# BALANCING AND SAFEGUARDING THE RIGHT TO FAIR TRIAL FOR SUSPECTS OF TERRORISM IN ETHIOPIA

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## Executive Summary

Terrorism is one of the biggest concerns for the international community. While the act has existed for such a long time, the issue has been magnified after the attacks in New York and Washington D.C. on September 09, 2011 by al-Qaeda. The attacks on 9/11 brought a renewed commitment to combatting terrorism.

Among the various measures taken, criminalizing and punishing acts of terrorism has been identified as the most effective way to combat it. Following the international trend, Ethiopia has adopted a subsidiary legislation that criminalizes and punishes terrorism. However, the application of this legislation has caused concerns on human rights. More specifically, the right to fair trial has almost been rendered meaningless affecting all other fundamental rights and freedoms.

This thesis will provide for safeguarding mechanisms that need to be adopted in Ethiopia to effectively guarantee fair trial for suspects of terrorism without compromising its counter terrorism efforts. Ensuring fair trial rights, in the midst of combating terrorism, requires a delicate balance which can only be achieved if the appropriate safeguards are in place. This balancing exercise will rely on a broader framework that looks at criminalization and prosecution through a fair trial lens.

In an effort to devise such balancing, the thesis will assess the law and practice of Ethiopia on fair trial and terrorism to compare it with the laws of the United Kingdom and the jurisprudence of the United Nations. Such assessment will critically analyze the scope, limitations and safeguards of the right to fair trial for suspects of terrorism provided in these jurisdictions.

Through this assessment, it will adopt a fair trial framework to countering terrorism. The framework provides for a balancing exercise within the scope already provided under international human rights law. Such framework will be supported by the necessary safeguards that protects suspects from abuse of overstretched standards.

## Acknowledgment

This dissertation is the product of a long journey that required a lot contemplation and frustration. It was however not a lonely road and I shall take time to thank the people who have made it a lot easier; this work is a testament to them.

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To my friends, who have never failed to give me an extra eye or a constant uplift during this time, I send this long overdue word of appreciation.

I am forever indebted to all of you.

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# List of Acronyms

**ACHPR:** African Charter on Human and People's Rights

**AComHPR:** African Commission on Human and Peoples' Right

**ATP:** Anti-Terrorism Proclamation

**AU:** African Union

**ECHR:** European Convention for the Protection of Human Rights and Fundamental Freedoms

**ECtHR:** European Court of Human Rights

**FDRE:** Federal Democratic Republic of Ethiopia

**GA:** General Assembly

**GC:** General Comment

**HPR:** House of Peoples' Representatives

**ICCPR:** International Covenant on Civil and Political Rights

**OAU:** Organization of African Union

**UK:** United Kingdom

**UN:** United Nations

**UNHRC:** Human Rights Committee

**UNHRCo:** Human Right Council

**UPR:** Universal Peer Review

## Introduction

Ethiopia adopted its first anti-terrorism legislation [hereinafter ATP] in 2009; ever since its adoption, the state has been under constant criticism for it. Domestically, scholars, human right groups as well as politicians have challenged and criticized the constitutionality of the law and its procedural flaws. Domestic critics call the legislation a license for the government to crack down on opposition. Internationally, the criticism has been forwarded from human rights organizations, other states, the United Nations [hereinafter UN] and regional organizations. Nonetheless, the state has called the criticism baseless[1].

The need for counter terrorism legislation in the country is undeniable. The country is situated in the horn of Africa, a region subject to terrorist attacks by *al shabaab*. The fragile political conditions in the countries that surround it, including Eritrea, Sudan and Somalia, bread a comfortable space for terroristic groups, posing a threat in the region as well as the country. More importantly, the state has an obligation under international and regional law to criminalizing acts of terrorism. Hence, the legislation was necessary- the criticism, however, is not on the need for legislation but more on the broad and extended hands of this law.

The practical application of the legislation by the state has shown that the critics are not without merit. Its application against opponents of the government for exercising their human rights has affirmed the abuse of the legislation. The ATP has been used against journalists, opposition political party members and leaders, human rights activists and members of the public that

[1]UNHRC 'Report of the Working Group on the Universal Periodic Review: Ethiopia' A/HRC/WG.6/19/L.12 (2014), §13, 152

strongly oppose the government[2]. Such individuals are charged for terrorism based on writings and other activities they undertake to challenge the ruling of the government.

Most recent use of the legislation, especially, has escalated the concern regarding the risk it is posing on human rights. The case of the 'Zone 9' bloggers, journalists like Temesgen Desalegn and Eskinder Nega, opposition political leaders such as Yonathan Tesfaye and Merara Gudina, the numerous students arrested for protesting the government's master plan for the capital city, Addis Ababa, are only a few of the cases that demonstrate the misuse of the legislation and its impact on fundamental rights and freedoms. The law has restricted freedom of expression, the right to privacy, the right to political freedom, the right to liberty and, more important to this thesis, the right to fair trial.

The government has repeatedly denied these allegations; it has stated that its actions are in accordance with its obligation under international and regional treaties[3]. The government has also responded to these criticisms by stating that its legislation is no different from counter terrorism legislations in the Western states. More frequently, the government claims to have used the Terrorism Act of the United Kingdom [hereinafter, UK] to draft its law. This thesis will compare different aspects of both the Ethiopian and UK legislation to check the validity of the government's statement.

As mentioned above, this thesis will focus on the right to fair trial for suspects charged with terrorism. The right to fair trial is a fundamental human right that is protected under international human rights law and guaranteed under the Ethiopian constitution[4]. The right is essential to

[2] Ibid

[3] Ibid

[4]Constitution of the Federal Democratic Republic of Ethiopia 1995 (art. 20)

ensure democracy and rule of law[5].It is especially important for the protection of other fundamental rights and freedoms as any violation to these rights requires a redress through a fair trial[6]. More specifically, it is highly intertwined with other rights such us the right to liberty, the right not to be subject to torture, inhumane, cruel, degrading treatment or punishment as well as the right to life.

As a result of this significance, the need to ensure fair trial while countering terrorism has repeatedly been asserted by international and regional human right bodies[7]. These bodies, while acknowledging the importance of taking strict measures against terrorism, have stated the need to respect human right law at all times[8]. Despite such push by the human rights bodies, the application of fair trial is repeatedly restricted by states in favor of measures taken against terrorism.

[5] Kevin Mgwanga Gunme et al V. Cameroon Comm no 266/03 (ACommHPR, 27 May 2009), 126;Ana Salinas de Frias, *Counter-terrorism and Human Right in the case law of the European court of Human Right* (Strasbourg: Council of Europe publishing, 2012) 93

[6] African Commission on Human and Peoples' Right, Resolution on the Right to Recourse and Fair Trial (AComHPR Tunisia 1992); Nsonurua J Udombana, 'The African commission on Human and people's right and the development of fair trial norms in Africa' [2006] AHRLJ http://www.ahrlj.up.ac.za/udombana-nj 300

[7] Ana Oehmichen, T*errorism and Anti-terror legislations, The terrorized legislator? A comparison of counter-terrorism legislation and its impact on human right in the legal system of UK, Spain, Germany and France* (Antwerp; Portland [Or.]: Intersentia, 2009) 21

[8] The United Nations Global Counter- Terrorism Strategy, GA Res 60/288 (20 Sep 2006); The United Nations Global Counter-Terrorism Strategy Review, GA Res 68/276 (24 June 2014); United Nations Global Counter-Terrorism Strategy Review, GA Res 70/291(1 July 2016)

The case of Ethiopia is no different if not more complicated. In a weak system of democracy with a frail judiciary, the effectiveness of fair trial in the country was already questionable before the application of the ATP. After the legislation, the heavy arms it places has posed even more risk on the right. To complicate things further, the politically motivated use of the legislation, puts fair trial at the edge of a long fall for these suspects.

This thesis will examine the Ethiopian law and practice in comparison with the law in the UK. Considering the fact that the UK has been confronted with terrorism for much longer, it has adopted several legislations[9]. This thesis will specifically focus on the 2001 Terrorism Act as it is the legislation that served as a basis for the ATP in Ethiopia. Furthermore, when discussing fair trial in the UK, the thesis will also rely on the European convention and the jurisprudence of the court. This is because the UK's human right act, which is enacted to give effect to the European Convention on Human Rights [hereinafter, ECHR] and the European Court of Human Rights [hereinafter, ECtHR], primarily depends on this[10].

The Ethiopian experience with ATP will also be compared with the UN. Although it is different in set up, the UN has adopted several guidelines, models and frameworks that help set standards. Furthermore, it has been on the frontline of combating terrorism by adopting norm setting principles and guidelines. It has also been actively requesting states to engage in the criminalization of terrorist activities. In addition to this, the UN has also been engaged in setting standards for Human Rights law. It has expert bodies set up for both and can be valuable in assessing the necessary safeguards in the protection of human right while combating terrorism



[9]The Anti-terrorism, Crime and Security Act 2001; The Prevention of Terrorism Act 2005, The Terrorism Act 2006, The Counter-terrorism Act 2008 and The Counter-terrorism and Security Act 2015

[10] Human Rights Act 1998

Through this comparison, the thesis will assert the importance of ensuring fair trial for suspects of terrorism to make counter terrorism measures effective. Violation of human rights, including on fair trial, harbors the growth of terrorism[11]; as such, respecting the right, is viewed by this thesis, as one counter terrorism strategy. Furthermore, the thesis will demonstrate that there is no goal to be achieved by restricting this right. Therefore, fair trial rights will be used as a lens to evaluate the effectiveness of such measures.

This thesis recognizes the unique threat posed by acts of terrorism and values national level efforts in preventing and combating it. It further recognizes that this effort by states may require a different application of fair trial. While this does not entail abandoning the right or excessively restricting it, it may mean a delayed application or some limitation. As such, the thesis will assert that these counter terrorism measures, that may limit or delay the application of fair trial, can be supported with the necessary safeguards to effectively guarantee fair trial rights. The thesis will present different safeguarding mechanisms that can balance the right with counter terrorism criminal prosecutions.

In this, the normative background will base itself on international and regional human right instruments as well as the jurisprudence of their corresponding human right bodies. The thesis will further be supported by other documents such as UN guidelines and academic writings. The writer will also use personal experiences in monitoring the anti-terrorism bench of the Federal High Court of Ethiopia to support the research.



[11]GA Res 60/288; GA Res 68/276; GA Res 70/291

This thesis is divided into three core chapters. The first chapter will discuss the normative framework of fair trial rights in detail along with the elements of the right. It will compare the meaning and scope of these elements under the different jurisdictions to fully understands differences as well as similarities. However, the discussion on elements will not be limited to the traditional understanding as provided by human right instruments. Other rights, which are highly integrated to fair trial, will be understood as components of fair trial for the purpose of this thesis as they will support discussions that will follow in other chapters.

The first chapter will then address the issue of limitation to analyze the qualifications to the right. It will explore the elements that are subject to limitation by looking at the legal instruments and the jurisprudences that followed- this will also be used to demonstrate the extent of such limitations. Finally, the chapter will discuss derogation; it will demonstrate aspects of fair trial as non derogable by relying on its relationship with other non derogable rights.

The second chapter will analyze the relationship between fair trail and criminal prosecution as a measure to counter terrorism. The chapter will first discuss the definition of terrorism in different jurisdictions by establishing the relationship between this definition and fair trial. Through this discussion, the writer will develop a model definition that best suits the crime while protecting the right. The definition forwarded by each jurisdiction will be compared with this model definition to assess the implication of the differences.

Following that, the second chapter will address restrictions on fair trial that result from such counter terrorism measures. The analysis will focus on the common practices in Ethiopian counter terrorism prosecutions- these discussions are also observed in the other jurisdictions making it even more relevant. The restrictions will be discussed with respect to the elements covered in the first chapter to understand how the practices affect the different elements.

The third chapter will cover balancing and safeguarding; the chapter will adopt what it will qualify as a fair trial framework to countering terrorism. Such balancing mechanism will secure an effective counter terrorism measure without compromising the fairness of a trial. The balancing exercise will be supported by the necessary safeguards of identifying essential elements and adopting an independent supervisory body.

Finally, the thesis will conclude by giving detailed perspective on to summarize the discussion- the concluding remarks will be complemented with the necessary recommendation the writer believes will improve the legal condition in Ethiopia.

# Chapter One: Normative Framework on the Right to Fair Trial

## 1.1. Introduction

The right to fair trial is a basic characteristic of democracy and rule of law as it provides safeguards to guarantee their protection[12]. Equality of arms, as an underlying principle of fair trial, guarantees equality before courts which is core to rule of law. Furthermore, it ensures the proper administration of justice[13] and can effectively guarantee all human rights[14]. The failure to observe this right will undermine the protection of all human rights[15]. The guarantee of human rights requires the provisions of an effective remedy to violations. An essential element of such remedy is the existence of a fair trial in which the defendant can adequately present such violation to get recourse. It is especially intertwined with the right to life and liberty. The guarantee of these rights means an individual cannot arbitrarily be deprived of these rights. The term arbitrary, within these rights, means without the existence of a fair trial[16]. Thus, the right holds a high value in a modern society.

[12]UHCR 'General Comment 32' Article 14: Right to equality before courts and tribunals and to a fair trial (2007) CCPR/C/GC/32 par 1; Ana D Boston, The Right to a fair trial: *Balancing Safety and Civil Liberty* (Cordozo Journal of intl & comparative law, Vol 12) 1

[13] UHCR 'General Comment 13' Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (1984) UN Doc HRI/GEN/13, 1; Right to Fair Trial (Journal of African law: Vol. 45, No. 1) 2001, 142; Piero Leanza, Ondrej Pridal, *The right to a fair trial: Article 6 of European Convention on Human Rights*, 7

[14]Ana Salinas de Frias, 93; Nsonurua J Udombana, 301

[15]Right to Fair Trial, 140

[16] Assanidze V. Georgia App no. 71503/01 (UNHRC, 8 April 2004) 175; Jėčius V. Lithuania App no. 34578/97 (ECtHR, 31 July 2000), §62; Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on

The right to fair trial is a guarantee that should be provided in all cases that determine rights and obligations. However, this thesis will exclusively deal with its application in the determination of criminal responsibilities. This chapter will specifically look at the minimum fair trial guarantees that need to be secured in criminal matters. This discussion will evaluate some elements independently while it groups others together. The right to presumed innocent, the right to remain silent and the right to a speedy trial will be assessed independently. On the other hand, the right to defend oneself, the right to be informed, the right to an interpreter, the right to adequate time and facilities for defence, the right to examine/have examined witnesses against oneself and the right to counsel will be grouped together under Rights relating to defence. Similarly, the right to be tried by an independent, impartial tribunal established by law will be discussed with the right to appeal. Such grouping among rights that are integrated is conducted for ease of discussion.

In addition to the elements listed under human right instruments, this chapter will look into other related rights. Evidence and principle of legality are selected as additional elements of fair trial for the purpose of this thesis. Such selection is made based on their relevance to the thesis and the upcoming chapters. Nonetheless, it is important to note that these are not the only other related rights.

In this thesis, the writer considers equality of arms as the underlying principle and goal of fair trial. While, equality of arms may be provided as an element of fair trial, the writer believes that it is integrated to all elements and shall be understood as such. This is especially true in criminal

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behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) V. Malawi Comm no. 64/92-68/92-78/92_7AR (AComHPR, 27 April 1994) §9; Purohit and Moore V. Gambia (The) Comm no. 241/01 (AComHPR, May 2003), §72

proceedings where the prosecutor, as a state machinery, has more power than the accused. Thus, the writer believes that elements of fair trial are intended to ensure the equality of the parties by giving defendants the tools necessary to balance power. According to the ECtHR, the essence of fair trial is that everyone has reasonably equal opportunity to present their case[17]. Hence, equality of arms will not be addressed as a separate element.

After discussing the elements of fair trial, the chapter will look at the limitations on the right. It will analyze limitations established in the legal instruments and jurisprudence of each jurisdiction. It will argue that such jurisprudence has expanded the limitations beyond what was provided by the instruments.

Following the discussion on limitations, the chapter will assess derogability. This section will ask if the right to fair trial is derogable with a vision of establishing non derogable aspects of the right.

The discussions, hereinafter, will be conducted based on ICCPR as it has the most elaborative list of elements. Moreover, it is relevant to all jurisdictions under consideration- it is the main legal framework for the UN and has been ratified by both Ethiopia and UK. In addition to ICCPR, the discussion will be complemented by the jurisprudence of the Human Right Committee. The discussion will also heavily rely on the ECHR and the jurisprudence of its court. Considering the extensive jurisprudence of the ECtHR as well as its value to the Human Right Committee, much of the standards will be explained by relying on its case law. Furthermore, the UK relies on the ECHR and the jurisprudence of the court in framing the understanding of the

[17]Edwards and Lewis v. The United Kingdom App no. 39647/98 and 40461/98(ECtHR, 27 October 2004)

right[18]. Thus, in referring to the European system, this thesis is discussing the UK. These will further be compared with the Ethiopian legal system by looking at the constitution, the criminal procedure code, other relevant laws and the jurisprudence of the African Commission on Human and Peoples' Right.

## 1.2. Elements of Fair Trial

- ***Presumption of Innocence***

Presumption of innocence is a fundamental element of fair trial[19] that protects the reputation of those accused. A person charged with a criminal offence shall be treated as innocent until guilt is established by a competent tribunal[20]. This means, the rights and obligations of this individual will not be affected by the accusation until a decision is rendered by the court[21]. As such, it protects suspects from a treatment dictated by the preconception of guilt.

An obligation to uphold this presumption lies on all state organs- typically, courts should not carry out their activities with the predetermined opinion of guilt towards the suspect[22]. The court shall make decisions by relying solely on facts and evidence presented. The court, before rendering its decision, should always regard the defendant as innocent and address him/her in the same manner. In addition to courts, the obligation also lies on other state bodies and all public

[18] Human Rights Act

[19]GC 32; GC 13, §7; Louise Doswald-Beck, *Human Rights in times of conflict* (Oxford: Oxford press) 2011

[20] Commission of The European Communities, Green paper on the presumption of innocence (2006)5; GC 32; African Commission on Human and Peoples Right, Principles and Guidelines on The Right to a Fair Trial and Legal Assistance in Africa (2003) 6 (e)

[21] Ibid

[22]Ibid

officials[23]. The ECtHR, in *Allenet De Ribemont V. France*, stated that the presumption of innocence may be infringed not just by judges but also by other public authorities[24]. Similarly, the UN jurisprudence provides that the duty lies on all public officials[25]. The AU jurisprudence carries the same narrative by putting an obligation on public officials not to express views of guilt in statements they make[26]. The Ethiopian legal system, follows this experience by extending the obligation on all state organs/public officials. The constitution, under article 13, states that the obligation to ensure human rights lie upon all organs of the state[27]. Following this, presumption of innocence, as a fundamental human right, shall also be upheld by all state organs and public officials representing them.

When we look at the practice, however, the obligation is mainly practiced by courts with violations by other organs going without redress. Public officials have been observed making statements of guilt on suspects with an ongoing case. Such statements have not been met with a consequence or any response from the courts. In a recent example, the prime minister of Ethiopia publicly declared that the Zone 9 bloggers are guilty, and his government has evidence that proves it while the court case was proceeding[28]. Following that, five of them had their charges

[23]Allenet De Ribemont V. France 15175/89 (ECtHR, 10 February 1995 )36; GC 32; Green paper 5

[24] Ibid

[25] GC 32, §30; Gridin v. Russian Federation, Communication No. 770/1997(UNHRC, 20 July 2000) CCPR/C/69/D/770/1997, §3.5 8.3

[26] AU Principles and Guidelines 6(e)(ii); Law Office of Ghazi Suleiman V. Sudan, 222/98-229/99 (AComHPR, May 2003), §56

[27] FDRE Constitution, art 13 (1) "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter"

[28] https://www.youtube.com/watch?v=VwimUr2C7mY

dropped by the Ministry of Justice for lack of evidence, and four of them were acquitted by the court. Nonetheless, there was neither a consequence nor an apology to this statement by the prime minister. This is just one example of the many circumstances in which public officials have violated the presumption of innocence. Save this failure to uphold the obligation in practice, the law clearly puts the obligation on all organs of the state.

The other expression of presumption of innocence is the treatment of suspects in pretrial detention. The condition in which suspects may be detained prior to a guilty ruling shall significantly be based on their understanding of this presumption. The first important thing to note in this is that pretrial detention is an exceptional circumstance[29]. Any deprivation of a right, including the right to liberty, prior to a court decision is a violation of presumption of innocence unless it is done exceptionally in a manner that doesn't equate to a punishment. Pretrial detention is justified where it is temporary and not automatic[30]; there shall always be a possibility of bail where reasonable conditions are fulfilled[31].

Where bail is denied causing the detention of suspects, the conditions of detention should be different than that provided for convicted individuals[32]. Suspects shall be detained in a facility separate from convicted individuals. They shall also be treated as a suspect and their detention shall not amount to a punishment. There shall be regular review of the reasons of detention to ensure detention remains valid meaning the detention should be checked by a court of law

[29] Green paper 5; UNHRC 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant-Argentina' CCPR/CO/70/ARG (15 November 2000), par 10; AU Principles and Guidelines, art O(j)

[30] Ibid; Garycki V. Poland App no. 14348/02 (ECtHR, 6 February 2007), §39, 40

[31] AU principles and guidelines, M (e)

[32] GC 32

regularly and where the conditions demanding detention have changed, the suspect shall be released.

These expressions of presumption of innocence are provided by all jurisdiction. While the Ethiopian legal system, does not state the pretrial existence of this element of fair trial[33], its practice in some ways signifies such expression. The legal system recognizes the right to bail[34] and suspects in detention are kept separate from convicted individuals. However, in recognizing the right to bail, the Ethiopian criminal procedure poses an additional requirement stating "Whosoever is arrested may be released on bail where the offence with which he is charged does not carry the death penalty or a rigorous imprisonment for 15 years or more….."[35] this additional requirement is a restriction on presumption of innocence.

Presumption of innocence, in addition to determining the treatment of suspects, imposes several standards on the criminal charge proceedings. It puts the burden of proof on the prosecutor and imposes a higher standard of proof. Placing the burden of proof on the prosecution because of this element has been established by the UN Human Right Committee[36], the ECtHR[37] as well as the African Commission on Human and Peoples' right[38]. In the same manner, the Ethiopian legal system also places the burden of proof on the prosecutor who has to prove all elements of the case before the defendant can present any defence.



[33] FDRE Constitution, art 20 (3) ……Presumption of innocence is provided as a right of an accused indicating that it exists during the trial. Furthermore, it states that the right exists during the trial proceeding.

[34] Proclamation 185/1961, Criminal Procedure Code of Ethiopia, art 63

[35] Criminal Procedure code, art 63 (1)

[36] GC 32, par 30

[37] Ibid

[38] AU principles and Guidelines, 6 (e) (i)

Presumption of innocence is also signified by placing a higher standard of proof; the standard required is 'beyond reasonable doubt'[39]. This standard means the prosecutor shall proof the case beyond doubt and any doubt on the case shall benefit the defendant[40]. This high threshold of proof is required with an understanding of the right to presumption of innocence.

Presumption of innocence is a fundamental element of fair trial[41] that protects the reputation of those accused. A person charged with a criminal offence shall be treated as innocent until guilt is established by a competent tribunal[42]. This means, the rights and obligations of this individual will not be affected by the accusation until a decision is rendered by the court[43]. As such, it protects suspects from a treatment dictated by the preconception of guilt.

The presumption of innocence is, thus, signified by directing all angles of the treatment forwarded to suspects pretrial and during trial. These expressions of the presumption shall be guaranteed until guilt is established by a competent tribunal.

- ***Right to Remain Silent***

The right to remain silent is another important element of the right to fair trial. While it is explicitly mentioned as an element in the ICCPR as well as the Ethiopian constitution, it is not mentioned in the ECHR and ACHR[44]. Nevertheless, these jurisdictions have subsequently recognized this as an element of fair trial and have qualified it as an essential component through

[39]Ibid

[40]Barbera, Messegue and Jabardo V. Spain App no. 10588/83; 10589/83; 10590/83 (ECtHR, 6 December 1988), §77

[41]GC 32; GC 13, §7; Green paper

[42] AU Principles and Guidelines, 5

[43] AU principles and Guidelines, 6 (e)

[44] ACHPR and ECHR do not explicitly state this right

their jurisprudence. The ECtHR, for instance, has identified it as the heart of fair trial[45]; similarly, the AComHPR has included it as one of the essential principles of fair trial[46].

At the core of the right lies the privilege against self-incrimination- the right to remain silent protects suspects from being forced to give information either by answering questions or providing evidence. The right to remain silent in the African Human Right jurisprudence also means an adverse inference cannot be drawn from exercising the right[47]. This means courts cannot interpret a suspect's silence as indicative of guilt. Even though the law in Ethiopia does not state this clearly, through practice we can see that courts do not draw any inference from silence. This is not the same in the European Human Right jurisprudence[48]; the ECtHR has stated that drawing an adverse inference from silence is not a violation of the right to remain silence[49]. However, the court has led a condition upon which this adverse inference may be drawn- the silence cannot be the sole factor upon which the courts base its judgment[50]. Furthermore, there shall not be a direct consequence that results from exercising the right[51]. As long as such conditions are met, the ECtHR allows states to draw an inference from silence.

This privilege is guaranteed to protect the presumption of innocence; more specifically, it protects presumption of innocence by placing the burden of proof on the prosecutor. When a suspect remains silent, by not providing information or evidence against oneself, the prosecutor

[45] Heaney and McGuinness V Ireland App no 34720/97 (ECtHR, 21 December 2000), §40

[46] AU Principles and Guidelines, 6(d)

[47] AU principles and Guidelines, 6(d) (ii)

[48] John Murray V. The United Kingdom App no. 18731/91 (ECtHR, 8 February 1996), §47

[49] Ibid

[50] Ibid

[51] Ibid; Saunders V. UK App. No 19187/91 (ECtHR, 17 December 1996), §71

has the burden of proving the case without relying on the suspect[52]. This means, the suspect cannot be forced to provide an information or evidence that helps the prosecution. In relation to this, it also respects the will of the individual[53]. Human dignity, which is a core principle of human right, requires suspect's will, including their will not to answer questions, be respected.

Another important justification for providing individuals with this protection is to shield them from being subject to cruel, inhumane and degrading treatment or punishment. Where individuals have a right not to provide information, police and prosecutor will not force suspects to give information because such information will be discarded as evidence. In order to guarantee this right, statements that have been obtained in violation of this right will not be used as an evidence. This rule is respected in all jurisdictions. However, in Ethiopia, the burden of proof in establishing the violation of such right is on the suspect. This has caused a lot of controversy among scholars in the country. On the one hand, the courts state whoever claims a fact has to proof it; in this, they consider the defendant to be a claimant of the lack of will hence the defendant shall prove this claim. This has been and continues to be the practice to date. On the other hand, scholars argue that the first claim is made by the prosecutor who claims there was will when presenting confessions[54]. It is also nearly impossible for suspects to prove lack of will from being subject to torture or inhumane treatment as it happens in detention centers in the absence of witnesses. The ECtHR jurisprudence has clearly stated that the obligation to prove the

[52] Green paper, 6; AU principles and Guidelines, art 6 (d); Saunders v. the United Kingdom App no 19187/91 (ECtHR, 17 December 1996), §68; Bernardino Gomaríz Valera V. Spain Comm no 1095/2002 (UNHRC, 22 July 2005), §6.2

[53] Ibid

[54] Simeneh Kiros Assefa, The Principle of the Presumption of Innocence and Its Challenges in the Ethiopian Criminal Process, Mizan Law Review Vol. 6 No.2, December 2012, 306

existence of will in confessions lies on the state[55]- the same holds true for the jurisprudence of the UN[56]. The writer agrees with the jurisprudence of ECtHR and the UN.

In the end, we have seen that the right to remain silent is crucial to the proper administration of justice and it fulfills the overall objective of the right to fair trial[57]. Thus, there is a need to provide for a means to secure this element. The right to counsel is this necessary security- ensuring a legal counsel is present to all interrogations and confessions guarantees the defendant will not be forced to waive his/her right[58].

- ***The right to defend oneself***

The right to have your cause heard is the definition of fair trial as it embodies the principle of equality of arms[59]. If the prosecutor has an opportunity to present his/her case and evidence to prove that, the defendant shall have a similar opportunity to present his/her story and evidences in support of that.

In order for the defendant to properly defend the case, a defendant needs to have full information on what the case entails. Any information, small or big, will be essential to the defence- thus, the right to be informed is a component of the right to defend oneself.

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[55] John Murray, §47

[56] Makhmadim Karimov and Amon Nursatov V. Tajikistan Comm. Nos. 1108/2002 and 1121/2002 (UNHRC,27 March 2007) CCPR/C/89/D/1108 & 1121/2002

[57] Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa V. Sudan, §64

[58]Pavlenko v. Russia App no. 42371/02 (ECtHR, 1 April 2010), §101

[59] Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) V. Burundi Comm no. 231/99 (AComHPR, 6 November 2000), §27

The right to be informed allows the defendant to receive all information about his/her charge promptly, in detail and in a language he/she understands. In this, the word 'prompt', has no specific predetermined time frame on which the defendant shall get this information. The UN and ECtHR require the determination to be made on a case by case basis[60]. The African system, on the other hand, requires this information to be provided 'as soon as the charge is first made by a competent authority'[61]. While this still doesn't give a fixed time frame, it gives a more concrete standard that helps the determination on each case; the standard used to determine the time is when the charge was formed. The Ethiopian constitution provides the right to be informed of charges as the right of a person arrested[62] and accused[63] indicating information shall be available from the beginning. However, the criminal procedure code provides that information shall be provided when the charge is filed at the court[64]. As such, information will be provided at the commencement of the trial when the prosecutor submits the charge to the court and the defendant[65]. The practice also reflects what is provided in the criminal procedure as defendants receive detail information of the charge when the charge is presented at the trial.

The right to be informed, in addition to the time frame, also addresses the contents of such information. The defendant needs to receive detailed information that enables him to understand the charge and adequately prepare for defense[66]. The amount/kind of details has to be assessed on

[60] GC 32; Borisova V. Bulgaria Application no. 56891/00 (ECtHR, 21 December 2006) §41-45

[61] AU Principles and Guidelines, N (1) (a)

[62] FDRE Constitution, art 23 & 19 (1)

[63] FDRE constitution, art. 20 (2)

[64]Proclamation 185/1961, Criminal Procedure Code of Ethiopia, art. 123

[65] Ibid, art. 127

[66] AU Principles and Guidelines; Mattoccia V. Italy App no 23969/94 (ECtHR, 25 July 2000), §59

a case by case basis by taking fair trial in general and more specifically the right to defense into account[67]. Notwithstanding that, the defendant shall receive both factual and legal basis of the charges against him/her[68]. The AComHPR's jurisprudence also requires the detail in the information to be available in a way that enables the defendants to secure immediate release[69]. This would require availability of all information that can be useful to the defendant.

The Ethiopian legal system, similarly, requires the defendant to receive, among other things, information regarding the offence, the legal and material elements, time and place of offence, law and legal articles[70]. However, this is information that is to be provided with the charge which is to be presented at the beginning of the trial. Therefore, it is uncertain what information will be provided pretrial or if information will be given at all.

Finally, the defendant should receive information in a language he/she can understand[71]. This may entail interpretation of the charge in a language he/she understands as well as elaboration of legal standards or legal language[72]. This means vague, informal knowledge doesn't amount to a fulfillment of this right[73]. On this, the Ethiopian criminal procedure puts this duty on the court as they have a responsibility to read and explain the charge[74].

[67]Ibid

[68]Kamasinski v. Austria App no, 9783/82 (ECtHR, 19 December 1989), §79

[69] AU principles and Guidelines, art 3 (e) (iii)

[70] Criminal Procedure code, art 111

[71] Brozicek V. Italy App no. 10964/84 (ECtHR, 19 December 1989), §41

[72]Mattoccia V. Italy, §59

[73]T V. Italy App no 14104/88 (ECtHR, 12 October 1992), §28

[74] Criminal Procedure Code, art 80

In relation to this comes the right of the defendant to be assisted by an interpreter if he/she does not understand the working language of the legal system. A complete understanding of the case, which is essential to defend oneself, requires a communication in a language the defendant speaks. This right shall exist at all stages of the process and should be provided free of charge[75]. The Ethiopian legal system that requires this assistant to be done by a competent interpreter that can translates all questions and answers[76].

### *The right to adequate time and facilities to prepare for defence*

The ability to defend one's case requires the provision of adequate time and facilities to prepare for defence. Adequate time is very essential to prepare for a meaningful defence. The amount of time required, to be classified as adequate, will of course depend on the case- the number of documents to be examined, the number of witnesses the defendant needs to evaluate and other elements of the defence should be taken into consideration to assess the time required[77].

The defendant shall also be given adequate facilities to prepare for the defence. Facilities here means access to documents, evidences and witnesses to defend his case[78]. The defendant shall have the right to bring witnesses and evidences that are necessary to challenge the case. This means the state shall assist the defendant in getting these things; courts should grant summons for witnesses and documents and the police shall assist the defendant in getting them. This signifies the equality of arms as the prosecutor has the backing of this state machinery in establishing the case so the same shall be given for the defendant. Under the Ethiopian criminal

[75]Harward v. Norway, Comm no 451/1991 (UNHRC,16 August 1994), §9.5; Criminal Procedure Code, art 126 (2)

[76] Criminal Procedure, art 27 (4)

[77] GC 32, §33

[78] GC 32, §9

procedure code, the defendant is granted with this right with the power to obtain evidence and witnesses through a court order.

The word facilities also mean giving access to evidences and witnesses presented against him/her. The defendant should have ability to cross examine witnesses and to obtain/challenge the evidences presented by the prosecutor[79]. A restriction on documents in such cases shall be considered as a breach of the right to fair trial.

### *The right to counsel*

The right to a legal counsel is another element of the right to fair trial discussed under the right to defence. This right however is different from the others grouped here because a legal counsel is not only important for the defence, but it also protects other elements of fair trial for the defendant. As mentioned above, a legal counsel is a safeguard for the right to remain silent. Nonetheless, a legal counsel is mainly related to the right to defence[80] which is why it is grouped under this section.

A legal counsel supports a defendant with the necessary legal knowledge balancing the legal knowledge of the prosecutor. Through this knowledge, the counsel can bring claims, object the acts of the prosecutor and protect the rights of the defendant. Hence, it is essential to achieve balance and equality of arms, which is the core underlying principle of fair trial.

[79] GC 32, §26; AU principles and Guidelines, art 6 (f) (v); Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) V. Burundi, §27

[80] GC 32, §34; AU Principles and Guidelines, art 6 (f) (iv)

The right allows all person suspected of criminal offence to defend the case with the help of a legal assistance of his/her own choosing[81]. The right contains two basic elements; the right to have legal assistance to defend the case and the right to choose that legal assistance. Choosing a legal assistance is a right granted by all legal systems[82]. The African commission in a case against Sudan stated that "*The right to freely choose one's counsel is essential to the assurance of a fair trial. To give the tribunal the power to veto the choice of counsel of defendants is an unacceptable infringement of this right*."[83].This choice may not be respected in cases where legal assistance is provided by the state for free[84]. Even when such restriction is imposed, it should not prejudice the accused by restricting the right of the suspect.

The right to legal counsel shall exist on all stages[85] starting from the very beginning of the process. A legal counsel should be available at the initial stages of interrogation[86]. This, as discussed in the previous section, is important to ensure the right to remain silent. It helps the defendant secure his privilege against self-incrimination and can also prevent torture, cruel, inhumane and degrading treatment. Therefore, legal counsel should be provided from the beginning. The ECtHR in a case against Croatia has expressed the vulnerability of a defendant

[81]Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa V. Sudan, § 64

[82] Ibid; GC 32, §37

[83] Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa V. Sudan, §64

[84]Michael & Brian Hill V. Spain Comm no 526/1993 (UNHRC, 2 April 1997), §14.2

[85]Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) V. Burundi Comm no. 231/99 (AComHPR, 6 November 2003), §30; Dvorski V. Croatia App no 25703/11 (ECtHR, 20 October 2015*)*, §77

[86] John Murray

during the initial stages requiring the presence of an adequate legal assistance during investigations[87]. Furthermore, the court has recognized the consequences of such initial stage proceedings[88]. Hence, the ECtHR requires the need to have legal assistance from the first interrogation[89]. However, this is not always the case; in other cases, the court did not find a violation in a delayed access to counsel[90]. The African Commission, on its part, while indicating that a two days delay is not acceptable, did not find a violation because counsel was provided after two days[91]. In the same manner, the UNHRC has accepted a delay in access to counsel. Hence, the exact time frame is something that is evaluated on a case by case basis.

The Ethiopian practice is a bit different from this as the right to counsel is provided as a right of an accused[92]. Thus, the law provides it as the right of people charged; the existence of the right prior to formulating the charge is unclear. The practice is also similar to the law; while a suspect can retain and communicate with a legal counsel before the charge, such counsel is not present at interrogations. Furthermore, when a suspect cannot afford such counsel, the state will only assign an assistance after the charge is presented to the trial court.

The legal assistance provided shall not only be available, but it should also be practically effective[93]. As the right is highly connected to access to court, the assistance provided by legal counsel shall practically provide the defendant with all the necessary help. An effective legal

[87]Dvorski V. Croatia, § 77

[88]Salduzv. Turkey App no 36391/02, (ECtHR, 27 November 2008), §50

[89]Ibid

[90] Dvorski V. Croatia, §80

[91]Gabriel Shumba V. Zimbabwe Comm no 288/04 (AComHPR, 30 June 2007), §178

[92] FDRE Constitution, art 20 (5)

[93] ECHR art 6; John Murray; Dvorski V. Croatia, § 80*;*

assistance also requires full unrestricted access. Providing preconditions or special permit to grant access to legal counsel is a violation of the right[94].

Another element of the right is legal aid; if the defendant cannot afford to pay for a legal assistance one should be provided by the state[95]. This is not automatic; rather, free legal assistance is provided when the interest of justice requires[96]. The meaning of the word in the interest of justice is subject to interpretation. In the European context, it is determined based on the complexity of the case[97]. The complexity of the case and its procedure is considered as a determinant factor to evaluate the need for legal aid[98]. This means, legal aid is of paramount importance in criminal cases; especially in capital punishment cases[99]. This is also the practice in the jurisprudence of the UNHRC[100].

Under the African jurisprudence, justice so demands when three circumstances are provided[101];

a. If the defendant doesn't have the means
b. Considering the seriousness of the offence and severity of sentence
c. Always when capital cases are involved

[94] Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa V. Sudan, §64

[95] AU Principles and Guidelines, art H

[96] FDRE Constituion, art 20 (5)

[97]Pakelli V. Germany App no. 8398/78 (ECtHR, 25 April 1983), §31

[98] ECHR art 6

[99]Nsonurua J Udombana, 323

[100] GC 32, § 37

[101] AU Principles and Guidelines, art H (b)

These are cumulative requirement that determine when the interest of justice obliges a state to provide legal assistance for free. The Ethiopian practice demonstrates that most criminal cases demand a free legal aid; as such, the state does provide legal assistance for free. However, there is no legal standard to determine the details of such circumstances. In any case, all jurisdictions accept the need for legal assistance in capital cases.

In general, the right to defence is a broad element of fair trial that accommodate other elements. An effective defence requires the full guarantee of all elements. More importantly, access to practically effective legal representation shall be guaranteed at all stages.

- ***Right to be tried by a Competent Tribunal***

This right is the central element of fair trial upon which all other elements rest. The full realization of fair trial rights depends on the existence of this right. The judiciary will evaluate restrictions on fair trial, assess the action of state officials to protect suspects and follows a procedure that ensures the right. Similarly, other fundamental rights are dependent on this right. The right to liberty, for example, will be ensured by challenging the legality of arrest in a court of law. The judiciary, as a branch of government, is an aspect of democracy that ensures check and balance as well as accountability with other branches of the state. This right also ensures access to justice which is central to rule of law.

The center of this right is the existence of a competent tribunal that can assess the charge to give a judgment. Therefore, access to court shall be understood as access to a competent tribunal. Competence is related to the power to make a binding decision[102]; a tribunal shall have a power

[102] Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa V. Sudan, §62

to affect rights and obligations through its decisions[103], to which other institutions are bound by. This competence comes from the establishment of the judiciary as an institution. A tribunal shall be established by law to have the power to make binding decisions[104]. The establishment by law also gives the legitimacy to the court that establishes trust in the justice system. This is very important as competence looks at the entire justice system[105].

Under the Ethiopian legal systems, the Federal constitution establishes an independent judiciary both at the federal and state level[106]. The constitution prohibits the existence of ad hoc or special courts that take power away from the judiciary[107]. Thus, it gives the judiciary full power to determine rights and obligations.

In addition to competence, the judiciary shall be independent, impartial and public. In the following section, the thesis will discuss each aspect of the judiciary.

- *Independence of Judges*

Independence of judges is a key component of a tribunal that can ensure fair trial. This component ensures that decisions are made independent of external influences. This is important because it increases legitimacy and respect to the institution, as such increasing the enforcement of its decisions. Therefore, it is an underlying concept that needs to be guaranteed.

When discussing the independence of the judiciary, it is important to answer, 'Independent from whom?'. The answer to this is independent from all external influence; anything that is not the fact or evidence presented before the court is considered as an external. More importantly, the

[103] AU Principles and Guidelines

[104]Media Rights Agenda / Nigeria Comm no 224/98 (AComHPR, 6 November 2000), §64

[105]Nsonurua J Udombana, 312

[106] FDRE Constitution, Article 78 (1), 79 (1)

[107] FDRE Constitution, Art 78 (4)

judiciary shall be independent from the executive branch of the government. It is necessary to have a clear division between the executive and the judiciary to ensure the judiciary is not influenced by the executive[108].

To ensure such independence, it is necessary to have criteria on establishment of the judiciary and the conditions regarding judges. The judiciary shall be established as an independent organ by a law, preferably the constitution, to avoid constant amendment.

- Judges need to be appointed based on clearly defined selection criteria; the same shall apply to promotion and other professional growth
- They need to be appointed for life or a long tenure
- They shall only be removed from office by predetermined law and it should not be based on decisions they render.
- They shall be remunerated well for the services they render
- Their decision shall not be reversed except by a higher appeal tribunal set by a prior law
- Determination of Budget shall also be independent of the executive

The Ethiopian constitution establishes an independent judiciary with the necessary powers[109]. The jurisdiction and functions of the courts is also determined by the law[110]. Judges are appointed by the HPR after selection by the judicial administration council[111]. The selection is made based on established criteria relating to personal and professional competence;

[108]Angel olo Bahamonde V. Equatorial Guinea Comm No. 468/1991(UNHRC, 10 November 1993) §9.4; Fie V. Colombia Comm no. 514/1992 (UNHRC, 26 April 1995), §8.3

[109] FDRE Constitution, art. 78(1) & 79(3)

[110]Federal Judicial Administration Commission establishment proclamation (Proclamation No 24/96) 1996

[111] FDRE Constitution, art 81

furthermore, a person may not serve in the judiciary if he/she is serving in other branches[112]. The tenure for judges is the retirement age which is 60 years old[113]; however, there is a possibility for termination prior to the age of retirement on certain conditions stipulated by law[114]. Furthermore, a judge's term will not be extended beyond the retirement day[115]. This is very essential as extensions will not be done to influence the decision of the judiciary. Finally, the budget of the judiciary is to be approved by the HPR[116].

Despite these positive aspects of the law, there are other aspects which might affect independence. For instance, the law stipulates that a judge may be terminated if he/she is incompetent or inefficient[117]. Where these terms are not clearly defined, what amounts to incompetent or inefficient is not clear. This removes the predictability of termination of judges and can be subject to abuse, which will jeopardize independence. Such vague/ambiguous laws need to be replaced by clear and specific provisions that can secure independence.

- *Impartiality*

Another aspect of the judiciary, which is essential to secure fair trial, is impartiality. Decision by tribunals should be on the basis of law, facts and evidence. While independence reflects on the lack of external influence on the judicial institution as well as judges themselves, impartiality reflects on the internal bias of the individual judges. Impartiality refers to the neutrality of the judge from an internal bias against the defendant.

[112] Amended Federal Judicial Administration Council Establishment Proclamation (Proclamation No. 684/2010) 2010, art. 11

[113] FDRE Constitution, art 79(4); Proc 684/2010, art 12(1)

[114] Ibid

[115] FDRE Constitution, art 79(4)

[116] FDRE Constitution, art 79(6) (7)

[117] Proc 684/2010, art 12 (1) (e)

Impartiality is evaluated from two aspects; subjectively and objectively. Subjective impartiality tests the personal convictions of the individual judge to evaluate if the judge is free from prejudice or bias[118]. Objective impartiality tests a judge's impartiality from the perspective of the parties[119]- it is about legitimate doubts that may arise on the judge's impartiality. The appearance of impartiality is important because it increases confidence in the court and ultimately contributes to democracy[120] as it increases legitimacy of the decisions and installs trust in the justice system. As such, a judge, not only has to be impartial, but must be deemed impartial for an objective observer.

The subjective or personal impartiality is presumed until proven to the contrary[121]. However, the objective impartiality can be challenged by any party[122]. This challenge should come from a legitimate reason that creates an objectively justified doubt on impartiality[123]. Legitimate doubts can be avoided where there are sufficient guarantees to exclude them[124]. Furthermore, parties should have the option of challenging such impartiality which shall be seen together with other

[118]Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) V. Nigeria Comm no. 60/91 (AComHPR, 22 March 1995), §13&14;Mr. Wolfgang Jenny V. Austria Comm No. 1437/2005 (UNHRC, 9 July 2008) §9.2; Moiseyev V. Russia App no. 62936/00 (ECtHR, 9 October 2008*)* §174

[119] Ibid

[120]Ekeberg and Others V. Norway App no 11106/04, 11108/04, 11116/04, 11311/04 And 13276/04 (ECtHR, 31 July 2007) §33

[121] ECHR art 6; Piersack V. Belgium 8692/79 (ECtHR, 26 October 1984)§374

[122] AU principles and guidelines

[123] Lindon et al V. France App no. 21279/02 (ECtHR, 22.10.2007)

[124]Ekeberg, §31

factual circumstances[125]; if this is well founded, there shall be an option to withdraw the judge from the case[126].

In the Ethiopian constitution, there is no mention of the impartiality of judges. However, the Federal courts proclamation states the possibility for a judge to withdraw from cases which may raise issues of impartiality[127]. At the same time, parties to the case may challenge the impartiality by asking for the removal of a judge deemed to be impartial[128]. Therefore, both subjective and objective impartiality is guaranteed in the legal contexts. However, there is a flaw in this law- when the parties request removal challenging impartiality, the decision is rendered by other judges on the panel. This raises the concern if such decisions are ever objective; judges making decisions on their colleagues has always raised issues on if such decision can ever be made objectively. In practice, the writer has never seen a decision where colleagues on the bench made a decision to remove a judge.

- *Publicity*

The last aspect of the judiciary that must be evaluated is the need for publicity. In determining cases, fair trial requires, the court to be open to the public except in certain conditions. Publicity of the trial is as much the right of the public as it is the right of the defendant. The public shall also have all the necessary information about the judicial bodies, their activity, the trial date and case files[129]. This right ensures the public's trust in the justice system as public trial ensures transparency and accountability. A trial in the open is less susceptible to right violation as

[125]Campbell & Fell

[126] Piersack Case

[127] Federal Courts proc, art. 27

[128] Federal Courts proc, art. 28

[129] AU principles and Guidelines

compared to those done in closed door. Thus, trial should be public unless there are certain exceptions that justify closed hearings

### *Right to appeal*

The accused shall have the right to appeal his/her case to a higher tribunal. The right to be tried by a competent judiciary requires the opportunity to correct mistakes through a review by a higher tribunal. This review is a mechanism for a higher court to correct errors made by lower courts.

The first aspect of the right to appeal is accessibility to a higher tribunal to enable the accused to exercise his/her right[130]. Accessibility means physical as well as legal accessibility; there shall be a legal avenue in place that allows defendants to appeal. Furthermore, the defendant shall be given a reasonable time to prepare for the appeal. All jurisdictions under consideration accept this right to appeal which is accessible, genuine and conducted within a reasonable time[131].

- ***Right to a Speedy Trial***

The right to fair trial requires the case to be tried with a reasonable time or without undue delay. What amounts to 'reasonable' or ‘undue’ is not definitively defined; this time limit can only be evaluated on a case by case basis by looking at the complexity of the case[132] and the conduct of the applicant as well as the applicant. The contribution of the applicant to the delay is important to determine whether it was undue or not.

[130] Aston Little V. Jamaica Comm No. 283/l988 (UNHRC, 22 March 1998)

[131] FDRE Constitution, art 20 (6), AU Principles and guidelines20, 10(a)(i)

[132] Michael & Brian Hill V. Spain, §12.4

Therefore, the right to speedy trial is a right to have the state exercise due diligence to assess a case and give ruling on a case. It protects defendants from unjustified delays that may prolong their case.

## 1.3. Other related rights

### *i. Evidence and Fair Trial Rights*

While evidence is not mentioned as one of the elements, it is an integrated element that should be considered part of defence. This section will discuss three major ways that this relationship is manifested. The first aspect is evidence as part of the defendant's right to adequately defend the case; in this, the defendant's right to present evidences to support the defence and the right to examine evidences presented against him/her remain an integral part of fair trial. The other aspect is the duty of judicial tribunals to decide cases objectively based on facts and evidence. The final aspect is the admissibility of evidence.

The right to adequately defend oneself is the core of fair trial right. Fair trial demands that the defendant have adequate facilities for defence[133]. Evidence is one of such facilities necessary for a defence[134] as it is essential to prove one's case. Fair trial also demands that the defendant has a right to obtain and examine/have witnesses examined- in this, it is important to note that witnesses are evidence and that this right extends to documentary evidences as well[135].

[133] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14 (3)(b); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 6(3) (b)

[134] AU Principles and Guideline, art F (1); Jalloh V. Germany;

[135] This article has been applied to discuss all evidence including documentary evidence

The other angle to evidence and defence is the right to access evidences presented by the prosecutor[136]. The right to examine/have examined witnesses presented by the prosecutor extends to all evidence and not just a witness testimony[137]. This is essential for the defendant as challenging evidences presented against him/her is crucial for the defence. Disproving evidences can change the result of a judgment.

The second aspect is the right to have decisions rendered based on objective view of facts and evidence[138]. This is related to independence and impartiality- an independent and impartial tribunal should base its decision solely on evidence presented. This means evidence presented by the prosecutor, it also means evidence presented by the defence.

The last aspect is on admissibility of evidence- while admissibility is not primarily a matter of fair trial, there are instances where admissibility can be related to fair trial. Admissibility of evidence may intersect with fair trial when admission of such evidence affects elements of fair trial or the overall fairness of a trial proceeding[139]. This is especially the case when an evidence is obtained through torture, ill, inhumane or degrading treatment/punishment. Evidences obtained through such treatment/punishment affects fair trial as it is contrary to the right to remain silent.

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[136]Edwards and Lewis V. The United Kingdom App Nos. 39647/98 And 40461/98 (ECtHR,27 October 2014); Bátěk and Others V. The Czech Republic App No. 54146/09 (ECtHR, 12 January 2017)§37; AU Principles and guidelines, art F (1)

[137] Ibid

[138]M v. The NetherlandsApp no. 2156/10 (ECtHR, 25 July 2010), §83

[139]Ibrahim and Others V. The United Kingdom App nos. 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016), §254; Bakhrinisso Sharifova, Saidali Safarov and Kholmurod Burkhonov V. Tajikistan Comm Nos. 1209, 1231/2003 and 1241/2004 (UNHRC, 1 April 2008), §6.5

Hence, while evidence may not be mentioned as an element in human right instruments, this thesis considers it as an integral element of fair trial.

### *ii. Fair Trial and Nullum Crimen, Nulla Poena*

*Nullum Crimen, Nulla Poena* or commonly referred to as the principle of legality prohibits the punishment of individuals for a crime where there is no prior law in place[140]. This means criminal offences have to be stipulated in a law prior to any commission- where a person commits an act, that act may not be regarded as a crime if that was not provided as a criminal act before he/she commits the said act. Even where the law was on the drafting process, the person may not be charged with a crime. Furthermore, a higher penalty may not be imposed on an individual than the one provided by law during the commission of such act. This does not apply to acts/omissions that were already recognized as a crime by general principles of law[141].

It is not sufficient to have a law- the principle of legality requires the existence of a specific, precise and narrow definition of criminal acts[142]. Broad and vague laws which can be subject to broad interpretation cannot be said to meet the criteria.

This is an important principle to ensure there would not be abuse of power. It prohibits the government from establishing new laws that target individuals. Where this principle is not adhered, the government can set up a law that specifically targets a person/group that it wants to

[140] ICCPR art 15, ECHR, art 7

[141] ICCPR art 15 (2), ECHR, art 7 (2)

[142] UNGA 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedom While Countering Terrorism' Martin Scheinin, A/HRC/16/51 (2010), § 26; UNGA 'Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism' A/HRC/8//13 (2008), §19

attack, by putting down the specifics of their act, which under normal circumstance is not criminal, as a crime. Having such principle protects individuals from arbitrary acts of the state and its government. This principle is also essential for individuals to know what acts are criminal to shape their behavior accordingly.

Even though this right is not listed as part of the elements of fair trial, the principle of legality is highly integrated to the right to fair trial. The writer considers this as an integral element of fair trial- this integral relationship has also been confirmed by the UN and other scholars[143]. More than anything, this principle is crucial for the right to defend oneself. If there is no law establishing an act as criminal, the first defence available would be that the act is not a crime. Where the act is provided as a crime, the defendant establishes his/her defence by disproving the commission of each element of the crime. In order to do this, there needs to be a clear and precise description of the elements of a crime easily available to the defendant. Therefore, the principle of legality is closely related to the right to fair trial.

### 1.4. Assessing Limitations on Fair Trial Rights

There is one limitation provided on the right to fair trial in the International Human Right instruments. All instruments provide a possibility to limit the publicity of a trial in pursuit of a legitimate aim[144]. The conditions recognized as legitimate aim are morality, national security, interest of justice for the protection of witnesses or children and the private life of the defendant. In such conditions, the trials may be closed to the public to the extent necessary in a democratic society. This limitation does not apply to the judgment; even where the trial is closed, the

[143] UNGA 'Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism' A/HRC/22/26 (17 December 2012), §21; Ana D. Bostan, 2

[144] ICCPR art 14; ECHR, Art 6; AU Principles and Guidelines, art 3 (f)

judgment shall be accessible to the public either by announcing the judgment in public or by making the document accessible in writing.

In addition to this, the ECHR provides two exceptions for the right to appeal under article 2 of protocol 7. The convention accepts limitations for minor offences, when it is provided by law or where the court that entertained the case was the highest tribunal[145]. Similarly, the UNHRC has stated that the right to appeal can be limited except in death penalty cases[146]. These limitations are not provided by the African jurisprudence; the Ethiopian legal system, on the other hand, does not limit the right except where the court that entertained the case is the highest tribunal. Even in such circumstances, there is a possibility to appeal the case on error of law to the cassation bench.

Further limitations on the right to fair trial have been placed by the jurisprudence of the UN and ECtHR, even though the instruments provide qualification only on publicity. These limitations are not available in the African human right system and the Ethiopian legal system.

For instance, the presumption of innocence has been limited by the ECtHR- the court in its jurisprudence has provided for conditions in which the burden of proof may be reversed to the defendant. The presumption of innocence places the burden of proof on the prosecutor. However, there are three circumstances accepted by the ECtHR where the prosecutor does not have this burden[147]. These are strict liability offence, offences where the burden of proof is reversed and when a confiscation order is made. The details of this limitation will not be discussed by this



[145] ECHR, Protocol 2

[146] Supra note 125

[147] AU Principles and Guidelines, p.6

thesis as the writer is only trying to highlight how the scope of limitation has been further expanded through jurisprudence.

Another limitation that has been imposed by the jurisprudence of the ECtHR is on the right to remain silent. ECtHR has stated this right is not absolute and may be restricted so long as the defendant has been provided with safeguards that can compensate the risk posed by such limitation[148]. The adverse inference that may be drawn from silence as well as obtaining evidences whose existence is independent of the defendant can also be regarded as further limitations developed by the court. The UNHRC, similarly, recognizes additional limitations that are not prescribed by ICCPR[149]. It recognized limitation on access to defence, access to counsel and others.

These bodies, in such cases, have accepted the limitations by looking at the right to fair trial as a whole. Especially, ECtHR looks at the fairness of the trial as a whole and accepts limitations on the elements as long as it doesn't affect the overall fairness[150]. While these limitations restrict the application of the rights, these bodies have considered the full guarantee of other elements can serve as a safeguard to fair trial. As such, these limitations are not considered a limitation on the right to fair trial because of the balance that is created.

The UK follows the ECtHR jurisprudence allowing limitations under fair trial; Lord Bingham stated that limitations directed by national authorities for public purpose are permissible[151]. This is not the case under the Ethiopian and the African jurisprudence. While there are flaws in the

[148]Al-Khawaja And Tahery V. The United KingdomApp nos. 26766/05 and 22228/06 (ECtHR, 15 December 2011), §118

[149]GC 32, §18, 39

[150]Dvorski V. Croatia, §71

[151]Brown v Stott (2003) 1 AC 681

application of the right to fair trial, the law and practice have not extended the limitations on fair trial.

### 1.5. Is Fair Trial Right a Derogable Right?

The right to fair trial is not listed among the non derogable rights under the ICCPR or ECHR. In principle, it is possible for states, subject to these instruments, to derogate from their fair trial obligation. Nonetheless, just because a state is allowed to derogate from its obligation, it does not mean derogation is always justified. Derogation shall be an extraordinary measure based on unique circumstances which can threaten the life of a nation[152]. This is an extreme standard to which a state must show the necessity to limit the application of fair trial right in order to secure the life of the nation. The state shall show the correlation between the need to limit the right and the risk to the life of the nation.

The other critical issue, when evaluating derogability of the right to fair trial, is the crucial link between non derogable rights and fair trial right[153]. Securing fair trial right is essential to protect defendants from torture and inhuman treatment or punishment. Elements of fair trial such as right to remain silent, right to legal counsel and the right to an independent and impartial tribunal are highly linked to this. The right to fair trial is also linked with the right to life and the right to liberty as the deprivation of these rights without the existence of a fair trial is a violation. The right to life and liberty rely on the existence of due process by an independent, impartial and competent tribunal. The lack of fair trial renders such rights meaningless.

[152] ICCPR art 4; ECHR, art 15

[153] UNGA 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' U.N. Doc. E/CN.4/1985/4, Annex (1985), §70

Considering this crucial relationship between fair trial rights and non derogable rights, one can safely argue that fair trial rights are, in effect, non derogable. In this, it is important to note that this argument does not apply to all elements; rather, crucial elements of fair trial, such as, the right to be tried by an independent, impartial and competent tribunal cannot be subject to derogation[154].

As such, while practically derogating from an obligation to secure fair trial right is not prohibited it doesn't mean all elements are derogable. There is always reluctance to claim fair trial right is absolutely derogable without any qualification to that statement. More importantly, even where a state has successful derogated from the right, there can still be a violation[155]. This being said, states have derogated from their fair trial obligation under ICCPR.

The discussion on derogation is completely different in the African context as the African Human Right system does not provide for any option for states to derogate from their obligation under the charter. Subsequently, the African Commission in its principles on the right to fair trial has provided that a state cannot derogate from its fair trial obligation under no circumstances[156].

The Ethiopian legal system is also unique in that the only non derogable right during a state of emergency is the prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[157]. Except this, the constitution allows derogation from all other fundamental rights

[154]General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 31 August 2001

[155] Alfred de Zayas, 'The United Nations and Guarantees of a Fair trial in the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1997) LIB/INTL/MISC/81

[156] AU principles and Guidelines, art. R

[157] FDRE constitution, article 93 (4) (c)

and freedoms. Even if this is the case, so far, the country has not derogated from its fair trial obligation when declaring a state of emergency.

## Conclusion

The right to fair trial is very wide in scope covering all aspects of a trial, the treatment of suspects and the conduct of state organs. The right is related to other fundamental rights and freedoms expanding its application. The right is also dynamic as the meaning of each element has been expanded through the jurisprudence of different tribunals.

Under the Ethiopian legal system, the right to fair trial is guaranteed to the full understanding of the international jurisprudence. Save the differences that can be observed in the discussion, the right to fair trial is covered in the legal system. However, the biggest challenge remains the application- even where the law has provided for the protection, there is a challenge in application. Moreover, the criminal procedure code, which in practical terms deals with the details of securing fair trial, was adopted before the current constitution. This means current understandings and scopes of the right are not covered in these details. Even if the constitution is adopted from international instruments, it does not address the necessary details to fully secure the rights. Such constitutional principles need to be translated to detailed laws that are applied in everyday practice.

# Chapter Two: Criminalizing Terrorism and The Right to Fair Trial

## Introduction

Terrorism is understood as one of the worst crimes by the international community as it creates fear in the public that is very distinct to the act. It places people in a state of uncertainty and vulnerability threatening the state of security.

While terrorism is regarded as one of the worst crimes by the international community, an in depth look at the acts shows that it is not very different from other criminal acts. Acts of terrorism, such as killing, taking hostages, suicide bombing,cause the same amount of damage to a society as mass murders, rapists, serial killers and other heinous crimes. Yet, terrorism is placed in a much higher state than most other crimes. Part of the reason for this is political- states do not accept this push on their political narrative. Hence, they magnify and promote this idea of terrorism being the monster of all crimes. Giving such magnitude also justifies the extensive measures they take-such measures undertaken under the umbrella of 'war on terrorism'are accepted by the public because it will be strange to question measures taken against this heinous act no matter how unjustified.

This, however, does not deny that terrorism is heinous act that causes a level of uncertainty and fear that makes them feel unsafe. While the fear it creates is a core component of the crime, one has to recognize the significance of the political agenda in magnifying and capitalizing on this fear. States exploit the fear and use it as a blank cheque to take any measure. The public, due to the intense fear, has given states an unwritten authority to take any measure to protect them. These means, most measures taken by states, as it relates to potential threats of terrorism, are accepted even though, under the normal course of things such measures would be considered outrageous.

This blanket authority threatens the protection of Human Rights- restrictions and limitations are extended compromising the right of individuals. States take different counter terrorism measures that threaten fundamental rights and freedoms. Some of the most frequently threatened rights remain the right to privacy, the right to liberty, the freedom from torture, cruel and inhumane treatment and the right to fair trial.

The right to fair trial is one of the human rights that is frequently set aside by counter terrorism measures. From the extended pretrial detentions to trial proceedings that do not adhere to the minimum fair trial standards, criminal proceedings to counter terrorism compromise fair trial for suspects of terrorism.

This chapter will discuss the relationship between criminalization of terrorism and the right to fair trial. It will discuss how counter terrorism legislations and criminal prosecutions affect the right. In order to do this, the writer will first discuss the definition of terrorism in a manner that shows the importance of definition to the right. Following that, it will analyze the crime by identifying the elements that constitute it to draw a model definition. Then, the writer will compare the definition provided by the three jurisdictions to show the difference with the ideal definition drawn by the writer.

In the sections that follow, the chapter will discuss the restrictions to fair trial by looking at different acts undertaken and how they compromise the right. The acts, under discussion, are selected based on the common practice observed by the writer in the Ethiopian counter terrorism practice.

## A. Defining the Crime of Terrorism: What is being criminalized?

- ***Why definition***

Definition is a very crucial step of criminalizing that requires precision and careful analysis. One cannot be held responsible for acts which do not fulfill the definitional elements provided by law. As such, defining a criminal act allows individuals to shape their behavior accordingly. Definition is also essential part of defense for the defendant as he/she can use the elements to show his acts do not fit the definition. Furthermore, definition is where we can understand exceptions, consequences and other important aspects of the crime. As a result, it remains to be the most important step of criminalizing an act.

Definition is related to fair trial in more ways than one. It is where the defendant will begin his/her defense as a lot of defense can be drawn from it. A defendant can contend the charges by showing the conducts do not meet the element of the crime; these elements are to be drawn from the definition provided by law. Furthermore, where the defendant is charged for an act that is not part of the definition of the crime, the *Nullum Crimen Sine Lege* principle can be invoked. This principle, as stated in the previous chapter, is considered an element of fair trial by this thesis. Hence, definition is very important when discussing fair trial.

- ***Defining terrorism***

There have been several efforts to provide definition for terrorism under the international sphere as well as national criminal law. While these share some common elements, there has not been one consistent definition for terrorism. This is especially true in the international arena where different points, such as the declassification of freedom fighters as terrorist and the issue of state sponsored terrorism, has been a point of contention. Furthermore, international law gives each state, in criminalizing terrorism, the autonomy to define and determine every other detail- in this

the only obligation is to criminalize and prosecute terrorism. As a result of this, different states give different definitions that fit their national context. These multiple efforts to define terrorism has created a lack of cohesion which resulted in the inclusion of different elements that resulted in a variation.

Under the UN system, there are more than ten instruments that are considered as the main legal texts on terrorism. While some legal systems, such as the European, consider these instruments as constituting terrorism, others provide their own definition. Such definitions are provided in the OAU convention, the Arab convention, Islamic convention and the commonwealth. When we compare the elements of definition in these documents we can clearly see the lack of cohesion.

The OAU convention[158] defines terrorism as;

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

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

*(ii) Disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or*

*(iii) Create general insurrection in a State;*

[158]Organization of the African Union Convention on the Prevention and Combating of Terrorism (14 July 1999), art 1(3)

The Arab convention[159] on the other hand defines it as;

*Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources*

The Islamic convention[160] states;

*"Terrorism" means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.*

And the commonwealth convention[161] defines it as;



[159] The Arab Convention for The Suppression of Terrorism (4 May 2004), art 1(2)

[160] Convention of the Organization of the Islamic Conference on Combatting International Terrorism (1 July 1999), art 1 (2)

[161] Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism (4 June 1999) art 1

*"Terrorism"—an illegal act punishable under criminal law committed for the purpose of undermining public safety, influencing decision making by the authorities or terrorizing the population, and taking the form of:*

*——Violence or the threat of violence against natural or juridical persons;*

*——Destroying (damaging) or threatening to destroy (damage) property and other material objects so as to endanger people's lives;*

*——Causing substantial harm to property or the occurrence of other consequences dangerous to society;*

*——Threatening the life of a statesman or public figure for the purpose of putting an end to his State or other public activity or in revenge for such activity; ——Attacking a representative of a foreign State or an internationally protected staff member of an international organization, as well as the business premises or vehicles of internationally protected persons;*

*——Other acts classified as terrorist under the national legislation of the Parties or under universally recognized international legal instruments aimed at combating terrorism;*

When comparing these definitions, we can see some similarities as well as key differences. When we look at the similarities, we can see that all instruments classify acts of terrorism as acts that are already criminal. Nonetheless, the Arab, Islamic and commonwealth conventions require these criminal acts to be acts of violence. Whereas, the OAU convention states any act will qualify as long as it endangers life, security, freedom or cause serious injury or damage property, natural resources, environmental or cultural heritage.

Another similarity in these definitions is the intention to put fear in the public. While this intention is common to all instruments, there are intentions that are present in some and not required in others. The Arab and Islamic conventions provide more intentions such as the

intention to endanger life, security, freedom, the intention to damage the environment or public service and the intention to endanger natural resources. The Islamic convention adds one more intention which is the intention to threaten stability, territorial integrity and political sovereignty. The OAU convention, on the other hand, does not provide the intentions provided in the Arab and Islamic conventions; however, adds disrupting public service and creating insurrections. Finally, the commonwealth convention contains none of the intentions above but adds influencing decision making as an intention of acts of terrorism.

In addition to the differences above, the instruments are also different in the purpose or motive of acts of terrorism. The OAU and commonwealth convention make no mention of the purpose of terrorist acts. On the contrary, the Arab and Islamic conventions explicitly state that purpose and motive are irrelevant to the definition of terrorism.

These instruments, while they show the lack of coherence in definition, also illustrate what elements are to be considered in any definition. In the section below, the writer will discuss definition of terrorism by looking at key elements that are essential in classifying an act as terrorism. This classification of elements is gathered from the definitions above, other international and national instruments as well as academic writings. The writer, based on analysis of these texts, views such elements to be essential in any definition.

- ***Defining terrorism***

In discussing definitions, this thesis will look into three main components that are key elements of definition- these are; the actus reus (act), the mens rea (intention) and the purpose/motive. Purpose/motive is a constitutive element of terrorism which distinguish it from other crimes with the same act and intention. Two individuals committing the same act with the same mental element may be qualified differently depending on this purpose/motive. Take a person who

kidnaps the son of the ministry of foreign affairs of a state. If this person kidnaps the boy intentionally to create fear but that fear was targeted to gain money for himself/herself that would not be an act of terrorism. The same act of intentionally kidnapping the minister's son to create fear will be terrorism if it pursues a motive of getting the minister to adopt a different foreign policy. Therefore, motive is a distinguishing element necessary to define this crime.

The first important element of the definition is the act or actus reus; acts of terrorism, while not unique to this particular crime, are necessary components of it. Terrorism requires serious criminal acts that usually constitute acts of violence or deprivation of freedom[162]. Some acts of terrorism include killing or causing serious injury to others, destroying public property and taking hostages. While most definitions require acts of terrorism to be acts of physical violence on persons or property, the writer believes this is a narrow understanding of terrorism in this age and era. In a digital era, constraining the definition of terrorism to physical acts of violence would eliminate other acts that rely on using technology but not resulting in any physical damage. These acts of cyber terrorism, while not causing physical damage, may still violate fundamental rights and freedoms causing fear in the public. Most definitions, except for the commonwealth convention, do not recognize this aspect of the crime. Even where it recognizes technological terrorism, the convention still only recognizes the use of technology to cause physical damage[163]- this doesn't constitute cybercrimes that threaten national security without any physical damage to persons or property.



[162] E Chadwick, Self Determination, terrorism and the International Humanitarian law of Armed conflict, 1996, p.2

[163] Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 1999

The second important distinguishing element of terrorism is the mental element. Terrorism has a mental element that, at the core, distinguishes it from others. First, it is important to note that terrorism always requires intention; it is not a crime that can be committed through negligence. In addition to the intention to commit the act, terrorism also requires there to be an additional intention- this is the intention to create fear on the public or the intention to compel a government or an international organization to act or to refrain from acting[164]. For instance, if we take the previous example, when the individual kidnaps the minister's child, the first intention to look at is the intention to kidnap. For this person to commit terrorism however, in addition to the intention to kidnap, he/she has to have an additional intention. If he or she kidnaped the child to compel the minister to take certain policy measures or refrain from taking such measures, then we can consider the second intention to be fulfilled. Therefore, terrorism has two mental elements that need to be fulfilled.

The crime of terrorism can only exist where the criminal act coincides with the necessary mental elements. In a context where the act is not a serious criminal offence or one of the mental elements is missing then the crime cannot be qualified as terrorism.

A final element, which is a distinguishing component in defining terrorism, is the motive or purpose of the act. The purpose in committing acts of terrorism is political, ideological, religious or others[165]. This act pursues a motive that is much bigger than an individual or personal need. Antonio Cassese states, and the writer agrees, that "Even when committed by an individual, acts

[164] UNSC Res1566 (8 October 2004) UN Doc S/RES/1566; Marcello Di Filippo, The Definition(s) of Terrorism in International Law, in Ben Saul, Research Handbook on International Law and Terrorism, 2014, p.9

[165] Measures to Eliminate International Terrorism, UNGA Res 49/60 (9 December 1994) §3

of terrorism have a collective agenda that is based on political, ideological, religious, ethnical or other purpose"[166].

Following the discussions above, the writer has provided a definition of terrorism that will appropriately address the crime while protecting individuals from excessive abuses or overstretching.

> *Terrorism is an intentional act which constitutes the commission of a serious crime that causes death, serious physical injury, violation of fundamental rights and freedom or threatens national security with an intention to cause fear in the general public or segments of it or compel a government or an international organization to act or refrain therefrom, in pursuit of a political, ideological, religious or ethnical purpose. This does not include protests, advocacy, dissent, writing or other exercise of fundamental rights and freedoms that do not intend to cause harm even when such harm results from these acts.*

- ***Scope of definition in Ethiopian, UK and the UN***

The Ethiopian government, among others, claims to have mainly relied on the UK's counter terrorism legislation in drafting its own. While prima facie, these legislations might give the impression that they are built on a similar ground, an in-depth look will prove otherwise. In some respects, we can clearly see the Ethiopian legislation took a lot from the UK legislation. However, there is a difference in key aspects which affects the right to fair trial.

In this section, we will analyze the similarities and differences in the definition provided by each jurisdiction. It will consider the three constituting elements to assess the difference among the

[166] Antonio Cassese, The Multi-Faceted Criminal Notion of terrorism in International Law [2006] JICJ 4 939

jurisdictions as well as their difference to the model definition provided by the writer. Analyzing these, the writer will discuss the practical consequences of such differences.

***Actus Reus***

ATP provides the following acts as constituting terrorism[167];

1. *causing a person's death or serious bodily injury;*
2. *creating serious risk to the safety or health of the public or section of the public;*
3. *kidnapping or hostage taking;*
4. *causing serious damage to property;*
5. *causing damage to natural resource, environment, historical or cultural heritages;*
6. *endangering, seizing or putting under control, causing serious interference or disrupting of any public service*

The UK terrorism act, similarly provides the following acts[168];

1. *Causing serious violence against a person,*
2. *causing serious damage to property,*
3. *endangering a person's life, other than that of the person committing the action,*
4. *creating a serious risk to the health or safety of the public or a section of the public,*
5. *seriously interfering with or seriously disrupting an electronic system.*

The act of terrorism, in both legislations, is defined by its consequence rather than the action. In this, what is important is the effect of the act taken rather than what action is taken. Terrorism is thus defined retroactively by looking at the consequence of the act. One exception with this

[167] Anti-terrorism proclamation 2009, art 3

[168] UK Terrorism Act 2000, Part 1

regard is the ATP provides kidnaping or hostage taking and seizing public service which is an act rather than a consequence- this is not a retroactive application.

When we compare the acts provided, the UK terrorism act is wider in scope than the ATP. For instance, the ATP requires causing death or serious bodily injury whereas under the UK legislation, endangering a person's life is sufficient even where it does not result in death or serious bodily injury. Furthermore, it provides seriously interfering or disrupting an electronic system as an act of terrorism. The ATP, on the other hand, adds three additional elements not provided in the UK terrorism act. These are, kidnapping or taking hostages, causing damage to natural resources, environment, cultural and historical heritage as well as endangering, seizing or seriously interfering with public services[169].

On the contrary, the UN definition does not have specified list of acts that constitute terrorism; it defines acts of terrorism as any criminal act committed with an intention to cause death or serious bodily injury or taking hostages[170]. This is closer to the definition provided by this paper.

***Mens rea***

The Ethiopian legislation does not discuss the mental element required to commit terrorism- what it provides as intention is what is classified in this thesis as purpose/motive. The UK legislation, on the other hand, requires an intention to influence the government or intimidate the public or a section of it[171]. The Ethiopian proclamation considers these means with the intention to advance political, religious or ideological causes. Where, what would have been considered as

[169]ATP, art 3 (4)

[170] UNSC Res1566

[171] UK Terrorism Act, Part I art 1

a purpose/motive, is provided as an intention and what should have been considered an intention is a means[172]. In the Amharic version, coercing the government, intimidating the public, destabilizing or destroying the fundamental political, constitutional, economic and social institutions are not considered as a means[173]. While the intention remains, the sense of the language is that the acts mentioned above are taken to coerce the government, intimidate the public, destabilize or destroy the fundamental political, constitutional, economic and social institutions[174]. Even where they are not provided as a means, the intention still remains to be advancing political, ideological or religious cause. In this aspect, the UK definition is closer to the correct definition whereas the Ethiopian definition of mental element has a confusing take which is not in line with the proper definition.

One can also observe the unique addition the Ethiopian legislation makes - in addition to coercing government and intimidating the public, it includes destabilizing or destroying the fundamental political, constitutional, economic and social institutions. This is exclusive to this legislation and broadens the scope of the definition.

The UN definition of mens rea is completely different from the other jurisdictions. The UN considers the intention of terrorism to be causing death or serious bodily injury or taking



[172] ATP, art 3 (1), 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

[173] Ibid

[174] Ibid

hostages[175]. The second intention, discussed above, is considered by the UN as a purpose/motive. This is also a different take that the definition provided by the writer.

***Purpose/Motive***

The Ethiopian legislation does not provide for purpose/motive; advancing political, ideological and religious cause is considered as an intention of the crime. The UK legislation, on the other hand, provides advancing political, ideological or religious cause as a purpose[176]. The UN considers the purpose of terrorism to be provoking a state of terror in the public, intimidating the population or compelling the state or an international organization[177].

***Assessing the differences***

As can be seen from the comparison above, there is a difference among the jurisdictions; at the same time, there is also a difference with the comprehensive definition provided by the writer. The UK definition is the closest to the definition provided by the writer as it provides all three components of the crime. However, there remains a difference with regards to the scope of acts covered, which are narrower in the UK definition.

The UN definition, on the other hand, covers two of the elements but misses the purpose or motive. The lack of this essential element fails to really qualify the crime terrorism as it should be understood. In instances like the previous example, where the individual kidnaps the son of a minister to invoke fear in the public purpose of the act makes the difference in qualification of the crime. If the purpose/motive of the individual was to show his personal strength, that will not



[175] UNSC Res1566

[176] UK Terrorism Act, Part I art 1

[177] SC Res 1566

be qualified as terrorism. Whereas, in the same situation, if the purpose was in pursuance of a religious, ideological or political aim that is more collective than the previous individualistic purpose then it can be qualified as terrorism. Hence, unless all three elements of the crime are fulfilled the crime should not be qualified as terrorism- the UN definition fails short of this.

Finally, the Ethiopian definition is ambiguous in that there is a difference between the definitions in the two languages. Even where the difference in language was not there, the language explaining mental element remains ambiguous. Furthermore, the definition adds destabilizing or destroying the fundamental political, constitutional, economic and social institutions to the mental element, broadening the scope of application.

### B. Restriction of Fair Trial for suspects of terrorism

Terrorism causes several restrictions on fair trail rights, however, in this thesis, the writer will discuss three acts commonly undertaken in counter terrorism cases which affect the right to fair trial. These restrictions are commonly observed in Ethiopia; however, they are also challenges present in other states and are considered concerns of the international community.

The discussion in the following section will explain how the actions taken restricts the right and which element of the right will be restricted. In that, it will compare the Ethiopian experience with the practice in the other jurisdictions under consideration. More specifically, it will compare the practice in Ethiopia with the guide set by the special rapporteur on protecting human right while countering terrorism. This thesis uses the guide as a bench mark on which it will assess the laws and practices of the country.

### ❖ *Listing of organizations*

Listing is a process by which organizations and/or individuals are proscribed as having terroristic purpose. This process is conducted by international organizations as well as states as a necessary precaution. The UN, for instance, has listed 256 individuals and 80 groups/entities, the UK has listed 71 international organizations/groups and 14 domestic groups/organizations and Ethiopia has added its own 5 organization as terrorist.

The legal consequence of such listing depends on the political situation of that listing- the body making the prescription will have a purpose in making this listing and will accordingly describe consequences of such list. Organizations may be denied legal personality or registration, individuals may be denied their request for asylum, however, the most common consequence remains to be the freezing of funds and assets[178]. When organizations are listed as terrorist, individuals that are members of such organization or associated with them may face prosecution.

This process of listing is a concern for fair trial as its procedure which has legal consequences is not conducted based on a judicial decision. In addition to that, there are concerns of standard of proof, presumption of innocence, right to defense, principle of legality, right to information and lack of remedies.

Listing of entities as terroristic in nature causes concerns to fair trial because the determination is not conducted by a court of law. The Ethiopian anti-terrorism proclamation empowers the HPR, a legislative branch of the state, to make these listings. In the UK, the Secretary of State, part of the executive branch, is empowered to conduct this process. In the UN, it is the security council

[178] UNGA 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' A/61/267 (2006), §30

that conducts this listing process; while the UN is not structured like a state, the security council is considered as an equivalent of the executive branch- in any case, it is not a judicial organ that can be considered as a tribunal that makes judicial decisions. The lack of judicial involvement, in a procedure that results in the denial of rights, is a violation of the underlying principle of fair trial. The right to fair trial demands that the determination of rights and obligations, whether criminal, civil or administrative, be done through a fair and public hearing by a competent court of law[179]. Any proceedings that has a legal consequence, including listing, shall be done through a review by an independent, impartial and competent court which is established by law[180]. Hence, the listing process conducted by political bodies is contrary to fair trial.

Furthermore, these political bodies have proceedings and composition different from a judicial tribunal which further affects fair trial. These bodies are not subject to the same independence and impartiality standards as courts. Moreover, since the procedures in these bodies is not judicial, measures designed to safeguard fair trial may not be applied. Guarantees such as cross examination, disclosure of evidence and standard of proof are judicial proceedings that may not be observed by the political bodies making the listing decision[181].

For instance, if we look at standard of proof, the required standard in listing is not clear from the law or practice of Ethiopia. While listing is not necessarily followed by a criminal sanction, thereby requiring a standard beyond reasonable doubt, a judicial procedure would still require some level of standard of proof. Furthermore, the special rapporteur on promotion and protection

[179] ICCPR art 14 (1), ECHR art 6

[180] UNCHR 'Annual Report Human Rights on the Protection of Human Rights and Fundamental Freedom While Countering Terrorism' A/HRC/8/13 (2008), §48

[181] Ibid

of human rights and fundamental freedom while countering terrorism, established that if a sanction attached to listing is permanent it may fall within the scope of a criminal sanction no matter how it is labeled[182]. Thus, there are conditions in which the sanctions of listing may be considered as criminal sanctions, hence requiring a proof beyond reasonable doubt. Nonetheless, listing remains to be conducted without any clear standard of proof requirement. This can be seen as a violation of presumption of innocence.

### *Lack of clear criteria*

Another challenge to fair trial, that comes with listing, is the lack of clear criteria in the determination of entities to be listed. As stated before this is a political process that is usually based upon secret evidence. Even where the process is clear, it usually lacks standards, uniformly set prior to any determination. The grounds upon which such determination is made is usually unknown to the entities or the public. There is, especially, a lack of objective reasonable criteria that is provided explicitly and applied uniformly.

This violates fair trial as it jeopardizes the right of the organization or individual to challenge the decision of listing. Where the affected party does not know the grounds upon which such listing is made, it is impossible to challenge this decision. The special rapporteur has expressed the concerns with the lack of fair and clear procedure for placing sanctions[183].

Fair trial also requires for the defendant to be informed of the listing and measures that will be followed from that as soon as possible[184]. Where those affected by such measure are not

[182] A/61/267, §35

[183] A/HRC/8/13, §45; A/HRC/16/51, §34

[184] UNOCHR 'Human rights, Terrorism and Counter Terrorism: Fact Sheet No 32', §39; A/HRC/4/88 par 17-22; A/HRC/8/13, §47

informed of the actions taken, along with the reasons for such measures, they will not be able to challenge this decision. If one is denied rights without the opportunity to be heard, it is a violation of the right to fair trial. Effective challenging of such decision requires full information of the grounds upon which this is made, furthermore, the evidence that was used to reach the decision must be available to the affected party[185].

Another concern to fair trial, when it comes to the listing process, is the lack of continuous review and de listing mechanism. The right to fair trial demands that a party affected has the right to have his/his case heard and challenge the listing. This means there has to be a process available for challenging the decision as well as a designated body that can process such applications[186]. In this, the minimum fair trial guarantees need to be ensured. The applicant needs to have the right to be informed of the listing in a language he/she understands, the right to be represented by a council, the right to an interpreter, the right to adequate time and facilities for defence which includes the right to access all evidence used in the listing process, the right to examine or have witnesses examined, the right to have the application reviewed without undue delay, the right to appeal and the right to have the application reviewed by an independent and impartial body established by law.

The Ethiopian anti-terrorism proclamation, unlike the UK and the UN, does not have a known mechanism for challenging such listing. The law states that the HPR has the power to delist organizations it proscribes[187]. However, the reasons or process by which such de listing will be made has not been provided. More importantly, there is no mechanism by which those affected

[185] A/61/267, §38

[186]A/HRC/16/51, §34

[187] ATP, art 25

by this decision can apply to challenge the proscription. Affected parties cannot approach the HPR to claim they have been wrongly labeled as a terrorist organization. This decision cannot also be challenged in a judicial proceeding; such challenge was raised by Zelalem Workagegnehu when he was charged with terrorism in association with a proscribed organization. Zelalem, in his defence, while asserting that he is not a member of the stated organization, challenged the listing of the organization by saying it is not a terroristic organization. Nonetheless, the court did not address this defence point raised by the defendant; following that, he was convicted of terrorism as a result of his association with the listed organization.

The lack of mechanisms to challenge such listing, in addition to being contrary to the underlying principle of fair trial, violates the presumption of innocence. As stated in the previous chapter, the right to be presumed innocent, a core part of the right to fair trial, means the burden of proof lies on the prosecutor. In this, the prosecutor has to prove legal as well as factual elements of the crime. However, there are instances where the legislator makes legal presumptions. For instance, the legislator may presume paternity of the husband for children born within a marriage or there may be a legal presumption that a person who has been declared absent for 2 years is dead. Such presumptions lift the burden of proof from the prosecutor and are assumed to be true from the beginning. This would not violate the presumption of innocence if there is a possibility for refuting the legal presumption[188]. Labelling of some groups as terrorist organizations is a legal presumption which the prosecutor is not required to proof. Where a prosecutor brings a case claiming an individual is a member of that group, he/she is only required to prove that person is a member. Where he/she is able to prove that connection, there is no need for the prosecutor to

[188] Green paper, page 6

establish that organization is established for a terrorist purpose. This legal presumption violates the presumption of innocence as there is no way to refute the claim. A person who cannot challenge the presumption that the organization he/she is associated is terroristic in nature has been denied the right to be presumed innocent thereby losing his/her fair trial right.

Contrary to the Ethiopian system, the UK and UN have mechanisms for challenging such listing. In the UK, there is an appeal mechanism where the organization or a party affected by the listing can apply to challenge such decision[189]. In the UN, the affected party can approach the security council through its state[190]. While the existence of a mechanism to challenge such proscription is admirable, both the UN and the UK are criticized for the shortcomings of their method. When we look at the UK for instance, the process is conducted by a body of the executive. The right to fair trial requires that such applications be heard by a competent and independent decision-making body[191]. This executive body, does not have the same independence and impartiality standard as a court of law. Especially, considering the fact that the review is conducted by the same body making the listing, raises concerns of impartiality; since this body had made prior judgment on the applicant, his/her impartiality on the case will come into question. Furthermore, the lack of judicial proceeding also raises concerns with the guarantee of minimum fair trial rights.

The same concerns can be raised for the UN system which does not have a judicial review of applications. A further concern with the UN is that there is a lack of direct access to the review body for the applicants. As mentioned above, applicants are expected to approach the security

[189] UK Terrorism act, part II art 4

[190] A/HRC/8/13, §49

[191] Fact Sheet No 32, §39; UNHRCo 'Report of the United Nations High Commissioner for Human Rights on The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' A/HRC/4/88 (2007), §17-22

council through their respective states. This means affected parties will not have a direct access to the security council-where the state is not willing to bring an application on its behalf the affected party will have no access to a review of the decision. This in effect may result in the denial of a delisting mechanism.

In addition to this, the special rapporteur stated the need to have periodic review to assess changes in circumstance; similarly, the applicant also needs to have the ability to reapply during such changes in circumstance[192]. The special rapporteur suggested that there is a need to review the list within a reasonable amount of time[193]. With this, the case of mistaken identities need be resolved quickly, and the necessary compensation needs to be provided[194].

Therefore, listing violates the right to be tried by an independent and impartial tribunal, the right to appeal is not available, it violates the right to defend oneself including all elements that are included under it by this thesis and it violates the presumption of innocence. As such, listing should not be conducted unless safeguarded by the necessary fair trial rights. It will only be acceptable if conducted by an independent and impartial tribunal that safeguards all fair trial requirements and shall provide for a possibility of appeal. Decisions of listing shall also be continuously reviewed to ensure there is no change in circumstances that have led to that decision[195].

[192] UNGA 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedom While Countering Terrorism' Martin Scheinin, A/HRC/16/51 (2010), §34

[193] A/61/267, §35

[194] A/HRC/16/51, §34

[195] Ibid

### ❖ *Intelligence, secret evidence and witnesses*

The increased use of intelligence in counter terrorism is also a concern of the right to fair trial for suspects of terrorism. Intelligence causes such concern because it has a different purpose from criminal investigation, thus, uses a different means. When we compare intelligence and criminal investigation, we can see the difference that results from their respective purpose. Intelligence information is collected for the purpose of ensuring national security, which means, likelihood or possibility suffice the need for action. Furthermore, there is a lot of secrecy involved in the information acquired and the means used to get the information. On the other hand, criminal investigation is conducted for prosecution which means there is a high standard of proof the criminal trial requires which the investigation needs to consider. A criminal trial also demands full disclosure of information acquired as well as the means used to acquire it.

The Ethiopian counter terrorism prosecution highly relies on intelligence which are admissible under the ATP. The prosecutor always presents intelligence reports as an evidence against suspects. This report is not supported by any other document; furthermore, the intelligence agency does not reveal the method it used to get this information. For instance, in several cases, phone conversations of suspects with other individuals qualified by states as members of a terrorist organization, are presented. The voice record of such transcribed conversation, however, is not presented to the court. There is no further supporting evidence to show such conversation truly did happen or if that person actually exists. The defendants deny the details or the conversation and sometimes, even knowing such person. However, since it is not possible to counter this claim that hangs in the air, the courts admit and make decisions based on this evidence.

The primary concern for fair trial remains the secrecy attached to this intelligence information. The secrecy of evidence and means of acquiring such information that intelligence requires is understandable- these things are a matter of national security and disclosing such information may jeopardize security. However, when such secret evidence is presented in a court for criminal prosecution it violates the right of the defendant to adequate facilities for his/her defence. As such, it restricts the right to adequately defend charges against him/her.

While secret evidence restricts fair trial rights, it may be an acceptable restriction where it is necessary and proportional to the legitimate aim being pursued[196]. National security is a legitimate aim that may be pursued by restriction[197], however, there is a need to ensure the restriction is necessary and proportional to the aim. More importantly, where there is a measure that is less restrictive, that should always be the preferred option. In this, we have to look at the effect of non-disclosure on the defendant; where the defendant's case is affected by non-disclosure there has to be a means to limit such effect or the decision-making body has to give less weight to the evidence which was not disclosed to the defendant.

In the UK, for instance, while information may not be disclosed for national security reason, the state has devised a mechanism to counter such secret evidence and secure fair trial. When information is not disclosed to the defendant on national security grounds, the state appoints a special advocate who has security clearance to assess the evidence and how it will affect the defendant's case[198]. The special advocate will discuss with the defendant, then access all evidence used against the defendant, thus, protecting his/her right to defence. This procedure is

[196]Edwards and Lewis V. The United Kingdom App nos. 39647/98 and 40461/98 (ECtHR, 27 October 2004)

[197] ICCPR, art 14 (1)

[198] Special Immigration Appeals Commission Act and the Northern Ireland Act 1997/1998, Sec 7

not perfect- the defendant still does not have access to the evidence against him impairing his ability to adequately defend the case. Even where the special advocate has full access, he/she will not be able to discuss with the defendant once he/she reviews this secret evidence. This means the defendant's access to counsel is restricted.

Nonetheless, special advocates provide a means to balance the restriction that national security imposes on fair trial. This provides an alternative to non-disclosure; as such, the writer supports their use as a viable alternative.

### ❖ *Right to Council*

A frequent violation that occurs on suspects of terrorism is the excessive restriction of their access to council. Suspects of terrorism are usually held in detention without access to a counsel for longer than other suspects. Where they are allowed to meet with a counsel, their communication is monitored and even recorded. Such monitoring is a violation of the right to counsel, as the effectiveness of the right depends on the confidentiality of the communication[199].

In the same manner, suspects of terrorism in Ethiopia are always held in detention long before a charge is made against them. Suspects may be held in detention for one year or longer before any charge is brought against them. In this, even when they are taken to court within 48 hours, the investigators will always ask for remand to conduct further investigation. The remand period for terrorism in the ATP has been extended from the ordinary 15 days to 28 days and not longer than four months[200]. Furthermore, there is no limit as to how many times such remand may be granted to the investigation. This discretion is given to the courts, which, to date, have not denied a request for remand. In the meantime, suspects are denied bail as the proclamation restrict bail for

[199] GC 32, 34
[200] ATP, art 20 (3)

suspects of terrorism[201]. Therefore, these suspects stay in detention for a long period while the police conduct interrogations and compile evidence against them. During this time, the communication of the suspects with their counsel is always restricted. Suspects may not meet their counsel for 6month to a year until a charge is made against them. This problem is even more present for those who cannot afford to pay for their own counsel. If suspects cannot afford their own counsel their right is completely restricted. The only way the state provides legal assistance is through the trial court and this happens only when the charge is made. This means, before the charge is made against suspects of terrorism, pretrial detention, that may last up to two years, will not be supported with an access to counsel.

More importantly, all interrogations are conducted without the presence of a lawyer. The lack of counsel presence during interrogations raises further problems as all suspects of terrorism allege that they have been tortured. However, the burden of proof when such allegations are made in Ethiopia, always lies on the defendant. The lack of access to counsel, especially during interrogations, makes proving such allegations difficult. While this is not unique to suspects of terrorism, the situation is more severe for them as they are always subject to torture. Furthermore, they are kept in pretrial detention for much longer than other suspects. While the exact time for access to counsel is not stipulated by any national or international instrument, access should be granted as soon as possible. Any limitation, that restricts the right to counsel should be determined on case by case basis- a blatant restriction because a person is suspected of terrorism will be in violation of the right of fair trial[202].

[201] Under article 63 (1) of the Ethiopian Criminal Procedure Code, bail is restricted if the crime is punishable with rigorous imprisonment of 15 years or more. Terrorism automatically falls under this category.
[202] UNOHCHR 'Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism' (October 2014), §71

Another challenge on the right to counsel is the monitoring and recording of communication between lawyers and suspects of terrorism. This has a chilling effect and restricts the effective communication between counsel and their clients. This further affects the ability to adequately defend one's case. As stated in the previous chapter, the right to counsel may be restricted to pursue a legitimate aim, as long as the restriction measure is necessary and proportional to the aim in a manner that does not affect the overall fair trial right. States have justified monitoring such conversations, as a way to prevent transfer of message from the suspect to other accomplices. The special rapporteur as well as the ECtHR have accepted this as a legitimate aim to monitor communication[203]. This is a big accusation- in effect, this is accusing the counsel of being complicit in terrorism which in itself is a criminal act. Even in such instances, the ECtHR found that such restriction may not be made without a specific allegation[204]. The special rapporteur, on the other hand, stated that such conversation may be visually monitored but not heard[205]. Finally, both the ECtHR and the special rapporteur stated the fact that a suspicion of terrorism is not a justification to make such restrictions. Moreover, restriction must be made on a case by case basis, based on the existence of a legitimate aim in a manner that is necessary and proportional to the aim. Finally, due consideration must be given to the overall fairness of the trial.

[203] UNGA Res 63/223 (6 August 2008) A/63/223, § 39.; Salduz v. Turkey, App No. 36391/02 (ECtHR, 2008), § 52, 54

[204]Ibid

[205] UNGA Res 63/23, § 39

## Conclusion

Among the many restrictions suspects of terrorism face in Ethiopia, the restriction on the right to fair trial stands out. This is very significant because the criminal prosecution and the trial is used as a shield for the state. Several human right violations including against liberty, freedom of expression and the right against torture, cruel, inhumane, degrading treatment or punishment is conducted under the façade of a criminal trial. Hence, identifying these restrictions, with an aim to establish the gaps, is essential to guaranteeing fair trial as well as the overall human rights.

# Chapter Three: Balancing and Safeguarding the Right to Fair Trial While Countering Terrorism

## Introduction

States security and human right constantly come in conflict when states are making continuous decision on how to safeguard one without compromising another. The problem is, when such conflicts becomes too difficult for any compromise, human rights end up being sacrificed. States are always willing to restrict or completely ignore human rights where the slightest question of state security comes into question. In most circumstance, states use national security as an excuse when they want to restrict/limit the application of human rights.

Terrorism, as the current biggest threat to security, has triggered a restriction on the application of human rights. The threat of terrorism, which is exaggerated and taken as more dangerous than any other threat to security, has endangered human rights by putting extreme restrictions to the extent of avoiding their application. It has taken the world to a place where it is considered acceptable to question the absolute nature of the prohibition against torture, cruel, inhumane treatment, a jus cogens norm, a norm held at the highest platform.

Fair trial is no exception, states restrict the application of most aspects of the right in the name of state security. This is especially the case in terrorism charges that has extended pretrial detentions, limitation on the right to counsel, restricted access to courts and so much more.

As the extreme weight of fear attached to terrorism extendsits heavy hands on the laws/policies of states, there shall be a mechanism to balance the effect it will have on human rights.Balancing should especially be emphasized when it comes to fair trial as it is the key for rule of law,

democracy and other fundamental rights[206]. In addition to these guarantees, balancing is also important for the success of counter terrorism measures making it a crucial step of national security.

In this chapter, the writer will identify ways to balance fair trial rights while countering terrorism by adopting what the writer calls a 'fair trial right framework to counter terrorism'.This is a derivative of the human right framework to countering terrorism adopted by the UN. Balancing, under this thesis, means working within limitations already available under international human rights law. When such limitations are applied, the thesis will argue that there are necessary safeguards that need to be adopted to adequately guarantee fair trial. These safeguards are absolute adherence to the essential elements which will be identified by the thesis and the need for a higher supervisory body that can independently assess the limitations set by states.

## I. A Fair Trial Framework to Counter Terrorism

The UN, in its efforts to counter terrorism, has adopted a strategy that contains four measures[207]. These are;

1. measures to address conditions conducive to the spread of terrorism,
2. measures to combat terrorism,
3. measures to build state capacity to prevent and combat terrorism and
4. measures to ensure respect for human rights for all and rule of law.

The fourth measure, more relevant to this thesis, relies on the recognition of the value in ensuring human rights to counter terrorism.According to this, guaranteeing human right and rule of law to

[206] UNGA Res 63/23 (6 August 2008) A/6323, § 7

[207]UNGA Res 60/288 (8 September 2006) A/RES/60/288, Annex

everyone is core to all the other counter terrorism strategies[208]. It considers countering terrorism and fair trial as mutually reinforcing. Ensuring human rights prevents the birth or growth of terrorists in a state. Terrorism, as discussed in the previous chapter, grows from a collective motive that is either political, religious, ethnic or others. Terrorist groups/individuals usually emerge from a group that is disadvantaged or denied of rights – it emerges from an ideological request that promotes the questions/needs of a specific group. The denial of human rights to a specific group will serve as a cause for the birth of a terrorist group; in the same manner, where the right to fair trial is denied to a suspect of terrorism, others may take this as a cause or an affirmation of the activities of the suspect. Thus, guaranteeing human right is complementary to counter terrorism measures; it is also relevant to the other three measures in the UN strategy.

The fair trial framework to counter terrorism is a derivate of this understanding by the UN- it is a strategy that aims to achieve an effective criminal counter terrorism measure by guaranteeing fair trial rights. Fair trial gives the best guarantee of getting to the truth and serving justice to the right suspect[209]. It also gives a sense of security and justice to individuals minimizing the growth of terrorists. Therefore, this framework is adopted to ensure an effective counter terrorism strategy that respects fair trial for all suspects.

This framework adopts a fair trial lens when suspects of terrorism are going through their prosecution. In this, it tries to balance both interests of the state by working through the limitations already provided under international law[210]. This thesis asserts that terrorism does not

[208] Ibid

[209]Gabriel Shumba V. Zimbabwe Comm no. 288/04 (AComHPR, 30 June 2017), §179; Ana D. Bostan, page 1 and 39

[210] A16/51, §12

warrant additional limitations; thus, it is possible to effectively combat it using the restrictions that are already provided. However, in working through limitations, additional safeguarding mechanisms shall be adopted to avoid abuse of discretion by states.

- ***Balancing Through Limitations***

Human rights are not absolute- except few rights, all are subject to permissible limitations provided by international human right law. These limitations allow states to restrict the applications of the right where the necessary preconditions are met.

As discussed in the first chapter, fair trial is one of these rights that is subject to limitations. Save the reservation the writer has with regards to the limitation on fair trial rights provided by the UN and ECtHR jurisprudence, these limitations are recognized and can serve as an important boundary. When the thesis discusses limiting fair trial, it is referring to the limitations provided in the first chapter.

Limitations do not provide free access for states to place any restriction; they need to be provided by law, they must pursue a legitimate aim and it should be proportional to the aim pursued[211]. As such, individuals are aware of the existence of such restrictions, they are necessary to achieve a legitimate purpose and the measures will not exceed what is proportionally needed to achieve the aim. The existence of such standard on limitations protect human rights from excessive abuse by states[212].



[211] See qualified rights in ICCPR, ECHR and ACHPR

[212] Fact Sheet 32, page 25-27

Terrorism can be considered as a legitimate aim that warrants a restriction on fair trial rights[213]. However, even when it provides for a legitimate aim, the limitation provided shall be necessary. All cases of terrorism do not necessitate a restriction on fair trial rights. For instance, not all suspects of terrorism can have a restricted right to defence. Where access to evidence or witnesses poses a threat to national security or the life of a witness, however, limiting this right may be necessary. Even where such measures are necessary, the limitation shall be proportional. In the circumstance provided above, it may be necessary to limit access to evidence but limiting all evidence including those that have no value to national security is not proportional to the aim. Hence, such limitation will not be acceptable.

While these standards provide a security to the balancing mechanism, they are also very broad standards that can be subject to a lot of discretions. They do not provide specific situations in which a right may be limited, rather they provide principles which are always vague, subjective and can be used freely by states. There is always, to use the term of the ECtHR, a margin of appreciation given to states to determine what they consider necessary and proportional[214]. Thus, states often abuse this broad discretion to assert excessive limitations on individuals. Especially in states with questionable commitment to human rights, limitations provide a legalized mechanism to restrict rights.

To counter balance this broadness, the thesis presents two mechanism which can minimize the abuse to guarantee success in balancing. These mechanisms are setting standards and ensuring states adhere to a superior body that is independent of the state's organs in every way.

[213] Fact Sheet 32, page 24; Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism Guidelines [2002] III(2)

[214] Handyside V. The United Kingdom App No 5493/72 (ECtHR, 7 December 1976), §47-49

Standards provide a strict parameter than principles in which there is no vagueness or room for manipulation. In limiting fair trial, the standard that is recognized by this thesis is identifying an essential element, that serves as a core of fair trial, that cannot be limited under any circumstance as a line states cannot cross.

On the other hand, balancing needs to be accompanied with an adherence to a superior body that is independent of any state organ and can check the compliance of states to the requirements of limitation as well as their preservation of the essential element.

In the coming subsection, the writer will discuss the essential element that should be set as a standard and the supervision by a superior body with its relevance to safeguarding the right to fair trial.

- ***Safeguarding fair trial while balancing with limitations***

#### *Identifying the Essential Element*

Fair trial elements listed in international conventions are not considered separately; as discussed in the first chapter, the elements are integrated with one another. The overall fair trial right is assessed by looking at the combined effects of such elements[215]. However, the thesis still considers there is an essential element that is the core of the right and necessary to protect all other elements.

Identifying this element as essential means laws and policies shall adhere to it without any restriction or derogation. Ensuring this element will be a priority for states with extra caution being placed on all laws/policies that concern this right.

[215]Mayzit v. Russia App no. 63378/00 (ECtHR, 20 January 2005) § 77; GC13, § 1

The thesis identifies the right to be tried by a competent, independent and impartial tribunal as an essential element of fair trial. This element is selected by the writer because of the relationship with other elements of fair trial as well as other fundamental rights. This selection is also justified by looking through international legal jurisprudence and the value attached to this right[216].

An independent and impartial tribunal with the competence to oversee cases is the first essential element of fair trial that cannot be compromised. This right ensures other elements of fair trial are guaranteed by overseeing their application. It can receive complaints on such elements; where it finds violations, it can redress it by giving orders to other state organs. For instance, where a defendant is denied the right to consult with counsel, that individual can apply to a court which has the power to give orders on the validity of such restriction. In the same manner, they can rule on evidence and guarantee the presumption of innocence of the defendant by issuing injunctions on statements or acts that are contrary to the right.

Furthermore, this right is a safeguard for other fundamental rights and freedoms. For instance, it can give rulings on detentions guaranteeing the right to liberty. The legality of a detention is guaranteed where individuals are presented before a court of law that can check the legality of the detention and has a power to issue bail. The judiciary also can ensure the individual is not subject to torture, ill or inhumane treatment by regularly checking the defendant while in detention, discarding evidence which has been obtained in such manner as well as deciding if a treatment is inhumane or torturous.

[216]International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioner Guide 1(2007) International Commission of Jurists, 3; Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda V. Nigeria Comm no 140/94-141/94-145/95 (AComHPR, 5 November 1999), § 33

An independent and impartial tribunal can also check on the restrictions posed by a state. The validity of limitations, including the standards, shall be assessed by an independent and impartial judiciary.For instance, where a defendant is denied access to evidence for national security reasons, the judiciary can play a significant role by looking through these documents to check if the national security restriction is valid and check the significance of the documents for the defence.

The judiciary can only play this critical role when it is independent, impartial and has the necessary competence to give rulings. A judiciary that is not independent, especially from the executive will serve as its arms. Such a judiciary will not work in the interest of individual's rights. Therefore, unless a judiciary is independent, impartial and competent, it cannot serve the purpose intended in this thesis.

The laws and policies of a state shall always aim for the existence of such a judiciary.Counter terrorism measures that aspires to have any effectiveness or legitimacy shall ensure the existence of such a judiciary. A state shall incorporate all important criteria discussed in the first chapter. Furthermore, there shall be a training for the judiciary to increase their competence. More importantly, a state shall not limit or derogate this right under any circumstance.

#### *Supervision by a Higher Body*

Another way to safeguard the right to fair trial is by having a neutral body that supervises the activities of the state. Balancing through limitations requires such supervision that can receive complaints on abuse of power by states. The adherence of a state to the three-part test, in exercising restrictions, requires an overlook by a higher body.

This is even more important in states like Ethiopia, that have a weak culture of democracy and rule of law. The blurry line that exists between the different branches of government minimizes the independence of the judiciary. Furthermore, judges are not equipped with the necessary training or job security to guarantee their independence. Another issue with this is the lack of application of international jurisprudence in Ethiopian courts. They also do not have the power to check the constitutionality of laws as this power is entrusted to the House of Federation [hereinafter, HOF]. This is a political body making it difficult to separate itself from the political agendas of the governing party to decide laws as unconstitutional.

In addition to the weakness in the national system, the state is not subject any binding superior supervisory body. The only independent body that can serve as a supervisory body for individuals is the AComHPR. This is a body whose decisions are non-binding with no enforcement mechanism. The commission has ruled on 12 cases against Ethiopia, from which only 3 have been admissible.Hence, it is difficult to make conclusions on the enforcement of decisions by the state. However, the AComHPR has made a ruling against the state for its violation of its fair trial obligation in one case where the state has been requested to pay compensation[217], which as far as the writer is aware of has not been executed. On another case, the commission recently ruled the state to pay compensation, to which the state officials blamed international influence on civil society organizations questioning the legitimacy of the decision[218]. Even though it is impossible to draw a conclusion from these two cases, it does not



[217] Haregewoin Gebre-Selassie and IHRDA (on behalf of former Dergue Officials) V. Federal Democratic Republic of Ethiopia Comm no 301/05 (AComHPR, 7 November 2011)

[218] Equality Now and Ethiopian Women Lawyers Association (EWLA) V. Federal Democratic Republic of Ethiopia Comm no. 341/2007 (AComHPR, 16 November 2015)

show prospects of the state to abide by the decisions of such a non-binding organ with no enforcement mechanism.

Besides the commission, the state is not subject to any supervisory body with an individual complaint mechanism. The state did not sign the optional protocol to ICCPR to allow individuals access to the UNHRC. The state is also not party to the African Court of Justice which has the power to receive individual complaints and makes binding decisions. This means individuals have no recourse to any independent supervisory body. There is no mechanism to check the exercise of power by the state to ensure laws, limitations and practices of the state are in line with international principles.

All of these conditions in the country, have allowed the state to comfortably broaden its power posing further limitations on fair trial. This is where the need for a supervisory body independent from the state becomes crucial.

On the contrary, the UK is party to the optional protocol of ICCPR; more importantly, the state is subject to the supervision of the ECtHR. This supervision, in addition to the strong national system with independent judiciary that has a power to make rulings on the state's compliance to human rights, has played a significant role in shaping the laws and practices of the state.

The ECtHR receives several cases against the UK concerning arbitrary detention and fair trial right violation. The decisions of the court have allowed individuals access to full exercise of their right and appropriate compensation. These decisions have also shaped the laws of the state. For instance, after the ruling on Chalal V. UK and and Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, the state has amended its laws to start the application of a special advocate to cases with evidences that are disclosed from the defendant

for national security reasons[219]. This is a good example of how a supervisory body can safeguard fair trial rights by checking the laws and practices of a state as an independent body which does not have an interest in the matter.

## Conclusion

Whereas limitations give states the necessary gap to balance their counter terrorism laws and policies with the right to fair trial, this gap may be subject to abuse. Therefore, there needs to be additional mechanisms to safeguard the right from such abuse. The first safeguarding mechanism is applying standards that will serve as strict parameters for states – these standards, as opposed to principles laid by limitations, are strict requirements that cannot be twisted and bent according to the needs of states. This thesis provides the existence of an independent, impartial and competent tribunal with the necessary competence which can neither be limited nor derogated from, as the necessary standard for states. This element is crucial to the guarantee of other elements of fair trial as well as other fundamental rights; thus, states should not be given any margin with regards to this right.

The other safeguarding mechanism is having a superior supervisory body that is independent of any state organ with the necessary enforcement mechanism. While the UK's fair trial right record on suspects of terrorism is far from perfect, the existence of ECtHR has given individuals the necessary recourse – in the same manner, it has made the state take the necessary adjustments to improve its laws and practices to comply with the standards set by the court.

The writer is not oblivious to the challenges of enforcement that can be related with the court or the need for additional measures to fully safeguard fair trial right for suspects of terrorism.

[219]Jasper V. The United Kingdom App no. 27052/95 (ECtHR, 16 February 2000) §35

However, the balancing mechanism, combined with the necessary safeguards can serve as a really good way of serving the needs of states in their counter terrorism action while protecting the rights of individuals. Thus, taking these steps together will provide the necessary fair trial right guarantee.

## Conclusions and Recommendations: Guaranteeing Fair Trial for Suspects of Terrorism in Ethiopia

The discussions, throughout this thesis, have demonstrated the significance of fair trial for the effectiveness of human rights. Fundamental rights can only be secured where the necessary remedy is available to redress violations. Such redress shall be done through a trial that consists of all the minimum due process guarantees.

The thesis has also argued the value of guaranteeing fair trial when combatting terrorism. Unfair treatment of suspects can create a breeding space of terrorism by making disadvantaged groups feel helpless. Unfair treatment also means the public will lose trust in the justice system. The feeling of helplessness and insecurity encourages terrorism. More importantly, a criminal system which does not adhere to these principles will jeopardize the truth finding process. Counter terrorism measures can be effective where the system is able to convict and punish those responsible. Errors in such effort will not only endanger the efforts to combat terrorism, it will also create further space for terrorists.

More importantly, the thesis evaluated Ethiopian counter terrorism practice in comparison with the UK and UN experience. While the government of Ethiopia, repeatedly, relies on the UK legislation, as a defence to the criticism it receives, the thesis has shown the existence of key differences in the two systems, that creates a gap.

The first difference observed is on the definition of terrorism; the thesis has demonstrated how Ethiopia has expanded the scope of the crime using small differences. More importantly, the vague, broad standards provided by the Ethiopian legislation affects fair trial rights.

Another difference that has been discussed in this thesis is in the listing of organizations as terroristic. While all these jurisdictions under consideration conduct such listing, the difference in delisting creates a difference in the protection of fair trial for suspects of terrorism. The UK legislation provides a mechanism for those listed or affected by the listing to challenge this decision. The same mechanism does not apply in Ethiopia which has no known mechanism to challenge this legislation.

In addition to these legislative differences, however, the threat to fair trial comes from the difference in the level of democracy and rule of law between these jurisdictions. Ethiopia has a weak democracy with a shaky, if not nonexistent, check and balance mechanism. The lack of accountability, that results from this, already threatens human rights. When a restrictive counter terrorism legislation is added to this fragile system with no safeguarding mechanism, it further undermines the small protection to fundamental freedoms. Fair trial is no exception to this- in fact, as this right is fundamental for rule of law, and hence, democracy, the weakness in them demonstrates the weakness in fair trial.

Considering all of these, the thesis has outlined safeguarding mechanisms that can protect fair trial for suspects of terrorism. The safeguarding mechanisms adopted is ensuring the independence, impartiality and competence of the judiciary. The thesis has identified several gaps in bringing about such a judiciary in Ethiopia. The first chapter has addressed the vague standards forwarded by the law that affects the independence of the judiciary. Similarly, the thesis addressed the ineffective mechanism forwarded by the law to challenge the partiality of judges. These gaps in the law are abused by the weak political system which does not create a check and balance mechanism to minimize the effect of this gap. As such, providing the first safeguard in Ethiopia requires reforming the political structure.

It is certainly important that the state fixes the gaps in the judicial system by providing for a clear law that does not leave a room for abuse. The vague principles for termination of judges, provided by the law, can be abused by the executive to fit any reason under this standard. Hence, having more concrete laws will be a definite step forward to having an independent judiciary. The thesis has asserted the importance of having clear set standards as compared to principles that are vague and susceptible to an overstretch. It is also necessary to have a different mechanism of assessing claims of partiality on judges. Such decisions shall be made by an impartial party which is not connected with the judge against whom the complaint is made.

However, even where these steps are taken to address the gaps, the lack of democracy in the country will always present a challenge to the judiciary. A well-functioning democracy that is evidenced by separation of power and a dedication to upholding human rights is the backbone to any safeguard. Ethiopia can only secure fair trial for suspects of terrorism when it works on the development of democracy, ensuring rule of law and upholding human rights as a higher norm.

The guarantee of all of these does not, however, mean fair trial for suspects of terrorism will not be compromised. The UK is a great example to show how counter terrorism measures can affect fair trial, even in democratic nations with an independent and impartial tribunal. This is where the second safeguarding mechanism plays a crucial role. The supervision of a higher body that is independent of the state dedicated to ensuring the protection of human right can make a significant difference. The thesis has used the impact of the ECtHR on the laws and policies of the UK to demonstrate the value of a supervisory body.

Ethiopia lacks any supervisory body that effectively checks the compliance of the state with international human right standards. There is even a lack of an independent body that checks on the constitutionality of laws. This decision is conducted by a political body that is no different

from the body that first promulgated the law. Such a political decision will not provide the safeguard fair trial needs. The other supervisory mechanism for Ethiopia is the AComHPR; the commission, however, does not make a binding decision. Even though, the decisions against Ethiopia are not enough to assess the country's record on enforcement, the mere fact that they are non-binding recommendations to a state that denies any wrongdoing shows the lack of enforcement. While the thesis acknowledges that enforcement is a challenge under international law, it also asserts that an enforceable decision has much better value than a mere recommendation. Furthermore, the weakness of investigative and implementation mechanisms under the AComHPR, means it cannot be considered as a supervisory body, under this thesis, for safeguarding fair trial rights. Hence, Ethiopia still needs to adhere to a higher supervisory body, that is independent from the state in all aspects and can make binding/enforceable decisions.

In conclusion, the thesis argues safeguarding fair trial rights for suspects of terrorism while also efficiently countering terrorism requires a unique approach that places the rights ahead. The fair trial framework to countering terrorism ensures that the states views its laws and policies, designed to counter terrorism, with the right as a filtering lens.

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