How to Rescue Human Rights from Proactive Counterterrorism in Ethiopia

Wondwossen Demissie Kassa (PhD)[*]

Abstract

Though, in theory, there is no trade-off between counterterrorism and the protection of human rights, in practice their interaction has been problematic. Broadly, the problematic nature of counterterrorism from human rights perspective is attributable to two factors. The first is lack of universally accepted definition of terrorism. The second is the proactive approach of counterterrorism — an approach that departs from the traditional reactive approach of the criminal law and allows intervention against a conduct before it matures into a terrorist act. This paper is concerned with Articles 4 and 7 of the Ethiopian Anti-terrorism Proclamation No 652/2009, which, respectively, criminalize preparatory conduct to commit a terrorist act and membership in a terrorist organization, and introduce a proactive approach to counterterrorism in Ethiopia. The application of these provisions involves prediction of future behaviours based on limited information, which makes them susceptible to misuse. This potential for abuse calls for maximum care in their implementation. This article explores how these provisions should be construed to mitigate human rights casualty. Drawing on the law and practice of counterterrorism in jurisdictions from which the Ethiopian antiterrorism proclamation has been adapted, this article suggests a precautious reading of these provisions. This path, which calls for the court to play its role in safeguarding human rights from proactive counterterrorism in Ethiopia, is not only desirable, but prudent and sufficiently mindful of the constitutional role of the judiciary.

Key terms: Ethiopia, proactive counter terrorism, Human Rights

Introduction

Ethiopia passed the Anti-terrorism Proclamation 652/2009 (ATP) in 2009. Both the law and its (mis)application have been the subject of consistent criticism from governmental and non-governmental organizations.[1] Research suggests the

[*] Assistant Professor, Addis Ababa University School of Law.

[1] African Commission on Human and Peoples' Rights, '218: Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia' (51st ordinary Session, 18 April to 2 May 2012, Banjul, The Gambia) <http://www.achpr.org/sessions/51st/resolutions/218/>; United Nations Human Rights, Climate of intimidation against rights defenders and journalists in Ethiopia (2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12365&LangID=E >; Human Rights Council Working Group on Arbitrary Detention (2012), Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty Fifth Session, 14-23 Nov, No. 62/2012 (The Federal Democratic Republic of Ethiopia), Retrieved from: <http://www.freedomnow.org/wp-content/uploads/2013/04/Eskinder-Nega-WGAD-Opinion.pdf>; Human Rights Watch, 'An Analysis of Ethiopia's Draft Anti-Terrorism Law' (30 June

problematic nature of the law from human rights point of view. Hiruy offers an overview of the broadness and vagueness of the definition of a terrorist act under the ATP and has warned that it can potentially be used to discipline dissent.[2] Similarly, Sekyere and Asare examine the relationship between some of the provisions of the ATP and human rights instruments and conclude that 'there is a real potential for the state to crack down on political dissent in governance and curtail the growth of democracy in Ethiopia.'[3] In an earlier work, I have expressed concern on the aptness of criminalising precursor and inchoate conduct and criminal participation under the ATP in the light of criminal law theories.[4] Mesenbet[5] and Husen[6] have pointed to the proclamation's potential to silence dissenting views. Those who denounce the ongoing prosecutions against journalists and opposition political party members under the ATP cite these prosecutions as evidence of the misuse of the law.[7]

2009) <https://www.hrw.org/news/2009/06/30/analysis-ethiopias-draft-anti-terrorism-law> accessed 20 July 2017; Amnesty International, 'Ethiopia: Dismantling dissent intensified crackdown on free speech in Ethiopia' (30 April 2012) <https://www.amnestyusa.org/reports/ethiopia-dismantling-dissent-intensified-crackdown-on-free-speech-in-ethiopia/> accessed 15 June 2017; Committee to Protect Journalists, 'Anti-terrorism legislation further restricts Ethiopian press' (23 July 2009) <https://cpj.org/2009/07/anti-terrorism-legislation-further-restricts-ethio.php> accessed 05 April 2016; Lewis Gordon, Sean Sullivan and Sonal Mittal, 'Ethiopia's Anti-Terrorism Law: A tool to Stifle Dissent' (2015), Retrieved from: <http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf> accessed 10 December 2016.

[2] Hiruy Wubie, *Some Points on the Ethiopian Anti-Terrorism Law from Human Rights Perspective*, 25 JOURNAL OF ETHIOPIAN LAW 24 (2011).

[3] Peter Sekyere and Bossman Asare, *An Examination of Ethiopia's Anti –Terrorism Proclamation on Fundamental Human Rights*, 12 EUROPEAN SCIENTIFIC JOURNAL 351, 351(2016).

[4] Wondwossen Demissie Kassa, *Criminalization and Punishment of Inchoate Conduct and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law*, 24 JOURNAL OF ETHIOPIAN LAW 147 (2010).

[5] Mesenbet A. Tadeg, *Freedom of Expression and the Media Landscape in Ethiopia: Contemporary Challenges* 5 U. BALT. J. MEDIA L. & ETHICS 69 (2016).

[6] Husen Tura, *The Impact of Ethiopia's Anti-Terrorism Law on Freedom of Expression*, (25 July 2017), Proceeding of 5th International Conference of PhD Students and Young Researchers, 393 Vilnius University Faculty of Law (International Network of Doctoral Studies in Law) https://ssrn.com/abstract=2660268 or http://dx.doi.org/10.2139/ssrn.2660268 accessed 10 September 2017.

[7] United Nations Human Rights, Climate of intimidation against rights defenders and journalists in Ethiopia (2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12365&LangID=E>; Patrick Griffith, "Ethiopia's Anti-Terrorism Proclamation and the right to freedom of expression" (*freedom now* 30 August 2013) <http://www.freedom-now.org/news/ethiopias-anti-terrorism-proclamation-andthe-right-to-freedom-of-expression/>; Human Rights Council Working Group on Arbitrary Detention (2012), Opinions Adopted by the Working Group on Arbitrary Detention at its Sixty Fifth Session, 14-23 Nov, No. 62/2012 (The Federal Democratic Republic of Ethiopia), Retrieved from: <http://www.freedomnow.org/wp-content/uploads/2013/04/Eskinder-Nega-WGAD-Opinion.pdf>; Human Rights Watch (2011), 'Ethiopia: Journalists Convicted Under Unfair Law, Deeply Flawed anti-terrorism Act should be revoked', retrieved from: <http://www.hrw.org/news/2011/12/21/ethiopia-journalists-convicted-underunfair-law>; Amnesty International (2012), Ethiopia: Conviction of government opponents a 'dark day' for freedom of expression, retrieved from: <http://www.amnesty.org/en/news/ethiopia-conviction-government-opponentsdark-day-freedom-expression-2012-06-27>

This article focuses on Articles 4 and 7 of the ATP which, respectively, criminalizes preparatory acts (refer to both planning and preparation) and membership in a terrorist organization. These provisions which introduce a proactive counterterrorism, otherwise known as precautionary approach to counterterrorism,[8] are susceptible to misuse and thus call for a maximum restraint in their application. The article proposes how these provisions should be construed so that their application on a wrong target can be minimized. It promises to be a valuable contribution to an understanding of the nature of precautionary counterterrorism and offering a perspective on how to mitigate its impact on human rights. The ATP has drawn on anti-terrorism laws of foreign jurisdictions,[9] such as Australia, United Kingdom and the United States. In order to gain original understanding of the law, the article draws heavily on the laws and literature relating to counterterrorism in these jurisdictions.

The article has three sections. The first provides a theoretical background to proactive counterterrorism in light of which the approach under the ATP is to be examined. It discusses the major justifications for the precautionary approach in the context of countering terrorism, the human rights concerns associated with adopting the approach and the safeguards that need to be put in place to minimise the human rights impact of the approach. The second section deals with precursor offences under the ATP. Specifically it analyses the physical and mental elements of these offences and their relationship with a principal terrorist act as provided under the ATP. The third section is concerned with how the ATP treats membership in a terrorist organisation. Though criminalisation of membership in a terrorist organization is arguably an extension of proactive counterterrorism, unlike in the case of preparatory offences, states have different approaches to its criminalisation. This section analyses the legal provisions of the ATP dealing with membership of a terrorist organisation in comparison with the approach in other jurisdictions. Finally, concluding remarks are offered.

1. Proactive counterterrorism and its potential intrusion on human rights

1.1. Proactive counterterrorism

United Nations Security Council Resolution 1373 (the Resolution) requires states to criminalise execution as well as preparation for and planning of a terrorist act.[10]

---

[8] For the details on this approach, see Section 1 below.

[9] Federal Democratic Republic of Ethiopia, 3rd House of Peoples Representatives (2008/2009), 4th year Adopted Proclamations, Public Discussions and Recommendations, Volume 7, p.1 16-117. Yemane Negash, "**ኤርፖርት ላይ አንደሚታነቁ የሚያምኑ ሰወች ቢኖሩም ኢህአዴግ ግን ስለመኖራቸዉ አያዉቅም**" (*ሪፓርተር* 10 December 2014) <http://www.ethiopianreporter.com/index.php/politics/item/8182>; a program on Terrorism in Ethiopia hosted by Ethiopian Television and Radio Agency in 2013, part two, Available at: <http://www.mereja.com/video/watch.php?vid=ecb2493b5>.

[10] SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) Para. 2 (e).

Even where counterterrorism instruments do not require states to criminalise preparatory acts, the states have been encouraged to do so.[11] The United Nations Security Council Counterterrorism Committee and the UN Office on Drugs and Crime have called upon states to criminalize 'extended modes of criminal participation' in their anti-terrorism legislation.[12]

In response to the Security Council's instruction and encouragements from different corners, states have adopted a proactive approach to fight terrorism. A proactive approach calls for 'a strategy to permit intervention against terrorist planning and preparation before they mature into action.'[13] This, in turn, entails 'criminalizing acts that are committed BEFORE any terrorist acts take place.'[14] Under this approach, state anti-terrorism laws push the traditional reach of criminal law. These laws criminalise planning and preparatory acts which transpire earlier than attempt and conspiracy in the continuum of contemplation and commission of a crime.[15] Preparatory offences 'stretch the thread between the substantive crime that the law seeks to pre-empt — terrorism — and the criminalized acts.'[16] These offences are referred to by different names such as precursor crimes,[17] pre-inchoate crimes,[18] or pre-crime.[19] Criminalising acts preparatory to terrorist attacks is a feature of 'a precautionary criminal law'[20] where authorities 'anticipate and forestall that which has not yet occurred and may never

[11] Ben Saul, *Criminality and Terrorism, in* COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 133, 148 (Ana María Salinas de Frías, Katja LH Samuel, and Nigel D. White eds., Oxford University Press 2012); Luis Misguel Hinojosa-Martinez, *A Critical Assessment of United Nations Security Council Resolution 1373*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 626, 626(Ben Saul ed., Edward Elgar 2014).

[12] Saul, *supra* note 11, at 148.

[13] United Nations Office on Drugs and Crime Terrorism Prevention Branch, *Preventing terrorist acts: A criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments*' (2006) 2 <https://www.unodc.org/pdf/terrorism/TATs/en/3IRoLen.pdf>.

[14] Jean Paul Labrode, 'Countering Terrorism: New International Criminal perspectives', 132nd International Senior Seminar Visiting Experts Papers (2007) 71 RESOURCES MATERIAL SERIES 10-13, 11 (emphasis original).

[15] JUDE MCCULLOCH AND DEAN WILSON, PRE-CRIME: PRE-EMPTION, PRECAUTION AND THE FUTURE (Routledge 2015).

[16] Jude McCulloch, *Human Rights and terror laws,* 128 PRECEDENT 26, 28 (2015).

[17] Stuart Macdonald, *Understanding Anti-terrorism policy: Values, rationales and principles*, 34 SYDNEY LAW REVIEW 317 (2012).

[18] Tamara Tulich, *Prevention and Pre-emption in Australia's domestic Anti-terrorism legislation*, 1INTERNATIONAL JOURNAL FOR CRIME AND JUSTICE 52, 56 (2012); ANDREW LYNCH, GEORGE WILLIAMS, AND NICOLA MCGARRITY, INSIDE AUSTRALIA'S ANTI-TERRORISM LAWS AND TRIALS 32 (NewSouth 2015).

[19] Jude McCulloch and Sharon Pickering, *Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'*, 49 BRITISH JOURNAL OF CRIMINOLOGY, 628 (2009). Chesney refers to the prosecution involving such acts as 'anticipatory'. Robert M. Chesney, *The Sleeper Scenario: Terrorism-support Laws and the Demands of Prevention*, 42 HARVARD JOURNAL ON LEGISLATION 1(2005); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenges of Unaffiliated Terrorism*, 80 SOUTHERN CALIFORNIA LAW REVIEW 425 (2007).

[20] Andrew Goldsmith, *Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law*, *in* LAW AND LIBERTY IN THE WAR ON TERROR *(*Andrew Lynch, Edwina MacDonald and George Williams eds., The Federation Press 2007).

do so.'[21] As noted by Virta, the 'precautionary principle' has been the basis of the counterterrorism policymaking.[22]

1.2. Justifications for Proactive counterterrorism

In view of the seriousness of the potential harm that might occur if the traditional criminal law approach were followed, there has been a support for the proactive approach to counterterrorism.[23] For example, Labrode suggests that terrorism being one of the most serious crimes, maximum attention should be given to prevent it.[24] According to Saul, the probability of catastrophic harm is among the factors that justify the peculiarity of regulating of terrorism from other crimes.[25] Williams argues that 'given the potential for catastrophic damage and loss of life, intervention to prevent terrorism is justified at an earlier point in the chain of events that might lead to an attack.'[26] Officials from the United States, the frontrunner in the global war on terrorism, vigorously expressed the need for a proactive approach on different occasions. For example, in May 2006, Deputy Attorney General Paul McNulty indicated:

> On every level we [are] committed to a new strategy of prevention. The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention. We resolved not to wait for an attack or an imminent threat of an attack to investigate or prosecute.[27]

While the prevention rationale dominates the proactive approach,[28] there is another related justification for it. Deterrence, one of the core functions of

---

[21] Lucia Zedner, *Pre-crime and post-criminology?* 11 THEORETICAL CRIMINOLOGY 261, 262 (2007).

[22] Sirpa Virta, *Re/building the European Union Governing through Counter terrorism*, *in* SECURITY IN EVERYDAY LIFE 186 (Vida Bajc and Willem de Lint eds., Routledge 2011).

[23] Lynch, Williams, and McGarrity, *supra* note 18; Goldsmith, *supra* note 20; Robert Cornall, *The effectiveness of Criminal Law on Terrorism*, *in* LAW AND LIBERTY IN THE WAR ON TERROR 50 (Andrew Lynch, Edwina MacDonald and George Williams eds., The Federation Press 2007); McCulloch, *supra* note16.

[24] Labrode, *supra* note 14, at 10.

[25] Saul, *supra* note 11, at 149.

[26] George Williams, *A Decade of Australian Anti-Terror Laws*, 35 MELBOURNE UNIVERSITY LAW REVIEW 1136, 1161(2011).

[27] Paul J. McNulty, Prepared Remarks of Deputy Attorney General Paul J. McNulty at the American Enterprise Institute (24 may 2006) <https://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html>. A month later, Homeland Security Secretary Michael Chertoff echoed:

> prevention is the goal of all goals when it comes to terrorism because we simply cannot and will not wait for these particular crimes to occur before taking action. Investigating and prosecuting terrorists after they have killed our countrymen would be an unworthy goal. Preventing terrorism is a meaningful and daily triumph.

Alberto Gonzales, U.S. Att'y Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (16 August 2006) <https://www.justice.gov/archive/ag/speeches/2006/ag_speech_060816.html>.

[28] McCulloch and Pickering (19) 632. For more on the rationale from the perspective of different actors in different jurisdictions see: McCulloch and Wilson (15).

punishment, is unworkable as far as jihadist terrorists are concerned. There are terrorists who are ready to die for their cause rendering punishment unable to serve its deterrent purpose.[29] As Ruddock notes, '[t]he underlying motivation of terrorism provides a compelling, nihilistic drive to terrorists that often trumps their value of the perpetrators' own lives.'[30]

Research by Baker, Harel, and Kugler indicates what they call 'virtue of uncertainty.'[31] According to their research, and other things being equal, uncertainty relating to the extent of sanction or the likelihood of detection before the commission of crime increases deterrence.[32] Citing this research, Zedner notes that 'in the case of determined terrorists it is probably fair to assume a high degree of calculative rationality, such that uncertainty could be expected to play a large part in deterrence.'[33] Furthermore, she endorses Baker *et al*'s view that 'if uncertainty in fact increases deterrence, then increasing uncertainty may be a cost-effective way to increase deterrence in situations in which there is reason to believe the existing level of deterrence is not optimal.'[34] Similarly, Saul argues that criminalising preparatory acts would have a strong deterrent effect on potential terrorists, who would otherwise not be deterred by the post-crime punishment, not to take the first step towards commission of a terrorist act.[35]

While accepting that the post-2001 Security Council resolutions focus on prevention of terrorist acts, others contend that the novelty of this approach is exaggerated.[36] For example, Labrode reiterates that public safety institutions have always attempted 'both to prevent crime and to solve offences already committed.'[37] Supporting this view, Saul notes that criminal law has never been exclusively reactive; it has played a preventive role as well.[38] Similarly, Ashworth and Zedner observe that 'even the most retributively focused system of criminal law could hardly fail to have regard to the prevention of the wrongs for which it

[29] Goldsmith, *supra* note 20, at 59; Cornall, *supra* note 23, at 50.

[30] Philip Ruddock, *Law as a Preventative Weapon against Terrorism*, *in* LAW AND LIBERTY IN THE WAR ON TERROR 3, 5 (Andrew Lynch, Edwina MacDonald and George Williams eds., The Federation Press 2007).

[31] Tom Baker, Alon Harel, and Tamar Kugler, *The virtues of uncertainty in law: an experimental approach*, 89 IOWA LAW REVIEW 443 (2004).

[32] *Id.*

[33] Lucia Zedner, *Neither Safe Nor Sound? The Perils and Possibilities of Risk*, 48 CANADIAN JOURNAL OF CRIMINOLOGY AND CRIMINAL JUSTICE 423, 429 (2006).

[34] *Id.* at 429.

[35] Saul, *supra* note 11, at 149.

[36] Labrode, *supra* note 14, at 10. Similarly, some legal scholars tend to refer to planning for and preparation to commit a terrorist act as inchoate offences on the grounds that they are similar to the traditional inchoate offences as in both cases defendants are convicted without completion of the substantive crime and with no harm caused. Bernadette McSherry, *Terrorism offences in Criminal Code: Broadening the Boundaries of Australian Criminal Laws*, 27 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 354 (2004); Saul, *supra* note 11, at 149.

[37] Labrode, *supra* note 14, at 10.

[38] Saul, *supra* note 11.

has decided to censure people.'[39] While acknowledging the seemingly perplexing nature of criminalising preparation for committing a terrorist act, Saul remarks that this is to be viewed as part of a wider expansion of liability in international criminal law as a whole.[40] Thus, he rejects the novelty of the proactive approach in counterterrorism noting that though the new terrorism offences reach much earlier or farther into acts preparatory to terrorism than in ordinary inchoate offences it is 'more a matter of degree than kind.'[41]

1.3. Human rights concerns associated with proactive counterterrorism

Prevention of commission of a terrorist act a laudable goal as it is, the criminal law's proactive approach to achieve this purpose has provoked concerns.[42] These concerns relate to a very difficult question in anticipatory prosecution which Chesney calls 'the early intervention dilemma',[43] the dilemma of 'when to arrest and begin prosecution.'[44] As Williams observes '[a]nti-terror laws raise important questions as to how early the law should intervene to pin criminal responsibility on actions that may give rise to a terrorist attack.'[45] It is a question of where the line should be drawn between 'innocent' conduct and that, which needs to be prohibited.[46]

As Zedner notes the criminal law's proactive approach opens a space for increasingly early and more intrusive measures,[47] which in turn results in an undesirable consequence of false positives.[48] It is true that on the continuum of

[39] ANDREW ASHWORTH AND LUCIA ZEDNER, PREVENTIVE JUSTICE 95 (Oxford University Press 2014).

[40] Saul, *supra* note 11.

[41] *Id.* at 149. Still others contend that "[t]he concept of prevention, while always in the picture of law enforcement, took on a particular meaning and urgency after September 11th." Gonzales, *supra* note 27, at 18.

[42] Lucia Zedner, *Pre-crime and pre-punishment: a health warning*, 81 CRIMINAL JUSTICE MATTERS 24 (2010); HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 196, 200 (Cambridge University press, 2nd ed., 2015). On the other hand, while acknowledging the potential human rights impact of a proactive approach in illiberal states, Laborde suggests that the approach would not be problematic in liberal jurisdictions. Labrode, *supra* note 14, at 11.

[43] Chesney, 'Beyond conspiracy?', *supra* note 19, at 433.

[44] Gonzales, *supra* note 27.

[45] Williams, *supra* note 26, at 1162.

[46] Lynch, Williams, and McGarrity, *supra* note 18, at 43.

[47] Zedner, 'Neither Safe Nor Sound?', *supra* note 33, at 430.

[48] Early intervention has another problematic side. It affects the prosecution's success rate. There is a possibility that while some of the arrested are truly dangerous, available evidence might not be adequate to result in their conviction (false negatives). Chesney agrees that early termination of gathering intelligence and evidence entails "greater risks of acquittals." Chesney, 'Beyond Conspiracy', *supra* note 19, at 427. On losing a court case being acceptable risk in an anticipatory prosecution, former U.S. Attorney General Alberto Gonzales notes "preventing the loss of life is our paramount objective. Securing a successful prosecution is not worth the cost of one innocent life." Gonzales, *supra* note 27. Furthermore the United States Deputy Attorney General Paul J. McNulty states "a reality of our prevention strategy is that we may find it more difficult in certain cases to marshal the evidence sufficient to convince 12 jurors beyond a reasonable doubt. That is because we must bring charges before a conspiracy achieves its goals – before a terrorist act occurs. To do so, we have to make arrests earlier than we would in other contexts where we often have the luxury of time to gather more evidence. This

anticipation and execution of a criminal thought the earlier the intervention, the lesser the evidence available to the prosecution. As Chesney rightly notes the farther one moves from a foretold completed act to the earlier stages of attempt, preparation, planning, 'the more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated.'[49] Though false positives cannot be avoided in criminal prosecution, be it proactive or reactive, the demand for prevention, by calling for intelligence and law enforcement agencies and blurring the distinction between evidence and intelligence, opens a space for 'greater tolerance for false positives.'[50]

As McCulloch has noted, under the proactive approach 'behaviours deemed to be preparatory acts are usually innocuous, harmless and lawful except for what is perceived to be the intention to engage in future act of terrorism.'[51] Similarly Galli observes 'the *actus res* of terrorist inchoate offences' are usually made to include 'a wide range of behaviours, sometimes apparently innocuous.'[52] For example, the law's 'going too far in criminalizing action engaged in prior to the commission of any terrorist act'[53] has been a common criticism against the Australian anti-terrorism legislation. Maidment, in connection with the Australian anti-terrorism law, observes that the type of conduct which may be caught by the provisions criminalising preparatory acts is unlimited.[54] Similarly, McSherry, referring to the same legislation, observes that 'any act' would be eligible to be the physical element of planning or preparation.[55]

---

heightened risk of acquittals is one we acknowledge and accept given our unwavering commitment to prevent terrorist risks from materializing into terrorist acts." McNulty, *supra* note 27. Similarly the Australian Federal Commissioner has noted:

> One of the biggest challenges we face is the acute need to manage risk … we must balance the needs of preventing an incident from occurring against the need to have gathered as much evidence as possible to ensure successful prosecution. As a result we intervene in a terrorist matter earlier than we normally would in other criminal investigations. McCulloch and Pickering, *supra* note 19, at 634-35.

[49] Chesney, 'Beyond Conspiracy?', *supra* note 19, 435.

[50] Kent Roach, *The Eroding Distinction between Intelligence and evidence in terrorism investigations*, *in* COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11 48, 49 (Nicola McGarrity, Andrew Lynch and George Williams eds., Routledge 2010).

[51] McCulloch, *supra* note 16, at 28-29.

[52] Francesca Galli, *Freedom of thought or 'thought-crimes'? Counter-terrorism and freedom of expression*, *in* COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW: CROSSING LEGAL BOUNDARIES IN DEFENCE OF THE STATE 106, 121 (Aniceto Masferrer and Clive Walker eds., Edward Elgar 2013).

[53] Lynch, Williams, and McGarrity, *supra* note 18, at 42.

[54] Richard Maidment, *Australia's Anti-terrorism Laws –the offences provisions*, A paper delivered to the National Imams Consultative Forum (21 April 2013) 5.n <http://asiainstitute.unimelb.edu.au/__data/assets/pdf_file/0009/760779/Theterrorismoffenceprovisions_-_21_April_2013.pdf>.

[55] McSherry, *supra* note 36, at 366.

David Anderson, the UK's Independent Reviewer of the Terrorism Legislation, observes the following in relation to preparatory offences under the UK Terrorism legislation:

> The potential for abuse is rarely absent … By seeking to extend the reach of the criminal law to people who are more and more on the margins, and to activities taking place earlier and earlier in the story, their shadow begins to loom over all manner of previously innocent interactions. The effects can, at worst, be horrifying for individuals and demoralising to communities.[56]

A drift towards criminalising innocuous conduct with the purpose of preventing future harm, Jakobs notes, is a feature of what he calls 'enemy criminal law.'[57] Thus, while criminalisation of preparatory conduct is described as 'a move from criminalizing conduct to criminalizing intention or thought,'[58] the anticipatory prosecution is described as 'a shift from prosecuting tangible terrorism conspiracies to prosecuting bad thoughts.'[59] Consequently, contrasting the impact on human rights of the broadness of the terrorism definition with the criminal law's proactive approach, McCulloch has attached more significance to the latter.[60]

1.4. The Need for caution in the application of proactive counterterrorism

While Zedner recognises that 'prevention makes good sense', she notes the impossibility of an accurate prediction of human behaviour as a major problem that would call for what she states is 'a health warning.'[61] A precautionary approach as a measure 'that act[s] coercively against individuals,' Zedner advises, 'need[s] to be subject to rigorous principled restraint.'[62] Zedner recommends firmness 'on proof beyond reasonable doubt that an individual has the necessary intention … to commit the substantive offence before we punish'[63] as a restraint to minimise the chance of conviction of innocent persons. As noted above, owing to the 'tendency to devise offences around a minimal *actus reus*'[64] almost any conduct can satisfy this element of terrorist preparatory offences. Consequently, it is the requirement that

---

[56] David Anderson, 2013, *Shielding the Compass: How to Fight Terrorism without Defeating the Law*, quoted in ANDREW ASHWORTH AND LUCIA ZEDNER, PREVENTIVE JUSTICE 105 (Oxford University Press 2014).

[57] G Jakobs, *Terroristen als personen im Recht?* 117 ZEITSCHRIFT FUR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 839 (2006) as quoted in Galli, *supra* note 52, at 117.

[58] Inayat Bunglawala, *Don't Even Think about It*, THE GUARDIAN (online), 6 December 2007 <http://www.theguardian.com/commentisfree/2007/dec/06/donteventhinkaboutit>. Also see: Duffy, *supra* note 41.

[59] Dahlia Lithwick, *Stop Me Before I Think Again*, THE WASHINGTON POST (online) 16 July 2006, B03, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/14/AR2006071401383_pf.html>.

[60] McCulloch, *supra* note 16, at 28.

[61] Zedner, 'pre-crime and pre-punishment', *supra* note 42.

[62] *Id.* at 25.

[63] *Id.*

[64] Galli, *supra* note 52, at 121.

the defendant does the act with an intention to commit a terrorist act that is seen as a bulwark against the potential overreach of the law that creates preparatory offences.[65] As such, Galli observes that in terrorist preparatory activities more importance is given to '*mens rea* over the *actus reus*.'[66] The wordings of provisions criminalising preparatory offences make the decisiveness of intention in preparatory offences clear. For example, the UK Terrorism Act Section 5(2) criminalises an act where 'an individual with the *intention* of committing acts of terrorism … engages in any conduct in preparation for giving effect to his intention.'[67] Relating to the Australian anti-terrorism legislation, Maidment points to the requirement that there be proof of a link between the alleged conduct and a foretold terrorist act, which is satisfied by proof of intention. [68] There is an intention to commit a terrorist act where the actor meant to 'do an act in preparation for a terrorist act.'[69] This accompanying intention gives an otherwise lawful/harmless activity a terrorist character.

On the importance of the requirement of intention to mitigate a potential intrusiveness of criminalising precursor offences, Rose and Nestorovska observe that an 'increasing remoteness of the supporting act is likely to be directly proportional to the increasing difficulty of proving *mens rea*. If no *mens rea* is established, then it is clear that no offence is proved.'[70] Though proving intention is 'a complex and exacting task for the prosecution',[71] it is this requirement that filters out innocuous activities which would have been otherwise caught under the broad physical element of preparatory offences.

However, McCulloch and Wilson observe that the guarantee that the requirement of proof of intention offers to safeguard the prosecution and conviction of innocent persons has been more apparent than real — the courts interpret the law in such a manner that satisfying the intention requirement is not difficult. Having reviewed court cases in Australia, UK and the US, they conclude that 'perceptions about the defendant's threatening identity have been bundled with evidence of intent.'[72] That is 'suspicious identity … stands in as proxy for intention,' a shortcut to get conviction.[73] In reality, they argue that 'prosecution of non-imminent crimes

[65] McCulloch, *supra* note 16, at 29. However, Saul observes that there are times where the standard of proof for these offences is lowered by requiring recklessness or dispensing with the *mens rea* requirement at all. Saul, *supra* note 11, at 148-149.

[66] Galli, *supra* 52, at 121.

[67] Section 5(2), Terrorism Act quoted in Zoe Scanlon, *Punishing proximity: Sentencing Preparatory Terrorism in Australia and the United Kingdom*, 25 CURRENT ISSUES IN CRIMINAL JUSTICE 764, 769 (2014) (emphasis added).

[68] Maidment, *supra* note 54, at 5.

[69] *Id.*

[70] G.L. Rose and D. Nestorovska, *Australian counter-terrorism offences: Necessity and clarity in federal criminal law reforms*, 31CRIMINAL LAW JOURNAL 20, 29 (2007).

[71] Maidment, *supra* note 54, at 6.

[72] McCulloch and Wilson, *supra* note 15, at 64.

[73] McCulloch, *supra* note 16, at 29.

makes it difficult for defendants to establish their innocence.'[74] Similarly Lynch, Williams, and McGarrity, citing court judgments in different terrorism prosecutions in Australia, argue that criminalising the very early stages of a terrorist act has exposed individuals to criminal responsibility without forming 'a clear criminal intent.'[75]

2. Preparatory offences under the ATP

Coming to the ATP, Article 4 provides '[w]hosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article.' This provision creates preparatory offences and prescribes punishment for the offences.[76] It establishes five different terrorism-related offences representing different steps towards the commission of a principal terrorist act: planning, preparation, conspiracy, incitement and attempt.[77] Article 4 criminalises both inchoate[78] and pre-inchoate offences of planning[79] and preparation.[80]

Apparently, by referring to '[w]hosoever plans, prepares, … to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation,' Article 4 does not seem to require an overt act.[81] The phrasing of

---

[74] McCulloch and Wilson, *supra* note 15, at 66.

[75] Lynch, Williams, and McGarrity, *supra* note 18, at 33.

[76] As Bentham has noted the laws that criminalise conduct and the laws that prescribe for its punishment are different:

> A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws; not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal; and, Let the judge cause whoever is convicted of stealing to be hanged.*

J. BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (W. Harrison ed., 1948). On the other hand, Meir Dan-Cohen notes the laws that prescribe for punishment of a conduct necessarily *imply* the laws that criminalize conduct. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,* 97 HARVARD LAW REVIEW 625, 627 (1984). Hart has argued that such approach obscures "the specific character of law as a means of social control." H.L.A. HART, THE CONCEPT OF LAW 39 (Clarendon Press 1961).

[77] This blend of different offences into one criminal provision would be a source of confusion for the defendants charged under this provision and opens a space for arbitrariness by the prosecution and the courts.

[78] Attempt is a crime under Article 27 of the Cr. Code of Ethiopia in general terms to apply to all principal crimes. Articles 36 and 38 of the Cr. Code deal with incitement and conspiracy respectively. While Article 36 (2) criminalises incitement only where the incited person at least attempts the crime, Article 4 of the ATP does not have such condition. Under the Cr. Code conspiracy is criminalised in exceptional cases, which are provided under Articles 257 (b), 274 (b), 300 and 478 of the Cr. Code. By virtue of Article 38(1) of the Cr. Code, in other cases, conspiracy serves as aggravating circumstance during the sentencing stage. On the other hand, Article 4 of the ATP makes it a crime to conspire to commit a terrorist act.

[79] Planning to commit crimes against the constitution or the state and international law are punishable under Articles 257(b) and 274(b) of the Cr. Code, respectively.

[80] As provided under Article 26 of the Cr. Code, in principle, preparation to commit a crime is not punishable.

[81] Wondwossen, *supra* note 4.

this provision is different from parallel provisions in other jurisdictions, where an overt act is explicitly required. For example, Article 101.6 (1) of the Australian Criminal Code criminalizes doing 'any *act* in preparation for, or planning a terrorist act.'[82] The UK's equivalent provision, *Section 5(2) of the Terrorism Act,* criminalises when an individual 'with the intention of committing acts of terrorism or assisting another to commit such acts, engages in any *conduct* in preparation for giving effect to his intention.'[83] Though arguably preparation necessarily involves an overt act,[84] planning being a step before preparation can purely be a mental activity with no overt act.[85] To the extent that Article 4 of the ATP criminalises planning that does not involve an overt act, it does criminalise a mere thought contrary to Article 29 of the Ethiopian Constitution that provides for freedom of thought and opinion. This renders Article 4 of the ATP to be susceptible for what Lithwick describes as the worst case scenario of anticipatory prosecution where individuals are prosecuted for their 'bad thoughts.'[86]

Having expressed prosecuting bad thoughts as undesirable, Lithwick warns that maximum care has to be taken for this not to happen.[87] Thus, to avoid this anomalous consequence one may argue that because '*planning*' is listed along with conspiracy, attempt and incitement (inchoate offences which normally require an overt act), a physical element (conduct) has to be read into it. This approach is supported by Article 23 of the Cr. Code. By virtue of Article 23 (2) of the Code, 'a crime is only completed when all its legal, material and moral ingredients are present.' Though the wording of Article 4 of the ATP does not appear to incorporate what is referred to as a material element, Article 23(2) of the Cr. Code in tandem with the preceding construction suggests that the material element is implicitly part of the crimes that Article 4 establishes.[88] It follows that planning which does not involve an overt act does not fall under Article 4 of the ATP. This would make Article 4 congruent with Article 29 of the FDRE Constitution.

While reading conduct element into Article 4 narrows its scope compared to its reach without the physical act requirement, the lack of restraint on the range of activities that constitute this element lessens the significance of this interpretation in narrowing its scope and protecting innocent people. There is no limit on the

[82] Criminal Code Act (1995).

[83] Terrorism Act 2006 (UK) (emphasis added).

[84] Article 26 of the Cr. Code defines preparatory acts as '*acts* which are committed to prepare or make possible a crime, particularly by procuring the means or creating the conditions for its commission' (emphasis added). Article 36 of the ATP authorizes resort to the Cr. Code where doing so is necessary to fill gaps in or interpret its provisions.

[85] The term 'plan' refers to 'an intention or decision about what one is going to do.' *English Oxford Dictionaries*, https://en.oxforddictionaries.com/definition/plan.

[86] Lithwick, *supra* note 59.

[87] *Id.*

[88] Article 36(2) of the ATP states '[w]ithout prejudice to the provisions of sub article (1) of this Article, the provisions of the Criminal Code and Criminal Procedure Code shall be applicable.'

type of physical act that would fall under Article 4. Any act is eligible to fulfil the physical element requirement of the offence.[89] Any slightest action suffices to satisfy the act requirement. Thus, the concern raised above in relation to the human rights impact of preparatory offences in general is relevant to Article 4 of the ATP.

Furthermore, Article 4 of the ATP does not specify the mental element for the offence thereunder. This silence invites resort to the Cr. Code.[90] Article 57(1) of the Cr. Code provides that a person is guilty and responsible under the law where 'he commits a crime either intentionally or by negligence.' Article 59 (2) provides 'crimes committed by negligence are liable to punishment only if the law so expressly provides.' Thus the cumulative reading of the two provisions indicates that where the law creating the offence does not specify the mental element, intention is presumed to be the required mental element under that law. It follows that no reference to a mental element under Article 4 of the ATP means the acts envisaged thereunder would be criminal and punishable only where the doer does any of the acts intentionally. Because, as noted above, almost any conduct satisfies the material element of Article 4, the real test of whether or not someone's act constitutes preparation for or planning a terrorist act centres on the actor's intention.

In its relevant part on the meaning of intention, Article 58(1) of the Cr. Code provides that a person is deemed to have committed a crime intentionally where he [sic] commits an act 'with full knowledge and intent in order to achieve a given result.' As noted above, Article 4 criminalizes planning, preparation… to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of the ATP. These offences are created to prevent commission of any of the six terrorist acts listed under Article 3.[91] To use Moore's terms these offences are 'wrongs by proxy'[92] but not stand-alone offences. Thus, for the purpose of Article 4 of the ATP, intention refers to one's doing of an act knowing and intending that she/he is doing the act in planning, conspiring, attempting, inciting or preparation for commission of any of the six terrorist acts listed under Article 3 of the ATP. The

[89] Only acts that are specifically criminalised under a separate provision of the ATP would be excluded from the scope of an act under Article 4. For example, Article 7 of the ATP criminalises taking training or becoming 'a member or participating in any capacity for the purpose of … committing a terrorist act ….' Similarly possessing or using 'property knowing or intending it to be used to committing or facilitating a terrorist act' is criminalised under Article 8 of the ATP.

[90] Anti-Terrorism Proclamation No. 652/ 2009 (Article 36), see *supra* note 88.

[91] Thus, preparation for or planning of committing any act other than those listed under Article 3 (1)-(6) of the ATP would not fall under Article 4 even if it is accompanied by the requisite motive and meant to coerce the government, intimidate the public or section of the public, or destabilise or destroy the fundamental political, constitutional, economic or social institutions of the country.

[92] MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 784 (Clarendon Press 1997) cited in Kimberly Kessler Ferzan, *Inchoate Crimes at the Prevention/punishment Divide*, 48 SAN DIEGO LAW REVIEW 1273, 1283 (2011).

intention element under Article 4 is established where the prosecution proves one or a combination of the six offences listed under Article 3 as foretold crime/s.

To prove a pre-crime terrorist activity under Article 4, the prosecution needs to establish certain conduct and is required to show that the prospective action to which the conduct in preparation or planning was directed has all of the characteristics of a terrorist act, save completion. That is, the prosecution has to establish that the actor engages in certain conduct with a view '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, economic or social institutions of the country' through the commission of one of the six acts listed under Article 3. Thus, at the time of carrying out a certain deed in preparation for or planning of committing any of the six acts that Article 3 refers to, the actor has the motive and accepted the means of advancing the cause to which Article 3 refers.[93] This makes these elements of Article 3 central to prove a precursor crime under Article 4.[94]

As noted above proving the existence of elements of a terrorist act for a prospective act is a complex and exacting task for the prosecution. However, it is that requirement which gives an alleged conduct its terrorist character and provides a safeguard against prosecution of innocent persons for non-terrorism related conduct.[95] Following Maidment's argument, it is the applicability of elements of Article 3 that qualifies a conduct as preparation for or planning of *the commission of a terrorist act* under Article 4.[96] Had it not been for this requirement, the type of conduct that Article 4 refers to, as noted above, would have been boundless. This relation between Articles 3 and 4 can be illustrated by employing Richard Maidment's approach[97] to distinguish a precursor crime from a principal terrorist act.

Violation of Article 3 would be established where the following are proved.

[93] To have the motive and to decide on the means of advancing the cause are mental processes that do not need an overt physical activity. What needs preparation or planning is the actual causing of the damage or imperilment through committing the acts listed under Article 3. Indeed, the motive to advance any one of the three causes and the conviction to use the violent means to promote one's cause precede even the planning and the preparation. In that sense what makes planning and preparation different from attempt is that the latter is closer to causing the damage or endangerment.

[94] The act would be categorized as planning, preparation, conspiracy, attempt and incitement depending on several factors including its proximity to the principal terrorist act.

[95] Scanlon, *supra* note 67, at 764; Maidment, *supra* note 54; Rose and Nestorovska, *supra* note 70, at 55.

[96] Maidment, *supra* note 54; Rose and Nestorovska, *supra* note 70, at 55.

[97] Maidment, *supra* note 54, at 5.

1) A defendant's conduct,
   And
2) The defendant's motivation being to 'advance a political religious or ideological cause',
   And
3) The defendant's intention of:
   a) Coercing the government,
      Or
   b) Intimidating the public or Section of the public
      Or
   c) Destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country
   And
4) The defendant's conduct has:
   a) caused a person's death or serious bodily injury; or
   b) created serious risk to the safety or health of the public or section of the public; or
   c) caused kidnapping or hostage taking; or
   d) caused serious damage to property; or
   e) caused damage to natural resource, environment, historical or cultural heritages; or
   f) endangers, seizes or puts under control, causes serious interference or disruption of any public service; or
   g) threatened commission of any of the acts stipulated 'a' to 'f' above.

On the other hand, violation of Article 4 would be established where the following are proved.

1) A defendant's conduct,
   And
2) The defendant's motivation being to 'advance a political religious or ideological cause',
   And
3) The defendant's intention of:
   a) Coercing the government,
      Or
   b) Intimidating the public or Section of the public
      Or
   c) Destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country
   AND
4) The defendant's *intention* that *their conduct* would be of a kind that would under normal circumstances:

a) cause a person's death or serious bodily injury; or,
b) create serious risk to the safety or health of the public or section of the public; or
c) cause kidnapping or hostage taking; or
d) cause serious damage to property; or
e) cause damage to natural resource, environment, historical or cultural heritages; or
f) endanger, seize or put under control, causes serious interference or disruption of any public service;

From this breakdown two points can be made on the relation between Article 3 and Article 4. First, the difference between the two provisions lies in the fourth component.[98] While a prosecution is to be based on Article 3 where any of the six acts has *actually materialised*, it would be based on Article 4 where there is merely an *intention to commit* any of these acts. Second, the last three components of Article 4 relate to the phrase '*to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3* of this Proclamation.' These components can only be established by linking the first element of Article 4 (conduct) to Article 3. This interpretation, by reading key elements of a terrorist act incorporated under Article 3 into Article 4, confines the scope of conduct that Article 4 captures to acts which are truly precursor to a principal terrorist act.

3. Membership offences under the ATP

Unlike preparation for or planning of a terrorist act, Resolution 1373 does not require states to criminalise membership of a terrorist organisation.[99] This is despite the similarity between justifications for both: prevention of a 'remote risk of grave harm to highly important legal interests.'[100] Criminalisation of membership of a terrorist organisation is an extension of a proactive application of the criminal law for the sake of prevention of commission of a terrorist act. However, many do not support criminalisation of mere membership of a terrorist organisation for different reasons.[101] First, criminalization of membership contradicts the principle of legality/rule of law. For example, Allen has argued:

> [a]lthough the point seems not often made, the *nulla poena* principle has important implications not only for the procedures of justice but also for the substantive criminal law. It speaks to the questions, What is a crime?

[98] While conduct under Article 3 refers to that which has *actually caused* any of the damages or risks listed under number four, a conduct under Article 4 is the conduct that the actor engages in with *the intention to cause* one of these damages or risks.

[99] Paragraph 2(a) of the Security Council Resolution 1373 requires states to suppress 'recruitment of members of terrorist groups.' SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).

[100] Liat Levanon, *Criminal Prohibitions of Membership in Terrorist Organizations*, 15 NEW CRIMINAL LAW REVIEW 224, 225 (2012).

[101] For an opposing view see: *Id.*

> And Who is the criminal? The *nulla poena* concept assumes that persons become criminals because of their acts, not simply because of who or what they are.[102]

Allen notes that laws criminalising one's status/membership of an association deny an opportunity to members to adapt their conduct to the law's requirement.[103] Citing Allen, McSherry argues that governments should punish criminal conduct not criminal types.[104] This is 'an important premise' of the rule of law which requires that there should be no punishment without law (*nulla poena sine lege*).[105] Thus, in analysing section 102.3 of the Criminal Code of Australia which criminalises membership of a terrorist organisation, McSherry argues that laws that criminalise mere membership breach the *nulla poena* principle.[106] Under such laws, one is deemed to commit a crime not because they committed a terrorism-related activity but simply because they are a member of a terrorist organisation.[107]

Second, criminalisation of membership is objectionable on freedom of association and due process grounds.[108] As Roach has noted criminalising membership of proscribed organisations is a practice found in non-democratic countries.[109] Legislative history of Section 2339B Title 18 of the United States Code, which criminalises material support to a Designated Foreign Terrorist Organisation, indicates that its preceding versions were rejected on the ground that the drafts capture mere membership in violation of Freedom of Association that the First Amendment to the Constitution recognises.[110]

The United States, without directly criminalising membership of a terrorist organisation, prohibits provision of material support to a Designated Foreign Terrorist Organisation.[111] 'Material support or resources' is defined as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal

---

[102] FRANCIS ALLEN, THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW 15 (Oxford University Press 1996).

[103] *Id.* at 15-16.

[104] Bernadette McSherry, *The Introduction of Terrorism-Related Offences in Australia: Comfort or Concern?*, 12 PSYCHIATRY, PSYCHOLOGY AND LAW 279 (2005).

[105] *Id.* at 282.

[106] *Id.* at 283.

[107] Edwina MacDonald and George Williams, *Combating Terrorism* 16 GRIFFITH LAW REVIEW 27, 37 (2007).

[108] Rachel E. VanLandingham, *Meaningful Membership: making war a bit more criminal*, 35 CARDOZO LAW REVIEW 79, 82-83 (2013-2014).

[109] Kent Roach, *The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001*, STUDI SENESI, 510-511 (2004) as quoted in MacDonald and Williams, *supra* note 107.

[110] VanLandingham, *supra* note 108, at 81-89; Chesney, 'The Sleeper Scenario', *supra* note 19, at 4-18.

[111] 18 USC § 2339B.

> substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[112]

Owing to the capacious nature of the definition, many liken criminalisation of material support to criminalisation of membership or guilt by association.[113] For example, Cole argues that by criminalising what is otherwise a lawful and peaceful act in the name of material support to a terrorist organisation, the statute criminalises the morally innocent which means treating the actor as 'guilty only by association.'[114] But the US Supreme Court decided that because the statute prohibits not being a member of a terrorist organisation but provision of material support, it does not contradict freedom of association under the First Amendment.[115] The court makes a distinction between membership and material support. Critics do not agree with this distinction on the ground that the conduct, which the statute criminalises, constitutes manifestations of one's membership.[116] However, one thing is clear. Mere membership, without more (passive-nominal membership), is not a crime under this law.[117] In the US:

> Supreme Court jurisprudence has long provided a bulwark against the criminal prohibition based solely upon group membership. Since the 1960s, this protection has taken the form of a scienter requirement, which protects members who lack the specific intent to further a particular group's criminal objectives.[118]

Similarly, in both Canada and New Zealand mere membership of a terrorist organisation is not criminalised. Under the title 'Participation in Activity of Terrorist Group', the Canadian Criminal Code criminalises those who 'knowingly *participate in* or *contribute to*, directly or indirectly, any activity of a terrorist group *for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity*.'[119] Similarly, the *New Zealand's Terrorism Suppression Act 2002* captures those who participate in a terrorist group or organisation 'in order to enhance the ability of the group or organisation to commit or participate in the commission of a

---

[112] 18 USC § 2339A (b).

[113] David Cole, *Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'*, *in* COUNTER TERRORISM: DEMOCRACY'S CHALLENGE 233 (Andrea Bianchi & Alexis Keller eds., Hart Publishing 2008); Levanon, *supra* note 100.

[114] Cole, *supra* note 113, at 241.

[115] *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010), 130 S.Ct. 2705.

[116] Cole, *supra* note 113; VanLandingham, *supra* note 108.

[117] VanLandingham, *supra* note 108, at 81.

[118] Scales v. United States, 367 U.S. 203, 208 (1961) in *id.*, at 83.

[119] § 83.18(1) R.S.C., ch. C -46 (1985) (emphasis added).

terrorist act.[120] Thus, a person's participation should be with a certain purpose related to terrorism in mind for the statute to capture the person.[121]

On the other hand, the United Kingdom and Australia criminalise membership of a terrorist group. The UK Terrorism Act 2000 prohibits belonging or professing to belong to a proscribed terrorist organisation.[122] By confining its applicability to membership of a proscribed organisation, Sec. 11 of the UK Terrorism Act 2000 is narrower in scope than its parallel in the Australian Criminal Code which captures membership of both proscribed and non-proscribed terrorist organisations.[123] Within the Australian approach there is a risk that a group of people who do not consider themselves as an organisation could be treated as such with a consequence of liability for membership and leadership in the group. There is a chance that they know they have formed an organisation where charges are laid.[124]

The requirement of participation in a terrorist organisation or terrorist act serves the underlying purpose of the membership offence — preventing commission of a terrorist act — while ensuring that punishment is imposed for an act of participation but not for one's mere status as a member of the organisation.[125] Thus, the requirement of participation in a terrorist organisation has been recommended to replace the mere membership offence in Australia.[126]

Within the ATP, participation in a terrorist organisation is regulated under Article 7. It provides that:

> 1/ Whosever [sic] recruits another person or takes training or becomes a member or participates in any capacity for the purpose of a terrorist organisation or committing a terrorist act, on the basis of his level of participation, is punishable with rigorous imprisonment from 5 to 10 years.
>
> 2/ Whosever [sic] serves as a leader or decision maker in a terrorist organisation is punishable with rigorous imprisonment from 20 years to life.

Article 7 envisions a range of crimes that one may commit. It criminalises participation in a terrorist organisation or terrorist act ranging from participating *in any capacity* to serving as a leader of that organisation. While Sub Article 2 deals with leadership of a terrorist organisation, Sub Article 1, like Article 4 of the ATP, refers to different types of criminal conduct. It criminalises training, membership,

---

[120] Terrorism Suppression Act 2002 (NZ), s 13.

[121] MacDonald and Williams, *supra* note 107, at 39.

[122] Terrorism Act 2000 (UK), s. 11as quoted in MacDonald and Williams, *supra* note 107, at 38.

[123] Section 102.3 Criminal Code.

[124] MacDonald and Williams, *supra* note 107, at 38.

[125] *Id.* at 40.

[126] Parliamentary joint committee on Intelligence and Security, Parliament of Australia (2006), 74 as quoted in *id.*

recruiting and participation *in another capacity* for the purpose of a terrorist organisation or carrying out a terrorist act. In relation to membership, at first sight mere membership of a terrorist organisation, a type of membership in a terrorist group that involves doing nothing of value for the group appears to fall under Article 7(1).[127] It follows that in so far as one is a member in a terrorist organisation, it does not seem that the prosecution needs to prove more (involvement in a certain terrorism-related conduct) to charge one under this provision.

However, a close reading of the provision suggests that mere membership is not criminalised. The term *participation*, which refers to 'the action of taking part in something,'[128] has a vital place under Article 7. First, the caption of the Article is 'participation in a terrorist organisation' which means membership is listed under the umbrella of *participation*. Second, the content of Sub Article 1 indicates the weight given to the term *participation* and reinforces the relation between it and membership. The first limb of the Sub Article by providing '[w]hosever [*sic*] recruits another person or takes training or becomes a member or *participates in any capacity* for the purpose of a terrorist organisation or committing a terrorist act …', suggests that it provides an illustrative list of *participation* in a terrorist organisation or in the commission of a terrorist act. This, in turn, indicates that the 'membership' envisioned is not a passive-nominal membership but that which involves some form of *participation*. Moreover, the second limb of the Sub Article which provides that one is punishable with rigorous imprisonment from 5 to 10 years 'on the basis of *his* [sic] *level of participation*,' indicates that the punishment needs to match one's degree of involvement in a terrorist organisation, strengthening the significance of participation.

In jurisdictions where mere membership is prohibited, it is criminalised separately from other acts that require participation.[129] Under the ATP, membership is mentioned along with conduct that requires some form of involvement in an activity relating to a terrorist organisation or terrorist act. It is associated with engaging in recruiting members for a terrorist organisation, taking training or participating in any other capacity in a terrorist organisation or committing a terrorist act, all of which involve some kind of a positive step towards contributing to the terrorist organisation or to the commission of a terrorist act.

Whether or not being a member, in and by itself, satisfies the requirement of *participation* in a terrorist organisation has been discussed in relation to anti-terrorism laws in other jurisdictions. MacDonald and Williams compare and contrast anti-terrorism laws of Australia, Canada, New Zealand, the United

[127] For this type of involvement in an organization see: VanLandingham, *supra* note 108, at 93.

[128] *Oxford Dictionaries*, <http://www.oxforddictionaries.com/definition/english/participation>.

[129] For example Terrorism Act 2000 (UK), S 11; Criminal Code (Australia) Section 102.3.

Kingdom and the United States in relation to the approach to criminalising membership of a terrorist organisation.[130] As noted above, while Australia[131] and the United Kingdom[132] criminalise membership in a terrorist organisation, others do not. New Zealand's Terrorism Suppression Act 2002[133] and the Canadian Criminal Code[134] target those who participate in a terrorist organisation or in its carrying out of a terrorist act. MacDonald and Williams referring to the requirement of *participation* interpret both provisions as not capturing 'merely the status of membership'[135] but one who participates with some purpose related to terrorism in mind.

In view of its emphasis on participation, Article 7(1) of the ATP is akin to parallel anti-terrorism provisions in these jurisdictions. Thus, MacDonald and William's interpretation of these provisions of the anti-terror laws of New Zealand and Canada would be relevant to interpret Article 7(1) of the ATP. Thus, following the same logic, Article 7(1) of the ATP does not allow prosecuting and punishing one for being a member of a terrorist organisation. To be prosecuted, the member has to *participate* in a certain capacity for the purpose of the terrorist organisation or committing a terrorist act.[136]

Another reason to construe Article 7(1) of the ATP to require some form of participation in addition to membership relates to Article 31 of the FDRE Constitution which provides for freedom of Association.[137] In explaining the reason for not criminalising membership of a terrorist organisation in Canada, New Zealand, and the United States, Roach has noted that in these countries freedom of association is protected by bills of rights.[138] Without prejudice to differences in enforcement, by recognising freedom of association at a constitutional level, Ethiopia is comparable to these jurisdictions. Thus the same logic — constitutional recognition of freedom of Association — would make Article 7(1) of the ATP unable to capture mere membership in the face of Article

---

[130] MacDonald and Williams, *supra* note 107 at 36-40.

[131] Section 102.3 Criminal Code.

[132] Terrorism Act 2000 (UK) s 11.

[133] Terrorism Suppression Act 2002 (NZ) Section 13.

[134] Criminal Code, RS 1985, c C-46, s 83.18.

[135] MacDonald and Williams, *supra* note 107, at 39.

[136] Similarly, while Germany criminalises membership of a terrorist organisation, to be considered as a member one has to engage in activities towards the terrorist objectives of the organisation after joining it. Merely joining a terrorist organisation does not satisfy the requirement of membership. Levanon, *supra* note 100 at 243-44.

[137] Article 31: Freedom of Association

> Every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited." By virtue of Article 13 (2) of the FDRE Constitution, this provision is to be construed in light of Article 20 and 22 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, respectively.

[138] Roach, *supra* note 109.

31 of the Constitution. Thus, the requirement of *participation* narrows the scope of members in a terrorist organisation that would fall under this provision by excluding passive-nominal members.

However, the phrase 'participation in *any capacity*' is so broad that there is a risk that it takes in any participation in the organisation irrespective of its relation with a terrorist act. This would be problematic when the provision is applied to participation in what are known as dual organisations, which engage in both terrorist and non-terrorist activities.[139] As Weinberg and Pedahzur have noted, under some circumstances terrorist organisations create a 'political wing' and become dual organisations. The reverse is not uncommon. [140] Once the organisations are transformed into dual purpose organisations, they engage in both violent and peaceful political activities simultaneously.[141] As Levanon has argued criminalisation of members of such organisations would be justifiable in relation to those who are involved in a terrorist wing. In dual purpose organisations, Levanon asserts, criminal liability should not be imposed as early as joining the organisation as a member. As far as such organisations are concerned, criminalisation of membership is 'justifiable only in later stages of activity'[142] where there is tangible evidence indicating the member's inclination to the terrorist side of the organisation.[143]

In *Scales v. the United States*, the US Supreme Court deals with membership in organisations having both legal and illegal objectives. The court contrasted these organisations with pure criminal conspiracies which have only criminal purposes.[144] According to the Court, criminalising 'all knowing association' with the latter, as opposed to organisations with dual purpose, would not harm legitimate political expression or association. Subsequent court cases confirm this.[145] For example in *Elfbrandt v. Russell*, the Supreme Court held that '[t]o presume conclusively that those who join a "subversive" organisation share its unlawful aims is forbidden by the principle that a State may not compel a citizen to prove that he has not engaged in criminal advocacy.'[146] Furthermore the court held

[139] Levanon, *supra* note 100; VanLandingham, *supra* note 108, at 84.

[140] LEONARD WEINBERG AND AMI PEDAHZUR, POLITICAL PARTIES AND TERRORIST GROUPS 37 (Routledge 2003).

[141] *Id.* at 61.

[142] Levanon, *supra* note 100, at 229.

[143] If mere membership is to be criminalised, Levanon argues, it should be in relation to organisations that have as their entire purpose the commission of a terrorist act. Levanon, *supra* note 100 at 229.

[144] VanLandinghamt, *supra* note 108, at 84.

[145] *Id.* Compare *Holder v. Humanitarian Law Project* 561 U.S. 1 (2010), 130 S.Ct. 2705 where the Supreme Court held that provision of otherwise a lawful service, such as legal advice, to a terrorist organisation is prohibited under Section 2339 B.

[146] *Elfbrandt v. Russell* 384 U. S. 17-18 (1966).

'[t]hose who join an organisation without sharing in its unlawful purposes pose no threat to constitutional government.'[147]

Article 7(1) does not make such distinction between participations in terrorist and non-terrorist sides of a dual purpose organisation. Because it does not confine its scope to an organisation's terrorist activity, it seems to capture participation not only in terrorist but also non non-terrorist activities of a dual purpose terrorist organisation.

Conclusion

There are sound reasons for adopting a proactive approach to counterterrorism. While the criminal law's proactive approach has been in place in contexts other than countering terrorism, it has been a predominant strategy in the context of the latter. Because the approach involves prediction of future behaviours based on limited information, there is a high risk that the approach may result in false positives, which calls for maximum care in its implementation. The requirement that one's intention to commit a principal terrorist act, which can be established through demonstrating a terrorist act as a foretold crime, be proved in anticipatory prosecutions is proposed as a mechanism to mitigate the human rights casualty.

The ATP incorporates a precautionary approach to countering terrorism. Provisions of the ATP relating to preparatory offences and membership offences are by and large vague and, therefore, susceptible to misuse and abuse. This article has suggested a precautious reading of these provisions to minimize such occurrences. A close reading of Article 4, by tying conduct that constitutes a precursor crime to the intention to commit any one of the six terrorist acts listed under Article 3, would guarantee that one would not be caught under Article 4 of the ATP for a seemingly, but only for a truly, precursor crime. Similarly, by conditioning criminal responsibility arising from membership of a terrorist organisation upon actual participation in a terrorist organisation, as contrasted to mere membership, the scope of conduct that Article 7 of the ATP captures could be narrowed down to the truly dangerous persons.[148] This path, which supports a pragmatic role for the court in the counterterrorism space in Ethiopia, is not only possible, but prudent and sufficiently mindful of the constitutional role of the judiciary.

* * *

[147] *Elfbrandt v. Russell* 384 U. S. 17 (1966).

[148] However, while requiring *actual participation* in a terrorist organisation or terrorist act precludes passive members, that the membership offence encompasses *any participation* still makes it broad enough to capture those who do not have the true intention to be involved in terrorist activities or in terrorism-related functions of a dual organisation.