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Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights

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Summary: *The right to freedom of expression is guaranteed under international law and in the constitutions of most countries. The content of this right has developed and recently has come to be thought of as including the internet as a medium of communication, and the question is raised whether access to the internet is protected under the current set of normative principles. The right to freedom of expression is fully protected under the African Charter on Human and Peoples' Rights, to which Ethiopia is a party. The Ethiopian government restricts freedom of expression on the internet and has adopted extraneous limiting measures. Most of these measures are incompatible with the African Charter. Restrictions to freedom of expression on the internet include internet shutdowns, hate speech and disinformation regulation, repressive laws, and internet censorship. These limitations may (in)directly muzzle freedom of expression in Ethiopia.*

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The writer argues that illegitimate limitations of the right fall short of the quadruple tests of limitation measures, both under the African Charter and the Ethiopian Constitution. As a result, these limitations violate individuals' freedom of expression on the internet. Finally, the article suggests that the Ethiopian government should draw guidance from the African Commission's 2019 Declaration on Freedom of Expression and Access to Information containing rules on limitation measures imposed on freedom of expression on the internet.

Key words: *freedom of expression on the internet; internet shutdown; internet censorship; hate speech; legality; African Charter; Ethiopia*

1 Introduction

Freedom of expression is one of the cornerstones of any free and democratic society.¹ It is a long-standing and fundamental human right that is an indispensable condition for the full development of the individual. It enhances access to information, pluralism,² and is key to the realisation of other human rights.³ The role of channelling free expression traditionally was performed by the print media and broadcasters, but online media through the internet⁴ are increasingly transforming our lives and are giving a voice to millions of people in Africa. The internet provides a mechanism for amplifying the exercise of free speech in many African countries, and in some cases it has enabled Africans to replace despotic and dictatorial rulers. For

1 UN Human Rights Committee (HRC) General Comment 34, art 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 para 2. See E Barendt *Freedom of Speech* (2007) 1821. See also J Magee *Freedom of expression* (2002).

2 Media Legal Defence Initiative (MLDI) Mapping Digital Rights and Online Freedom of Expression in East, West and Southern Africa (2018) 10-14, https://10years.mediadefence.org/wp-content/uploads/2019/07/Mapping-digital-rights-litigation_Media-Defence_Final.pdf (accessed 11 March 2020), See also D McGoldrick 'The limits of freedom of expression on Facebook and social networking sites: A UK perspective' (2013) 13 *Human Rights Law Review* 125 151.

3 See J Cannataci et al 'Privacy, free expression and transparency and redefining their new boundaries in the Internet ecosystem' UNESCO Internet Study (2016).

4 A Puddephatt *Freedom of expression and the internet* (2016) 17.

example, social media played a role in popular revolutions in Egypt,⁵ Ethiopia,⁶ Sudan⁷ and Tunisia.⁸

Under international law, freedom of expression embraces⁹ the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media, including the internet.¹⁰

The African Charter on Human and Peoples' Rights (African Charter) guarantees freedom of expression¹¹ subject to 'claw-back clauses'.¹² The 2002 African Declaration on Principles of Freedom of Expression in Africa stressed the importance of free speech as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.¹³ However, the Declaration places little emphasis on the right as exercised on the internet and did not clearly address the digital aspect.¹⁴ The revised and updated version of the Declaration, adopted in 2019, extends the scope of protection of freedom of expression to online media.¹⁵ In 2012 the then Special Rapporteur on Freedom of Expression and Access to Information, Pansy Tlakula, identified key challenges to freedom of expression in Africa, including a lack of political will to implement the recommendations of the Special Rapporteur; limitations of the African Charter and the Declaration; a lack of political will by state parties to enact laws on freedom of expression; a lack of real and

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- 5 See K Clarke & K Kocak 'Launching revolution: Social media and the Egyptian uprising's first movers' (2018) 50 *British Journal of Political Science* 1.
 - 6 A Bitew 'Social media and the simmering Ethiopian revolution' ECDAP 3 September 2016, <https://ecadforum.com/2016/09/03/social-media-and-the-simmering-ethiopian-revolution-alem-bitew/> (accessed 6 May 2020).
 - 7 N Taha 'Sudan's social media deemed major player in Bashir's ouster' *VOA News* 18 April 2019, <https://www.voanews.com/a/sudan-s-social-media-deemed-major-player-in-bashir-s-ouster-/4882059.html> (accessed 6 May 2020).
 - 8 A Dhillon 'Social media and revolution: The importance of the internet in Tunisia's uprising' Independent Study Project (ISP) Collection (2014) 1.
 - 9 D Voorhoof 'The right to freedom of expression and information under the European human rights system: Towards a more transparent democratic society' EUI Working Paper RSCAS 2014/12 (2014) 1.
 - 10 Art 19(2) International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A of 16 December 1966 (ICCPR). See also J Rowbottom 'To rant, vent and converse: Protecting low level digital speech' (2012) 71 *Cambridge Law Journal* 355.
 - 11 Art 9 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 June 1981.
 - 12 Art 9(2) African Charter.
 - 13 The African Commission on Human and Peoples' Rights, ACHPR/Res 62 (XXXII) 02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002) meeting at its 32nd ordinary session, Banjul, The Gambia, 17-23 October 2002, Preamble para I.
 - 14 Para X Preamble African Declaration (n 13).
 - 15 Principle 5 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019) Lawrence Mute, Special Rapporteur on Freedom of Expression and Access to Information in Africa (2019 African Declaration on Expression and Information).

effective democratic institutions; the weakness of the rule of law and human rights; low levels of education; and poverty.¹⁶ However, the findings of the Special Rapporteur overlooked a few restrictions imposed on freedom of expression on the internet, such as the internet shutdowns in Guinea, Ethiopia and Egypt.

The jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) regarding freedom of expression on the internet is still in the making, with the exception of a handful of communications on free press,¹⁷ on the issue of what constitutes 'expression through any form of communication',¹⁸ and the right to publish an article on the internet.¹⁹ Although much work remains to be done, there are developments in the form of soft law²⁰ in Africa aimed at enhancing freedom of expression on the internet. For instance, the African Commission's Resolution on Freedom of Information and Expression on the Internet urges African states to respect the right to freedom of expression on the internet by taking legislative and other measures.²¹

Freedom of expression on the internet is guaranteed under the Federal Constitution of Ethiopia as the Constitution allows expression of ideas using any media.²² The Constitution also stipulates restrictions on the right, such as legal limitations to protect the well-being of the youth; the honour and reputation of individuals; any propaganda for war; and the public expression of

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- 16 Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented by Adv Pansy Tlakula, 52nd ordinary session of the African Commission on Human and Peoples' Rights, 9-22 October 2012, Yamoussoukro, Côte d'Ivoire, paras 22-23.
- 17 *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 107.
- 18 *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* Communication 379/09, para 114.
- 19 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* Communication 294/04 paras 3, 110-112.
- 20 See African Commission on Human and Peoples' Rights Model Law on Access to Information for Africa, April 2013. See also African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression and Joint Declaration on Freedom of Expression and responses to conflict situations, adopted in Riga, 4 May 2015, art 4(C), 'Filtering of content on the internet, using communications "kill switches" (ie shutting down entire parts of communications systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law.'
- 21 Art 1 African Commission on Human and Peoples' Rights Resolution on the Right to Freedom of Information and Expression on the Internet in Africa - ACHPR/Res 362(LIX) 2016, meeting at its 59th ordinary session, Banjul, The Gambia, 21 October to 4 November 2016.
- 22 Art 29 Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995, Federal Negarit Gazeta (Ethiopian Constitution).

opinion intended to injure human dignity.²³ Under international law, limitations on the freedom of expression on the internet should fulfil at least four requirements, namely, the restriction should be prescribed by law, must achieve a legitimate aim, must be necessary in a democratic society, and must be proportionate to the aim sought to be achieved.²⁴ However, the Ethiopian government has restricted freedom of expression on the internet and adopted extraneous limitations, most of them incompatible with the Constitution and the African Charter. Restrictions made on freedom of expression on the internet in the Ethiopian context include internet shutdowns, hate speech or disinformation regulations, draconian national laws such as the Computer Crime Proclamation adopted in 2016 and the Hate Speech and Disinformation Proclamation of 2020, and internet censorship. These limitations have the potential to affect freedom of expression on the internet.

This article starts by mapping the conundrum regarding (il) legitimate limits to freedom of expression on the internet through the lens of the African Charter. It is argued that illegitimate limitations of the right fall short of the four requirements that limitation measures must meet under the African Charter. As a result they violate individuals' freedom of expression on the internet. Part 2 of the article discusses the development of the internet in Ethiopia, and emerging concerns pertaining thereto. Part 3 explores the local context by highlighting the practical limitations unfolding in Ethiopia. These include internet shutdowns, hate speech and disinformation regulation, repressive laws, and internet censorship. In part 4, the normative content of freedom of expression on the internet under the African Charter is presented with specific reference to the obligations of the Ethiopian government under the African Charter, on the one hand, and of non-state actors, on the other. Part 5 discusses the tests used to define limitations of freedom of expression on the internet. As part of assessing these limitations four tests are examined, such as legality, legitimacy, necessity and proportionality. The article concludes by making recommendations based on its findings.

2 Development of the internet in Ethiopia

The internet was introduced to Ethiopia only two decades ago. Ethiopia had telephone services since 1894, but the internet was only introduced in 1997, and broadband internet was not widely

²³ Art 29(6) Ethiopian Constitution.

²⁴ General Comment 34 (n1) paras 22-36.

available.²⁵ According to data from the Ethiopian Ministry of Communication and Information Technology, the first 4 000 kilometres of fibre optic backbone were laid in Addis Ababa in 2005.²⁶

Ethiopia is among the countries that have the lowest level of internet penetration and use. Statistics show that the number of internet users in Ethiopia remains low compared to the total number of population.²⁷ There is disagreement about the exact number of Ethiopians with access to the internet, but estimates typically range from 18 to 23 million. For example, in the year 2018 the International Telecommunication Union (ITU) recorded that out of 110 135 635 people living in Ethiopia, 18,62 million people were internet users, constituting 17,1 per cent of the total population.²⁸ The state-owned Ethio-Telecom recently released new figures in its annual report and, according to the report, as of December 2019 there were 22,74 million internet subscribers in Ethiopia,²⁹ constituting 20,65 per cent of the total population. In the past few years Ethiopia experienced steady growth in internet penetration from 0,02 per cent in 2000³⁰ to 22,74 per cent in 2019. That is, it is estimated that 23 million people currently are using the internet. Although Ethiopia still lags behind the rest of the world in internet penetration, it is rapidly bridging that gap. For instance, in 2019 the number of internet users in Egypt was around 48,7 per cent, roughly double that of Ethiopia.³¹

The Ethiopian ICT policy adopted in 2009 underlines the need for enhanced innovation including internet access. The country's Second Growth and Transformation Plan/GTP II (2016-2020) aims to serve as a springboard for realising the national vision of becoming a low middle-income country by 2025, through 'sustaining rapid, broad-based and inclusive economic growth, which accelerates economic

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- 25 KM Yilma & HH Abraha 'The internet and regulatory responses in Ethiopia: Telecoms, cybercrimes, privacy, e-commerce, and the new media' (2015) 9 *Mizan Law Review* 109.
- 26 Ethiopian Ministry of Communication and Information Technology (2014) 1 *Communication and Information Technology Statistical Bulletin* 6.
- 27 See HH Abraha 'Examining approaches to internet regulation in Ethiopia' (2017) 26 *Information and Communications Technology Law* 293.
- 28 See International Telecommunications Union (ITU) 'Internet users by country', <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (accessed 12 March 2020).
- 29 K-Bekele 'Ethio-Telecom expresses concern on liberaliwtion process' *The Reporter* 18 January 2020, <https://www.thereporterethiopia.com/article/ethio-telecom-expresses-concern-liberalization-process>(accessed 22 January 2020).
- 30 International Telecommunications Union (ITU) 'Percentage of individuals using the internet, Ethiopia', <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (accessed 22 January 2020).
- 31 Internet World Stats (IWS) <https://www.Internetworldstats.com/africa.htm#eg> (accessed 12 March 2020).

transformation and the journey towards the country's renaissance'.³² In GTP II the strategic directions for digital infrastructure are to

accelerate information and communication technology, human development, ensure the legal framework and security, use ICT for government administration, upgrade government electronics services, internalise ICT knowledge among the general public, use ICT for industrial and private sector development and ICT research and development.³³

Practically, the internet and mobile technology have played a decisive role in transforming the lives of millions in Ethiopia through innovation, tech startups and creativity since private companies have been introduced to alternative digital services in banking and other sectors.³⁴ For instance, using mobile phones, the M-birr service offers financial transactions. By using M-birr customers can deposit, withdraw and transfer cash, as well as settle bills, and pay for goods and services.³⁵ Similarly, the HelloCash service enables existing and potential customers of financial institutions to carry out transactions.³⁶ One of the unique features of the HelloCash mobile money service is the shared infrastructure feature, allowing multiple banks and Micro Finance Institutions to serve one another's customers. In the agricultural sector, the Ethiopian Commodity Exchange (ECX) launched a gateway for direct online trading of agricultural products among farmers.³⁷ In the transport sector, the Ride, also known as the 'Ethiopian version of Uber', simplified the lives of many Ethiopians who use private taxi transportation.³⁸

In the context of these policies, Ethiopia launched ambitious projects through the Woredanet and Schoolnet systems.³⁹ However, the Ethiopian government uses the Woredanet and Schoolnet projects to advance political ends and narrative control.⁴⁰ Put simply, Woredanet stands for 'network of district (woreda) administrations'

32 Ethiopia: Second Growth and Transformation Plan (GTP II: 2016-2020), <https://en.unesco.org/creativity/policy-monitoring-platform/second-growth-transformation-plan> (accessed 22 January 2020).

33 As above.

34 Collaboration on International ICT Policy for East and Southern Africa (CIPESA) and Small Media, Ethiopia: Universal Periodic Review (UPR) Session 33 Digital Rights Advocacy Briefing Document (2019) 8-9, https://cipesa.org/?wpfb_dl=292 (accessed 20 January 2020).

35 As above.

36 As above.

37 As above.

38 RIDE to Re-launch Internet Based Taxi Hailing Service in Addis Ababa, 2Merkato.Com, <https://www.2merkato.com/news/alerts/4783-ride-to-re-launch-Internet-based-taxi-hailing-service-in-addis-ababa> (accessed 22 January 2020).

39 See I Gagliardone "'A country in order": Technopolitics, nation building, and the development of ICT in Ethiopia' (2014) 10 *Information Technologies and International Development* 3.

40 As above.

and employs the same protocol upon which the internet is based, but rather than allowing individuals to independently seek information and express their opinions, it enables ministers and cadres in Addis Ababa to video-conference with the regional and district offices and instruct them on what they should be doing and how.⁴¹ Gagliardone argues that

the Schoolnet uses a similar architecture to broadcast pre-recorded classes on a variety of subjects, from mathematics to civics, to all secondary schools in the country while also offering political education to school teachers and other government officials.⁴²

I would argue that the Woredanet and Schoolnet programmes are used as tools for narrative control and governmental information channels.

In relation to freedom of expression on the internet, emerging concerns in Ethiopia include a lack of internet access; internet shutdowns; hate speech and disinformation regulation; draconian national laws such as the 2016 Computer Crimes Proclamation; and internet censorship.

3 Major concerns regarding freedom of expression on the internet in Ethiopia

This part of the article identifies a plethora of practical limitation measures in Ethiopia, which potentially may be considered illegitimate limitations on the right to freedom of expression under the African Charter. These are internet shutdowns, hate speech and disinformation regulation, draconian national laws and internet censorship.

3.1 Internet shutdowns

Internet shutdowns are a menace which curtail freedom of expression on the internet. Technically, it is 'a deliberate disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information'.⁴³ Shutdowns are

41 I Gagliardone & F Golooba-Mutebi 'The evolution of the internet in Ethiopia and Rwanda: Towards a "developmental" model?' (2016) 5 *Stability: International Journal of Security and Development* 1 6.

42 As above.

43 This definition was developed at RightsCon Brussels in 2016 in collaboration with a diverse set of stakeholders including technologists, policy makers, activists,

also called 'blackouts' or 'kill switches'.⁴⁴ Thus, internet shutdowns involve measures to intentionally prevent or disrupt access to or dissemination of online information in violation of human rights law.⁴⁵ The 2019 African Declaration on Expression and Information clearly prohibits any disruption of access to the internet.⁴⁶ This makes the African human rights system very progressive in terms of having norms in place which prohibit internet shutdowns.

Successive prime ministers in Ethiopia have used internet shutdowns as a tool to muzzle freedom of expression.⁴⁷ Although the regime of the current Prime Minister, Abiy Ahmed, is praised for advancing human rights in Ethiopia, in respect of freedom of speech, the regime has continued in the habit of repressing dissent both offline⁴⁸ and online.⁴⁹ Under the rule of the previous Prime Minister, Hailemariam, particularly between 2016 and 2018, the internet was shut down more than three times under the broader 'economic development narrative', to control cheating during examinations, for national security, and to quell civil disobedience. Similar reasons have been given by the government under Abiy for shutting down the internet, including the need to control palace strikes by the defence forces,⁵⁰ and managing security in Wollega province.⁵¹

Internet shutdowns have also had an immense economic impact. Under Hailemariam, a month-long internet shutdown in Ethiopia

and others, <https://www.accessnow.org/no-Internet-shutdowns-lets-keepit-on/> (accessed 13 March 2020).

- 44 B Wagner 'Understanding internet shutdowns: A case study from Pakistan' (2018) 12 *International Journal of Communication* 3918.
- 45 'The promotion, protection and enjoyment of human rights on the internet: Resolution/adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/13 para 10.
- 46 Principle 38(2) (n 15).
- 47 See YE Ayalew 'The internet shutdown muzzle(s) freedom of expression in Ethiopia: Competing narratives' (2019) 28 *Information and Communications Technology Law* 208.
- 48 Amnesty International 'Ethiopia: Stop harassing Eskinder Nega for his opinions' 7 June 2019, https://www.amnesty.org/en/latest/news/2019/06/ethiopia-stop-harassing-eskinder-nega-for-his-opinions/?utm_source=twitter&utm_medium=quote&utm_term=VGhpcyBoYXN&utm_campaign=social (accessed 24 January 2020).
- 49 B Taye 'Old habits die hard: Ethiopia blocks internet in the eastern part of the country, again!' 7 August 2018, <https://www.accessnow.org/ethiopia-blocks-Internet-in-eastern-part-of-country-again/> (accessed 24 January 2020).
- 50 YE Ayalew 'A tale of two prime ministers? Internet shutdowns gagging free speech in Ethiopia' *OxHRH Blog*, July 2019, <http://ohrh.law.ox.ac.uk/a-tale-of-two-prime-ministers-Internet-shutdowns-gagging-free-speech-in-ethiopia/> (accessed 23 January 2020).
- 51 See L Bader 'Millions of Ethiopians can't get COVID-19 news' Human Rights Watch Report, 20 March 2020, <https://www.hrw.org/news/2020/03/20/millions-ethiopians-cant-get-covid-19-news> (accessed 14 May 2020). See also YE Ayalew 'How internet shutdowns have affected the lives of millions of Ethiopians' *The Conversation* 3 April 2020, <https://theconversation.com/how-Internet-shutdowns-have-affected-the-lives-of-millions-of-ethiopians-134054> (accessed 14 May 2020).

in 2016 cost US \$8 million according to a Brookings⁵² estimation, while under Abiy a blackout for almost half a month in 2019 cost the country US \$66,87 million, as estimated by NetBlocks.⁵³ In a digital world people are highly dependent on the internet for social services, including access to information, blogging services, daily messaging, and accessing health services. Thus, when the state or internet service providers block or otherwise disrupt the internet, it unequivocally affects free speech, as any form of internet shutdown results in a failure to access information, and may also stifle other socio-economic rights such as the right to health.⁵⁴ During the blackout week in Ethiopia, there was no access to email communication or social media. During the shutdown Ethiopians had no sources other than mainstream media to access or verify information.⁵⁵

In light of article 9 of the African Charter, and the accepted norms of international human rights law, shutdowns ordered covertly or without an obvious legal basis violate the requirement of legality as explained below. Shutdowns ordered pursuant to vaguely-formulated laws and regulations also fail to satisfy the legality requirement.⁵⁶ For example, in 2016 Ethiopia passed a State of Emergency Directive which allows the government to block mobile services and internet access without a court order on the basis of a state of exception.⁵⁷

3.2 Hate speech and disinformation regulation

The Ethiopian Attorney-General has developed a law to prevent hate speech and disinformation in Ethiopia: the Hate Speech and Disinformation Suppression Proclamation (Hate Speech

52 DM West 'Internet shutdowns cost countries \$2,4 billion last year, Brookings Institution' 6 October 2016, <https://www.brookings.edu/research/Internet-shutdowns-cost-countries-2-4-billion-last-year/> (accessed 24 January 2020).

53 The NetBlocks Cost of Shutdown Tool, <https://netblocks.org/cost/> (accessed 24 January 2020).

54 YE Ayalew 'Questioning Ethiopia's internet shutdown measures through the lens of the right to health' Global Health Law Groningen Blog 28 June 2019, <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/questioning-ethiopia-internet-shutdown-measures-through-the-lens-of-the-right-to-health-28-06-2019> (accessed 24 January 2020).

55 As above.

56 Para 12 Report of the Special Rapporteur to the General Assembly on the Contemporary Challenges to Freedom of Expression, David Kaye, A/71/373 (2016), https://www.un.org/ga/search/view_doc.asp?symbol=A/71/373 (accessed 15 March 2020).

57 Art 4(2) Ethiopian Proclamation 1/2016 – State of Emergency Proclamation for the Maintenance of Public Peace and Security, Addis Ababa, 25 October 2016. 'When the Emergency Command Post believes that it is necessary for the observance of the constitutional order and for the maintenance of peace and security of the public and citizens, it may: cause the closure or termination of any means of communication.'

Proclamation). As the Deputy Attorney-General remarked at a parliamentary discussion,

the aim of the law is to punish those perpetrators who make dangerous statements. In the past few years, we have learned tragic violence's, ethnic and religious based attacks, deaths, and civilian displacements in different parts of the country. As such, the aim is to quell all these odds and to ensure rule of law.⁵⁸

The Hate Speech Proclamation has a restrictive Preamble. The first paragraph sets out that the aim of the Proclamation is 'to prevent and suppress ... the deliberate dissemination of hate speech and disinformation'.⁵⁹ This law generally targets offensive and hate speech, thus there should be maximum safeguards and restraints not to police speech. Indeed, there is no 'heckler's veto under international human rights law',⁶⁰ which would 'mandate the stifling of speakers when those who are offended choose to show their displeasure through harmful acts'.⁶¹ In the Ethiopian context where ethnicity is a defining political ideology and party organising factor, the heckler's veto could easily be applied to stand up with those offended or harmed ethnic groups. As such, the language of the Preamble should have been drafted in a human rights-friendly manner.

The Proclamation⁶² defines hate speech as 'speech that deliberately promotes hatred, discrimination or attack against a person or an identifiable group, based on ethnicity, religion, race, gender or disability'.⁶³ This definition is quite nebulous and overbroad, and may be regarded as illegal under international human rights law. However, the Proclamation aims to be specific by giving definitions for vague terms such as 'discrimination' and 'attack', although it fails to define what constitutes 'hatred'.⁶⁴ Laws should be clear, precise and unambiguous. Freedom of expression may be limited by laws that are clear and precise according to the UN Human Rights

58 YE Eneyew 'Muting sectarianism or muzzling speech?' *Ethiopia Insight* 31 January 2020, <https://www.ethiopia-insight.com/2020/01/31/muting-sectarianism-or-muzzling-speech/> (accessed 13 March 2020).

59 Para I Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/2020, Federal Negarit Gazette 26th Year, Addis Ababa, 23 March 2020 (Hate Speech Proclamation).

60 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, the regulation of online 'hate speech', 74th session, Agenda item 70(b), A/74/486 (9 October 2019) 7, https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf (accessed 23 January 2020).

61 EM Aswad 'To ban or not to ban blasphemous videos' (2013) 44 *Georgetown Journal of International Law* 1322.

62 Art 2(2) Hate Speech Proclamation (n 59).

63 As above.

64 See YE Ayalew Working Paper on the Draft Hate Speech Law in Ethiopia, Network for Digital Rights in Ethiopia (NDRE) (13 January 2020, unpublished).

Committee General Comment 34.⁶⁵ In this regard, the Proclamation should have drawn inspiration from the Camden Principles⁶⁶ and Facebook⁶⁷ to define these vague terms. Thus, such overbroad formulations could create interpretive ambiguities, and clearly violate the legality thresholds under article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) and article 29(5) of the Ethiopian Constitution.

The Proclamation incorporates the intent requirement through the term 'deliberately'⁶⁸ in its definition. Specifically, the law uses the term 'promotes' instead of 'advocates'. The term 'promote' sets out neither the intent requirement nor the intention to encourage hatred, discrimination or attack towards the target group. The term 'incitement' refers to statements about ethnic, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.⁶⁹ Incitement, although subject to judicial application, embraces causation and contexts.

Most importantly, the Proclamation does not draw inspiration from the most widely-accepted norm under international human rights law to draft hate speech laws, the Rabat Plan of Action.⁷⁰ The Rabat Plan of Action contains six factors to determine whether or not speech could be regarded as hate speech. These include context, the status of the speaker, intent, content, audience, and the likelihood of effectively inciting harm.⁷¹

Furthermore, the law punishes the dissemination of hate speech.⁷² During the drafting stage it was unclear from its provisions whether the term 'disseminating of hate speech' included mere sharing and distribution of hateful content. How could the public prosecutor indict all the followers that disseminate hate speech once it goes viral? In a country where 'echo-chambers' are common, it would be very

65 General Comment 34 para 25.

66 Article 19 *The Camden Principles on Freedom of Expression and Equality* (2009). Eg, Principle 12(1) defines 'hatred' as 'the intense and irrational emotions of opprobrium, enmity and detestation towards the target group'.

67 Facebook Community Standards 'Hate speech', https://www.facebook.com/communitystandards/hate_speech (accessed 24 January 2020). 'Attack' means 'a violent or dehumanising speech, statements of inferiority, or calls for exclusion or segregation'.

68 As above.

69 As above.

70 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, United Nations Office of the High Commissioner for Human Rights A/HRC/22/17/Add.4, 11 January 2013.

71 Para 29 Rabat Plan of Action (n 70).

72 Art 4 Hate Speech Proclamation (n 59).

difficult to fully enforce this kind of stipulation. This issue casts doubt on the practicality of the law. Even when the law was approved, the definition of 'dissemination' remained problematic. It is defined as 'spread or share a speech on any means for many persons, but it does not include like or tag on social media'.⁷³ A literal reading of this provision implies that any person who 'shares' any content on social media is deemed to be a disseminator of disinformation and will be liable. While the drafters narrowed the scope of 'disseminating', the provision remains subjective and lacks specificity. It would have been preferable to use the term 'advocacy' rather than 'disseminating' under article 4, since the latter falls short of demonstrating intent.

In the disinformation part the law gave a broad and subjective definition to the term 'disinformation' as 'speech that is false, is disseminated by a person who knew or should reasonably have known the falsity of the information and is highly likely to cause a public disturbance, riot, violence or conflict'.⁷⁴ How does one know whether a given statement is false? Who determines that a statement is false? During parliamentary deliberations the Deputy Attorney-General stated that one knows a statement is false through evidence. Therefore, it is for the courts to determine this.⁷⁵ Second, the disinformation definition lacks precision as it fails to define what constitutes 'knew or should reasonably have known the falsity of the information'. Yet, article 29 of the Constitution does not limit freedom of expression to 'truthful' information, but rather applies to 'information and ideas of all kinds'.

3.3 Draconian national laws

Repressive laws and the courts may be used to muzzle political dissenters, bloggers, journalists and others. Through the prosecutorial apparatus the Ethiopian government has been using oppressive legislation to neutralise real or perceived foes from the political landscape, effectively taking over the democratic public sphere.⁷⁶

When a law puts an absolute proscription on conduct it grants authorities a wide margin of appreciation to restrict expression while providing limited guidance to individuals about the demarcation

⁷³ Art 2(7) Hate Speech Proclamation..

⁷⁴ Art 2(3) Hate Speech Proclamation.

⁷⁵ YE Ayalew 'Is Ethiopia's first fake news case in line with human rights norms?' *Ethiopia Insight* 1 May 2020, <https://www.ethiopia-insight.com/2020/05/01/is-ethiopias-first-fake-news-case-in-line-with-human-rights-norms/> (accessed 14 May 2020).

⁷⁶ A Awol & t Beza 'Spectacles of illegality: mapping Ethiopia's show trials' (2015) 13 *African Identities* 284.

between lawful and unlawful behaviour.⁷⁷ For instance, the Ethiopian Computer Crime Proclamation 958/2016 punishes with imprisonment the dissemination of any type of writing or video online that is likely to cause violence.⁷⁸ Here the law did not specify the *modus operandi* and what content would be likely to cause violence.

The Hate Speech Proclamation presents a second example. Under the cloak of countering hate speech and disinformation the Ethiopian government has been engaged in stifling individual freedom by using vague formulations in this Proclamation. The UN Special Rapporteur expressed concerns about the ambiguous formulation of Ethiopia's hate speech and disinformation law which was recently presented to Parliament, stating that it goes far beyond the scope of article 20(2) and the limitations on restrictions required by article 19(3) of ICCPR.⁷⁹ This is because the definition is nebulous and overbroad and not based on international human rights law. According to the UN Human Rights Committee, laws should be clear, precise and unambiguous in what they stipulate. Freedom of expression may only be limited by laws that are clear and precise.

The Hate Speech Proclamation also has a strict criminal provision which includes both imprisonment and excessive fines. It states that if the offence of hate speech or disinformation was committed through a social media account with more than 5 000 followers, the person responsible for the act shall be punished with simple imprisonment not exceeding three years, and/or a fine not exceeding 100 000 Birr (US \$3 000).⁸⁰ This is an instance where journalists and activists could be targeted for having 5 000 followers. It is bizarre to see the 5 000 followers standard as a threshold, a move that seems to be novel and arbitrary. The question may be posed as to whether this formulation is based on Facebook's friendship limit or comparative experience. Unlike in Egypt, where the law obliges personal social media accounts with 5 000 followers to come under

77 UN Special Rapporteur (n 56) para 13.

78 Art 14 Computer Crime Proclamation 958/2016, Federal Negarit Gazette, Addis Ababa, 22nd Year 83.

79 United Nations Special Rapporteur on the Right to Freedom of Opinion and Expression, David Kaye, Visit to Ethiopia, 2-9 December 2019, End of Mission Statement, <https://www.ohchr.org/EN/NewsEvents/Pages/> (accessed 24 January 2020).

80 Art 7(4) Hate Speech Proclamation (n 59). There also is an apparent contradiction between the Amharic and the English versions: The former uses 'and', meaning both imprisonment and fine, may be imposed together, while the latter uses 'or', meaning the court may order imprisonment or a fine, but not both. In interpretation issues, Amharic is binding and prevails in the event of ambiguity on the basis of Federal Negarit Gazette Establishment Law (art 2(4) Federal Negarit Gazeta Establishment Proclamation, 1st Year 3, Addis Ababa, 22 August 1995).

media regulations,⁸¹ the 5 000 standard in Ethiopia is stricter and an aggravating ground for a charge rather than a starting point. Moreover, the fine is excessive compared to the fines for crimes such as female genital mutilation (FGM), in respect of which a fine of 500 Birr is set. For committing hate speech, an individual receives a fine of 50 000 Birr. The magnitude is 100 times higher than that for other ordinary crimes. Also, given the modest income of many social media writers, this law could lead to self-censoring of free speech on the internet and could force some to reduce their followers to avoid punishment. The Proclamation would have a chilling effect on freedom of expression on the internet.

A third example is the Anti-terrorism Proclamation 652/2009⁸² under which many human rights defenders and activists were targeted. For instance, in case of *Prosecutor v Yonatan TR*⁸³ the Ethiopian Federal High Court convicted the accused, the former spokesperson of the Blue Party, for a Facebook post as encouragement of terrorism under article 6 of the Proclamation without defining what constitutes 'encouragement of terrorism'. Using such repressive laws, the authorities enjoy unlimited discretion to police free speech in Ethiopia. This again clearly signals how draconian laws gag freedom of expression on the internet.

3.4 Internet censorship

Internet censorship is a growing threat to the free speech rights of bloggers, journalists and individuals online. It refers to the use of technology that blocks pages by reference to certain characteristics, such as traffic patterns, protocols or keywords, or on the basis of their perceived connection to content deemed inappropriate or unlawful.⁸⁴

In 2018, Ethiopia unblocked hundreds of websites⁸⁵ as part of political reforms under a new government. However, merely a year later there was a resurgence of internet censorship in the country. On 22 June 2019, following a high-profile assassination in the

81 See Egypt: Law on the Organisation of Press, Media and the Supreme Council of Media 2018.

82 Anti-Terrorism Proclamation 652/2009, Federal Negarit Gazeta 15th Year 57 (Anti-Terrorism Proclamation) has now been amended by Proclamation 1176/2020.

83 *Public Prosecutor v Yonathan Tesfaye*, Federal High Court of Ethiopia, Lideta District (Judgment) F/P/P 414/08, May 2016 (on file with author).

84 Article 19 'Freedom of expression unfiltered: How blocking and filtering affect free speech' Policy Brief December 2016 7.

85 B Taye et al 'Ethiopia: Verifying the unblocking of websites' 29 June 2018, <https://ooni.org/post/ethiopia-unblocking/> (accessed 24 January 2020).

Amhara region and Addis Ababa, access to WhatsApp and Facebook was completely blocked. The blocking of the website of African Arguments, a pan-African platform covering investigative stories, followed a few weeks later.⁸⁶

Technically, according to the Open Net Initiative (ONI), there are four approaches to internet censorship:⁸⁷ first, technical blocking, including IP blocking, DNS tampering, and URL blocking using a proxy; second, the removal of search results. These are acts by companies that provide internet search services through cooperation with governments to omit illegal or undesirable websites from search results. In the third place, when takedown measures are effected,⁸⁸ for example where regulators have direct access to and legal jurisdiction over web content hosts, the simplest strategy is to demand the removal of websites with inappropriate or illegal content. Lastly, through induced self-censorship, users could be restricted from posting online because of fear of arrest or intimidation. In Ethiopia, IP and URL blocking and self-censorship are common. As a result of these measures, bloggers' and individuals' free speech have been stifled.

In the same vein, the UN Special Rapporteur expressed concerns over states' filtering measures with the assistance of the private sector.⁸⁹ The Joint Declaration on Freedom of Expression and the Internet forbids content-filtering systems which are imposed by a government or commercial service providers, and which are not end-user controlled. They are considered as a form of prior censorship and are not justifiable as a restriction on freedom of expression.⁹⁰

The first recorded case of internet censorship in sub-Saharan Africa occurred in Zambia in 1996. The ONI observed the presence of technical internet filtering in four sub-Saharan African countries in

86 M Xynou et al 'Resurgence of internet censorship in Ethiopia: Blocking of WhatsApp, Facebook, and African arguments' 14 August 2019, <https://ooni.org/post/resurgence-Internet-censorship-ethiopia-2019/> (accessed 24 January 2020).

87 Open Net Initiative 'Overview of internet censorship', <https://opennet.net/about-filtering> (accessed 27 May 2019).

88 *Delfi AS v Estonia*, ECHR Application 64569/09 2013, para 155.

89 Report of the Special Rapporteur to the Human Rights Council on Freedom of Expression, States and the Private Sector in the Digital Age, David Kaye, A/HRC/32/38 (2016) para 46. See also Principle 38(1) of the 2019 African Declaration (n 15): 'States shall not interfere with the right of individuals to seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless such interference is justifiable and compatible with international human rights law and standards.'

90 Joint Declaration on Freedom of Expression and responses to conflict situations (n 20).

2008 to 2009, namely, Ethiopia, Nigeria, Uganda and Zimbabwe. Despite government attempts, of these four countries only Ethiopia was found to be filtering the internet. Until June 2018 Ethiopia's filtering regime targeted independent media, blogs and political reform and human rights sites. However, though the filtering is inconsistent in that many prominent sites that are critical of the Ethiopian government remain inaccessible, while some blocked sites seem harmless.⁹¹

4 Normative content of freedom of expression on the internet under the African Charter

Freedom of expression is a fundamental right protected under the African Charter.⁹² Drawing on the findings of the African Commission, it should be understood as a basic right, vital to an individual's personal development, political consciousness, and to participation in the conduct of the public affairs in a country.⁹³ Under the African Charter, this right encompasses the right to receive information and to express one's opinion. Article 9 of the African Charter provides as follows:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.

Based on the above provisions, it may be concluded that the African Charter clearly spells out that individuals have the right to freedom of expression. Thus, it includes the right of access to information and of disseminating information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers.⁹⁴ Importantly, the phrase 'to express and disseminate' under the African Charter embraces numerous means and forms of expression.⁹⁵

A comparison between the African Charter and other regional human rights documents reveals that the Charter does not have

91 R Heacock 'Internet filtering in sub-Saharan Africa, Open Network Initiative' (2012) 6.

92 Arts 4-14 African Charter

93 *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 36.

94 Art 1 African Commission Resolution (n 21).

95 See generally R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019).

the specificity and clarity⁹⁶ found in other instruments,⁹⁷ such as the Universal Declaration of Human Rights (Universaal Declaration),⁹⁸ which includes the reference to 'any media', ICCPR,⁹⁹ the European Convention of Human Rights (European Convention)¹⁰⁰ and the American Convention on Human Rights.¹⁰¹ However, the African Charter's failure to mention any specific media forms could be a positive factor since it could be interpreted to embrace any medium, including the internet. First, the African Charter has a flexibility clause which allows the African Commission to draw inspiration from international law on freedom of expression which can extend the right to the use of any medium.¹⁰² Also, in the case of *Media Rights Agenda v Nigeria*¹⁰³ the African Commission provided relevant guidance on how article 9(2) should be interpreted. Besides, the 2019 African Declaration on Expression and Information clearly provides that the right to freedom of expression has to be protected both offline and online.¹⁰⁴ Hence, freedom of expression as formulated under the African Charter denotes conveying thoughts in whatever means to reach the wider public. This again applies to the internet.

Using a 'holistic approach' of treaty interpretation, where a provision is interpreted in its entirety blending many factors together, as enunciated under the Vienna Convention of the Law of Treaties,¹⁰⁵ article 9(2) of the African Charter may be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Charter in its context and in light of its object and purpose. Although the contextual meaning of the phrase 'to

96 For extensive discussion, see WE Adjei 'The protection of freedom of expression in Africa: Problems of application and interpretation of article 9 of The African Charter on Human and Peoples' Rights' unpublished PhD thesis, University of Aberdeen, 2012 237.

97 K Olaniyan 'Civil and political rights in the African Charter: Articles 8–14' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986–2006* (2008) 220.

98 Art 19 Universal Declaration of Human Rights 10 December 1948, 217 A (III).

99 Art 19(2) ICCPR.

100 Art 10 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950, ETS 5.

101 Art 13 American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969.

102 Art 60 African Charter.

103 *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 66: 'According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.'

104 Principle 5 (n 15).

105 Art 31(1) Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol 1155 331.

express and disseminate opinions' does not imply anything about the nature of the medium, the phrase ordinarily implies stating ideas or venting one's thoughts using any media. The object and purpose or teleological interpretation of the phrase, as an instrument for the protection of individual human beings, require that the Charter's provisions be interpreted and applied so as to make its rights practical and effective. In addition, any interpretation of the rights under article 9(2) of the Charter is aimed at maintaining and promoting the ideals and values of a democratic society.¹⁰⁶ Similarly, the African Charter must be interpreted holistically and all clauses must reinforce each other to enable an individual to live a dignified life and enjoying the ideals of democracy.¹⁰⁷ Accordingly, freedom of expression on the internet should be guaranteed to enable individuals to express their views online.¹⁰⁸ Alternatively, if the interpretation of the above phrase is limited to traditional mediums, such as print or broadcasting, still using an evolutive method of interpretation, namely, that the African Charter as a living instrument must be interpreted in light of present-day contexts,¹⁰⁹ I would argue that article 9(2) includes any modern mediums, including the internet.

The last hallmark of the normative content of the right is the so-called 'claw-back clause'¹¹⁰ which entitles states to restrict the granted rights to the extent permitted by domestic law.¹¹¹ The caveat 'within the law' refers to the fact that the right could be restricted by the application of law. However, the question remains as to what 'within the law' refers to. The phrase 'within the law' is a claw-back clause under the African Charter which restricts the enjoyment of the right.¹¹² In this regard, the African Commission¹¹³ has interpreted

106 *Soering v The United Kingdom* 1/1989/161/217 ECtHR, 7 July 1989, paras 87-88.

107 *Lawyers of Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) para 37.

108 See D Cucereanu *Aspects of regulating freedom of expression on the internet* (2008) 137.

109 *Tyrer v The United Kingdom* 5856/72 ECtHR 15 March 1978 para 31; *Marckx v Belgium* Application 6833/74, ECtHR 13 June 1979 para 41.

110 Higgins has defined claw-back clauses as those clauses that in normal circumstances permit the breach of an obligation for a specified number of public reasons. See R Higgins 'Derogations under human rights treaties' (1976/77) 48 *British Yearbook of International Law* 281.

111 See R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 691; GJ Naldi 'Limitation of rights under the African Charter on Human and Peoples' Rights: The contribution of the African Commission on Human and Peoples' Rights' (2001) 17 *South African Journal on Human Rights* 110; and S Singh 'The impact of clawback clauses on human and peoples' rights in Africa' (2009) 18 *African Security Studies* 100.

112 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 679 688.

113 See *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para 112. The African Commission notes that the meaning of the phrase 'within the law' in art 9(2) must be considered in terms of whether the restrictions meet the legitimate interests, and are necessary in a democratic society. In addition, the

this clause contained in article 9(2) to mean that any restriction on freedom of expression has to be ‘provided by law’¹¹⁴ and must also conform to international human rights norms and standards relating to freedom of expression and should not jeopardise the right itself.¹¹⁵

Therefore, the normative content of freedom of expression on the internet embraces free speech online using a cornucopia of means and modes of expression in a similar manner to offline mediums. However, since the right is not absolute, it could be limited by law¹¹⁶ that serves legitimate purposes and is necessary in a democratic society.¹¹⁷

Ethiopia ratified the African Charter on 15 June 1998.¹¹⁸ The obligation of the Ethiopian government under the African Charter is to respect, protect and fulfil all rights, including freedom of expression,¹¹⁹ both offline and online, as required by article 9(2) of the African Charter. It may be recalled that the UN Human Rights Council adopted a landmark resolution in 2012 affirming ‘the same rights that people have offline must also be protected online’.¹²⁰

According to a tripartite assessment of a state party’s obligations under international human rights law,¹²¹ freedom of expression imposes three obligations on states, namely, the respect, protect and fulfil obligations. The state’s obligation to respect implies a negative duty by which all branches of government (executive, legislative and judicial) must refrain from violating the right. For example, a state is duty bound to refrain from shutting down the internet

concept of ‘within the law’ employed in the African Charter cannot be divorced from the general concept of the protection of human rights and freedoms.

- 114 *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) paras 59-60.
- 115 *Constitutional Rights Project* (n 93) paras 39-40. ‘According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one’s opinions guaranteed at the international level; this would make the protection of the right to express one’s opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.’
- 116 Art 9(2) African Charter
- 117 Art 1(2) African Commission Resolution (n 21).
- 118 List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples’ Rights, https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 23 January 2020).
- 119 R Murray *Human rights in Africa: From the OAU to the African Union* (2008) 90.
- 120 OHCHR Report of the Special Rapporteur to the Human Rights Council on the Promotion, Protection and Enjoyment of Human Rights on the Internet, 29 June 2012, UN Doc A/HRC/20/L.13 para 1, http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_20_L13.doc (accessed 23 January 2020).
- 121 UN Special Rapporteur for the Right to Food, *The Right to Adequate food as a Human Right: Final Report* submitted by Asbjorn Eide, UN Doc E/CN.4Sub.2/1987/23 (1987) paras 67-69.

or cracking down websites aimed at stifling free expression. The obligation to protect obliges state parties to the African Charter to guard rights holders from the actions of non-state actors. In other words, the obligation also requires state parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of free expression to the extent that these Charter rights are amenable to application between private entities.¹²² For instance, internet providers could be private entities, and at some point they might block or withdraw services to the online community. In this instance it is the state's obligation to protect the rights of individuals from arbitrary interference with access to the internet. Besides, freedom of expression on the internet also includes the obligation to fulfil, which imposes an obligation on the authorities to take positive measures to promote through arranging mechanisms to open access of the internet and installing telecommunication facilities. Hence, as a party to the African Charter Ethiopia has the duty to respect, protect and fulfil freedom of expression on the internet in light of legitimate limitations under article 27.

Turning to non-state actors operating in Ethiopia, they are under an obligation to respect freedom of expression on the internet on the basis of the UN Guiding Principles on Business and Human Rights.¹²³ For example, companies should work to moderate content and remove contents before hate speech or disinformation goes viral. The Ethiopian Hate Speech Proclamation contains provisions regarding the responsibility of social networks.¹²⁴ It obliges them to remove illegal content from their platforms less than 24 hours from receiving notification. This makes Ethiopia one of few sub-Saharan African countries to legislate content moderation regulation where the law obliges social networks to remove hate speech or illegal content less than 24 hours from notification.¹²⁵

122 UN Human Rights Committee (HRC) General Comment 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 8.

123 UN Human Rights Council 'Protect, respect and remedy: A framework for business and human rights' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5_7 April 2008, <http://www.undocs.org/A/HRC/8/5> (accessed 23 January 2020).

124 Art 8(2) Hate Speech Proclamation (n 59).

125 Art 3(2) Germany Act to Improve Enforcement of the Law in Social Networks, (Netzdurchsetzungsgesetz, NetzDG), 1 October 2017. Art 3(2) 'removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint'; <https://germanlawarchive.iuscomp.org/?p=1245> (accessed 23 January 2020). Note that while the final version used the term 'swiftly', the approved version of the Ethiopian Hate Speech Proclamation used the '24 hours' standard.

Freedom of expression as a human right creates a vertical obligation on state parties to a treaty. In other words, states have a primary duty to observe human rights. However, this does not mean that non-state actors such as private companies are not required to be responsive to human rights commitments.¹²⁶ Non-state actors have horizontal obligations even though they are not parties to a treaty. Based on the African Commission definition, non-state actors refer to individuals, organisations, institutions and other bodies acting outside the state and its organs.¹²⁷ The Universal Declaration emphasises groups broadly, including private actors, to observe human rights.¹²⁸ The involvement of non-state actors in a society is rapidly increasing, and at the same time their engagement has caused human rights abuses. As such, to bestow on non-state actors the responsibility for protecting human rights, the UN Human Right Council has endorsed the John Ruggie Principles¹²⁹ on the applicability of human rights to businesses. While conducting their activities, business entities have a duty to respect human rights, to protect the rights holders from harm and to provide a remedy for human right abuses.¹³⁰

As far as the internet is concerned, non-state actors generally refers to bodies such as the internet intermediaries,¹³¹ or internet service providers, search engines, blogging services, online community and social media platforms,¹³² private contractors or corporate entities. So far, the human rights regime provides a soft law mechanism to make them responsible. Since the UN Guiding Principles provide the responsibility of businesses to respect human rights, non-state actors directly involved in the internet domain should set out minimum standards for corporate human rights accountability through a clear commitment to respect human rights; conduct due diligence that meaningfully 'identify, prevent, mitigate and account for' actual and potential human rights impacts throughout the company's operations, and provide for or cooperate in the remediation of adverse human rights impacts.¹³³

126 General Comment 31 (n 122) para 8.

127 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 136.

128 Art 30 Universal Declaration.

129 United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (Geneva, United Nations, 2011) 4.

130 As above.

131 TF Cotter 'Some observations on the law and economics of intermediaries' (2005) 1 *Michigan State Law Review* 67.

132 R MacKinnon et al 'Fostering freedom online: The role of internet intermediaries' UNESCO Series on Internet Freedom Report (2014, Paris: UNESCO) 11.

133 UN Guiding Principles (n 124) Principles 16-24.

5 Assessing the limitations to freedom of expression on the internet under the African Charter

While it is clear from the above part that Ethiopia has an obligation under the African Charter to ‘respect, protect, and fulfil’ freedom of expression, including online, under international human rights law, there are also several ways in which the Ethiopian government is legally allowed to restrict such freedoms. I now analyse four requirements that human rights limitations need to fulfill to allow the Ethiopian government’s various orders to restrict internet access lawfully under international human rights law. These are legality, legitimacy, necessity and proportionality.¹³⁴

5.1 Legality

Legality refers to the fact that limitations imposed on freedom of expression should be provided by law. The Ethiopian Constitution underscores the legality requirement in article 29. This means that the right can be limited only through laws that are guided by the principle that freedom of expression cannot be limited based on a subjective appreciation of the content or effect of the point of view expressed.¹³⁵

The African Charter has spelled out the legality requirement in article 9(2). Accordingly, one can express his or her views ‘within the law’. According to Human Rights Committee General Comment 34, the underlying tenet of the legality requirement is that the restrictions have to be clearly provided for by law. Thus, law may include laws of parliamentary privilege and laws of contempt of court.¹³⁶ Since the restriction on freedom of expression may constitute a serious curtailment of the rights *per se*, it is not compatible with legitimate limitations for the restriction to be enshrined in traditional, religious or other such customary law because the law has to be made by pertinent law makers and courts. The law has to be formulated with sufficient precision so as to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.

For example, internet shutdown measures ordered pursuant to vaguely-formulated laws and regulations fail to satisfy the legality requirement. For instance, in 2016 Ethiopia passed a State of Emergency Directive which allows the government to block mobile

134 Note that the discussion under this part is partly adapted from Ayalew (n 47).

135 Art 29(6) Ethiopian Constitution.

136 General Comment 34 (n 1) para 24.

services and internet access without a court order on the basis of a state of emergency. In particular, article 4(2) of the Directive provides:

When the Emergency Command Post believes that it is necessary for the observance of the constitutional order and for the maintenance of peace and security of the public and citizens, it may cause the closure or termination of any means of communication.

The African Court on Human and Peoples' Rights (African Court) has elaborated on the legality test in its ruling in the *Konaté* case where it stated that restrictions on freedom of expression were indeed provided by law as they were part of the penal and information codes of Burkina Faso.¹³⁷ The Court added that the Burkinabe Penal and Information Codes were drafted with sufficient clarity to enable an individual to adapt with the Rules and to enable those in charge of applying them to determine which forms of expression are legitimately restricted and which are unduly restricted.¹³⁸ However, in the separate opinion released by four dissenting judges the laws were found to be too broad and problematic and in conflict with article 9 of the African Charter.¹³⁹

In the same vein, the African Commission has communicated that although in the African Charter the grounds of limitation to freedom of expression are not expressly provided for as in the other international and regional human rights treaties, the phrase 'within the law' in article 9(2) provides 'a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation'.¹⁴⁰ The phrase 'within the law' must be interpreted with reference to international norms which can provide grounds of limitation on freedom of expression.¹⁴¹

In addition to the accessibility and clarity requirement, the law has to provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.¹⁴² Furthermore, the legality requirement asks that laws apply equally to everyone, and that the

137 *Lohé Issa Konaté v Burkina Faso* ACTHPR, Application 4/2013, Judgment, 5 December 2014, para 130.

138 As above.

139 *Lohé Issa Konaté v Burkina Faso* ACTHPR, Application 4/2013, Separate Opinion, Elsie Thompson, Sophia Akuffo, Bernard Ngoepe and Duncan Tambala JJ 2014, paras 4-5.

140 *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 188.

141 *Malawi Africa Association & Others v Mauritania* (2000) AHRLR 194 (ACHPR 2000) para 102.

142 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, (Article 19, London, ISBN 1 870798 89 9, November 1996) Principle 1.1(b).

penalty for contravention may not be corporal punishment.¹⁴³ Thus, on the basis of the legality test, the second State of Emergency Directive adopted in February 2018 does not pass this test.

5.2 Legitimacy

The legitimacy test refers to the requirement that measures have to be in conformity with laws and be acceptable to the general public interest. The Ethiopian Constitution provides a few grounds by which freedom of expression can be legally limited.¹⁴⁴ These include limitations imposed to protect the well-being of the youth, the honour and reputation of individuals, prohibition of propaganda for war and public expression of opinion intended to injure human dignity.¹⁴⁵

While delineating freedom of expression under article 9, the African Charter does not explicitly list the limitation grounds, the Charter in article 27(2) mentioned the 'rights of others', 'collective security', 'morality' and 'common interest' as possible grounds justifying limitation.¹⁴⁶ In other words, whenever any restrictions are imposed on freedom of expression online, due regard should be had to these factors.

The first legitimacy caveat is 'the rights of others'.¹⁴⁷ This could for example mean any restriction on freedom of expression in order to protect the right to vote or the right to privacy.

The second potential limiting ground is related to 'collective security',¹⁴⁸ which resembles national security under ICCPR. Thus, freedom of expression should be limited for genuine purposes, such as to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to the violent overthrowing of the government. However, national security cannot be invoked to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its institutions, to entrench a particular ideology, or to suppress industrial unrest.

143 General Comment 34 (n 1) para 26.

144 Art 29(6) Ethiopian Constitution.

145 As above.

146 Art 27 African Charter.

147 As above.

148 As above.

The third caveat is related to 'morality',¹⁴⁹ that is, freedom of expression online can be legitimately limited to protect morality. The African Charter does not define the term 'morality'. According to the UN Human Rights Committee jurisprudence, 'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'.¹⁵⁰

The last potential restriction ground is 'common interest'. Although the African Charter did not define the term, it may refer to mutual societal needs and community demands.¹⁵¹ In other words, common interest may refer to collective aspirations and mutual social destiny. In this respect, without defining what constitutes collective security, morality and common interest, the African Commission¹⁵² and, more recently, the African Court,¹⁵³ have used article 27(2) in particular to incorporate the rules and principles employed in other regional and international systems into the African Charter.¹⁵⁴

5.3 Necessity

Necessity is the third gauge by which to judge the legality of any restrictions placed on freedom of expression online. This means that the right to freedom of expression can be limited if it is necessary in order to protect a legitimate objective, such as the rights or reputations of others, national security, public order, public health or morals. In this regard, unlike ICCPR, the Ethiopian Constitution and the African Charter failed to incorporate the necessity test. However, the 2019 African Declaration on Expression and Information provides a useful guidance as to the necessity requirement by requiring that the limitation has to originate from a pressing and substantial need that is relevant; and has to have a direct and immediate connection

¹⁴⁹ As above.

¹⁵⁰ UN Human Rights Committee (HRC), ICCPR Committee General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion) 30 July 1993 CCPR/C/21/Rev.1/Add.4 para 8.

¹⁵¹ See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339.

¹⁵² *Konaté v Burkina Faso* (n 137) para 134.

¹⁵³ *Constitutional Rights Project v Nigeria* (n 93) para 41. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in art 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

¹⁵⁴ Murray (n 95) 583.

to the expression and disclosure of information.¹⁵⁵ Whenever a limitation is deemed 'necessary', this implies that the limitation is based on one of the grounds justifying limitations being recognised by the relevant provisions of the treaty, and responds to a pressing public or social need.¹⁵⁶ As such, any assessment as to the necessity of a limitation must be made on objective considerations, and on a case-by-case basis.¹⁵⁷

In the *Konaté* case the African Court held that 'if a restriction is to be deemed acceptable, it is insufficient for it to be provided for by the law and to be written precisely; it must also be absolutely necessary for the advantages which are to be obtained'.¹⁵⁸ However, such necessity measures may not thwart the very purpose of the right.¹⁵⁹ Even more importantly, a limitation may never have as a consequence that the right itself becomes illusory. Thus, the Court's holding showed that limitations to be imposed on necessity grounds should meet the pressing social need and may not nullify the very purpose of the right.¹⁶⁰

Hate speech regulation in Ethiopia invariably fails to meet the standard of necessity. The 'necessity' inquiry requires that the claimant should show that the hate speech law would achieve its stated purpose. As can be seen from the examples discussed during the course of the article, these laws often achieve the opposite effect. Some governments argue that it is important to tackle hate speech and offensive statements. Yet these measures fall short of the necessity test since hate speech is an emotive concept,¹⁶¹ and regulating emotions through law is very complex.

Given that Ethiopia is organised on the basis of an ethnically-centred political system, hate speech laws could easily be used to silence opposition ethnic parties and individuals' free speech. In a democratic society, hate speech ideally should not be deterred through the use of the law but through robust political discussion. As US Supreme Court Judge Brandies famously observed in the case

155 Principle 9(4)(a-b) (n 15).

156 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4, Principle 10.

157 As above.

158 *Konaté v Burkina Faso* (n 138) para 132.

159 As above.

160 As above.

161 AF Sellars 'Defining hate speech' 8 December 2016 *Harvard University Berkman Klein Center Research Publication* 2016-20 14.

of *Whitney v California*, 'the remedy to be applied is more speech, not enforced silence'.¹⁶²

The Ethiopian government's stated justification for having hate laws in place is that such laws curb the violence that may result from hate speech. However, it could be argued that it is not the hate speech *per se* that creates violence, but rather the ethnicity-based political system or age-old repression. As such, promoting free speech is a more pressing social need than policing speech using hate speech regulations. Thus, by using the necessity test states can measure whether or not the likelihood and action to be taken constitute a pressing social need. What constitutes a pressing need may be determined by the court. Yet the word 'pressing' refers to 'requiring quick or immediate action or attention'.¹⁶³ As such, a pressing social need may refer to social actions that demand quick intervention and urgency.¹⁶⁴

5.4 Proportionality

By applying the proportionality test, states can restrict freedom of expression online if the restriction is believed to be proportional to the right being protected. This means that states have to demonstrate that the tools chosen to achieve legitimate objectives are proportionate so as to protect the rights or reputations of others, national security, public order, public health or morals. While this test allows for some restrictions of internet access, it does not give states exorbitant leverage to muzzle the rights holder. However, unlike the 2019 African Declaration,¹⁶⁵ the Ethiopian Constitution and the African Charter failed to incorporate the proportionality test.

Restrictions must be commensurate with the objective sought. In the case of *Zimbabwe Lawyers for Human Rights*, following the publication of *The Daily News* by Associated Newspapers of Zimbabwe (ANZ) on 25 October 2003, the police moved back into the ANZ offices, stopped their work and prevented all further publication. The complainants argued that the closure of the newspaper was causing

¹⁶² See the case of *Whitney v California* US Supreme Court 274 US 357, 372 16 May 1927; concurring opinion of Brandeis J finds that hate speech and fake news can be deterred through more speech. 'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence;' <https://globalfreedomofexpression.columbia.edu/cases/whitney-v-california-brandeis-j-concurring/> (accessed 25 April 2020).

¹⁶³ See *Oxford online dictionary*, <https://en.oxforddictionaries.com/definition/pressing> (accessed 23 January 2020).

¹⁶⁴ As above.

¹⁶⁵ Principle 9(4)(b) - (c) (n 15).

irreparable harm to the freedom of expression as delineated in the African Charter.¹⁶⁶ The Commission stated:¹⁶⁷

The principle of proportionality seeks to determine whether, by the action of the state, a fair balance has been struck between the protection of the rights and freedoms of the individual and the interests of the society as a whole. In determining whether an action is proportionate, the Commission will have to answer the following questions: (1) Was there sufficient reasons supporting the action? (2) Was there a less restrictive alternative? (3) Was the decision-making process procedurally fair? (4) Were there any safeguards against abuse? and (5) Does the action destroy the very essence of the Charter rights in issue?

When one combines these criteria, the closure of a newspaper amounts to a disproportionate measure and violates the right to freedom of expression as it is clear that the action of the state to stop the complainants from publishing their newspapers, close their business premises and seize all their equipment cannot be supported by any genuine reasons.¹⁶⁸

The UN Human Rights Committee elaborated what measures satisfy the test of proportionality in its General Comment 27 as follows:¹⁶⁹

They must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected ... has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.

Similarly, the principle of proportionality must take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed on freedom of expression by ICCPR is particularly high in the context of public debate in a democratic society concerning figures in the public and political domain.¹⁷⁰ In the *Konaté* judgment the Court held that freedom of expression in a

¹⁶⁶ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) paras 1-12.

¹⁶⁷ *Zimbabwe Lawyers for Human Rights* (n 166) para 176.

¹⁶⁸ *Zimbabwe Lawyers for Human Rights* (n 166) para 178. The Commission reiterated that in a civilised and democratic society, respect for the rule of law is an obligation not only for the citizens but also for the state and its agents. If the state considered the complainants to be operating illegally, the logical and legal approach would have been to seek a court order to stop them.

¹⁶⁹ UN Human Rights Committee (HRC), CCPR General Comment 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9 paras 14-15.

¹⁷⁰ *Bodrozic v Serbia and Montenegro*, UN HRC Communication 1180/2003, views adopted on 31 October 2005, para 7.2.

democratic society must be subjected to a lesser degree of interference when it occurs within the context of public debate relating to public figures.¹⁷¹ Public figures therefore should necessarily endure a high degree of criticism than private citizens in order to prevent the stifling of public debate.¹⁷²

Therefore, internet shutdowns do not satisfy the test of proportionality, even though their duration and geographical scope may vary. Affected users are cut off from emergency services and health information, mobile banking, e-commerce, transportation, school classes, voting and election monitoring, reporting on major crises and human rights investigations. Most importantly, blanket shutdown measures are disproportionate to the legitimate aim to be sought as they are imposed on a wholesale basis. In the Ethiopian context, shutdown measures in connection with the security forces strike are said to be proportional as the closure was concentrated in Addis Ababa and did not extend to other parts of the country, whereas the shutdown action in connection with the second state of emergency and high-profile assassinations did not fulfil the proportionality test since it was neither geographically-limited nor time-specific.

6 Conclusion

Freedom of expression on the internet embraces freedom to seek, receive and impart information using an online medium. Ethiopia is a party to the African Charter and recognises freedom of expression subject to claw-back clauses. This article navigated major concerns arising in connection with freedom of expression on the internet in Ethiopia. These include internet shutdowns, hate speech and disinformation regulation, draconian national laws, and internet censorship. The article examined the normative contents of freedom of expression on the internet under the African Charter, and the extent of its protection. Ethiopia has an obligation under the African Charter to respect, protect and fulfil freedom of expression, both offline and online. This is also reinforced by the UN Human Right Council's landmark resolution in 2012 affirming that 'the same rights that people have offline must also be protected online'.

The article examined two forms of limitation on freedom of expression on the internet. The first is legitimate restriction, bringing together various legitimate limitations to be imposed on freedom

¹⁷¹ *Konaté v Burkina Faso* (n 138) para 155.

¹⁷² *Media Rights Agenda* (n 103) para 74.

of expression on the internet provided they meet four yardsticks: legality (prescribed by law); protecting a legitimate objective (legitimacy); necessity; and proportionality. The legality test obliges the government to make limitations on freedom of expression on the internet by enacting laws that are consistent with international human rights law. The Ethiopian government should furthermore employ utilitarian grounds, such as public morality, public order, and national security to fulfil the legitimacy requirement. The necessity test should be applied as it commands the government to take necessary measures aimed at achieving the above utilitarian grounds, whereas the proportionality requirement guides the government to take comparable and fair measures while limiting the right.

The second form is illegitimate limitation, comprising those measures imposed contrary to international human rights law. For instance, the Ethiopian government has muzzled freedom of expression on the internet using blanket internet shutdowns, unfettered hate speech provisions and disinformation regulation, draconian national laws and internet censorship.

To tackle these challenges, the Ethiopian government needs to take effective legislative, policy, administrative and judicial measures, and should draw inspiration from the African Commission's 2019 African Declaration on Expression and Information by observing the rules pertaining to limitations to freedom of expression on the internet. As the UN Human Rights Council Resolution 32/13 in 2016 unequivocally condemned measures to intentionally prevent or disrupt the internet in violation of international human rights law, the Ethiopian government should be cognisant of it, and take concrete legislative measures aimed at redressing internet shutdowns. When shutdowns are imposed, they should be transparent, legal, necessary and proportional in a democratic society. The government should amend or repeal all repressive laws aimed at stifling or otherwise targeting individuals' free expression on the internet in Ethiopia, such as hate speech and disinformation laws, and the Computer Crimes Proclamation. Also, when internet service providers practise content-filtering and censorship of the internet, they should explain, justify and clarify this to their users. Finally, social media companies should work to remove hate speech content and disinformation on their platforms less than 24 hours after receiving notification of it being posted.