

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the right to privacy; the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the right to privacy; Special Rapporteur on freedom of religion or belief and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 34/18, 32/32, 37/2, 40/10 and 40/16.

In this connection, we offer the following comments on A Proclamation to Provide for the Prevention and Suppression of Terrorism 2019 (“the Proclamation”), which raises serious concerns regarding a number of human rights and advance our views on this pending legislation, encouraging review and reconsideration of certain key aspects to ensure that new legislation is in compliance with Ethiopia’s international human rights obligations.

As a result of the work of a national commission tasked with reviewing and suggesting reforms to a number of national laws, a proposal (“the Proclamation”) has been advanced to address your country’s counter-terrorism law. We understand that the Office of the Federal Prosecutor produced the draft Proclamation, that it was adopted by the Council of Ministers of Ethiopia with some amendments and debate and is now under consideration by the Parliament which decides whether to approve it and set its date of implementation.

Overview of international human rights law standards applicable

We remind your Excellency’s government of international human rights standards applicable, particularly under the International Covenant on Civil and Political Rights (ICCPR), which Ethiopia acceded to 11 June 1993. In particular, we refer to the general international legal obligation in the ICCPR art. 2, whereby the State is under a duty to adopt laws that give domestic legal effect to the rights, and adopt laws as necessary to ensure that the domestic legal system is compatible with the Covenant.

Article 19 of the ICCPR protects the right to freedom of opinion and expression. Whereas the right to freedom of opinion in article 19(1) is absolute, the right to freedom of expression in 19(2) is subject to restrictions based on the requirements in article 19 (3). The scope of art. 19 (2) is broad. It protects the right to seek, receive and impart

information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20, CCPR/C/GC/34 para. 11. Furthermore, it protects all forms of expression and the means of their dissemination: “Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. [...] They include all forms of audio-visual as well as electronic and internet-based modes of expression.” CCPR/C/GC/34, para. 12.

Any restrictions on the right to freedom of expression must be compatible with the requirements of article 19(3). It is up to the State to demonstrate that a particular restriction is compatible with the requirements of the Covenant, CCPR/C/GC/34 para. 27 and 35. Under no circumstance can restrictions jeopardize the right itself, for example by reversing the relationship between norm and exception, CCPR/C/21/Rev.1/Add.13 para. 6 and CCPR/C/GC/34 para. 21. In addition, they must:

1. *pursue a legitimate aim*, limited to those specified under article 19(3).
2. *be provided by law*, in that any restriction “must be made accessible to the public” and “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.” Moreover, it “must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”, CCPR/C/GC/34, para 25.
3. *be proportionate to the legitimate aim pursued*: the requirement of proportionality entails that restrictions “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”, *id* para. 22. Beyond prohibiting overbroad restrictions, restrictions must be “appropriate to achieve their protective function; they must be the least intrusive instrument [...]; they must be proportionate to the interest to be protected”, *id* para. 34.

We further recall ICCPR Art. 20 whereby the state has a duty to prohibit certain forms of expression. The provision reads: “1. Any propaganda for war shall be prohibited by law, 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. All measures of prohibition, including criminalisation of speech, within the scope of article 20 must meet the standards of legitimacy, legality and proportionality see CCPR/C/GC/34 para. 50. Whereas the State has a duty to prohibit speech under Art. 20, no such duty exists for the prohibition of speech that falls outside the scope of Article 20. Thus, a lower threshold for disproportionality under Article 19 (3) exist for the prohibition, and criminalisation, of speech outside the scope of Art. 20.

Concerns relating to the compatibility of the Proclamation with international human rights law

Introduction

We are aware of the previous concerns articulated about existing counter-terrorism law and practice, and as a preliminary matter welcome a process of review and consideration of emergency, security and terrorism related powers in Ethiopia, in particular where such laws bring national practice into international human rights compliance. The government has a rare opportunity to tighten and ensure that the definition of terrorism contained in national law is appropriately narrow and tailored, and that use of counter-terrorism law and practice is in conformity with international human rights standards, and strictly contained to those specifically violent acts that constitute terrorism under international law. It is also important that the process of revision be transparent and accessible, inviting the widest possible engagement from stakeholders. For that purpose, we would recommend that the Government public releases the Proclamation for public review.

Definition of Terrorism

We note that the Preamble to “the Proclamation” sets out a number of understandings that frame the proposed legislation. These include defining terrorism rightly as a “serious threat to peace and security” affecting both persons and property, and the view that government should take “strong precautionary and preparatory acts centered [on] the nature of the crime”. In this regard, we would caution that an emphasis on damage to property harm steers the domestic legal standard away from the core emphasis found in agreed international treaties on terrorism and UN Security Council Resolution 1566 on the targeting of civilians.¹ We urge the government to maintain a definition of terrorism consistent with the core legal meanings adopted by States and commends the definition of terrorism developed by this mandate for your consideration (A/HRC/16/51). Furthermore, we highlight some concerns about the move to criminalizing and regulating precautionary measures, where the burdens of proof, and the legal basis for adverse legal and liberty consequences for the individual are not grounded in any specific and proven act. This shift to precautionary enforcement of counter-terrorism and the criminal law, upends the traditional legal basis upon which due process protections are premised and can pose significant challenges to protecting individual rights.

We welcome the Preamble affirmation of Ethiopia’s commitment to enforcing its international treaty obligations; its acknowledgment that the 2009 Proclamation created a range of loopholes with negative “effects on the rights and freedoms of citizens”; and a robust commitment to the rights of victims of terrorism which is a matter of considerable importance to the Special Rapporteur.

¹ OP 3 of UNSCR 1566 (2004), “Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature”.

Part II, Terrorism and Related Crimes

The definition of terrorism contained in Section 3 of the Proclamation, has a core focus on ‘spreading fear among the public or a section of the public or coercing or compelling the government’, which is in line with agreed international best practice outlined above. The Special Rapporteur however notes the meaning of the phrase “advancing political, religious, or ideological causes for terrorising” is not clear and would encourage greater clarity in the phrasing used to avoid the application of ‘terrorism’ to a range of acts and views that are not consistent with precise and appropriate use of the term under international law.

We note the consistent use of the phrase (in the English translation) “rigorous punishment” in various sections of the Proclamation which appears to be in parallel to the Criminal Code provision using the same terminology.² We are concerned that this terminology suggests, that above and beyond the specific term of imprisonment given to an individual for a specific offence defined in this Proclamation, further and intensive additional punishments will follow simply from having been convicted of offences listed in this legislation. Such ‘additional’ punishment would be inconsistent with the State’s international human rights obligations, and specifically the prohibition on arbitrary detention, the prohibition on double jeopardy, and disproportionate sentencing.³ We also note that a capacity for rehabilitation and reintegration for all offenders may be offset by terms and locales of imprisonment that are *prima facie* not designed for this purpose.

We also call attention to the application of the Proclamation to the offence of “obstruct[ing] public service” in paragraph 3(e). We are concerned that the definition of ‘public service’ is exceptionally wide-ranging including but not limited to infrastructure, electronics, information, communication, information telecommunications. I urge the government to narrow this definition to a specific and narrow class consistent with the severity of the offence of terrorism to avoid forms of protest or action involving engagement with public services being captured inappropriately as terrorism.⁴ This would provide a degree of legal certainty currently absent with respect to this offence in the legislation.

Intimidation, Planning, Preparation and Conspiracy to commit a terrorist act

² Article 108.- Rigorous Imprisonment under the criminal code mandates “for a strict confinement of the criminal and for special protection to society”. The mandate notes that the stated period of imprisonment is normally for a period of 1-15 years, and potentially for life and the site of imprisonment are in “such prisons as are appointed for the purpose”.

³ Article 9 of the Universal Declaration on Human Rights; Article 9 of the International Covenant on Civil and Political Rights and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (GA 41/173)

⁴ Noting guidance in the *Compendium of Best Practice on the Protection of Critical Infrastructure from Terrorist Attack* (2018) available at https://www.un.org/sc/ctc/wp-content/uploads/2018/06/Compendium-CIP-final-version-120618_new_fonts_18_june_2018_optimized.pdf which specifically recommends that States comply with international human rights obligations in any efforts to protect critical infrastructure (at p22) and encourages States to “... conduct regular human rights assessments of measures taken to tackle the terrorist threat to critical infrastructure and ensure that such measures are evidence based ...”.

This provision (section 5) creates a novel offence of “intimidation” to commit a terrorism offence. The offence as drafted is vague and lacks legal certainty. It is unclear what acts would rise to the level of intimidation creating the possibility of over-reach. The Special Rapporteur encourages reconsideration of this offence as drafted, to ensure it complies with the requirements of necessity, proportionality and legal certainty.⁵ In respect of planning and preparation (section 6), the definition of what might constitute planning and preparation under Article 2(6) creates a challenge of legal certainty, and legal concerns of *nullem crimen sine lege*. Conspiracy (section 7) also raised similar concerns. The Special Rapporteur recommends that these offences have greater definitional clarity.

The Special Rapporteur highlights my concern at the definition of a new crime of “false threat of a terrorist act” (section 8). I note that in the current global and national environment where persons are often encouraged to act on the basis of suspicion of a terrorist or violent threat, there is a clear danger of mixed messages to the body politic, when individuals may be subjected to criminal penalty for acting in what they may (subjectively) believe to be in the public interest and safety. The Special Rapporteur suggests that this provision be deleted in its entirety from the legislation.

Article 9 addresses the complex issue of support to terrorism. We acknowledge the importance of addressing direct and unequivocal enablement of support to terrorism.⁶ We are, however, concerned that the language of this provision criminalises a range of activities that cannot be reasonably or fairly described as terrorist in nature or intent. In particular the subsections which articulate preparation of documents and information and providing technical, counselling or professional support are of concern. We highlight the emphasis on ‘indirect’ support to terrorism which may capture a range of legitimate activities that may hamper in particular the work of civil society, lawyers, journalist, and human rights defenders. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism addressed this matter substantively in my her report to the Human Rights Council [A/HRC/40/52](#) in 2019, and urged States to avoid overly broad material support to terrorism provisions in national legislation given the adverse effects on the functioning and capacity of civil society and civic space. We would underscore that mere communication or storage of materials or content should not necessarily be a crime in the absence of intent to incite a terrorist act. We also highlight the apparently disproportionate penalty applied to negligent use of material, when it is not clear what threshold of negligence constitutes the legal liability under relevant domestic law. We welcome the humanitarian aid exemption contained in sub-section 5 of this provision.

Incitement

The Proclamation criminalizes incitement to terrorism in numerous ways under Section 10. First, we recall the standards for incitement in listed in the ICCPR Art. 20 listed above. One particular concern under the ICCPR Art. 19 (3) relates to the scope of

⁵ Corresponding to the fundamental requirement of no punishment without law.

⁶ The Special Rapporteur notes the reference in United Nations Security Council Resolution 2462 (2019) with respect to terrorism financing addresses this issue and affirms such regulation must be undertaken in compliance with international law obligations.

the Proclamation section 10 (2), in the sense that section 3 of the proclamation is broader than the prohibition in the ICCPR Art. 20. Another concern under the ICCPR Art. 19 (3) is that the proclamation section does not distinguish between situations of legitimate storage and dissemination of information to the public, for example in the context of news reporting.

We express grave concern that mere ‘storage’ of information under paragraph 10(2) will constitute a serious criminal offence, and notes that persons may communicate, share and store information for innocuous reasons. We believe this section to require greater precision and narrowness in its drafting. We are concerned that this regulation impinges unnecessarily on individual rights to privacy, family life, and may reach to freedom of religion and belief.

We recall that any limitations on rights by the application of counter-terrorism law must be (a) necessary; (b) impinge only minimally on rights (least restrictive alternative); (c) demonstrate proportionality between means and clearly stated objectives; and (d) be consistent with other fundamental rights and non-discriminatory in purpose and practice.

Crimes committed against whistleblowers and witnesses

We note our concern with the inclusion of crimes against whistleblowers as stand-alone terrorism offences. In our view, the protection of whistleblowers and witnesses is an important and critical aspect of a functional democracy and rule of law system, see the report of the Special Rapporteur on the Freedom of Opinion and Expression on the protection of whistleblowers (A/70/361). However, protections for these categories of legal actors should not be contained in a counter-terrorism Proclamation and is rather more rightly placed in the ordinary criminal law. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recalls her observations in the her report [A/HRC/37/52](#) concerning *de facto* states of emergency that States are better served and in due compliance with their international human rights law obligations by ensuring that the ordinary law is used where appropriate, and that countering terrorism is not weakened by bringing the regulation of acts that rightly belong elsewhere in the criminal, civil or administrative law into counter-terrorism regulation.⁷ She articulates concerns that the application of these multiple powers may give rise to a *de facto* state of emergency where the widespread use of restrictive powers occurs without formal acknowledgement of emergency *per se*.⁸ She also highlights grave concerns about the terminology in this section which not only makes liable persons believed responsible for threatening witnesses or whistleblowers but also “a person who has close relationship with him”. This provision criminalizes mere association in a manner which is wholly inconsistent with international human rights law and violates Article 9 (1) and Article 17 of the International Covenant on Civil and Political Rights.

We are equally concerned that provisions concerning crimes committed against the judiciary and executive organs (section 13, the crime against destroying evidence

⁷ [A/HRC/37/52](#), paragraph 6.

⁸ [A/HRC/37/52](#), paragraph 30.

(section 14), the crime of aiding a suspect (section 15), and protection of witnesses (section 16) are contained in a counter-terrorism Proclamation, given the wide scope of these provisions, their application to a range of judicial and criminal justice enforcement contexts, and their lack of nexus with the core international law prohibitions concerning terrorism are not human rights compliant.

Concern is also expressed for section 13(3), because the possibility for crimes to apply “concurrently” may result in double jeopardy and therefore be incompatible with article 14(7) of the ICCPR. The mention to the “concurrent” application of crimes is also found in Section 12(3) of the Proclamation. Additionally, Section 14 defines the crime of destroying evidence in excessively broad terms, which could include the unintentional or accidental destruction of evidence.

Powers of proscription

Part III of the Proclamation sets out a broad and highly expansive power of proscription. The power to proscribe is accorded to the legislature (section 18, House of Peoples’ Representatives). I am deeply concerned that the power to proscribe can be expressly exercised in the absence of a judicial determination (s18(3)) or any criminal, civil or administrative proceedings related to terrorism. There is a clear impingement on the right of association as set out under the International Covenant on Civil and Political Rights article 22. We are further troubled that the basis for proscription does not exclude secret evidence which may not be tested or challenged openly by the organization affected, and may also be inaccessible to the members of the House of Peoples’ Representatives. The fact that the Proclamation excludes ‘detailed’ confidential information but allows for ‘general information about confidential information’ is not an adequate human rights protection for the rights of groups and individuals to associate. Section 21 expressly denies organizations the right to access, review and test such confidential information. As section 22 sets out in detail the legal consequences of proscription, the process of proscription lacks sufficient due process and procedural safeguards to prevent violations of human rights.

We further express concern of the relationship between the power of proscription in the proclamation and the requirements under ICCPR Article 19(3). First, broad powers of proscription risk creating a chilling effect on the exercise of the right to freedom of opinion and expression. Second, any power to restrict rights must be compatible with the requirement that any restriction be provided by law, including the duty of accessibility in the scope of the restriction. Third, we are concerned that the powers of proscription shift the burden of proof on the part of the State, which requires that para. 35)the State must “demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat”.⁹ Lastly, we are concerned of the relationship between the basis for the procedure and the right of access to information under ICCPR Art. 19 (2). The use of secret information in procedures not only risks wrong outcomes. It also takes away the right of the individual to control information held by public authorities and the

⁹ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

right to have incorrect information rectified. Furthermore, it risks going contrary to the side of the right of access to information that overlap to ICCPR Article 14 and the rights of due process to those accused of a criminal offence, see CCPR/C/GC/34 para. 18.

We welcome the specification of process for the revocation of proscription.

Membership in a terrorist organization

Part II of the Proclamation sets out a range of penalties related to membership of a terrorist organization. We highlight some key concerns. Under section 30 the Proclamation creates a category of negligent membership of a terrorist organization (the “should have known” standard). We hold this to be a highly controversial provision which creates an undue burden on individuals, particularly where a wide power of proscription which might be applied to a wide variety of organizations would leave individuals vulnerable to charges of terrorism, in ways that are not consistent with international law obligations, primarily the need for necessity and clarity in legal sanction. Section 31 provides a legal basis for ‘surprise search’ with no requirement of judicial oversight or authorization. Section 34 giving the police virtually unlimited power to produce evidence or information is not clearly formulated and lacks sufficient oversight, from either an independent oversight body or judicial entity. Furthermore, the Proclamation creates a category of lessor responsibility for terrorism which, added to the practical difficulties it would pose in its application, is an unjustified extension of liability for terrorist offences and not consistent with international law obligations. We are concerned that the requirements placed on lessors who rent homes, buildings, premise to record in detail the identity of a lessee, is a form of sub-contracted surveillance to individuals, and a profound encroachment on the privacy and family life of individuals, including the right to privacy protected by Article 17 of the International Covenant on Civil and Political Rights. The particular obligations in relation to “foreigners” may constitute a form of profiling which breaches the non-discrimination and equality before the law provision of the International Covenant on Civil and Political Rights (Article 2). We note that section 35 makes reference to “extremism” and the government role in prevention of extremism. We note serious concern about the use of the terminology of “extremism” in national law and practice.¹⁰ We point out that while there is acknowledgment of the challenges of “violent extremism” in some Security Council resolutions as evidenced in the Secretary-General’s 2016 Plan of Action to Combat Violent Extremism,¹¹ some human rights treaty bodies have articulated their concern in relation to the use of the term “extremist” activity, which her mandate shares.¹² We take the view that the term “extremism” has no purchase in binding international legal standards, and when operative as a criminal legal category is irreconcilable with the principle of legal certainty and is *per se* incompatible with the exercise of certain fundamental human rights. We have previously noted concern when the term “extremism” is deployed, not part of a strategy to counter violent extremism, but as an offence in itself.¹³

¹⁰ A/HRC/31/65, para. 21

¹¹ <https://www.un.org/counterterrorism/ctitf/en/plan-action-prevent-violent-extremism>; See also UN General Assembly Resolution [A/RES/70/291](#)

¹² CCPR/C/CG/34 para 46

¹³ A/HRC/31/65, para. 21

We urge your Excellency's Government to, at a minimum, provide additional time for legislative and public consideration of the Proclamation, and evaluate the Proclamation to ensure its consistency with international human rights standards. We are aware that an earlier draft, the Proclamation had provisions aimed to correct the defects in the Criminal Procedure Code about the right to conditional release, presumption of innocence, arrest and detention procedures including the evidence threshold for arrest and detention, admissibility of confession statements, and we would strongly encourage their reconsideration and (re)inclusion. To this end, we encourage a broad process of public engagement and deliberation on the draft legislation including experts, stakeholders and civil society.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain how the Proclamation (and any changes made to it since the date of this communication) is compatible with Your Excellency's Government's obligations under Articles 9, 17, and 22 of the Covenant.
3. Please explain the existing legal mechanisms and safeguards in Ethiopia aimed for the independent oversight of surveillance activities by law enforcement and intelligence services. Please explain safeguards and remedies to ensure that surveillance is conducted only as provided for by law, using only measures which are necessary and proportionate in a democratic society.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We would also like to inform your Excellency's Government that given the extremely brief timeline the Government has provided for public consideration, this communication will also be made available to the public and posted on the website page for the mandate of the Special Rapporteur on protection and promotion of human rights and fundamental freedoms while countering terrorism.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
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Clement Nyaletsossi Voule

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