LENGTH OF PRE-CHARGE DETENTION OF TERRORIST SUSPECTS IN ETHIOPIA

Asmelash Yohannes Teklu, Dr.[æ]

Abstract

One of the questions that is often raised with regard to terrorism cases is the length of time a terrorism suspect is held in police custody before being charged. Different countries have suggested different length of time. Ethiopia enacted counter-terrorism legislation in 2009, which came up with its own length of pre-charge detention. This article provides a critical analysis of the length of pre-charge detention of terrorist suspects in Ethiopia. This is done by exploring the UK pre-charge detention laws. The writer argues that the current law governing pre-charge detention of terrorist suspects in Ethiopia is excessive and Ethiopia needs to introduce some alternatives to cut down the excessive pre-charge detention of terrorist suspects.

Keywords: Terrorist suspects, pre-charge detention, bail, post-charge questioning, threshold test, contingency powers

♦ Assistant Professor at Mekelle University College of Law and Governance, Ethiopia ; LLB (Mekelle University Faculty of Law); LLM (Erasmus University Rotterdam, the Netherlands); PhD (University of Lincoln, UK); email: ateklu4@gmail.com

1. THE GENERAL RULES ON INVESTIGATIVE REMAND IN ETHIOPIA

There is a constitutional guarantee to the effect of bringing an arrested person before a court within 48 hours.[1] The right to habeas corpus is also available under Article 19 (4) of the FDRE Constitution. The Ethiopian Criminal Procedure Code also distinguishes between arrests with warrant and without warrant.[2] However, arrest without warrant is allowed only in exceptional cases.

A court appearance within 48 hours helps examine the adequacy of the reasons why the individual is deprived of his liberty in the first place. A court appearance also gives the arrestee the opportunity to expose any abuse during the custody. In some cases, however, arrestees are not brought before a court within 48 hours. In one case, for instance, an Ethiopian court granted remand for investigation despite the fact that the suspects were brought after 48 hours.[3] Despite recognition of the right of access to a court of law within 48 hours, the judge granted the additional for investigation requested by the police when the suspects were brought after 48

1The FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA CONSTITUTION Art. 19(3) FED. NEG. GAZETTA (No.1/1995) (hereinafter FDRE Constitution) and Criminal Procedure Code of Ethiopia Art. 29 (Proclamation No. 185/1961) (hereinafter Ethiopian Criminal Procedure Code).

2 These are covered from Articles 49 to 55 of the Ethiopian Criminal Procedure Code.

3 Public Prosecutor vs Muhamed Mahemmed Farah, et al., Fed. Hi. Ct. F. No. 123 (1998) (the defendants in this case were detained between 15 and 67 days before they were interrogated by the police after the initial arrest. This is against Article 27 of the Criminal Procedure Code, which provides for immediate interrogation of arrested persons once their address and identity is established.).

hours. Although the original detention might be lawful, the subsequent failure of the police to bring the suspects before a court entails a serious violation of liberty.

The next issue relates to the fate of a suspect who was bought before a court within 48 hours. According to Article 59 (1) the Criminal Procedure Code, “the court before which the arrested person is brought shall decide whether such person should be kept in custody or be released on bail". Moreover, based on Article 59 (2) of the same code, the police may request for additional time if the investigation is not completed. Both the sub-articles therefore talk about remand for investigation. Based on Article 60 of the Ethiopian Criminal Procedure Code, remanded persons "shall be detained on conditions prescribed by law relating to prisons". Thus, once remanded, the suspect will remain under police custody.

However, the major defect of the Ethiopian Criminal Procedure Code is the amount of time granted for a remand order. Article 59 (3) of the Ethiopian Criminal Procedure Code provides that "no remand shall be granted for more than 14 days on each occasion". The problem with this Article stems from the fact that it places no limit on the number of occasions the police may request for further 14 days. As a result, the police can request 14 days repeatedly. Moreover, in one case related to terrorism, it was observed that there was minimum judicial scrutiny when the police requested additional 14 days for investigations.[4] The reluctance of the judges to intervene is partially attributed to the wording of Article 59 (3) of the Ethiopian Criminal Procedure Code. This Article only permits the maximum remand period of 14 days on each court appearance. The wording of the Article does not seem to allow active judicial participation. However, this does not mean that judges cannot give shorter periods than what is requested by the police.

2. PRE-TRIAL DETENTION (INVESTIGATIVE REMAND) UNDER ETHIOPIA’S ANTI-TERRORISM PROCLAMATION

4 See for example Public Prosecutor vs Hailu Shawul, et al., Fed. Hi. Ct F. No. 43246 (2007).

Article 20 of Ethiopia's Anti-terrorism Proclamation[5] **(**hereinafter the EATP) covers pre-charge detention. This Article states that once a suspect is arrested on reasonable suspicion of having committed a terrorist act, an Ethiopian court "may give an order to remand the suspect for investigation or trial".

The wording of Article 20 (1) of the EATP is different from Article 59 (1) of the Ethiopian Criminal Procedure Code that provides the alternatives for remand for investigation or release on bail. Article 20 (1) of the EATP does not seem to provide bail as an alternative or a right to be released unconditionally during the first court appearance.

On the other hand, Article 20 (2) of the EATP states, "if the investigation is not completed, the investigating police officer may request the court for sufficient period to complete the investigation." However, the application of Article 20 of the EATP shows that the police applied for an investigative remand though a defendant may not get the opportunity to appear before a court within 48 hours. For instance, in one high profile case,[6] several defendants were charged for various offences under the EATP. The defendants were remanded several times, with one of the defendants, *Yohannes Terefe*, telling the court that he was actually detained for 55 days in isolation before he was even brought before a court. Yet, that did not deter the court from remanding him for further periods.

The fate of the defendants in other cases charged under the EATP was the same: they were all remanded between 28 and 120 days. In the case of *Public Prosecutor vs. Elias Kifle,*[7] the four

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5 Anti-terrorism Proclamation, FED. NEG. GAZETTA, (No. 652/2009).

6 Public Prosecutor v Andualem Arage, e al Fed. Hi. Ct. F. No.

7 Public Prosecutor v Elias Kifle, et al., Fed. Hi. Ct. F. No. 112199 (2011).

defendants charged with him were remanded twice. In the case of *Abdiweli Mohammed Ismael*,[8] the four defendants were charged under the EATP. The charges included, *inter alia*, rendering support for and participating in terrorist organisations. The two Ethiopian defendants pleaded guilty and were sentenced immediately, having already been remanded for 28 days. However, the two Swedish journalists were remanded for a total of 36 days. In general, the police were continually granted the minimum 28 days pre-charge while already holding the suspects. None of the suspects were released on bail. These cases show that the defendants charged in relation to terrorism are seemingly always remanded for at least the minimum term offered under the EATP, without being given the opportunity to be released on their first court appearance.

According to Article 20 (3) of the EATP, "each period given to remand the suspect for investigation shall be a minimum of 28 days provided that the total time shall not exceed a period of four months". According to this sub-article, once the suspect is brought before an Ethiopian court, the minimum remand period that can be requested is 28 days. Why the legislature chose to set a minimum period instead of fixing the maximum period is very difficult to understand.

It is easy to recognise the problematic nature of the above Article by comparing it with the UK laws[9], which is quite often mentioned as one of the sources for the EATP.[10] The primary purposes of lengthy pre-charge detentions of terrorist suspects in the UK are: "to uncover admissible evidences sufficient to put before the court, to gather background intelligence, to

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8 Public Prosecutor v Abdiweli Mohammed Ismael, et al. Fed. Hi. Ct. F. No.112198 (2011).

9 See for example Section 41 of Terrorism Act 2000, which was subsequently amended by section 306 Criminal Justice Act 2003 and section 23 Terrorism Act 2006.

10 The late Prime Minster Zenawi's speech given to parliament in 2009 Gregorian Calendar; see also Ethiopian National TV, Terrorism in Ethiopia: Part II, https://www.youtube.com/watch?v=9lPIzu30D9U

facilitate the carrying out of searches, to deal with special problems posed by international terrorism".[11]

However, these justifications are difficult to fit into Article 20 (3) of the EATP where suspects can be locked up for a minimum of 28 days without a court knowing about the complexity of the case or the kind of evidence the police are attempting to uncover.

Moreover, one of the problems in the UK, as stated above, is the international nature of the threat and the complexity of sharing intelligence with other countries. However, this aspect is almost completely absent in Ethiopia. International terrorism is not a threat to the country, as yet. Over thirty years, the only notable terrorism case that had international connections was the attempted murder of the former Egyptian President, Hosni Mubarak, in Addis Ababa.[12] Neither Al-Qaeda nor any of the many other international terrorist organisations have ever posed a threat to Ethiopia. Most of the proscribed organisations are domestic political parties that have fallen out with the Ethiopian government.[13] This begs the question why the country took the drastic measure of introducing a 28-day minimum pre-charge detention.

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11 CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION (2nd ed., Oxford University Press, 2009), at 134.

12 Youssef M. Ibrahim, Egyptian Group Says It Tried to Kill Mubarak, THE NEW YORK TIMES, (July 5, 1995), **http://www.nytimes.com/1995/07/05/world/egyptian-group-says-it-tried-to-kill-mubarak.html**

13 The three organisations officially proscribed so far are Ginbot 7, Oromo Liberation Front and Ogaden National Liberation Front.

The Ethiopian government maintains that Article 20 (3) of the EATP is intended to rectify the problems associated with Article 59 (3) of the Ethiopian Criminal Procedure Code.[14] As discussed above, the latter Article fixes a maximum of 14 days pre-charge detention but there is no limit on the number of times the maximum days can be requested. As a result, the police can request 14 days as many times as they deem necessary. Thus, the EATP attempts to rectify that flaw by setting a minimum of 28 days and a maximum of 4 months pre-charge detention. However, it also paves the way for violation of liberty, which has no equivalence with any other law in the world as will be shown below.

Another point of the Ethiopian government is that the EATP on pre-charge detention was modelled on the British experience.[15] However, although British law might inspire it, there are not any substantive similarities between the two laws. First, the UK's 28-day maximum could be reintroduced every year. The EATP does not provide for such a possibility. Second, the British law sets a maximum period, whereas Ethiopian law sets 28-days minimum and 120 days maximum. As indicated in the table below,[16] it is longer than all reviewed countries, bar India, and is certainly the longest in comparison to Western democratic countries.

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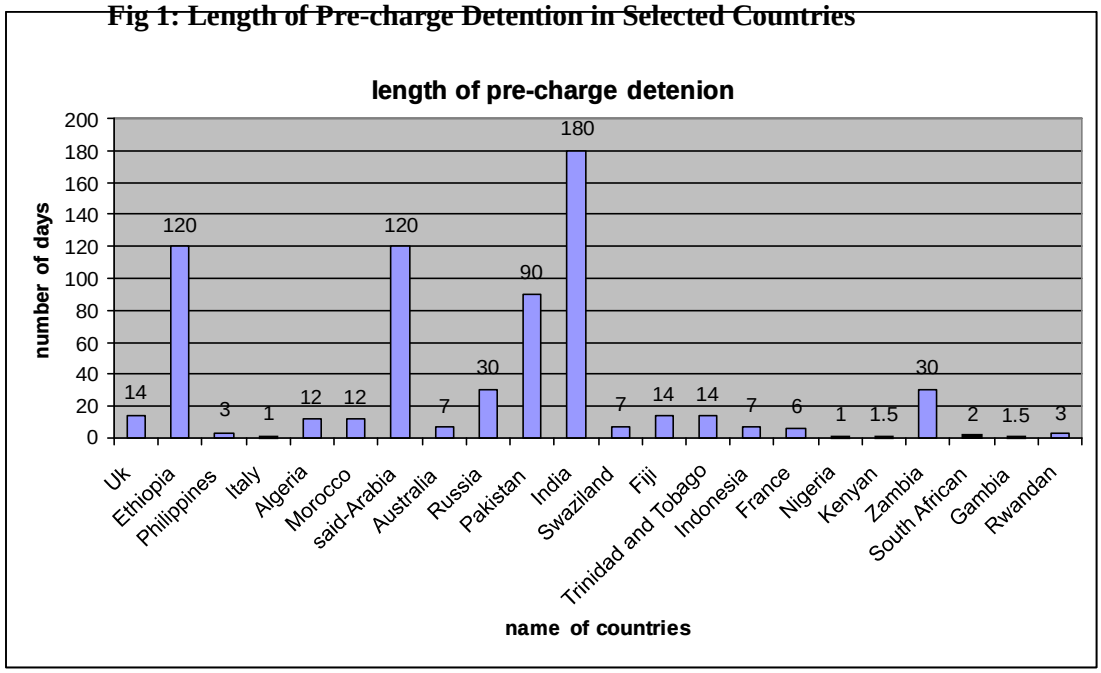
14 Ethiopian National TV, supra note 10.

15 Ibid.

16 The lion's share of the data is taken from the following source: Human Rights Watch, in the Name of Security: Counter-terrorism Laws Worldwide since September 11, (June 29, 2012).

https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11, But the data for some of the countries is taken from their counter-terrorism laws.

Fig 1: Length of Pre-charge Detention in Selected Countries



Third, the EATP does not provide for a periodic review of the arrest by the Ethiopian courts or by high-ranking officers before the first court appearance. In the UK, before a suspect is

brought before a court, Terrorism Act (TA) 2000[17]provides for review procedures post-arrest but before a court warrant for further detention is issued.

The above paragraphs specify the time interval for review, grounds for continued detention, the identity of the reviewing officer, representation during reviews, etc. However, the EATP does not provide such review procedures. Although there are some similar procedures under the Ethiopian Criminal Procedure Code, they are not nearly as strict as the schedule 8 procedures in the UK. For instance, Article 27 of the Ethiopian Criminal Procedure Code deals with interrogation post-arrest. But it does not specify review intervals. In the UK, the reviews take place at intervals of not more than 12 hours before a court-ordered extension is granted.[18] Moreover, the UK law provides for grounds where the review procedure can be postponed.[19]

The absence of such reviews in Ethiopia is attributed to the fact that the EATP and the FDRE Constitution requires suspects to be brought before a court within 48 hours. Once the accusation is read out to the suspect, the next step is taking the suspect to the nearest court. Article 28 of the Ethiopian Criminal Procedure Code gives a power to the police to release a suspect on bond "where it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of".[20] In other words, the police cannot hold the suspect for more than 48 hours unless "local circumstances and communications" permit.[21]This has been

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17 Part II of schedule 8 to Terrorism Act (TA) 2000, paragraphs 21-28, as amended by the Criminal Justice Act 2003 and TA 2006.

18 Para. 21 of schedule 8 to Terrorism Act 2000 C. 11 (UK)

19 Id, para. 22.

20 See section 41 (4) of Terrorism Act 2000 for comparison.

21 Article 29 of the Ethiopian Criminal Procedure Code; Article 19 (2) of the EATP; Article 19 (3) of the FDRE Constitution; note also that access to a solicitor or making intimation may be delayed under paragraph 16 (4) & (7), and Para. 17(3) & (4) of schedule 8 to Terrorism Act 2000.

interpreted to refer to the distance of a police station from the nearest courts and the availability of courts during holidays or weekends.

Unless the Ethiopian Criminal Procedure Code and the EATP are amended to allow for the necessary reviews before a suspect is rushed to a court, Ethiopian judges will inevitably find themselves in a difficult position of granting 28 days minimum without getting all the circumstances of the case.

Fourth, under the UK law, there is no need for personal appearance of the suspect before a court when an application for extension over 48 hours is made.[22] The police may apply for an extension without a personal appearance of the suspect. Moreover, British courts can issue a shorter period of pre-charge detention than is requested by the police.[23] Besides, according to section 23 (4) Terrorism Act (TA) 2006:[24]

A judicial authority may issue a warrant of further detention in relation to a person which specifies a shorter period as the period for which that person's further detention is authorized if- (a) the application for the warrant is an application for a warrant specifying a shorter period; or (b) the judicial authority is satisfied that there are circumstances that would make it inappropriate for the specified period to be as long as the period of seven days…

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22 In the UK, for example, paragraphs 29-30 and 36 of schedule 8 to Terrorism Act 2000 do not allow for personal appearance; see also the decision of the ECtHR in Brogan and Others v the United Kingdom, 29 November 1988, Series A No. 145-B (it has stated that with regard to terrorism cases 'the requirement under the ordinary law to bring the person before a court had been made inapplicable.) ..

23 See sections 29-36 of schedule 8 to TA 2000.

24 Terrorism Act 2006 (c.11) which received Royal Assent on 30 March 2006 (UK).

When the EATP was enacted, for some reason the legislature preferred to omit section 23 (4) of TA 2006 and a similar power is not given to the judiciary under the EATP. Although the Ethiopian law guarantees a personal appearance within 48 hours, this right is meaningless because the Ethiopian courts do not have the power to issue shorter periods when they believe that issuing longer period is inappropriate. This is because section 20 (3) of the EATP makes it mandatory for the judges to issue a minimum of 28 days. This effectively handicaps the judiciary's power to issue shorter pre-charge detention.

Article 20 (3) of the EATP contradicts with Article 19 (4) of the Ethiopian Constitution, which states that " in determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial". This part of the constitution is rendered ineffective as there is no right to a speedy trial if a suspect is to be locked up for a maximum of 4 months without being charged. As held by the European Court of Human Rights (hereinafter ECtHR) in the case of Winterwerp v the Netherlands,[25] the review must not be limited to bare legality of detention but "deprivation of liberty … requires a review of lawfulness to be available at reasonable intervals". Other ECtHR cases also affirm the importance of review of the original detention. [26] However, the construction of the EATP in Ethiopia shows a distinct lack of similar safeguards at these earlier stages of the case.

Consequently, a court appearance within 48 hours becomes worthless unless a judge is empowered to review every aspect of the original detention and is able to issue shorter periods of pre-charge detention than is requested.

Fifth, a major problem of pre-charge detention in Ethiopia is the absence of judicial safeguards. In the UK, a suspect is not entitled to appear during a hearing to extend pre-charge

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25 Winterwerp v the Netherlands, 24 October 1979, Series A, No. 33.

26 See for instance X v the United Kingdom, 5 November 198, Series A, No. 46.

detention and his/her solicitors are also excluded from obtaining the "information which was seen by the judge".[27] However, the ECtHR held that withholding information from the defence engages Article 5 of the European Convention on Human Rights (hereinafter ECHR) as decided in Garcia v Germany.[28] Accordingly, "equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to challenge the lawfulness of his client's detention".[29]

Although the above analysis bring to light issues of inadequacy within the current arrangements in the UK,[30] UK law on pre-charge detention at least permits representation and disclosure of some information to a judge at the extension hearing. The EATP, on the other hand, is devoid of even these minimum safeguards. The only argument the police in Ethiopia present during the extension is that they need 28 days extension because the proclamation says so. This is similar to the problems reflected in the UK where the police's "understanding and experience was that it was enough for them to show that more time was needed to convert intelligence to evidence and that the inquiry was being progressed diligently and expeditiously".[31] However, as noted by the Joint Committee on Human Rights, this kind of practice can result in a violation of Article 5 ECHR. In the Ethiopian case, allowing pre-charge detention at the request of the police without further disclosure to the defence is against Article 19 of the Ethiopian Constitution.

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27 Joint Committee on Human Rights, Counter-terrorism Policy and Human Rights (Thirteenth Report): Counter-terrorism Bill: Thirtieth Report of Session 2007-08. HL 172/HC 1077, para. 58.

28 Id, para. 60.

29 Garcia Alva v Germany (2001) 37 EHRR 335.

30 Joint Committee on Human Rights, Counter-terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back in Sixteenth Report of Session 2009-10, HL Paper 86 HC 111, para. 65-80.

31 Id, para. 71.

3. ALTERNATIVES TO THE CURRENT 120-DAY PRE-CHARGE DETENTION UNDER THE EATP

As discussed in the preceding sections, the EATP on pre-charge detention is excessive. Therefore, the sub-sections below offer some alternatives to shorten the excessive pre-charge detention of terrorist suspects.

3.1. Bailing terrorist suspects

The right to bail is one of the rights specifically enumerated under the Ethiopian Constitution. Accordingly, Article 19 (6) of the FDRE Constitution states: "persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person".
Given that the right to bail is not an unconditional right, there are specific laws that govern the conditions under which a person may be granted his freedom pending the outcome of a criminal investigation or the conclusion of a verdict against him.

These conditions are stated under Articles 63 and 67 of the Ethiopian Criminal Procedure Code. The cumulative reading of Articles 28, 63 and 67 of that code states that granting bail is the sole authority of the judiciary. The Ethiopian courts thus consider both objective and subjective criteria in determining whether a person should be released on bail.

For some commentators, [32] Article 63 is considered objective criteria due to the fact that a judge has no option but to evaluate the appropriate law against the suspect. The judge in this case decides whether the charge "carries the death penalty, or rigorous imprisonment of 15 years or

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32 Getnet Metiku, The Right to Bail in Cases Involving Sexual Offences Against Children, (2012), https://www.abyssinialaw.com/blog-posts/item/1450-the-right-to-bail-in-cases-involving-sexual-offences-against-children

more and where there is no possibility of the person in respect of whom the offence was committed dying".[33]

The other conditions stipulated under Article 67 of the Ethiopian Criminal Procedure Code are considered subjective criteria[34]; these conditions are decided on case-by-case basis. This Article states that bail shall not be granted if "the applicant is of such nature that it is unlikely that he will comply with the conditions laid down in the bail bond; the applicant, if set at liberty, is likely to commit other offences; the applicant is likely to interfere with witnesses or tamper with the evidence". However, Ethiopian courts are inconsistent in their approach to the law on bail.[35]

Moreover, the legislature needs to take its fair share of the blame on the confusion over bail law as it tends to "frequently amend" it.[36] For instance,

> *When the Anti-Corruption Rules were originally adopted, corruption was a bailable offence. By a minor amendment made few days later, corruption became a non-bailable offence. This Rule again was amended after few years in that only those corruption offences that are punishable by at least ten years of rigorous imprisonment were made non-bailable.*[37]

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33 Article 63 (1) of the Ethiopian Criminal Procedure Code.

34 Getnet, supra note 32.

35 SIMENEH KIROS ASSEFA, CRIMINAL PROCEDURE LAW: PRINCIPLES, RULES AND PRACTICES (Xlibris Corporation 2010), at 235-244 .

36 Id. at 234.

37 Ibid .

This resulted in substantial confusion over the Ethiopian constitutional principle of non-retrospective application of a law[38]; the Ethiopian government tried to use the non-bailable offences under the "amended rule" against suspects who were already in police custody.[39]

The problematic nature of the Ethiopian bail law discussed above does not really help in trying to understand the provisions that govern terrorist suspects and their conditional release on bail. In the same manner, the Ethiopian Criminal Procedure Code, Article 20 of the EATP gives the Ethiopian courts the power to decide whether the arrestee should be remanded for trial or investigation. However, unlike the Ethiopian Criminal Procedure Code, the EATP does not state the conditions under which the Ethiopian courts need to consider in bail decisions**.** It simply states that once a person is brought before a court within 48 hours, the relevant Ethiopian court "may give an order to remand the suspect for investigation or trial." [40] Moreover, Article 20 (2) of the EATP states that "the investigating officer may request the court for sufficient period to complete the investigation".

The EATP is vague as to whether bail is allowed for terrorist suspects. Article 20 (4) of the EATP declares that a "public prosecutor may appeal on bail conditions." But this is possible only if there is a clear law which allows conditional release of terrorist suspects. The EATP does not seem to provide that. In such circumstances, how the prosecutor could appeal in bail cases remains unclear. On the other hand, it could be argued that Article 19(6) of the FDRE Constitution, which guarantees conditional release of terrorist suspects, should apply to terrorism cases. If so, it makes sense to talk about the relevance of Article 20 (4) of the EATP. Even Article

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38 See Article 5 of the Ethiopian Criminal Code for non-retrospective application of a law .

39 Simeneh, supra note 35, at 127

40 Article 20 (2) of the EATP.

36 (1) of the EATP does not render ineffective the application of Article 19 (6) of the FDRE Constitution to suspects of terrorism. Article 36 (1) of the EATP states that "no law, regulation, directive or practice shall, in so far as it is inconsistent with this proclamation, be applicable with respect to matters provided for by this proclamation". It, therefore, seems possible to apply Article 19 (6) of the FDRE Constitution to suspects of terrorism.

However, Article 36 (2) also causes another problem. This sub-article states that the Ethiopian Criminal Code and the Ethiopian Criminal Procedure Code are applicable to suspects of terrorism in so far as they do not contradict with the EATP. As discussed above, the relevant provisions of the Ethiopian Criminal Procedure Code those that deal with bail are Articles 63 and 67. These provisions do not prohibit allowing bail for terrorism suspects provided that the applicants meet the conditions laid down. In addition, they do not distinguish between persons who are already charged and those who are under police investigation. The sticking point under the EATP is Article 20 (5). It states that "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".

In other words, once a terrorist suspect is charged, he could no way be released on bail. Article 20 (5) effectively renders ineffective the application of articles 63 and 67 of the Ethiopian Criminal Procedure Code and Article 19 (6) of the Ethiopian Constitution. Therefore, appeal by a public prosecutor based on Article 20 (4) of the EATP is relevant to bail only before the suspect is charged. If he is charged, Article 20 (5) of the EATP bars the Ethiopian courts from granting him bail.

The denial of bail to terrorist suspects who are already charged is problematic in Ethiopia. The problem of denying bail to terrorist suspects in Ethiopia could be compared to the UK law on similar issues. According to the TA 2000, police officers do not have the power to release on bail

terrorist suspects who are arrested under section 41.[41] As held in Duffy, the main problem with TA 2000 is that it does not have a "provision for conditional release on bail within the statutory scheme".[42] The absence of bail has been criticized as exclusion unjustified by any "principled basis"[43] and many argue in support of the introduction of bail under section 41 TA 2000.[44]

As discussed, the EATP, on the other hand, does not give police the power to release terrorist suspects conditionally on bail. But in ordinary crime cases, it was shown above that Article 28 of the Ethiopian Criminal Procedure Code gives power to police to release a suspect on bond "where it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of". However, unlike TA 2000, the EATP, specifically Article 20 (5), contains a novel provision in the sense that once a terrorist suspect is charged, there is no possibility of releasing him conditionally on bail.

The ECtHR held that Member States could "justify continued detention provided there are relevant and sufficient reasons to show that detention was not unreasonably prolonged and contrary to Article 5 (3) (art. 5-3) of the Convention".[45]despite the difference in the construction, Article 5 (3) ECHR has a similar message to that of Article 19 (6) of the FDRE Constitution. The latter Article is even more explicit; it clearly talks about the right to be granted bail pending trial

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41 BEN EMMERSON, et al., HUMAN RIGHTS AND CRIMINAL JUSTICE (3rd ed, Sweet & Maxwell 2012), at 360.

42 Re: Duffy Judicial Review (No. 2) [2011] 2 All ER, 364, para. 31.

43 David Anderson, The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, Independent Reviewer of Terrorism Legislation (June 2012), para.7.71, https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/report-terrorism-acts-2011.pdf

44 CLIVE WALKER, TERRORISM AND THE LAW (Oxford University Press, 2011), at 7 and seq

45 *Wemhoff v Germany* (1979-80) 1 EHRR 55 (App. No. 2122/64), para12.

or the conclusion of an investigation. In light of the FDRE Constitution, Article 20 (5) of the EATP violates the right to liberty of terrorist suspects because the Ethiopian courts are not considering any "sufficient reasons" why terrorist suspects charged under the EATP should be detained "until the court hears and gives decision on the case".[46]

The attitude of Ethiopian courts towards bailing terrorist suspects who are already charged could shed light why Article 20 (5) of the EATP is contrary to the constitutionally guaranteed right to liberty. In one case,[47] 9 defendants were charged with attacking the political and territorial integrity of the state. According to Article 241 of the Ethiopian Criminal Code, such terrorist attacks, if proved, would entail "rigorous imprisonment from 10 years to 25 years, or in case of exceptional gravity, life imprisonment or death". The case came to the Federal High Court before the enactment of the EATP. The applicants applied for a bail. Because the Ethiopian Criminal Procedure Code does not automatically rule out granting bail to anyone charged with serious criminal offences (except under the conditions listed down under Article 63 and Article 67 of the Criminal Procedure Code), the Ethiopian court in this case had exhausted all "relevant and sufficient" grounds before it turned down the application.

In other cases,[48] defendants were charged with violating Article 238 (1) of the Ethiopian Criminal Code, which states that "whoever conspires to overthrow, modify or suspend the Federal or State Constitution" shall be punished with 3 years to life imprisonment depending on the gravity of the case. The defendants' application for bail was rejected by the Ethiopian Federal

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46 Article 20 (5) of the EATP.

47 Public Prosecutor v Adam Ahmed, et al. Fed. Hi. Ct F No. 51550 (2007).

48 Public Prosecutor v Eyob Tilahun Fed. Hi. Ct F No. 27093 (2007); see also Public Prosecutor v Derege Kassa Bekele Fed. Hi. Ct F No. 27536 (2007).

High Court, which was appealed. The Ethiopian Supreme Court reversed the decisions of the lower court and granted bail to the applicants. It reasoned that the serious nature of the charges filed against the defendants should not be the only reason to deny bail to the applicants.

In the opinion of the Ethiopian Supreme Court in the above cases, an application for bail would be denied only if the two cumulative criteria of Article 63 of the Ethiopian Criminal Procedure Code are satisfied. According to the Article, a charge should not "carry the death penalty or rigorous imprisonment for fifteen years or more". In addition, it must be stated that "there is no possibility of the person in respect of whom the offence was committed dying". Unless these two elements are satisfied, the serious nature of the charges does not preclude courts from granting bail to individuals charged with terrorism.

These decisions support the argument that Article 20 (5) of the EATP needs to be amended. Despite the decision of the Ethiopian Supreme Court in mind, lower courts are still inconsistent in their approach to bailing terrorism suspects.[49]

To make the provisions of the EATP more compatible with Article 19 (6) of the FDRE Constitution, Article 20 (5) of the EATP should be amended to allow bail for terrorist suspects who are charged, unless there is “relevant and sufficient” reason to take a contrary decision. The conditions laid down under Articles 63 and 67 of the Criminal Procedure Code could be considered “relevant and sufficient” grounds to deny bail. Doing so would lessen the need to detain terrorist suspects for up to 120-day under Article 20 (3) of the EATP.

All in all, allowing bail would effectively serve as an alternative to a lengthy pre-charge detention. Therefore, the Ethiopian legislature has to abandon the current 120-day pre-charge

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49 Public Prosecutor v Tefera Mamo Cherkos (General), et al. Fed. Hi. Ct F No. 81406 (2009) (in this case, all defendants, except those tried in absentia, were denied bail. In their decision, the courts focused on the seriousness of the charges to deny bail to the suspects.).

detention. As an alternative, Articles 20 (4) and 20(5) of the EATP need to be amended so that terrorist suspects, whether charged or not, could have the right to bail.

3.2. Post-charge Questioning

Before discussing whether post-charge questioning could be considered relevant in terrorism cases in Ethiopia, the article will first discuss the availability of investigation techniques under the Ethiopian Criminal Procedure Code.

The Ethiopian Criminal Procedure Code contains the procedures that need to be followed in criminal investigations. These are divided into two parts: crime investigation[50] and the instituting of criminal proceedings.[51] The first part covers the power of the police in regard to criminal investigations. This part covers several issues, *inter alia*, summoning of the accused or suspected person,[52] arrest,[53] interrogation,[54] procedures after arrest,[55] and the closure of the police investigation file.[56]

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50 Articles 22-39 of the Ethiopian Criminal Procedure Code.

51 Id, Articles 40-48.

52 Id, Article 25.

53 Id, Article 26.

54 Id, Article 27.

55 Id, Article 29.

56 Id, Article 39.

After an arrest is made, the police are required to establish the identity and address of the arrestee and read out the accusation or complaint made against the arrestee. Unless it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of,[57] the police must take the arrestee to the next available court within 48 hours. As discussed, although a court has several choices to make once the accused is brought before it, the Ethiopian Criminal Procedure Code does not allow the court to release the accused unconditionally.

The second part of the criminal investigation procedure starts with the completion of the police investigation and reporting of the results of the investigation to the public prosecution. The public prosecutor can do one of the following things after receiving report from the police[58]; prosecute the accused on a charge drawn up by him; order that a preliminary inquiry be held; order further investigations; or refuse to institute proceedings.

The public prosecutor is required to institute proceedings unless:[59]

> *1) (a) The public prosecutor is of opinion that there is insufficient evidence to justify a conviction;(b) There is no possibility of finding the accused and the case is one which may not be tried in his absence;(c) The prosecution is barred by limitation or the offence is made the subject of a pardon or amnesty;(d) (1) The public prosecutor is instructed not to institute proceedings in the public interest by the Minister by order under his hand. (2) On no other grounds may the public prosecutor refuse to institute.*

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57 Id, Article 28.

58 Id, Article 38.

59 Id, Articles 40 and 42.

So long as the above elements are not satisfied, bringing a charge against the accused would be the next step. Once a charge is brought, the next question is whether the Ethiopian Criminal Procedure Code allows the possibility of questioning the suspect further to uncover additional evidence. As shown above, the public prosecutor has four options once the police report is received. If the first option is taken, i.e., charging the accused, trial proceedings begin.[60] During a trial, a judge can adjourn a case, fix the date and place of trial, issue a warrant for a witness or a defendant that has failed to appear, read out the charge to the defendant, record any pleas, etc.

However, the Ethiopian Criminal Procedure Code does not have a single provision concerning the post-charge questioning of an indicted individual.

Therefore, post-charge questioning similar to the power available in the UK[61] is not relevant in Ethiopia. This article does not consider post-charge questioning to be a proper alternative to the current pre-charge detention period in Ethiopia in view of the increased likelihood of abuse at the hands of the police as will be shown below.

Even if post-charge questioning is a judiciary-controlled process, as it currently under section 22 of the Counter-terrorism Act 2008 (CTA) in the UK, the judiciary in Ethiopia does not have extensive powers of scrutiny over any abuse taken place in police stations.[62] Additionally, in

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60 Id, Articles 94-107.

61 See section 22 of Counter-terrorism Act 2008 c. 28 (in force from July 10, 2012); for further discussion, see M. Zander, Is Post-charge Questioning: A Step Too Far? 172 (44) J. P. 716-718 (2008); see also Clive Walker, Post-charge Questioning of Suspects 7 CRIMINAL LAW REVIEW 509-524 (2008).

62 In the case of Public Prosecutor v Abas Hussein and Kasim Mohammed, Fed. Hi. Ct F No. 6000 (2008), the court failed to scrutinize torture allegation at the hands of the police.

order to use post-charge questioning as an alternative to the lengthy pre-charge detention under the EATP, the police need to have some evidence to enable them to bring a charge in the first place. In the absence of any evidence to bring charge, this alternative would be less likely to guarantee early release of a suspect either conditionally or unconditionally.

There are also some inherent problems with the current design of section 22 CTA 2008 in the UK. First, "there is absolute limit of forty-eight hours for any given authorisation, though there may be repeated authorisations".[63] If similar legislation is adopted in Ethiopia, these "repeated authorisations" could encourage the police to use every means available to get a confession from the suspects.

Second, section 22 (6) CTA 2008 contains the elements a judge needs to take into account before authorising a post-charge questioning of a terrorist suspect. However, some of the elements lack clarity. One of these factors is authorisation “in the interest of justice”. But this requirement is defined nowhere in the CTA and it is not clear what the judge is supposed to consider in deciding whether to allow further questioning of a suspect. A quick reference to the Criminal Justice Act 2003, for instance, shows that there are some guidelines a judge could take into account in admitting a statement not made in oral hearings provided "the court is satisfied that it is in the interest of justice for it to be admissible".[64] These guidelines are illustrated under section 114 (2) of the Criminal Justice Act 2003. Such non-exhaustive guidelines are not provided under section 22 (6) CTA 2008.

The other element that needs clarification is stipulated under section 22 (6(a)) CTA 2008. Accordingly, a judge would refuse authorisation unless "what is authorized will not interfere unduly with the preparation of the person's defence to the charge in question or any other criminal

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63 CLIVE, supra note 4, at 192.

64 Section 114 (1) (D) of Criminal Justice Act 2003 C. 44 (UK) Received Royal Assent on 20 November 2003.

charge". The purpose of introducing post-charge questioning in the first place is to gather further evidence that might come after a charge.[65] This certainly will "unduly interfere with the preparation of the person's defence" particularly "if novel offences are uncovered".[66] In this situation, the counsel for the defendant is not sure how best to defend the defendant as he might need more time to prepare. It is not clear if a judge would refuse further questioning in that situation in the UK.

Due to these problems, this article concludes that post-charge questioning should not be considered an alternative to pre-charge detention under Ethiopian law.

3.3. Using the Threshold Test

Under normal circumstances in the UK, the Crown Prosecution Service (CPS) applies what is known as the full test code in deciding "whether to prosecute after investigation has been completed".[67] The test has two significant elements: the evidential test and the public interest test.[68] The first element demands the existence of sufficient and reliable evidence. If there is sufficient evidence to provide a realistic prospect of conviction and public interest requires prosecution, the case should proceed further. Prosecuting terrorist suspects in the UK would definitely pass the public interest element.

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65 Joint Committee on Human Rights, Counter-terrorism Policy and Human Rights: 42 Days. HL 23 / HC 156 (Incorporating HC 994-I from Session 2006-07), Second Report of Session 2007-08, http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/23/23.pdf

66 CLIVE, supra note 44, at 192.

67 See the UK's Code for Crown Prosecutors, para. 4.2, (February 2010) http://www.skadden.com/eimages/The_Code_for_Crown_Prosecutors.pdf

68 Ibid.

The case is likely to be dropped if both elements are absent. The threshold test is, therefore, an exception to the full code test in the sense that the public prosecutor will be able to bring charges if the following conditions are met:[69]

> *There is insufficient evidence currently available to apply for full code test; there are reasonable grounds for believing that further evidence will become available within 3a reasonable period; the seriousness of the case justifies the making of an immediate charge decision; there are continuing substantial grounds to object to bail in accordance with the Bail Act 1976 and in all the circumstances of the case an application to withhold bail may be properly be made*.

As discussed above, under the Ethiopian Criminal Procedure Code, one of the options a public prosecutor could do after receiving the police report is instituting criminal proceedings by bringing charge against the accused. The form, the manner, and the time of instituting a criminal charge are governed under Articles 108-122 of the Ethiopian Criminal Procedure Code. According to Article 109 of this code, a public prosecutor is required to file a charge "within fifteen days of the receipt of the police report". This charge must contain "legal and material ingredients"[70] and description of circumstances of the offence.[71] Once a charge is brought, it cannot be changed or altered.

The only case where the prosecutor is allowed to change or alter the charge is if he erred in filing a charge.[72] This covers a situation where a criminal proceeding is instituted "on a charge

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69 Ibid .

70 Article 111 of the Ethiopian Criminal Procedure Code.

71 Id, Article 112.

72 Id, Articles 118-121.

containing essential errors or omissions or such errors or omissions that the accused has been or is likely to be misled".[73] Thus, the public prosecutor could not bring lesser charges with the assumption that a more serious charge will be followed once more evidence is gathered.

Having said this, the question is whether the threshold test could be treated as an option to replace the lengthy pre-charge detention of 120 days in Ethiopia.

First, it is acknowledged in the UK that the test does not completely overcome the need for pre-charge detention.[74] A conclusion that can be reached from the few cases that came to light is that suspects who were charged based on the threshold test were held longer than those charged based on the full code test.[75] Thus, being charged early, in anticipation of key evidence, did not bring any fundamental change in the circumstances of the detainees; they remained in police custody. The Joint Committee on Human Rights also criticized the UK government for failing to disclose to the defence under what test a suspect is charged[76], which affects a person's right to know the basis of the charge against him. Furthermore, courts do not have the opportunity to scrutinize the use of the test in terrorism cases.

Thus, for the Ethiopian legislature to introduce the threshold test as an appropriate alternative to the 120 days pre-charge detention currently offered would be to import a test riddled with defects.

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73 Id, Article 119.

74 Joint Committee on Human Rights, Counter-terrorism Policy and Human Rights (Eighth Report): Counter-terrorism Bill Ninth Report of Session 2007-08. Report together with Formal Minutes, and Oral and Written Evidence. HL Paper 50 HC 199, Appendix 9, http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf

75 Ibid .

76 Joint Committee on Human Rights, supra note 74.

Even if all the defects of the test were rectified, for instance, by increasing judicial scrutiny and disclosing the basis of the charge as early as possible, dropping a charge after a lengthy detention entails a grave violation of liberty.

Therefore, the test is not suitable for Ethiopia. Even if the EATP is amended and the length of pre-charge detention is reverted to 14 days, as is the case for regular crimes under the Ethiopian Criminal Procedure Code, there is no guarantee that law enforcers will not abuse it by charging suspects at the end of the maximum pre-charge detention.

3.4. Contingency Powers as an Alternative to 120 Days Pre-charge Detention

It has been argued throughout this article that Ethiopia's pre-charge detention regime detains suspects, or contains the potential to detain suspects for too long. There is no justification for the detention of terrorist suspects for 120 days without a trial. Granting bail until completion of a criminal investigation has been suggested as one alternative to Article 20 (3) of the EATP. Another option worth considering is using contingency powers to hold suspects for longer periods when exceptional circumstances demand. This is a power that could be exercised in exceptional circumstances that threatens the security of a country.

Are there any legal or constitutional difficulties in using contingency powers under Ethiopian legal systems? It would seem not. To begin with, in the FDRE Constitution, Article 17 (2) states "no person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him". Taken literally, the second paragraph of this Article seems to suggest that after an initial arrest, a person has either to be charged or released. However, this would be a naive interpretation considering that Article 19 (4) of the FDRE Constitution states that "the court may order the arrested person to remain in custody or, when requested remand him for a time strictly required to carry out the necessary investigation". In light of this Article, it is difficult to justify how a pre-charge detention period of 120 days under the EATP is “a time strictly required to carry out the necessary investigation”.

The FDRE Constitution does not have any article that deal with using contingency powers to arrest terrorist suspects. It does, however, have an article that deals with powers of arrest under a

'State of Emergency'. According to Article 93 (4) (c) of the Ethiopian Constitution, there are only a few fundamental rights that could not be suspended under emergencies.[77] All other rights, including right to liberty, could be suspended. According to Article 93 (6) (a) of the Ethiopian Constitution, the State of Emergency Inquiry Board is expected to "make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest". This Article only deals with making public the names of people arrested under emergency powers. It does not provide the right to court appearance within one month and any subsequent public trial or release of those held under police custody. The FDRE Constitution does not have any limit on how long people could be held under the provisions enacted during a State of Emergency.

If Article 20 (3) of the EATP is abrogated and replaced with 14 days of pre-charge detention, as required under Article 59 (3) of the Ethiopian Criminal Procedure Code, would it be appropriate to resort to Article 93 (6) (a) of the FDRE Constitution to hold terrorism suspects for a period longer than 14 days?

The answer to this question is negative. The police can only use Article 93 of the FDRE Constitution during a State of Emergency as declared by the Council of Ministers. Moreover, even if a State of Emergency is declared,[78] Article 93 of the FDRE Constitution could not be an appropriate remedy for Article 20 (3) of the EATP. This is due to the fact that the FDRE Constitution does not put a limit on detaining people during a State of Emergency.

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77 These refer to the following Articles of the FDRE Constitution: Article 1 (Nomenclature of the State); Article 18 (Prohibition against Inhuman Treatment); Article 25 (Right to Equality); Article 39 (1) and Article 39 (2) (Rights of Nations, Nationalities, and Peoples).

78 Article 93(1)(a) of the FDRE Constitution (Due to, for example, catastrophic terrorist attack "which endangers the Constitutional order and which cannot be controlled by the regular law enforcement agencies".

With these difficulties in mind, in the event that Article 20 (3) of the EATP was to be replaced, how would the police respond to complex terrorism cases that require extended periods of investigation? There should be legislation in place that can be triggered where a lengthy period is required to complete an investigation while the suspects are still held in custody. As declared by the Ethiopian government, the EATP is inspired by UK legislation and other Western legislation. Therefore, it is necessary to take into account changes that are taking place in the UK. One of the changes brought about by the previous UK coalition government is the abandonment of the 28 days pre-charge detention, reverting instead to 14 days. In addition, there is a law that deals with contingency powers that could be triggered under exceptional circumstances.[79] A similar procedure in Ethiopia would be appropriate because having all the powers is necessary to enable the police and the intelligence community to tackle complex terrorism cases that require an extended period of investigation.

One of the positive things about the UK's contingency powers is that the 28 days maximum is to be introduced for shorter periods of 3 months unlike the expired provision that was renewable annually. Also, under the current Protection of Freedoms Act 2012[80], extension will be sought if and only if a need arises. On the other hand, the Ethiopian legislation on pre-charge detention is not renewable annually. It is a permanent legislation which can be abused easily. By having legislation on contingency powers, and with greater scrutiny by the legislature when these powers are triggered, abuse of the provisions that deal with pre-charge detention can be minimized. Therefore, transposing the contingency powers with a sunset clause into Ethiopian law is better than resorting to Article 93 of the FDRE Constitution because the said Article places no limit on the length of pre-charge or post-charge detention of persons held during a State of Emergency.

However, assuming that the government of Ethiopia is to introduce emergency powers by repealing the current pre-charge detention, there seems unsolved question of the procedures of

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79 See section 58 of the Protection of Freedoms Act 2012 (UK) Received Royal Assent on 1 May 2012.

80 Ibid.

introducing these powers. For instance, in the UK, section 58 of the Protection of Freedoms Act 2012 gives the Secretary of the State the power to introduce orders under certain circumstances.

In Ethiopia, it is the Ministry of Justice[81] that has similar powers to the Secretary of the State for the Home Department. If the British model on draft contingency power is to be introduced into the Ethiopia legal system, then it will be this very organ that could request Parliament to extend the pre-charge detention from 14 days to 28 days in exceptional circumstances. As an alternative to asking parliament, the other viable option would be to use these exceptional powers of detention through supervision by a senior Supreme Court judge. This proposal is different from section 58 of the Protection of Freedoms Act in the UK, which does not seem to include judicial scrutiny.

The norm under the British law is 4 days.[82] For this reason, it might be difficult to argue that a return to 14 days is a return to normality. But according to Article 59 (3) of the Ethiopian Criminal Procedure Code, a 14-days pre-charge detention has been the norm in the country since 1961. Therefore, proposing a 28-days detention in exceptional circumstances has the possibility to withstand some criticism.

4. CONCLUSIONS

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81 For detail power of the Ministry of Justice, see A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, FED. NEG. GAZETTA, Art. 16 (No. 691/2010), ; see also Article 28 (2) the EATP, which requires the Ministry of Justice to "organize a separate specialized department which follows up terrorism cases"

82 Joint Committee on Human Rights, Draft Detention of Terrorist Suspects (Temporary Extension) Bills. HL Paper 161/ HC Paper 893, para. 3, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdetent/161/161.pdf

The Ethiopian government does not even need to ‘borrow' or ‘learn' from the West in respect of counter-terrorism measures that affect liberty. Fourteen-day pre-charge detention is already the standard under the Ethiopian Criminal Procedure Code. What the Ethiopian Parliament might have done is to make a minor modification to the above Code that would empower judges to rigorously test the necessity of extending detention beyond the benchmark of 14 days. By so doing, this would inevitably limit the amount of times the police could request to extend the 14-days detention. Furthermore, similar tests to those of schedule 8 of the TA 2000, which require an arrest to be lawful, necessary and that the investigation is conducted expeditiously, are absolutely necessary under Article 20 (3) of the EATP. These could help the Ethiopian judiciary evaluate each individual case to find out the necessity of extending detention and whether the police are acting diligently to bring a charge or release the suspects at the earliest possible stage.

Finally, what could not be established from this research is the justification behind the Ethiopian legislature's decision to fix pre-charge detention at 28-days minimum and 120-days maximum. We cannot say by analysis, as is the case in some Western countries, that “a lack of faith in the criminal law”[83] is the precursor for this measure. Evidence of the police struggling to complete terrorist investigations within the maximum period allowed under the Ethiopian Criminal Procedure Code is lacking. Pre-charge detention within Ethiopia seems to be an entitlement of the police rather than justified by genuine need. Furthermore, the decision to adopt such lengthy pre-charge detention periods has not been promoted by exceptional circumstances around the time of their introduction. Thus, we can safely conclude that there is nothing special about investigating terrorism in Ethiopia that requires the excessive detention of terrorism suspects.

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[83] KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM (Cambridge University Press, 2012), at 237.