

Counter-terrorism and the suppression of political pluralism: An examination of
the Anti-terrorism Proclamation of Ethiopia

Submitted in partial fulfillment of the requirements of the degree
LLM (Human Rights and Democratization in Africa)

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29 October 2010

DECLARATION

I, MELHIK ABEBE BEKELE, do hereby declare that this research is my original work and that, to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

DEDICATION

To my father who believes in and inspires my dreams

ACKNOWLEDEMENTS

I owe a great deal of gratitude to my supervisor, Professor Nii Ashie Kotey, for his focused guidance, invaluable comments and suggestions that stirred me in the right direction. I have been humbled by his insightfulness and commitment to make this dissertation the best it can be. Thank you.

I would also like to thank the Centre for Human Rights, University of Pretoria and the Faculty of Law, University of Ghana for making my year at both institutions memorable.

My family, Abi, Wube, Esset and Hiyaw, I will always be indebted to you for sharing my dreams and being my rock during hard times. And finally, thank you LLM class of 2010 for giving me the best and most unique academic experience I could have imagined for when I joined this program.

LIST OF ABBREVIATIONS

AU	African Union
ECHR	European Court of Human Rights
EJP	Eminent Jurists Panel
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
EU	European Union
GA	General Assembly
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
OAU	Organization for African Unity
OFDM	Oromo Federalist Democratic Movement
OHCHR	Office of the United Nations High Commissioner for Human Rights
OLF	Oromo Liberation Front
ONLF	Ogaden National Liberation Front
U.S.	United States of America
UDHR	Universal Declaration of Human Rights
UEDF	United Ethiopian Democratic Forces
UK	United Kingdom
UN	United Nations
UPR	Universal Periodic Review

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CHAPTER ONE

Introduction

1.1 Background to the study

In the wake of the 11 September 2001 attacks in the United States (U.S.), many states, responding to United Nations (UN) Security Council Resolutions,¹ began to adopt an increased array of counter-terrorism measures.² The Security Council had not in the beginning pre-empted the risk of counter-terrorism measures violating human rights as it failed to immediately refer to states' duty to respect human rights in their responses to terrorism.³ It was only in 2003, in Resolution 1456, that the Security Council stated such duty by providing that 'states must ensure that any measures taken to combat terrorism must comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law.'⁴

However, this belated recognition of the unwelcoming effects of counter-terrorism measures was limited to human rights. The Security Council has not responded to or specifically pre-empted the implications of counter-terrorism laws on political pluralism and democracy in states that could use the opportunity to quell political dissent and opposition. The wide latitude given to states by the Security Council to decide on what acts constitute terrorism (through its failure to define terrorism) and what proscription methods they can use to curb activities of terrorist groups has armed governments with a manoeuvre to crackdown on political dissent. New counter-terrorist laws have been enacted (with minimal examination of the adequacy of existing laws), and they often contain over-broad definitions of terrorism or terrorist acts, and provide for new offences that penalize political opinion or social dissent.⁵

The risk of counter-terrorism being a pretext for suppressing political dissent is of a particularly acute concern in countries with records of intolerance to political pluralism and open political resistance. In democracy, political pluralism is a guiding principle which permits the peaceful coexistence of different interests, convictions and lifestyles. It requires the protection of rights that ensure political participation or democratic rights, chief amongst them being the rights

¹ United Nations (UN) Security Council Resolutions 1368, 1373 and 1377 of 2001, 1390 of 2002, 1455 and 1456 of 2003 and 1526 of 2004.

² 'Assessing damage, urging action' Report of the Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights (EJP report) (2009) 5.

³ As above.

⁴ UN Security Council Resolution 1456 (2003).

⁵ EJP report (n 2 above) 10.

to freedom of association, freedom of expression and the right to political participation.⁶In the countries with anti-democratic tendencies, the concerns raised in relation to terrorism laws goes beyond the violation of the rights of individuals. It extends to, an arguably equally legitimate concern, the suppression of political pluralism and thus democracy.

African states are no exception to the wave of anti-terrorism laws that followed the Security Council's Resolution 1373, euphemistically dubbed the engine powering this legislative wave,⁷ as a number of them responded by enacting domestic anti-terrorism laws. However, there were previous efforts of African states to counter terrorism that predate Resolution 1373. This is signified most notably by the adoption of the Organization for African Unity (OAU) Convention on the Prevention and Combating of Terrorism in 1999.⁸ Following the Security Council's Resolutions imposing extensive obligations on states to prevent and counter terrorism, the African Union adopted the Protocol to the OAU Convention on the Prevention and Combating of Terrorism.⁹

In May 2005, Ethiopia held its third multi-party national election since the coming to power of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) in 1991, which was 'the most genuinely competitive election the country has experienced'¹⁰ and was followed by 'the bloodiest electoral violence in the history of Ethiopia.'¹¹The brief window of political space that preceded the controversial 2005 elections in Ethiopia was an anomaly in the EPRDF's 19-year rule and has now been slammed shut.¹² The enactment of an anti-terrorism law in 2009 was one of the ways through which political space has been closed down. Despite the barrage of criticism from different stake holders about the implications of the draft proclamation on human rights and democracy,¹³ the proclamation was adopted by parliament in July 2009.¹⁴

⁶Office of the UN High Commissioner for Human Rights 'Human Rights, Terrorism and Counter-Terrorism' Fact Sheet No 32 (OHCHR Fact Sheet No 32) 43.

⁷ M QC Muller 'Terrorism, proscription and the right to resist in the age of conflict' (2008) 20 *Denning Law Journal* 111 – 131.

⁸ Organization for African Unity (OAU) Convention on the Prevention and Combating of Terrorism (1999/2002).

⁹ Protocol to the OAU Convention on the Prevention and Combating of Terrorism (2004) Preamble para 6.

¹⁰ European Union (EU) Observer Mission in Ethiopia 'Preliminary statement' 17 May 2005 available at www.kaeup.com/newsImages/Archive/EU-Pre-state-May17.pdf (accessed 21 July 2010).

¹¹ W Teshome 'Electoral violence in Africa: experience from Ethiopia' Vol. 3 No. 2 *International Journal of Humanities and Social Sciences* (2009) 176-201.

¹² L Lefkow Senior Researcher Africa Division, HRW 'Ethiopia's stalled democracy' Testimony at the U.S. House of Representatives at the hearing of 17 June 2010 available at www.hrw.org/.../testimony-leslie-lefkow-us-house-representatives-ethiopia (accessed 6 August 2010).

¹³ A/HRC/WG.6/6/ETH/3 'Universal Periodic Review (UPR) stake holders' submission: Ethiopia' 22 September 2009 para 68; US Department of State '2008 country reports on human rights practices: Ethiopia' (25 February 2009) available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm> (accessed 12 October 2010); TA Tekle 'Ethiopia's opposition parties resist new draft law on terrorism' *Sudan Tribune* 11 June 2009 available at

1.2 Definition of terms

Political pluralism

Although, as pointed out by the UN,¹⁵ the participation of more than one political party in elections and governance is one facet of political pluralism, there is more to political pluralism than the proliferation of political parties. Political pluralism is a system in which there is a balance of power among overlapping groupings, each with some voice in shaping socially binding decisions and has adjustments which encourage conflict within established channels and allows disagreements to dissolve into compromise solutions.¹⁶ As a system, political pluralism is said to promote, more effectively than any other known alternative, a plurality of private and public ends and benefits society by providing for the means to channel important interests to governmental arenas for dialogue and resolution.¹⁷

Democracy is about pluralism, open-mindedness and tolerance.¹⁸ Even in the most homogeneous societies democracy has pluralistic elements in the sense that to function properly and maintain their democratic and participatory character, governments need to allow and encourage plurality of political views in societies.¹⁹ This is crucial for democracy as it is this kind of participation that is the soil from which democracy, if absent today, may grow tomorrow and, just as important, accustoms people to practices that are indispensable to the workings of democracy.²⁰ The analysis in this work is based on this description of political pluralism.

<http://www.sudantribune.com/spip.php?article31465> (accessed 12 October 2010); HRW 'Analysis of Ethiopia's draft Anti-terrorism Proclamation' (updated 30 June 2009) available at <http://www.hrw.org/en/news/2009/06/30/analysis-ethiopia-s-draft-anti-terrorism-law> (accessed 21 July 2010).

¹⁴ Proclamation No 652/2009 Anti-Terrorism Proclamation Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia 28th August 2009 (Anti-terrorism Proclamation).

¹⁵ 'United Nations guidance note of the Secretary-General on democracy' 6 available at www.un.org/democracyfund/.../UNSG%20Guidance%20Note%20on%20Democracy.pdf (accessed 6 August 2010).

¹⁶ WE Connolly *Democracy, pluralism and political theory* (2008) 15.

¹⁷ As above.

¹⁸ See *Handyside v UK* ECHR (1979/80) Ser A 24 para 49; *Jersild v Denmark* ECHR (1994) Ser A 298 para 37.

¹⁹ D Nicol 'African pluralism and democracy' in Ronen (ed) *Democracy and pluralism in Africa* (1986) 173.

²⁰ E Abrams 'Pluralism and democracy' in Ronen (n 19 above) 63.

Terrorism

A study in 1988 identified 108 different definitions of terrorism by different lawyers, academicians, domestic legislatures, regional and international intergovernmental organizations.²¹ The search for a legal definition for terrorism has been compared with the quest for the Holy Grail.²² There are scholars that contend that international law does provide a definition for terrorism and such a definition can be discerned by abstracting the common elements and themes presented in the different resolutions, conventions and protocols on counter-terrorism.²³ There are also those scholars who argue that defining terrorism is but an endeavour with no use as the existing treaties dealing with the different species of terrorism already define all conceivable forms of terrorism.²⁴ Setting aside ongoing debate on the matter, it suffices to state that the absence of a comprehensive legal definition agreeable to all is at the heart of the problem this study seeks to address. Therefore, the recommendation part of the work will provide the author's take or proposed solution to the definitional problem.

1.3 Statement of the problem

While imposing an obligation on states to criminalize and punish terrorism, the UN Security Council has not provided for what constitutes terrorism, effectively outsourcing the definition of terrorism to states themselves. The Security Council's Resolutions or other international and regional counter-terrorism frameworks do not provide for the necessary safeguards or minimum standards that proscription regimes in anti-terrorism laws should guarantee. This has not only made it possible for states to violate the human rights of individuals through anti-terror laws, but has also proved vital in arming governments with yet another manoeuvre to suppress individual and group political dissent and thus political pluralism. Empowering and obliging states, regardless of their records of democracy in terms of tolerating political dissent, to criminalize and punish terrorism is a threat to political pluralism and democracy.

²¹ AP Schmid & AJ Jongman *Political terrorism: A new guide to actors, authors, concepts, databases, theories and literature* (1988) 5.

²² B Golder & G Williams 'What is terrorism: Problems of legal definition' 27(2) *University of New South Wales Law Journal* (2004) 270-295; NJ Perry 'The numerous federal legal definitions of terrorism: The problem of too many grails' 30 *Journal of Legislation* (2003-2004) 249-274; G Levitt 'Is 'terrorism' worth defining?' 13 *Ohio Northern University Law Review* (1986) 97-115.

²³ See for example R Young 'Defining terrorism: The evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation' 29 *Boston College International and Comparative Law Review* (2006) 23-106.

²⁴ J Dugard 'The problem of the definition of terrorism in international law' in P Eden & T O'Donnell (eds) *September 11, 2001: A turning point in international law* 187-205.

The anti-terrorism law of Ethiopia, which was passed in 2009 demonstrates how anti-terrorism laws pose such a threat to political pluralism at the national level. With its broad definition of terrorism and a questionable mechanism of proscribing terrorist organizations, the anti-terrorism law of Ethiopia goes beyond the immediate effect of violating human rights as it also closed down the political space that for a short while existed in the country before the 2005 elections. This paper will analyze to what extent the major intergovernmental counter-terrorism frameworks have pre-empted the danger of anti-terrorism laws being used to suppress dissent in politics. It will then focus on addressing the question whether and how the anti-terrorism proclamation of Ethiopia has suppressed or threatens to suppress political pluralism and explore and recommend means of neutralizing the same.

1.4 Proposed research questions

The general research question this paper seeks to address is whether and how states' counter-terrorism laws pose a danger to political pluralism by taking Ethiopia as a case study. The specific questions addressed under this umbrella are:

1. What are regional and global developments that signify the emergence of a right to democracy and the corresponding duty (commitment) of states to promote democracy and political pluralism?
2. To what extent are international and regional counter-terrorism frameworks responsive to (pre-emptive of) the risk of counter-terrorism laws being used to suppress political pluralism?
3. Is political pluralism being suppressed in Ethiopia through the use of anti-terror legislation? And if so, how?
4. What can be done to ensure that anti-terrorism laws are not used to suppress political pluralism?

1.5 Preliminary literature review

The literature on the undesirable side effects of counter-terrorism measures has focused on the human rights implications of such measures. Much emphasis is given to whether human security and human rights are competing and contradicting interests, not whether human security interests can be manipulated to counter or to the detriment of democratization interests of societies. The debate has emphasized human rights violations as undesirable ends by themselves and does not adequately stress their far-reaching implications on political pluralism. However, the violations of certain human rights have much more sweeping repercussions than others. This is particularly

true of the so-called freedom or democratic rights, the rights to freedom of expression and association and the right to political participation. Literature is also warning on the dangers posed by such counter-terrorism measures against Africa's and Ethiopia's situation relative to democracy as well as human rights.

Concerning the human rights implications of counter-terrorism measures, the Eminent Jurists Panel (EJP) noted that 'in their attempts to respond to the threats posed by terrorism many states have ignored or under-estimated the implications of tampering with the foundations of the human rights system.'²⁵ It also emphasized that 'any implied dichotomy between securing people's rights and people's security is wrong. Upholding human rights is not a matter of being "soft" on terrorism.'²⁶ In this regard, Hoffman holds that 'history shows that when societies trade human rights for security, most often they get neither. Instead minorities and other marginalized groups pay the price through violation of their human rights.'²⁷ He also holds that 'the impulse to abandon human rights in times of fear and crisis is short-sighted and self-defeating.'²⁸ Although he notes that broad and vague definitions of terrorism by governments have to be avoided so as not to label as 'terrorists' those who engage in political dialogue critical of existing governmental policies,²⁹ Hoffman's main focus was on the violation of human rights of individuals suspected of terrorism and does not adequately engage the concern of anti-terrorism laws being used for the political ends of governments.

On the abuse by states of counter-terrorism measures for political ends, the EJP noted that 'counter-terrorism laws have in the past been abused for political reasons, or have been extended to apply beyond the original stated purpose of combating terrorism'³⁰ and that '[i]n the past there are many examples of states seeking to stifle dissent by defining terrorist offences in law in overly broad terms.'³¹ One writing that attempts to analyse of the implications of counter-terrorism laws on political pluralism is 'Terrorism, proscription and the right to resist in the age of conflict.'³² It raises and addresses the question how the recent swathe of domestic state anti-terror legislation has affected the status of any evolving right to democracy³³ and holds that

²⁵ EJP report (n 2 above) 12.

²⁶ N 2 above, 16.

²⁷ P Hoffman 'Human rights and terrorism' 26 *Human Rights Quarterly* (2004) 932-995.

²⁸ Hoffman (n 27 above) 934.

²⁹ N 27 above, 938.

³⁰ N 2 above, 37.

³¹ As above.

³² Muller (n 7 above).

³³ N 7 above, 112.

despite the political commitment of states to the principle of democracy most states have failed to incorporate that commitment into domestic definitions of terrorism.³⁴

In *International human rights law in Africa*, Viljoen indicates that ‘[o]n the whole, counter-terrorist measures pose a much greater risk to Africa’s people than terrorism itself’.³⁵ He goes on to indicate that the adoption of anti-terror legislation by African states at an increased rate after 9/11 has elicited concern that ‘[such legislation may be used to stifle legitimate opposition]’³⁶ and ‘[s]tates would exploit the mood of the time to cloak the stifling and criminalization of internal dissent as “terrorism”’.³⁷ The author’s review of literature has also discovered that there is not a comprehensive academic work on the implications of the 2009 anti-terrorism proclamation of Ethiopia on space for political dissent and pluralism in the country.

1.6 Significance of the study

Besides the more immediate threats to individuals’ human rights, counter-terrorism laws also pose a danger to democratization process by labelling political dissent as terrorism and suppressing it. Unfortunately, there is not adequate literature that unearths the terrorism laws that demonstrate such danger. This paper seeks to fill this gap by interrogating the legitimacy of any concern about political pluralism being suppressed by terrorism laws by looking at the anti-terrorism law of Ethiopia as a case study.

Ethiopia, along with a number other states, has responded to terrorism by enacting an anti-terrorism law and there is a need to look at the corpus of this law to assess its implications, if any, on political pluralism and its compatibility with the emerging right to democracy.

In providing for the right of individuals to participate freely in the government of their country, the African Charter on Human and Peoples’ Rights (African Charter) is at the same time establishing the corresponding duty of state Parties to respect this right.³⁸ Furthermore, the African Charter on Democracy, Elections and Democracy, which Ethiopia has signed, establishes popular participation as an inalienable right of the people³⁹ and imposes on states the obligations to promote democracy⁴⁰ and strengthen political pluralism.⁴¹ These make it all the more important

³⁴ N 7 above, 120.

³⁵ F Viljoen *International human rights law in Africa* (2007) 299.

³⁶ Viljoen (n 37 above) 302.

³⁷ N 37 above, 299.

³⁸ African Charter on Human and Peoples’ Rights (African Charter) (1981/1986) Art 13(1).

³⁹ African Charter on Democracy, Elections and Democracy (Democracy Charter) (2007/) Art 4(2).

⁴⁰ Art 4(1).

⁴¹ Art 3(11).

to look at the Ethiopian anti-terrorism law to evaluate its compliance with the principle of political pluralism the Charter requires states to strengthen.

The paper also seeks to examine the means making up the international community's response to the threat of terrorism to gauge the extent to which they have reflected the concern of states countering democracy, instead of or in addition to terrorism. The examination looks at the responsiveness of the frameworks to the risk of anti-terror laws reducing the space for societies to be as politically plural as is necessary for democracy to sprout (in the case of non-democratic regimes) or persevere (in the case of those that are already democratic).

1.7 Proposed methodology

Although the study will mainly use an analytical approach, a descriptive approach is used whenever appropriate to inform the analysis. The analysis begins by exploring, through literature review and textual analysis, trends highlighting the emergence of the right to democracy and states' commitment to cultivate political pluralism. The implications, if any, of the Anti-terrorism Proclamation of Ethiopia on political pluralism is examined mainly through critically analyzing the corpus of the Proclamation, reviewing literature available on the topic and government action taken on the basis of the Proclamation. A comparative approach is also used to refer to the corpus and implementation of different states' anti-terrorism laws to bolster the finding of the analysis by way of examples and similar practices in other jurisdictions. The existing international and regional counter-terrorism frameworks will be analyzed through analysis of the documents containing these frameworks and literature review on the topic.

The study makes use of primary sources including the various relevant international and regional instruments making up human rights law and counter-terrorism measures and the Anti-Terrorism Proclamation of Ethiopia and other relevant countries for the comparative analysis. The secondary sources that are used include publications, studies and reports on the topic as well as news reports on different events. The study uses desktop, internet and library research to gather the primary and secondary information for analysis.

1.8 Overview of chapters

This paper has five chapters attending to the research questions sought to be addressed. This chapter has introduced and set the context for the discussion in subsequent. The trends and frameworks that signify the emergence of the right to democracy and the increased international commitment of states to promote democracy and political pluralism are highlighted in the second

chapter. This will be followed by an examination, in chapter three, of the implications of the post-9/11 counter-terrorism on democracy and political pluralism and the responsiveness of intergovernmental counter-terrorism to such implications. Chapter four analyzes the Anti-terrorism Proclamation of Ethiopia to assess whether and how it has been used to quell political dissent and opposition. The last chapter wraps up with recommendations of ways to neutralize the threat counter-terrorism frameworks and the Anti-terrorism Proclamation of Ethiopia pose on political pluralism and democracy by exploring standards in international and African human rights and counter-terrorism frameworks.

1.9 Delineation of the study

This work does not purport to break new ground in the area of political ends being pursued by the use of counter-terrorism laws, nor does it contend to shed light on the issue for the first time. Rather, it seeks to explore and develop means of ensuring that counter-terrorism laws do not cause the suppression of political dissent by developing on existing works on the area that emphasize the need to guarantee that political activities will not be wrapped up in accusations of terrorism. It looks at the definition of terrorism and structuring of proscription regimes by states in the absence of any international consensus on the areas as ways through which political pluralism is threatened by anti-terrorism laws. Such analysis will make use of the anti-terrorism law of Ethiopia as a case study and refers also to similar trends identified in other relevant jurisdictions. On the basis of such analysis and the recent development in Africa of the adoption of the African Charter on Democracy, Elections and Democracy which imposes on states the obligations to promote democracy and strengthen political pluralism, this work makes recommendations on how to ensure compliance by states to their commitment to the promotion of political pluralism.

CHAPTER TWO

The right to democracy and political pluralism

2. Introduction

The chapter subsequent to this one examines the implications of the post-9/11 counter-terrorism paradigm on the interests of ensuring democratic forms of government and politically plural societies. The anti-terrorism law of Ethiopia is examined with the view to demonstrating such implications. The importance of studying how the interest of ensuring democratic governance and political pluralism have been undermined by the fight against terrorism becomes evident once it has been established that individuals and peoples have a right to democratic governance and political pluralism the undermining of which warrants investigation. Therefore, in this chapter, the trends and frameworks that signify the emergence of the right to democracy and the increased international commitment of states to promote political pluralism are highlighted. Before any such discussion, however, it is necessary to specifically locate the point of intersection between the right to democracy and the concept of political pluralism.

2.1 Democracy and political pluralism

Democracy is a system in which there are inherent limitations to the domain of legitimate political-decision making.⁴² One of the theories of the limits to government in democracy is political pluralism, which is ‘an understanding of social life that comprises multiple sources of authority - individuals, parents, civil associations, faith-based institutions, and the state, among others - no one of which is dominant in all spheres, on all occasions.’⁴³ It is instrumental in preventing the power of government from becoming absolute by voicing the interests and concerns of different groups.

Furthermore, democracy is about dialogue and solving differences through non-violent means and depends upon the free expression of opinions.⁴⁴ This has been affirmed by the European Court of Human Rights when it that democracy is about pluralism, open-mindedness and tolerance.⁴⁵ The Court has also held in a number of decisions that *there can be no democracy*

⁴² WA Galston *The practice of liberal pluralism* (2005) 1.

⁴³ Galston (n 43 above) 1&2.

⁴⁴ G Fox & G Nolte ‘Intolerant democracies’ 35 *Harvard International Law Journal* (1995) 1; R Burchill ‘The developing international law of democracy’ in GH Fox & BR Roth (eds) *Democratic governance and international law* (2000) 129.

⁴⁵ See *Handyside v UK* (n 18 above) para 49 and *Jersild v Denmark* (n 18 above) para 37.

without pluralism,⁴⁶ establishing, most authoritatively, the intersection between democracy and political pluralism.

Even in the most homogeneous societies democracy has pluralistic elements in the sense that to function properly and maintain their democratic and participatory character, governments need to allow and encourage plurality of political views in societies.⁴⁷ This is crucial for democracy as it is this kind of participation that is the soil from which democracy, if absent today, may grow tomorrow and, just as important, which accustoms people to practices that are indispensable to the workings of democracy.⁴⁸ More specific areas of intersection between democracy and political pluralism are indicated in the ensuing discussion on developments signifying the emergence of a right to democracy.

2.2 Developments indicating the emergence of democracy as a right

There are two major ways through which the evolution of democracy into an entitlement can be best traced or demonstrated. These are hastened democratization process and the increased use of electoral observation to legitimize governments since the 1990s and normative developments that fortify the foundation for the entitlement under international law. These developments are more directly reminiscent of the existence of a commitment on the part states to promote a democratic form of government.

2.2.1 The upsurge of democratization and increased legitimization through electoral observation

Much of the seminal work on the status of democracy under international law was conducted after the end of the Cold War in the 1990s.⁴⁹ The work of Thomas M. Franck, an article entitled ‘The emerging right to democratic governance,’⁵⁰ which by far is the earliest and most

⁴⁶ See for e.g. *The United Communist Party of Turkey and Others v Turkey* ECHR (30 January 1998) para 43; *The Socialist Party and Others v Turkey* (25 May 1998) para 41; *Freedom and Democracy Party (OZDEP) v Turkey* (8 December 1999) para 37.

⁴⁷ Nicol (n 19 above) 173.

⁴⁸ Abrams (n 20 above) 63.

⁴⁹ See for e.g. Fox & Nolte (n 44 above); G Fox ‘The right to political participation in international law’ 17 *Yale Journal of International Law* (1992) 539 - 541; B Roth ‘Government illegitimacy revisited: “Pro-Democratic” armed intervention in the post-bipolar world’ *Transnational Law and Contemporary Problems* (1993) 505; Y Beigbeder *International monitoring of plebiscites, referenda and national elections Self-determination and transition to democracy* (1994); AM Slaughter ‘International law in a world of liberal states’ 6 *European Journal of International Law* (1995) 503; D Wippman ‘Defending democracy through foreign intervention’ 19 *Houston Journal of International Law* (1997) 659 661 - 662.

⁵⁰ TM Franck ‘The emerging right to democratic governance’ (86)1 *The American Journal of International Law* (1992) 46-91; an updated version of this article also forms chapter one - ‘Legitimacy and the democratic entitlement’ - in Fox & Roth (n 44 above) 25-47.

trendsetting work in this domain, is a product of this period. This was because prior to the events of 1989 to 1991, scholars shared the widely accepted view of the Cold War era which was that ‘international law does not generally address domestic constitutional issues such as how a national government is formed.’⁵¹

The end of the Cold War swept the African continent into the so called ‘third wave of democracy.’⁵² The third wave of democracy began in Southern Europe with the overthrow of the Portuguese dictatorship in April 1974 and spread to South America, East, Southeast, and South Asia, Eastern Europe and Central America in the 1970s and 1980s, finally reaching Africa in February of 1990 with the sovereign National Conference in Benin and the release of Nelson Mandela and unbanning of the ANC in South Africa.⁵³ This upsurge of democracy has been characterized as the ‘victory’ of democracy.⁵⁴ With most states joining the trend in the 1990s, as of late 1997, there are more than 130 governments that are legally committed to permitting open, multiparty and secret-ballot elections with a universal franchise.⁵⁵

This upsurge or ‘victory’ of democracy indicates that the most accepted and legitimate form of government is democracy, which was not the case two decades ago. The reason for this upsurge is the push for an international law-based entitlement to democracy by governments themselves as a result of their ‘craving for validation’ as evidence of legitimacy.⁵⁶ This is evidenced by the practice of inviting the UN to observe elections becoming the rule and no longer the exception.⁵⁷ Former UN Secretary-General Kofi Annan confirmed this as well said in 1997 that:⁵⁸

[t]he value that Member states [of the UN] attach to democratization is reflected in the large number of requests the United Nations receives for electoral assistance.

This trend was something that started with the UN election observation missions to Nicaragua⁵⁹ and Haiti⁶⁰ in 1990. In 1992, the UN General Assembly mandated the creation of a unit to support

⁵¹ GH Fox & BR Roth ‘Introduction: The spread of liberal democracy and its implications for international law’ in Fox & Roth (n 44 above) 1.

⁵² S Huntington *Democracy’s third wave* (1991) 15.

⁵³ L Diamond ‘Is the third wave of democratization over?’ An Empirical Assessment Working Paper #236 (1997) 2 available at <http://kellogg.nd.edu/publications/workingpapers/WPS/236.pdf> (accessed 25 August 2010).

⁵⁴ See F Fukuyama *The end of history and the last man* (1992).

⁵⁵ TM Franck ‘Legitimacy and the democratic entitlement’ in Fox & Roth (n 44 above) 27; In the 1992 (older) version of this article the number of states was 110, see Franck (n 50 above) 47.

⁵⁶ Franck (n 50 above) 48-51.

⁵⁷ Franck had predicted this in his 1992 article, see n 50 above, 30.

⁵⁸ Report of the Secretary-General on the work of the Organization, GOAR, 52nd Session, Supp. No. I (A/52/I) 1997 7 para 38.

⁵⁹ UN DOC. A/44/375 (1989).

⁶⁰ GA Res. 45/2 (12 October 1990).

the new role of focal point for electoral assistance activities⁶¹ and in 1995, the Under-Secretary-General for Political Affairs became the focal point.⁶² Between 1989 and 2005, the UN received 363 official requests for electoral assistance, 101 from UN Member states and four from non-Member states, and delivered these services in 96 countries.⁶³

2.2.2 Normative and institutional foundations for the entitlement to democracy

The entitlement to democracy in international law has evolved, not only in the practice of states and organizations in the above portrayed upsurge of democracy, but also as a rule in the normative framework of international law on human rights.⁶⁴

'Building blocks' of the right to democracy

The evolution of the entitlement to democracy under international law has been best captured by Franck who dubs the rights to self-determination, freedom of expression and political participation the 'building blocks' or 'subsets' of the entitlement to democracy.⁶⁵

Self-determination is the first building block for and the oldest root of the entitlement to democracy. It has as its normative foundation the International Covenant on Civil and Political Rights (ICCPR)⁶⁶ and the International Covenant on Economic Social and Cultural Rights (ICESCR)⁶⁷ at the global level and the African Charter⁶⁸ at the African regional level. The role of the right to self-determination is not limited to decolonization processes but rather extends to the self-direction of each society by its own people and affirming the principle of democracy at a collective level.⁶⁹ The people of existing states have been identified by the UN Human Rights Committee as the subjects of the right to self-determination, which the Committee has equated with existence within a state of a continuing system of democratic government based on public participation.⁷⁰ The African Commission on Human and Peoples' Rights (African Commission) has unequivocally established this in *Constitutional Rights Project and Civil Liberties Organization v Nigeria*. In this communication, the Commission interpreted peoples' right to determine their 'political status' to mean their right to choose freely those that will govern them

⁶¹ GA Resolution A/Res/46/137 (1992).

⁶² UN Electoral Assistance Division Department of Political Affairs webpage available at <http://www.un.org/Depts/dpa/ead/overview.html> (accessed 24 August 2010).

⁶³ As above.

⁶⁴ Franck (n 58 above) 90.

⁶⁵ N 50 above.

⁶⁶ International Covenant on Civil and Political Rights (ICCPR) (1966/1976) Art 1.

⁶⁷ International Covenant on Economic Social and Cultural Rights (ICESCR) (1966/1976) Art 1.

⁶⁸ African Charter Art 20.

⁶⁹ J Crawford 'Democracy and the body of international law' in Fox & Roth (n 44 above) 94.

⁷⁰ As above.

and referred to it as the collective counterpart of the individual right to participate in government.⁷¹ This decision also links the right to democracy to the concept of political pluralism by establishing peoples' (groups') rights to participate in and choose their government, one way through which political pluralism features in societies.

The second building block of the right to democracy is the right to political participation. The first instrument that entrenches this right is the Universal Declaration of Human Rights (UDHR) which provides in Article 21 that:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives
- ...
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

This provision is central to the normative development of the right to democracy as it links governmental legitimacy or authority to respect for the popular will. This linkage does not however feature in the legally binding ICCPR. Article 25 of the ICCPR, which is the most widely subscribed treaty provision guaranteeing participatory rights, provides for the rights:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

This provision does not condition governmental authority on respect for the will of the people as does Article 21 of the UDHR.⁷² Nonetheless, it remains a very important provision in the evolution of democracy as a right as it is the first legally binding treaty provision that establishes the right to political participation.

This provision is praiseworthy in another respect in that it also encapsulates the concept of political pluralism by establishing participation in public affairs and free expression of the will of electors as enforceable rights. Participation in public affairs and free expression of the will of the electorate are instrumental in balancing power among groupings and shaping decisions. A politically plural society is, as theorists of democracy such as Tocqueville, Montesquieu and

⁷¹ Communication 102/93 *Constitutional Rights Project and Civil Liberties Organization v Nigeria*, Twelfth Annual Report (1998/1999).

⁷² See also JN Maogoto 'Democratic governance: An emerging customary norm?' *Bepress Legal Series Paper 1351* (2006) 11 available at <http://law.bepress.com/expesso/eps/1351> (accessed 28 August 2010); Roth (n 53 above) 505; H Steiner 'Political participation as a human right' 1 *Harvard Human Rights Year Book* (1988) 77&87.

Locke espouse, a more open universe where average citizens are capable of active participation in public affairs and where as a result power and influence could be widely distributed.⁷³

In the African Charter, the right to political participation is guaranteed under Article 13. Although the protection given to the right to political participation in the African Charter is less than that provided in Article 25 of the ICCPR, the African Commission has made up for this shortcoming through both its protection and promotional mandates. In *Constitutional Rights Project and Civil Liberties Organization v Nigeria*, the African Commission unpacked the content of the right under Article 13(1). It neutralized the ambiguity about whether it includes the right to vote and established the respect for the verdict of the polls as an inevitable corollary of the right.⁷⁴ It also stressed the value to be attached to the verdict of international election observers.⁷⁵ The Commission also held, in a 1996 resolution on electoral process and participatory governance, that ‘elections are the only means by which the people can elect democratically the government of their choice in conformity to the [African Charter].’⁷⁶ Article 13 of the Charter and the decision and resolution of the Commission referred to also underline the need to promote politically plural societies much in the same way as the ICCPR. Citizens’ free participation in government directly or through representatives, respect of the right to vote and the findings of election observers are all central to the functioning of a society that is politically plural as they are instrumental in encouraging and channelling conflicts and allowing them to dissolve into compromise solutions through dialogue.⁷⁷

The third building block for the right to democracy is the right to freedom of expression. The normative foundation for freedom of expression is constituted from the UDHR,⁷⁸ ICCPR⁷⁹ at the global level and the African Charter⁸⁰ at the African regional level. Here also the African Commission, in *Amnesty International v Zambia*,⁸¹ links the right to freedom of expression with the individual’s right to participate in the public affairs of his country. The link between political pluralism and freedom of expression is more obvious in that political pluralism is about the positive negotiation of conflicting interests in society and acknowledges the diversity of interests

⁷³ G Parry ‘Pluralism, participation and knowledge’ in International Political Science Association Research Committee on Socio-political Pluralism *Three faces of pluralism* (1980) 66.

⁷⁴ *Constitutional Rights Project and Civil Liberties Organization v Nigeria* (n 71 above) para 49.

⁷⁵ N 71, Para 47.

⁷⁶ Resolution on Electoral Process and Participatory Governance adopted by the African Commission at its 19th Ordinary Session Ouagadougou (Burkina Faso) 26 March to 4 April 1996.

⁷⁷ Connolly (n 16 above) 15.

⁷⁸ Universal Declaration of Human Rights (UDHR) Arts 19 and 20.

⁷⁹ ICCPR Art 19.

⁸⁰ African Charter Art 9.

⁸¹ Communication 212/98 *Amnesty International v Zambia* Twelfth Annual Report (1998/1999).

and considers it imperative that members of society accommodate their differences by engaging in good-faith negotiation. Such accommodation of interests through good-faith negotiation is but a pipe dream unless members of society have the freedom to express and negotiate their opinions.

Although the building blocks of the right to democracy identified by Franck are the above three rights, the freedom of association is equally important in the evolution of the right to democracy and thus should be included as an element of the entitlement to democracy.⁸² This is because associating with others in such organizations as political parties, non-governmental organizations and pressure groups is an important way of participating in the public affairs of one's country or simply of democratic governance. The right to freedom of association is encapsulated in the UDHR,⁸³ ICCPR⁸⁴ as well as the African Charter.⁸⁵ The ICCPR gives a better protection to the right than does the African Charter as it links the limitation of the right to the requirement of such restriction being *necessary in a democratic society* in addition to being in accordance with the law.⁸⁶ However, the African Commission played an important role in this case also by neutralizing the 'claw-back clause' in Article 10(2) by ruling that in restricting the freedom of association, governments should not override the right guaranteed under international human rights standards.⁸⁷ In the case of freedom of association as well, the link with political pluralism is evident in that, unless people are allowed to associate freely into groups and organizations to voice their positions on policies, the society cannot be said to be politically plural.

However, by far the most important and pioneering development in establishing a strong normative foundation for the right to democracy and political pluralism is the African Charter on Democracy, Elections and Democracy. The Charter, among other things, establishes popular participation through universal suffrage as an inalienable right of the people.⁸⁸ Although the Charter has not yet entered into force as it has not been ratified by 15 states,⁸⁹ it nonetheless

⁸² Many scholars consider the freedom of association as a political right along with the freedoms of thought, conscience and religion, expression and assembly. See for example F Ouguergouz *The African Charter on Human and Peoples' Rights: A comparative agenda for human dignity and sustainable democracy in Africa* (2003) 155 -183.

⁸³ UDHR Art 20.

⁸⁴ ICCPR Art 22.

⁸⁵ African Charter Art10.

⁸⁶ ICCPR Art 22(2); Compare with Art 10(2) of the African Charter.

⁸⁷ Communication 101/93 *Civil Liberties Organization in respect of Nigerian Bar Association v Nigeria*, Eighth Annual Report (1994/1995) paras 17 - 19.

⁸⁸ Democracy Charter Art 4(2).

⁸⁹ Seven AU member states, Mauritania, Ethiopia, Burkina Faso, Sierra Leone, Rwanda, Lesotho and Ghana, have ratified the Charter so far, see 'Ratification of African Charter on Democracy key to development in Africa, PAP urged' *African Press Organization* 11 October 2010 indicating that available at

constitutes a milestone in the development of democratic governance as a right. It imposes on states the obligations to promote democracy,⁹⁰ regularly hold transparent, free and fair elections,⁹¹ create a conducive environment for independent and impartial national monitoring or observation mechanisms,⁹² and inform the Commission of the Union of scheduled elections and invite it to and an electoral observer mission.⁹³ Of paramount importance is the express reference the Charter makes to political pluralism in establishing a legally binding obligation on states to strengthen political pluralism.⁹⁴

Finally the European Court of Human Rights can be credited with giving the reinforcement democracy and political pluralism need from legally binding pronouncements to stand as rights in international law. The Court has, in a number of decisions, held that *there can be no democracy without pluralism*.⁹⁵ These cases also establish and indicate, most authoritatively, the intersection between the right to democracy and political pluralism.

2.3 Conclusion

Significant changes have taken place in international law throughout the twentieth century. International law has come a long way from a set of norms with the primary purpose of allowing states to have their sovereignty respected and to prevent external intervention by foreign states as it has increasingly come to be involved in issues concerning the way in which governments ought to be structured.⁹⁶ The Cold War, much in the same way World War II did forty years prior, awakened the international community to the fact that international law has to go beyond protecting the sovereignty of states over their territories and extend to domestic issues concerning states' governance.⁹⁷

Significant developments have taken place both in terms of the upsurge of democratization and normative buttressing of the legal basis for democracy as an entitlement under international law. And the emergence of democracy as a right has brought with it the corollary interest of

<http://appablog.wordpress.com/2010/10/11/ratification-of-african-charter-on-democracy-key-to-development-in-africa-pap-urged/> (accessed 15 October 2010).

⁹⁰ Art 4(1).

⁹¹ Art 17.

⁹² Art 22.

⁹³ Art 19(1).

⁹⁴ Art 3(11).

⁹⁵ See for e.g. *The United Communist Party of Turkey and Others v Turkey* (n 46 above) para 43; *The Socialist Party and Others v Turkey* (n 46 above) para 41; *Freedom and Democracy Party (OZDEP) v Turkey* (n 46 above) para 37.

⁹⁶ WM Reisman 'Sovereignty and human rights in contemporary international law' in Fox & Roth (n 44 above) 239&249.

⁹⁷ E Gross 'Fighting terrorism: Bringing democratic regime to nondemocratic countries-the legal implications' 16 *Tulane Journal of International and Comparative Law* (2007/2009) 17-47.

pluralizing societies politically both as a means of limiting government decision-making power and making societies as politically open and participatory as is necessary for democracy to sprout and persevere.

It is important to note that although there is no question as to whether, the substantive content of the right to democracy comprises of its 'building blocks' or 'subsets', care should be taken not to be too simplistic and positivist about the content of such an important right. These 'subsets' of the right to democracy came to graduate as rights in international law at their own individual paces with the right to self-determination being the first amongst them to gain prominence. The rights to freedom of expression and association and the right to political participation or electoral rights followed suit in due time. With the playing field for the right to democracy changing continuously, it would be detrimental to prescribe the contents of the right as including specified rights and freedoms. This is especially true with the era of counter-terrorism shaking things up in international relations. With this continually changing playing field, it is conceivable that the content of the right to democracy may change as even more principles and dictates of democracy emerge as rights. Therefore, the content of *democracy as a right* should be understood in such a way as to allow more elements of *democracy as a form of government* to emerge as rights, while certainly including the 'building blocks' or 'subsets' that in the first place cumulatively gave birth to it.

CHAPTER THREE

Democracy and political pluralism in an era of counter-terrorism

3. Introduction

This chapter has the objective of gauging the implications post-9/11 responses to terrorism have had on democracy and political pluralism in the world. In essence, this chapter is a comparison of the weight given to two important global interests, countering terrorism on the one hand and promoting democracy by ensuring political pluralism that allows space for political dissent on the other. Both are valid interests worth pursuing through the use of international law and have a strong foundation under international and human rights law.

‘There is probably not a single right exempt from the impact of terrorism’.⁹⁸ States, therefore, have a right and a duty under international law to protect the human rights of people from threats posed by others (such as terrorists).⁹⁹ It is for this reason that international law imposes on states the obligation to criminalize and punish terrorism.

Development in the domain of democracy was virtually impossible during the Cold War era. And the most important leaps in the development of democracy as an entitlement were made in the period following the end of the Cold War. The subsequent sections examine how the beginning of a new era, that of counter-terrorism, changes the playing field for democracy and political pluralism in the world.

The ‘war on terror’ is spearheaded understandably by the U.S., the target of the most devastating terrorist attack in the last decade. This has led to an epochal shift in emphasis in the shape of international relations with the U.S.-led ‘global war on terror’ restructuring global politics.¹⁰⁰ Therefore, due attention is given in the following section to the ‘war on terror’ waged by the U.S.. Intergovernmental counter-terrorism frameworks developed subsequent to the clarion call of the U.S. will also be scrutinized with a view to unearthing the extent to which or if the international community’s response to terrorism caters for the need to protect and promote democracy and political pluralism while countering terrorism.

⁹⁸ UN Doc E/CN.4/Sub.2/2001/31 UN ECOSOC Sub-Committee on Promotion and Protection of Human Rights ‘Terrorism and human rights: Preliminary report’ prepared by former Special Rapporteur of the UN Commission on Human Rights KK Koufa 102.

⁹⁹ See *Velasquez Rodriguez v Honduras* Inter-American Court of Human Rights 9 *Human Rights Law Journal* (1988) 212; See also UN Human Rights Committee General Comment 6 (1994) on Article 6 of the ICCPR.

¹⁰⁰ H Glickman ‘Africa in the war on terrorism’ 38 *Journal of Asian and African Studies* (2003) 162-174.

3.1 The U.S.-led ‘war on terror’

In a 2002 article, Euan Macdonald, had made predictions based on the premise that democracy achieved prominence in international law because of an intra-disciplinary truce made possible by the end of the Cold War.¹⁰¹ His prediction was that the events of 9/11 would have serious repercussions for the debate on the status of democracy under international law by putting this consensus to the test.¹⁰² He postulated that this would happen through the distancing of U.S. national interest and foreign policy from global democracy promotion, which in turn would lead the work in this field to lose much of its prominence by losing one of its theoretical supports.¹⁰³ This prediction has been proven right by the developments in the years following 9/11 highlighted below.

The years immediately following 9/11 witnessed a rhetorical emphasis of U.S. counter-terrorism policy on democracy promotion.¹⁰⁴ It was when the U.S. included promotion of democracy as one of its justifications for invading Iraq that this rhetoric surfaced.¹⁰⁵ By the second term of Bush, this rhetoric had become a global framework as heralded in the second inaugural speech of Bush that set out the so called ‘freedom agenda’ of the U.S. when he announced that:

[i]t is the policy of the [U.S.] to seek and support the growth of democratic movements and institutions *in every nation and culture*.¹⁰⁶

However, this democracy rhetoric remained just that, rhetoric. Although the U.S. characterized its intervention not only in Iraq, but also in Afghanistan, as a democratizing mission, in both cases security objectives played the most important role.¹⁰⁷ Beyond these interventions, the counter-terrorism policy of the U.S. globally, including in Africa, was disproportionately focused on, or

¹⁰¹ E Macdonald ‘International Law, Democratic Governance and September the 11th’ (3)9 *German Law Journal* (2002) paras 29&30.

¹⁰² As above.

¹⁰³ As above.

¹⁰⁴ A Thurston ‘Counterterrorism and democracy promotion in the Sahel under Presidents George W. Bush and Barack Obama from September 11, 2001, to the Nigerian Coup of February 2010’ *Bulletin no 85 Concerned Africa Scholars* (2010) 50-62; See also OJ Dobriansky ‘Democracy promotion: Explaining the Bush administration’s position’ 82(3) *Foreign Affairs* (2003) 141 - 144 declaring that ‘democracy promotion is the best antidote to terrorism.’

¹⁰⁵ T Carothers Vice President for Studies, Carnegie Endowment for International Peace ‘U.S. democracy promotion during and after Bush’ (2007) 3 available at http://www.carnegieendowment.org/files/democracy_promotion_after_bush_final.pdf (accessed 15 August 2010).

¹⁰⁶ ‘President Bush’s second inaugural address’ (20 January 2005) available at <http://www.npr.org/templates/story/story.php?storyId=4460172> (accessed 5 October 2010) (emphasis added).

¹⁰⁷ T Carothers ‘The democracy crusade myth’ *The National Interest* (2007)10; Carothers (n 105 above) 5.

driven by, stability and security concerns in states that were labelled ‘breeding grounds’ for and vulnerable to terrorism¹⁰⁸ than on democratizing these states.¹⁰⁹

The pattern in the Middle East of the U.S. putting aside its democratic scruples to seek closer ties with autocratic regimes spread to other regions. The case of Pakistan is most striking in this respect with the cold shoulder the U.S. gave to General Pervez Musharraf following his 1999 seizure of power being replaced by a bear hug for his critical supporting role in the war on terrorism.¹¹⁰ This had helped Musharraf steadily consolidate his authoritarian power in the first half of this decade.¹¹¹

In general, since 9/11, counter-terrorism cooperation has strengthened rather than weakened U.S. ties with authoritarian countries that do not allow space for politically plural societies to emerge.¹¹² U.S. foreign military assistance policy has changed significantly with the previous practice of countries engaged in gross human rights violations being denied military aid being rapidly replaced by one in which ‘known violators find it easier to access the tools of abuse.’¹¹³ The U.S. lifted the military aid sanctions on numerous countries with bad human rights records such as Uzbekistan, Philippines, Oman and Tajikistan.¹¹⁴

In Latin America, 9/11 has completely changed the foreign policy of the U.S. towards countries in the region. The U.S. defence policy in the region in the 1990s that emphasized the need for civilian oversight to democratize civil-military institutions has been replaced, since 9/11, by one that encourages the increased use of the armed forces and urges Latin American militaries to become more involved in different roles that civilians had been jealously guarding from the

¹⁰⁸ Glickman (n 119 above) 167-168; For anxieties about Africa's failing and failed states informing specific counter-terrorism agendas of the U.S., see SE Rice former US Assistant Secretary of state for African Affairs ‘Testimony before the Subcommittee on Africa of the International Relations Committee, United States House of Representatives’ (15 November 2001) available at http://www.house.gov/international_relations (accessed 10 September 2010); R Rotberg I ‘Failed states in a world of terror’ 81(4) *Foreign Affairs* (2002) 127-141; KM Campbell & CJ Ward ‘New battle stations?’ 82(5) *Foreign Affairs* (2003) 95-103; CA Crocker ‘Engaging failed states’ 2(5) *Foreign Affairs* (2003) 32-44; PN Lyman and SJ Morrison ‘The terrorist threat in Africa’ 83(1) *Foreign Affairs* (2004) 75-86.

¹⁰⁹ Thurston (n 105 above).

¹¹⁰ T Carothers ‘Promoting democracy and fighting terror’ Reprinted by permission of *Foreign Affairs* 2003 *Council on Foreign Relations Inc* (January/February 2003) available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1154> (accessed 10 September 2010).

¹¹¹ T Carothers ‘Democracy promotion under Obama: Finding a way forward’ Policy Brief 77 (2009) 1 available at http://www.carnegieendowment.org/files/democracy_promotion_obama.pdf (accessed 10 September 2010).

¹¹² As above.

¹¹³ HRW ‘Dangerous dealings – Changes to US military assistance after September 11’ (2002) 2 available at <http://hrw.org/reports/2002/usmil/USass0202.pdf> (accessed 15 August 2010); For more on this, see Federation of American Scientists ‘“The War on Terrorism” and human rights: Aid to abusers’ available at <http://fas.org/terrorism/at/docs/Aid&HumanRights.html> (accessed 15 August 2010).

¹¹⁴ HRW Press Release ‘U.S.: Military Aid After 9/11 Threatens Human Right’ (15 February 2002) available at http://hrw.org/english/docs/2002/02/15/usint3750_txt.htm (accessed 15 August 2010).

reach of military control.¹¹⁵ This has compromised the pluralistic nature of the civil-military institutions in the region by re-establishing the dominance of the military over them. It has narrowed the possibilities for the differences between civil and military entities to be mediated without overt conflict and increased civil-military friction which had been the norm in the region.¹¹⁶

In sub-Saharan Africa, although the U.S. counterterrorism policy is still evolving, American policymakers have increasingly prioritized stability in the region over democratization through electoral change.¹¹⁷ In East Africa, the focus counter-terrorism assistance from the U.S. and other donors has been imbalanced towards short and medium-term measures aimed at bringing terrorists to justice, strengthening national counter-terrorism infrastructures, emphasizing training military, intelligence, criminal justice, and border security officials and pushing for more robust counterterrorism legislation.¹¹⁸

The U.S. under Bush maintained friendly relations with the governments of more than half of the forty-five 'non-free' countries in the world, in glaring contrast to the rhetoric of supporting 'the growth of democratic movements and institutions in every nation and culture.'¹¹⁹ Meanwhile, U.S. democracy spending for different regions, such as the former Soviet Union, sub-Saharan Africa, and Latin America have remained unchanged or have decreased in the decade following 9/11.¹²⁰

3.1.1 Implications of the U.S.-led 'war on terror'

The implications of this security-focused, as opposed to democratization-focused, counter-terrorism approach have been felt globally. Supplementing other peculiar factors at work to specific regions and countries, the U.S.-led war on terror has led to developments signifying that democracy has, at least relative to its state in the 1990s, fallen into distress.

The decade following 9/11 the spread of democracy has stagnated in the many parts of the world with democratic backsliding outweighing gains.¹²¹ There have been serious regressions in

¹¹⁵ G Weeks 'Fighting terrorism while promoting democracy: Competing priorities in U.S. defence policy toward Latin America' 23(2) *Journal of Third World Studies* (2006) 59 - 77.

¹¹⁶ Weeks (n 135 above) 73.

¹¹⁷ Thurston (n 121 above) 50.

¹¹⁸ See for example, E Rosand et al 'Implementing the UN Global Counter-terrorism Strategy in East Africa' 13 available at <http://www.globalct.org/images/content/pdf/reports/estafrica.pdf> (accessed 4 October 2010).

¹¹⁹ Carothers (n 105 above) 9.

¹²⁰ Carothers (n 105 above) 11.

¹²¹ For detailed accounts of the backslides democracy has taken in different parts of the world since 9/11, see Weeks (n 135 above); J Cotton 'Southeast Asia after 11 September' 15(1) *Terrorism and Political Violence* (2003) 148 - 170;

important Latin American countries,¹²² Russia and many parts of the former Soviet Union,¹²³ Asia, particularly China, Thailand, Bangladesh, Burma, Cambodia, Laos, North Korea, and Vietnam,¹²⁴ Central and Eastern Europe,¹²⁵ and the Middle East.¹²⁶

The U.S.-led war on terror has contributed a lot to the regression democracy has experienced in this decade by weakening the legitimacy of the very concept of democracy and democracy promotion.¹²⁷ Carothers aptly describes this development as follows:¹²⁸

In the 1990s democracy promotion gradually shed much of its baggage as a Cold War cover for instrumental political interventionism, gaining reasonably wide legitimacy as an increasingly normal part of international relations. The Iraq war has reversed that progress, effectively rebranding democracy promotion as a tool of hegemonic interventionism...[and contributing] significantly to the growing pushback against democracy assistance by governments in many places.

The U.S.-led war on terror has strengthened authoritarian governments in Southeast Asia, the Middle East, and North Africa, by providing them with tools and justifications to resist calls for democratization.¹²⁹ It also made it impossible for many 'emerging democracies' to consolidate their democracy.¹³⁰ The democratization of civil-military institutions in Latin America has been seriously undermined through increased military attention in the region in the U.S.-led war on terror.¹³¹ It also led to public violence in countries like Thailand, Indonesia, and Mali in reaction to government cooperation with the U.S. war on terror¹³² and spurred antagonism in countries like

MR Thompson 'Pacific Asia after "Asian Values": Authoritarianism, democracy, and "Good Governance"' 25(6) *Third World Quarterly* (2004) 1079-1095; K Delacoura 'U.S. democracy promotion in the Arab Middle East since 11 September 2001: A critique' 81(5) *International Affairs* (2005) 963-979; F Volpi 'Algeria's pseudo-democratic politics: Lessons for democratization in the Middle East' 13(3) *Democratization* (2006) 442-455; C Jourde 'Constructing representations of the "Global War on Terror" in the Islamic Republic of Mauritania' 25(1) *Journal of Contemporary African Studies* (2007) 77-100; and J Keenan 'The Banana theory of terrorism: Alternative truths and the collapse of the "Second" (Saharan) front in the war on terror' 25(1) *Journal of Contemporary African Studies* (2007) 31-58.

¹²² Carothers (n 105 above) 12.

¹²³ See Freedom House *Nations in Transit* (14 editions including 2010) detailing the increased momentum of democratic backsliding in the region available at <http://www.freedomhouse.org/template.cfm?page=17> (accessed October 2010).

¹²⁴ Carothers (n 105 above) 12.

¹²⁵ As above.

¹²⁶ T Carothers 'Stepping back from democratic pessimism' (2009) 7 available at http://www.carnegieendowment.org/files/democratic_pessimism.pdf (accessed 19 August 2010); See also 'Freedom in the world 2010' available at <http://www.freedomhouse.org/template.cfm?page=505> (accessed 2 October 2010).

¹²⁷ T Carothers 'Is a League of Democracies a Good Idea?' (2008) 1 available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=2013> (accessed 15 August 2010).

¹²⁸ N 105 above, 15.

¹²⁹ See Keenan, Thompson, Volpi, Cotton, Delacoura, and Jourde (n 145 above).

¹³⁰ BE Whitaker 'Reluctant partners: Fighting terrorism and promoting democracy in Kenya' 9 *International Studies Perspectives* (2008) 254-271.

¹³¹ Weeks (n 125 above).

¹³² Thompson (n 145 above); A Croissant 'Muslim insurgency, political violence, and democracy in Thailand' 19(1) *Terrorism and Political Violence* (2007) 1-18; D Gutelius 'Islam in Northern Mali and the war on terror' 25(1) *Journal of Contemporary African Studies* (2007) 59-76.

South Africa and the Philippines because of anti-terrorism bills pushed forward or exported by the U.S..¹³³

Furthermore, the fact that the U.S. has lost its legitimacy in the domain of democracy promotion is in itself seriously damaging to the status of democracy and democracy promotion internationally as the U.S. has for long been the positive example to which reference is made to bolster calls for democratization and politically plural societies.¹³⁴ The adverse implication of the loss of legitimacy of the U.S. in this respect becomes most apparent when one takes stock of the anti-democratic influences of the other two major role players in international relations currently, China and Russia.

Central to this backslide democracy has taken due to the post-9/11 counter-terrorism paradigm is the widespread smothering of political pluralism and open political dialogue and opposition. The EJP has noted in this regard that counter-terrorism has created a climate of fear in which minority groups and human rights defenders in particular are marginalized and the space for public dialogue is being restricted when governments introduce increasingly invasive measures to counter terrorism without a fair assessment of the threat.¹³⁵ In so doing they reinforce the very goal of terrorism by instilling fear in the public.¹³⁶ This characterization is befitting of post-9/11 developments globally as it is partly because increasingly non-democratic governments have used counter-terrorism as a tool and justification for suppressing political pluralism by clamping down on legitimate political opposition and criticism that democracy in the world is in distress in this era of counter-terrorism.

3.2 Intergovernmental counter-terrorism frameworks

Since 9/11, many assert the unprecedented and exceptional nature of the contemporary threat from terrorism to bolster calls for exceptional responses that aver that the legal framework that existed before is essentially inadequate.¹³⁷ In the wake of 9/11, the UN Security Council used its Chapter VII powers to adopt resolution 1373 (2001), which obliges Member states to among

¹³³ BE Whitaker 'Exporting the Patriot Act? Democracy and the "war on terror" in the Third World' 28(5) *Third World Quarterly* (2007) 1017-1032.

¹³⁴ Carothers (n 105 above); See also Arch Puddington Freedom House 'Freedom in the world 2009: Setbacks and resilience' 2 portraying the U.S. as an established democracy having a central role in countering the gathering authoritarian pushback against promotion of freedom in the world, available at http://www.freedomhouse.org/uploads/fiw09/FIW09_OverviewEssay_Final.pdf (accessed 25 August 2010).

¹³⁵ N 2 above, 25.

¹³⁶ As above.

¹³⁷ EJP report (n 2 above) 21&23.

other things criminalize various forms of terrorist actions and to take measures to assist and promote cooperation among countries.¹³⁸

This was followed by an intensified use of intergovernmental counter-terrorism frameworks and a proliferation of national counter-terrorism legislation and policy across the globe.¹³⁹ Although, only 12 of the 16 international counter-terrorism instruments currently operational were adopted after it, resolution 1373, which also obligates states to sign and ratify international counter-terrorism instruments, has brought about attitudinal change of states. Currently two-thirds of UN member states have either ratified or acceded to at least 10 of the 16 instruments and every country has either signed or become a member of at least one of them.¹⁴⁰

As with most measures taken for security reasons, counter-terrorism measures have their own share of undesirable side effect. The call on states to fight terrorism was followed by states' counter-terrorism measures culminating in serious human rights violations.¹⁴¹ This prompted the international community to respond by forging safeguards against violations of human rights inbuilt in counter-terrorism frameworks.

Commendable as this may be, in much of the growing discourse intended to neutralize the adverse implications of counter-terrorism the dominant theme appears to be counter-terrorism versus human rights. This can be discerned from the different frameworks on the area. While imposing a host of obligations on states, Resolution 1373 (2001) had not addressed the concern of democracy and political pluralism being suppressed by states through counter-terrorism measures. Even Security Council Resolution 1456 (2003), which is credited for pronouncing the international community's interest and states' obligation of fighting terrorism without violating human rights¹⁴² has not addressed, or sufficiently addressed, the equally concerning quagmire that is countering terrorism while at the same time protecting democracy and political pluralism. The Resolution has failed to specifically address the need also for states not to counter democracy by stifling voices critical to their policies.

In addition to this general imbalance of the orientation of counter-terrorism frameworks towards a law a primarily enforcement/military approach emphasising reacting to terrorism, the

¹³⁸ UN Doc S/RES/1373 UN Security Council Resolution 1373 (2001), adopted 28 September 2001, (2001).

¹³⁹ OHCHR Fact Sheet No 32 (n 6 above) 20.

¹⁴⁰ UN Security Council Counter-Terrorism Committee 'International laws' available at <http://www.un.org/sc/ctc/laws.html> (accessed 4 October 2009).

¹⁴¹ See EJP report (n 2 above); OHCHR Fact Sheet 32 (n 6 above).

¹⁴² See Security Council resolution 1456 (2003) para 6.

absence of a binding definition for ‘terrorism’ and proscription regimes with inadequate procedural safeguards are ways by which political pluralism is threatened by counter-terrorism frameworks. These are discussed below.

3.2.1 The definitional problem

Following the imposition on states of the obligation to criminalize and punish terrorism, states have increasingly adopted broad and vague definitions of terrorism in domestic legislation because the absence of a comprehensive definition of terrorism agreeable to all.¹⁴³ Attempts have been made to limit the use of the term to genuinely terrorist acts. These are the International Convention for the Suppression of the Financing of Terrorism and Security Council Resolution 1566 (2004) which have *described* (not defined) terrorism as follows:¹⁴⁴

...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...

This description is a noteworthy attempt to make up for the absence of a comprehensive definition to terrorism in international law and has received support by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.¹⁴⁵ However, it falls short of a binding definition as it is only a description.¹⁴⁶ The definition of terrorism is still effectively outsourced to the domestic legislation of states. This has allowed governments such as Columbia, Nepal, Philippines and Uganda to redefine longstanding domestic conflicts as part of the post-9/11 international threat from terrorism, to further their own ends and expecting external sympathy and support.¹⁴⁷ More importantly, the outsourcing of the definition has led to the adoption, in many countries, of vague and over-broad definitions of terrorism that risk abuse against political dissenters. The EJP expressed concerns about the broad domestic definitions of terrorism in Algeria, Australia, Chile, Egypt, Germany, India, Jordan, the Maldives, Morocco, Tunisia, the Philippines, the Russian Federation, Sri Lanka, Uganda and the UK.¹⁴⁸ The definitions of terrorism in the 2002 Council of the European Union’s Framework Decision on Combating Terrorism and the 1998 Arab Convention for the Suppression of

¹⁴³ See section 1.2. Definition of terms, above.

¹⁴⁴ International Convention for the Suppression of the Financing of Terrorism (1999); UN Doc. S/RES/1566 (2004) UN Security Council Resolution 1566 (2004).

¹⁴⁵ E/CN.4/2006/98 ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin’ para 42.

¹⁴⁶ See OHCHR Fact Sheet No 32 (n 6 above) 41 in which the OHCHR conceded that this does not constitute a definition of terrorism by the Security Council; see also EJP report (n 2 above) 7.

¹⁴⁷ EJP report (n 2 above) 31.

¹⁴⁸ N 2 above, 125.

Terrorism have also been included in this list.¹⁴⁹ The validity of such concern has been practically affirmed in at least one case. In Uganda, although the case has recently been dismissed by the Constitutional Court, a new anti-terror legislation that defines terrorism in a broad and vague manner¹⁵⁰ was used to charge leading opposition figure Kizza Besigyea and nine co-defendants with terrorism in 2005.¹⁵¹

3.2.2 Proscription of organizations as terrorist organizations

International and national listing of organizations as terrorist organizations has become a central feature of counter-terrorism frameworks with renewed efforts being made to proscribe organizations after 9/11.¹⁵² As mechanisms that mainly target organizations, proscription regimes are more susceptible to abuse to target organizations that represent certain unconventional interests that are out of favour in mainstream societies. As such, their increased use in this decade is expected to be accompanied by safeguards to prevent such abuse. This, however, has not been the case. According to EJP, the procedural safeguards to ensure the compliance of proscription regimes with international human rights law have been inadequate where they exist at all.¹⁵³ The proscription regime of the UN Security Council, which is expected to set an exemplary role to states, is continuously criticised for lack of transparency and due process in its listing procedures.¹⁵⁴ Proscription mechanisms at the national level, especially in countries with a long tradition of restricting political dissent, use arbitrary listing procedures that lack transparency and procedural safeguards that allow the targeting of certain groups who are doing nothing more than expressing ‘unpopular’ opinions.¹⁵⁵

There are few efforts made to reverse this trend. These include a 2008 decision of the European Court of Justice, holding that the enforcement of the UN Security Council’s list within the European Union (EU) has to be done in a human rights-compliant manner,¹⁵⁶ and the continued push for the development of procedural safeguards such as judicial review in the listing

¹⁴⁹ As above.

¹⁵⁰ See Anti-terrorism Act of Uganda (2002) Sec 7.

¹⁵¹ ‘Uganda’s main opposition leader acquitted of terrorist charges’ *Earth Times* 12 October 2010 available at <http://www.earthtimes.org/articles/news/348302,leader-acquitted-terrorist-charges.html> (accessed 20 October 2010).

¹⁵² EJP report (n 2 above) 113; A Lynch et al ‘The proscription of terrorist organizations in Australia’ 37 *Federal Law Review* (2009) 1–40.

¹⁵³ N 2 above, 121.

¹⁵⁴ N 2 above, 115&116; OHCHR Fact Sheet No 32 (n 6 above) 39&47.

¹⁵⁵ N 2 above, 115.

¹⁵⁶ Court of Justice of the European Communities *Kadi and Al Barakat International Foundation v the Council of the European Union* Joint cases C-402/05 P and C-415/053 September 2008.

procedures at different levels.¹⁵⁷ For the most part however, proscription regimes remain highly susceptible to abuse both at the international and national levels.

3.3 Conclusion

The advent of an era of counter-terrorism has altered the playing field for democracy and pushed it into a state of distress. It also threatens to push the right to democracy out of the prominence it had achieved in the 1990s. Counter-terrorism legislation is increasingly being used in different countries to counter political dissent and opposition to government. In the face of these, the safeguards in counter-terrorism measures that enjoin states to comply with their human rights obligations fall short of what is required to ensure the protection of democracy by maintaining societies that are politically open and plural. With few exceptions,¹⁵⁸ the existing counter-terrorism frameworks either fail to foresee or tolerate democracy and political pluralism becoming casualties of the intensifying global fight against terrorism. The belated proclamation by the UN Security Council, and subsequently other counter-terrorism frameworks, of the obligation of states to comply with their obligations under international law had not, but ought to have, specifically targeted the conspicuous and growing tendency of using counter-terrorism to silence political dissent.

Of course, the obligations of states under international human rights law includes obligations in respect of the rights that are the ‘building blocks’ of the right to democracy and human rights law can be used to ensure the protection of these rights and by-implication the right to democracy itself. However, due to the growing pushback against democratization efforts in many parts of the world because the prominence democracy achieved in international law has been put to the question in this counter-terrorism era, defending democratic governance and political pluralism against counter-terrorism measures by using human rights law becomes an even more intricate and difficult task than that of defending other rights.

¹⁵⁷ See for example E/CN.4/2005/103 ‘Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman’ paras 13-15; A/59/401 ‘Report of the special representative of the Secretary-General on human rights defenders, Hina Jilani’ paras 49, 51-82; and A/61/267 ‘Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin’ para 29 quoted in OHCHR Fact Sheet No 32 (n 6 above) 44.

¹⁵⁸ One example is the Organization of American States (OAS) that, in a resolution adopted on 21 September 2001 (even before UN Security Council resolution 1373 was adopted), called on member states to take effective measures against terrorists, while also emphasizing the need to protect not only human rights, but also *democracy*; See OAS 23rd Meeting of Consultation of Ministers of Foreign Affairs Resolution Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism (RC.23/Res.I/01) 21 September 2001.

The international community responded with vigilance and rush to security threats from terrorism. When it came to reversing the above disturbing trend, however, vigilance and rush were substituted by oversight of the stark reality or perhaps even acceptance that the suppression of democracy and political pluralism in certain parts of the world is tolerable collateral damage in the campaign of addressing security threats in others.

CHAPTER FOUR

Anti-terror legislation and suppression of political pluralism in Ethiopia

4. Introduction

The advent of counter-terrorism as a major international objective after 9/11 has relegated the interest of democratizing states by pushing them towards political openness and pluralism to the backburner. This has been demonstrated in Chapter three by looking at countries that suffered serious regressions in democracy in the decade following 9/11. Ethiopia is certainly a country that has become less politically plural in this counter-terrorism era. It has experienced more regressions in democracy in terms of the political pluralism that needs to exist for its people to have a meaningful choice of government or government policies. In this chapter, the role of counter-terror legislation in the current political state of Ethiopia is analyzed.

The analysis gives due attention to counter-terrorism targeting certain elements in society that are central to the functioning of a pluralistic political system. These include members of opposition parties, the media, civil society and individuals. The next section sheds light on the general orientation of U.S. and UN counter-terrorism efforts in Ethiopia and the Horn of Africa sub-region and its general implications on democracy.

4.1. U.S. and UN counter-terrorism efforts in Ethiopia and the Horn of Africa

Ethiopia and the entire Horn of Africa sub-region are a working example of the trend of U.S. and UN counter-terrorism efforts being driven by security concerns as opposed to democratization. The government of Ethiopia, usually dubbed the only viable U.S. partner in the volatile Horn region,¹⁵⁹ has been embraced by the U.S. as a useful security partner despite being an authoritarian government which manipulates elections and limits political freedom.¹⁶⁰ Ethiopia's support in the U.S. 'global war on terrorism' has been described by the U.S. as 'solid and unwavering' especially in connection with Somalia.¹⁶¹ The Ethiopian government has proved its allegiance to the war on terror by invading Somalia with U.S. backing in December 2006 and overthrowing the Union of Islamic Courts, which was accused of harbouring al Qaeda members

¹⁵⁹ See for e.g. Lefkow (n 12 above).

¹⁶⁰ Carothers (n 105 above) 8.

¹⁶¹ See US Department of State 'Country reports on terrorism 2004' (April 2005) available at <http://www.state.gov/s/ct/rls/crt/45388.htm> (accessed 15 August 2010).

including those suspected with the 1998 bombings of U.S. embassies in Kenya and Tanzania.¹⁶² It has also outlawed and restricted financial practices used by suspected terrorists;¹⁶³ tightened border security and continues to provide intelligence on terrorist activities in the Horn of Africa.¹⁶⁴

A recent development adding to this list is the enactment of the Anti-terrorism Proclamation in July 2009. Correspondingly, following 9/11, U.S. military assistance to Ethiopia increased from \$928,000 in the period 1999-2001 to \$16.7 million between 2002 and 2004.¹⁶⁵ In 2005, a year of contested Ethiopian parliamentary elections, Ethiopia received \$7 million in the Foreign Military Financing program to purchase U.S.-made weapons and services.¹⁶⁶ In the same period, Ethiopia also received increased funding from the International Military Education and Training program, and the Pentagon's new post-9/11 Regional Defence Counterterrorism Fellowship Program which trains foreign forces in counterterrorism techniques.¹⁶⁷ In 2008, Ethiopia was one of the largest recipients of U.S. aid in sub-Saharan Africa, receiving \$1 billion.¹⁶⁸

Along U.S. lines, UN counter-terrorism efforts in the Horn have also emphasized what has been called a 'hard' action by expediting the ratification and implementation of international counter-terrorism instruments and comprehensive counterterrorism laws, training criminal justice officials, and generally encouraging countries to enhance their operational counter-terrorism capacity.¹⁶⁹ This call for 'hard' action by governments in a region 'where democracy is fragile and governance weak,' has led to increased repression through the abuse of counter-terrorism legislation by governments to crackdown on certain groups.¹⁷⁰ In the case of Ethiopia, this has featured through the enactment of an anti-terror legislation which has been criticized by many as being a tool to close down space for political dissent and criticism against the government.¹⁷¹ The political dimensions and intended use of the legislation are most evident when placed in the

¹⁶² MW Guevara Centre for Public Integrity 'Allegiance Rewarded: Ethiopia reaps U.S. aid by enlisting in war on terror and hiring influential lobbyists' (5 May 2007) available at <http://projects.publicintegrity.org/MilitaryAid/report.aspx?aid=864> (accessed 15 August 2010).

¹⁶³ See US Department of State 'Country reports on terrorism 2009' (August 2010) 20 crediting parliament for passing anti-money laundering/combating the financing of terrorism legislation in November 2009 with U.S. support through technical advice from the U.S. Department of Treasury available at <http://www.state.gov/s/ct/rls/crt/2009/index.htm> (accessed 12 October 2010).

¹⁶⁴ Guevara (n 162 above).

¹⁶⁵ As above.

¹⁶⁶ As above.

¹⁶⁷ As above.

¹⁶⁸ J Tepperman 'With a friend like this' *News Week* 11 April 2009 available at <http://www.newsweek.com/2009/04/10/with-a-friend-like-this.html> (accessed 20 October 2010).

¹⁶⁹ Rosand (n 118 above) 14.

¹⁷⁰ As above.

¹⁷¹ N 13 above.

context of longstanding trends in Ethiopia in general and those following the 2005 national elections in particular. The next section investigates these trends.

4.2. Suppression of political dissent and independent voices after 2005

In May 2005, Ethiopia held an election which was dubbed ‘the most genuinely competitive election the country has experienced’.¹⁷² Political opposition parties, civil society and the media effectively exploited their first ever access to a ‘limited but historic opening of democratic space’ in the pre-election period.¹⁷³ However, the election was followed by ‘the bloodiest electoral violence in the history of Ethiopia’¹⁷⁴ marked by the violent suppression of post-election protests after announcements that the ruling party had won. In the violence, almost 200 people died¹⁷⁵ tens of thousands of people were arrested.¹⁷⁶

In the ensuing five years, the government devised a strategy of systematically closing down political space to make sure that the challenges it faced in 2005 did not surface again in the 2010 elections. This included increased intimidation of the opposition, suppression of government criticism and independent civil society, brutal counter-insurgency campaigns, and the entrenchment of the power of the ruling party.¹⁷⁷ From the developments in Ethiopia in the last five years, it is easy to see that ‘the brief window of political space that preceded the [2005 elections] was an anomaly in the EPRDF’s 19-year rule and has now been slammed shut.’¹⁷⁸

A major target of the government’s systematic constriction of political space has been the political opposition. The governments used broad patterns of intimidation and harassment of members and supporters of opposition parties that have prevented the emergence of organized opposition for the 2010 elections in most parts of the country.¹⁷⁹ This made competition difficult for the opposition, leading to major opposition parties boycotting the 2008 local elections and

¹⁷² EU Observer Mission in Ethiopia ‘Preliminary statement’ (n 10 above).

¹⁷³ HRW ‘Ethiopia: “One hundred ways of putting pressure” - Violations of freedom of expression and association in Ethiopia’ (March 2010) 12 available at <http://www.hrw.org/en/reports/2010/03/24/one-hundred-ways-putting-pressure-0> (accessed 14 October 2010).

¹⁷⁴ Teshome (n 11 above)179.

¹⁷⁵ As above.

¹⁷⁶ HRW ‘Ethiopia: Government repression undermines poll’ (24 May 2010) available at <http://www.hrw.org/en/news/2010/05/24/ethiopia-government-repression-undermines-poll> (accessed 14 October 2010).

¹⁷⁷ See “‘One hundred ways of putting pressure” - Violations of freedom of expression and association in Ethiopia’ (n 173 above); HRW ‘Collective punishment: War crimes and crimes against humanity in the Ogaden area of Ethiopia’s Somali region’ (12 June 2008) documenting the details of the brutal-counter insurgency campaign against the Ogaden National Liberation Front (ONLF), available at <http://www.hrw.org/node/62176> (accessed 14 October 2010); US Department of State ‘2008 country reports on human rights practices: Ethiopia’ (n 13 above); HRW ‘Analysis of Ethiopia’s draft Anti-terrorism Proclamation’(n 13 above).

¹⁷⁸ Lefkow (n 12 above).

¹⁷⁹ HRW ‘Ethiopia: Human Rights Watch 2010 report’ 21 January 2010 available at <http://www.hrw.org/en/node/87604> (accessed 15 August 2010).

resulting in a large margin of victory for the ruling party that took 99% of the seats contested.¹⁸⁰ Birtukan Mideksa, the most prominent opposition leader in the country imprisoned and pardoned by the government twice since the 2005 election,¹⁸¹ had to the following to say in an interview she gave while in prison for the second time, she had the following to say:¹⁸²

[T]here is *neither pluralism nor commitment to democratic principles and practices* in Ethiopia. The government's claim of political pluralism has not gone beyond the stage of political sloganeering. ...If pluralism means increased and diverse participation in the political decision-making process and giving everyone a stake in the political process, it does not exist in Ethiopia.¹⁸³

4.3. Expression of political discontent or terrorism?

The regular harassment and arrest of political opponents and critics, discussed above as part of the government's strategy of closing down political space, are often routinely accompanied by accusations of membership of 'anti-peace', 'anti-people' or 'terrorist' organizations.¹⁸⁴ The organization whose name commonly features in such habitual accusations and is denounced as 'anti-peace', 'anti-people' or 'terrorist' is the Oromo Liberation Front (OLF).¹⁸⁵ The OLF emerged in the protracted armed struggle in Oromia against the government of Emperor Haile Selassie in the 1960s.¹⁸⁶ Although the OLF considers itself as a political organization¹⁸⁷ and continues in many ways to be the central focus of political discourse in Oromia,¹⁸⁸ which is Ethiopia's most populous region, it is categorised by Ethiopian authorities as a terrorist

¹⁸⁰ See US Department of State '2008 country reports on human rights practices: Ethiopia' (n 13 above); Freedom House 'Freedom in the World 2009: Ethiopia' (2009) <http://www.freedomhouse.org/template.cfm?page=22&country=7606&year=2009> (accessed 13 October 2010).

¹⁸¹ 'Ethiopia's pardoned critic jailed' *BBC News* 30 December 2008 available at <http://news.bbc.co.uk/2/hi/africa/7804302.stm> (accessed 17 October 2010); 'UDJ's Chairwoman, Judge Birtukan Mideksa, arrested' *Ethiopian News Agency* 29 December 2008 available at <http://www.ethiofact.com/index.php?/20081229241/news/birtukan-mideksa.html> (accessed 3 October 2010). 'Ethiopian opposition leader Birtukan Mideksa freed' *BBC News Africa* 6 October 2010 available at <http://www.bbc.co.uk/news/world-africa-11483828> (accessed 12 October 2010). Her pardon was revoked and her sentence of life imprisonment reinstated on account of a statement she made to supporters abroad that she did not request the pardon. Her detention after the revocation of her pardon was determined to be arbitrary by United Nations Working Group on Arbitrary Detention in December 2009, see A/HRC/18/3 UN Human Rights Council 'Report of the Working Group on Arbitrary Detention' (15 January 2010).

¹⁸² A Mariam 'Ethiopia is the country of the future' Interview with Birtukan Mideksa *Pambazuka News* Issue 482 (20 May 2010) available at <http://pambazuka.org/en/category/features/64563> (accessed 3 October 2010).

¹⁸³ Mariam (n 216 above) (emphasis added).

¹⁸⁴ HRW 'Human Rights Watch world report 2009: Ethiopia' available at <http://www.hrw.org/en/node/79222> (accessed 15 July 2010).

¹⁸⁵ See HRW 'Suppressing dissent: Human rights abuses and political repression in Ethiopia's Oromia region' May 2005 Vol. 17 No. 7 (A) available at http://www.omoliberationfront.org/News_Archives/hrw-eth-10may.pdf (accessed 8 October 2010).

¹⁸⁶ As above.

¹⁸⁷ Oromo Liberation Front (OLF) 'OLF Mission' available at <http://www.omoliberationfront.org/OLFMission.htm> (accessed 12 October 2010).

¹⁸⁸ HRW 'Suppressing dissent: Human rights abuses and political repression in Ethiopia's Oromia region' (n 185 above) 10.

organization and has been outlawed since 1992.¹⁸⁹ The government has since then regularly used accusations of membership of or support for the OLF as a pretext for cracking down on political dissent and independent voices, especially among the Oromo population.¹⁹⁰

Even more concerning is that such accusations are known to target agents with important roles in maintaining a politically plural society such as members of legally registered opposition parties and civil society organizations. The targeting of civil society has featured in many instances with the most apparent cases involving the government's repeated crackdown on the organization effectively destroying the Mecha-Tulema Association, the oldest and most prominent Oromo civil society organization.¹⁹¹ The government has accused the Mecha-Tulema of supporting the OLF and involvement in 'terrorist' activities.¹⁹² These accusations culminated in the Ministry of Justice revoking the organization's license in 2004 because of its alleged 'political' activities in violation of its charter.¹⁹³ This was preceded by the arrest in the same year of four Mecha-Tulema leaders on accusations of involvement in a grenade explosion at Addis Ababa University and providing support to the OLF.¹⁹⁴ This was described by Human Rights Watch as an attempt to silence peaceful criticism of government policies.¹⁹⁵

Accusations of supporting the OLF started to be affiliated with the offense of terrorism per se mainly after 2005, barring the accusations against the Ogaden National Liberation Front

¹⁸⁹ HRW 'Suppressing dissent: Human rights abuses and political repression in Ethiopia's Oromia region' (n 185 above) 24; See also Interview of *Les nouvelles d'Addis* with Dawud Ibsa Ayana, Chairman of the Oromo Liberation Front (29 March 2006) in which Ayana states that the OLF was banned by the government available at http://www.lesnouvelles.org/P10_magazine/15_grandentretien/15050_itvOLF/15050_itvOLF_eng.html (accessed 12 October 2010). While there is no provision in the Ethiopian criminal code or the Anti-terrorism Proclamation dealing specifically with the OLF, allegations of involvement with the organization can lead to charges of inciting or participating in armed insurrection against the government, arms trafficking and treason, among other offenses.

¹⁹⁰ HRW News Release 'Ethiopia: Charge or Free Ethnic Oromo Terrorism Suspects' 27 November 2008 available at <http://www.hrw.org/en/news/2008/11/26/ethiopia-charge-or-free-ethnic-oromo-terrorism-suspects> (accessed 12 October 2010).

¹⁹¹ HRW 'Suppressing dissent: Human rights abuses and political repression in Ethiopia's Oromia region' (n 185 above) 16.

¹⁹² D Ketema 'Mecha-Tulema employees arrest continues - Police want permission to check a detainee's e-mail accounts' *The Daily Monitor* 30 August 2004 available at <http://allafrica.com/stories/200408310469.html> (accessed 12 October 2010); HRW P Takirambudde 'Letter to Ethiopian Prime Minister Meles Zenawi' 7 September 2004 available at <http://www.hrw.org/english/docs/2004/09/07/ethiop9320.htm> (accessed 12 October 2010).

¹⁹³ 'Letter to Ethiopian Prime Minister Meles Zenawi' (n 192 above).

¹⁹⁴ Amnesty International 'Éthiopie: Craintes de torture, arrestations arbitraires, prisonniers d'opinion' 19 July 2004 (AI Index: AFR 25/008/2004) quoted in Immigration and Refugee Board of Canada 'Ethiopia: An organization called Mecha Tulema, including its objectives, structure and status; the treatment of its leaders and members by the current government (1990-Sept. 2004)' 23 September 2004 available at <http://www.unhcr.org/refworld/docid/42df60e520.html> (accessed 14 October 2010).

¹⁹⁵ HRW (n 192 above).

(ONLF),¹⁹⁶ the Mecha-Tulema Association and the OLF itself. In the run up to the 2010 elections, hundreds of government critics have been targeted by the government's accusations of terror with a view to prevent the government facing the kind of strong opposition it did in 2005. In 2008 alone, more than 100 individuals were arrested on accusations of helping to plan terrorist attacks for the OLF.¹⁹⁷ In response to these arrests, Human Rights Watch Africa Director Georgette Gagnon said the following:¹⁹⁸

Ethiopia has well-founded fears of terrorist attacks, but has often manipulated those fears to suppress dissent...These mass arrests bear all the hallmarks of the 'imprison first, investigate later' tactics used to arbitrarily detain peaceful critics.

The government has used accusations of terrorism to target members of registered opposition parties as well. In 2007, a year in which Prime Minister Zenawi openly accused opposition party members of acting as a front for the OLF,¹⁹⁹ approximately 450 individuals, most of which were members of the United Ethiopian Democratic Forces (UEDF) and Oromo Federalist Democratic Movement (OFDM), were arrested and accused of supporting OLF or terrorist activity.²⁰⁰ In 2008, OFDM Secretary General Bekele Jirata was arrested and charged with recruiting and organizing OLF members, financially supporting the OLF and promoting its terrorist activities.²⁰¹ Jirata fled the country while free on bail and was convicted in absentia.²⁰² As will be indicated further below, accusations of terrorism or support to terrorism have also been invoked by the government to target the media thereby curbing its contribution to political pluralism.

4.4. The Anti-terrorism Proclamation and political dissent

It is with the above portrayed longstanding history of accusations of terrorism being used to suppress political dissent that the Anti-terrorism Proclamation was passed into law with less than a year to go before the next national elections. The legislation stirred up a lot of negative attention and criticism from different stakeholders. The main theme of this criticism was that the law could be used by the government as an instrument to suppress political opposition and dissent

¹⁹⁶ HRW 'Collective punishment: War crimes and crimes against humanity in the Ogaden area of Ethiopia's Somali region' (n 177 above).

¹⁹⁷ 'Letter to Ethiopian Prime Minister Meles Zenawi' (n 192 above).

¹⁹⁸ As above.

¹⁹⁹ 'Ethiopia: Meles warns opposition parties supporting of OLF' *The Reporter* 27 October 2007 available at <http://allafrica.com/stories/200710270019.html> (accessed 1 October 2010).

²⁰⁰ US Department of State '2008 country reports on human rights practices: Ethiopia' (n 13 above).

²⁰¹ As above.

²⁰² B Malone 'Ethiopia opposition leader flees 12-year jail term' *Reuters* 8 April 2010 available at <http://af.reuters.com/article/topNews/idAFJJOE6370NC20100408> (accessed 21 October 2010).

especially in the run up to the 2010 elections.²⁰³ The political climate in which the Anti-terrorism Proclamation was enacted is very telling of the intended use of the law. Even more telling of such intended use, however, is the law itself.

4.4.1 An overbroad definition of terrorism

As is the case in the anti-terrorism laws of several countries,²⁰⁴ the proclamation defines terrorism in an overly broad and ambiguous way when it provides:²⁰⁵

[w]hosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:

- (1) causes a person's death or serious bodily injury;
- (2) creates serious risk to the safety or health of the public or section of the public;
- (3) commits kidnapping or hostage taking;
- (4) causes serious damage to property;
- (5) causes damage to natural resource, environment, historical or cultural heritages;
- (6) endangers, seizes or puts under control, causes serious interference or disruption of any public service; or threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article;

is punishable with rigorous imprisonment from 15 years to life or with death.

From the standpoint of political pluralism, the most threatening aspect of this provision is its ambiguity and the inclusion of property crimes and 'disruption of public services' committed without any intent to cause death or serious bodily injury, or taking of hostages.²⁰⁶ Acts of political dissent such as public demonstrations, non-violent marches and minor acts of violence committed in the context of political activism are categorized as terrorist acts carrying a penalty of minimum 15 years' imprisonment, or death so long as they cause the results in sub-articles (4) to (6) above.²⁰⁷

The theme of the government's political discourse, especially in Oromia, has been one of routinely using 'unproven allegations of links to the OLF as a pretext to subject law-abiding government critics to arbitrary detention, torture, extrajudicial killing, and other forms of human

²⁰³ See CIVICUS 'Ethiopia: Submission to the UN UPR' 13 April 2009 available at http://www.civicus.org/csw_files/UPRSubmissionEthiopia-April2009.pdf (accessed 12 October 2010); HRW 'Ethiopia: Amend draft terrorist law' 30 June 2009 available at <http://www.hrw.org/en/news/2009/06/30/ethiopia-amend-draft-terror-law> (accessed 12 October 2010); Amnesty International 'Ethiopia: New Anti-terrorism proclamation jeopardizes freedom of expression' 7 July 2009 available at <http://www.amnesty.org/en/for-media/press-releases/ethiopia-new-anti-terrorism-proclamation-jeopardizes-freedom-expression-> (accessed 12 October 2010).

²⁰⁴ See text accompanying n 148 above.

²⁰⁵ Art 3.

²⁰⁶ Limiting the definition of terrorism to acts committed with the intention of causing death or serious bodily confining the injury, or the taking of hostages, has been advocated for by the UN Special Rapporteur on counter-terrorism and human rights as a means to ensure the definition of terrorism is applied to conduct that is of a genuinely terrorist nature, see text accompanying n 144-146 above.

²⁰⁷ See also HRW 'Analysis of Ethiopia's draft Anti-terrorism Proclamation' (n 13 above) 4.

rights abuse.²⁰⁸ Within this ‘climate of fear and repression’ cultivated by authorities often using state power in a brutal fashion in ‘an ongoing war against dissent,’²⁰⁹ the threat posed by the broad definition of terrorism to political pluralism is apparent. This provision is tailored less toward addressing terrorism and more toward allowing for a heavy-handed response to mass public unrest, like that which followed the 2005 elections.²¹⁰

4.4.2 Proscription without judicial review and due process

Article 25 of the Anti-terrorism Proclamation provides:

- (1) The House of Peoples’ Representatives shall have the power, upon submission by the government, to proscribe and de-proscribe an organization as terrorist organization.
- (2) Any organization shall be proscribed as terrorist organization if it directly or indirectly:
 - (a) commits acts of terrorism;
 - (b) prepares to commit acts of terrorism;
 - (c) supports or encourages terrorism; or
 - (d) is otherwise involved in terrorism.

The power to proscribe terrorist organizations is given to the House of Peoples’ Representatives, a law making organ of the federal government. Given the legacy of the government’s terrorist labels targeting political parties and civil society organizations, this poses a serious threat to the space for political dialogue in the country. With this legacy, the enactment of the law alone is enough to silence government critics with no need for the government to actually start proscribing organizations under this provision. What is more, the decision of the House of Peoples’ Representatives does not afford due process and is not subjected to judicial review or oversight. This is a violation of the right to be heard and the right to judicial review.²¹¹ This lack of safeguards against abuse of proscription powers seriously discourages strong political criticism and opposition in the country. As it is, journalists, civil society leaders and political party members who had been publicly critical of the government have been forced into exile for lack of trust in the judiciary’s independence and ability to remedy abuse of government power.

The inclusion of ‘support’ or ‘encouragement’ of terrorism as a ground for proscription is also disconcerting. In light again of the legacy of government critics being routinely accused of support to terrorism, this discourages, at the pain of being labelled a terrorist organization, political parties, self-help and civil society organizations and individuals from voicing interests of

²⁰⁸ HRW ‘Ethiopia: Repression sets stage for non-competitive elections’ 9 April 2008 available at <http://www.hrw.org/en/news/2008/04/09/ethiopia-repression-sets-stage-non-competitive-elections> (accessed 12 October 2010).

²⁰⁹ HRW ‘Suppressing dissent: Human rights abuses and political repression in Ethiopia’s Oromia region’ (n 185 above) 13.

²¹⁰ Lefkow (n 12 above).

²¹¹ See *Kadi and Al Barakat International Foundation v the Council of the European Union* (n 156 above).

the public considered ‘unpopular’ by government. The EJP has identified and expressed concern about similar trends in the proscription regimes of Canada, the UK, Australia and the EU.²¹²

4.4.4 A long pre-trial detention period and permissive rules of evidence

Supplemented by additional provisions in the Proclamation that are in violation of international human rights standards, the repressiveness of the broad definition of terrorism and the questionable proscription regime is more threatening. These include the provisions on pre-trial detention and rules of evidence during trial.

Although the right to be brought before a court within 48 hours of arrest is provided in the Proclamation,²¹³ the worth of this right is devalued by a provision that allows the police detain the person without charge for up to four months by requesting additional investigation periods of minimum 28 days each.²¹⁴ This is in violation of standards in international human rights law which guarantees the right of arrested persons to be promptly brought before a judicial authority and charged.²¹⁵ The European Court of Human Rights has held that, even where there is serious terrorist threat, four days pre-charge detention without judicial supervision was not permissible.²¹⁶ If the routine arrests and months-long detention of individuals without charge is any indication of what is to ensue, this *de jure* permission of pre-trial detention is likely to lead to even further abuses.²¹⁷

Another concerning aspect of the Proclamation is that it sets highly lenient standards of evidence for terrorism cases. The Proclamation allows hearsay as admissible evidence in all cases with no limitation.²¹⁸ It goes as far as basically permitting the use of torture to obtain evidence by allowing intelligence reports to be used as evidence without the report having to disclose the source of the intelligence or the method it was gathered in.²¹⁹ All confessions taken out of court are also admissible as evidence with no restriction on the admissibility of confessions given under torture.²²⁰ This trend of reliance on confessions from detainees in terrorism cases is observed in a number of other countries. The EJP has raised concerns about countries such as Jordan, India, Pakistan, Sri Lanka and Tunisia that have made the same changes to their laws as has Ethiopia to facilitate the use

²¹² N 2 above, 116.

²¹³ Art 19(2).

²¹⁴ Art 20.

²¹⁵ ICCPR Art 9; See also UN Human Rights Committee General Comment No. 8 (1982) Article 9 of the ICCPR and UN Human Rights Committee General Comment No. 9 (1982) on Article 10 of the ICCPR.

²¹⁶ *Brogan and others v the United Kingdom* ECHR (29 November 1988) Application Nos. 11209/84, 11234/84, 11386/85) cited in EJP (n 2 above) 145.

²¹⁷ HRW ‘Analysis of Ethiopia’s draft Anti-terrorism Proclamation’ (n 13 above) 8.

²¹⁸ Art 23(2).

²¹⁹ Art 23(1).

²²⁰ Art 23(5).

of confessions as evidence.²²¹This contravenes the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which prohibits the use of statement made under torture as evidence.²²²

4.4.3 Criminalization of ‘encouragement’ of terrorism: Stifling of the media

The continued habitual accusations of affiliations to terrorist entities have targeted the independent media as well. At least 41 Ethiopian journalists have fled into exile in this decade.²²³ This has seriously diminished the media’s input to pluralizing the society politically and neutralised its role as a medium for channelling independent voices from different groups and providing a platform for dialogue.

The government has used its habitual accusations of affiliation with terrorist organizations to curb criticism from international media outlets. In 2008, it went as far as severing diplomatic relations with Qatar claiming direct and indirect assistance to terrorist organizations by Quatrain media outlets following a series of broadcasts on the plight of civilians in the Ogaden.²²⁴ In August 2009, the government unsuccessfully attempted to force Kenyan broadcaster Nation Television (NTV) not to air a four-episode investigative report on the OLF with the Ethiopian ambassador to Kenya accusing the station of speaking for ‘a terrorist group.’²²⁵The threats of these accusations on the instrumental role of the media in the functioning of a politically plural system are evident.

The Anti-terrorism Proclamation emboldens the threat to such role of the media. The Proclamation criminalizes ‘encouragement’ of terrorism²²⁶ by providing that:

[w]hosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism... is punishable with rigorous imprisonment from 10 to 20 years

This provision restricts speech that encourages or incites terrorism as do many other anti-terrorism laws. However, it does not, contrary to requirements in international standards on

²²¹ N 2 above, 149&150.

²²² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984/1987) Art 15.

²²³ Committee to Protect Journalists (CPJ) ‘Attacks on the press 2009: Ethiopia’ 16 February 2010 available at <http://cpi.org/2010/02/attacks-on-the-press-2009-ethiopia.php> (accessed 12 October 2010).

²²⁴ ‘Ethiopia Breaks Ties with Qatar’ *Al Jazeera* 21 April 2008 available at <http://english.aljazeera.net/news/africa/2008/04/2008614234048573869.html> (accessed 10 October 2010).

²²⁵ P Leftie ‘TV Series Sparks Diplomatic Row’ *Daily Nation* 6 August 2009 available at <http://www.nation.co.ke/News/-/1056/635812/-/item/0/-/2yf1wz/-/index.html> (accessed 12 October 2010).

²²⁶ Art 6.

freedom of speech,²²⁷ limit such restriction to speech that directly incites, or is likely to result in, an imminent crime.²²⁸ In fact, it explicitly defines ‘incitement’ to include even cases where the incited act is not attempted.²²⁹ This has been inimical to reports covering political opposition groups banned and labelled as terrorist by government. Members of the media that cover reports referring to individuals or organizations so labelled such as the OLF and Ogaden National Liberation Front (ONLF) could and have been included in this broad definition.²³⁰ In late 2009, security officials summoned several newspaper editors and warned that certain articles could be deemed to promote terrorism.²³¹ In December 2009, the private weekly newspaper *Addis Neger*, the leading independent political newspaper with a circulation of 30 000, closed after several of its editors fled the country for fear of prosecution under the new anti-terror legislation.²³² This was preceded, among others, by the state owned daily newspaper *Addis Zemen* accusing *Addis Neger* and another private newspaper, *Awramba Times*, of supporting banned political organizations and undermining the national interest.²³³ In August 2009, exiled journalists Dereje Habtewold and Fasil Yenealem were prosecuted in absentia and found guilty of involvement in a coup plot by the ‘terror network’ of Berhanu Nega, exiled leader of Ginbot 7 Movement, which the government has banned.²³⁴ All these testify that the intended use of the legislation is to give the government a potent tool in its ‘ongoing war against dissent’ and to the adverse implications of this on political pluralism in the country.

4.4.5 Increased number of convictions and arrests

In August 2009, the the Federal High Court passed a sentence of life imprisonment against Bashir Makhtal, an Ethiopian-Born Canadian, on four terror charges, including being a member of the ONLF.²³⁵ In December 2009, the Federal Supreme Court upheld the conviction and life imprisonment although there were allegations that his trial was unfair, which the government has

²²⁷ See U.N. Doc. E/CN.4/1996/39 Johannesburg Principles on National Security, Freedom, of Expression and Access to Information (1996), principle 6; *Erdogdu and Ince v Turkey* (1999) ECHR Nos. 25067/94 and 25068/94 cited in HRW ‘Analysis of Ethiopia’s draft Anti-terrorism Proclamation’ (n 13 above) 5.

²²⁸ HRW ‘Analysis of Ethiopia’s draft Anti-terrorism Proclamation’ (n 13 above) 5.

²²⁹ Art 2(6).

²³⁰ HRW ‘Analysis of Ethiopia’s draft Anti-terrorism Proclamation’ (n 13 above).

²³¹ HRW “‘One hundred ways of putting pressure’ - Violations of freedom of expression and association in Ethiopia’ (n 173 above) 50.

²³² CPJ ‘Attacks on the press 2009: Ethiopia’ (n 223 above); Reporters Without Borders ‘Weekly forced to stop publishing, its journalists flee abroad’ 4 December 2009 available at <http://www.rsf.org/Weekly-forced-to-stop-publishing.html> (accessed 15 October 2010).

²³³ As above.

²³⁴ CPJ ‘Attacks on the press 2009: Ethiopia’ (n 223 above).

²³⁵ ‘Ethiopia sentences Canadian to life on terrorism charges’ *Sudan Tribune* 4 August 2009 available at www.sudantribune.com/spip.php?article32025 (accessed 15 August 2010).

denied.²³⁶ Hassan Makhtal, his brother, died in November 2009 after his release from prison in October, reportedly from complications due to ill-treatment in detention.²³⁷ The ONLF, like the OLF, has been banned in Ethiopia and is mentioned in terrorist accusations made against many who criticize the government, especially in Ethiopia's Somali region.²³⁸ Amnesty International has indicated that it considers Makhtal a prisoner of conscience.²³⁹

In February 2010, two men were tried and convicted of terrorism, and sentenced to 18 and 21 years, after allegedly admitting their guilt.²⁴⁰ Most recently, in August of 2010, the Federal High Court convicted 30 individuals of terrorist acts and passed jail terms ranging between 16-19 years.²⁴¹ Although detailed information on these convictions was not available at the time of writing, these convictions have evoked an uproar among Oromo interest groups who have criticised them as being an intentional targeting of peaceful dissent and criticism of the government from the Oromo ethnic group.²⁴²

Increased use of the Anti-terrorism Proclamation is likely in the foreseeable future in light of recent reports of the government arresting 'terrorist' and foiling terrorist plots and attacks. By October 2010 alone, there have been at least three reports of the government arresting large numbers of 'terrorists', with the October arrest of 75 Eritreans topping the charts.²⁴³ Most of the persons arrested were alleged to have received military training in Eritrea and to have been planning terrorist attacks in the country.²⁴⁴ Continuing with the longstanding tradition, in at least one of these reports, the persons arrested were said to be members of the OLF.²⁴⁵ In light of the government's well documented record of accusing political dissenters of terrorism and a new law

²³⁶ Amnesty International 'Amnesty International report 2010: Ethiopia' 28 May 2010 available at <http://www.unhcr.org/refworld/docid/4c03a82c28.html> (accessed 12 October 2010).

²³⁷ As above.

²³⁸ HRW 'Collective punishment: War crimes and crimes against humanity in the Ogaden area of Ethiopia's Somali region' (n 177 above).

²³⁹ As above.

²⁴⁰ TA Tekle 'Ethiopia: Plotters sentenced on terrorism charges' *Sudan Tribune* 22 February 2010 available at <http://www.sudantribune.com/spip.php?article34205> (accessed 15 August 2010).

²⁴¹ TA Tekle 'Ethiopian court passes jail sentences against 30 on terrorism charges' *Sudan Tribune* 29 August 2010 available at <http://www.sudantribune.com/spip.php?article36093> (accessed 24 September 2010).

²⁴² See for e.g. 'The verdict is a deliberate attempt to silence the Oromo people' *Oromedia* available at <http://oromedia.wordpress.com/2010/04/10/the-verdict-is-a-deliberate-attempt-to-silence-the-oromo-people/> (accessed 12 October 2010); 'Oromia-Ethiopia: Woyane moves its kangaroo court trials behind closed doors' *Gada.com* 29 August 2010 available at <http://www.gadaa.com/oduu/?p=5372> (accessed 12 October 2010).

²⁴³ See 'Ethiopia foils terrorist plot against top government officials' *ETV News* 7 January 2010 available at <http://www.newsdire.com/news/91-etv-news-ethiopia-foils-terrorist-plot-against-top-government-officials.html> (accessed 12 October 2010); 'OLF and Al-shabab terrorist attack foiled: Task Force' *Ethiopian News Agency (ENA)* 3 May 2010 available at <http://www.ena.gov.et/EnglishNews/2010/May/03May10/111759.htm> (accessed 12 October 2010); TA Tekle 'Ethiopia says captured 75 Eritrean "terrorists"' *Sudan Tribune* 1 October 2010 available at http://www.sudantribune.com/spip.php?page=imprimable&id_article=36457 (accessed 12 October 2010).

²⁴⁴ As above.

²⁴⁵ See 'OLF and Al-shabab terrorist attack foiled: Task Force' (n 243 above).

transparently intended for such purpose exactly, the arrest, detention, trial and sentence of those arrested in 2010 needs to be closely watched. Although the author is not privy to the details of these arrests, it is not inconceivable that these persons may be political dissenters caught up in the government's routine accusations of terrorism.

4.5. Violation of the African Charter on Democracy, Elections and Governance

The Democracy Charter establishes states' obligations to strengthen political pluralism²⁴⁶ and promote democracy.²⁴⁷ In its response to the recommendations given during the Universal Periodic Review (UPR) of Ethiopia in 2009, the government prided itself on being the second country to ratify the African Charter on Democracy, Elections and Governance while at the same time rejecting vehemently calls to repeal the Anti-terrorism Proclamation.²⁴⁸ Ethiopia has ratified the Democracy Charter and although the Charter has not come into force,²⁴⁹ it is obliged to refrain from acts which would defeat the object and purpose of the Charter.²⁵⁰

The government's actions of increasingly suppressing political pluralism in the country and using counter-terrorism as a tool to crackdown on opposition parties, CSOs, the media and other government critics are acts that defeat the object and purpose of the Charter. The object of the Charter *inter alia* is to '[n]urture, support and consolidate good governance by... inculcating political pluralism.'²⁵¹ Therefore, the charges against the government of Ethiopia of using anti-terrorism legislation to suppress political pluralism have a firm legal basis under international law.

²⁴⁶ Art 3(11).

²⁴⁷ Art 4(1).

²⁴⁸ A/HRC/13/17/Add.1 'Report of the Working Group on the Universal Periodic Review: Ethiopia – Addendum (replies of the state under review)' 18 March 2010 paras 7&8.

²⁴⁹ Seven AU member states, Mauritania, Ethiopia, Burkina Faso, Sierra Leone, Rwanda, Lesotho and Ghana, have ratified the Charter so far, see 'Ratification of African Charter on Democracy key to development in Africa, PAP urged' *African Press Organization* 11 October 2010 indicating that available at <http://appablog.wordpress.com/2010/10/11/ratification-of-african-charter-on-democracy-key-to-development-in-africa-pap-urged/> (accessed 15 October 2010).

²⁵⁰ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organization (1986) Art 18.

²⁵¹ Democracy Charter Art 2(6) – Objectives.

CHAPTER FIVE

Conclusions and Recommendations

5.1. Conclusions

In the decade following the end of the Cold War, democracy attained prominence in international law. Its evolution into an entitlement was marked by the unprecedented upsurge of democratization in the period, the increased use of international election monitoring and normative developments of the ‘building blocks’ that cumulatively yielded the right to democracy. The advent of a different era, of counter-terrorism, after 9/11 changed the playing field for democracy and by implication for its corollary, political pluralism. In this decade, the giant leaps democracy took in the 1990s has been neutralized as counter-terrorism efforts driven by security interests increasingly relegated the interest of pushing for political pluralism to democratize states to the backburner. The conclusions of this study are presented below in two sections, the first concluding the global dimensions of the study and the other the specific case study.

5.1.1 Democracy and political pluralism threatened in an era of counter-terrorism

The right to democracy and political pluralism is facing threat from counter-terrorism frameworks that emerged in the post-911 counter-terrorism era and are imbalanced towards security interests as opposed to democratization interests. The outsourcing of the definition of ‘terrorism’ to states and the absence of procedural safeguards in proscription regimes constitute the main ways through which political pluralism is threatened by such counter-terrorism frameworks.

Secondly, existing counter-terrorism frameworks do not adequately respond to the problem of states using counter-terrorism laws to suppress political pluralism. They do not have checks to ensure that their dictates to fight terrorism are not abused by states for political ends.

Thirdly, in the counter-terrorism era where the playing field for democracy as a right has been significantly altered and pushback against democratization efforts is mounting, relying on international human rights law to defend democracy and political pluralism as an entitlement is difficult.

5.1.2 Anti-terrorism legislation suppressing political pluralism in Ethiopia

With regards to the subject of the case study in this work, the umbrella observation from the investigation is that the Anti-terrorism Proclamation seriously threatens political pluralism in Ethiopia as it constitutes a potent tool through which political dissent can be given a heavy-handed response. This observation is discerned from the following specific conclusions.

Primarily, the definition of ‘terrorism’ in the Anti-terrorism Proclamation is broad and not limited to acts committed with the intent of causing injury or death to civilians or hostage taking. It allows the criminalization of peaceful political dissent such as demonstrations and is thus tailored more toward allowing for a heavy-handed response to mass public unrest, like that which followed the 2005 elections and less toward countering terrorism. Such purpose of the law is accentuated by the legacy of the government’s routine accusations of terrorism against members of opposition parties, CSOs and the media that has significantly narrowed the space for political pluralism in the country by cultivating a ‘climate of fear and repression’ through the use of state power in ‘an ongoing war against dissent.’

Secondly, the proscription regime in the Proclamation is also worrying as the power to proscribe is given to a law-making organ with no judicial review or oversight. It is also concerning because supporting terrorism is a ground for proscription as a terrorist organization. The threat this poses to political pluralism in the country is evident given the legacy of members of opposition parties, CSOs and the media being accused of supporting OLF terrorist activity and more specifically the Mecha-Tulema Association being gradually destroyed by these accusations.

Furthermore, as developments in 2009 and 2010 have shown, the criminalization of ‘encouragement’ of terrorism is inimical to media coverage of stories on organizations labeled terrorist by the government.

Lastly, the increased use of terrorism accusations against the OLF and the ONLF, both organizations struggling for the self-determination of their respective ethnic groups for decades, signify something more than the suppression of political pluralism. It also signifies that the new counter-terrorism paradigm in Ethiopia is increasingly resembling the trajectory of domestic counter-terrorism efforts that have sought to redefine longstanding conflicts as part of the post-9/11 worldwide threat from terrorism. This allows the government not only to avoid criticism by disguising the suppression of political pluralism as counter-terrorism but also to get the external support it needs to maintain its power. Indeed, the government of Ethiopia is receiving

appreciation for its ‘solid and unwavering’ role in the ‘global war against terror’, especially from the U.S, both in terms of financial and military assistance and a boost to its reputation. ‘[I]n a country many hoped would move forward on democracy during this decade, ... [the U.S.] has downplayed the democracy issue for the sake of cooperative ties.’²⁵²

5.2. Recommendations

There is a need to remedy or mitigate the impacts of the problem identified and investigated in this study, the growing trend of states abusing the contemporary counter-terrorism paradigm for their own political ends of suppressing political pluralism and the inadequacy of existing counter-terrorism frameworks to prevent or respond to such trend. The first step is to recognize the undesirable effects of the global war on terror on democracy worldwide. Such recognition is important if effective mechanisms of responding to this trend are to be forged.

5.2.1 Towards a holistic approach to counter-terrorism

To curb the above trend, it is recommended that the orientation of counter-terrorism frameworks be recast toward a holistic approach of counter-terrorism and away from the existing primarily law enforcement/military approach emphasising reacting to terrorism. This can be done by developing on efforts already underway in the UN Global Counter-Terrorism Strategy of 2006 (UN Strategy)²⁵³ to fight terrorism by addressing underlying conditions conducive to its spread. The Strategy represents the agreement, for the first time, of states on the imperative to address underlying conditions conducive to the spread of terrorism.²⁵⁴ As it stresses the preventing terrorism through promotion of human rights, socio-economic and political inclusion and good governance, among others,²⁵⁵ the Strategy is a historic instrument which, if exploited vigilantly, has the potential to prevent counter-terrorism relegating democracy and political pluralism as international priorities. However, this potential is seriously undercut by the fact that, the UN Strategy, unlike the ‘hard’ instruments that enjoin states to combat terrorism, is ‘soft’ law without binding force. Therefore, it is recommended that the proposed reorientation of counter-terrorism be done by inculcating into the Security Council’s and other ‘hard’ counter-terrorism frameworks, the conceptual shift in the Strategy to a longer-term form of counter-terrorism that promotes a holistic response to terrorism.

²⁵² Carothers (n 105 above) 8.

²⁵³ The UN Global Counter-terrorism Strategy, UN General Assembly Resolution 60/288, A/RES/60/288, New York, 8 September 2006 (UN Strategy), available at <http://www.un.org/terrorism/strategy-counter-terrorism.shtml> (accessed 4 October 2009).

²⁵⁴ UN Strategy (n 253 above) section I.

²⁵⁵ Rosand (n 118 above) 7.

5.2.2 Towards a definition and proscription regimes less susceptible to abuse

Regarding the definitional problem, it is recommended that ‘hard’ counter-terrorism frameworks devise a binding definition that limits the use of the term ‘terrorism’ to genuine acts of terrorism. Adopting into hard law the description of terrorism advocated for by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism²⁵⁶ is ideal for this purpose. Accordingly, the author welcomes this description as a means to address the definitional problem and recommends that the Security Council’s and other counter-terrorism frameworks make use of it as a means to ensure that states’ anti-terrorism laws do not provide broad and vague definitions of terrorism.

With regard to proscription regimes, it is recommended that the Security Council and other proscription regimes set good examples by adopting procedural safeguards in their proscription regimes that guarantee transparency, the possibility for proscribed organizations to petition and be heard by the proscribing organ and to have the decision reviewed by an independent judicial or quasi-judicial organ. It is further recommended that a model proscription mechanism be devised in the different counter-terrorism frameworks. As is the case in Australia, Canada and Tanzania²⁵⁷ the model law should expressly exclude engagement in advocacy and protest not directed against life or person as grounds for proscription.

5.2.3 Pressure on the Ethiopian government to change the trajectory of counter-terrorism suppressing political pluralism

Holding the government accountable for violation of obligations under international law

It is recommended that the a communication be filed to the African Commission seeking a recommendation holding the government liable for violation of the rights in the African Charter which the Anti-terrorism Proclamation violates including the rights to freedom of association, expression and political participation.

It is further recommended that the communication also allege that the Anti-terrorism Proclamation threatens democracy by suppressing political pluralism and is thus a violation of the object and purpose of the Democracy Charter. The instruments the African Commission is

²⁵⁶ E/CN.4/2006/98 (n 145 above) para 42.

²⁵⁷ Australia Criminal Code Sec 100.1; The Criminal Code of Canada Paragraph 83.01(1)(b)(ii)(E) as amended by the Anti-Terrorism Act of Canada (2001) Prevention of Terrorism Act of Tanzania (2002) Art 4 (4)(b) cited in EJP report (n 2 above) 127.

mandated to draw inspiration from while deciding on communications include instruments other adopted by African countries,²⁵⁸ which the Democracy Charter is.

External pressure from important role players

Concerted efforts underway urging the government of Ethiopia to stop accusing government critics of terrorism and to repeal or amend the Anti-terrorism Proclamation should be continued. The government is kept afloat by international donors who give Ethiopia more than US\$2 billion in aid annually.²⁵⁹ Calls for political liberalization have to date been met with little or no serious response from the government for this reason.²⁶⁰ Therefore, it is recommended that such donors exert meaningful pressure on the government to hold it true to its word of consolidating democracy and good governance.²⁶¹ A commendable effort in this regard is a draft law proposed in August 2010 before the U.S. Senate called The Support for Democracy and Human Rights in Ethiopia Act of 2010.²⁶² The bill has as one of its objectives supporting the government of Ethiopia to develop a counter-terrorism strategy consistent with international law²⁶³ and purports to go to the extent of limiting financial aid if the government does not take demonstrable steps annually towards democratizing itself.²⁶⁴ It is therefore recommended that pushing for the adoption and enforcement of this draft bill be put on the agenda of stakeholders.

²⁵⁸ African Charter Art 60.

²⁵⁹ Lefkow (n 12 above).

²⁶⁰ As above.

²⁶¹ A/HRC/13/17/Add.1 (n 248 above) para 7.

²⁶² Available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3757>; (accessed 20 October 2010).

²⁶³ S. 3557 Support for Democracy and Human Rights in Ethiopia Act of 2010 Sec 1(b).

²⁶⁴ N 263, Sec 5(1).

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