2011 Concluding Observations on Ethiopia, the U.N. Human Rights Committee regretted the unclear definition of certain offenses in Ethiopia's anti-terrorism law, and called upon Ethiopia to ensure that its anti-terrorism legislation defined the nature of terrorist acts with sufficient precision to enable individuals to regulate their conduct.⁸⁶ Similarly, in 2010 the African Commission on Human and People's Rights expressed concern that Ethiopia's delegation had failed to respond adequately to issues raised in respect to the anti-terrorism law.⁸⁷ Concerns continued to be expressed about the law in submissions by civil society organizations to the U.N. Universal Periodic Review mechanism in 2014.⁸⁸

Ethiopia is bound by the African Charter on Human and Peoples' Rights (the African Charter) and by the International Covenant on Civil and Political Rights (ICCPR).⁸⁹ Both instruments contain provisions guaranteeing the *nullum crimen* principle. Article 7(2) of the African Charter guarantees that "[n]o one may be condemned for an act or omission which did not constitute a legally punishable offense at the time it was committed." This substantially reflects the content of Article 15 of the ICCPR, which provides that "no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed."⁹⁰ Similar provisions may be found in other international and regional instruments.⁹¹

In elucidating the parameters of the *nullum crimen* principle, it is useful to consider the jurisprudence of European and American human rights mechanisms.⁹² The European Court of Human Rights has held that Article 7(1) of the European Convention on Human Rights is an essential element of the rule of law and should be construed and applied so as to provide effective safeguards against arbitrary prosecution, conviction, and punishment.⁹³ Article 7(1), which prohibits the retroactive application of the criminal law, also enunciates the overall principle of *nullum crimen sine lege*, which includes the requirement that an offense should be clearly defined.

Respect for the principle of legal certainty requires that a fair definition of the acts that create an individual's criminal responsibility be clearly set out in the law, reflecting the general principle that interference with fundamental rights must be in accordance with the law, and that individuals should be able to regulate their conduct by reference to the prevailing norms of the society in which they live.⁹⁴ The European Court has indicated that the principle of legal certainty implies certain qualitative requirements, including accessibility and foreseeability. An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him or her criminally liable.⁹⁵

A similar approach has been taken under the American Convention on Human Rights. Notably, the Inter-American Court of Human Rights has held that anti-terrorism legislation enacted by Peru violated the *nullum crimen* principle recognized in Article 9 of the American Convention because it failed to narrowly define the proscribed criminal behavior. The Convention required a clear definition of the criminalized conduct, establishing its elements and the factors that distinguished it from behaviors that were not punishable offenses. The court commented that ambiguity in describing crimes creates doubt and the opportunity for abuse of power.⁹⁶

The Use of Illegal Abductions in Enforcing the Anti-Terrorism Law

Ethiopia is believed to have abducted individuals from foreign countries and brought them to Ethiopia to face charges of violating the anti-terrorism law. Such abduction and subsequent removal violates international law, in that

(i) it violates the terms of extradition treaties between Ethiopia and other countries; (ii) it violates the territorial sovereignty of those other countries; and (iii) it violates the fundamental human rights of those charged under the law.



A. ETHIOPIA VIOLATES THE TERMS OF ITS EXTRADITION TREATIES WITH OTHER COUNTRIES

Ethiopia has entered into extradition treaties with other countries. When an extradition treaty is in force between two countries, then as a matter of international law the provisions of the treaty must be followed. Pursuant to the terms of the Extradition Treaty, extraditable offenses are classified as offenses that are punishable under the laws of both states at the time of the request, and which carry a minimum penalty of at least one year's imprisonment. Even if the violation of the anti-terrorism law qualifies as an extraditable offense under such treaties, Ethiopia is still obliged to make a formal extradition request from the other country. Yet there is evidence that Ethiopia has at least sometimes and perhaps often not made such a request.

B. THE ABDUCTION OF INDIVIDUALS FROM A FOREIGN COUNTRY VIOLATES TERRITORIAL SOVEREIGNTY

When individuals are abducted from another country by Ethiopian security personnel, the territorial sovereignty of the other country is violated. Any exercise of law enforcement or police power by one state, without permission, on the territory of another is a violation of the sovereignty of that country.⁹⁷

The concept of the “territorial sovereignty of States” is a long-standing and well-established rule of customary international law, reaffirmed by Article 2(4) of the Charter of the United Nations.⁹⁸ In *The Lotus* case, the World Court declared that “the first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”⁹⁹ Since abduction involves the exercise of police power by a state in the territory of another state and infringes the territorial sovereignty of a state, there is no doubt that it is a clear violation of international law. There are scores of cases similarly finding instances of abduction to be clear violations of international law.¹⁰⁰

The use of Ethiopian forces to forcibly abduct and then extradite individuals charged under Ethiopia's anti-terrorism law is a clear violation of territorial sovereignty and thus a violation of international law.

C. ABDUCTIONS VIOLATE INTERNATIONAL HUMAN RIGHTS LAW

As the Universal Declaration of Human Rights declares, “no one shall be subjected to arbitrary arrest, detention or

exile.”¹⁰¹ The International Covenant on Civil and Political Rights provides further that “[e]very one has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”¹⁰² The African Charter on Human and Peoples' Rights similarly provides that “[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”¹⁰³

The illegal abduction and extradition of an individual is a clear violation of these fundamental rights. By way of example, the U.N. Human Rights Committee, which is responsible for enforcing the provisions of the ICCPR, found the abduction of a Uruguayan refugee from Argentina by Uruguayan security and intelligence forces to constitute a violation of Article 9 of the Covenant.¹⁰⁴ It followed, the Committee held, that the state was under an obligation to provide effective remedies, including immediate release and permission to leave the country.¹⁰⁵

The abduction of individuals from another country and their detention in Ethiopia is a violation of both these provisions and thus a violation of international human rights law.

D. ETHIOPIA SHOULD RETURN ABDUCTED INDIVIDUALS TO THEIR HOME COUNTRY

When one state has violated international law by unlawfully abducting someone from another state, the abducting state must make appropriate “reparation” to the offended state.¹⁰⁶ Ethiopia should therefore provide restitution by releasing individuals abducted from another country and sending them back to that country.¹⁰⁷ As set forth in the official comment to section 432(2) of the Restatement (Third) of Foreign Relations Law of the United States, outlining the norm of international law:

If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned.¹⁰⁸

Violations of Fair Trial Rights: the Non-Retroactivity Principle, Forced Confessions, and Fabricated Evidence

A. VIOLATION OF THE NON-RETROACTIVITY PRINCIPLE

Some individuals charged under Ethiopia's anti-terrorism law are being prosecuted for conduct that occurred before that law entered into force. These prosecutions violate the principles of legality and non-retroactivity, which Ethiopia is bound to uphold under international law and its own constitution.

Non-retroactivity is a fundamental principle of international law. It is closely linked to the principle of *nulla poena sine lege*, under which conduct may not draw a higher penalty than the penalty that was provided for in law when the conduct took place.

Ethiopia has expressly enshrined the principle of non-retroactivity in Article 22 of its Constitution, which provides that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed." The Constitution goes on to guarantee "nor shall a heavier penalty be imposed on any person than the one that was applicable at the time when the criminal offence was committed." Ethiopia has also agreed to be bound by the principle as set out in the African Charter and the ICCPR.

The anti-terrorism law was enacted in 2009. To convict a defendant under the anti-terrorism law for acts committed prior to this date would contravene Article 22 of the Ethiopian Constitution, as well as Ethiopia's obligations under the African Charter and the ICCPR. Assuming that the acts or omissions with which such a defendant is charged were not otherwise criminal according to general principles of international law, it would also violate Ethiopia's obligations under the ICCPR. It would unlawfully expose the defendant to the particular consequences associated with terrorism offenses, including the severest of punishment, for conduct that was not proscribed as terrorism at the time of its commission.

B. CONFESSIONS OBTAINED THROUGH TORTURE CANNOT BE CONSIDERED

Under international and regional human rights treaties that Ethiopia has ratified, a court must exclude in its entirety a confession obtained by torture. There is substantial evidence to suggest that individuals who have allegedly confessed to committing terrorist acts may have been

subjected to torture that resulted in such confessions. For instance, the 2013 Human Rights Watch report, *They Want a Confession*, notes that those charged are typically held at the Maekelawi prison, which has consistently been the subject of allegations of torture, ill-treatment, and fabrication of prisoner confessions.¹⁰⁹ In 2012, the African Commission on Human and Peoples' Rights passed a resolution expressing grave concern over the Ethiopian government's torture of its political opponents, and the misuse of the anti-terrorism law to arrest and charge those opponents "with terrorism and other offences including treason, for exercising their peaceful and legitimate rights to freedom of expression and freedom of association."¹¹⁰

Further, some "confessions" provided to counsel have a clearly implausible level of detailed recollection, including specific dates and times of events that occurred years earlier. Such confessions must not be admitted into evidence without proper inquiry into the circumstances of their provision. In the absence of such an inquiry, these confessions must not be relied upon in support of a conviction for the serious offenses charged in these cases.

1. Prohibition against torture as a peremptory norm of customary international law

The prohibition against torture is a peremptory norm, or *jus cogens*, of customary international law.¹¹¹ As such, it enjoys higher rank in the international law hierarchy than treaty law and "ordinary" customary international law rules and is among the strongest prohibitions in customary international law.¹¹² All states, including Ethiopia, are required to adopt national measures to prevent or expeditiously put an end to any act of torture.¹¹³ This includes the exclusion in judicial proceedings of evidence obtained by torture, which may itself have acquired the status of peremptory norm.¹¹⁴ In any event, as set out below, evidence obtained by torture is inadmissible pursuant to Ethiopia's obligations under the ICCPR and the African Charter.

2. Admitting a confession obtained by torture would violate the ICCPR

Under Article 7 of the ICCPR, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹¹⁵ Under Article 14 of the ICCPR, "everyone shall be entitled to a fair and public hearing by a competent,





Aerial view of “Maekelawi” compound, the main federal police investigation center, in Central Addis Ababa, on February 18, 2013.
© DigitalGlobe 2013. Source Google Earth

independent, and impartial tribunal established by law.”¹¹⁶ The exclusion of evidence tainted by torture and other ill-treatment is explicitly recognised under the ICCPR jurisprudence as an inherent part of the absolute prohibition on torture and as a necessary part of the guarantees that ensure the fairness of judicial proceedings.

In its General Comment on Article 14 of the ICCPR, the Human Rights Committee unequivocally stated that because “article 7 is . . . non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14 . . . except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.”¹¹⁷ The Committee applied this principle in *Jumaa v. Libya*, finding that the defendant suffered violations of Article 7 during his interrogation for an alleged crime, and that confessions obtained as a result had been used against the defendant in violation of his right to a fair trial under Article 14.¹¹⁸

The General Comment also provides that where evidence is used to show torture or other treatment prohibited by Article 7 provision occurred, “the burden is on the State to prove that statements made by the accused have been given of their own free will.”¹¹⁹ In *Zhuk v. Belarus*, the defendant alleged his confession had been obtained by ill-treatment. The Committee found that due weight had to be given to the defendant’s allegations because the state refused to present evidence to the contrary, and, as a result, the state violated

Articles 7 and 14(3)(g).¹²⁰ Similarly, in *Chiti v. Zambia*, the Committee found a violation of Article 14(3)(g) when statements signed by the defendant were elicited through unrefuted allegations of torture.¹²¹

Ethiopia is a party to the ICCPR, and the provisions of the ICCPR have the force of domestic law in Ethiopia. It follows that Ethiopian courts are subject to the procedural requirements set out in the General Comment. Accordingly, Ethiopian courts may not use confessions obtained through torture and ill-treatment as evidence in judicial proceedings. Furthermore, Ethiopian courts are required to place the burden of proof on the State to show that statements have not been elicited by prohibited means.

3. Admitting a confession obtained by torture would violate the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)

Article 15 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) contains an explicit exclusionary rule prohibiting the use of all evidence obtained through torture in any proceedings. It provides, “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”¹²² In the General Comment on Article 2 of the UNCAT, the Committee against Torture states that the protections of Article 15 are non-derogable and “must be observed [by signatories] in all circumstances.”¹²³

When defendants have alleged that a state has used torture to obtain evidence for judicial proceedings, the Committee against Torture has required the state in question to address the substance of defendants' allegations. The Committee against Torture has found violations of Article 15 where the state refused to address the substance of such claims and continued to use the allegedly tainted evidence in judicial proceedings.

In *Niyonzima v. Burundi*, the defendant claimed that the proceedings against him relied on confessions obtained through torture and that Burundi had not refuted torture allegations documented through a medical certificate.¹²⁴ The Committee held that Burundi was under an obligation to verify the substance of the defendant's claims and show that his confessions had not been obtained through torture.¹²⁵ By failing to verify the defendant's claims and by using his confessions in judicial proceedings, Burundi violated Article 15 of the UNCAT.¹²⁶

Similarly, in *Ali Aarrass v. Morocco*, the state took little investigative action when the defendant made multiple complaints about his treatment and requested to be examined by an independent forensic examiner.¹²⁷ The Committee considered that the failure to conduct an investigation was plainly incompatible with the Convention.¹²⁸ The allegations of torture, taken together with questions raised by the Special Rapporteur on Torture during a visit in 2012, gave the state ample opportunity to consider the risk that the defendant's confessions were obtained by torture.¹²⁹ Because the state failed to examine the allegations, and thereafter convicted the defendant largely on the basis of his confessions, the Committee ruled that Article 15 had been violated.¹³⁰

Ethiopia is a party to the UNCAT. As such, it must exclude from any judicial proceeding all evidence tainted by torture. Furthermore, under the precedent established by the Committee against Torture, the allegations that defendants' confessions have been obtained through torture must be addressed by the state. Failure to address such allegations, when a defendant has shown that any self-incriminating statements were in all probability a result of torture, will constitute a violation of Article 15.

4. Admitting a confession obtained by torture would violate the African Charter on Human and Peoples' Rights

Like the ICCPR, the African Charter prohibits the use of torture: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel,

inhuman or degrading punishment and treatment shall be prohibited."¹³¹ The African Charter also provides that "Every individual shall have the right to have his cause heard."¹³²

The African Commission on Human and Peoples' Rights, which was established by the African Charter, has quasi-judicial authority to interpret the Charter and promote human rights and ensure their protection in Africa.¹³³ In 2011, the Commission reviewed a complaint brought by the Egyptian Initiative for Personal Rights alleging that detainees of the Egyptian government were subject to torture and ill-treatment in violation of Article 5 of the African Charter in order to "confess" their crimes to the state prosecutor for purported involvement in bombings.¹³⁴ The complainants provided medical evidence consistent with signs of torture.¹³⁵ The Commission held as follows:

Once a victim raises doubt as to whether particular evidence has been procured by torture or other ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment. Moreover, where a confession is obtained in the absence of certain procedural guarantees against such abuse, for example during incommunicado detention, it should not be admitted as evidence.¹³⁶

It found that the defendants all raised allegations of torture that were consistent with the facts of their case, including incommunicado detention and medical reports, which indicated a risk of ill-treatment.¹³⁷ Because the "confessions" were nonetheless admitted and relied upon, the Egyptian courts violated Article 7 of the African Charter granting every African citizen the right to have his cause heard.¹³⁸ Thus the African Charter prohibits the admission of evidence once a defendant has raised doubt as to whether the evidence was procured by torture or ill-treatment, unless the state can prove otherwise.

As a party to the African Charter, Ethiopia is bound by the exclusionary rule promulgated by the Commission. If an Ethiopian defendant raises doubts regarding whether evidence against him, including confessions, was obtained through torture, and the state cannot prove otherwise, the court may not admit the tainted evidence.

5. Inadmissibility of confessions obtained through torture: the criminal justice and due process standards of the United States and United Kingdom

In *Lyons v. State of Oklahoma*, the United States Supreme Court recognized that declarations procured through



torture are not premises from which a civilized forum will infer guilt.¹³⁹ In *People v. Sweeney*, the Illinois Supreme Court explained that whenever a confession is offered in evidence, the defendant is entitled to have the evidence of the circumstances under which it was made heard by the court for the purpose of determining whether the confession is admissible.¹⁴⁰ Where defendants have claimed that confessions or statements were a result of torture or the threat of torture, United States courts have held that the confessions or statements are inadmissible at trial, based expressly or by implication, on a determination that they were not voluntarily made.¹⁴¹

In the United Kingdom, a similar rule applies by operation of statute within the Police and Criminal Evidence Act.¹⁴² It states that where it is represented to the court that the confession was obtained (i) by oppression; or (ii) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made in consequence thereof, the court must not admit the confession into evidence unless the prosecution proves to the court beyond a reasonable doubt that it was not obtained under such circumstances.

Hearsay and Shifting the Burden of Proof: Further Violations of Human Rights

A. HEARSAY AND OTHER EVIDENCE

Ethiopia's anti-terrorism law sets new evidentiary standards for terrorism cases under the legislation that are far more permissive than the rules covering ordinary cases. Under these new rules, hearsay or "indirect evidence" can be admitted in court without any limitation. Official intelligence reports can also be admitted, "even if the report does not disclose the source or the method it was gathered."¹⁴⁵ By making intelligence reports admissible in court even if the sources and methods are not disclosed, the law effectively allows evidence obtained under torture: if the defense counsel cannot ascertain the methods by which intelligence was collected, they cannot show that it was collected in an abusive way.

B. THE PRESUMPTION OF INNOCENCE AND PROOF BEYOND A REASONABLE DOUBT

"Presumption of innocence is a restatement of the rule that in criminal matters the public prosecutor has the burden of proving guilt of the accused in order for the accused to be convicted of the crime he is charged with."¹⁴⁶ "Presumption

C. FABRICATED EVIDENCE CANNOT BE CONSIDERED

The U.N. Human Rights Committee has adopted a similar approach to the admissibility of fabricated evidence. In the case of Viktor Shchetka, Shchetka's mother alleged that Ukrainian authorities fabricated evidence on which to convict her son in violation of Article 14 of the ICCPR.¹⁴³ The Committee found that because the state did not address the substance of the mother's claims, and based on the materials on file, the Ukrainian courts had not observed the minimum guarantees of a fair hearing in violation of Article 14 of the Covenant.¹⁴⁴

As a party to the ICCPR, which has the force of domestic law in Ethiopia, Ethiopian courts must properly investigate any claims that evidence against a defendant has been fabricated or altered in some capacity. Where the state refuses to do so, the Human Rights Committee may infer a violation of Article 14 of the ICCPR. Similarly, under the African Charter's guarantee of due process, Ethiopian courts must investigate any allegation by a defendant that a confession or other evidence against him or her has been fabricated or altered to demonstrate his or her guilt. At a minimum, the court must give the defendant a fair opportunity to be heard on the allegation that evidence against him or her was fabricated.

of innocence . . . is fundamental to the protection of human rights. It imposes a duty on public authorities to refrain from prejudging the outcome of a trial."¹⁴⁷ The Constitution of Ethiopia explicitly adopts this principle and confers on the accused a right "to be presumed innocent until proved guilty according to law"¹⁴⁸

The right is further supported by the Universal Declaration of Human Rights ("[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in public trial at which he has had all the guarantees necessary for his defence"),¹⁴⁹ Article 14(2) of the ICCPR ("[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law")¹⁵⁰, and Article 7 of the African Charter on Human and Peoples' Rights (it is an individual's "right to be presumed innocent until proved guilty by a competent court or tribunal.")¹⁵¹

However, the international instruments and Ethiopian Constitution are silent as to the applicable standard and burden

of proof. Nonetheless, in General Comment No. 32, the Human Rights Committee clarified the expected standard and burden of proof for parties to the ICCPR by specifying that:

The presumption of innocence, which is fundamental to the protection of human rights, *imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt*, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle (emphasis added).¹⁵²

As a signatory to the ICCPR, Ethiopia has an explicit duty to guarantee the right of the accused to be presumed innocent, and to prove any charge beyond a reasonable doubt. Further, although the “Ethiopian legal system nowhere clearly states the requisite standard of proof in criminal proceedings,”¹⁵³ “[i]n a legal system where presumption of innocence is recognized, the beyond reasonable doubt standard follows as the standard of proof required of the prosecution to prove guilt before the court can lawfully convict the defendant.”¹⁵⁴

There are two accepted elements necessary to satisfy the burden of proof: “the first element is evidentiary burden, i.e. producing evidence in support of one’s allegation, while the second element relates to the burden of persuasion (also referred to as the legal burden), which is the obligation of the party to convince the court that the evidence tendered proves the party’s assertion of facts.”¹⁵⁵ It follows then that the court would need to satisfy each element of the crime charged beyond a reasonable doubt.

Conclusion

There is substantial evidence to conclude that prosecutions under Ethiopia’s anti-terrorism law are deficient in critical respects and in contravention of international law. The process by which many of those charged come to be brought before the court represents a violation of Ethiopia’s international obligations and the defendants’ rights. Significant concerns have been raised about the breadth of the anti-terrorism law and its deployment to stifle legitimate dissent.

Furthermore, it appears that the fair trial rights that Ethiopia has agreed to guarantee are not being afforded to those

Pursuant to Ethiopian criminal procedure law, partway through anti-terrorism trials, the court typically and impermissibly shifts the burden of proof to the defendant, requiring him to prove the legal insufficiency of the government’s case. This burden shifting violates contemporary standards of due process in criminal proceedings as well as international human rights law treaties by which Ethiopia is bound.

Ethiopia’s 1961 Criminal Procedure Code is responsible for this burden shifting, as it contains a provision, Section 142, that dramatically and drastically departs from the rule that requires the state to prove its case beyond a reasonable doubt:

Where the court finds that a case against the accused has been made out . . . it shall call on the accused to enter upon his defence and shall inform him that he may make a statement in answer to the charge and may call witnesses in his defence.¹⁵⁶

The effect of this provision is to shift the burden of proof from the state to the accused. This provision has no counterpart in the rules of European countries or the United States.

Further, in 2011 the Ethiopian Council of Ministers adopted the Criminal Justice Administration Policy.¹⁵⁷ Intended to “improve the criminal justice system,”¹⁵⁸ the policy “has, at least, one major predicament; it tends to shift the burden of proof to the accused by the use of presumptions in a few serious crimes, such as . . . acts of terrorism”¹⁵⁹ The policy has been described as vague and overbroad and criticized by the international community for its violation of accepted domestic and international law.

charged under the law. Individuals are being prosecuted under the law for conduct that occurred before its entry into force. Confessions, some of which are likely to be the product of torture or fabricated, are obtained and admitted as evidence without inquiry into the circumstances under which they were made. To convict individuals under these circumstances would be contrary to Ethiopia’s international obligations, which in turn have the force of domestic law under the Ethiopian Constitution. Ethiopia’s anti-terrorism law must be amended to comply with international standards and the government’s misuse of the law to stifle freedom of expression and political opposition must cease.



Endnotes

- 1 See <http://www.refworld.org/docid/4ba799d32.html> for the text of the law.
- 2 Laetitia Bader, "They Want a Confessions: Torture and Ill-Treatment in Ethiopia's Maekelawi Police Station." Human Rights Watch, 2013, <https://www.hrw.org/report/2013/10/17/they-want-confession/torture-and-ill-treatment-ethiopia-s-maekelawi-police-station>.
- 3 *Id.*, p. 40.
- 4 See U.N. September 18, 2014 news release, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E>;
U.N. July 18, 2012 news release; <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12365&LangID=E>;
U.N. February 2, 2012 news release, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11793&LangID=E>.
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