

4 January, 2006

Judges:

Adil Ahmed

Leul G/Mariam

Mohammed Amin Sani

Charge brought by: Public Prosecutor

Accused: Engineer Hailu Shawl and Others

- Under file number 43246. The accuser, the Federal Public Prosecutor, present in the person of Abrham Tetemke, Shimelis Kemal, and Mekasha Abera. The list of names of the accused has been presented as follows.

.....

Ruling

- The detailed arguments presented by the accused in the last court session stating that they should be released on bail are presented in general as follows. It has been clearly stipulated under article 19 of the FDRE Constitution as well as the International Covenant on Civil and Political Rights and the Declaration of Human Rights which are part of Ethiopian law that the power to grant or deny bail is the exclusive mandate of the Court and the right to bail can not be limited by law. The Court should not deny us bail by simply looking at the charges unless it also determined that the Public Prosecutor has submitted sufficient evidence that could get us punished. As could be seen from the charges presented nothing has been mentioned about a person dying except for the first charge. According to article 63 of the Criminal Procedure Code bail may be denied only if the victim of the crime died. The first charge targets the Constitution and the alleged crime was committed on the Constitution rather than a dead person. If we had been charged with homicide and the charge could get us punished, our right to bail may be denied. However, bail should not be denied on charges relating to attempt to forcefully abolish the Constitution. Similarly, the charges listed from second to seventh do not preclude bail. The first charge relates to criminal instigation and we have been charged with attempting to instigate the public to abolish the Constitution. And, under article 27/2 of the Criminal Code, criminal conspiracy or instigation is punishable only when the law expressly states that it is punishable. Since criminal instigation has not been expressly stated under article 238, our right to bail should not be denied for a crime for which we cannot be liable.

[Intelligible signature]

[Intelligible signature]

Moreover, quoting article 67 of the Criminal Procedure Code, they have argued that since the conditions for denial of bail do not describe their situation and the accused should not be denied bail under this article, the Court should release them on bail. In general, they argued that the Court should grant their right to bail since releasing on bail is the rule rather than the exception. The 92nd, 94th and 95th accused presented their arguments stating that they should be released on bail separately. These accused claimed that they have been charged only under the first charge and even then only the part indicated under item number 4 on page 21 of the statement of charge relates to them. That is, we have been charged with instigating for mutiny supporting the intentions of the accused listed from 1st to 39th using the organizations we work with and passing decisions and issuing declarations in the name of the organizations. The Public Prosecutor has not submitted any documentary or video and tape recorder evidence especially against the accused Daniel and Netsanet to support this charges. In these circumstances, the fundamental constitutional rights of the accused should not be denied just because the Public Prosecutor brought the charges under a criminal article that carries a serious offence. The Court should determine that the charges were brought without sufficient supporting evidence. Since denying us the right to bail merely on the basis of the Criminal Code provision the Public Prosecutor chose to bring charges under will be tantamount to saying that there is no need to submit petitions for bail to the Court, the Court should make sure that the charges are supported by sufficient evidence. Let alone in criminal cases, even in civil litigation courts do not call on the defendant to respond merely because a statement of claim has been submitted without making sure that there is a cause of action. The accused argued that in criminal cases, a Court is expected to doubly make sure the existence of cause of action. Concerning the 92nd accused, the evidence submitted against him were issued in the name of an association and even then do not have any criminal content. They have also argued saying that the part of the first charge relating to us does not say anything about loss of life due to the actions of the accused and does not preclude bail under article 63 of the Criminal Procedure Code. Moreover, there is no reason to deny bail to the accused under article 67 of the Criminal Procedure Code. They have concluded their arguments stating it should not be forgotten that the matter relates to disputes between two political parties and needs political solutions and the Court should grant our right to be released on bail. The Public Prosecutor, on its part, has responded that a petition for bail is to be granted or denied on the basis of the law. Article 19 sub-article 6 of the FDRE Constitution stipulates that the right to bail may be limited by law in special circumstances. Since the Council of Constitutional Inquiry has already determined that the right to bail may be limited by law, the claim that the right to bail should not be limited by law is not acceptable. The claim that the Public Prosecutor has brought charges without sufficient supporting evidence is not acceptable because now is not the time for examining whether or not the Public Prosecutor has or has not submitted evidence and if the evidence is sufficient or not. As per article 63/1/ of the Criminal Procedure Code, it has been stipulated that the right to bail is to be denied where

the charge carries a punishment of more than fifteen years and where there is loss of life. Since the first charge concerns substantial loss of life and carries a punishment of life imprisonment or the death penalty, the fact that they have been charged under this article alone precludes their right to bail and the Court should deny their petition. The Public Prosecutor presented objections against granting bail stating that a person accused of attempt is punished for the planned offence and the charges against the accused preclude bail. Moreover, the Public Prosecutor argued that the accused should not be released on bail even under article 67. The Court has examined the arguments presented in light of the law and identified the following two points as issues.

1. whether the right to bail can or can not be limited by law; what do the international documents mentioned by the accused, especially the 1966 International Covenant on Civil and Political Rights, and the laws operational in Ethiopia and the Constitution say on this matter.
 2. if it is said that the right to bail can be limited by law, whether or not the criminal offence or provision under which the accused have been charged in this file does or does not preclude bail as per the applicable Criminal Procedure Code article 63. We will examine these broad points as follows.
- The accused have argued that the Declaration of Human Rights and the International Covenant on Civil and Political Rights, which are part of Ethiopian law, stipulate that the power to grant or deny bail is the exclusive mandate of the Court and the right to bail cannot be limited by law. The court has examined the two documents. While the Declaration of Human Rights of 1948 does not contain a provision showing the arguments of the accused, we have found article 9 sub-article 3 of the International Covenant on Civil and Political Rights to be appropriate in relation to the arguments presented by the accused. This article, i.e., the second paragraph of article 9 sub-article 3, reads as follows: - It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees. What we can understand from this article is that accused persons whose case is under consideration in a court should not in principle and generally be under custody while they follow up their case and should be released on bail. Neither this article nor other articles of the Convention imply that bail cannot be limited by law. What we can understand from these articles is that granting of bail is considered to be the principle while denial of bail by the Court or by law is considered the exception. The accused argued that the denial of bail is to be exclusively determined by courts rather than being stipulated by law. However, as we have seen above, the document quoted by the accused only provides that denial of bail is to be considered an exception rather than supporting this allegation. Article 19 of the FDRE Constitution has stipulated that persons arrested have a constitutional right to be released on bail. The last part of this article also stipulates that the court may deny bail in exceptional circumstances prescribed by law. Thus, the argument claiming that the right to

bail cannot be limited by law is not acceptable. When we come to the second issue, it requires that we examine article 63 of the Criminal Procedure Code. The presentation of this article shows that the right to be released on bail is the principle and that bail may be denied in special circumstances. The meaning of article 63 of the Criminal Procedure Code is interpreted in different manners by different parties. Some say that any person charged for a crime that carries the death penalty, a punishment of rigorous imprisonment for fifteen years or more should not be released on bail. Others contend that, to preclude the right of the accused to be released on bail, it is necessary that the victim of the crime has died or is likely to die as a result of the crime in addition to the offence carrying a punishment of rigorous imprisonment for fifteen years or more. Since the right to be released on bail is the rule and denial is the exception and since exceptions should be interpreted narrowly, the Court has endorsed the second line of interpretation. That is, the fact that the offence for which the person has been charged carries the death penalty or a punishment of rigorous imprisonment for fifteen years or more is not sufficient to deny bail. It is also necessary that the victim of the crime has died or is likely to die as a result of the crime. Accordingly, we will now separately examine whether the charges against the accused deny or grant them bail under this article. The Public Prosecutor has submitted seven charges against the accused. The first charge is brought against all 131 accused. The charge alleges that the accused have committed an offence against the Constitution and the constitutional order in violation of articles 32/1/a/b/, 38, 34, 27/1/ and 238 sub-article 2 and 258. The particulars of the charge indicate separately the level of participation of the accused. In this first charge, the actions of the 1st to 39th accused in perpetrating the crime are listed separately while those of 40th to 69th, 70th to 90th, 91st to 95th, 96th to 121st, 122nd to 127th, and 128th to 131st are similarly listed in detail separately. This first charge brought against all the accused is a criminal offence under article 27/1/, 238/2/ and 258 and presented at the level of attempt. As prescribed under article 27/3/ of the Criminal Code, the punishment for charges submitted at the level of attempt is that of the attempted offence. Accordingly, it is possible to definitely ascertain that the charge brought against the accused carries a punishment of more than fifteen years. This situation fulfills the extent of punishment set as the first condition for denial of bail under article 63 of the Criminal Procedure Code. The second condition is whether or not the victim of the crime has died or will die. The issue of whether or not this condition is fulfilled has been examined as follows. One of the contentions in the arguments submitted by the accused is that no one has died as a result of their actions and that they have been accused of attempt to forcefully abolish the Constitution rather than homicide. The charge against the accused explains that they have been charged with mutiny and criminal conspiracy to abolish the Constitution and the system established on the basis of the Constitution. The details of the charge further elaborates that the accused have caused the death of 26 citizens on 8 June 2005; since 1 November 2005 they have instigated mutiny and rioting by simultaneously creating mutiny and rioting in fifty five selected areas and in the regions, instigated firing,

throwing explosives and use of sharp instruments against security forces preventing them from enforcing law and order causing the death of 34 persons due to injury on security forces and civilians. It has been explained above that one of the conditions for denial of bail under article 63 of the Criminal Procedure Code is the death or possible death of the victim of the criminal act. The word crime in the phrase “the victim due to injury caused by the criminal act” does not refer to homicide or aggravated homicide. It covers all acts identified as offences in the criminal law. That is, if loss of life among security forces or civilians resulted from the action while attempt to forcefully abolish the constitutional system is being committed, it satisfies the condition stating if the victim of the crime died under article 63 of the Criminal Procedure Code. In contrast to these circumstances, which have been presented in the first charge, the argument of the 92nd, 94th and 95th accused that they have been charged only under the part indicated under item number 4 on page 21 of the statement of charge which does not say anything about loss of life call for an examination of the manner in which the charge has been presented. When we see that the 1st charge refers to articles 32/1/a/ and /b/, it indicates that all the accused have been charged as principal offenders (without clarity). The fact that the accused have been listed in seven distinct groups in the details of the charge only indicates the specific actions of the accused as principal offenders rather than what was submitted by the accused. This could be confirmed by examining the actions of these three accused as described under item number 4 on page 21 of the statement of charge. This reads as: - the accused listed from 91st to 95th, taking the criminal intentions of the accused listed from 1st to 39th as their own. It is possible to understand from a reading of this statement that the charge brought against all of the accused is similar. Thus, the charge brought against the accused does not permit them to attend their trial being released on bail under article 63 of the Criminal Procedure Code. In addition to the above presented arguments, we will examine the claims by all the accused stating that they should not be denied bail simply because of the presentation of the charges; that the Court should determine sufficient evidence has been submitted and reach a reasonable assumption that we could be punished; that a defendant is not called on to appear before the existence of a reasonable cause of action has been ascertained even in civil proceedings; and that no evidence has been submitted against us. The Civil Procedure Code clearly states that a defendant is not called on to appear before the existence of reasonable cause of action has been ascertained. But, it is not proper to submit this prescription for comparison in a criminal case. This is because article 40 of the Criminal Procedure Code and subsequent articles put an obligation on the Public Prosecutor to submit charges whenever the Public Prosecutor believes that there is reason to do so. The court does not have the authority to say that the charge is or is not supported by evidence or the charge has no basis before weighing the evidence and providing its judgment. Similarly, there is no legal procedure at this stage for the court to examine whether the evidence brought by the Public Prosecutor support the charges in as long as the charges preclude bail under article 63 of the Criminal Procedure Code. Thus, since examination of the 1st

charge alone as presented above shows that the charges brought against the accused do not permit their right to bail under article 63 of the Criminal Procedure Code, we have rejected the petitions of the accused. And, since the arguments of the accused based on article 67 of the Criminal Procedure Code would only have been appropriate if their right to bail could be granted under article 63 of the Criminal Procedure Code, the arguments have been passed over without the need for examination. In relation to the argument of the accused claiming that the matter relates to disputes among political parties and needs political solutions, the Court has determined that the issue should not be submitted to this Court since apart from technically investigating and giving legal decisions on charges brought by the appropriate organs the Court cannot determine whether the matter should or should not be resolved outside the court.