



**ETHIOPIA HUMAN
RIGHTS PROJECT**

Federal Public Prosecutor of Ethiopia vs. Soleyana Shimeles et al.

Legal Commentary

Ethiopia Human Rights Project (EHRP)

I. Executive Summary

On July 17, 2014, the Federal Prosecutor of Ethiopia charged 10 individuals (seven members of the Zone 9 blogging collective and three independent journalists) on two counts of terrorism under the case name Public Prosecutor vs. Soleyana Shimeles et al. The first count accuses the defendants of Terrorism, which is in violation of Articles 3(2) and 4 of the Anti-Terrorism Proclamation. The second count is for “outrages against the constitution” under Article 238(1) of the Federal Criminal Code. However, the court ultimately dropped this second charge on November 3, 2014. Five of the charged were released on July 8 & 9, 2015 after the prosecutor dropped charges, four individuals remain in custody and one remains charged in absentia. The purpose of this document is to analyze both the amended and dismissed charges against all 10 defendants.

The Ethiopia Human Rights Project (EHRP) calls for the charges to be dropped against the remaining five defendants as the trial process has been neither free nor fair and further human rights violations have occurred during the defendants’ time in custody. Key objections are highlighted below and further detailed in the subsequent text:

- ✚ **Denial of Bail:** The right to bail, the constitutional right of any defendant has been violated on the case of Soleyana et. al. The right to bail of the defendants had been restricted by the mere fact that they were charged of terrorism.
- ✚ **Failure meet specificity thresholds in the charge:** Ethiopian law requires that a prosecutor must establish clear and specific material, moral and legal crimes to constitute a charge. The absence of such clarity in the charge affects the accused’s’ constitutional right to clearly understand the criminal charge brought against them and curtails their right to challenge the prosecutor’s criminal allegation. This was apparent in several instances:
 - **Material:** The prosecutor did not identify by name or other appropriate means the alleged clandestine/undercover enterprise established, joined and run by the accused. Without clearly understanding this, it is impossible to file a case according to procedure law.
 - **Legal:** The charge states the third defendant, Natnael Feleke Abera, received USD 2400 and distributed the money to members “under his command.” But the prosecutor did not sufficiently indicate who sent said money to Natnael and for what purpose it is used. Thus, there is no evidence that the funds were received or utilized for any purpose, much less in the commission of any illegal act.
 - **Legal:** The charge states that the defendants received various trainings that constituted an act of terrorism and were thus illegal. In this regard, issues such as

who rendered the training, when and where the training is rendered to the accused is very important. But the prosecutor did not specify such important elements that constitute occurrence of such events, if any.

- **Moral/Mental:** A criminal charge that accuses more than one person under the same charge needs to indicate the nature of the participation of each defendant in the commission of a crime according to criminal law. A key aspect of the charge is the joint commitment to execute an act of terror. However, neither the police, the prosecution nor the court addresses the role each of those individually charged were responsible for executing/leading/etc.

✚ **Mistreatment and Torture while Detained:** The second defendant, Befekadu Hailu (May 7th), the seventh defendant, Abel Wabella (on May 8, 2014) and the fifth defendant Atnaf Berhane (on May 17, 2014) informed the court that they were mistreated by police in order to obtain a confession of guilt.” The court has a duty as per Article 13 (2) of the FDRE constitution to enforce right of the detainees/accused not to be subjected to inhumane and degrading treatment as provided under Article 18 of the FDRE Constitution. In the case at hand, the court did not take appropriate measure to vigorously investigate the validity of complaints made by the accused during their pre-trial detention. Without an investigation, the court was prevented from taking remedial measure against the concerned body, if necessary, to ameliorate the condition of the treatment of the accused. The court’s failure to do so casts a high doubt in the ability of the court in implementing the laws impartially and issuing a fair decision at the end.

II. Introduction

On July 17, 2014, the Federal Prosecutor of Ethiopia (herein after referred to as the prosecutor) charged 10 persons (seven members of the blogging collective called ‘Zone 9 bloggers’ and three independent journalists in the Federal High Court 19th Criminal Bench - herein after referred as Soleyana et al.) on two counts of terrorism. The first count accuses the defendant of violating Article 3(2) and Article 4 of the Anti-Terrorism Proclamation. The second count is for “outrages against the constitution” under Article 238(1) of the Federal Criminal Code

Four of the 10 defendants remain in custody. The first defendant - Soleyana Shimeles - is being tried in absentia. Following the defense counsel’s objection (details below) during the preliminary hearing of the case, the court dismissed the second count and ordered the prosecutor to amend the charges accordingly. On November 3, 2014, the prosecution filed the amended charges. This paper analyzes both the amended and dismissed charges against the 10 defendants.

This commentary examines the legal proceedings of the case in light of the relevant provisions of 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution, the 2005 Criminal Code, Criminal Procedure Code of 1961, the Anti-Terrorism Proclamation 2009 and the International Covenant on Civil and Political Rights (ICCPR), as well as the Federal Supreme Court Cassation bench’s binding decisions on matters related to the case at hand. Accordingly, the article makes comments on the legality of the arrest, search and seizure of property, treatment of the defendants, the denial of bail and the legal technicalities of the charge. The primary data that served as the basis of this commentary include: the terrorism charge filed against Soleyana et al (10 persons), the application for bail, the rulings of both the High and Supreme Courts on the bail application, the applications of the defense counsel for the amendment of the charge and the court rulings over the applications.

The commentary mainly focuses on the proceedings beginning from the arrest of the suspects, including the application for release on bail, through the defendants’ entry for plea of guilty/not guilty.

Arrest and filing of the charge:

On April 25, 2014, police arrested six Zone 9 bloggers and three independent journalists, searching the searched detainees’ residences and seizing computers, newspapers, books, and computer discs in the process.¹ On April 27, 2014 police brought the detainees before the Federal First Instance Court, First Criminal Bench at *Arada*, claiming they were suspected of “working with foreign organizations that claim to be human rights activists and agreeing in idea and receiving finance to incite public violence through social media.” In accordance with the police’s request for additional days to continue the investigation, the First Instance Court, pursuant to Article 59 (2) of the Criminal Procedure Code, authorized the detention of arrested bloggers and journalists. On May 7 and 8, the court reauthorized the detention of all nine detainees under the Criminal Procedure Code.²

On May 17, 2014, police informed the court on hearing conducted at Arada criminal bench that the detainees were being investigated for crimes of terrorism and were to be held pursuant to Article 20 of the Anti-Terrorism Proclamation.³ (This shift was done by police with no specific reason and substitutive evidence presented to the court) The pre-trial hearing was adjourned 11 times before the Government of Ethiopia finally filed a formal criminal charge in the Federal High Court against defendants on July 17, 2014. The charge alleged the detainees were in violation of Article 4 of the Anti-Terrorism Proclamation and had committed “outrages against the constitution” under Article 238(1) of the Federal Criminal Code. Accordingly, the charges are preparation, conspiracy and incitement to commit terrorism acts that are stipulated under article 3(2) of the Anti-Terrorism Proclamation.

On November 21, 2014, the Federal Court considered the defense team’s argument that the government’s charges failed to provide sufficient allegations to support the charges. Hence, the court dropped the charges of “outrages against the constitution” under Article 238(1) of the Criminal Code. The court also ordered the prosecutor to amend the charges to include specific information about the supposed terrorist activity the detainees had allegedly participated in or attempted to incite, to mention specific name of the clandestine group established, to present details of the specific trainings and trainers allegedly expressed as terrorism trainings.⁴

On December 3, 2014 the federal prosecutor filed the charge sheet and the court postponed the proceedings and reauthorized the continued detention of the defendants. The court made three additional requests for the prosecution to provide additional information on the charges on December 16, January 5, and January 14 respectively; however, prosecutors failed to provide the requested information and the court responded by simply continuing the proceedings and reauthorizing the imprisonment of the detainees.

III. The pre-trial detention and the denial of bail

Article 14 of the FDRE constitution⁵ provides all citizens with the inviolable and inalienable right to liberty. Similarly, Article 17 prohibits deprivation of liberty of a person except on grounds and procedure as are established by law, which includes not to be subjected to arbitrary arrest and detention without a charge or conviction against him. The right to presumption of innocence as a fundamental right of human beings is recognized by the FDRE constitution under Article 20 (3) stating, “During Proceedings, accused persons have the right to be presumed innocent until proved guilty according to law...” The FDRE constitution recognized these rights and require, under its Article 13 (2), their interpretation to be made in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR), ICCPR and other international human rights covenants and instruments adopted by Ethiopia. This serves to safeguard the rights of the suspected and accused individuals from any punitive measures and treatments that compromise legal innocence before conviction, including arbitrary denial of the right to bail.⁶

The right to be released on bail directly relates to the two cardinal principles of criminal law: not to be subjected to arbitrary detention and presumption of innocence.⁷ accordingly, the FDRE Constitution under Article 19 (6) guarantees the right to bail for persons arrested. Therefore, bail is a constitutional right. The right to be released on bail may demanded by persons arrested but not formally charged (during pre-trial detention) and persons accused (during trial after a formal charge filed).

Though the FDRE constitution recognizes both an arrested and accused persons' right to be released on bail, it, however, states bail right is not absolute and '(i)n exceptional circumstances prescribed by law, the court may deny bail...' The prosecutor invoked the Anti-Terrorism Proclamation Article 20(5) in his charge, which states "If a terrorism charge is filed in accordance with this Proclamation, the court shall order the suspect to be remanded for trial until the court hears and gives decision on the case." But the Proclamation does not prohibit the court from releasing suspects on bail, provided they have not been formally charged.

In Soleyana et al., the denial of the accused persons' right to bail by the High Court and the Federal Supreme Court affirmation, after the accused formally charged, was made according to Article 20 (5) of the Anti-Terrorism proclamation. But Article 20 (5) of the proclamation is unconstitutional by itself as it clearly violates article 13(2), 17, 19(6) and 20(3) of the constitution, the supreme law of the land.⁸ The legality of the court's denial of the bail application during the pretrial detention of the accused until July 17, 2014 on the ground that the investigation is ongoing is, still, illegal because of the 'unconstitutionality' of Article 20 (5) of the Anti-Terrorism Proclamation.

For the purpose of completion of the criminal investigation, Article 20 (2 and 3) of the ATP allows the pre-trial court to order the remand of the arrested persons for up to 28 days at once as long as the pretrial detention period does not exceeds four months in total. In this regard, the court repeatedly reauthorized the prosecutor's request to keep the detainees in custody in order to provide additional time to continue the investigation, as this may be justified under the Criminal Procedure Code and the Anti-Terrorism Proclamation. However, the repeated authorization of the remand of the detainees under the guise of completion of the investigation in the absence of concrete justification by police, as the law required, casts doubt on the court's ability to ensure speedy trial to the detainees. Thus, with the fact that the detainees were remanded 11 times during the pre-trial proceedings and the denial of bail during this time may tantamount to arbitrary detention.⁹

IV. The terrorism charge: the legal sufficiency of its content

As per Article 23 (2) of the 2007 Criminal Code,¹⁰ the three crime-constituting elements - legal, material and moral - must all exist in order to establish criminal offence. Accordingly, a criminal charge needs to vividly demonstrate these three elements: the criminal law provisions alleged to be in violation (legal element); the action or omission/inaction through which the law is violated (material element); and the mental state of the suspect/accused (intention or negligence) upon

which he/she acted or omitted the criminal offense. It is the constitutional right of accused persons to enjoy fair trial guided by due process of law. Among other things, due process of law require criminal charges be framed in a manner that allow the accused to clearly understand what he is accused of and the available legal ways to challenge it. The charge should mention the specific legal provisions allegedly violated by the accused. A criminal charge needs also to specify how, when and where the suspect allegedly committed or omitted the crime.¹¹

It is difficult to envision a fair trial if the three crime-constituting elements are not present.¹² Hence, the framing of a proper charge is vital to a criminal trial and is a matter on which the Judge should bestow the most careful attention. In this regard, the FDRE Constitution under Articles 19 and 20 clearly state accused or arrested persons have the right to be informed of the charges brought against them in manner they can understand. Similarly, the Criminal Procedure Code provides provisions (Article 111 and 112) emphasized the content of a charge to be prepared plainly to adequately inform persons accused. To this effect, the Criminal Procedure Code states a charge, among other things should show “the offence with which the accused is charged and its legal and material ingredients” (Article 111, 1-b); and “the time and place of the offence and, where appropriate, the person against whom or the property in respect of which the offence was committed” (Article 111, 1-c). It also says under Article 112, “(e)ach charge shall describe the offence and its circumstances so as to enable the accused to know exactly what charge he has to answer. Such description shall follow as closely as may be the words of the law creating the offence.”

Criminal charge must demonstrate the particulars of an offence in order to inform the accused of the key circumstances of the case, including: time, place, conduct, subject matter of the crime which has thus been alleged against the accused and other particulars that provide reasonable information as to the nature of the charge. This is necessary so the accused and his legal defense may be able to provide relevant, sound defense.

The content of the charge filed against Soleyana et al.

The amended charge filed on November 3, 2014 accused the 10 persons of committing acts of terrorism under Article 3(2) and Article 4 of the Anti-Terrorism Proclamation.(ATP) Article 3 of the Proclamation defines terrorist acts and establishes the crime of terrorism, stating: “(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...”. Sub-Article 2 reads “...creates serious risk to the safety or health of the public or section of the public.. Article 4 states, “Whosoever 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 [ranging from 15 years in prison to death].”Article 4 thus makes a cross reference to Article 3 of the proclamation. In the case of Soleyana et al., the charge cumulatively includes elements stated

under Article 4 and Article 3 of the Proclamation in order to constitute a crime of terrorism. The charge accused all defendants on both principle responsibility and conspiracy (under Articles 32(1) & (2) and 38(1) & (2) of the Criminal Code). Consequently, in order for someone to be charged as a principal criminal, Article 32 (1) and (2) of the Criminal Code requires that s/he must commit the crime directly or indirectly, particularly, by means of animal or natural forces or fully associates with the crime and the intended result without even performing the criminal act. Article 38 (1) and (2) of the Criminal Code addresses criminal conspiracy in which it allows aggravation of punishment as per Article 84 (1) (d) for entering in to an agreement to commit a crime. It also states, if such conspiracies are done against interests of state and its defense, this provision will not affect provisions contained in special part of the Criminal Code.

To compare whether the charge conflate, as per Article 112 of the Criminal Procedure Code, the wordings of Article 3 (2) and 4 of the Anti-Terrorism Proclamation, we must examine the specification of the criminal offence the prosecutor stated against all the accused persons:

... from or about May 2012 until they got captured, conspire and agree with various other members and associates, and willfully join an undercover enterprise of persons with the intent to overthrow, modify or suspend the Ethiopian Federal State Constitution; by violence, threats, or conspiracy. By designing long and short term goals the accused have partaken in various activities by classifying duties and responsibilities as leadership; research & advocacy; public & foreign relations groups amongst themselves to further the unlawful purpose of their clandestine enterprise. The defendants have agreed to share a common criminal purpose and commit prosecutable criminal offenses, which they intended to carry out since August 2012.

In addition, by willfully accepting the strategies of Ginbot 7, a terrorist organization named by the House of Peoples Representative, conspire against the constitution and constitutional order of the country and agree to be politically operative in the secret domestic and international network of the terrorist group. With the support provided by Ginbot 7 the defendants tried to encrypt their lines of communication and attempted to conceal the contents of their messages from government agents. They took part in trainings of making and detonating explosives. They also attempted to impart these kinds of skills to their 'not detained' associates. They have also created a working relationship with Ethiopian Satellite Television and Radio, the mouthpiece of the terrorist organization, recruit new members and taken the political program of OLF, another terrorist organization as their own political program (Direct translation of the charge)....

Legal Analysis on the failings of the charge

- ✚ Its failure to discern adequately the undercover enterprise allegedly established and joined by the accused persons**

In the charge sheet, all of the defendants charged ‘to conspire and agree with various other members and associates and willfully join an undercover enterprise of persons with the intent to overthrow, modify or suspend the Ethiopian Federal State Constitution by violence, threats, or conspiracy.’ Here the crime allegedly committed by the defendants’ is willfully joining an enterprise of terror and violence. The enterprise in which the defendants’ alleged to be a member needs to be clearly identified properly by name or indicated separately from the other organization mentioned in the charge, Ginbot-7 (also referred to as the Oromo Liberation Front). In Soleyana et al. the prosecutor did not identify by name or other appropriate means the alleged clandestine/undercover enterprise established, joined and run by the accused. The absence of such clarity in the charge affects the accused constitutional right to clearly understand the criminal charge brought against them and curtails their right to challenge the prosecutor’s criminal allegation.

✚ The charge lacks clarity regarding the responsibility of each of the accused individuals

In criminal law, criminal responsibility and penalty is individual. Thus, a criminal charge that accuses more than one person under the same charge needs to indicate the nature of the participation of each defendant in the commission of a crime. The charge sheet however did not sufficiently specify, as it claimed, what tasks the defendants divided among themselves

✚ The charge failed to clearly list ‘the various trainings’ it alleged to have been received and rendered by the defendants

The charge stated that the defendants’ received various trainings of acts of terrorism. In this regard, issues such as who rendered the training, when and where the training is rendered to the accused is very important. But the prosecutor did not specify such important elements that constitute occurrence of such events, if any.

✚ The charge failed to show the alleged ‘conspiracy’

Though the defendants’ have been accused of conspiracy, the elements to establish such crime are not indicated clearly in the charge. For a crime of conspiracy to exist, the prosecution must demonstrate the accused was in agreement with others to commit the act, to pursue a course of conduct and the conduct, if carried out, must amount to or involve the commission of an offence. But the charge has not specifically addressed any of these elements, which makes the accusation bogus.

✚ Regarding the 48,000 birr or (2400 USD) allegedly received by and divided amongst the defendant

The charge stated that defendant number 3, Natnael Feleke Abera, received USD2400 and distributed the money to members under his command. But the prosecutor did not sufficiently

indicate who sent the said money to Natnael and for what purpose it is used. Thus, there is no evidence that the funds were received or utilized to advance terrorism.

The preparation of the criminal charge with adequate particularities about the criminal offence has, *inter alia*, two purposes. First and foremost it allows the defendant to clearly understand the crime s/he is accused of committing. This in its turn helps him to challenge the charge by preparing his defense, if any. Second, the clarity of the charge is important for the court to conduct fair trial by properly managing the trial proceedings to get to the truth and render just decision. Hence, criminal charges need as clearly as possible to inform the accused and the court about whom, how, when and where the alleged criminal act is committed. The prosecution's charge against Soleyana et al. fell short of fulfilling these two purposes. The deficiencies of the charge, as discussed above, infringes upon the constitutional rights of the accused to be informed adequately of the crime of which they are charged. This, in its turn, curtails their constitutional right to challenge the charge filed against them.

The court adjudicating this case, as a guardian of the fundamental rights and freedoms of Ethiopia's citizens, has a constitutional duty to enforce, as per Article 13 (2) of the Constitution, the rights of persons arrested and accused in a manner that conform with the standards under UDHR and ICCPR. In this regard, the court was required to order the dismissal of the charge and the release of the accused until and unless the prosecutor amended the charges in a manner that addresses the fundamental elements of a criminal charge.

V. The court ruling on the accused application against their mistreatment by Police

Article 7 of the ICCPR establishes a non-derogable prohibition on torture and other mistreatment; it provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Although torture is not defined under the ICCPR, the Convention Against Torture, to which Ethiopia is a party, broadly defines torture as including the severe infliction of physical or mental pain or suffering for the purposes of obtaining information or a confession. The second defendant, Befekadu Hailu, the seventh defendant, Abel Wabella (on May 8, 2014) and the fifth defendant Atnaf Berhane (on May 17, 2014) informed the court that they were mistreated by police in order to obtain a confession of guilt.” The court has a duty as per Article 13 (2) of the FDRE constitution to enforce right of the detainees/accused not to be subjected to inhumane and degrading treatment as provided under Article 18 of the FDRE Constitution. In the case at hand, the court did not take appropriate measure to investigate the validity of complaints made by the accused during their pre-trial detention. Without an investigation, the court was prevented from taking remedial measure against the concerned body, if necessary, to ameliorate the condition of the treatment of the accused. The courts failure to do so casts a high doubt in the ability of the court in implementing the laws impartially and issuing a fair decision at the end.

a. The court ruling on the accused application for accessing the prosecutor evidence

It is the constitutional right of the accused to have access to and challenge the evidence brought against them. Indeed the Anti-terrorism proclamation Article 32 (b & c) stipulated that the identity of the witness may not be revealed in the charge. Defendants can only be denied their right to know the identity of the witness testifying against them if it is proved that revealing the identity of will endanger the life of such witness. Accordingly, the prosecutor has to convincingly state the reasons how the witness will be threatened if named in the charge. This was not done in the case of Soleyana et al., even though the court is required to question a prosecutor when witnesses are not named so that the accused would prepare their defense.

End Note

1. *Ethiopia: Release Zone9 Bloggers and Independent Journalists*, East and Horn of Africa Human Rights Defenders Project (Apr. 27, 2014), available at <http://www.defenddefenders.org/2014/04/ethiopia-release-zone9-bloggers-independent-journalists/>.
2. TamiruTsigie, *Detained journalists, bloggers appear before court*, The Reporter (Apr. 28, 2014), available at <http://www.thereporterethiopia.com/index.php/news/headlines/item/1931-detained-journalists-bloggers-appear-before-court>.
3. Anti-Terrorism Proclamation No. 652/2009, [Ethiopian] House of People's Representatives (published Aug. 28, 2009).
4. Information about the revised charge sheet is available at <http://trialtrackerblog.org/>.
5. Constitution of the FDRE,1995, Proclamation no 1, Neg. Gaz., Year 1 No. 1.
6. Rinat Kitai, "Limits of Preventive Detention," *Mc George Law Review*, Vol. 40 (2009) , p.921
7. Francois Quintard Morenas, "The Presumption of innocence in the French and Anglo American Legal Traditions," *The American Journal of Comparative Law*, Vol. 58 (2010), p.109.
8. Constitution of the FDRE,1995, Proclamation no 1, Neg. Gaz., Year 1 No. 1. Article 9(1).
9. Over the course of the investigatory detention, five separate judges authorized the detention of the detainees on May 7 and 8, 2014; May 17, 2014; June 1, 2014; June 14, 2014; and June 28 and 29, 2014).
10. Criminal Code of the FDRE, 2004, Proclamation no 414, Neg. Gaz. Year 10 No. 58.
11. Negatu Tesfaye, *Materials for the Study of Ethiopian Criminal Procedure (In Amharic)*,

(Addis Ababa University, 1991).

12. Donovan, Dolores A. _The Judicial Duty to Protect and Enforce Constitutional Rights of Accused Persons Unrepresented by Counsel‘, Ethiopian Law Review, Vol. I No.1.