THE MIST SHROUD OVER HUMAN RIGHTS: FREEDOM OF EXPRESSION AND COUNTER-TERRORISM LEGISLATION OF ETHIOPIA

A COMPARATIVE STUDY

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"Through Him, all things were made; without Him, nothing was made that has been made" (John 1:3). Almighty God, Thank You for everything that You have done to me.

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ABSTRACT

The Anti-Terrorism Proclamation of Ethiopia has a far-reaching effect on human rights to freedom of expression. The provisions of the law that impact freedom of expression are discussed in this thesis. The vague and overly broad lists of terrorist acts run counter to the principle of legality and infringe freedom of expression in various ways. The law gives leeway to criminalize innocent acts of individuals who are critical of government policies. Besides this, the law criminalizes in/direct encouragement to the preparation, instigation and commission of terrorism through the publication of statements. The law falls short of international standards that require only the criminalization of a speech intended and likely to incite terrorist acts.

The Proclamation demands everyone including the media and journalists provide terrorism-related information to law enforcement agencies. The only way to be relieved of this obligation is showing the existence of a 'reasonable cause', a phrase that is not defined by the law. Moreover, the journalistic privilege of confidentiality of information and the protection of sources is not stipulated as an exception to the obligation of disclosure of information. Nor does the law provides the circumstances in which a journalist may be forced to divulge her information.

Though surveillance and interception undermine democracy, a mere suspicion of terrorism gives the National Intelligence and Security Service a power to conduct surveillance or intercept any type of communications. The Proclamation failed to provide circumstances that the court should consider before permitting surveillance or interception. Surveillance and interception invade privacy and chill freedom of expression. However, the Proclamation failed to provide any safeguards that limit the misuse of executive power against freedom of expression.

Domestic courts should draw upon or transplant principles from jurisdictions like South Africa and Council of Europe to fill legal loopholes. The legal ambiguity together with the nascent jurisprudence pose problems on freedom of expression. However, this "jurisprudential dearth" could be filled and the impact of the Proclamation on freedom of expression may be assuaged by incorporating the three-part test (prescribed by law, legitimate aims and necessary in a democratic society) from the well-developed jurisprudences of human rights bodies and regional courts, notably the European Court of Human Rights, which stands at the heart of the Council of Europe system.

SECTION ONE

GENERAL INTRODUCTION

> "Our response to terrorism, as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms, and the rule of law are essential tools in the effort to combat terrorism—not privileges to be sacrificed at a time of tension."
>
> (Kofi Annan 2003)[1]

1.1 General Background

Security is the linchpin of the protection of human rights. States have obligation to keep their security tight and spare citizens from terrorist attacks. Nevertheless, the exercise of human rights is, more often than not, undermined, or rather eroded by anti-terrorism laws under the guise of enhancing national security. In some countries, counter-terrorism responses are affecting the very essence of human rights that they meant to stand for. Freedom of expression is one of the rights which is restricted as a result of vague, overly broad and security sensitive counter-terrorism laws. This thesis will discuss the engagement of the Anti-Terrorism Proclamation[2] of Ethiopia with legal provisions protecting the right to freedom of expression.

Freedom of expression is one of the fundamental rights enshrined in different international (notably, International Covenant on Civil and Political Rights[3]) and regional human rights

[1] Kofi Annan, statement to the special meeting of the Security Council's Counter-Terrorism Committee with international, regional and sub-regional organizations, (2003 New York) as cited by Neil Hicks, '*the Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective' pp.* 209-224 in Richard Ashby Wilson (ed), '*Human Rights in the 'war on Terror''* (Cambridge University Press 2005) p. 221

[2] Proclamation No. 652/2009 of 2009, *Anti-Terrorism Proclamation*, 7 July 2009 (hereinafter "the Proclamation"), Available at: http://www.refworld.org/docid/4ba799d32.html

[3] Article **19,** International Covenant on Civil and Political Rights, 1976, Available at **http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf**

instruments (like European Convention on Human Rights[4], African Charter on Human and Peoples' Rights[5], and American Convention on Human Rights[6]). As the European Court of Human Rights pointed out, freedom of expression "constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man."[7] Freedom of expression is not only a right by its own right but is also an essential element for claiming and achieving other human rights.[8] It helps to build a self-governing, vibrant and open democratic society and is a key for individual self-fulfillment.[9]

However, in the aftermath of the September 11 attacks, states have shown a propensity towards adopting restrictive laws and rules for war reporting, and also increasing their reliance on war propaganda and manipulation of the media.[10] Governments are imposing severe restrictions on the use of encryption software to protect the privacy of e-mail communications, increased legal or regulatory pressures on journalists to reveal their sources of information or to hand over to authorities information that deemed to be related to terrorism or terrorist activities.[11] Restriction on access to information in a growing number of areas, the adoption of rules restricting the coverage of governments' activities, and the imposition of prior censorship are also the swords drawn against freedom of expression. Journalists are facing criminal charges for publication and distribution of information regarded by governments as damaging and individual or group implicated in terrorist or subversive activities. Governments are engaging with shutting down or taking over of media outlets in the name of anti-terrorism operations.[12]

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[4] Article **10,** Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf

[5] Article 9, African (Banjul) Charter on Human and Peoples' Rights, 1982, Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

[6] Article 13, American Convention on Human Rights,1969, available at http://www.refworld.org/docid/3ae6b36510.html

[7] Hayndyside v. the United Kingdom, App No. 5493/72 (ECtHR 7 December 1976), para 49,

[8]Ambeyi Ligabo, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', (2008), A/HRC/7/14, p 17ff

[9] Eric Barendt, Freedom of Speech (2nd ed, Oxford University Press 2007)

[10] Ambeyi Ligabo, *Report of the Special Rapporteur, Civil and Political Rights, Including the Question of Freedom of Expression*. E/CN.4/2003/67.

[11] Ligabo ibid (n 10), p 17.

[12] Ligabo, ibid (n 10), pp 17-18 The Special Rapporteur outlines various evils used to stifle freedom of expression. "In addition to the formal adoption of laws and regulations specifically targeting the free flow and exchange of information and communications and free expression, more generally, the right to freedom of opinion and expression might be effectively - though indirectly - restricted through various means, such as the bombing of broadcasting facilities and the targeting of journalists by the military in conflict areas; restrictions on the freedom

Following this trend, freedom of expression in Ethiopia has eroded under the pretext of preventing terrorism. Civil societies have criticized the Ethiopian government for relying upon the Proclamation[13] to silence dissidents. For instance, Amnesty International report shows that freedom of expression is restricted and the government threw some of the journalists and bloggers behind the bar and cause others to flee their country.[14] Human Rights Watch has also confirmed that more than 60 journalists have fled into exile from 2010-2015.[15] In its statement, the Human Rights Watch marked Ethiopia as one of "world's worst offenders in using counter-terrorism legislation to prosecute those publicly critical of the government."[16]

Freedom of expression is not an absolute right. The actual scope of the right to freedom of expression is understood by the interplay of the principle and the exceptions.[17] The exceptions, however, should be construed narrowly lest the right itself put in jeopardy.[18] The Ethiopian government interpret the limitation on freedom of expression broadly. As a result, journalists, bloggers, political party leaders and human rights activists are sentenced to jail for the exercise of their legitimate right to freedom of expression. The government has also used the law to silence critical voices and opposition political party members. This thesis discusses issues that raise freedom of expression concern in the Proclamation.

Terrorism is a challenge that faces many countries. Terrorist threats are argued to be prevalent and transnational in nature and states cannot practically deal with them in isolation. Hence, the comparative analysis of counter-terrorism laws expedites the counter-terrorism endeavor. Therefore, the study is focused on analyzing the Ethiopian counter-terrorism law according to the standards presented by the Council of Eurpe including the European Court on Human Rights and

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of journalists to access certain conflict areas; or the resort to the argument of patriotism and to the threat of displeasing majority public opinion to demand complicit silence from journalists and stifle dissent and criticism. The use of such means of pressure lead, more often than not, to self-censorship of media professionals, human rights defenders, or political opponents." Para. 59

[13] Proclamation No. 652/2009, ibid (n 2).

[14] Amnesty International Report 2024/2015: *The State of the world's Human Rights*, p. 148

[15] Human Rights Watch, Ethiopia: Events of 2015, https://www.hrw.org/world-report/2016/country-chapters/ethiopia

[16] Human Rights Watch (2015), UN Human Rights Council: *Panel on the effect of terrorism on human rights, Joint statement on the Impact on human rights defenders,* https://www.hrw.org/news/2015/06/30/un-human-rights-council-panel-effect-terrorism-human-rights accessed 26 November 2015

[17] General Comment No. 10: *Freedom of expression* (Art. 19): 29/06/1983. http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf accessed 28 November 2015

[18] Ibid

by the model of South Africa's anti-terrorism law. The thesis will add some value to the Ethiopian jurisprudence and will trigger a further comparative analysis of the impact of Ethiopian laws on human rights.

1.2 Jurisdictions

The thesis will follow a comparative approach—considering the statutes and case law of Ethiopia, South Africa and the Council of Europe. It is focused on analyzing the legality and human rights implications of the Ethiopian counter-terrorism law on freedom of expression against the standards presented by the counter-terrorism legal frameworks of the Council of Europe and South Africa.

The relatively effective protection of human rights and the well-developed case law prompt the author to choose the Council of Europe, particularly the European Court of Human Rights, as a jurisdiction for a comparative analysis. The relative familiarity of the author with the case-law of the European Court of Human Rights and language accessibility of laws are other pushing factors that lead to the selection of the jurisdiction.

There are reasons that lead to the selection of South Africa as a comparator. Among other things, it is a democratic state and its anti-terrorism law, alike the Ethiopian one, is influenced by the Prevention of Terrorism Act of the United Kingdom. In addition, Ethiopia and South Africa owe duties that emanate from the same regional human rights regime, under the African Charter on Human and Peoples' Rights.

1.3 Methodology

The thesis will draw on literature on the contemporary relationship between counter-terrorism in one hand and human rights, particularly freedom of expression, on the other hand. Primary sources, inter alia, case law, statutes, treaties and reports of human rights groups, and secondary sources, like books and journal articles will be utilized to address the issues.

The breadth of counter-terrorism law is challenging to produce a comparative analysis, for it includes criminal, administrative, immigration, constitutional, military, financial and foreign affairs laws, and involves the interaction of domestic and international laws.[19] However, the thesis

[19] Kent Roch (ed), '*Comparative Counterterrorism Law'* (Cambridge University Press 2015) pp. 1-3

attempts to analyze only the provisions of the specific anti-terrorism law that cause an adverse impact on the exercise of freedom of expression.

For the sake of this thesis, freedom of expression is couched broadly constituting the right to hold opinions, to seek, receive and impart information and ideas by any means and form, and the right to access information from public bodies and private actors performing public functions. Moreover, when the author discuss a legitimate restriction on freedom of expression, it does not include the right to hold opinions, which is an absolute right where interference is not allowed.

1.4 Hypothesis

Freedom of expression has been threatened and its scope is shrinking by the Anti-Terrorism Proclamation of Ethiopia.

1.5 Structure of the Thesis

The thesis is divided into five sections. The first Section introduces some basics of the thesis. The second Section has two sub-sections that deal with some conceptual frameworks. Human rights can only be realized if there is a general climate of security and safety in a society. Therefore, the first sub-section addresses the relationship between human rights and national security. The continuing debate between the need for security and liberty is also discussed. Terrorism as a threat to national security and the impact of counter-terrorism responses on the protection of human rights is also scrutinized under this section. Under the second sub-section, the author examines the relationship between freedom of expression and national security. The sub-section starts by examining and defining the notion of freedom of expression. This Section also encompasses some philosophical justification that explains why freedom expression do merit protection. Freedom of expression as an important element of discovering the truth in relation to the marketplace theory is highlighted. Other theoretical bases of freedom of expression as a means of self-expression and self-fulfillment**,** as a prerequisite of self-governance and democracy, is addressed under this sub-

section. As the final analysis of this Section, the relationship between freedom of expression and national security is dealt.

The protection accorded to freedom of expression by human rights instruments is discussed in the third Section. The first part of this Section focuses on international human rights instruments and freedom of expression in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In order to comprehend the clear ambit of the right to freedom of expression, General Comments set out by the Human Rights Committee, and international standards and principles are discussed. The discussion in the second part of this Section will explore the protection of freedom of expression under regional human rights instruments. The scope of the norm and the extent of the limitation imposed on freedom of expression in the European Convention on Human Rights, the African Charter of Humans and Peoples' Rights, and the American Convention on Human Rights is discussed. The legitimacy of the restriction of freedom of expression has been dealt from the perspective of the three conditions (the condition of legality, legitimacy, and proportionality) that are recognized and applied by human rights courts and the Human Rights Committee.

Section four of the thesis addresses the Anti-Terrorism Proclamation of Ethiopia and its influence on the exercise of freedom of expression. The discussion of this Section is a comparative analysis of the limitation imposed by the anti-terrorism laws on the exercise of the freedom of expression. In the first part of the Section, the right to freedom of expression of the three jurisdictions (Ethiopia. South Africa and Council of Europe, notably the European Court of Human Rights) is scrutinized. The second part covers the justifiable limitations that may be imposed on the exercise of the right to freedom of expression. In the third part, the definitional provision of the Ethiopian Proclamation, encouragement of terrorism, the journalistic privilege of confidentiality of information and protection of sources, and the influence of surveillance and interception on freedom of expression is tested against the standards set by the other two jurisdictions. Finally, conclusion and recommendations will be presented in the last Section of the thesis.

SECTION TWO

THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND NATIONAL SECURITY

2.1 Introduction

Governments are enacting anti-terrorism laws that are impinging on human rights including the right to freedom of expression.[1] This section will discuss some general theoretical backgrounds of the main underlying themes of the thesis. On the one hand, human rights are best served in a tranquil environment for which a strong national security is required. On the other hand, national security measures, like anti-terrorism legislation may not unduly intrude on human rights. Accordingly, the first part of this section will discuss the relationship between human rights and national security, terrorism as a threat to national security, and the other ways in which human rights may be engaged by counter-terrorism policies.

National security is one of the legitimate aims that justifies the restriction of freedom of expression. The relationship between freedom of expression and national security and some philosophical justifications that vindicate the protection of freedom of expression will be addressed. Freedom of expression as an important element of discovering the truth in the marketplace of ideas will be highlighted. Other theoretical bases of freedom of expression, like self-fulfillment**,** self-governance and democracy will also be addressed.

[1] As defined in the previous section (Methodology part), for the sake of this thesis freedom of expression is couched broadly constituting the right to hold opinions, to seek, receive and impart information and ideas by any means and form, and the right to access information from public bodies and private actors performing public functions. Moreover, when the author discuss a legitimate restriction on freedom of expression, it does not include the right to hold opinions, which is an absolute right in which interference is not allowed.

2.2 Security and Human Rights: A Necessary Tension?

Human rights are best protected in a peaceful environment where a robust national security is maintained. National security is nothing without the protection of human rights. The prevalence of the threat to national security and the widening of state's human rights obligations intensified the relationship between the two values.[2] However, every national security measure may not unduly restrict human rights, nor every human rights protection measures expose a state for a security threat.[3]

Commentators are divided over whether it is necessary to restrict human rights to make a state more secure. There are three groups of thoughts regarding the relationship between human rights and security.[4] For "consequentialists", no evil exists in restricting human rights as long as it effectively serves to save the lives and security of the people.[5] However, a government is not better than terrorists who dismantle the democratic and human rights system if it breaches human rights while tackling terrorism.[6] Unduly limiting human rights for combating terrorism "would amount

[2] Myriam Feinberg, 'International Counterterrorism – National Security and Human Rights: Conflicts of Norms or Checks and Balances?'(2015), The International Journal of Human Rights, 388 http://dx.doi.org/10.1080/13642987.2015.1027053 accessed 14 February 2016.

[3] Ben Golder & George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism', Journal of Comparative Policy Analysis: Research and Practice, (2006), 8:01, 43-62, DOI: 10.1080/13876980500513335, 43, 52.

[4] Security used as a form of surveillance and control, not as an individual protection. See Didier Bigo and Elspeth Guild, 'The Worest Case Scenario and the Man on the Calpham Omnibus', in Benjamin J. Goold and LIora Lazarus (eds) *Security and Human Rights (*Hart Publishing 2007)

[5] Michael Ignatieff, '*The Lesser Evil: Political Ethics In An Age of Terrorism'* (Princeton university press 2004) pp 7-8

[6] Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights', in Goold and Lazarus (n 3) 207. Ashworth said that "if, per contra, states argue that the ends [preserving freedom and democratic institutions] justify the means [curtailing human rights], then their reasoning is no more acceptable than that of terrorists who maintains that the means (causing death, injury, fear, disruption) are justified by the ends that they are pursuing." This argument can be easily attacked by its ill per contra reasoning. The means utilized and the ends purportedly achieved by the two groups may not be juxtaposed for contrast. The means deployed by the two groups negatively affect freedoms, but the way and the magnitude that the government and terrorist groups are using is incomparable. With similar note, the end that the government wants to achieve is preserving humanity, whereas, the terrorists aim is imposing influence on the government, provoking terror and debilitating humanity. Moreover, the act of the government is under the surveillance of institutional accountability whereas the terrorists are not bound by any institutional obligation.

to losing the war on terrorism without firing a single shot."[7] On the other hand, for "civil libertarians", some human rights should be kept protected no matter how their limitation would protect the majority.[8] Torture, for instance, should never be justified in a liberal democratic society. The third approach falls between these two groups. It dictates that democracy requires getting rid of the "greater evil" and choosing the "lesser evil" principle.[9] According to this group, notwithstanding that the acts would still be wrong, inhuman and degrading treatment, torture and killings are justified for the interest of the majority.

The first and third groups give emphasis to the security of the nation. Democratic and undemocratic nations attempt to vindicate the restrictions imposed on human rights by appealing to the need of maintaining security. They tempt to disregard all rights if they think that it spares the nation from terrorist attacks (the "consequentialists"). Though there are no any group of rights that can be categorized as untouchable in the third group, at least, a balance between the risk of violating a right and the casualties that would happen due to the terrorist's attack would be weighed ("lesser evil"). There is a balancing concept in the third group, but the "lesser evil" principle is not compatible with the international human rights laws, for it disregards the notion of absolute human rights.

A state has a right to self-defense and can use coercive power and maintain a secure life for its citizens.[10] When a nation is in a state of emergency or normalcy restriction of the exercise of rights (derogation and suspension) is the option that helps to save the human rights system from complete

[7] Senator R Feingold (D–WI), 'Statement on the Anti-Terrorism Bill' (Speech at US Senate on 25 October 2001) as adopted by Christopher Michaelsen, 'The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German–Australian Comparison,' [2010] 2:1 City University of Hong Kong Law Review 19*, 21*

[8] Ignatieff (n 5) 8.

[9] ibid

[10] See, Shalomit Wallwrstien, 'The States Duty of Self-defense', in Goold and Lazarus (n 4).

crumpling, for human rights and security is inextricably interwoven. For a democratic society, security and human rights are not mutually exclusive. Nevertheless, in the aftermath of September 11 attack, the balancing discourse between security and liberty diminished, if not abandoned, and the former has become a trump card.[11]

How could a government incline to prefer one virtue at the expense of the other? Are security and human rights mutually exclusive? One, security or human rights, may not triumph in the expense of the other since democracy is for the majority and for the minority as well. Both values, human rights and security, have a place in democracies. Human rights are not different from security; rather they are securities against the abuse of government powers.[12] Therefore, for contemporaneous application, a fair balance between security and human rights shall be maintained.[13] To strike a balance, a nation should have a human security legislation that protects both national security and human rights.[14] When security necessitates the curtailment of rights, as long as there are good causes, limiting rights based on a balancing principle is necessary for the survival of a democratic system.[15] For Ignatieff, democracy itself is the shield that protects values not to grind slowly. It is the limit to the aggrandizement of the "lesser evil" so that the values of rights will not recede.[16]

[11] ibid 390.
[12] David Luban, 'Eight Fallacies about Liberty and Security', in Richard Ashby Wilson (ed), '*Human Rights in the 'war on Terror*'' (Cambridge University Press 2005), 245
[13] International Council on Human Rights Policy, Human Rights after September 11 (2002), Versoix, Switherland: International Council on Human Rights Policy, as cited by Michael Freeman, 'Order, Rights and Threats: Terrorism and Global Justice', in Wilson (n 11), 45
[14] Hon Philip Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism'(2004), *UNSW Law Journal, 27 (2), 254, 254*
[15] Ignatieff, (n 5), 9
[16] ibid.

Balancing entails proportionality analysis that needs the weighing of the legitimate aim (the end), on the one hand, and the measure (the means), on the other hand. Though the philosophical aspect of the principle of proportionality traced as far back as the time of Aristotle, in law, it originates in Germany legal system.[17] It has a place in the application of the international human rights instruments, like International Covenant on Civil and Political Rights and European Convention on Human Rights.[18] The instruments dictate that any measure meant to limit or derogate from rights should be sufficient and relevant to the end sought. Yet, proportionality principle is not applicable with regard to absolute rights. If the measure is "categorically prohibited", it is not, from the outset, considered as a means to an end.[19]

However, when the means is not rejected from the outset, the proportionality analysis must traverse through three steps.[20] The first step is known as a "suitability or fitness" test. It is all about whether the means adopted by the government is rationally linked to the legitimate aim. The means should be "truly a means […which] is truly helpful and contributes to achieving the end."[21] However, Boyron pointed out that before the "fitness or suitability test", there is a need to consider whether the end is legitimate.[22] Moreover, the authority that adopts the measure should have the jurisdiction to do so. International human rights law substantiate the legitimacy of the end by restricting particular ends for limiting a certain right. For instance, under Article 10 of the

[17] H Goerlich, *'Fundamental Constitutional Rights: Content, Meaning and General Doctrines'* in U Karpen (ed), '*The Constitution of the Federal Republic of Germany'* (Nomos, Baden-Baden 1988) 45; Sweet and Mathews (n 35) 98. As cited by Michaelsen (7); Sophie Boyron, '*The Constitution of France: A Contextual Analysis'*, (Hart Publishing 2013), 728.

[18] The European court of Human rights has its own way of ascertaining the proportionality of the measure by applying the three-tire test, i.e Prescribed by law, legitimate aim and necessary in a democratic society. At times, the court may skip the proportionality steps (discussed in the next paragraphs) under the guise of margin of appreciation. *For instance, see* S. A.S V France App No 43835/11 (ECtHR 1 July 2014).

[19] Boyron (n 17) 722.

[20] Michaelsen (n 7) 30.

[21] Boyron (n 17) 723.

[22] ibid 722.

European Convention on Human Rights, the right to freedom of expression may only be subject to restriction for the sake of legitimate aims stipulated under sub-article 2.[23] There might be an involvement of some kind of balancing while deciding whether the end is legitimate. Nevertheless, the detailed analysis and balancing will be held at a later stage.[24]

The second step is "necessity", which requires adopting the "least restrictive means" to achieve the stated legitimate aim. Necessity refers taking a measure that may not impinge upon any right. However, if this is not possible and the situation precipitates the adoption of a measure, it must be the least intrusive one. Necessity refers the intensity of the restriction to the right holder(s).[25]

The third step is called "proportionality in the narrow sense or proportionality *stricto senso*," which requires the measure to be "appropriate and strictly proportionate."[26] Since weighing unquantified interests, rights, and values is difficult, the third step is most complex and contested.[27] In order to simplify the process, Robert Alexy pointed out that balancing requires:

> [F]irst, determining the detriment to one side if the other side should win; secondly, determining the detriment to the other side if the first side should win; thirdly, determining whether the importance of one side winning justifies the detriment to the other.[28]

Evaluating the restriction in light of the end is subjective. It needs a comparison of the two values together to assess the impact of upholding or ignoring of one value or the other. The decision

[23] European Convention for the Protection of Human Rights and Fundamental Freedom (1950), Art. 10. Any end that does not fall in any of the following is illegitimate. National security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
[24] Boyron (n 17) 723.
[25] ibid 724.
[26] Michaelsen (n 7) 30.
[27] Boyron (n 17) 724.
[28] Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4, Law and Ethics of Human Rights 20, as cited by ibid 725.

maker should establish the type and intensity of the harm inflicted on one side if she decides in favor of the other side of the competing interests and vice versa. She should also carefully analyze whether the decision made in favor of one of the values justifies the burden imposed on the other competing interest.

In conclusion, national security and human rights are not two conflicting interests. Rather they are values that the protection of one is indispensable for the survival of the other. The principle of proportionality works for the optimization of national security and human rights. The principle is applicable to all branches of the government. For a legitimate restriction of human rights, the legislature should undertake a balancing exercise while setting exceptions on the exercise of human rights. The legitimacy of the administrative measures of the government shall also be tested against the principle of proportionality. A court is an independent organ of the government entrusted with protecting the rights of the citizenry from unwarranted intrusions. Therefore, the principle of proportionality must be a guiding star while scrutinizing the actions and decisions of the legislative and the executive branches of the government. The approach taken by the major international human rights instruments and monitoring bodies regarding national security, freedom of expression and the application of proportionality principle will be discussed in the next section.

2.3 Terrorism as a Threat to National Security

No clear definition of terrorism that binds the whole world in consensus is formulated. Despite the lack of a single common definition, terrorism has been defined at the international, regional and national levels. The lack of standard definition of terrorism has its own problems. Ambeyi Ligabo, the UN Special Rapporteur said:

> "… in practice it is quite difficult to monitor the legitimacy, necessity, and proportionality of anti-terrorism measures in the absence of a universally accepted, comprehensive and authoritative

> definition of terrorism. This, on the one hand, leaves ample space for abusive restrictions based more on varying definitions of terrorism that respond to individual States' interests than on a universal concept of what a terrorist act is, and, on the other hand, makes it all the more difficult to monitor and evaluate the necessity and proportionality of such restrictions."[29]

The absence of a consensual international definition of terrorism impedes the effort of countering the threat and it permits the governments to add political flavors in their definitions. It has a negative implication on human rights protection, too, since the definition may be vaguely formulated to encompass conducts with no genuinely terrorist nature.[30] A vague or broad definition exposes human rights to governmental abuse.

At this juncture, it is pertinent to adopt a definition of the word terrorism. Though there is no consensus on what terrorism constitutes, it is germane to discuss some attempts and provide a working definition from the legalistic than etymological perspective. International legal scholars attempted to define the term by proscribing certain specific acts, like hijacking airplane[31] and taking a hostage.[32] The attempt of adopting a general definition of terrorism started during the period of the League of Nations[33] but come to fruition in 2002 when the International Convention for the Suppression of the Financing of Terrorism entered into force with both specific[34] and general definitions.[35]

Article 2(1) (b) of the Convention defines terrorism as:

> [A]ny… act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such an

[29] Ambeyi Ligabo, 'Report of the Special Rapporteur, Civil and Political Rights, Including the Question of Freedom of Expression', E/CN.4/2003/67, Para 66.
[30] Martin Scheinin, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (2005), E/CN.4/2006/98, 22.
[31] Convention for the Suppression of Unlawful Seizure of Aircraft (1970 The Hague)
[32] International Convention against the Taking of Hostages, 1316 UNTS 205 (1983).
[33] Convention for the Prevention and Punishment of Terrorism (League of Nations Doc C.546 M.383 1937 V (1937))
[34] The Convention incorporates specific definitions by referring to other Conventions.
[35] International Convention for the Suppression of the Financing of Terrorism, 2178 ILM 229 (2002)

> act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The Convention recalls and recognizes the definition of terrorism formulated by other previous instruments and added its own general description. Accordingly, terrorism is an offense committed against civilians. Unless the perpetrators intended the act to intimidate a population or to force a government or international organizations to do or not to do an act, the act would be considered as an ordinary crime.

The sweeping Resolution 1373[36], which is adopted in the aftermath of September 11 attack by using the Chapter VII mandatory power of the Security Council has failed to define what terrorism mean. Nor does it attempted to confirm the previous general definitions but gave a discretion to states to adopt their own definition.

In 2004—Resolution 1566[37] Paragraph 3 define terrorism as

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

The Security Council attempted to formulate a general definition, however, in 2004 many states has adopted their own definitions.[38] In addition to what are incorporated in the 2002 Convention, this definition comes up with another possible intention of a terrorist as "provoking a state of terror". The word *including* and *other similar nature* at the beginning and end of the definition respectively indicates that the Council has faced difficulties in formulating a clear-cut definition.

[36] S/RES/1373 (2001).
[37] S/RES/1566 (2004).
[38] Kent Roach (ed), '*Comparative Counter-Terrorism Law*' (Cambridge University Press 2015), 14.

On September 2014, the Security Council again used its Chapter VII power in Resolution 2178[39] to label terrorism a serious crime. Despite all attempts, the Resolution increased definitional ambiguity by using words like "violent extremism" and "radicalization."[40] All the attempted definitions have problems regarding state terrorism, freedom fighters and crimes committed against properties.

This thesis does not attempt to come up with a new definition of terrorism. Targeting civilians for death and destruction is a common definitional aspect of the term. Therefore, for the sake of this thesis, it is rather preferable to assume the core meaning of terrorism at least as an attack against civilians. With little normative disagreement, this principle lies in the international human rights and humanitarian laws.[41] However, taking only the base offense as "an act intended to cause death or serious bodily injury on civilians, or the taking of hostages" pose difficulties in differentiating terrorism from other ordinary crimes.[42] Therefore, the purposes of committing the act are the necessary elements of the definition.[43] There are four purposes as a least common denominator of the latest definitions. These are provoking a state of terror, intimidating a population, compelling a government or an international organization to do or abstain from doing any act. Conducts in support of terrorist offenses, like incitement, must have the purpose of one of the above four elements. The Special Rapporteur on the promotion and protection of human rights and

[39] S/RES/2178 (2014).
[40] Roach (n 38) 15. The inclusion increase the restriction and violation of human rights and "undermine the legitimacy of some counter terrorism efforts."
[41] Paul Hoffman, 'Human Rights and Terrorism, Human Rights Quarterly' (Johns Hopkins University Press 2004) 26, 4, 932, 937 http://www.jstor.org/stable/20069768 accessed 14 February 2016.
[42] Thomas Weigend, 'The Universal Terrorist: The International Community Grappling with a Definition' (2006), Journal of International Criminal Justice, 4, 929, as cited by Wondwossen Demissie Kassa, 'The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments' (2014), Mizan Law Review 8, 2, 371, 386
[43] Cassese approaches the notion of terrorism in terms of its objective and subjective elements in Antonio Cassese (2006), Journal of International Criminal Justice, 4, 935, as cited by Kassa, ibid.

fundamental freedoms while countering terrorism also endorses such kind of formulation of the definition of terrorism.[44] Moreover, the law that proscribes terrorism must be accessible, precisely formulated, non- discriminatory, non-retroactive, and in congruence with international laws.[45] The scope of the definition of terrorism should be as defined in the international laws relating to terrorism.

National security constitutes interests like territorial integrity, ability to defend threat or use of force, and political independence.[46] It is evident from the definitions that terrorism is a menace to national security. It targets the nation or its people through killing and injuring civilians to stir up fears, dismantling state structure, and pressurizing organizations to submit themselves to terrorist groups. It has a potential to force states to change their security strategy and even to suspend or limit human rights. Therefore, counter-terrorism measures are responses that are meant to maintain national security. Hence, national security interest, though it suspends or limits human rights, can vindicate the promulgation of counter-terrorism legislation. Nevertheless, the limits to human rights must fulfill a strict test of justification and that will be discussed in the next sections.

2.4 Counter-Terrorism Legislation and Human Rights

Al-Qaida's attacks on the United States on the morning of 11 September 2001 left the world, particularly the allies of America, in a profound state of trepidation, fury, grief, and uncertainty. It is also the turning and the reawakening movement that leads to the proliferation of counter-terrorism legislation. As a vanguard to maintain the international peace and security, the Security

[44] Scheinin (n 30).
[45] ibid, Para 13-14.
[46] Article 19, The Johannesburg principles on National Security, Freedom of Expression and Access to Information (1996) International Standards Serious, https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf accessed 8 March 2016, and P.M. Kamath, 'Terrorism in India: Impact on national security, Strategic Analysis' (2001), Vol 25, No 9, 1082.

Council condemned the attacks, expressed its sympathy,[47] and passed a resolution that enjoins states to enact legislations for an effective prevention and suppression of terrorist acts.[48] The Council has likewise established the Counter-terrorism Committee aimed to bolster counter-terrorism efforts of United Nations member states and adopted the sheer number of resolutions directed against terrorism. Due to the conspicuous and the sweeping Security Council resolution 1373 (2001) that dictates nations to issue counter-terrorism law, since then an "anti-terrorist legislative wildfire"[49] has been broken out. In the aftermath of the September 11 attacks, some states adopt new counter-terrorism law, and others revisited their previous legislation.

This legislation enjoins the government to plan an effective strategy for countering terrorism. Hocking pointed out that in the western liberal democratic countries; counter-terrorism strategy mainly consists of "legislation, intelligence, police special squads, military involvement in civil disturbance, and media management."[50] The strategies are backed by laws or executive orders and serve as a preemptive defense or/and *post facto* means of dealing with terrorism. These strategies are not limited only to the western liberal democratic nations. Though their strength and results are different from country to country, they are also administered in jurisdictions where this thesis focuses (Council of Europe, South Africa, and Ethiopia). The idea of this work is to assess the engagement of anti-terrorism legislation with freedom of expression. Therefore, the whole discussion is zoomed towards one of the most important strategies pointed out by Hocking, i.e. legislation. Counter-terrorism legislation is enacted to suppress any terrorist activities and to reinvigorate the security of the nation.

[47] S/RES/1368 (2001).
[48] S/RES/1373 (2001).
[49] Joan Fitzpatrick, 'Speaking Law to Power: the War against Terrorism and Human Rights' 2003, EJIL, 14, 2, 243.
[50] Jenny Hocking, 'Terrorism and Counter-Terrorism: Institutionalizing Political Order' (1986), The Australian Quarterly, 58, 3, 297, 299.

States have a duty to protect individuals within their jurisdictions from any kind of attack. As Sottiaux pointed out, states' obligation to spare anyone under its jurisdiction emanates from the human rights laws in two respects.[51] Firstly, a duty to protect is one of the three types[52] of states' human rights obligations. The obligation demands states and its agents to take the necessary measures (positive actions) to protect individual liberties from any unlawful attacks, terrorist encroachments for that matter.[53] Secondly, states are duty-bound by international human rights laws to insulate their democratic regime from any terrorist attacks, for human rights can better be served in a democratic system.[54] Therefore, nations are duty-bound to take necessary counter-terrorism measures that aim at reducing, if not wiping out, terrorism casualties.

Accordingly, after the September 11 attack, security has become the primary policy agenda item and dominated the rhetoric of states. For the UN and other human rights groups, counter-terrorism efforts must be taken for the sake of human liberties, and no counter-terrorism response should unduly affect the very essence that the measure meant to stand. Notwithstanding that, the notion of the war on terrorism "has been used by governments opportunistically to justify the repression of opponents."[55] However, there is nothing in the contemporaneous international human rights laws that impairs states' counter-terrorism efforts.[56] States do have the right to take any counter-terrorism measure under the bounds of international human rights standards.

[51] Stefan Sottiaux, '*Terrorism and Limitation of Rights: the ECHR and the US Constitution*' (Hart Publishing 2008), 3

[52] The taxonomy of state duties in to three, to respect, protect and fulfill, originally introduced in 1980 by Henry Shue and later refined in 1987 when he function as the Special Rapporteur to the UN Sub-Commission. Ida Elisabeth Koch, '*Dichotomies, Trichotomies or Waves of Duties?*' (2005), Oxford Journals, Human Rights Law Review, 5, 1 http://hrlr.oxfordjournals.org/content/5/1/81.full Accessed 23 October 2015

[53] The duty of states to protect its citizens from terrorist threats enshrined in article 1 of Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, adopted by the committee of ministers in 2002, Available on **http://www.legislationline.org/documents/action/popup/id/8086**

[54] Sottiaux (n 41) 5-7.

[55] Human Rights Watch, 'In the Name of Counter-Terrorism: Human Rights Abuses Worldwide' *(2003)*, 3, https://www.hrw.org/legacy/un/chr59/counter-terrorism-bck.pdf accessed 27 November 2015.

[56] Hoffman (n 41) 951.

When the government thinks that the "rules of the game are changing"[57] (when the state of normalcy is disturbed), it extends its law-making power to confer more powers on the executive and narrow down the human rights regime. After the September 11 attacks, the exceptions are considered as a blank check, and the governments are putting the citizenry in a mass surveillance, tending to torture the suspects, detaining illegally or imposing measures that muzzle the right to freedom of expression, banning freedom of assembly and so on. The necessity of exceptionalism to tackle terrorist threats is undisputable. However, "the exceptions must occur inside the rule of law; they cannot frame the rule of law."[58]

States have the right to install a watertight security system. Yet, the system may not breach the aim that it is meant to stands for. The United Nations Security Council has been calling that states' counter-terrorism responses should be compatible with their international obligations and respect the international human rights, refuge, and humanitarian laws.[59] The 2005 World Submit Outcome also emphasized the states' responsibility of combating terrorism without breaching their international obligations.[60] Though the United Nations appointed a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and recurrently urge to uphold fundamental freedoms during the fight against terrorism, states are engaging on "a shocking onslaught against human rights and the rule of law."[61]

[57] Speech by United Kingdom's Prime Minister Tony Blair, 'The Rules of the Game are Changing' (2005), To legitimize a stringent anti-terrorism measures, he remarked "let no one be in any doubt that the rules of the game are changing." http://www.theguardian.com/uk/2005/aug/05/july7.uksecurity5

[58] Bigo and Guild (n 4), in Goold and Lazarus (n 4), 111.

[59] *Inter alia* S/RES/1456 (2003) Para. 6, S/RES/1624 (2005), Para 2.

[60] 2005 World Summit Outcome, A/RES/60/1, Para. 85, http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf accessed on 27 November 2015

[61] Amnesty International, 'Malaysia: New Anti-terrorism Law a Shocking Onslaught against Human Rights,' https://www.amnesty.org/en/latest/news/2015/04/malaysia-new-anti-terrorism-law-a-shocking-onslaught-against-human-rights/ accessed on 24 November 2015

Even though the most effective way of tackling terrorism is upholding the rule of law and ensuring the exercise of human rights for all without an arbitrary discrimination, governments tend to act in the contrary by enacting a tight anti-terrorism legislation.[62] The laws are crafted to stifle human rights without a reasonable compromise and twisted to any direction to suppress human rights activists. Nowadays, anti-terrorism laws are the sword of Damocles hanging over human rights and fundamental freedoms. They are the mist that shroud over the human rights' sun that has been shining since the adoption of the Universal Declaration of Human Rights.

The violation of human rights and fundamental freedoms by anti-terrorism legislation can be attributed to different reasons. First, the lack of a standard definition of the term terrorism poses an obstacle for human rights. It gives a wider margin of appreciation to the states to adopt their own broad definition with political flavors. The absence of an international definition and enactment of politically driven domestic definitions create impediments to monitor and evaluate the necessity and proportionality of the measures.[63]

The second reason is related to the nature of the crime itself. The fruition of counter-terrorism activities presupposes an effective coordination of different government bodies. Countries are applying a "whole government" approach[64], which reflects the application of various laws and the participation of different governmental offices to detect and combat terrorist activities. The integrated "whole government" approach, however, makes difficult to draw a link between a certain counter-terrorism action and a specific governmental office. The absence of a responsible organ may result in a lack of accountability for human rights violations.[65] This, in turn, makes

[62] Ligabo (n 29).
[63] ibid, Para 66.
[64] Roach (n 38) 566.
[65] ibid 688-692.

difficult to prove the violation in courts of law and leave the victims without any redress for the damage they sustain due to the counter-terrorism measures.

The third reason is somehow related to the second one. The clandestine role of intelligence services in curbing terrorism has a negative implication on human rights and pose problems not to hold the government accountable.

Above all, governments' inclination towards watertight security measures and unwillingness to observe human rights are behind all the above reasons. Had governments willing to protect human rights while combating terrorism, the above reasons would not have materialized. Human rights groups and international human rights authorities are urging governments to balance their security measures with human rights and fundamental freedoms.

What works effectively and what impact will the action produces are the central questions while countering terrorism. More security and less human rights violations must be the aim of the measures. However, states should also give consideration to the counter-production of their anti-terrorism measures. Are states not pushing the people to be less cooperative to the government forces and the survivors to be more extremist? Voluntary cooperation of the civilian population is an indispensable contribution to tackling terrorism. Respect for and protection of human rights helps to solicit popular support while countering terrorism. The "practical effectiveness and the moral standing" of the contemporaneous human being demand the protection of human rights while repelling terrorism.[66]

[66] Kofi Annan, 'Reports of the Secretary General: In Larger Freedom: Towards Development, Security, and Human Rights for All', Delivered to the General Assembly, UN Doc. A/59.2005 (March 21, 2005) Para 140.

In conclusion, international human rights laws are not impediments to tackling terrorism. Nor do they prohibit the criminalization of dangerous activities. Public order, national security, public safety, prevention of disorder and crime serve as a legitimate aim of limiting the exercise of human rights. Human rights standards give freedom to the government to derogate from the observance of human rights while the nation faces a crisis that could not be halted under a normal condition. The existing human rights standards accommodate the need for the interest of national security. Therefore, the fight against terrorism should adhere to the international human rights standards, for human security can never be achieved while threatening human values.

2.5 Freedom of Expression and National Security

2.5.1 Why Freedom of Expression?

The philosophy underlying freedom of expression helps to appreciate and interpret the right. Therefore, this section devoted to the examination of the reasons that necessitates the recognition and protection of freedom of expression as a human right. Each underlying principle has criticisms and counter-criticisms, but it is beyond the scope of this work to address all of them. Instead, the author makes passing remarks with regard to some of the criticisms.[67] Moreover, the rationales are interrelated. Therefore, the protection of a single piece of speech may be vindicated by different rationales.

2.5.1.1 Truth Finding

This rationale proposed by John Milton, but often credited to John Stuart Mill, refers that various ideas will flourish and compete in a free marketplace of ideas, and the idea that successfully

[67] *For detail account of rationales see* Eric Barendt, '*Freedom of Speech'* (2nd edn, Oxford University Press 1985).

triumphs the competition shall outshine.[68] The search for truth (the marketplace of ideas) is based on two premises. First, the truth is relevant for a human life. Second, the truth is the one that is accepted in the competition of the marketplace of ideas.[69] A truth is valued because it is an "autonomous and fundamental good" and plays a role in the progress of the society.[70]

The theory of marketplace of ideas is criticized, however, by the notion of an unequal playing field of ideas where powerful and those with better resources monopolize the market and make only their ideas to supersede.[71] Others still argue that the theory wrongly assumes truth as the "highest public good" in all circumstances.[72] At times, the wellbeing of the society needs other values at the expense of truth. Another criticism questions one of the foundational assumptions of this theory i.e. whether "discussion necessarily leads to the discovery of truth."[73] Barendt concluded that unregulated speech does not always help to arrive at the truth.[74] Yet, the theory of the marketplace of ideas is one of the justifications that lies in the strict scrutiny of "content-based and viewpoint regulation of speech" in the US jurisprudence.[75] In another instance, Justice Holmes (*Abrams V US case)* in his dissenting opinion incorporated the theory as follow: "…ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[76]

[68] Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet, Pamela S. Karlan, '*Constitutional Law',* (5th edn, ASPEN Publishers 2005)*,* 1055.
[69] Abrams v. United States, 250 U.S 616, 630 (1919) (Justice Holmes, Dissenting).
[70] Barendt (n 67), 7.
[71] Ashley Packard, '*The Borders of Free Expression'* (Hampton Press, INC 2009) 139; ibid 7.
[72] Barendt (n 67).
[73] ibid 9.
[74] For more criticisms and detail discussion of the theory *see* ibid 7-13.
[75] ibid 11.
[76] Abrams V US (n 69).

2.5.1.2 Self-governance /Democracy

Democracy is the most influential of all the free speech rationales. It is associated with Alexander Meiklejohn and emanates from the idea that when people govern themselves, they are the only authority to decide the morality of an expression.[77] Another aspect of this theory is the "checking value" of freedom of speech. According to this rationale, freedom of expression provides information regarding public interest and helps to keep the government in check.[78] Freedom of expression is "the lifeblood of democracy", and it is difficult to imagine an effective form of the rule of law without it.[79] It helps to know the opinions of the politicians, and let the people know to whom they should vote for.

In its first judgment on freedom of expression, *Handyside V. UK*, European Court of Human Rights described freedom of expression as one of the essential foundations of a democratic society.[80] Since then, the Court in plenty of its decisions reiterated the value of freedom of expression to build a democratic society based on "pluralism, tolerance, and broadmindedness."[81] The Court gives a robust protection for discussing ideas of public interest, for democratic discourse is not conceivable without a public debate. Similarly, in its advisory jurisdiction, the Inter-American Court of Human Rights described freedom of expression as the basic foundation of a democratic society and a *conditio sine qua non* for freedom of assembly and association.[82]

[77] Alexander Meiklejohn, 'Free Speech and its Relation to Self-Government' 15.16, 24-27, as cited by Stone, Seidman, Sunstein, Tushnet, Karlan, (n 68) 1056.
[78] Blasi, '*The Checking Value in First Amendment Theory*' (Am. B. Found. Res. J 1977) 521, 527-542, as cited by Stone, Seidman, Sunstein, Tushnet, Karlan, (n 68) 1058.
[79] Regina *v* Secretary of State for the Home Department Ex Parte Simms [1999] UKHL, http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990708/obrien01.htm accessed 4 March 2016.
[80] Handyside V. the United Kingdom App No 5493/72 (ECtHR 7 December 1976), Para. 49.
[81] ibid.
[82] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985), Para 70.

In the US jurisdiction too, this rationale has been repeatedly reflected. For instance, concurring Judges Justice Black joined by Justice Douglas, in the *Pentagon Papers case,* affirmed that freedom of speech must be insulated from unwarranted curtailment, for it helps to "censure the government." In the same case, concurring Justice Stewart joined by Justice White stressed the value of freedom of speech as to create an "enlightened citizenry" to check the power of the executive.

Chafee argues that Meiklejohn's self-governance rationale focuses on public speech though in fact its distinction with a private speech is blurred.[83] It went on and pointed out that private speeches like scholarship and literature are as valuable as self-government. Hence, they need to be protected by the first amendment of the US Constitution. Meiklejohn conceded and said that all "ranges of human communications from which the [citizens] drive the necessary knowledge, intelligence and sensitivity to human values," too, must be protected.[84]

2.5.1.3 Means of Self-fulfillment/Autonomy

Justice Marshall said that there is a human spirit that calls for self-expression that can be satisfied by guaranteeing the freedom of expression, which is an integral part of the development of ideas and a sense of identity.[85] This human spirit is the capacity of a human being:

> "…to create and express symbolic systems, such as speech, writing, pictures and music…and it nurtures and sustains the self-respect of … [a] person. The value of free expression, in this view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish." [86]

[83] Chafee, Book Review, Harvard Law Review, 62, 891, 899-900 (1949), as cited by Stone, Seidman, Sunstein, Tushnet, Karlan, (n 68) 1056.
[84] Meiklejohn (n 68) as cited by Stone, Seidman, Sunstein, Tushnet, Karlan, (n 68) 1057.
[85] Procunier V. Martiez, 416 U.S. 375 (1974), Justice Thurgood Marshal (Concurring Opinion).
[86] Richards, 'Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment' (1974), U. Pa. L. Rev.123, 45, 62 (1974) as cited by Stone, Seidman, Sunstein, Tushnet, Karlan, (n 68) 1058.

Reading, listening, speaking, and writing are skills that contribute to the personal development of a human being.[87] As a human being, a person wants to express her beliefs regarding any sort of topics. Therefore, inhibiting a free speech runs against human freedom. Additionally, the Human Rights Committee in its General Comment No. 34 referred freedom of expression as "an indispensable condition for the full development of a person."[88] Nevertheless, Barendt argues that this rationale may not hold water to the disclosure of information and extension of the right to free speech to the legal person, press and other media.[89] However, individual self-autonomy may not only be achieved through expressing one's beliefs but through reading and listening too. Access to information is also necessary to make up one's own mind and to pass a rational decision. This rationale has been reiterated by the European Court of Human Rights jurisprudence since the court in *Handyside case* described freedom of expression as "one of the basic conditions for [the] progress and development of every man."[90]

2.5.1.4 Other Rationales

a. **The tolerant Society:** Free speech helps "to develop and demonstrate a social capacity to control feelings…"[91] For instance; tolerance was the underlying value when the US Supreme Court extends the protection of the first amendment to Nazi Speech in *Collin v Smith case.*[92]

b. **Dissent and Conformity:** Dissent do benefit the society more than conformity for the development of diversified and innovative ideas. Dissent needs a flow of information, and hence, freedom of speech is necessary for dissenters and for the society as a whole.[93]

[87] Barendt (n 67) 15.
[88] General Comment No. 34, CCPR/ C/GC34 (Human Rights Committee 2011), Para 2.
[89] ibid.
[90] Handyside V. the UK (n 80), Para. 49.
[91] Bollinger, L, the Tolerant Society: Freedom of Speech and Extremist Speech in America 9-10, 107 (1986) as cited by Stone, Seidman, Sunstein, Tushnet, Karlan, (n 68), 1059.
[92] Collin v. Smith, 439 U.S. 916 (1978)
[93] Sunstein, why Society Need Dissent?, 2003 as cited by Stone, Seidman, Sunstein, Tushnet, Karlan, (n 68), 1059.

2.5.2 Protection of National Security as a Justification to Limit Freedom of Expression

The existence of freedom of expression is a significant indicator of the level of protection and respect of fundamental human rights and marked the difference between democracy and terror.[94] Violation of freedom of expression may exist in a democratic or undemocratic system. Freedom of expression, however, benefits from a democratic environment and is a value certainly contributes to the building of a democratic regime.[95] Yet, freedom of expression is not an absolute right. It can be restrained to achieve other competing interests, such as national security.

There is no international human rights law that provides a definition for national security. The Tshwane Principles give the discretion to states to define the term "in a manner consistent with the needs of a democratic society."[96] On the other hand, the Siracusa Principles provide that "[n]ational security may be invoked to justify a restriction only when they are taken to justify measures limiting [freedom of expression] only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."[97] The incidents that may justify the restriction of freedom of expression based on national security are more refined by the Johannesburg Principles.[98] The Johannesburg Principles excluded 'political independence' and added another circumstance that can justify restriction to maintain national security— "capacity to respond to the use or threat of force" that is projected either from internal or external sources.[99] It also provides that the limitation, *prima facie*, must be effective in

[94] Ligabo (n 29) Para 67.
[95] ibid, Para 72.
[96] The Global Principles on National Security and the Right to Information (2013), Principle 2 (C).
[97] The Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights, U.N. Doc E/CN.4/1985/4, Para 29.
[98] Article 19 (n 46), Principle 2.
[99] ibid, Principle 2 (a).

protecting national security.[100] The Siracusa Principles not only define what constitute a threat to national security but also give instances that cannot be a legitimate justification to limit freedom of expression. Accordingly, sporadic threats to law and order cannot justify limitation under the guise of national security.[101] Moreover, national security may not be invoked to suppress dissent voices against systemic human right violations or to commit repressive acts.[102] The Johannesburg Principles provide that the restriction should not be "unrelated to national security, such as to protect the government from embarrassment or exposure of wrongdoings…"[103]

Concession between national security and freedom of expression may be precipitated in different contexts. Governments vindicate suppression of freedom of expression by invoking national security though the genuine aim is protecting the government from embarrassment or muzzling critics. Governments' interest of maintaining the secrecy of certain types of classified information is also another facet of tension between the two values. For instance in the *Pentagon Papers case*,[104] the government claimed that divulging certain types of information threatens the national security of USA. It claimed the enjoining of the publication of the secret information that is obtained from a study conducted about US's participation in the Vietnam War. The government pleaded that if the materials were published in the New York Times and Washington Post newspapers, it would lead to "the death of soldiers, the undermining of [US's] alliance, the inability of [US's] diplomats to negotiate, and the prolongation of the war."[105] The Supreme Court held that the government has a "heavy burden of showing justification" to impose a prior restraint for the

[100] Sandra Coliver, 'Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information', in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen (eds), *'Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*' (Martinus Nijhoff Publishers 1999) 20.
[101] Siracusa Principle (n 97), Para 30.
[102] ibid, Para 32.
[103] Article 19 (n 46), Principle 2.
[104] New York Times Co. v. United States; United States v. Washington Post Co; 403 U.S 713 (1971).
[105] Stone, Seidman, Sunstein, Tushnet, Karlan (n 68), 1128.

sake of national security, but failed to meet the burden. The *per curiam* rejected the claim of the government but failed to define what the government should have shown to meet the heavy burden to vindicate its position. Justice Black and Douglas in their concurring opinion stressed the value of an informed citizenry for a democratic society.[106] They further held that suppressing freedom of expression in order to guard military and diplomatic secrets has no any real national security reason.[107] The Dissenting Justice Blackmun opined that publications should be enjoined if it "could clearly result in a great harm to the nation."[108] He borrowed a definition of "harm" from a dissenting Judge Wilkey in the *District of Columbia case* to mean "the death of soldiers the destruction of alliances, the greatly increased difficulty of negotiations with … enemies, the inability of … diplomats to negotiate."[109] He added his own lists of what a "harm" constitutes as "prolongation of the war and further delay in the freeing of United States prisoners."[110] Each list of what "harm" constitutes needs a further definition. Definitely, the definition of each list will put the judge under the protectionist position and undermine freedom of speech.

Keeping the confidentiality of information that impinges on national security has been repeatedly alleged in the ECHR jurisprudence too, to vindicate the curtailment of freedom of expression. For instance, in the *Observer and Guardian case,*[111] the government claimed the necessity of injunctions for the protection of national security. The Strasbourg Court is of the opinion that the confidentiality of certain information is necessary to protect national security. As the US Supreme Court hinted a possibility of prior restraint with a heavy burden of justification on the government (*Pentagon Papers Case*), the Strasbourg Court also maintained the Conventional validity of prior

[106] ibid, 1129.
[107] Ibid.
[108] ibid 1135.
[109] ibid.
[110] ibid.
[111] Observer and Guardian v the United Kingdom App No 13585/88 (ECtHR 26 November 1991).

restraint as long as it passes the three-part test. However, it did not set any standard to explain how far the alleged publication must be detrimental to the national security. The partly dissenting judge Petti (joined by Judge Pinheiro Farinha) argued that protection of national security might not be a reason to cover government irregularities. This stance is in congruent with the position of Justice Black joined by Douglas in *Pentagon Paper case*, who gave emphasis to the importance of the press to inform the public about government misdeeds. These cases epitomized how the control of confidential information is controversial and runs against the right to freedom of expression of the citizenry.

Government's surveillance of its citizens is also another facet of tension between freedom of expression and national security.[112] Monitoring the communication of citizens has a chilling effect on future speeches. Once an individual perceives that her communication is under the eyes of the government, she may prefer to either keep silent or censor herself. Surveillance may lead to "forced conformity"--a phenomenon whereby a person tends to make her idea in conformity with the observer's viewpoint.[113]

The criminal prosecution for publishing classified materials has a chilling effect on the exercise of the right to freedom of speech. It may not be invoked for the sake of protecting national security since the prosecution comes after the information is divulged. For instance, in *the Pentagon Papers Case*, Justice White joined by Justice Stewart held that the government has protected its national security interest by sanctioning an "unauthorized disclosure of potentially damaging information."[114] Strictly speaking, prohibiting previous restraint and pointing out the possibility of

[112] Douglas M. Fraleigh and Joseph S. Tuman , '*Freedom of Expression in the Market Place of Ideas' (*SAGE Publications*, Inc. 2011)*, 105.
[113] Ibid 106.
[114] Stone, Seidman, Sunstein, Tushnet, Karlan, (n 68) 1132.

imposing *ex post facto* penalty on the applicants may not violate the right to freedom of speech for that particular case. The criminal sanction, however, has a chilling effect, for applicants and other persons may be threaten and discouraged to exercise their right to freedom of speech.

2.6 Conclusion

Human rights may either be suspended or limited for the interest of national security. Nonetheless, both are values that must be maintained for the existence of a democratic society. Balancing is necessary in order to safeguard national security without unduly impinging on human rights. The means adopted should be rationally linked to the national security interest. Moreover, the limits on human rights should be the least intrusive, appropriate, and proportionate to protect national security.

Terrorism is a key threat to the imperative to ensure national security. It is an act intended to cause death or serious bodily injury on civilians, or the taking of hostages to provoke a state of terror, intimidate a population, and compel a government or an international organization to do or not to do an act. To prevent terrorist casualties a state may adopt counter-terrorism legislation that limits human rights under national security ground. Human rights in and of itself do not impede anti-terrorism efforts. International human rights laws allow a state to derogate or restrict the exercise of human rights. In addition, the observance of international human rights, refuge, and humanitarian laws while countering terrorism makes the response more productive.

Freedom of expression plays a pivotal role in the marketplace of ideas, self-fulfillment, and democracy. However, unregulated speech may imperil national security interests. Freedom of expression is one of the revered universal human rights, but it can be trammeled to ensure the

protection of some countervailing values like national security. Yet, the limitation should be compatible with international human rights standards that will be examined in the next section.

SECTION THREE

NATIONAL SECURITY AS A JUSTIFICATION TO LIMIT FREEDOM OF EXPRESSION IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS SYSTEMS

> "Freedom of expression is the basis of human rights, the source of humanity and the mother of truth. To block freedom of speech is to trample on human rights, to strangle humanity and to suppress truth."[1]
>
> Liu Xiaobo

3.1 Introduction

Freedom of expression as a civil right protects the sphere of individual life against state's undue interference, and as a political right, it is indispensable to participate in governmental affairs and to build a democratic society.[2] It is not only one of the fundamental human rights but also "among the most violated of rights."[3] The right to freedom of expression is both a negative and positive right. The right to freedom of expression as a negative right imposes duties of forbearance on government's measures. The government should refrain from imposing unwarranted curtailments on the exercise of the right. Freedom of expression, as a positive right, imposes on the government

[1] Clifford Coonan, 'China Condemns ''Insult'' of Award for Jailed Dissident Liu Xiaobo', The Independent, 9 October 2010,http://www.independent.co.uk/news/world/politics/china-condemns-insult-of-award-for-jailed-dissident-liu-xiaobo-2101810.html accessed 26 March 2016.

[2] Abid Hussain, Report of the Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression Pursuant to Commission on Human Rights Resolution 1993/45 (1994), E/CN.4/1995/32, 5.

[3] Michael O'Flaherty, 'Freedom of Expression: Article 19 of The International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No34' (Oxford University Press 2012), Human Rights Law Review, 5.

an obligation to protect the exercise of the right against third party interference or to take appropriate steps to create a conducive environment.[4]

Unregulated speech may expose a country to a terrorist threat. Counter-terrorism legislation uses the interest of national security as a ground to limit or suspend freedom of expression. Accordingly, this section deals with national security as a legitimate justification to restrict the exercise of freedom of expression under international and regional human rights instruments. The right to freedom of expression can be suspended to protect the interest of national security during a state of emergency. However, more often than not, states tend to limit than temporarily suspend the right to freedom of expression to secure their national security.[5] Hence, the discussion will focus on national security as a legitimate aim to restrict the exercise of freedom of expression.

The first part of this section will outline the approach taken by the international human rights instruments concerning restrictions on freedom of expression on the ground of national security. National security as a limit to freedom of expression in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights will be discussed. In order to comprehend the clear ambit of the right to freedom of expression and national security justification, General Comments of the Human Rights Committee, and the Johannesburg and Siracusa Principles will be examined. Though they are not binding, the statements of the United Nations Special Rapporteurs play a "standard-setting" role that provides an authoritative

[4] United Nations Human Rights Committee, General Comment No 34 (2011), CCPR/C/GC/34 Para 7, and *See Ozgur Gundem V. Turkey App No. 23144/93 (ECtHR 16 March 2000),* Dink V. Turkey App No. 2668/07, 6102/08, 30079/08, 7072/09 And 7124/09 (ECtHR 14 September 2010). Manfred Nowak, '*UN Covenant on Civil and Political Rights: CCPR Commentary'* (Second Ed, N. P. Engel Publisher 2005), 448.

[5] Martin Scheinin, 'Limits to Freedom of Expression: Lessons from Counter-Terrorism' In Tarlach Mcgonagle and Yvonne Donders (Eds) '*The United Nations and Freedom of Expression and Information: Critical Perspectives'* (Cambridge University Press 2015), 429.

interpretation of freedom of expression.[6] Hence, the reports of the Special Rapporteurs together with the decisions and concluding observations of the Human Rights Committee will be referred to clarify and underpin points.

The second part of this section will explore the protection of freedom of expression and national security justification under regional human rights instruments. It will discuss the scope of the norm and the extent of the national security limitation imposed on freedom of expression under the European Convention on Human Rights, the African Charter on Human and People's Rights, and the American Convention on Human Rights.

3.2 International Human Rights Instruments

The most secure nation gives the optimum protection to human rights. A government has to respect all human rights in order to maintain its national security.[7] Ensuring the protection of national security is one of the legitimate grounds to abridge the exercise of freedom of expression under international human rights instruments. However, unwarranted restriction of freedom of expression is not allowed. Hereunder, the right to freedom of expression and national security as a ground of limitation under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights will be discussed.

[6] *See* Toby Mendel,' The UN Special Rapporteur On Freedom Of Opinion And Expression: Progressive Development Of International Standards Relating To Freedom Of Expression' In Mcgonagle and Donders (n 5).

[7] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2013), A/68/362, 14.

3.2.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), "the Magna Carta of humankind"[8], has been a source of inspiration for international, regional and national human rights instruments. It is the first of its kind and the trailblazer in the development of comprehensive international human rights laws. Though it has been envisaged as a moral obligation when it is crafted as a mere declaration, most of its provisions have achieved the status of customary international law.[9]

The declaration entitles to everyone the right to freedom of opinion and expression, which includes the right to seek, receive and impart information.[10] The formulation of Article 19 is a bit different from the subsequent human rights instruments, but somehow similar to the formulation of the American Convention on Human Rights except the latter uses the word "thought" instead of "opinion". The European Convention on Human Rights incorporates the right to hold opinion under freedom of expression, on the other hand, the International Covenant on Civil and Political Rights enshrine the right to hold opinions as a distinct absolute right. Whereas the African Charter on Human and Peoples' Rights does not expressly recognize the right to hold opinions.

The right to freedom expression is a universal but not an absolute right. A limit can be set on the exercise of the right for the sake of rights and freedoms of others, morality, public order, and general welfare.[11] Yet, national security is not directly prescribed as a legitimate aim to limit the exercise of the right to freedom of expression. However, it is assumed that national security is

[8] The Domestic Application of International Human Rights Norms, In *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms*, Report of A Judicial Colloquium In Bangalore (Commonwealth Secretariat, Sept. 1988), 97, As Cited By The Article 19 Freedom of Expression Handbook, 'International And Comparative Law, Standards and Procedures' (Article 19, 1993), 10.
[9] Tarlach Mcgonagle. 'The Development of Freedom of Expression and Information With in the UN: Leaps and Bounds or Fits and Starts', In Mcgonagle and Donders (n 5), 8.
[10] The Universal Declaration of Human Rights (General Assembly Resolution 217/A 1448), Art 19.
[11] ibid, Article 29.

implicit in the legitimate purposes that are explicitly referred, like rights and freedoms of others, public order, and general welfare.[12] It is difficult, if not impossible, to maintain the rights of others, public order, and the general welfare while the security of the nation is in jeopardy. Moreover, the interpretation of the right to freedom of opinion and expression may not result in the destruction of any rights enshrined in the declaration.[13] Letting the right to freedom of expression unregulated may imperil the national security and ultimately endanger the exercise of other rights. Moreover, national security is not insisted during the drafting stage to be part of the permissible limitations because the drafters felt that it is covered under other explicitly listed limitations.[14] Therefore, it is safe to conclude national security as an implicit legitimate justification to limit the right to freedom of expression. However, any restriction should be prescribed by law, necessary in a democratic society, and tailored to achieve one of the legitimate grounds including national security. These criteria will be discussed in the next sub-sections.

3.2.2 International Covenant on Civil and Political Rights

The international Covenant on Civil and Political Rights (hereafter ICCPR or the Covenant) is adopted by the General Assembly of the United Nations (UN) in 1966 and entered into force in 1976. Though its decision is not binding, the UN Human Rights Committee (hereafter the Committee) is the organ entrusted to monitor the implementation of the Covenant by dealing with complaints against states. The Committee also gives an authoritative interpretation of the provisions of the Covenant in the form of General Comments.

[12] Article 19 Freedom of Expression Handbook (n) 19, 16.
[13] (n 10), Article 30.
[14] Gudmundur Alfredsson and Asbjorn Eide (Eds), '*the Universal Declarations of Human Rights: A Common Standard of Achievement*' (Martinus Nijhoff Publishers 1999), 636.

Article 19 of the Covenant incorporates the right to freedom of expression. This article, unlike Article 10 of the ECHR, makes the right to hold opinions (19 (1)-Private freedom) discrete from freedom of expression (public freedom) stipulated in Article 19 (2).[15] The right to hold opinions is not enumerated in Article 4 as non-derogable right. However, Article 19 (1) entitle everyone to enjoy the right without any interference and the Human Rights Committee regarded it as a right with an absolute character, non-derogable and to which reservation is not allowed.[16]

The right to freedom of expression encompasses "freedom to seek, receive and impart information and ideas of all kinds."[17] Article 19 (2) of the Covenant gives an individual the right of access to information and imposes an obligation on the government to disclose public and personal information.[18] Moreover, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, as a recent development, noted the right of access to information as one of the constitutive elements of Article 19**.**[19] Besides, the choice of means and forms of communication to convey information have also entitled the protection of Article 19. Additionally, non-verbal communications, for instance, raising a banner in *Kivenmaa v. Finland case*, forms part of the right to freedom of expression.[20]

The freedoms enumerated in Article 19 impose responsibilities on the right holder. States have also an obligation to interfere with the exercise of the right to freedom of expression when it unduly

[15] Manfred Nowak, '*UN Covenant on Civil and Political Rights: CCPR Commentary'* (Second Ed, N. P. Engel Publisher2005), 440.
[16] United Nations Human Rights Committee, General Comment No. 10: Freedom of Expression (Art. 19) (1983), Para 1, and General Comment No. 34 (n4), Para 5.
[17] International Covenant on Civil and Political Rights, Entered into Force 23 March 1976, Art 19 (2).
[18]Abid Hussain, Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression (1999), E/CN.4/1999/64, Para 12. General Comment 34 (n 4) Para 18.
[19] Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2010), A/HRC/14/23, Para 24, 5, and David Kaye, 'Report of the Special Rapporteur on the Promotion and the Protection of the Right to Freedom of Opinion and Expression' (2015), A/70/361, Para 5, 4.
[20] Kivenmaa V. Finland, Communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990 (1994).

intrudes on the interest of others.[21] The concept "special duties and responsibilities" in Article 19 shoulders the media an obligation to refrain from abusing its rights against individuals.[22] Hence, freedom of expression is not an absolute right but it is a right that can be limited for the protection of higher values, like the protection of national security. National security can be invoked to trammel the exercise of freedom of expression based on Article 19 and 20. National security restrictions may take the form of criminal, civil or/and administrative sanctions. However, the restrictions should be construed narrowly so that it may not undermine the right to freedom of expression.[23] Moreover, limits on freedom of expression should fall under the permissible ambit of Article 19 (3).

The interference to the exercise of freedom of expression must "meet a strict test of justification" lest it unduly impinges on the right.[24] First, a legislative enactment should provide the restriction for the protection of national security (prescribed by law). The law must be "accessible" and formulated in a "sufficient precision" so that individuals can reasonably predict what their action entails.[25] It should be compatible with the provisions, aims and objectives of the Covenant and other international human rights laws.[26] If a law is framed too vaguely, it may lead to arbitrariness and discourages individuals from exercising their freedom of expression fearing the consequence. Therefore, it should be formulated as specific as possible.[27] Additionally, the Special Rapporteur on promotion and protection of the right to freedom of opinion and expression pointed out that it

[21] Hussien (n 2), Para 36, 10.
[22] ibid, Para 37, 10.
[23] General Comment No 34 (n 4), Para. 21.
[24] *Tae Hoon Park V. Republic of Korea*, Communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995 (3 November 1998), Para 10.3.
[25] General Comment No 34 (n 4), Para 25.
[26] ibid, Para 26, and *Toonen V. Australia*, Communication No. 488.1992 (1994), Para 8.3.
[27] General Comment No 34 (n 4), Para 27. For Instance Concluding Observation on Russian Federation (CCPR/CO/79/RUS) (2003), Para 20.

is a *prima faci* violation of the right if the executive organ set forth the limitation without constitutional delegation.[28] The law should have a mechanism to ensure whether government officials are implementing it under the ambit of the rule of law.[29] In case the law is not applied legitimately, procedures and remedies must be provided to challenge the abusive implementation, "includ[ing] a prompt, comprehensive and efficient judicial review."[30]

Second, the restriction of freedom of expression must be imposed to achieve legitimate aims like national security. The Human Rights Committee emphasizes that article 19 (3) may not be invoked to suppress freedom of expression unless it has a genuine purpose of maintaining national security.[31] National security may legitimately justify the restriction if it is meant "to protect a country's existence, or its territorial integrity […] or its capacity to respond to the use or threat of force."[32] The Special Rapporteur on promotion and protection of the right to freedom of opinion and expression is of the opinion that national security may only be invoked when a direct threat to the entire nation happen.[33] The Johannesburg Principles provide instances, endorsed by the Special Rapporteur[34], which cannot warrant invoking national security as a legitimate defense to muzzle freedom of expression. Hence, national security may not be a legitimate justification "to protect the government from embarrassment or exposure of wrongdoings."[35] Moreover, national security may not be a pretext for thwarting the flow of information regarding the function of public

[28] Hussien (2), Para 42, 11.
[29] General Comment No 34 (4), Para 25; Rue (n 19), Para 79, 13. The burden of proof of the compatibility of the law with international human rights instruments lies with the government.
[30] Rue (n 19), Para 79, 14.
[31] General Comment No 34 (4), Para 30.
[32] Article 19, The Johannesburg principles on National Security, Freedom of Expression and Access to Information (1996) International Standards Serious, Principle 2 (A).
[33] Hussain (n 2), Para 48, 12.
[34] Hussain (n 18), Para 22-23, 8-9.
[35] Article 19 (n 32), Principle 2 (B).

institutions or "commercial sector, banking, and scientific progress"[36], to create a hegemonic ideology or to control labor strikes.[37] The Special Rapporteur in his report on the mission to Malaysia noted that freedom of expression might not be trammeled "on the mere ground that it might possibly jeopardize national security."[38] The government must specify "the precise nature of the threat" posed by the alleged expression or information to legitimately invoke national security.[39] In somehow related fashion with the US's "clear and present danger" [40] test, the Human Rights Committee dictates the need for establishing a "direct and immediate connection" between the alleged expression and the threat.[41] States may take various measures, like enacting counter-terrorism legislation, to maintain their national security. However, the law that prohibits the encouragement of terrorism, extremist activity, praising, justifying or glorifying terrorism may not stifle freedom of expression.[42]

Third, the restriction should be necessary in a democratic society. Unlike the European Convention on Human Rights (article l0 (2)), ICCPR (19 (3)) does not explicitly require a restriction to be "necessary in a democratic society." However, the Human Rights Committee invoke the principle while scrutinizing limitations.[43] The Committee is of the opinion that the restriction must be proportionate and necessary to the aim sought.[44] The Special Rapporteur on promotion and

[36] General Comment No 34 (4), Para 30.
[37] Article 19 (n 32), Principle 2 (B).
[38] Abid Hussain, 'Report of the Special Rapporteur on the Promotion and the Protection of the Right to Freedom of Opinion and Expression' (1998), E/CN.4/1999/64/Add.1, Para 66, 13.
[39] *Johng-Kyu Sohn V. Republic of Korea*, Communication No 518/1992 (1995), Para 10.4; and *Tae Hoon Park V. Republic Of Korea,* Communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995 (3 November 1998), Para 10.4.
[40] *Schenck V. United States*, 249 U.S. 47 (1919).
[41] General Comment No 34 (n 4), Para 35.
[42] ibid, Para 46.
[43] O' Flaherty (n 3), 12, As Cited By Esther Janssen, *'Faith In Public Debate: On Freedom of Expression, Hate Speech and Religion in France and Netherlands' (*International Publishing Ltd, 2015), 150.
[44] *Toonen V. Australia*, Communication No 488/1992 (1994), Para 8.3, *Velichkin V. Belarus*, Communication No 1022/2001 (2005), Para 7.3; and General Comment No 34 (4), Para 22, 33-36.

protection of the right to freedom of opinion and expression noted that a restriction should be tailored to address a "pressing social need".[45] The limitation must be necessary and the least intrusive means to freedom of expression. A reasonable and proportionate limitation imposed during the time of war may not be equally valid when peace is restored. Therefore, depending on the prevailing situation, the imposed restriction should be reviewed and its validity should be scrutinized periodically.[46]

3.3 Regional Human Rights Instruments

3.3.1 The European Convention on Human Rights

The European Convention on Human Rights (the Convention) together with the European Court of Human Rights (the Court) is the guarantors of the right to freedom of expression in the Council of European. Article 10 (1) of the Convention provides the right to freedom of expression for everyone, either physical or legal person. It also stipulates the elements that freedom of expression constitutes. Accordingly, freedom of expression encompasses freedom to hold opinions and to receive and impart information and ideas. The right not to be compelled to speak has also given the protection of Article 10. In *K v Austria*, [47] a person fined and sentenced to five days of detention for his failure to testify against himself. The Court held that the right to freedom of expression impliedly recognizes the right to remain silent. Hence, compelling the applicant to speak violates Article 10 of the Convention. If it is under the permissible restrictions, the right to freedom of expression "is applicable to not only information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb."[48]

[45] Rue (n 19), Para 79.
[46] ibid, Para 79, 14.
[47] K v Austria App No 16002/90 (ECtHR 13 October 1992).
[48] Observer and Guardian v the United Kingdom App No (ECtHR 13585/88), Para 59.

Article 10 of the Convention gives protection not only for the substance of ideas expressed but also for the forms and means of ideas in which they are conveyed.[49]

Ostensibly, freedom of expression is protected against interference by public authorities, since Article 10 (1) guarantee the right "without interference by public authority." However, the right to freedom of expression has a horizontal application too and imposes a duty on the government to protect individuals from undue interference.[50]

As evidenced in the *Tarsasag A Szabadsagjogokertv v. Hungary*, the Strasbourg Court recognizes the right to access to information by virtue of a broader interpretation of "freedom to receive information", and is of the opinion that information of a public interest shall be accessed without impediments posed by the government. It is a violation of Article 10 of the Convention if the government thwarts the flow of information of public interest due to an information monopoly held by its authorities.[51] The extension of Article 10 to encompass the right to access to official documents is an important paradigm shift in the Court's long-standing approach of the refusal of applying the article in cases of failure of the government to open access to public documents.[52] This paradigm shift may be precipitated by the Reports of the Special Rapporteur and the position of Inter-American Court of Human Rights, which gives a guarantee to the right of all person to

[49] For Instance, *See* Jersild V Denmark App No, 15890/89 (ECtHR 23 September 1994), Para 31; and Autronic AG V. Switzerland App No 12726/87 (ECtHR 22 May 90) Respectively.

[50] *For Instance See* Ozgur Gundem v Turkey App No 23144/93 (ECtHR 16 March 2000), Dink v Turkey App No. 2668/07, 6102/08, 30079/08, 7072/09 And 7124/09 (ECtHR 14 September 2010)

[51] Youth Initiative For Human Rights V Serbia (Application No 48135/06 ECtHR 25 September 2013), Though the Strasbourg Court failed to directly refer 'the right to access information", it recognized implicitly when it decided that inhibiting the flow of information that serve for the public debate amounts to a violation of article 10 of the Convention.

[52] Dirk Voorhoof, '*Freedom Of Expression, Media And Journalism'*, 59-103 In Peter Molnar (Ed), *Free Speech And Censorship Around The Globe*, (Central European University Press, 2014), 99-101; Justice Nicol, Gavin Millar QC, And Andrew Sharland, *'Media Law And Human Rights'* (Second Edn, Oxford University Press 2009),

request access to information and existence of a positive duty of a state to furnish information unless it has justification to limit its flow.[53]

Pursuant to the Court's jurisprudence, denial of clearly established historical facts, such as the Holocaust, is categorically removed from the protection of Article 10 by virtue of Article 17, as an abuse of right.[54] The Court's acceptance of the criminalization of Holocaust denial is not simply because it is a clearly established historical fact, "but in that, its denial, even if dressed up as impartial historical research, must invariably be seen as connoting an anti-democratic and anti-Semitism."[55] The Court is of the opinion that Holocaust denial is against a democratic society that the Convention aspires to build and protect. According to the Court, denying crimes against humanity shakes the foundation and darken the aspirations of the Convention.[56]

In order to legitimize restrictions, alike the ICCPR (but without the word "special"), the right to freedom of expression is backed with "duties and responsibilities." Hence, it may be subject to "formalities, conditions, restrictions or penalties" under the supervision of the European Court of Human Rights.[57]

Any curtailment of the right to freedom of expression should be "prescribed by law." This requirement entails that the alleged law ought to fulfill certain qualities like foreseeability and accessibility.[58] The law must be "formulated with sufficient precision to enable the citizen to regulate [her] conduct; [she] must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequence which a given action may entail."[59]

[53] *Claud Reys Et Al V Chile*, Case 12.108 (IACtHR 19 September 2006).
[54] Garaudy V. France (Application No 65831/01, ECtHR, 24 June 2003)
[55] Perincek V Switzerlalnd App No 27510/08, (ECtHR, 15 October 2015), Para 243
[56] ibid, Para 21.
[57] The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 10 (2).
[58] Delfi As V. Estonia App No 64569/09 (ECtHR 16 June 2015) , Para 120
[59] ibid, Para. 121

This does not mean that the law must be absolutely foreseeable. The Court takes into cognizant that a law may be couched vaguely where its certainty and interpretation may depend on the reality on the ground. Moreover, the precision of a law is relative that may depend on the content of the law, the area that it deals, and the number and the status of the addressee.[60] However, the law should not be too vague "to lead the individual to abstain from exercising their freedoms" or to create a risk of arbitrariness.[61] Similarly, in the US jurisprudence, a vague law is considered as unconstitutional since it has a chilling effect on the exercise of freedom of speech.[62]

According to the Inter-American Court of Human Rights, the restrictive law must be enacted by the legislative or constitutionally delegated branch of the government in accordance with the constitution or other domestic laws.[63] The principle of legality requires a formal proclamation of the law and the existence of a system that controls the implementation of the law.[64] Seemingly, the ECHR focuses on the material requirements (the quality) of the law and the IACtHR focuses on the formal and procedural requirements too. However, in the ECtHR set-up too, a legally empowered organ should adopt the law, and for accessibility, the law must be formally proclaimed. The law must be compatible with the rule of law and provide an effective supervision of the executive.[65] The principle of legality in the American Convention on Human Rights is more

[60] ibid, Para. 122.
[61] Oliver De Schutter, *'International Human Rights Law: Cases, Materials, Commentary'* (Second Edn, Cambridge University Press 2014), 296.
[62] Nicol and Millar (n 52), 2.38.
[63] Advisory Opinion, The Word 'Laws' In Article 30 Of The American Convention on Human Rights, Inter-American Court of Human Rights, OC-06/86, 1986, Para.22, 36.
[64] Ibid.
[65] Rotaru V. Romania App No 28341/95 (ECtHR 4 May 2000), Para 59.

stringent than the ICCPR and ECHR, for the latter give recognition for a limitation imposed by unwritten law, such as the common law.[66]

The restriction should be targeted to achieve one or more of the legitimate aims provided under Article 10 (2). The right can be restrained "in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[67] Since the legitimate aims are framed in a broad term, states can easily make their restrictions fall under any of the lists.[68]

As the former President of the ECtHR Luzius Wildhaber noted the Convention should not be an impediment of states to secure democracy and the rule of law.[69] Moreover, states have a positive obligation to protect its citizenry against threats. Therefore, they can maintain their national security and invoke it as a legitimate aim to vindicate their measures taken against freedom of expression.

Nevertheless, the restriction must be "necessary in a democratic society." There should be a "pressing social need" that require the limitation of the right to freedom of expression.[70] The

[66] Viviana Krsticeviv, Jose Miguel Vivanco, Juan E. Mendez and Drew Porter, 'The Inter-American System of Human Rights Protection: Freedom of Expression, "National Security Doctrines" and The Transition to Elected Government', In Sandra Coliver, Paul Hoffman, Joan Fitzpatrick and Stephen Bowen (eds), Security and Liberty: Freedom of Expression and Access to Information (Martinus Nijhoff Publishers 1999), P. 173.
[67] ECHR (n 57), Article 10 (2).

[68] Karel Rimanque, Noodzakelijkheid In Een Denicratische Samenleving—Een Begrenzing Van Beperkingen Aan Grondrechten In Liber Amicorum Frederic Dumin (Antwerp,Kluwer, 1983) 1217,1219 As Cited By Stefan Sottiaux, Terrorism and Limitation of Rights: The ECHR and The US Constitution (Hart Publishing 2008), 43.
[69] Jan Sikuta, 'Threats of Terrorism and The European Court Of Human Rights' (2008), European Journal of Migration and Law 10, 2.
[70] Vajnai v Hunagary App No 33629/06 (ECtHR 8 July 2008), Para 43.

pressing social need must correspond to the protection of a real and present, not a speculative danger against national security.[71] Though the national authorities have a margin of appreciation to determine the existence of a pressing social need, the European Court of Human Rights has the mandate to ascertain whether the measure taken was proportionate, relevant and sufficient.[72] The national authorities must base the restriction "on [an] acceptable assessment of relevant facts and applied standards" that are in conformity with the principles enshrined in Article 10.[73] There should be a rational connection between the means and the end sought to be achieved (appropriateness).[74] Additionally, the means should not transcend the limit that is necessary to achieve the objective justifying the interference (necessity test).[75]

3.3.2 The American Convention on Human Rights

The right to freedom of expression is enshrined in Article 13 of the American Convention on Human Rights (ACHR). Accordingly, everyone has the right to seek, receive, and impart information and ideas of all kinds by any means of communication. The right has an "individual dimension" which allows everyone to express her opinion and a "collective dimension" that entitles the society the right to obtain information.[76]

In its advisory opinion, the Inter-American Court of Human Rights stated that the ACHR has given the most generous breathing space to freedom of expression compared with the ICCPR and

[71] ibid, Para 49, Para 55.
[72] ibid; and Animal Defenders International v The UK App No 48876.08 (ECtHR 22 April 2013), Para 100.
[73] Vajnai v Hungary (n 70), Para 45.
[74] Schutter (n 61), 313.
[75] ibid; *and* Hadjianastassiou v Greece, App No 12945/87 (ECtHR 16 December 1992), Para 47.
[76] Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights (2009), OEA/Ser.L/V/II, Para 13.

ECHR.[77] Moreover, the Court asserted that restrictive grounds that are not envisaged by the drafters of the Convention could not be invoked to limit freedom of expression.[78] For instance, unlike the ACHR, *ordre public* in the ICCPR, and territorial integrity in the ECHR are grounds that can be invoked to restrict freedom of expression. Additionally, distinct from other major human rights instruments, the ACHR explicitly prohibit previous censorship except for the moral protection of childhood and adolescence in the case of public entertainment.[79]

Though prior censorship is prohibited as a principle, *ex post facto* liability may be attached to the exercise of freedom of expression to ensure the protection of national security and other interests. Alike other international and regional human rights instruments, the restriction should traverse under certain conditions and must be compatible with democratic principles.[80] The Inter-American Court in its advisory opinion pointed out that subsequent liability must be based on priorly established grounds that are expressly and precisely prescribed by law.[81] Additionally, the restriction should be "necessary to ensure" the protection of national security and other interests.[82]

Article 30 of the Inter-American Convention requires the restrictive law to be enshrined in a formal law "enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."[83] The IACtHR pointed out that the requirement of "general interest" refers the law to be enacted for the "general welfare", which is a concept that has "the purpose of protect [ing the] rights of man and the creation of circumstances that will permit [her]

[77] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985), Para 50; and Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights (2009), OEA/Ser.L/V/II, Para 3.
[78] ibid, Para 51-52.
[79] American Convention on Human Rights, Entered in to Force 18 July 1978, Article 13(2) and (4).
[80] Special Rapporteur (n 76), Para 66, 23.
[81] Advisory Opinion, Membership…Para 39.
[82] Ibid.
[83] IACtHR (n 77), Art. 30.

to achieve spiritual and material progress and attain happiness."[84] The restrictive law may not be vague and ambiguous, for it may result in arbitrariness and disproportionate burden.[85] Moreover, the law may only be applied to the aim designed to achieve---the protection of national security for that matter.[86]

According to the Inter-American Court of Human Rights, the restrictive law must be enacted by the legislative or constitutionally delegated branch of the government in accordance with the constitution or other domestic laws.[87] The governmental authorities have no an unfettered freedom to abridge the right to freedom of expression.[88] The principle of legality requires a formal proclamation of the law and the existence of a system that controls the implementation of the law.[89] In the American Convention on Human Rights, legality requirement is more stringent than the ICCPR and ECHR, for the latter gives recognition for a limitation imposed by unwritten law, such as the common law.[90] Moreover, the principle of legality should be satisfied. For instance, a criminal law may not have retrospective application except for the benefit of the accused.[91] Nor the law that set the limits may narrow down constitutional principles.[92]

There is no identical phrase to "necessary in a democratic society" in the ACHR. However, the Inter-American Court interpret the phrase "necessary to ensure" with similar fashion to how the

[84] American Declaration of the Rights and Duties of Man, As Cited IACtHR (n 63), Para 29.
[85] Special Rapporteur (76), Para 70, 25.
[86] IACtHR (63),Para 28.
[87] IACtHR (n 63), Para 36.
[88] ibid, Para 27.
[89] ibid.
[90] Krsticeviv, Vivanco, Mendez and Porter (n 66), 173.
[91] ACHR (n 79), Art 9.
[92] Claudio Grossman, 'Challenges to Freedom of Expression within the Inter-American System: A Jurisprudential Analysis' (2012), *Human Rights Quarterly, 34, 361 (2012)*, American University, WCL Research Paper No. 2013-01, 31.

ECHR interprets "necessary in a democratic society" test. Therefore, the restriction should be necessary, least intrusive, and precipitated by a "compelling governmental interest."[93]

The restriction would not be legally permitted unless the protection of national security tilt over the individual and societal right to exercise their freedom of expression.[94] Besides, it ought to be proportionate to the aim it sought to achieve—the protection of national security.[95] According to the IACtHR, three factors should be taken into consideration in order to weigh whether the measure is proportionate. First, the degree to which the national security is affected, second, the importance of maintaining national security, and third, whether the protection of national security justifies the restriction of freedom of expression.[96]

3.3.3 African Charter on Human and Peoples' Rights

African Charter on Human and Peoples' Rights (hereafter ACHPR or the Charter) gives the weakest and state-centric formulation of freedom of expression compared to other major human rights instruments.[97] Structurally also, Article 9 is different from other regional and international human rights documents. The Charter only recognizes the right to receive information. There is no direct reference to the right to "seek and impart information." However, it is possible to conclude that the right to impart information is implicitly recognized under the phrase the "right to receive information." The speaker must first transfer her information so that the receivers can exercise their right to receive information. Impeding the right to impart information is inhibiting the right

[93] IACtHR (77), Para 46.
[94] ibid.
[95] Special Rapporteur (n 76), Para 88, 30.
[96] *Kimel V. Argentina* (IACtHR 2 May 2008), Para 84. The Special Rapporteur also endorsed this analysis in his report. (n 76), OSA, Para 89, 31.
[97] Claude E. Welch,Jr., 'The African Charter and Freedom of Expression in Africa' In Sandra Coliver, Hoffman, Fitzpatrick and Bowen (n 66) 152, 153; Cristiano d'Orsi, 'Applicable Norms to Freedom of Expression in Sub-Saharan Africa: An Assessment of Anglophone Western and Southern Africa' (2010), Sri Lanka Jil 215, 22, 1, 228, 229.

to receive it. This line of argument can also be inferred from the decision of the African Commission, which recognizes the dual dimensions of the right to freedom of expression—individual right to impart and others' right to receive information.[98] Generally, the Commission interpreted the right to freedom of expression entitlements enshrined in the Charter in line with other jurisdictions. Hence, the right to freedom of expression with its components the right to seek, receive and impart information of any kind across frontiers is recognized as one of the fundamental human rights.[99]

Article 9 (2) of the Charter protects the right to express and disseminate opinions within the law. Unlike other major human rights instruments, this article does not make a direct reference to the right to hold opinions. Nor the right to express and disseminate is extended to information or ideas. Yet, the right to express opinions presuppose the right to hold opinions. Therefore, it is implicit in the right to express and disseminate opinions. The right to hold opinions is an absolute right in ICCPR, but the Charter does not explicitly recognize its absolute nature.

The Declaration of the Principles of Freedom of Expression in Africa outlawed an arbitrary interference with the right to freedom of expression.[100] However, since the enjoyment of the right "carries special duties and responsibilities with it", it can be trammeled for the rights of others, collective security, morality, and common interest.[101] The Charter does not prescribe the common three-part tests. Yet, the African Commission recommends that any limitation of freedom of

[98] Scanlen & Holderness / Zimbabwe Commission Communication No 297/05 (ACoHPR 2009), Para 108; *And* Sir Dawda K. Jawara / Gambia 147/95-149/96 (ACoHPR 2000), Para 65.
[99] Monim Elgak, Osman Hummeida and Amir Suliman /Sudan Communication 379/09 (ACoHPR 2015), Para 114, 23.
[100] The Declaration of The Principles of Freedom of Expression In Africa, The African Commission on Human And Peoples' Rights (2002) Meeting at its 32nd Ordinary Session, In Banjul, The Gambia, Art II (1).
[101]African Charter on Human and Peoples' Rights (21 October 1986), Article 27; *And* Monim Elgak *Etal* V Sudan, Para 114, 23.

expression should be prescribed by law, serve a legitimate aim, and necessary in a democratic society.[102]

Any State Party to the Charter may not set aside the right to freedom of expression by its domestic law. The restrictive law should be consistent with other rights incorporated in the Charter and other international human rights instruments and practices.[103]

The exact phrase "national security" is not couched as a legitimate aim that vindicates the restriction of freedom of expression. The Charter employed the phrase "collective security" which is considered by the Commission as synonymous with national security.[104] Hence, the enjoyment of the right to freedom of expression can be limited to preserve the interest of national security. Nonetheless, to legitimately curtail freedom of expression, there should be a rational link between the expression and the threat to the national security.[105] The menace should also be "a real threat of harm" to the national security.[106] The Commission draw inspiration from other human rights systems and repeatedly cite the interpretation of freedom of expression and its limits in the Inter-American and European Human Rights Court jurisprudences. Therefore, the discussion held above regarding the "necessary in a democratic society" test squarely fits the African jurisprudence.

[102] Scanlen & Holderness / Zimbabwe (n 98), Para 107; *And* Monim Elgak Etal V Sudan (n 99), Para 114, 23; *And* The Declaration of The Principles of Freedom of Expression In Africa, The African Commission on Human And Peoples' Rights (2002) Meeting at its 32nd Ordinary Session, In Banjul, The Gambia, Art II (2).
[103] Scanlen and Holderness (98), Para 112-116; *and* **Article** 19 /the State of Eritrea, Communication No. 275/ 2003 (ACoHPR 2007).
[104] *For Instance* Monim Elgak, Osman Hummeida and Amir Suliman /Sudan (n 99), Para 115, 24.
[105] Declaration of Principle of Freedom of Expression in Africa (100). Article XIII (2).
[106] Ibid.

3.4 Conclusion

Freedom of expression enunciated as a fundamental human right in the international and regional human rights instruments. The first comprehensive international human rights instrument, UDHR, incorporates the right to freedom of expression under Article 19. It entitles to everyone the right to freedom of opinion and expression, which constitutes the right to seek, receive and impart information. The textual structure of Article 13 of the ACHR is similar with UDHR except for the latter employ the word "thought" instead of "opinion". On the other hand, Article 19 of ICCPR prescribe the right to hold opinions as a discrete right. In the European Convention on Human Rights, the freedom to hold opinions is embodied under the right to freedom of expression. Distinct from the international human rights instruments and ACHR, the European Convention on Human Rights and ACHPR do not incorporate the right to seek information as part of freedom of expression.

Freedom of expression can be trammlled to protect other values of equal or higher importance. The Universal Declaration of Human Rights does not explicitly stipulate the interest of national security as an exception to limit the exercise of freedom of expression. The rest instruments prescribe national security ("collective security" in ACHPR) as a legitimate aim to vindicate the restriction imposed on freedom of expression.

Despite some textual differences, there is a convergence of the interpretation of the right to freedom of expression and its limits by the monitoring bodies and different authorities (Courts, Commission, Committee, Special Rapporteurs and different Principles). The right to freedom of expression is construed broadly to include the right to hold opinions, to seek, receive, and impart information, and the right of access to information. This right can be trammeled to ensure the protection of national security. The monitoring bodies are in congruence regarding the need of the

triple-test while applying a limit. Therefore, a restriction should be prescribed by law, serve a legitimate aim, and necessary in a democratic society.

Generally, there is a profound tension between national security and freedom of expression. To lighten, if not avoid, the tension, international human rights instruments have given a legitimate space to states to legitimately limit the exercise of freedom of expression for ensuring the protection of national security. However, states have to make sure that the restriction should not unduly impinge on freedom of expression. The restriction must fall under the permissible limit as discussed above.

Ethiopia is a State Party to ACHPR and ICCPR. Moreover, Article 9 (4) of the Ethiopian Constitution provides that "all international agreements ratified by Ethiopia are an integral part of the law of the land." Besides, Article 13 (2) of the Constitution stipulates that the human and democratic rights chapter of the document shall be interpreted in conformity with principles of international instruments that Ethiopia pledged to observe. Therefore, the interpretation of freedom of expression in ICCPR and ACHPR systems as discussed above is relevant and applicable for the domestic interpretation and protection of the right. Law making bodies should take the above-discussed interpretation of freedom of expression and its limits into consideration when they enact a law. Courts and administrative organs should also observe their constitutional obligations and give protection to freedom of expression in a manner conforming to international and regional standards that Ethiopia is a party.

SECTION FOUR

FREEDOM OF EXPRESSION AND THE ETHIOPIAN ANTI-TERRORISM PROCLAMATION

4.1 Introduction

The security—freedom paradox is the major dilemma that countries are currently confronting. Security legislation like anti-terrorism law widens executive power without judicial supervision against human rights. Governments not only to maintain legitimate national security and public order but also to silence political dissidents use their power. In their joint declaration of 2010, the Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression and other international mandate holders working on freedom of expression singled out ten key challenges in a decade starting from 2010.[1] The eighth challenge to freedom of expression is governments' over-zealous national security concern that aims to keep their security tight.[2] The groups also picked counter-terrorism legislation as a threat to freedom of expression. True to their words, anti-terrorism laws are undermining the right to freedom of speech.[3]

Like other nations that are prompted by 9/11 incident to devise counter-terrorism mechanisms, Ethiopia, though not immediately, has adopted its anti-terrorism Proclamation in 2009 "…to prevent, control and foil terrorism, and […] in order to bring to justice suspected individuals and

[1] A/HRC/14/23/Add.2, Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression: Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade (2010).
[2] ibid, 6.
[3] Article 19, Comment on Anti-terrorism Proclamation of Ethiopia (2010), 3.

organizations [...]."[4] However, it is hardly escaped criticisms from human rights groups, politicians, peer states, journalists and international human rights authorities.

Amnesty International and other human rights groups reiterated that the terms used to define terrorism and terrorist activities in the Proclamation are imprecise, and vague that can be used to criminalize a legitimate exercise of freedom of expression.[5] In its evaluative comments, Article 19 said: "[t]he Proclamation seriously undermines freedom of expression rights in a manner that is unlikely to improve security."[6] Human rights groups have repeatedly urge Ethiopia not to use its anti-terrorism legislation as a pretext to impinge on freedom of expression.[7] The UN Special Rapporteur on freedom of opinion and expression, the OSCE representative on freedom of the media and the OAS Special Rapporteur on freedom of expression jointly condemn the use of counter-terrorism measures as a pretext to stifle human rights.[8] Similarly, Amnesty international vociferously criticize how the Ethiopian government is implementing its anti-terrorism law.[9] Even though some of the provisions of the law are similar with other democratic countries[10], its implementation in the absence of due process negatively infuses all human rights that the country has pledged to respect and protect. For instance, at times, the evidence adduced by prosecutors are

[4] Federal Negarit Gazeta, Anti-terrorism Proclamation No. 652/2009, preamble, Para 4. Hereinafter "the Proclamation."
[5] ibid; Oral Statement by Amnesty International to Special Rapporteur on Freedom of Expression and Access to Information in Africa (2011), 1.
[6] ibid (n 3), 11.
[7] Amnesty International Submission to the UN Universal Periodic Review, Ethiopia: Failure to Address Endemic Human Rights Concerns (2014), 6; Amnesty International Public Statement, Ethiopia: Concerns that Anti-Terrorism Law is Being Used to Suppress Freedom of Expression (2011), UN Experts Urge Ethiopia to Halt Violent Crackdown on Oromia Protesters, Ensure Accountability for Abuses (2016) file:///C:/Users/Me/Desktop/UN%20experts%20urge%20Ethiopia%20to%20halt%20violent%20crackdown%20on%20Oromia%20protesters,%20ensure%20accountability%20for%20abuses.html
[8] ibid (n 1), 1.
[9] The Oakland Institution and Environmental Defender Law Center also conclude that the law at its face value and application violates international human rights standards. The Oakland Institution and Environmental Defender Law Center, Ethiopia's Anti-terrorism Law: A tool to Stifle Dissent (2015), 5.
[10] For instance, alike the Ethiopian proclamation, the counter terrorism laws of Austria and United Kingdom criminalize encouraging terrorism.

not "sufficient and relevant" for conviction. Rather they are mere critical articles and journalistic reporting that epitomize a legitimate exercise of freedom of expression.[11] Besides, evidence obtained through illegal means including torture, inhuman and degrading treatments are used to prosecute and convict individuals.[12]

Ethiopia is infamous for using its anti-terrorism legislation to silence political dissents, critical voices, and journalists who express innocent concerns against national policies, laws, and their implementations. The government has repeatedly failed to cooperate with the UN human rights groups (failed to accept and implement recommendations, to respond to communications, and to allow independent groups to investigate alleged human rights violations).[13] Against this backdrop of human rights violations and muzzling of freedom of expression, the present section will be devoted to discussing how the Ethiopian anti-terrorism law limits freedom of expression. The two relatively democratic jurisdictions, South Africa and Council of Europe, will be discussed to evaluate the status given and the protection accorded to freedom of expression under the Ethiopian counter-terrorism law.

[11] Amnesty International*, Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia* (Amnesty International Ltd 2011),

[12] Political prisoners usually complain before courts that they meted out torture and inhuman and degrading treatments by security agents and investigative police officers who aligned with the ruling government. For instance, *See,* Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (2012).

[13] Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment (2012); United Nations Human Rights Council, Opinions Adopted by Working Group on Arbitrary Detention, 66th session (2012); Ethiopia's Response to Recommendations in A/HRC/27/14 (2014), UPR, 2nd Review, Session 19.

4.2 Freedom of Expression

The FDRE Constitution dispenses the right to freedom of expression to everyone as follow.[14]

> *Article 29*
>
> *Right of Thought, Opinion and Expression*
>
> *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 honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.*
>
> *7. Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.*

Article 29 (1) and (2) are the verbatim copies of Article 19 (1) and (2) of ICCPR except the former as a principle provides freedom of expression *without any interference.*[15] The Constitution provides the right to hold an opinion absolutely. Though the title of the provision includes *thought*, the main body of the article failed to incorporate it. It may be left because thought is the process

[14] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995 (herein after the Constitution or the FDRE Constitution).

[15] In its General Comment 34, the Human Rights Committee recognize freedom to hold opinion as an absolute right. CCPR/C/GC/34, Human Rights Committee, General Comment No. 34 (2011), 102nd Session.

of holding opinions and guaranteeing the latter necessary protects the former. Generally, the provision enunciates the private freedom (holding an opinion) and the public freedom (the public and social dimension of freedom of expression, which includes the right to seek, receive and impart any information or ideas).

Freedom of opinion and expression are provided in separate provisions in the Constitution of the Republic of South Africa[16] while it is part of freedom of expression in the European Convention on Human Rights. In line with ICCPR and General Comment No 34, the Ethiopian Constitution provides freedom of opinion as a distinct right to freedom of expression in which any interference is not allowed. There is no prohibition of interference in the exercise of freedom of opinion in the Constitution of South Africa. Nor is the right to hold opinions recognized as a non-dergoable right in Article 37. It is not also clear from the Constitution of South Africa whether freedom of opinion is recognized as a discrete right or part of freedom of expression, and whether it is guaranteed without interference. However, it is hardly possible to suppress freedom to hold opinion due to the nature of the right itself, which is an inner activity of human being. Therefore, it is safe to conclude that the right to hold an opinion is an absolute right in South Africa as stipulated in ICCPR and underpinned by General Comment No 34.

Freedom of media (including the press) and artistic creativity are protected in the Constitutions of South Africa and Ethiopia.[17] Though artistic creativity and freedom of the press and other media are not specifically enumerated in the European Convention with similar fashion to the two Constitutions, the right to use art and media to express an opinion is guaranteed.[18] The ECHR

[16] Constitution of the Republic of South Africa No. 108 of 1996, Article 15 and 16.
[17] ibid (n 14), Article 29 (3).
[18] For instance, Sunday Times v. the UK (ECtHR Application No 6538/74 26 April 1979), Jersild v. Denmark (ECtHR Application No 15890/89 23 September 1994), Observer and Guardian v. the UK (ECtHR Application No 13585/88

reiterated the vital role played by the media to censure and control governments and to create an informed citizenry, which is necessary for democracies.[19]

The Ethiopian government repeatedly fails to live up to its constitutional promises. It violates human rights including the right to freedom of expression. Various publishing companies are illegally closed and a small number of private presses, if not none, are available in the market.[20] It also imposes restrictions on artistic works despite their roles for individuals' self-fulfillment and autonomy. State-owned and ostensibly private media have banned to broadcast some pieces of music.[21] Besides, the government prohibits the distribution and sale of books that it claims that, but without any tangible ground, they incite violence.[22]

In Article 29 (3), the Ethiopian Constitution protects the press from any form of censorship while the South African counterpart keeps silent. Despite the absence of prohibition or otherwise of censorship in the South African Constitution, prior restraint is a permitted restriction of freedom of expression if it is in line with Article 36.[23] Likewise, ECHR recognizes prior restraint as a jurisprudential device to limit freedom of expression as long as it passes through the three-part test

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26 November 1991), Leroy v France (ECtHR Application No 36109/09 26 February 2009); For freedom of expression in South Africa for instance see, Goodman Gallery v The Film and Publication Board 8/2012

[19] Observer and Guardia, (n 18), Para 59.

[20] Committee to Protect Journalists, Ten Most Censored Countries (2015), https://www.cpj.org/2015/04/10-most-censored-countries.php accessed 8 August 2016.

[21] For instance, the famous Tewodros Kassahun's (AKA Teddy Afro) music*, Jah Yasteseryal (God Forgives)*, is prohibited though it is not banned to listen to it publicly. The music criticize that the incumbent government is not different from the previous one, and it calls for national reconciliation and agreement of different political groups.

[22] The Book vendors speak to the Voice of America Radio that they are arrested, tortured and asked to pay bribe for selling political and historical books. One of the vendor said that even he is prohibited to sell a book called *Aba Koster* (1991), which is about a young hero who battled with Fascist Italy from 1928-1935. http://amharic.voanews.com/a/book-vendors-in-addis-abeba/3482161.html

[23] Midi Television v Director of Public Prosecutor, Case No 100/06; *Tshabalala-Msimang v Makhanya* (The High Court of South Africa, Witwatersrand Local Division Application No 18656/07), Para 35. The court pointed out "[f]reedom of the press does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However, freedom of the press does meant that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish."

(prescribed by law, legitimate aim and necessary in a democratic society) of Article 10 (2).[24] However, due to its serious implications, like a chilling effect, on freedom of expression, the European Court is of the opinion that a previous restriction needs the "most careful scrutiny."[25]

The Ethiopian Constitution gives legal protection to the press and clearly states its indispensable role in the development and functioning of a democratic society.[26] Though the Constitution prohibits censorship, Article 42 of the Freedom of the Mass Media and Access to Information Proclamation permits the public prosecutor to take impounding measure.[27] Practically too, journalists are, by one way or another, forced to censor themselves or/and they encounter direct and indirect governmental censorship.[28] Even though the Ethiopian Constitution only prohibits censorship of the press, this prohibition should extend to other forms of expressions and should pass the "strict scrutiny test" as stipulated in the ECHR and South African jurisprudence.

Additionally, the right of the press to access information of a *public interest* is enshrined in Article 29 (3) (b) of the Ethiopian Constitution. The South Africa's Constitution provides the right to access to information for everyone without any restriction,[29] unlike its Ethiopian counterpart that allows the press to access only information of a *public interest*. A *Public interest* is not defined in Ethiopian jurisprudence and it is amenable to governmental abuse. However, it can be interpreted in line with the example given by the non-governmental organization-Article 19 and endorsed by Special Rapporteur on freedom of opinion and expression. Accordingly, information of a public

[24] Sunday Times v. the UK (ECtHR Application No 26 April 1979), Observer and Guardian v. The United Kingdom (ECtHR Application No 13585/88 26 November 1991)
[25] Observer and Guardian v. the United Kingdom, (n 24) Para 60.
[26] ibid (n 14), Article 29 (4).
[27] Freedom of the Mass Media and Access to Information Proclamation No. 590/2008
[28] Human Rights Watch, Ethiopia: Events of 2015, 42ff https://www.hrw.org/world-report/2016/country-chapters/ethiopia Accessed 11 November 2016.
[29] The Constitution of South Africa (n 16), Article 32.

interest may include "operational information about how the public body functions and the content of any decision or policy affecting the public."[30] The people do have a stake in any decision passed by or information related to the function of the executive, judiciary, and legislature. Hence, everyone has the right to access such information without undue restrictions.

With regard to the right of access to information, the Constitution failed to provide the right and limitation according to the internationally accepted standards. At the very beginning, it rather provides a restricted right. That means information is not accessible unless it is of a *public interest*. However, the Constitution should have provided a wider right of the press to access information alike the South African counterpart. Then the general limitation clause will be applied. That means, the right may be limited when the restriction is provided by law, for the sake of legitimate aims (like national security or public interest), and necessary in a democratic society.[31] Moreover, it is not clear why the Ethiopian Constitution singled out the press out of the media and guaranteed the right of access to information. However, it should be interpreted that other media (broadcast and online) plays no less role than the press, and do have a protected right of access to information. Besides, Article 29 (2) of the Constitution that provides the right to seek and receive information to everyone permits this line of interpretation.

Though the South Africa's Constitution bestows the right to information to everyone without limitation, the Protection of State Information Bill enshrines the possibility of limiting the right to access information.[32] The Bill guaranteed access to state information as a basic human right.[33] The

[30] Abid Hussain, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2000), E/CN.4/2000/63, Para 44, 15.
[31] Article 19, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, International Standard Series (1996), Principle 11.
[32] Republic of South Africa, Protection of State information Bill (B 6B 2010).
[33] Ibid, Article 6 (C)

right is also protected in the Council of Europe.[34] However, the sky is not the limit for the exercise of this right. The limitation that is provided by law in a democratic society for a justified public or private interest warrants the limitation of the right of access to information in both South Africa[35] and Council of Europe.[36]

Despite its practical absence, Article 29 (5) of the Ethiopian Constitution provides that state-owned and state-financed media ought to open their home for diversified opinions, including dissidents. The reality shows otherwise and state-sponsored media shuts their door to critical and opposition views and works for 'hegemonizing' the "developmental state" and "revolutionary democracy" ideals of the ruling government. The European Court is of the opinion that there is no democratic society without "pluralism, tolerance, and broadmindedness."[37] Media pluralism and diversified contents including critical voices are the part of freedom of expression and paramount for a democratic society. The Council of Europe in its recommendation stipulates that guaranteeing media pluralism is the positive obligation of member states.[38] Similarly speaking, reflecting a multiplicity of voice is one of the principles in the South Africa's Media Code.[39]

As indicated, the Ethiopian Constitution guarantees freedom of expression almost in line with international standards (this claim does not include the limitation clause which will be discussed below). However, following the 2005 election crackdown, the ruling party has restricted freedom of expression in various ways. Human rights groups like Human Rights Watch consider the

[34] Council of Europe Convention on Access to Official Documents (2009).
[35] South African Protection of State information Bill Article 6 (a) (n32) and the Constitution of South Africa (n16), Article 36.
[36] ibid (n 34), Article 3.
[37] Handyside v the United Kingdom (EtCHR Application No 5493/72 7 December 1976), Para 49
[38] Recommendation CM/Rec (2016) 4 of The Committee of Ministers to Member States on The Protection of Journalism and Safety of Journalists and Other Media Actors (2016), Article 15.
[39] Code of Ethics and Conduct for South African Print and Online Media (2016).

environment of freedom of expression as suffocating.[40] The government owns most media outlets (print and broadcast). Private media are threatened and intimidated by the mere fact of voicing dissents and they are expected to be conformists with government views. The government frequently jams transmissions from abroad, threat, arrest, convict their sources, and block foreign-based dissenting websites. The situation even gets worse in the aftermath of the 2010 election when the government secured a sliding victory of 99.6% of parliamentary seats (increased to 100% seats in the 2015 election).[41] As Human Rights Watch claimed in its 2015 country report, at least 60 journalists are fled their country and more than 19 are thrown to jail.[42] The government is against critical voices and its harassment increases when an election approaches. As its preparation for the 2015 election, the government decimated private media outlets by arresting journalists (ten journalists and bloggers arrested in 2014) and opinion writers on newspapers and magazines and intimidating persons who work on printing and distributing companies.[43] In the same year, the government accused six newspapers and magazines of encouraging terrorism and resulted in 16 journalists to flee their motherland.[44] Publishing opinions and criticisms against government policy and performance may lead to a conviction for the encouragement of terrorism.[45]

Outspoken journalists like Eskinder Nega, Wubshet Taye, and Temesgen Desalegn are prosecuted for exercising their free speech right. Most of the journalists languishing in prison are

[40] Human Rights Watch, Ethiopia: Events of 2015, https://www.hrw.org/world-report/2016/country-chapters/ethiopia

[41] Despite this glaring fact of monopoly, President Obama praised Ethiopia as democratic during his official visit in 2016.

[42] Human Rights Watch, Violation of Media Freedom in Ethiopia, 2015, 1. https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia Accessed 8 October 2016.

[43] ibid (n 20)

[44] ibid.

[45] ibid (n 28), 61.

accused/prosecuted under the draconian Anti-Terrorism Proclamation.[46] Ethiopia is also number four in the CPJ's list of the most censored nations of the world.[47] Despite the guarantee of freedom of expression by the Ethiopian Constitution, the above scenarios show how far freedom of expression is undermined. Below, the constitutional limitations on the exercise of the right to freedom of expression will be discussed.

4.2.1 Limitation on Freedom of Expression

Freedom of expression is not an absolute right in the three jurisdictions. The Ethiopian Constitution outlawed "content and effect-based restrictions" stating that an expression may not be restricted due to its content or effect.[48] However, this statement is not absolute. A speech may be limited based on its content or effect if the restriction is prescribed by law for the sake of protecting the "well-being of the youth, honor and reputation of individuals, human dignity, and prevention of propaganda of war."[49] The legitimate aims of freedom of expression enshrined in the Constitution are "vulnerable to overly broad and abusive interpretation."[50] Additionally, the "jurisprudential dearth"[51] of freedom of expression in the Ethiopian legal system exposes the right to extreme restrictions. International instruments like UDHR and ICCPR do not envisage legitimate aims, like the well-being of the youth and human dignity.[52] Nor do these phrases have a clear-cut definition

[46] Ibid (n 20).
[47] CPJ, Ibid https://www.cpj.org/2015/04/10-most-censored-countries.php
[48] ibid (14), Article 29 (6).
[49] ibid.
[50] ibid (n 28), 56-57.
[51] Gedion Timothewos, 'Freedom of Expression in Ethiopia: The Jurisprudential Dearth' (2010), Mizan Law Review, Vol 4, NO 2, 228.
[52] Article 19, the Legal Framework for Freedom of Expression in Ethiopia (2003), 18-19. Article 19 opined that restriction of freedom of expression for the well-being of the youth is not necessary in a democratic society.. Moreover, the expression "public expression of opinion intended to injure human dignity" is vague and not clear what it aimed to achieve. Nor does it provided in Article 19 and 20 of ICCPR. Therefore, curtailing free speech to protect human dignity is not in line with international standards, since it does not full fill the triple-test. However, even though "human dignity" and the well-being of the youth are not verbatim expressed in the international and regional human rights instrument, they may fall under "public moral" and "reputation or rights of others."

in the Ethiopian legal system. Therefore, the terms should be interpreted narrowly so that the right to freedom of expression is not unduly restrained. Protection of human dignity is also one of the constitutional value that the post-apartheid South Africa is founded, and it is provided as a legitimate aim to vindicate limitations imposed on freedom of expression.[53] ECHR too invokes human dignity imperative to limit freedom of expression, for instance, in the case of hate speech.

Compared to Article 10 of ECHR and Article 19 and 20 of ICCPR, the legitimate aims envisaged by the Constitution are smaller in number. National security and public order, for instance, are not explicitly stipulated as legitimate aims to vindicate the restriction of freedom of expression. Besides, in contrast to the South Africa's Constitution and the ECHR jurisprudence, the Ethiopian Constitution does not explicitly prohibit inciting imminent violence through speech. In the international human rights system, national security and prevention of disorder and crime are legitimate aims that vindicate the limits to free speech.[54] Though they are not incorporated in the Constitution, the Ethiopian government repeatedly use "public order and national security" as justification to restrain the exercise of the right. However, it is possible to incorporate these legitimate aims through interpretation despite the list of legitimate aims does seems exhaustive. Because Chapter Three of the Ethiopian Constitution shall be interpreted "in a manner conforming" with international human rights instruments that Ethiopia is a party.[55] Besides, pursuant to Article 9 (4) of the Constitution, standards set by international human rights ratified by Ethiopia are part of the law of the land. Therefore, standards that recognize national security

[53] Ibid (n 16), Article 1 and 36; Ryan Haigh, 'South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression' (2006), Wash. U. Global Stud. L. Rev. 5: 187, 187-210, 195.
[54] *For instance*, Article 19 of UDHR and ICCPR, Article 10 (2) of ECHR.
[55] ibid (n 14), Article 13 (2).

and public order as legitimate aims to restrict freedom of expression are also applicable in the domestic jurisdiction.

Moreover, unlike ECHR and South Africa's jurisprudence, the Ethiopian Constitution does not have a test that examines whether the limit of freedom of expression is "necessary in a democratic society." The South Africa's Constitution gives a detailed account of how a right should be limited. It expounds what is commonly characterized as "necessary in a democratic society."[56] This stage is the most important stage to protect freedom of expression from excessive government interference. It is not easy for the judiciary to shield the right to freedom of expression without scrutinizing whether the limit is necessary and proportionate to the aim pursued. The Human Rights Committee is of the opinion that the restriction imposed on freedom of expression must be "proportionate and necessary to the aim sought."[57] The Special Rapporteur on promotion and protection of the right to freedom of opinion and expression noted that a restriction should be tailored to address a "pressing social need".[58] The limitation must be necessary and the least intrusive means to the exercise of the right. Additionally, as discussed in the previous section, the African Commission on Human and People's Rights use the triple test to examine whether a restriction on freedom of expression is legitimate.

[56] Ibid (n 16), Article 36: Limitation of rights.-(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

[57] *Toonen V. Australia*, Communication No 488/1992 (1994), Para 8.3, *Velichkin V. Belarus*, Communication No 1022/2001 (2005), Para 7.3; and General Comment No 34 (n 15), Para 22, 33-36.

[58] La Rue F, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2010), A/HRC/14/23, Para 79.

Therefore, pursuant to Article 13 (2) of the Constitution that requires Chapter Three (which encompasses human and democratic rights) to be interpreted in conformity with international human rights laws that Ethiopia is a State Party and Article 9 (4) that makes these laws part of the law of the land, judges should test limitations against the principles developed by such human rights instruments and authorities. Therefore, despite the explicit gap in the Constitution, limitations imposed on freedom of expression shall be "necessary in a democratic society."

4.3 Counter-Terrorism Legislation

The Ethiopian Anti-Terrorism Proclamation has been labeled as draconian since its drafting stage.[59] For instance, Joanne Mariner, Terrorism and Counter-Terrorism Program Director at Human Rights Watch said, "[a]s drafted, this law could encourage serious abuses against political protesters and provide legal cover for repression of free speech and due process rights."[60] Despite the fear and urge of human rights groups, the law has been promulgated without significant amendments. The law has noticeable effects on freedom of expression. Human rights groups, UN, and other countries repeatedly recommended the government to stop an abusive use of the law to arrest and prosecute dissidents, human rights advocates, journalists and opposition party members and leaders. For instance, UN experts on human rights urged the government to stop using the anti-terrorism law to stifle freedoms like freedom of expression.[61] Nevertheless, the government turn a deaf ear and give a blind eye to the recommendations that call for abrogation or amendment of the

[59] For instance: Human Rights Watch (2009), Ethiopia: Amend Draft Terror Law, https://www.hrw.org/news/2009/06/30/ethiopia-amend-draft-terror-law , Human Rights Watch (2009), Analysis of Ethiopia's Draft Anti-terrorism law, https://www.hrw.org/print/237005 accessed 8 August 2016.
[60] Ibid, Human Rights Watch (n 59).
[61] UN Experts Urge Ethiopia to Stop Using Anti-terrorism Legislation to Curb Human Rights (2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E#sthash.bJQyrx2x.dpuf Accessed 8 August 2016, OHCHR, Ethiopia, News, UN experts Disturbed at Persistent Misuse of Terrorism Law to Curb Freedom of Expression as cited by A/HRC/WGAD2012/62, Opinion Adopted by the Working Group on Arbitrary Detention (2012)

Proclamation. For example, Ethiopia defied and rejected recommendations forwarded by peer countries in the Universal Periodic Review to apply the Proclamation apolitically (The USA and Australia) and remove the vague provisions that impinge on freedom of expression (Sweden).[62]

In the following part, provisions of the Proclamation that shrink the sphere of freedom of expression will be tested South African counter-terrorism bill and standards set by Council of Europe including the European Court of Human Rights.

4.3.1 Definition of Terrorism

The Proclamation do not directly define what terrorism mean. The *chapeau* of Article 3 and its subsequent lists rather stipulate the types of acts that may expose an individual to be accused and punished for committing terrorist acts.

> ***Terrorist Acts***
>
> *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.*

[62] Ethiopia's Response to Recommendations in A/HRC/27/14 (2014), UPR, 2nd Review, Session 19, 16.

The principle of legality is at the heart of criminal justice system. Besides, any restriction on freedom of expression should be "prescribed by law."[63] The law that limits a right should be accessible to the public and sufficiently precise to enable individuals to behave according to the law and reasonably predict what their actions entail.[64] However, the above definition of terrorism is criticized for being broad and vague and against the principle of criminal justice.[65] For vague and imprecise definition grants the opportunity to the government to muzzle dissent voices.[66]

Pursuant to the definition, a protest that aims to influence governmental decisions, seeks to advance a political, religious or ideological cause, and "causes interference or disruption of any public service" may amount to terrorism. This indicates that the definition is too vague and wide to include peaceful political or other forms of demonstrations whereby free speech right is exercised. A peaceful demonstration with a benign motive may result in serious interference or disruption of a public service like transportation. However, a peaceful protest that aims to channel certain grievances may be labeled as an act of terrorism.

Politicians who assembled to lobby the government for a policy change may damage properties in the course of their demonstration. Such persons may be prosecuted as terrorists. However, their action falls under the right to peaceful assembly and freedom of expression, or if it should be criminalized, it is not as serious as terrorism, and it should be rendered an ordinary crime that transcends the limit of the right to assembly and freedom of expression. Considering pity offenses as terrorism chills freedom of expression.

[63] ibid (n 14), Article 29 (6).
[64] General Comment 34 (n 15), Para, 25.
[65] Amnesty International, Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia (Amnesty International Ltd 2011), 21. Oakland Institute (n 9), 12.
[66] ibid.

Additionally, a person who advised a protestor might be convicted as a terrorist by the broad definitional provision of Article 3 cumulatively with Article 5 (1) (b).[67] Therefore, the definition of terrorism as provided by the Proclamation criminalizes a peaceful exercise of free speech right and it unwarrantedly trammeled the constitutionally guaranteed right of freedom of expression.

An individual who threaten to commit any of the acts stipulated in Article 3 (1)-(6) is a terrorist. That means a person who threatens to commit serious damage to property or to disrupt public service by way of protest may be convicted as a terrorist. However, it is far from the international standard to include threating to commit a crime against property as a terrorist act. The UN Human Rights Committee has found that such kind of broad definition of terrorism violates international human rights standards.[68] Besides, it urged that counter-terrorism laws should be formulated with sufficient precision so that the citizen are able to regulate their actions accordingly.[69] It recommended the Ethiopian government to repeal those provisions that criminalize ordinary crimes as terrorism (like property crimes and crimes related to interference and disruption of public services) and revise laws that unduly impinge on the exercise of human rights in the name of countering terrorism.[70]

Generally, the definition of terrorism in the Proclamation criminalizes "legitimate acts of protest and political dissent", and encompasses minor crimes that do not amount to terrorism, like property crimes or disruption of public service or a threat thereof.[71] Additionally, the definitions terrorist organizations (Article 2 (4) cumulative with Article 3) is broad to include actions that do not

[67] Oakland Institute (n 9), 9.
[68] Article 19 (n 3), 5.
[69] CCPR/C/ETH/CO/1, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant (2011), 4.
[70] ibid.
[71] The Oakland Institute (n 9), 9.

amount to terrorism. For instance, more than two people who conduct political protest may be deemed a terrorist organization and convicted as terrorists.[72] Therefore, it is safe to conclude that the broad and vague definition of terrorism in the Proclamation restricts freedom of expression.

The definitional provisions of the South African counter-terrorism legislation are broad and complex compared to the Ethiopian counterpart. However, Article 1 (3) of the law has exempted advocacy, protest, dissent or industrial action as long as the persons have no the intention of committing a harm stipulated in Article (1) (a) (i –vi). That means, the exceptionally protected actions like advocacy and protest are narrowed down by the exception attached with Article 1 (3), which provide that such actions are not outlawed as long as the individual "does not intend the harm contemplated in Paragraph 1 (a) (i) – (v)" of the definitional provision.[73] However, despite the exceptional protection of these acts, the broadly worded exceptions attached with the provision has a negative influence on freedom of expression. For instance, a protest that restricts the physical freedom of a person (1 (a) (iii)) is considered as terrorist activity. In addition, "…a political demonstration that causes substantial property damage would not be protected by the important exemption for protests and strikes."[74]

The mental element that is incorporated in the definition of terrorism in the Ethiopian Proclamation is "intention." However, Article 1 (b) of the South African law said that a terrorist activity should be "intended or by its nature or consequence, *can reasonably be regarded as being intended*" to

[72] Human Rights Watch (n 59), 2.
[73] Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (2005), Article 1 (3) and Azhar Cachalia, 'Counter-Terrorism and International Cooperation against Terrorism – an Elusive Goal: A South African Perspective', 26 S. Afr. J. on Hum. Rts. 510 (2010),517.
[74] Kent Roach, 'A Comparison of Canadian and South African Anti-Terrorism Legislation' (2005), 18: 2, S. Afr. J. Crim. Just. 134.

cause all actions stipulated in Article 1 (b) i-iii [emphasis added][75]. This indicates that the mental element required in the South African legislation, which includes negligence,[76] is lower than the Ethiopian one that only envisages intention. According to such provision, protestors may be considered as a terrorist if they knew their action would cause a feeling of insecurity even though they did not have the intention to create such result.[77] Moreover, the inclusion of motive as an element of the definition of terrorism in the Ethiopian and South African legislation shrinks the space of freedom of expression.[78]

The Council of Europe has no definition of terrorism except endorsing and incorporating Convention offenses that focus on thematic areas.[79] All of the Conventions failed comprehensively

[75] ibid (n 73), 1 (b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to- (i) threaten the unity and territorial integrity of the Republic;
(ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organization or body or intergovernmental organization or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles, whether the public or the person, government, body, or organization or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic;

[76] Cachalia (n 73) 514.

[77] Roach, (n 74) 137.

[78] Cachalia (n73), 519.

[79] Council of Europe Convention on the Prevention of Terrorism (2005). Article 1 of the Convention define terrorist offences as any of the offences stipulated in any of the following instruments.
1. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971;
3. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in
New York on 14 December 1973;
4. International Convention against the Taking of Hostages, adopted in New York on 17 December 1979;
5. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980;
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988;
8. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March
1988;

to define terrorism. Of the instruments incorporated by the Council of Europe, the International Convention for the Suppression of the Financing of Terrorism attempted to define terrorism as "…an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act."[80] This definition is narrower than the definition stipulated in the Ethiopian and South African legislation. An act attempted or committed against non-combatants to cause injury or death is considered as terrorism. The act should be intended and aim to intimidate a population or to influence the behavior of the government or international body. This definition is far from undermining freedom of expression. A protest that aims to influence the government to act or not to act in a certain way may result in injury or death of civilians. However, if the suspect does not intend the result, she may not be considered as a terrorist. On the other hand, protesters or strikers knowingly and willingly may engage in an activity causing injury or death of a person while protesting against the government. In such instances, it seems unfair to render protection under the guise of freedom of expression. Rather, the act should be considered as an ordinary crime.

Generally, the thematic Convention offenses do not define terrorism and only focuses on specific acts like a hostage, and their effect on freedom of expression is less severe than that of South African and Ethiopian legislation. In addition, the Convention definition discussed above is effectively distanced from threatening freedom of expression.

9. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997;
10. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999.

[80] ibid (n 79), International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)

4.3.2 Encouragement of Terrorism

The Special Rapporteur for Freedom of Expression and Opinion, David Kaye, and the Special Rapporteur for Peaceful Assembly and Association, Maina Kiai have expressed their concern on the use of an anti-terrorism law to muzzle freedom of expression.[81] David Kaye said that democracy needs critical voices, and silencing media and dissidents is not apposite to prevent terrorism.[82] With an equivalent tone, human rights groups repeatedly urge the Ethiopian government not to use its counter-terrorism legislation to throttle critical voices and opposing political party members.

Article 6 of the Ethiopian Proclamation punishes "direct and indirect encouragement or other inducement" to the commission, preparation or instigation of terrorist acts through the publication of a statement.[83] Besides, Article 25 (2) (c) provides that an entity may be labeled as a terrorist by the House of People's Representatives if it encourages terrorism. Encouragement of terrorism as a justification to trammel human rights is outlawed by the Human Rights Committee when it has dealt with the Terrorism Act 2006 of the United Kingdom.[84] However, the Ethiopian Proclamation runs far against international standards and criminalizes "direct and indirect encouragement" to the commission, preparation, and instigation of terrorism through the publication of a statement. Besides, against the principle of legality, these terms have clear definition neither in the

[81] United Nations Human Rights Office of the High Commissioner, Continued Detention of Ethiopian Journalists Unacceptable – UN human rights experts (2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15890&LangID=E Accessed 29 August, 2016.

[82] Ibid

[83] ibid (n 4), Article 6: Encouragement of Terrorism
Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years

[84] UN Doc. CCPR/C/GBR/CO/6, Concluding Observations of the Human Rights Committee, United Kingdom, 21 July 2008.

Proclamation nor in the jurisprudence. The Human Rights Committee and human rights groups pointed out that phrase like "in/direct encouragement and other inducement" are contrary to the international standards, for they are broad, imprecise and prone to be abused by despotic governments like the Ethiopian one.[85] In its comment on the anti-terrorism law of Ethiopia, the non-governmental institution, Article 19 addressed that:

> "The offenses of "direct or indirect encouragement or other inducement" are extraordinarily broad and vague offenses that fail the limitations for restrictions on rights required under international human rights law. While "encouragement" and "inducement" are vague terms, "indirect encouragement or other inducement" is so vague as to be without meaning. They create a subjective standard based on what "some…members of the public" may understand which can be applied (or misapplied) to nearly any statement made in the media as being supporting of terrorism."[86]

The Johannesburg Principles, which are endorsed by the Special Rapporteur on Freedom of Opinion and Expression, dictates that freedom of expression should be trammeled for legitimate and genuine national security threat. Accordingly, Principle 6 stipulates that the right to freedom of expression may only be restrained under the pretext of national security if it *is intended and likely to incite immediate violence*, and "there is a *direct and immediate connection* between the expression and the likelihood and the occurrence of such violence" [Emphasis added].[87] Prohibiting incitement to terrorism is compatible with human rights. However, as epitomized by the Ethiopian case, the standard of limiting speeches that incite violence is being eroded by broad and vague touchstones in the aftermath of September 11 attacks.[88] "Incitement should be understood as a *direct call* to engage in terrorism, with the *intention* that this should *promote* terrorism, and in a context in which the call is *directly causally responsible for increasing the actual likelihood of a terrorist act* occurring" [Emphasis added].[89] Encouragement and

[85] Article 19, ibid (n 3), 10 and CCPR/C/GBR/CO/6, ibid. (n 84)
[86] Article 19, ibid (n 3), 9.
[87] ibid (31).
[88] ibid (n 1), 1.
[89] ibid (n 1), 2.

inducements are loose and much broader than incitement, for they do not immediately, directly and casually result in terrorist acts.

Article 6 creates difficulties in making a rational relation between the speech and the purported act, for the provision provides a "subjective standard."[90] It is difficult to judge how much percent of the public should likely to understand the statement as in/direct encouragement or inducement to the commission, preparation or instigation of terrorism. "The law does not provide an objective assessment of the form of a speech made and the *mens rea* of the speaker but rather shifts the test in favor of the audience."[91] The English version of Article 6 does not mention the mental element required to prosecute a speaker (however, the Amharic version (prevail over the English version) criminalizes both negligent and intentional act of encouragement of terrorism).[92]

As repeatedly happen, this provision result in the prosecution of journalists for reporting and politicians for writing about individuals or groups deemed to be a terrorist.[93] The government misuse this provision to silence legitimate criticisms and political dissents. For instance, all the 24 defendants in the case of '*Federal Prosecutor vs Andualem Arage and others'* are charged for in/direct encouragement and other inducements of terrorism.[94]

The application of vague and overly broad crimes without defining with sufficient precision results in prosecuting individuals who innocently exercise their free speech right. For instance, the UN Human Rights Council said that Mr. Eskinder Nega is convicted "…due to the use of his free

[90] Mesenbet Tadeg, 'Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges' (2016), Journal of Media Law and Ethics, Vol. 5, No. 1 / 2, 66, 93.
[91] Tadeg (n 90), 93, and Article 19, ibid (3).
[92] Besides, unlike the American jurisprudence, a speech that is not "*likely to incite immediate lawless action"* is outlawed. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[93] Amnesty International, Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia (Amnesty International Ltd 2011), 21.
[94]Amnesty International, ibid (n 65), 21. Andualem Aragie is opposition politician who is sentenced for life by the Anti-terrorism Proclamation.

expression rights and activities as a human rights defender […].”[95] The UN Human Rights Committee too expressed its concern that the inclusion of vague words like “direct or indirect encouragement and other forms of inducement” may chill free speech.[96]

In its Resolution No 1624, the UN SC calls a state legally to prohibit incitement of terrorism.[97] The Security Council makes clear that it condones penalizing glorification (apologie) or justification of terrorism that may incite terrorist acts.[98] However, the probability of abusing provisions that criminalize remote actions, like encouragement and incitement, is high since “the commission of the crime is established without the need to show the actual resulting harm.[99] Therefore, legal provisions that criminalize such actions should be framed cautiously, narrowly and in line with criminal justice system so that they may not unduly restrain freedom of expression.[100] For instance, indirect encouragement committed negligently to the preparation of terrorism is difficult to prove in a court of law. For the encouragement is indirect, and also it is meant recklessly to make others get prepared to commit a terrorist act.

As discussed in Section two, the European Court of Human Rights has a strong jurisprudence on freedom of expression. Freedom of expression may be trammeled in order to curb terrorism and maintain public order. Even though, national authorities do have a “margin of appreciation”, the Court plays a supervisory role of checking whether the national discretion is applied in line with the human rights standards of the Council of Europe.[101] The restriction should be prescribed by

[95] A/HRC/WGAD2012/62, Opinion Adopted by the Working Group on Arbitrary Detention (2012)
[96] CCPR/C/ETH/CO/1, ibid (n 69), 4.
[97] United Nations Security Council Resolution 1624, http://www.state.gov/j/ct/rls/other/un/65761.htm Accessed 15 September 2016.
[98] Ibid.
[99] Tadeg (n 90), 93.
[100] Tadeg, ibid.
[101] Gul and Others v Turkey (ECtHR Application No 4870/02 8 June 2010), para 36.

law, to safeguard national security and must be necessary in a democratic society. There must be a "pressing social need" that the government aims to meet by restraining freedom of expression.[102] The interference must be proportionate to the aim perused and the evidence produced by domestic authorities must be "relevant and sufficient" to vindicate the restriction.[103] The "nature and severity" of the measure should also be assessed to determine whether the restriction is proportionate to the aim sought to achieve.[104]

State Parties do have a wide margin of appreciation to deal with remarks that incite violence.[105] Besides, ECtHR is of the opinion that media should not be a vehicle for the promotion of violence.[106] In *Erdoğdu case,* the Court ruled that analytical issues that do not reach to the magnitude of incitement of violence may not be inhibited no matter how they are unpalatable to the government.[107] However, the Court ruled in *Gual case* that the speech does not encourage the use of violence and there has been a violation of Article 10.[108] This ruling seems that the Court tolerates criminalizing encouragement of the use of violence. The *contrario* reading of the statement seems Article 10 of the Convention would not have been violated had the alleged speech encouraged the use of violence. Nevertheless, the Convention on the Prevention of Terrorism of the Council of Europe prohibits only "provocation of terrorism" as defined in Article 5. This definition is narrower than "encouragement of terrorism" stipulated, not defined, in Article 6 of the Ethiopian Proclamation. First, it does not incorporate ambiguous phrase, as "some members of the public" but it require the message to be distributed to the public, and it does not take the

[102] ibid.
[103] Gul and Others v. Turkey (n 101), para 37.
[104] ibid.
[105] Erdoğdu and Ince v. Turkey (ECtHR, Applications nos. 25067/94 and 25068/94 8 July 1999), Para 50.
[106] ibid, para 54.
[107] ibid, Para 52.
[108] Gul and Others v. Turkey, Para 44.

subjective element (the understanding of the public) into consideration. Second, it includes the *mens rea* of the speaker. That means the speaker should have the *intention* to incite terrorism. Thirdly, unlike the Ethiopian law that criminalizes in/direct encouragement or other inducement, the Convention only prohibits incitement. Fourth, the Ethiopian law penalizes in/direct encouragement or other inducement of remote crimes like preparation or instigation of terrorist acts. In contrast, though inchoate crimes like organizing are banned, the Convention only inhibits the incitement of the commission of terrorist acts. Moreover, the Convention explicitly sets principles that must be observed while countering terrorism. The Convention sets that any measure that is meant to curb terrorism should not excessively impinge on human rights like freedom of expression.[109] It also set out that anti-terrorism measures should pass through the three-part test and they may not be arbitrary and discriminatory.[110]

Moreover, the Committee of Ministers of the Council of Europe calls the member countries not to equate journalistic reporting with supporting or encouraging terrorism, and to "adequately and clearly define" incitement of terrorism.[111] However, under the Ethiopian law, journalistic reporting about terrorists and their organizations, or censuring the anti-terrorism policies of the government may be prosecuted as advice, encouragement, or inducement of the commission, preparation or instigation of terrorism.[112] Interestingly, the South African legislation only criminalizes remarks that have the potential to inciting terrorism.[113] However, this inhibition should be decided case-

[109] Council of Europe Convention of the Prevention of Terrorism, (Warsaw, 16.V.2005) Article 12.
[110] ibid, Article 12 (1).
[111] Council of Europe, Committee of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism (2005), 2. They declared "…the mere fact of reporting on terrorism cannot be equated to supporting terrorism. It is also legitimate to engage in open dialogue and public debate about the causes of terrorism or about political issues surrounding it."
[112] ibid (n 4), Article 6 Cumulative with article 5 (1) (b).
[113] ibid (n 73), Article 14.

by-case basis and must pass the constitutional muster. The restriction imposed on the speaker under the pretext of inciting terrorism shall pass through the maze of tests set out under Article 36 of the South African Constitution.

4.3.3 Journalistic Privilege of Confidentiality of Information and Protection of Sources

The Ethiopian counter-terrorism law imposes an obligation on individuals and media to furnish information that is deemed relevant to the protection of terrorism, the prosecution or the conviction of a terrorist. These provisions impede journalists to exercise their investigative, journalistic and reporting duty. Forcing journalists to disclose their sources and information inhibit the flow of information and hinder the media from playing a public watchdog role, hamper the public to make their own opinion and adversely affect the press from providing reliable and accurate information.[114] Hence, for instance, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information categorically prohibit compelling a journalist to divulge her information and sources to protect national security.[115]

There are provisions of the Proclamation that raise serious issues regarding the right to freedom of expression and access to information.

Article 12 of the law enshrines that failure to provide information related to terrorism will result in rigorous imprisonment from three to ten years.[116] Any media or private individual shall furnish any information that is relevant for the prevention of terrorism or the prosecution or conviction of

[114] Council of Europe, Committee of Ministers, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (2000), 1.
Goodwin v. the UK (ECtHR Application No 17488/90), para 39.
[115] ibid (n 31), 18.
[116] ibid (n 4), Article 12: Failure to Disclose Terrorist Acts
Whosoever, having information or evidence that may assist to prevent terrorist act before its commission, or having information or evidence capable to arrest or prosecute or punish a suspect who has committed or prepared to commit an act of terrorism, fails to immediately inform or give information or evidence to the police without reasonable cause, or gives false information, is punishable with rigorous imprisonment from 3 to 10 years

terrorists unless she has a *reasonable cause* to act otherwise. However, the phrase *reasonable cause* is not defined in the Proclamation. Nor is it necessary to give a static definition, since it is more appropriate to define it on a case-by-case basis. Therefore, courts have the discretion to define *reasonable causes* that justify a failure to furnish terrorism-related information to the police. The journalistic privilege of confidentiality of information and protection of sources are *reasonable causes* that justify failure to inform the police. The court has to define a *reasonable cause* as broadly as possible to give a wider breathing space to the right of access to information and freedom of expression. However, the privilege of journalists may not absolutely save a journalist from divulging her source or information. In the ECHR jurisprudence, if vital public and individual interest are at stake, despite its role in a democratic society, the privilege may not be protected.[117] Terrorism poses a threat to individual and public interests. Therefore, preventing terrorism, prosecuting or convicting a terrorist justify compelling journalists to disclose their information or/and sources. Nonetheless, neither the Ethiopian Proclamation nor the freedom of expression jurisprudence provides conditions whereby a journalist may be compelled to disclose her information or sources. The law also failed to give the power to the court of law to assess in each case whether the compulsion of a journalist to disclose her information or sources is necessary and proportionate to prevent terrorism, prosecute and convict a terrorist.

In the Council of Europe, limitation of the non-disclosure of journalistic information and sources is not absolute. The right is subject to Article 10 (2) of the Convention.[118] As it transpires from the ECtHR jurisprudence, the disclosure of information or sources should be ordered after assessing whether the measure is proportionate and necessary to the aim perused, including the prevention

[117] Goodwin v. UK (n 114), Para 37.
[118] Ibid (n 114) Council of Europe Recommendation No. R (2000) 7, principle 3.

of terrorism, prosecution or conviction of a terrorist.[119] The court must ascertain that the evidence produced by the police, prosecutor or anti-terrorism task force to restrict the right is "relevant and sufficient."[120]

Moreover, the Committee of Ministers of the Council of Europe is of the opinion that the principle of non-disclosure of journalistic information and sources is not only limited to journalists.[121] However, it also applied to those persons who get access to the journalistic information due to their professional linkage with journalists, like editors.[122]

Confidentiality of journalistic information and sources has no statutory protection in South Africa. The counter-terrorism legislation imposes on any person an obligation to give information about a person who intended to commit or has committed a terrorist act or a place where she hides.[123] Such provision underpinned by Section 189 and 205 of the Criminal Procedure Act. These provisions oblige a person, including a journalist, to be subpoenaed, appear before a court and give testimony of the fact that she knows or reveals any physical evidence in her possession under the pain of punishment of contempt of court if she failed to appear without a "just cause".[124] The Criminal Procedure Code of South Africa and the anti-terrorism legislation of Ethiopia exempted those who do have reasonable cause from reporting duty. On the contrary, the duty to report in the anti-terrorism legislation of South Africa is formulated without exception. The counter-terrorism

[119] Council of Europe Recommendation No. R (2000) 7 (n 114),
[120] Goodwin v. the UK (n 114), Para 40.
[121] "The term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication." Committee of Ministers Recommendation No. R (2000) 7 (n 114), 2.
[122] Recommendation No. R (2000) 7 ibid (n 114), 3. *Principle 2 (Right of non-disclosure of other persons)*
Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established [in the recommendation that sets protection for journalists from any compulsion of disclosing journalistic sources].
[123] ibid (n 73), Art 12.
[124] South African Criminal Procedure Act N0 51 (1977).

legislation should be interpreted in line with the South Africa's Constitution that guarantees media freedom. Effective protection of freedom of expression requires the confidentiality of journalistic information and sources. Therefore, journalists should not be denied a privilege, nor they should be granted an absolute protection from revealing their information and sources. An absolute denial of the privilege will unnecessary hamper the media from playing its informative, reporting, critiquing and public watchdog role. An absolute guarantee of the right of journalists' to confidentiality of information and protection of sources will be detrimental to the interest of the public. The qualified privilege of journalists to the confidentiality of information and protection of sources will let the court weighing competing interests of a journalist and the public. Therefore, the exception of "just cause" set out in the Criminal Procedure Code should play a role while implementing the counter-terrorism legislation. The "just cause" exception ought to be interpreted on a case-by-case basis and compatibly with Article 36 of the South African Constitution.

Additionally, the Ethiopian law imposes a duty on any person or institution to disclose any information that a police "reasonably believes could assist to prevent or investigate terrorism cases."[125] This imposition does not take into consideration the international standard of the protection of journalists' sources and confidentiality of information, which are indispensable for the free flow of information, protection of whistleblowers and existence of a democratic society. Nor does the law obliged the police to request a court warrant to access information and documents.

As highlighted above, journalistic privilege of confidentiality of information and protection of sources is recognized internationally.[126] And it may only be trammeled with exceptional

[125] Ibid (n 4), Article 22; Article 19, ibid (n 3).
[126] Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources (Privacy International, November 2007). http://www.privacyinternational.org/sources ; Legal Protections on the

circumstances. For instance, the Declaration of Principles on Freedom of Expression in Africa issued by the African Commission on Human and People's Rights provides that confidential journalists' sources and information may only be disclosed provided that:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defense of a person accused of a criminal offense;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression;
- Disclosure has been ordered by a court, after a full hearing.[127]

Moreover, The UN Special Rapporteur on Human Rights and Counter-Terrorism has found that confidential information and sources may be divulged when the "need for disclosure is proved, the circumstances are of a sufficiently vital and serious nature and the necessity of the disclosure is identified as responding to a pressing social need."[128]

Likewise, the Special Rapporteur on Freedom of Expression and Access to Information of African Commission on Human and Peoples' Rights, along with her fellows in the UN, OAS and OSCE has said that confidential information and sources may only be divulged in exceptional circumstances.[129] The joint declaration states that a journalist may be forced to disclose

Right to Information, State Secrets and Protection of Sources in OSCE Participating States (PI and OSCE, May 2007). http://www.privacyinternational.org/foi/OSCE-access-analysis.pdf Accessed 8 October 2016.

[127] African Union, Declaration of Principles on Free Expression. Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002.

[128] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Mr. Martin Scheinin), Doc. A/HRC/13/37, 28 December 2009.

[129] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 9 December 2008. Available at

confidential information or sources if it is decided by the court that it is "necessary to protect public interest or private rights that cannot be protected by other means."[130] Therefore, a journalist may only be forced when the court as a last resort ordered the disclosure of confidential information or sources. Besides, the court should enjoin to disclose information if it is necessary and proportionate to protect individual and public interest.

4.3.4 Surveillance and Interception

Surveillance and interception of communication are relevant to prevent terrorism or to prosecute and convict terrorists. However, unfettered executive power for conducting surveillance or intercepting communications divest an individual of freedom. As the UN Special Rapporteur pointed out, surveillance and interception should be "case-specific interference, on the basis of a warrant issued by a judge on showing of probable cause or reasonable grounds."[131]

Article 14 of the Ethiopian Proclamation bestows to the National Intelligence and Security Service (NISS) a right to intercept any means of communication and conduct surveillance on any person. Obviously, this executive privilege undermines human rights like the right to privacy and freedom of expression. The Committee of Ministers of the Council of Europe has declared that surveillance

www.osce.org/documents/rfm/2008/12/35705_en.pdf ; Council of Europe, (n 111).

[130] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 9 December 2008. Available at www.osce.org/documents/rfm/2008/12/35705_en.pdf ; ibid (n 111) Council of Europe, Declaration on freedom of expression.

[131] A/HRC/13/37, Report of the Special Rapporteur on the Promotion and Protection of Human rights and Fundamental Freedoms While Countering Terrorism (2009), 9.

without effective safeguards has "a chilling effect on citizen participation in the social, cultural and political life and, in the longer term, could have damaging effects on democracy."[132]

Though the Ethiopian National Intelligence and Security Service practically intercepts and conduct surveillance without court authorization, the law stipulates that this responsibility should be undertaken after securing a court warrant. When the court is requested to give the warrant to intercept communications or conduct surveillance against individuals, it should reasonably be convinced that the action is sufficient and necessary to advance the prevention of terrorism, the prosecution or conviction of a terrorist. It should also make sure that the act of the executive, NISS for that matter, do not excessively restrict human rights.

The European Court of Human Rights is of the opinion that a mere existence of a law that permits surveillance runs against the right to privacy and the right to freedom of expression.[133] However, this interference may only be justified if it is in accordance with a law, meant for protecting a legitimate aim and it is necessary in a democratic society.[134] The Court accentuated that "surveillance of citizens […] are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions."[135] Besides, surveillance and interception must be "strictly necessary […] for the obtaining of vital intelligence in an individual operation."[136]

Though judicial authorization is required to conduct surveillance and interception in Ethiopia, the Proclamation does not set out any safeguards to minimize the misuse of surveillance power. In

[132] Declaration of the Committee of Ministers on Risks to Fundamental Rights Stemming from Digital Tracking and other Surveillance Technologies (Adopted by the Committee of Ministers on 11 June 2013 at the 1173rd meeting of the Ministers' Deputies).
[133] Szabo and Vissy v Hungary (ECtHR Application no. 37138/14) 12 January 2016) and Klass and other v Germany (ECtHR Application No 5029/71 September 1978), Weber and Saravia v. Germany (ECtHR Application No. 54934/00 29 June 2006)
[134] European Convention on Human Rights (1950), Article 8 (2) and 10 (2).
[135] Szabo and Vissy v Hungary (n133), Para 54 and Klass v Germany (n 133), Para 42.
[136] Szabo and Vissy v Hungary (n 133), Para 73.

contrast, the European Court of Human Rights has developed minimum safeguards that must be incorporated in law to prevent abuse of surveillance power. Besides, in the Ethiopian law, interception or surveillance may be conducted against any suspect of terrorism. However, the Committee of Ministers of the Council of Europe recommends that "special investigation techniques", like surveillance and interception, "[…]should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared […]."[137] The Committee appreciates the intrusive nature of the "special investigation techniques" against freedoms and recommends using them restrictively in exceptional circumstances where it is necessary to prevent a serious crime or to prosecute or convict a dangerous criminal, like a terrorist.

The European Court of Human Rights too is of the opinion that the law that permits surveillance should also address:

> "…the nature of offences which may give rise to an interception order; the definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or destroyed."[138]

Surveillance and interception are allowed in the Ethiopian Proclamation to prevent and control terrorist acts. A person who is suspected of terrorism is liable to have been surveilled or their communications are intercepted. However, as it has been discussed somewhere else above, the broad and vague definition of terrorism may pose a problem to set out clearly the categories of people who are liable for such kind of measures. The procedure how and the time limit when a surveillance is conducted are not provided. Nor circumstances of communicating the data to the

[137] Council of Europe Committee of Ministers, Recommendation Rec(2005)10 of the Committee of Ministers to Member States on "Special Investigation Techniques" in Relation to Serious Crimes Including Acts of Terrorism, Article 4.
[138] Szabo and Vissy (n 133), Para 56.

third party or how they will be destroyed or retained are detailed (except that Article 14 (2) says information obtained through interception remain secret). However, since the Proclamation envisages judicial authorization of surveillance and interception measures, courts may not rubber-stamp executive requests. Rather, it should be satisfied that adequate safeguards are provided and must give a direction how the measures should be undertaken without unduly violating individual freedoms.[139]

The ambit of this thesis only extends to discussing the anti-terrorism laws of Ethiopia, South Africa, and Council of Europe. It narrowly focuses on those rules that impact freedom of expression of individuals. Therefore, though South Africa has laws that allow and regulate surveillance[140], it is not purported to be discussed all here, for they rest out of the scope of the thesis. On the other hand, the counter-terrorism act of South Africa (Protection of Constitutional Democracy against Terrorist and Related Activities Act 33) does not include provisions that allow surveillance and interceptions. However, it is apt to make a passing remark with regard to the Regulation of Interception of Communications and Provision of Communications-Related Information Act of South Africa (RICA). Unlike the Ethiopian Proclamation but in line with what is envisaged by the ECHR as discussed above, the South African RICA has detail procedures that dictate what should be fulfilled to permit interception. Interception may only be permitted only for

[139] In Szabo and Vissy v. Hungary, the Court expressed its views that it "must be satisfied that there are adequate and effective guarantees against abuse. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorize, carry out and supervise them, and the kind of remedy provided by the national law. The Court has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in a democratic society." Para. 57.

[140] The Regulation of Interception of Communications and Provision of Communications Related Information Act (Act 70 of 2002) (RICA); The Protection of Personal Information Act (Act 4 of 2013) (POPI) ; The Financial Intelligence Central Act of (Act 38 of 2001) (FICA); The Intelligence Services Oversight Act (Act 40 of 1994) (ISOA) ; The Cyber Crimes and Cyber Security Bill (2015) (CAC); The Electronic Communications and Transactions Act (Act 25 of 2002) (ECTA); The General Intelligence Laws Amendment Act (act 11 of 2013) (GILAB); The Criminal Procedure Act (Act 51 of 1977) (CPA); The Films and Publications Act (Act 65 of 1996) (FPA)

a designated purpose like foiling terrorism. Prior to granting a warrant to intercept communications, the court should be satisfied that the interception is helpful for the furtherance of the prevention of terrorism. Interception should be held as a last resort when other less intrusive means are tested and failed or if measures other than intervention will not be successful or result in unnecessary risk.[141]

4.4 Conclusion

Freedom of expression is guaranteed in Article 29 of the Ethiopian Constitution. However, the Constitution failed to restrict the limitation on freedom of expression as strongly as its South African counterpart and ECHR. Especially, it failed to incorporate "necessary in a democratic society" test that requires the government to provide sufficient and relevant evidence to prove that its restriction is necessary and proportionate to the aim pursued.

Though prevention of terrorism or protection of national security is not among the legitimate aims provided by the Constitution to limit freedom of expression, the government frequently invokes them. The Ethiopian government promulgated Anti-Terrorism Proclamation in 2009 to prevent terrorism. This Proclamation has some limitations that run against the international and regional standards of the protection of freedom of expression. The definitional provision of the Proclamation has some vague and broad phrases that are open to abuse against freedom of expression. A protest with a benign motive that restricts public transport or damage property may be labeled as terrorism. However, these acts fall under the ambit of the right to assembly and freedom of expression. If these actions should be prosecuted (if they transcend the limit), they have

[141] ibid (n 4), Article 16 (5) (V).

to be categorized as less serious crimes than terrorism. Considering ordinary offenses as terrorist acts has a chilling effect on freedom of expression.

The Proclamation criminalizes in\direct encouragement to the commission, preparation and instigation of terrorism through the publication of a statement. Article 6 of the Proclamation fall short of the standard provided in the South Africa and Council of Europe jurisprudence that only criminalize incitement to terrorism. Moreover, unlike these jurisdictions, the Proclamation (English version) does not refer to the mental element of the speaker. However, the Amharic version of Article 6 expressly criminalizes encouragement of terrorism that is committed either negligently or intentionally.

The Proclamation does not expressly provides for the journalistic privilege of confidentiality of information and protection of sources. Nor does it furnishes situations whereby a journalist may be forced to disclose her information and sources. The Proclamation also fails to give discretion to the court of law to assess whether forcing a journalist to divulge her information and sources is necessary and proportionate to prevent terrorism, prosecute or convict a terrorist.

Article 14 of the Proclamation authorizes the National Intelligence and Security Service to put a person suspected of terrorism under surveillance and intercept her communications. This provision too failed to give due protection to journalists. Besides, if a person thinks that she is under surveillance or her communications are intercepted, she will inhibit herself to express her opinions or speaks only what satisfies the interceptor or the entity who is conducting surveillance. The Proclamation also failed to provide minimum safeguards to prevent abuse of surveillance and interception power against freedom of expression.

Beyond the problems of the Ethiopian Proclamation, practically, freedom of expression seems a forgotten issue in the country. Freedom of expression course is not given in the Ethiopian law schools in undergraduate level, except 'Media Law' course that focuses only on the small pie of the ideal. The Human Rights Law course that is given for law students does not accentuate on specific rights, like freedom of expression, assembly, and association, which play an indispensable role in building a democratic society. The level of study of the largest proportion of Ethiopian judges and public prosecutors is a Bachelor degree and below. This has its own repercussion and makes the protection of freedom of expression in Ethiopia far behind the international standards. For instance, the judge in *Public Prosecutor v Ibrahim M. (Cr.F.N 71562)* interprets Article 29 (6) of the Constitution conversely stating that the Constitution allows content-based restriction on freedom of expression.[142] In another case pending in the High Court, *Yonatan Tesfaye v. Federal Prosecutor* (Federal Prosecutor File No 414/08), the prosecutor charged the young politician with terrorism allegations based on what he has written on his Facebook page. There are instances in the charge sheet that epitomizes how the prosecutor hardly appreciates the ambit of freedom of expression and incitement to terrorism. One of the paragraph that is considered as incitement to terrorism goes:

> "…the ruling EPRDF government who has killed more than 40 students last year does not take a lesson from its previous mistakes and it continues killing its citizens to solve problems. Solving problems in good faith has failed and the government is stifling dissidents. The recent protest and the response of the citizens against government measures indicate that we are heading to the inevitable protest."[143]

Such kind of statements that do not incite terrorism are expected from vociferous politicians. It is pertinent to take another paragraph from the charge sheet to indicate how the prosecutors broadly

[142] *Public Prosecutor v Ibrahim* M. (Cr.F.N 71562), as cited by Timothewos (n 51), 225-226.
[143] Public Prosecutor v Yonatan Tesfaye, Federal Prosecutor File No 414/08. Translation mine.

and loosely understand incitement of terrorism. The charge alleges the following statement as an incitement to terrorist acts:

> "…there was no any Master Plan when the Oromo protests have begun. These protests divulged your [government officials] land-grabbing conspiracy. You [government] need not to tell and convince us that you rejected the Plan, for we already knew it. We stood against the plan that you adopted, and we again and again said that we do not need the Master Plan" [translation mine].[144]

Even though it is too early to criticize the case without looking the reaction of the court to these scenarios, the two paragraphs clearly show how incitement of terrorism is broadly and freedom of expression is too narrowly interpreted in the Ethiopian jurisprudence.

[144] Public Prosecutor v Yonatan Tesfaye, Federal Prosecutor File No 414/08. Master Plan is the scheme adopted by the government to connect the Capital and its environs with infrastructure. However, it has been strongly condemned by the surrounding Oromo People and become the pretext of the Oromo Protest.

SECTION FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The September 11 attacks marked a turning point in the proliferation of laws that aim for countering terrorism. In the aftermath of the attacks, many states engage in enacting legislation to tighten security and curb terrorist acts. These anti-terrorism laws cast a shadow over the sun of human rights that have risen since 1948. Ethiopia has also promulgated its Anti-Terrorism Proclamation in 2009. The law has been a bone of contentions and point of criticism since its drafting stage. This thesis has discussed the provisions that shrink the ambit of freedom of expression against the standards adopted in South Africa and Council of Europe, including the case law of the European Court of Human Rights.

Despite its practical absence, the right to freedom of expression of individuals is guaranteed in Ethiopia by constitutional dispensation. Content and effect based restrictions are not allowed except if they are in accordance with the law for the protection of the "well-being of the youth, honor, and reputation of individuals, human dignity, and prevention of propaganda of war." Despite repeated claims of the government, national security, and prevention of disorder and crime are not included in the Constitution as legitimate imperatives to limit freedom of expression. However, the Constitution guides to interpret human and democratic rights in conformity with international instruments that Ethiopia has ratified. Moreover, according to Article 9 (4) of the Constitution, all international agreements that Ethiopia has ratified are part of the domestic law. Therefore, it is possible to incorporate national security and prevention of disorder and crime in the jurisprudence as legitimate aims of restricting freedom of expression.

Unlike South Africa and Council of Europe, the Ethiopian Constitution has failed to narrowly restrict the limitations on freedom of expression. The only limitations that are envisaged by the Constitution are "prescribed by law" and a limited number of "legitimate aims" (well-being of the youth, honor, and reputation of individuals, human dignity, and prevention of propaganda of war). It does not prescribe that the limitation to be "necessary in a democratic society", which requires a "pressing social need" and the limitation to be "necessary and proportionate" to the aim pursued. Without such limitation, freedom of expression would be restricted excessively. This is the limitation that entails the evidence adduced by state officials to be "sufficient and relevant". This criterion tests the magnitude of the limitation. However, the Ethiopian Constitution failed to devise a mechanism to limit the limitation clause itself.

In addition to the "jurisprudential dearth"[384] of freedom of expression, the law that is meant to counter terrorism has created serious problems on the exercise of the right. The lists of terrorist acts are too vague and broad so as to criminalize peaceful protests and innocent exercise of the right to free speech. For instance, it criminalizes as terrorism acts that interfere in or disrupt public service during a protest or threatening to damage property if public demands are not answered. Such kind of acts are far from being terrorism in South Africa and the Council of Europe. The definition of South Africa's counter-terrorism act attempted to leave a leeway for some justifiable exercise of the right to freedom of expression, like protest and strike. On the other hand, the Ethiopian Proclamation envisages intention of the wrongdoer, which is stricter than its South African counterpart that criminalizes negligence too.

The Ethiopian Proclamation failed short of the standards provided by the Council of Europe and South Africa's counter-terrorism law. Both prohibits incitement to the commission of terrorism, but the Proclamation went further to criminalize "in/direct encouragement of the commission, preparation and instigation of a terrorist act" committed through negligent or intentional publication of a statement. The Human Rights Committee has outlawed criminalizing encouragement of terrorism which is far from inciting an immediate lawless action. The criminalization of in/direct encouragement of terrorist acts has repercussion on freedom of expression. This is evident from the fact that many journalists and politicians are prosecuted and convicted for transgressing this vague provision. The English version of Article 6 of the Proclamation that criminalizes in/direct encouragement of terrorist acts does not have a reference to the mental element of the speaker. However, negligent and intentional acts of encouragement of terrorism are punishable under the Amharic version (the binding version of the law). Therefore, a person may be prosecuted for his innocent report or criticism under the guise of indirect encouragement of terrorism, even though she does not intend the action. It is too far to create a rational linkage between a terrorist act and a speech claiming that the expression is an indirect encouragement which is committed negligently. Moreover, rather than evaluating the speech by itself, the law includes a subjective element, which is the audience's ability to understand the speech.

The media effectively undertake its informative, reporting, critiquing and public watchdog role if and only if the confidentiality of their information and sources is guaranteed. However, the Ethiopian Proclamation obliges any individual, including media or a journalist, to provide the police with any information relevant to the prevention of terrorism or the prosecution or conviction of terrorists. The law does not insulate journalists and whistleblowers from the obligation of

divulging their sources and information. The law has a leeway that allows an individual not to be forced to disclose her information if she does have a good cause. Though a court is not empowered to give the warrant to force a journalist to disclose her information or sources, it may *post factum* consider journalistic privilege as a good cause. However, this privilege must be tested against the public interest. Unlike, South Africa and Council of Europe, Ethiopia failed to provide how a balance may be struck between these two interests, which are a journalistic privilege and public interest. Nonetheless, it is apt to leave the discretion to courts to decide on a case-by-case basis.

The right to privacy is necessary for the exercise of the right to hold opinion and freedom of expression. The Ethiopian Proclamation permits the conduct of surveillance and interception of communications of individuals who are suspected of terrorism. The mere existence of laws that allow surveillance and interception violate the right of individuals. However, the right to freedom of expression is not an absolute right. Even though the law keeps silent regarding what type of issues should be examined by the court before permitting interception or surveillance, it is evident from other jurisdictions that the measures should be tailored to safeguard democratic institutions and access vital intelligence. The lack of safeguards to minimize misuse of executive power may be compensated by mandatory requirements that the court should consider before issuing a court warrant. Prior to granting a warrant to intercept communications or conduct surveillance, the court should be satisfied that the measure is helpful for the furtherance of the prevention of terrorism. Interception or surveillance should be held as a last resort when other less intrusive means are tested and failed or if measures other than intervention will not be successful or result in unnecessary risks.

5.2 Recommendations

Taking into cognizant the role that diversified views play for societal development and building and sustaining a democratic society, the Ethiopian government should start to live up to its constitutional promises. Human rights should not only be abstract ideals but concrete and every right holder should benefit from their constitutional dispensation. The government should change its policy of muzzling every critical voice and stop throwing dissidents into jail. The Ethiopian government should also be committed to ensuring the exercise of the right to freedom of expression. It may not involve in outrightly denying shadow reports, statements made by human rights groups, and recommendations provided by international and regional human rights authorities and peer states. Rather, it should evaluate its human rights performances against the tests set by international human rights standards. And, it should endeavor to improve its human rights track records, including freedom of expression. The government should also engage in reviewing the Proclamation and its anti-terrorism practices so that individuals can fully exercise their right to freedom of expression.

Courts should draw upon the experiences and interpretation of the scope of freedom of expression and its limitations in South Africa and the Council of Europe including EtCHR. For instance, despite the absence of "necessary in a democratic society" test in the Constitution, it ought to be incorporated by courts since it is an accepted standard by international and regional human rights instruments that Ethiopia is a party and human rights authorities that the country assented for and endorsed their establishment. Besides, the test is practically proved effective in regions that are praised for their human rights protection. Moreover, Article 9 (4) and 13 (2) of the Constitution open a way for courts to resort to international and regional standards of human rights protection.

Though not provided by the Constitution, the Ethiopian government may bring national security argument like prevention of terrorism, to interfere with right to freedom of expression. Even though it is possible to incorporate such type of imperative to limit freedom of expression, courts should interpret them narrowly so that the right may not be unduly restrained.

The definitional provision of the Proclamation is too broad and vague to criminalize legitimate exercise of free speech right. Therefore, Article 3 should be interpreted strictly for a genuine cause and demonstrable effect of preventing terrorism. For instance, serious interference or disruption of public service and threatening to destruct a property if certain public demands are not meet may not be incorporated as elements of terrorist activities. Besides, advocating for the change of government and protesting to channel one's political idea may not be considered as destabilizing political institutions. Moreover, clear definitions should be provided for terms like "section of the public", destabilizing political, constitutional and economic and social institutions" so that the Article may not be abused against dissidents. Or rather, the government may replace Article 3 by the following narrower definition, which is provided by the International Convention for the Suppression of the Financing of Terrorism: Terrorism is "…an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act."

As recommended by the Human Rights Committee, Article 6 of the Proclamation (in/direct encouragement of terrorism) should be repealed and replaced by a provision that criminalizes incitement to terrorism. Or at least, the phrase "in\direct encouragement to the commission, preparation, and instigation of a terrorist act" should be clearly and narrowly defined.

Failure to provide terrorism-related information is punishable with rigorous imprisonment except the individual has a *reasonable cause* to justify her commission or omission. *Reasonable cause* is not defined by the Proclamation. Therefore, courts should define such phrase as broadly as possible to give effect to the right to freedom of expression. Moreover, the Proclamation should include circumstances whereby a journalist may be forced to disclose her information and sources in a similar fashion with the Declaration of Principles on Freedom of Expression in Africa.

The Proclamation should incorporate minimum safeguards to prevent abuse of power by the National Intelligence and Security Service. However, even though the Proclamation keeps silent, courts should set minimum safeguards while issuing a warrant to conduct surveillance and intercept communications. Before issuing a warrant, a court must be satisfied that the action is necessary to safeguard democratic institutions or obtain vital information in a certain operation. Surveillance and interception are serious interferences with the right to privacy and freedom of expression. Therefore, they have to be implemented in exceptional situations when NISS *reasonably* suspects (the Proclamation envisages a mere suspicion) that a terrorism has been committed or prepared, or is being prepared to commit. Rather than rubber-stamping the executive request, the court that issues a warrant should also specify who should be under surveillance or whose communication should be tapped, for how long the interference continues, how the data procured should be examined and stored or communicated to a third party and the circumstances whereby the data must be erased.

Generally, though the need for anti-terrorism laws is not questionable, the Ethiopian Proclamation casts a shadow over freedom of expression. However, judicial activism can play an indispensable role in formulating a jurisprudence that insulates freedom of expression from the heavy hands of the executive. Freedom of expression, assembly and association courses that help for building a

democratic society should be given in law schools so that prosecution offices and courts know the value of these rights for a democratic society. The vague and broad words of the Proclamation should be defined and legal loopholes should be filled by courts in favor of freedom of expression. For building a democratic system will remain to be a mere rhetoric that is meant for soliciting aid and political support unless the government is truly committed to respect and protect the right to freedom of expression.

Bibliography
Books

1. Alexy R, The Construction of Constitutional Rights (Presses Universitaires de France 2010)
2. Alfredsson G and Eide A (Eds), The Universal Declarations Of Human Rights: A Common Standard of Achievement (Martinus Nijhoff Publishers 1999)
3. Barendt E, Freedom of Speech (2nd edn, Oxford University Press 1985).
4. Boyron S, The Constitution of France : A Contextual Analysis (Hart Publishing 2013)
5. Cole D and Dempsey JX, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security (The New Press 2002)
6. Coliver S, Hoffman P, Fitzpatrick J and Bowen S (eds), Security and Liberty: National Security, Freedom of Expression and Access to Information (Martinus Nijhoff publishers 1999)
7. Fraleigh D and Tuman J, Freedom of Expression in the Market Place of Ideas *(*SAGE Publications, *Inc. 2011)*
8. Goold B and Lazarus L (eds), Security and Human Rights *(*Hart Publishing 2007)
9. Hoffman P, Human Rights and Terrorism, Human Rights Quarterly (Johns Hopkins University Press 2004)
10. Ignatieff M (edn), The Lesser Evil: Political Ethics in an Age of Terror (Princeton Press 2004)
11. _____, American Exceptionalism and Human Rights (Princeton Press 2005)
12. Janssen E, Faith In Public Debate: On Freedom Of Expression, Hate Speech And Religion In France And Netherlands *(*International Publishing Ltd 2015)
13. Karpen U (ed), The Constitution of the Federal Republic of Germany (Nomos, Baden-Baden 1988)
14. McGonagle T and Donders Y (eds), The United Nations and Freedom of Expression and Information (Cambridge University Press 2015)
15. Molnar P (ed), Free Speech and Censorship around the Globe (Central European University Press 2014)

16. Molnar P (Ed), Free Speech And Censorship Around The Globe, (Central European University Press, 2014)
17. Nicol J, Millar QC G, and Sharland A, Media Law And Human Rights (Second edn, Oxford University Press 2009)
18. Nowak M, UN Covenant on Civil and Political Rights: CCPR Commentary (Second Ed, N. P. Engel Publisher 2005)
19. O'Flaherty M, Freedom of Expression: Article 19 of The International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34 (Oxford University Press 2012)
20. Packard A, The Borders of Free Expression (Hampton Press, INC 2009)
21. Roach K (ed), Comparative Counter-Terrorism Law (Cambridge University Press 2015)
22. Schutter O, International Human Rights Law: Cases, Materials, Commentary (Second edn, Cambridge University Press 2014)
23. Sottiaux S, Terrorism and Limitation of Rights: The ECHR and The US Constitution (Hart Publishing 2008)
24. Tarlach Mcgonagle and Yvonne Donders (Eds) The United Nations And Freedom Of Expression And Information: Critical Perspectives (Cambridge University Press 2015)
25. Whittaker J, D, Counter Terrorism and Human Rights (Pearson Education Limited 2009)
26. Wilson A R (ed), Human Rights in the 'war on Terror' (Cambridge University Press 2005)
27. Zeno Z, Freedom of Expression: A Critical and Comparative Analysis (Routledge-Cavendish 2008)

Articles

1. Banisar D, *Speaking of Terror: A Survey of the Effects of Counter-Terrorism Legislation on Freedom of the Media in Europe (2009),* International Journal of Civil Society Law, Vol. VII, Issue 3.
2. Cachalia A, *Counter-Terrorism and International Cooperation against Terrorism – an Elusive Goal: A South African Perspective,* 26 S. Afr. J. on Hum. Rts. 510 (2010)

3. Cram I, Regulating the Media: *Some Neglected Freedom of Expression Issues in the United Kingdom's Counter-Terrorism Strategy (2007*) 18:2.

4. D'Orsi C, *Applicable Norms to Freedom of Expression in Sub-Saharan Africa: An Assessment of Anglophone Western and Southern Africa* (2010), Sri Lanka Jil.
5. Feinberg M, *International Counterterrorism – National Security and Human Rights: Conflicts of Norms or Checks and Balances?* (2015), the International Journal of Human Rights.
6. Fitzpatrick J, *Speaking law to power: The War against Terrorism and Human Rights*, Eur J Int Law *(2003) 14 (2).*
7. Gedion Timothewos, 'Freedom of Expression in Ethiopia: The Jurisprudential Dearth' (2010), Mizan Law Review, Vol 4, NO 2.
8. Golder B & Williams G, *Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism (2006)*, Journal of Comparative Policy Analysis: Research and Practice.

9. Grossman C, *Challenges to Freedom of Expression within the Inter-American System: A Jurisprudential Analysis* (2012), *Human Rights Quarterly, 34, 361 (2012), American University, WCL Research Paper No. 2013-01,* 31.

10. Haigh R, *South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression* (2006), Wash. U. Global Stud. L. Rev. 5: 187
11. Hocking J, *Terrorism and Counter-Terrorism: Institutionalizing Political Order* (1986), The Australian Quarterly, 58, 3.
12. Jan Sikuta, *Threats of Terrorism and The European Court Of Human Rights* (2008), European Journal of Migration and Law 10, 2.
13. Kaponyi E K , *Upholding Human Rights in the fight against Terrorism, Society and Economy,* Vol. 29, No. 1 (2007).
14. Kassa W, *The Scope of Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Counterterrorism Instruments* (2014), Mizan Law Review 8, 2.

15. Koch I, *Dichotomies, Trichotomies or Waves of Duties?* (2005), Oxford Journals, Human Rights Law Review, 5, 1.
16. Lumina C, *Counter-terrorism legislation and the protection of human rights: a survey of selected international practice* (2007) 1 *AHRLJ*.
17. Michaelsen C, *The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German–Australian Comparison,* (2010) 2 City.
18. Paust J, *The Link between Human Rights and Terrorism and Its Implications for the Law of State Responsibility,* Hastings International and Comparative Law Review, vol. 11, No. 1 (1987).
19. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment* (1974), U. Pa. L. Rev.123, 45, 62.
20. Roach K, *A Comparison of Canadian and South African Anti-Terrorism Legislation* (2005), 18: 2, S. Afr. J. Crim. Just.
21. Ruddock H, *Australia's Legislative Response to the Ongoing Threat of Terrorism* (2004), *UNSW Law Journal, 27 (2).*
22. Tadeg M, *Freedom of Expression and the Media Landscape In Ethiopia: Contemporary Challenges* (2016), Journal of Media Law and Ethics, Vol. 5, No. 1 / 2

Treaties, Laws and Various Legal Instruments

1. International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999.
2. African (Banjul) Charter On Human and Peoples' Rights
3. African Union, Declaration of Principles on Free Expression. Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002.
4. American Convention on Human Rights
5. American Convention on Human Rights
6. American Declaration of the Rights and Duties of Man
7. Code of Ethics and Conduct for South African Print and Online Media (2016)

8. Committee of Ministers, Recommendation CM/Rec (2016) 4, The Protection of Journalism and Safety of Journalists and Other Media Actors (2016)
9. Constitution of the Republic of South Africa No. 108 of (1996)
10. Convention for the Prevention and Punishment of Terrorism (League of Nations Doc C.546 M.383 1937 V (1937))
11. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971
12. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988
13. Convention for the Suppression of Unlawful Seizure of Aircraft (1970 The Hague)
14. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970
15. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980
16. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973
17. Council of Europe Committee of Ministers, Recommendation Rec(2005)10 of the Committee of Ministers to Member States on "Special Investigation Techniques" in Relation to Serious Crimes Including Acts of Terrorism, Article 4.
18. Council of Europe Convention of the Prevention of Terrorism, (Warsaw, 16.V.2005)
19. Council of Europe Convention on Access to Official Documents (2009)
20. Council of Europe Convention on the Prevention of Terrorism (2005). Article 1 of the Convention define terrorist offences as any of the offences stipulated in any of the following instruments.
21. Council of Europe, Committee of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight against Terrorism (2005)
22. Declaration of the Committee of Ministers on Risks to Fundamental Rights Stemming from Digital Tracking and other Surveillance Technologies (Adopted by the Committee of Ministers on 11 June 2013 at the 1173rd meeting of the Ministers' Deputies).
23. European Convention for the Protection of Human Rights and Fundamental Freedoms

24. Federal Negarit Gazeta, Anti-terrorism Proclamation No. 652/2009
25. Freedom of the Mass Media and Access to Information Proclamation No. 590/2008
26. International Convention against the Taking of Hostages, 1316 UNTS 205 (1983)
27. International Convention against the Taking of Hostages, adopted in New York on 17 December 1979
28. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997
29. International Convention for the Suppression of the Financing of Terrorism, 2178 ILM 229 (2002)
30. International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)
31. Anti-Terrorism Proclamation, Proclamation No. 652/2009 of 2009
32. Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (2005)
33. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988
34. Republic of South Africa, Protection of State information Bill (B 6B 2010)
35. Security Council Resoulution 1373 (2001)
36. Security Council Resolution 1368 (2001)
37. Security Council Resolution 2178 (2015)
38. Security Counicl Resolution 1566 (2004)
39. South African Criminal Procedure Act N0 51 (1977).
40. The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995
41. The Criminal Procedure Act (Act 51 of 1977) (CPA)
42. The Films and Publications Act (Act 65 of 1996) (FPA)
43. The Electronic Communications and Transactions Act (Act 25 of 2002) (ECTA); The General Intelligence Laws Amendment Act (act 11 of 2013) (GILAB)
44. The Intelligence Services Oversight Act (Act 40 of 1994) (ISOA) ; The Cyber Crimes and Cyber Security Bill (2015) (CAC)

45. The Protection of Personal Information Act (Act 4 of 2013) (POPI) ; The Financial Intelligence Central Act of (Act 38 of 2001) (FICA)
46. The Regulation of Interception of Communications and Provision of Communications Related Information Act (Act 70 of 2002) (RICA)
47. Universal Declaration of Human Rights (1948)

Cases

Ethiopia

1. *Public Prosecutor v Ibrahim* M. (Cr.F.N 71562)
2. *Public Prosecutor v Yonatan Tesfaye*, (Federal Prosecutor File No 414/08)

Council of Europe

1. Animal Defenders International v The UK App No 48876.08 (ECtHR 22 April 2013)
2. Autronic AG V. Switzerland App No 12726/87 (ECtHR 22 May 90)
3. Delfi As V. Estonia App No 64569/09 (ECtHR 16 June 2015)
4. Dink v Turkey App No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR 14 September 2010)
5. Erdoğdu and Ince v. Turkey (ECtHR, Applications nos. *25067/94 and 25068/94* 8 July 1999)
6. Garaudy V. France (Application No 65831/01, ECtHR, 24 June 2003)
7. Gul and Others v Turkey (ECtHR Application No 4870/02 8 June 2010)
8. Hadjianastassiou v Greece, App No 12945/87 (ECtHR 16 December 1992)
9. Hayndyside V. the United Kingdom, App No. 5493/72 (ECtHR 7 December 1976)
10. Jersild V Denmark App No, 15890/89 (ECtHR 23 September 1994)
11. K v Austria App No 16002/90 (ECtHR 13 October 1992)
12. Klass and other v Germany (ECtHR Application No 5029/71 September 1978)
13. Leroy v France (ECtHR Application No 36109/09 26 February 2009)
14. Observer and Guardian v the United Kingdom App No 13585/88 (ECtHR 26 November 1991)
15. Ozgur Gundem v Turkey App No 23144/93 (ECtHR 16 March 2000)

16. Perincek V Switzerlalnd App No 27510/08, (ECtHR, 15 October 2015)
17. Rotaru V. Romania App No 28341/95 (ECtHR 4 May 2000)
18. S. A.S V France App No 43835/11 (ECtHR 1 July 2014)
19. Szabo and Vissy v Hungary (ECtHR Application no. 37138/14) 12 January 2016)
20. Vajnai v Hunagary App No 33629/06 (ECtHR 8 July 2008)
21. Weber and Saravia v. Germany (ECtHR Application No. 54934/00 29 June 2006)
22. Youth Initiative For Human Rights V Serbia (Application No 48135/06 ECtHR 25 September 2013)

South Africa

1. Goodman Gallery v The Film and Publication Board (Case No 8/2012)

2. Midi Television v Director of Public Prosecutor (Case No 100/06)
3. *Tshabalala-Msimang v Makhanya* (The High Court of South Africa, Witwatersrand Local Division Application No 18656/07)

USA

1. Abrams v. United States, 250 U.S 616, 630 (1919)
2. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)
3. New York Times Co. v. United States; United States v. Washington Post Co; 403 U.S 713 (1971)
4. Procunier V. Martiez, 416 U.S. 375 (1974)
5. *Schenck V. United States*, 249 U.S. 47 (1919)

UK

1. Regina *v.* Secretary of State for the Home Department Ex Parte Simms [1999] UKHL

Inter-American Court of Human Rights

1. Advisory Opinion, The Word 'Laws' In Article 30 of The American Convention on Human Rights, Inter-American Court of Human Rights, OC-06/86 (1986)

2. *Claud Reys Et Al V Chile*, Case 12.108 (IACtHR 19 September 2006)

3. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985)
4. *Kimel V. Argentina* (IACtHR 2 May 2008)

African Commission on Human and People's Rights

1. Article 19 /The State of Eritrea, Communication No. 275/ 2003 (ACoHPR 2007)
2. Monim Elgak, Osman Hummeida and Amir Suliman /Sudan Communication 379/09 (ACoHPR 2015)
3. Scanlen & Holderness / Zimbabwe Commission Communication No 297/05 (ACoHPR 2009)
4. Sir Dawda K. Jawara / Gambia 147/95-149/96 (ACoHPR 2000)

Human Rights Committee

1. *Johng-Kyu Sohn V. Republic of Korea*, Communication No 518/1992 (1995)
2. Kivenmaa V. Finland, Communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990 (1994).
3. *Tae Hoon Park V. Republic Of Korea*, Communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995 (3 November 1998)
4. *Toonen V. Australia*, Communication No. 488.1992 (1994)
5. *Velichkin V. Belarus*, Communication No 1022/2001 (2005)

Other Sources

1. A/HRC/13/37, Report of the Special Rapporteur on the Promotion and Protection of Human rights and Fundamental Freedoms While Countering Terrorism (2009)
2. A/HRC/WGAD2012/62, Opinion Adopted by the Working Group on Arbitrary Detention (2012)

3. Abid Hussain, 'Report of the Special Rapporteur on the Promotion and the Protection of the Right to Freedom of Opinion and Expression' (1998), E/CN.4/1999/64/Add.1
4. Abid Hussain, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2000), E/CN.4/2000/63
5. Abid Hussain, Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression (1999), E/CN.4/1999/64
6. Abid Hussain, Report of the Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression Pursuant to Commission on Human Rights Resolution 1993/45 (1994), E/CN.4/1995/32.
7. Ambeyi Ligabo, 'Report of the Special Rapporteur, Civil and Political Rights, Including the Question of Freedom of Expression', E/CN.4/2003/67.
8. Ambeyi Ligabo, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2008), A/HRC/7/14.
9. Amnesty International Public Statement, Ethiopia: Concerns that Anti-Terrorism Law is Being Used to Suppress Freedom of Expression (2011)
10. UN Experts Urge Ethiopia to Halt Violent Crackdown on Oromia Protesters, Ensure Accountability for Abuses (2016)
11. Amnesty International Report 2024/2015: The State of the World's Human Rights.
12. Amnesty International Submission to the UN Universal Periodic Review, Ethiopia: Failure to Address Endemic Human Rights Concerns (2014)
13. Amnesty International, 'Malaysia: New anti-terrorism law a shocking onslaught against human rights,' https://www.amnesty.org/en/latest/news/2015/04/malaysia-new-anti-terrorism-law-a-shocking-onslaught-against-human-rights/
14. Amnesty International, Dismantling Dissent: Intensified Crackdown on Free Speech in Ethiopia (Amnesty International Ltd 2011)
15. Article 19, Comment on Anti-terrorism Proclamation of Ethiopia (2010) Oral Statement by Amnesty International to Special Rapporteur on Freedom of Expression and Access to Information in Africa (2011)
16. Article **19,** International Covenant on Civil and Political Rights, 1976, **http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf**

17. Article 19, The Johannesburg principles on National Security, Freedom of Expression and Access to Information (1996) International Standards Serious, https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf
18. CCPR/C/ETH/CO/1, Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant (2011)
19. Clifford Coonan, 'China Condemns ''Insult'' of Award for Jailed Dissident Liu Xiaobo', The Independent, 9 October 2010,http://www.independent.co.uk/news/world/politics/china-condemns-insult-of-award-for-jailed-dissident-liu-xiaobo-2101810.html
20. Committee to Protect Journalists, Ten Most Censored Countries (2015), https://www.cpj.org/2015/04/10-most-censored-countries.php
21. David Kaye, 'Report of the Special Rapporteur on the Promotion and the Protection of the Right to Freedom of Opinion and Expression' (2015), A/70/361.
22. Ethiopia's Response to Recommendations in A/HRC/27/14 (2014), UPR, 2nd Review, Session 19.
23. Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2010), A/HRC/14/23
24. General Comment No. 10: *Freedom of expression* (Art. 19): 29/06/1983. http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf
25. Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, adopted by the committee of ministers in 2002, Available on **http://www.legislationline.org/documents/action/popup/id/8086**
26. Henry Shue, Special Rapporteur to the UN Sub-Commission. http://hrlr.oxfordjournals.org/content/5/1/81.full Accessed 23 October 2015
27. Human Rights Committee, General Comment No. 34, CCPR/ C/GC34 (2011)
28. Human Rights Watch (2009), Analysis of Ethiopia's Draft Anti-terrorism law, https://www.hrw.org/print/237005
29. Human Rights Watch (2009), Ethiopia: Amend Draft Terror Law, https://www.hrw.org/news/2009/06/30/ethiopia-amend-draft-terror-law

30. Human Rights Watch (2015), UN Human Rights Council: Panel on the effect of terrorism on human rights, Joint statement on the Impact on human rights defenders, https://www.hrw.org/news/2015/06/30/un-human-rights-council-panel-effect-terrorism-human-rights accessed 26 November 2015
31. Human Rights Watch, 'In the Name of Counter-Terrorism: Human Rights Abuses Worldwide' *(2003)*, 3, https://www.hrw.org/legacy/un/chr59/counter-terrorism-bck.pdf accessed 27 November 2015.
32. Human Rights Watch, Ethiopia: Events of 2015, https://www.hrw.org/world-report/2016/country-chapters/ethiopia
33. Human Rights Watch, Violation of Media Freedom in Ethiopia (2015) https://www.hrw.org/report/2015/01/21/journalism-not-crime/violations-media-freedoms-ethiopia
34. International Council on Human Rights Policy, Human Rights after September 11 (2002), Versoix, Switzerland: International Council on Human Rights Policy
35. Kofi Annan, 'Reports of the Secretary General: In Larger Freedom: Towards Development, Security, and Human Rights for All', Delivered to the General Assembly, UN Doc. A/59.2005 (March 21, 2005)
36. Kofi Annan, Statement to the Special Meeting of the Security Council's Counter-Terrorism Committee with International, Regional and Sub-regional Organizations, (2003 New York)
37. Legal Protections on the Right to Information, State Secrets and Protection of Sources in OSCE Participating States (PI and OSCE, May 2007). http://www.privacyinternational.org/foi/OSCE-access-analysis.pdf
38. Martin Scheinin, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (2005), E/CN.4/2006/98.
39. Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Doc. A/HRC/13/37, 28 December 2009.
40. Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights (2009), OEA/Ser.L/V/II.

41. OHCHR, Ethiopia, News, UN experts Disturbed at Persistent Misuse of Terrorism Law to Curb Freedom of Expression as cited by A/HRC/WGAD2012/62, Opinion Adopted by the Working Group on Arbitrary Detention (2012)

42. Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2013), A/68/362.
43. Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression: Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade (2010).
44. Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment (2012); United Nations Human Rights Council, Opinions Adopted by Working Group on Arbitrary Detention, 66th session (2012)
45. Senator R Feingold (D–WI), 'Statement on the Anti-Terrorism Bill' (Speech at US Senate on 25 October 2001)
46. Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources (Privacy International, November 2007). http://www.privacyinternational.org/sources

47. Speech by UK's Prime Minister Tony Blair, 'The Rules of the Game are Changing' (2005), http://www.theguardian.com/uk/2005/aug/05/july7.uksecurity5
48. The Article 19 Freedom of Expression Handbook, 'International And Comparative Law, Standards and Procedures' (Article 19, 1993)
49. The Declaration of The Principles of Freedom of Expression In Africa, The African Commission on Human And Peoples' Rights (2002) Meeting at its 32nd Ordinary Session, In Banjul, The Gambia.
50. The Global Principles on National Security and the Right to Information (2013).
51. The Oakland Institution and Environmental Defender Law Center, Ethiopia's Anti-terrorism Law: A tool to Stifle Dissent (2015)
52. The Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights, U.N. Doc E/CN.4/1985/4.
53. The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of

Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, 9 December 2008. Available at www.osce.org/documents/rfm/2008/12/35705_en.pdf

54. UN 2005 World Summit Outcome, A/RES/60/1 http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf
55. UN Experts Urge Ethiopia to Stop Using Anti-terrorism Legislation to Curb Human Rights (2014) http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15056&LangID=E#sthash.bJQyrx2x.dpuf
56. United Nations Human Rights Committee, General Comment No. 10: Freedom of Expression (Art. 19) (1983)
57. United Nations Human Rights Office of the High Commissioner, Continued Detention of Ethiopian Journalists Unacceptable – UN human rights experts (2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15890&LangID=E