

# ETHIOPIA: COMMENTARY ON THE DRAFT CRIMINAL PROCEDURE CODE

## INTRODUCTION

This is a commentary on the draft Criminal Procedure Code (CPC), which the Federal Attorney General of the Federal Democratic Republic of Ethiopia distributed to stakeholders for feedback. Amnesty International commends the Attorney General's initiative to revise the current CPC adopted in 1961. Specifically, Amnesty International welcomes the efforts made thus far to resolve some of the gaps in the existing CPC.

The commentary is intended to ensure the draft CPC is consistent with Ethiopia's Constitution as well as its regional and international human rights commitments. The principal focus of the commentary is on provisions of the draft CPC that directly relate to the right to fair trial, such as notification of rights, right to an attorney, equality of arms, right to conditional release, prohibition of torture and other ill-treatment, admissibility of evidence, burden of proof and standards of proof. In general, the recommendations in the commentary are meant to encourage and promote full respect for:

- The right to prompt notification of rights commencing from arrest or detention;
- The right to equality of arms in the preparation and presentation of cases, including the right to adequate time and facilities to prepare a defence and disclosure by the prosecution of material information;
- The right to liberty and presumption of innocence, including through processes that treat conditional release as the rule and remand in custody as the exception;
- Freedom from torture and other ill-treatment in the rules that govern admissibility of evidence; and
- Presumption of innocence in the rules governing the probative value of evidence, especially confession statements.

Amnesty International is also sharing its [Fair Trial Manual](#), a practical and authoritative guide to international and regional standards for fair trial, which we hope will be an invaluable resource in finalizing review of the draft CPC.<sup>1</sup>

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<sup>1</sup> Amnesty International, *Fair Trial Manual*, Second Edition, 2014 (POL 30/002/2014), available at <https://www.amnesty.org/en/documents/POL30/002/2014/en/>.

## ARTICLE 119: NOTIFICATION OF AND RIGHTS DURING ARREST

Amnesty International welcomes the safeguards in the draft CPC for people under arrest, including: the requirement for arresting officers to identify themselves to the arrestee and identify the person before arrest; as well as the requirement to read and show the arrested individual a court-issued arrest warrant before arrest.

However, Article 119 does not require the police to inform arrestees of their right to remain silent nor of their right to an attorney. Although Article 119 provides that the arresting officer shall read and show the arrest warrant to the accused, it is not clear in the draft CPC whether or not the arresting officer shall inform the arrestee of the reason for the arrest in cases of arrest without warrant.

The UN Human Rights Committee (HRC) has stated that Article 9(2) of the International Covenant on Civil and Political Rights (ICCPR) distinguishes between reasons for the arrest and the reasons for charges against the accused:

“Paragraph 2 of Article 9 imposes two requirements for the benefit of persons who are deprived of liberty. First, they shall be informed, at the time of arrest, of the reasons for the arrest. Second, they shall be promptly informed of any charges against them. The first requirement applies broadly to the reasons for any deprivation of liberty. Because “arrest” means the commencement of a deprivation of liberty, that requirement applies regardless of the formality or informality with which the arrest is conducted...”<sup>2</sup>

Amnesty International recommends that the draft CPC explicitly provides several other safeguards to ensure that fair trial rights of the accused during arrest are protected, in line with regional and international human rights law. These include: provisions specifying obligations of the police or arresting officials to promptly notify the arrestee, in a language he or she understands, of his or her rights to remain silent; that anything he/she says can be adduced as evidence in a court of law; and of their right to an attorney.

Amnesty International also believes that the right to communicate with Embassies, consular offices or appropriate international organizations, when the arrested person is a foreign national, a refugee or stateless person, should be recognized in the draft CPC.<sup>3</sup>

Amnesty International is also concerned there are no detailed procedures in the draft CPC to ensure compliance, or accountability in the event of failure to comply with these safeguards, during arrest.

**Amnesty International recommends the draft CPC include provisions that provide additional safeguards against human rights violations during arrest, particularly the requirements that:**

- a) Arresting officers notify the individual of:**
  - i. his or her rights in a language that he or she understands;**
  - ii. the reasons for his or her arrest;**

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<sup>2</sup> Human Rights Committee (HRC), General Comment No. 35 on Article 9 (Liberty and Security of Person), 16 December 2014, para 24.

<sup>3</sup> African Commission on Human and Peoples’ Rights (ACHPR), Principles and Guidelines on a Right to a Fair Trial and Legal Assistance in Africa, 2003, para. N (2) (g).

- iii. his or her right to remain silent;
  - iv. the fact that that any statement the individual makes can be used in a court of law;
  - v. the fact that the individual has a right to an attorney and, if the individual cannot afford one, the State will provide one, in cases specified under Article 10(2) of the draft CPC; and
- b) Where the arrested person is a foreign national, a refugee or stateless person, the arresting officers should be required to notify the individual of his or her right to communicate with his or her Embassy, consular offices of his or her country or the appropriate international organization (for example, the UN High Commissioner for Refugees (UNHCR)). Finally, the draft CPC should explicitly provide that any statement made by the individual in the absence of police communication of his or her rights will be inadmissible as evidence in a court of law.

## ARTICLE 120: INTERROGATION PROCEDURES

Article 120 of the draft CPC articulates procedures for interrogation. However, the draft CPC does not have detailed provisions that govern the:

- Duration of interrogation sessions;
- Intervals between interrogation sessions;
- Breaks during interrogation sessions;
- Frequency of sessions within specified periods;
- Behaviour and conduct of interrogators; and
- Environment of interrogation (lights, ventilation, refreshments, etc.).

Article 11 of the Convention against Torture (CAT) requires state parties to “keep under systematic review interrogation rules, instructions, methods and practices... with a view to preventing any cases of torture.” Specifically, interrogation rules should address, among other things: informing the individual of the identity (name or police number) of all present during questioning; the permissible duration of interrogations or interrogation sessions (both of which should be strictly limited); required rest periods between sessions or breaks during a session; places in which questioning may take place; and questioning people under the influence of drugs or alcohol.<sup>4</sup>

**Amnesty International recommends the draft CPC incorporate additional procedures and safeguards to ensure effective oversight of interrogations and protection of the accused’s rights. Specifically, the rules should explicitly require that:**

- a) The person conducting the interrogation is clearly identified to the person under interrogation and his or her attorney;
- b) There are limitations on interrogation sessions, specifically through limitations on the number of sessions allowed within certain period, and limitations on the duration of sessions;
- c) There are rest periods between interrogation sessions and breaks during a session;
- d) There is an explicit prohibition on interrogations being conducted under the influence of drugs or alcohol; and
- e) The records of all of interrogation sessions are accessible to the accused and their attorney.

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<sup>4</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards, CPT 2nd General Report, 2002, para 39; Human Rights Council, Concluding Observations, Japan, 13-31 October 2008, para 19.

## ARTICLE 13 AND 126(2): EQUALITY OF ARMS

Article 13 lays down the principle that ensures equality between the prosecution and the defense in all criminal trials. According to Article 126(2), detention facilities are required to enable the accused individual to access the particulars of criminal charges.

Amnesty International is concerned that Article 126(2) does not incorporate comprehensive elements of the right to equality of arms. These include: the right to prompt disclosure of charges and evidence in the prosecution's possession; and the right of the accused to adequate time and facilities to prepare his or her defense.

While commenting on Article 14 of the ICCPR on equality of arms, the HRC stated that the right to equality of arms includes ensuring access to:

"Adequate facilities including documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defense (for instance indications that a confession was not voluntary)."<sup>5</sup>

The right of the accused to adequate time and facilities to prepare his or her defense also includes the provision of space that ensures confidential communication with an attorney.<sup>6</sup>

**Amnesty International recommends that Articles 13 and 126 of the draft CPC explicitly incorporate key procedural aspects to ensure full realization of the right to equality of arms, including:**

- a) **The right of the accused in pre-trial custody to a competent and effective attorney to prepare his or her defense;**
- b) **The right of the accused to have access to information, evidence and any exculpatory material,<sup>7</sup> in possession of the prosecution; and**
- c) **The right of the accused to adequate time and facilities to prepare his or her defense.**

## ARTICLE 22(4): PRIVATE MEETING WITH PARTNERS

Amnesty International appreciates Article 22(4), which requires prison and police officials to facilitate private meetings between detainees and their spouses. However, Amnesty International is concerned the distinction between married and unmarried detainees is discriminatory and places unmarried detainees at a

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<sup>5</sup> Human Rights Committee, General Comment No. 32 on Article 14 (Right to equality before courts and tribunals and to a fair trial), 23 August 2007, para 33.

<sup>6</sup> Human Rights Committee, General Comment No. 32, on Article 14 (Right to equality before courts and tribunals and to a fair trial), 23 August 2007, para 34.

<sup>7</sup> Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defense (for instance indications that a confession was not voluntary).

disadvantage.<sup>8</sup> This provision also excludes visits with children of the detainees. The Bangkok Rules<sup>9</sup> require States to ensure visits involving children take place in an environment that is conducive to a positive experience and allows open contact between female detainees and their children. They also require that prison staff searching children visiting detention facilities treat children with respect and sensitivity.

**Amnesty International recommends that Article 22(4) of the draft CPC makes it explicit that access would be provided to all partners of detainees, irrespective of marital status, as well as their children.**

Amnesty International also recommends the draft CPC include provisions that ensure reasonable and conducive facilities to communicate with and receive visits from family, including children and friends, whether the detainees are held in police custody or the detainee is on remand pending trial.

### **ARTICLE 94(3): USE OF FORCE FOR EXTRACTION OF BODY SAMPLES FROM ACCUSED**

Article 94(3) allows the police to use force to extract samples from the accused—including handwriting, finger prints, photographs or similar samples—if the accused is not cooperative.

Amnesty International is concerned about the illustrative list of samples in the provision, which may be open to abuse. Collection of samples should meet international privacy standards. Any use of force should be necessary and proportional to meet a legitimate goal. Collection of samples without the accused's full, informed consent can only be justified in limited circumstances, such as when necessary to the investigation of a serious crime, must be prescribed by law and conform with relevant human rights standards. Additionally, the mode of collection should be open to the scrutiny of an independent judicial organ.

**Amnesty International recommends the provision provide an exhaustive list of samples the police are allowed to collect from the accused through necessary and proportionate use of force and only in exceptional circumstances when the accused is uncooperative. Moreover, the use of force to extract samples from the accused should only be conducted when:**

- a) **The sample is crucial for investigation of a serious crime;**
- b) **The investigation is prescribed by law and in conformity with human rights standards; and**
- c) **There is no other alternative method to get the sample.**

Where a person is accused of terrorism crimes, Article 94(5) of the draft CPC allows the police to use proportional force to extract samples directly from the body of the accused—hair, blood, urine or any other body fluid. Amnesty International is concerned Article 94(5) of the draft CPC singles out individuals accused of “terrorism acts” to be subjected to forceful extraction of samples of their body fluids, without providing the limitations provided under international law, including the need to ensure such measures only be taken when necessary and proportional to meet a legitimate goal.

There is also no agreed definition of “terrorism” under international law and definitions in regional instruments vary. Amnesty International has consistently criticized these definitions for being overly broad

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<sup>8</sup> United Nations Minimum Standard Rules for the Treatment of Prisoners (Nelson Mandela Rules), General Assembly Resolution 70/175, 17 December 2015. Rules 2 and 58(2).

<sup>9</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), General Assembly resolution 65/229, adopted on 21 December 2010, paras. 21 and 28.

and vague. The definition of acts of terrorism under the Anti-Terrorism Proclamation No. 652/2009<sup>10</sup> is concerning given its vague definition of terrorism offences, undermining the principle of legality, a core general principle of international law, enshrined, *inter alia*, under Article 15 of the ICCPR, which requires laws to be clear and accessible and for their application in practice to be sufficiently foreseeable. Amnesty International's research, not only in Ethiopia but also in other countries, demonstrates many governments invoke such broad definitions of terrorism to repress the political opposition, human rights defenders and others legitimately exercising their freedoms of expression, association and assembly.

**Amnesty International recommends Article 94(5) of the draft CPC be deleted.**

## **ARTICLE 104-105: SPECIAL INVESTIGATION TECHNIQUES**

The draft CPC provides that the police can use special investigation techniques such as electronic surveillance, interception of communications and undercover operations with authorization from the Federal High Court or the Regional Supreme Court.

**Amnesty International recommends the draft CPC provides clear pre-conditions to admission of confession statements registered at preliminary inquiry and other pre-trial hearing, and specifically that:**

- a) **The accused must have been informed of his or her rights, including the right to remain silent and to not confess at the court that registered the statement;**
- b) **Confession will not prejudice the presumption of innocence; and**
- c) **The court will conduct a trial within a trial where there are claims the confession was made under duress.**

**In addition, Amnesty International suggests that Article 121 state explicitly that the accused will not lose the right to change or withdraw a statement made at preliminary inquiry or any other stage of pre-trial hearing.**

## **ARTICLE 144: AIM OF PRELIMINARY INQUIRY**

Article 144 of the draft CPC provides that the purpose of preliminary inquiries is to register and preserve evidence, as requested by the prosecution or the accused. In other common law jurisdictions that have a preliminary inquiry procedure, the main purpose of the preliminary inquiry is to decide on the sufficiency of the prosecution's evidence to go to trial. As such, it is an important procedure that saves resources, ensures a speedy trial and facilitates the release of the accused from detention in circumstances where there is insufficient evidence.

**Amnesty International recommends Article 144 is revised to bring it in line with the purpose of preliminary inquiries in other jurisdictions and, specifically, to clearly articulate that preliminary inquiries will be held to establish whether the prosecution has sufficient evidence to go to trial.**

## **ARTICLE 154: NON-BAILABLE CRIMES**

Article 154 of the draft CPC stipulates that a person accused of certain crimes shall not be allowed conditional release during pre-trial and trial periods. These crimes are terrorism, outrages against the Constitution or the

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<sup>10</sup> Anti-terrorism Proclamation No. 652.2009, 28 August 2009, Articles 3 and 6.

State, crimes against the external security and defensive power of the state, organized crimes, corruption, rape of women and children and any other crimes that carry penalties of life imprisonment or death.

Amnesty International is concerned the list of non-bailable offences in Article 154 of the draft CPC compromises elements of the right to fair trial, the right to liberty and the right to presumption of innocence. Article 154 of the draft CPC deviates from the HRC's recommendations to the effect that:

"Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime... Pre-trial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pre-trial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pre-trial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case."<sup>11</sup>

**Accordingly, Amnesty International recommends the revision of Article 154 to ensure the Government of Ethiopia meets its international obligations under Article 9(3) of the ICCPR. Specifically, the draft CPC should allow for conditional release of the accused unless the two conditions below are met:**

- a. **There is reasonable suspicion the accused has committed an offence that is punishable by imprisonment; and**
- b. **There are substantial reasons for believing that, if released, the accused would:**
  - i. **flee/abscond;**
  - ii. **commit a serious offence;**
  - iii. **interfere with the investigation or the course of justice; or**
  - iv. **pose a serious threat to public order.**

There must also be no other alternative measures available to address these concerns.

Moreover, the draft CPC should incorporate provisions to the effect that the burden rests with the State to establish that it is necessary and proportionate to deprive an individual of their liberty during and pending trial. The State must establish that conditional release would create a substantial risk of flight, harm to others or interfere with evidence or investigation in a manner that cannot be allayed by other means.

## **ARTICLE 123(1): BRINGING THE ACCUSED TO COURT**

Article 123(1) provides that "anyone arrested as per the provision of this Section shall be brought to Court within 48 hours. The time shall not include the time required for transporting the accused to the Court". Amnesty International notes this provision is in line with Article 19(3) of the Constitution. However, according to the HRC:

"... 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified

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<sup>11</sup> Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and Security of Person), 16 December 2014, para 38.

under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment. Laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and those limits should also not be exceeded.”<sup>12</sup>

**Amnesty International suggests the draft CPC be revised to include provisions that would compel the police to bring the accused to court promptly after the arrest, and that the 48 hour limit remain exceptional. The limit should not be exceeded unless justified under the circumstances.**

## **ARTICLE 124 AND 125: LENGTH OF PRE-TRIAL CUSTODY<sup>13</sup>**

Article 124 of the draft CPC provides that the pre-trial court can remand the accused in police custody for a maximum of 14 days and that the pre-trial detention period cannot be more than 28 days. However, this period is extended where the accused is charged under the Anti-Terrorism Proclamation. In cases brought under the Anti-Terrorism Proclamation, the maximum length of remand in police custody is 28 days and the maximum pre-trial detention period is four months.

Amnesty International is concerned the remand period in the draft CPC could facilitate enforced disappearances, torture and other ill-treatment, as well as coerced confessions. Our research on Ethiopia has shown detainees are at the highest risk of the above in the earliest stages of their detention.

**Amnesty International recommends the draft CPC should stipulate determination of custody periods be based on the circumstances of the case, instead of the specific crime with which the suspect is charged. The duration of pre-trial custody should be determined based on the time needed to complete the investigation, with due diligence of the police.**

**Therefore, when asking for remand of the suspect to police custody, the draft CPC should require the police to prove to the court that custody of the suspect is necessary for the investigation. The duration of the custody should be determined accordingly. As such, Amnesty International suggests that the phrase “maximum time” to be deleted and replaced with “expeditiously and without undue delay”.**

Article 124(5) of the draft CPC also allows the court to remand the accused in custody for an additional 15 days until the trial starts, even after the investigation is completed. Moreover, according to Article 125(3), in cases where the crime is non-bailable but the investigation is not completed within the specified period, the court shall order the prosecution to make a decision on the case within 15 days.

**Amnesty International recommends the revision of the draft CPC to include provisions that reflect the following:**

- a) **In situations where the accused is in custody, the trial should begin immediately after the completion of investigation;**
- b) **In all cases where the police is not able to complete the investigation within the specified period, the prosecution should decide immediately whether or not to**

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<sup>12</sup> Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and Security of Person), 16 December 2014, para 33.



proceed with trial and, if unable to do so, allow the courts to order conditional release of the accused.

## **ARTICLE 275(2): PROBATIVE VALUE OF CONFESSION STATEMENTS**

Article 275(2) of the draft CPC states that:

“[u]nless the defendant rebuts them with evidence, confessions given outside of the trial court by accused, and confession statements in writing, voice recording, video cassette or recorded in any mechanical or electronic device by [those] accused of terrorism charges shall be considered as proven without a need for additional prosecution evidence”.

The provision violates the rights of the accused to presumption of innocence, a core general principle of international law. It also allows for violations of the accused’s rights to freedom from torture and other ill-treatment, since it shifts the burden of proof to the accused to rebut confession statements made outside of the trial court.

**Amnesty International recommends deletion of Article 275(2) to ensure confessions given outside of the trial court are not used to violate the principle of presumption of innocence during trial. The draft rules of evidence in the draft CPC should also require the prosecution to corroborate confession statements with additional evidence.**

Amnesty International further recommends the draft CPC clearly states:

- a) **The right of the accused to withdraw his or her confession at any time;**
- b) **That the prosecution bears the burden to prove beyond reasonable doubt that the accused gave the confession voluntarily; and**
- c) **That all procedures for procurement of confessions are fulfilled and confirmed before they are admitted as evidence.**

The right to fair trial and the right to equality before the law as articulated in the Constitution and regional and international treaties applies in all circumstances. The draft CPC should safeguard against undermining these rights where an individual is charged with terrorism crimes. Provisions allowing confession statements by persons accused of terrorism crimes without ensuring fulfilment of conditions such as notification of rights and presence of an attorney increases the risk that confessions would be forcefully extracted.

**Amnesty International recommends the draft CPC includes provisions that require trial courts to undertake a trial within a trial in circumstances where the accused alleges that the confession statement is not given voluntarily.**

## **ARTICLE 279: PROCEDURES TO DETERMINE ADMISSIBILITY OF ALLEGED FORCED CONFESSION**

Amnesty International appreciates that Article 279 provides a list of inadmissible evidence in criminal trials. However, Amnesty international is concerned the draft CPC does not include procedures to determine the inadmissibility of evidence derived as a result of human rights violations, including torture and other ill-treatment.

The CAT, which Ethiopia ratified in 1993, obliges states parties to enforce the absolute prohibition on torture and other cruel, inhuman or degrading treatment or punishment. It requires the exclusion of any evidence

procured or derived through torture, except against a person accused of torture as evidence that the statement was made.<sup>14</sup> Similarly, the African Commission on Human and Peoples' Rights has stated that:

"[E]vidence obtained by illegal means constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceeding, except in the prosecution of the perpetrators of the violations".<sup>15</sup>

**Amnesty International recommends the draft CPC incorporates provisions that require the trial court to hold a separate hearing (a trial within trial) in cases of allegations that statements, whether by the accused or by other people, have been elicited through or derived from human rights violations, especially torture and other ill-treatment. This should also be the case where there are even suspicions of torture and other ill-treatment. Moreover, the draft CPC should include provisions requiring the prosecution to bear the onus of producing evidence that proves beyond reasonable doubt that the statements and evidence were obtained legally and voluntarily.**

## **ARTICLE 317: STANDARD OF PROOF**

Article 317 of the draft CPC provides the prosecution has the duty of proving the elements of crime 'clearly and convincingly'—a standard of proof which is less rigorous on the prosecution compared to 'proof beyond reasonable doubt'. 'Clear and convincing' standard of proof requires a plaintiff to prove a particular fact is substantially more likely than not to be true or to prove there is a high probability that a particular fact is true. It is a standard of proof used in civil suits, where something more than money is at stake, such as custody, inheritance and administrative claims.

Amnesty International is concerned the 'clear and convincing' standard of proof undermines the right of the accused to presumption of innocence. Unlike the 'proof beyond reasonable doubt' standard—the most widely used standard of proof in jurisdictions that pursue adversarial procedures like Ethiopia—the 'clear and convincing' standard of proof requires the prosecution to prove only the high probability that the accused might have committed the crime.

The importance of the 'beyond reasonable doubt' standard is also reflected in statutes establishing international criminal tribunals. According to the HRC, this standard is an integral part of the presumption of innocence:

"The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle."<sup>16</sup>

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<sup>14</sup> United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, Article 15.

<sup>15</sup> African Commission on Human and Peoples' Rights, Principles And Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, para. N (6) (g).

<sup>16</sup> Human Rights Committee, General Comment No. 32, on Article 14 (Right to equality before courts and tribunals and to a fair trial), 23 August 2007, para 30.

Amnesty International recommends the 'clear and convincing' standard of proof in the draft CPC be removed and replaced with 'proof beyond reasonable doubt', consistent with the right to presumption of innocence recognized in international and regional human rights treaties that Ethiopia has ratified as well as the provisions of the Constitution.