

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7081

John Doe, a.k.a. Kidane,

Plaintiff/Appellant

v.

Federal Democratic Republic of Ethiopia,

Defendants/Appellees

On Appeal from the United States District Court for the District of
Columbia, No. 1:10-cv-00539, Honorable Barbara J. Rothstein

**BRIEF OF AMICI CURIAE UNITED NATIONS HUMAN RIGHTS
EXPERTS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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Certificate as to Parties, Rulings, and Related Cases

I. All Parties, Intervenors, and Amici

A. Parties

1. Plaintiff

- John Doe, also known as Kidane

2. Defendant

- Federal Democratic Republic of Ethiopia

B. Amici

1. David Kaye, United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression

2. Maina Kiai, United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association

3. Michel Forst, United Nations Special Rapporteur on the Situation of Human Rights Defenders

II. Ruling Under Review

The ruling under review is as follows:

- *Doe v. Fed. Democratic Republic of Ethiopia*, No. 1:14-cv-00372, 2016 U.S. Dist. LEXIS 67909 (D.D.C. May 24, 2016)

III. Related Cases

None.

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amici state that none of the *Amici* has a parent corporation and no publicly held corporation owns 10% or more of the stock of any amicus.

SOURCE OF AUTHORITY TO FILE

This brief is submitted pursuant to Rule 29(a) and Rule 29(b) of the Federal Rules of Appellate Procedure and Rule 29(b) of the D.C. Circuit Rules, in conjunction with the attached Motion for Leave to File.

AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this *Amici Curiae* brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the *Amici Curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.



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GLOSSARY OF ABBREVIATIONS

High Commissioner	United Nations High Commissioner for Human Rights
FSIA	Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891
U.N.	United Nations
The Covenant	International Covenant on Civil and Political Rights, 999 U.N.T.S .171 (1966)
Wiretap Act	Electronic Communication Privacy Act of 1986, Pub. L. 99-508 § 103, 100 Stat. 1848

STATUTES AND REGULATIONS

All applicable statutes, etc. are contained in the Brief for Appellant.

INTEREST OF *AMICI CURIAE**

Amici are independent human rights experts (officially known as “U.N. Special Rapporteurs”) appointed by the Human Rights Council, the central human rights institution of the U.N. *Amicus curiae* **David Kaye** is the **U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression**. *Amicus curiae* **Maina Kiai** is the **U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association**. *Amicus curiae* **Michel Forst** is the **U.N. Special Rapporteur on the situation of human rights defenders**.

Amici believe that this case raises critical questions about access to a justice process and an effective remedy for violations of individual rights committed by a foreign State on U.S. soil. The surveillance activities described in the Appellant’s complaint not only violate U.S. laws, but also rights guaranteed under the International Covenant of Civil and Political Rights and related international and human rights norms. To assist the Court in its deliberations, *amici* provide information and analysis on how its ruling might vindicate Appellant’s rights and enable the United States to comply with its international legal obligations.

* The Special Rapporteurs would like to thank Mr. Amos Toh, Ford Foundation Fellow of the UC Irvine School of Law International Justice Clinic, and Mr. Stephen Suk and Ms. Reeti Patel, student advocates with the clinic, for their assistance with the preparation of this brief.

SUMMARY OF ARGUMENT

The invasive surveillance described in the Appellant's brief – the targeting of an activist's computer with malware and the regular collection and transmission of his communications in the United States – highlights one way in which Governments worldwide threaten fundamental freedoms.¹ The most basic of these freedoms are codified as a matter of international human rights law, binding on the United States since 1992 and Ethiopia since 1993 under the International Covenant on Civil and Political Rights ("the Covenant").² The Covenant obligates each of its 168 States Parties to respect and ensure the rights the Covenant guarantees to all individuals within their territory and subject to their jurisdiction. The allegations in this case describe a strikingly audacious violation, implicating Ethiopia's obligation to protect the Covenant-guaranteed rights to freedom of opinion and expression (Article 19), privacy (Article 17), and the right to peaceful assembly (Article 21), and the freedom of association (Article 22).

¹ Morgan Marquis-Boire, Bill Marczak, Claudio Guarnieri, and John Scott-Railton, "You Only Click Twice: FinFisher's Global Proliferation," Citizen Lab Research Brief No. 15, at 2, 7-10 (March 2013), <https://citizenlab.org/wp-content/uploads/2009/10/You-Only-Click-Twice-FinFisher%E2%80%99s-Global-Proliferation.pdf>.

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force March 23, 1976) 999 U.N.T.S. 171, entered into force for the United States September 8, 1992 [hereinafter "ICCPR"].

Individuals worldwide who suffer such harassment and violation often lack access to a system of justice that might bring this kind of surveillance to a halt. *This case is different.* The U.S. legal system provides an avenue of recourse to this U.S. citizen, through the non-commercial tort exception to the Foreign Sovereign Immunities Act (“FSIA”), coupled with the substantive protections of the Wiretap Act noted in the Appellant’s Brief. Such recourse enables the United States not only to protect its citizens under domestic law but to promote respect for the rights guaranteed under the Covenant. Though there is no allegation of United States involvement in the interception and collection of appellant Kidane’s digital communications and information in Maryland, the United States does have an obligation to ensure that individuals subject to its jurisdiction may exercise the rights which they are guaranteed. In short, U.S. laws, in the form of the FSIA and Wiretap Act, enable this Court to provide Appellant access to a justice process and the possibility of an effective remedy, thus giving effect to the obligation of the United States to ensure respect for Appellant’s rights under the Covenant.

In this brief, *amici* aim to bring to the Court’s attention three main points: first, that reversal of the decision below, and providing Mr. Kidane with access to legal process, would facilitate the U.S. obligation to ensure respect of the Covenant; second, that the allegations against Ethiopia detail several concrete and serious violations of the guarantees provided by the Covenant; and third, that the mere

opportunity for Mr. Kidane to pursue his claims in this case would send a strong global signal that such serious violations of the Covenant must be subject to the rule of law and accountability.

ARGUMENT

I. This Court’s recognition that it is capable of exercising jurisdiction over Appellant’s claims would give effect to the United States’ obligation to ensure the rights guaranteed to him under the International Covenant on Civil and Political Rights.

On June 8, 1992, the United States ratified the Covenant, “one of the fundamental instruments created by the international community for the global promotion and protection of human rights.”³ The Covenant “codifies the essential freedoms people must enjoy in a democratic society.”⁴ For instance, its substantive provisions provide an international legal basis for the prohibition of discrimination, summary execution, torture, and slavery, and it guarantees the protection of due process, privacy, religious belief and conscience, opinion and expression, and association and peaceful assembly. When transmitting the Covenant to the Senate for advice and consent to ratification, President George H.W. Bush noted that, with a few exceptions that could be addressed by reservations and understandings, the

³ S. REP. NO. 102-23, at 3 (1992).

⁴ United States: Senate Committee On Foreign Relations Report On the International Covenant On Civil and Political Rights, 31 I.L.M. 645, 660 (May 1992) (earlier draft, adopted later by the Senate and President).

Covenant is “entirely consonant with the fundamental principles incorporated in our own Bill of Rights.”⁵

In order to give effect to the Covenant, Article 2 of the Covenant provides as follows:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

⁵ *Id.*

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Several points deserve highlighting. First, all States Parties to the Covenant, under Article 2(1), “[u]ndertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”⁶ This undertaking “implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise [these] rights ... including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights.”⁷ Second, where there are gaps in their domestic legal frameworks, States must “adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”⁸ In particular, States Parties to the Covenant agree that violations entitle victims to “an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”⁹ Third, States Parties also agree that claimants should enjoy access to legal process, whether judicial or administrative, and “to develop the possibilities of judicial remedy.”¹⁰

⁶ ICCPR, *supra* note 2, art. 2(1).

⁷ Thomas Buergenthal, "To Respect and Ensure: State Obligations and Permissible Derogations," in Henkin (ed.), *The International Bill of Rights* 77 (1981).

⁸ ICCPR, *supra* note 2, art. 2(2).

⁹ ICCPR, *supra* note 2, art. 2(3)(a).

¹⁰ ICCPR, *supra* note 2, art. 2(3)(c).

In most situations, the United States may be able to meet these obligations through the application of Constitutional and statutory law at the federal, state and local levels of government, whether through judicial, legislative or administrative means. Human rights law requires that governments “ensure” protection of individuals’ rights not only against the State but also third parties.¹¹ In a case like the instant one, in which the Government responsibility involves its citizen’s rights within its territory against a third party State, the availability of specific legal frameworks, such as the FSIA, enables the United States to meet its Article 2 obligations.

Article 2(3)’s references to judicial mechanisms emphasize the role of domestic courts in ensuring that “individuals have accessible and effective remedies to vindicate [their] rights.”¹² Courts may address claims of rights violations under domestic law through the “direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.”¹³

¹¹ Kälin and Künzli, *The Law of International Human Rights Protection* 109-11 (2009).

¹² U.N. Human Rights Comm., General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter “General Comment 31”]; *see also* Buergenthal, *supra* note 7, at 77.

¹³ General Comment 31, *supra* note 12, ¶ 15.

The non-commercial tort exception under the FSIA provides the basis for this Court to advance U.S. obligations under the Covenant. When adopting the FSIA, the House of Representatives emphasized that U.S. citizens “increasingly com[e] into contact with foreign states in a variety of circumstances” where “access to the courts” is required “to resolve ordinary legal disputes.”¹⁴ While this is no “ordinary legal dispute[,]” it highlights exactly the kind of contact with a foreign state that the FSIA is designed to address. In this circumstance, where a foreign State’s interference amounts to tortious conduct occurring within the United States, the exception provides “possibilities of judicial remedy” as envisioned by the Covenant.

As explained below, the surveillance activities that Ethiopia allegedly conducted on Kidane’s computer in Maryland unduly interfered with rights guaranteed to him under Articles 17, 19, 21 and 22. Application of the non-commercial tort exception under the FSIA would provide Kidane the opportunity to seek relief for these violations, and enable the United States to meet its commitment to ensure respect for his rights under the Covenant.

¹⁴ H.R. REP. NO. 94-1487 at 6 (1976); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 490 (1983) (FSIA “ensure[s] ‘our citizens ... access to the courts,’ *id.*, at 6 (emphasis added)”).

II. The Appellant suffered violations of rights to freedom of expression, privacy, peaceful assembly and association guaranteed by the Covenant.

Targeted surveillance of the kind alleged in this case is all too common, and its aims are clear. It fundamentally aims to silence individuals who express criticism of government or government officials, associate with like-minded human rights defenders, and report on government malfeasance. The Appellant's Brief shows how Kidane suffered tortious harm under the Wiretap Act; those same factual allegations underscore Kidane's rights under the Covenant.¹⁵

A. Ethiopia's alleged surveillance of Kidane violated his right to freedom of opinion and expression under Article 19 of the Covenant.

Article 19 provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart

¹⁵ The human rights norms described in this brief find expression throughout international human rights law. In addition to the Covenant, these norms may be found in regional human rights instruments as discussed in Parts II (C) and III (A). *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 12, 19, 20(1) (Dec. 10, 1948) [hereinafter "Universal Declaration of Human Rights"]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, arts. 8, 10, 11, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 [hereinafter "European Convention"]; Organization of American States (OAS), American Convention on Human Rights, arts. 11, 13, 16, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter "American Convention"]; Organization of African Unity (OAU), African Charter on Human and Peoples' Rights, arts. 9, 10, 11, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter "African Charter"].

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 of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For the respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The allegations suggest multiple violations of Article 19.

1. *The alleged surveillance interfered with Kidane's right to freedom of opinion.*

The Covenant distinguishes the freedom of opinion from the freedom of expression, conferring unconditional protection on the former. Article 19(1) guarantees the “right to hold opinions without interference,” which protects the right to have and hold opinions without being compelled to express or otherwise disclose them to anyone. The right to hold opinions also implies the right “to *form* an opinion and to develop this by way of reasoning.”¹⁶ This right is not simply “an abstract concept limited to what may be in one’s mind.”¹⁷ In the digital age, individuals may

¹⁶ Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary 441 (1993) (emphasis added).

¹⁷ Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, para. 20, U.N. Doc. A/HRC/29/32 (May 22, 2015) [hereinafter “Kaye Report, A/HRC/29/32”].

“sav[e] their views and their search and browse histories, for instance, on hard drives, in the cloud, and in e-mail archives ... prepare and store digitally memoranda, papers and publications, all of which involve the creation and holding of opinions.”¹⁸

The Covenant does not permit opinions “to be restricted by law or other power.”¹⁹

The contemporaneous recording of Kidane’s online activities violates Article 19(1). Ethiopia allegedly intercepted and collected his browsing activities and potentially other computer files that store or reflect Kidane’s thoughts, views and ideas. This form of surveillance undermines his right to both hold and form opinions without interference, “as the fear of unwilling disclosure of online activity, such as search and browsing, likely deters individuals from accessing information, particularly where such surveillance leads to repressive outcomes.”²⁰

2. Ethiopia’s surveillance of Kidane violates the right to freedom of expression under Article 19(2) of the Covenant.

Article 19(2) protects the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers ... or through any ... media of his choice,” while Article 19(3) permits restrictions if they satisfy two criteria. First, restrictions must be “provided by law.” Second, restrictions must be “*necessary*: (a) For the respect of the rights or reputations of others; [or] (b) For the protection of

¹⁸ *Id.* ¶ 20.

¹⁹ *Id.* ¶ 19.

²⁰ *Id.* ¶ 21.

national security or of public order (ordre public), or of public health or morals.”
(emphasis added)

Article 19(2) protects Kidane’s right to freedom of expression through digital media, including on his computer and the Internet. State Parties to the Covenant adopted the general phrase “through any ... media,” as opposed to an enumeration of then-existing media.²¹ Article 19(2) was therefore drafted in order to accommodate technological developments in modes of expression and communication. Indeed, there is widespread consensus that rights offline are equally protected online.²² Accordingly, Kidane’s Skype phone calls, e-mails, web browsing and social media activity – all of which Ethiopia allegedly intercepted and collected – are expressive activity protected under Article 19(2).

Such interception and collection restrict Kidane’s right to freedom of expression and are subject to the requirements of Article 19(3). Without appropriate limits, government surveillance deters individuals from exercising the freedom of expression for fear of unwarranted government scrutiny or disclosure. In the digital context, a growing number of domestic and regional courts around the world, including the United States Supreme Court and the European Court of Human

²¹ *Id.* ¶ 26.

²² H.R.C. Res. 32/13, The Promotion, Protection and Enjoyment of Human Rights on the Internet, ¶ 1 (June 27, 2016); H.R.C. Res. 26/13, The Promotion, Protection and Enjoyment of Human Rights on the Internet, ¶ 1 (July 14, 2014).

Rights, have recognized that unchecked electronic surveillance of private communications and information exerts a significant chilling effect on freedom of expression.²³ International bodies and human rights experts have also observed a sharp increase in reports linking targeted electronic surveillance to the intimidation and harassment of activists, journalists and human rights defenders in order to suppress their views.²⁴

Once an individual has established a restriction on freedom of expression, the burden falls on the State Party to the Covenant to demonstrate that the restriction complies with the requirements of Article 19(3).²⁵ Ethiopia likely cannot satisfy this burden. Its surveillance activities on Kidane's computer were conducted without evident legal justification, and therefore were not "provided by law". The condition of legality requires at least some public showing that the activity was authorized

²³ *Bartnicki v. Vopper*, 532 U.S. 514, 533, 121 S. Ct 1753 (2001) ("the fear of public disclosure of private conversations might well have a chilling effect on private speech"); *Klass and Others v. Germany*, App. No. 5029/71, Judgment, 28 Eur. Ct. H.R. 4, ¶ 43 (1978) [hereinafter "*Klass v Germany*"]; *see also* *Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 200, ¶ 80, (July 6, 2009) [hereinafter "*Escher v. Brazil*"] (holding that "the monitoring of the telephone communications of the association ... caused fear and tensions ... [that] altered the free and normal exercise of the right to freedom of association").

²⁴ *See infra* notes 67, 69-70 and accompanying text.

²⁵ U.N. Human Rights Comm., General Comment No. 34, Article 19, Freedoms of Opinion and Expression, ¶ 27, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter "*General Comment 34*"].

under formally enacted domestic laws and regulations. And even if Ethiopia provides justification *ex post facto*, the law(s) it relies on must be “formulated with sufficient precision” and “may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”²⁶ – a standard it is unlikely to meet given the indiscriminate nature of its alleged intrusion into Kidane’s private communications.

It is also unlikely that Ethiopia’s surveillance activities are “necessary” for the protection of any of the objectives specified under Article 19(3). The requirement of necessity implies that restrictions must not simply be useful, reasonable or desirable to achieve a legitimate government objective. Instead, a State must demonstrate “in specific and individualized fashion the precise nature of the threat” that it seeks to address, and a “direct and immediate connection between the expression and the threat.”²⁷ Necessity also implies an assessment of proportionality of the relevant restrictions. In particular, States must show that the restrictions are “appropriate to achieve their protective function ... the least intrusive instrument amongst those

²⁶ *Id.* at 25.

²⁷ *Id.* at 35.

which might achieve their protective function ... [and] proportionate to the interest to be protected.”²⁸

Ethiopia’s alleged surveillance of Kidane is neither necessary nor proportionate. As a threshold matter, the U.N. Human Rights Committee (the body of experts charged with monitoring implementation of the Covenant) has found that “the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights” is never a legitimate objective;²⁹ in fact, it undermines public engagement and debate in a manner that runs counter to the letter of Article 19 and the object and purposes of the Covenant. Accordingly, Ethiopia cannot justify surveillance activities as necessary if it targeted Kidane merely because of his human rights work. In any case, the continuous, real-time interception and collection of Kidane’s digital communications and activities for almost five months is unlikely to be proportionate to any legitimate interest Ethiopia seeks to achieve.

B. Ethiopia’s surveillance of Kidane’s communications and personal data arbitrarily and unlawfully interfered with his right to privacy.

Under Article 17(1) of the Covenant, “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” Article

²⁸ *Id.* at 34; U.N. Human Rights Comm., CCPR General Comment No. 27: Article 12 (Freedom of Movement), ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

²⁹ General Comment 34, *supra* note 25, ¶ 23.

17(2) further guarantees that “everyone has the right to protection of the law against such interference.”

Ethiopia’s alleged surveillance activities interfere with Kidane’s general right to privacy, which, by its very definition, protects “an area of anonymous development, interaction, and liberty ... free from State intervention.”³⁰ The interception and collection of Kidane’s Skype phone calls, e-mails and other communications also interfered with the privacy of his correspondence. Correspondence “primarily means written letters, [but] today covers all forms of communications over distance, i.e., by telephone, telegram, telex, telefax, e-mail and other mechanical or electronic means of communication.”³¹ The privacy of such correspondence requires that it “should be delivered to the addressee without interception and without being opened or otherwise read.”³²

Ethiopia’s surveillance activities are “arbitrary and unlawful” under Article 17(1). The term “unlawful” implies that no interference can take place “except in

³⁰ Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, ¶ 22, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013) [hereinafter “La Rue Report, A/HRC/23/40”].

³¹ Nowak, *supra* note 16, at 401; *see also* U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report (Bulgaria), ¶ 22, U.N. Doc. CCPR/C/BGR/CO/3 (Aug. 19, 2011).

³² U.N. GAOR, 43rd Sess., Supplement No. 40, Annex VI, ¶ 8, U.N. Doc. A/43/40 (Sept. 28, 1988).

cases envisaged by the law.”³³ Ethiopia’s lack of evident legal justification for its surveillance of Kidane is “unlawful” for the same reasons it fails to satisfy the “provided by law” requirement under Article 19(3).

The indiscriminate recording and monitoring of Kidane’s private digital life for four and a half months is also “arbitrary.” At a minimum, an interference with privacy is “arbitrary” if it is unpredictable, capricious and unreasonable.³⁴ Arbitrariness “is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person’s rights under Article 17 and its compatibility with the purposes, aims and objectives of the Covenant.”³⁵ A number of international bodies and experts – including the Human Rights Committee, the U.N. High Commissioner for Human Rights, and various U.N. Special Rapporteurs – conclude that an interference with privacy is non-arbitrary only if it is necessary to achieve a legitimate aim, proportionate to the aim sought.³⁶

³³ U.N. Human Rights Comm., CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Apr. 8, 1988).

³⁴ Fernando Volio, Legal Personality, Privacy, and the Family, in the International Bill of Rights: The Covenant on Civil and Political Rights 185, 191 (Louis Henkin ed., 1981); Nowak, *supra* note 16, at 382-3.

³⁵ U.N. Human Rights Comm., Communication No. 558/1993, *Canepa v. Canada*, ¶ 11.4, U.N. Doc. CCPR/C/59/D/558/1993 (June 20, 1997).

³⁶ U.N. Human Rights Comm., Communication No. 488/1992, *Toonan v. Australia*, ¶ 8.3, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994); see also U.N. Human Rights Comm., Communications Nos. 1482/2006, ¶¶ 10.1, 10.2, U.N. Doc. CCPR/C/93/D/1482/2006 (Sept. 2, 2008), and 903/1999,

There is no evidence that Ethiopia has met any of these criteria. It allegedly intercepted and collected Kidane's private communications and personal data and those of his family without asserting any public justification, and without any evident effort to minimize the information collected. Moreover, Ethiopia only attempted to cease its surveillance activities after they were exposed by The Citizen Lab at the University of Toronto, in March 2013.³⁷

C. Ethiopia's surveillance of Kidane also violated his rights of peaceful assembly under Article 21 and freedom of association under Article 22.

Article 21 protects the "right of peaceful assembly," while Article 22(1) protects the "right to freedom of association with others." The right of peaceful assembly encompasses the right to organize and hold gatherings for a specific purpose, whether in public or private spaces, and both offline and online.³⁸ The freedom of association implies the right to form and join "any groups of individuals

para 7.3, U.N. Doc. CCPR/C/82/D/903/1999 (Nov. 1, 2004); U.N. High Comm'r for Human Rights, *The Right to Privacy in the Digital Age*, ¶¶ 21-23, U.N. Doc. A/HRC/27/37 (June 30, 2014); La Rue Report, A/HRC/23/40, *supra* note 30, ¶¶ 28-29; Human Rights Council, *Report of the Special Rapporteur on the right to privacy*, Joseph A. Cannataci, ¶ 2, U.N. Doc. A/HRC/31/64 (Mar. 8, 2016); Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin, ¶¶ 16-19, U.N. Doc. A/HRC/13/37 (Dec. 28, 2009) [hereinafter "Scheinin Report, A/HRC/13/37"].

³⁷ See Plaintiff's First Amended Compl. (Dkt. No. 26) at ¶ 9.

³⁸ Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, Maina Kiai, ¶¶ 24, 32, U.N. Doc. A/HRC/20/27 (May 21, 2012) [hereinafter "Kiai Report, A/HRC/20/27"].

or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.”³⁹ It also includes the right “to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right.”⁴⁰ Associations protected by the right include civil society organizations, NGOs and, increasingly, online associations.⁴¹ Such associations may be formal or informal.⁴²

No restrictions may be placed on either right other than those which are “in conformity with” or “prescribed by law,” and “necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.” (Article 21; Article 22(2)).

The rights to freedom of opinion and expression and privacy are critical to the enjoyment of freedom of assembly and association; accordingly, interference with

³⁹ *Id.* ¶ 51.

⁴⁰ Baena-Ricardo et al. v. Panama, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 156 (Feb. 2, 2001); *see also* Kiai Report, A/HRC/20/27, *supra* note 39, ¶ 65.

⁴¹ Kiai Report, A/HRC/20/27, *supra* note 39, ¶ 52.

⁴² *See* Kiai Report, A/HRC/20/27, *supra* note 39, ¶¶ 51, 56.

one is likely also an interference with the other.⁴³ The interconnectedness of these rights is amplified in the digital age, where the “increased use of the Internet, in particular social media, and other information and communication technology” provides additional “basic tools” that enable individuals to assemble and associate, both online and offline.⁴⁴

As explained above, Ethiopia’s surveillance activities exerted a chilling effect on Kidane’s freedom of expression, and interfered with his privacy. These restrictions in turn inhibited Kidane’s ability to assemble and associate with members of the Ethiopian diaspora, particularly through the Internet. In particular, Kidane’s fear of intimidation, harassment and reprisal by the Ethiopian government has forced him to “consistently use” a pseudonym when he provides technical support and assistance to Ginbot 7, a group that protests abuses by the government.⁴⁵ He also has little choice but to keep his associations with Ginbot 7 and other members of Ethiopia’s democratic opposition movement secret from even his “closest, most immediate family members.”⁴⁶

The restrictions on Kidane’s freedom of assembly and association arising

⁴³ See General Comment 34, *supra* note 25, ¶ 20; Kiai Report, A/HRC/27/37, *supra* note 39, ¶ 20.

⁴⁴ Kiai Report, A/HRC/20/27, *supra* note 38, ¶ 32.

⁴⁵ Decl. of John Doe (AKA "Kidane") in Support of Mot. for Leave to Proceed in Pseudonym (Dkt. No. 1), ¶¶ 6, 9.

⁴⁶ *Id.* ¶ 6.

from Ethiopia's surveillance activities do not satisfy the requirements of legality, necessity and proportionality under Articles 21 and 22(2), for the same reasons they do not satisfy the same under Article 19(3).

III. Judicial process in this case would promote the global consensus that such surveillance violates international human rights law.

Ethiopia's alleged surveillance of Kidane does not merely violate the rights guaranteed under the Covenant. State practice and the jurisprudence of international and regional human rights bodies establish global consensus that digital surveillance measures intended to disrupt or deter the work of human rights defenders and activists violate well-established human rights norms. Recognizing that U.S. law provides a vehicle to redress these violations would align the United States with the international community and send a strong global signal against such digital attacks.

A. International and regional bodies recognize that improper digital surveillance violates well-established human rights law.

As explained in Section I, targeted digital surveillance engages the duty of States to ensure respect for fundamental rights, including the rights to privacy, freedom of opinion and expression and freedom of assembly and association. These rights are not merely established under the Covenant but also the Universal Declaration on Human Rights⁴⁷ and regional human right treaties such as the

⁴⁷ Universal Declaration of Human Rights, *supra* note 15, arts. 12, 19, 20(1).

American Convention on Human Rights,⁴⁸ the European Convention on Human Rights⁴⁹ and the African Charter on Human Rights.⁵⁰ The duty to respect these rights – and the ensuing limitations on targeted surveillance measures – therefore have precedent in numerous other international and regional fora.

The international community has recognized that improper government surveillance not only affects the right to privacy but also a range of closely related fundamental rights. According to the U.N. General Assembly, “the exercise of the right to privacy is important for the realization of the right to freedom of expression and to hold opinions without interference,” and the surveillance and interception of communications and personal data therefore implicates both these rights.⁵¹ The U.N. Human Rights Council has reiterated “the impact of surveillance on the right to privacy and other human rights.”⁵² The U.N. High Commissioner for Human Rights (“High Commissioner”) has stated that “[e]ven the mere possibility of communications information being captured creates an interference with privacy, with a potential chilling effect on rights, including those to free expression and

⁴⁸ American Convention, *supra* note 15, arts. 11, 13, 16.

⁴⁹ European Convention, *supra* note 15, arts. 8, 10, 11.

⁵⁰ African Charter, *supra* note 15, arts. 9, 10, 11.

⁵¹ G.A. Res. 68/167, The Right to Privacy in a Digital Age, at 1 (Dec. 18, 2013).

⁵² Human Rights Council, Draft Resolution: The Right to Privacy in a Digital Age, at 2, U.N. Doc. A/HRC/28/L.27 (Mar. 24, 2015).

association”.⁵³ Regional human rights bodies agree: the Special Rapporteur for Freedom of Expression for the Inter-American Commission on Human Rights, for example, concluded that “[r]espect for online freedom of expression assumes that there is privacy for people’s communications,” and that surveillance that violates such privacy “instills fear and inhibition as part of the political culture.”⁵⁴ The Council of Europe’s Human Rights Commissioner has also recognized that the privacy of personal data serves as “a key enabler of other fundamental rights, such a freedom of communication and freedom of association.”⁵⁵

International bodies and experts have emphasized that the interception, collection and use of digital communications and data must, at minimum, be provided by law and non-arbitrary.⁵⁶ The growing body of international jurisprudence on digital surveillance measures identifies specific limits that are capable of satisfying these criteria: the authorization of such surveillance under validly enacted laws;⁵⁷ narrowly drawn purposes for which the authorities can order

⁵³ U.N. High Comm'r for Human Rights, *supra* note 36, ¶ 20.

⁵⁴ Inter-Am. Comm'n H.R., Office of the Spec. Rapporteur for Freedom of Expression, Freedom of Expression and the Internet, ¶¶ 130, 150 (Dec. 31, 2013).

⁵⁵ Council of Europe, Comm'r for Human Rights, *The Rule of Law on the Internet and in the Wider Digital World*, at 88 (Dec. 8, 2014).

⁵⁶ *See supra* note 36.

⁵⁷ *See* *Donoso v. Panama*, Preliminary Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 56 (Jan. 27, 2009); *Klass v. Germany*, *supra* note 23, ¶ 43.

the surveillance;⁵⁸ limits on the nature, scope and duration of surveillance,⁵⁹ as well as the subsequent use, retention and sharing of the information collected;⁶⁰ judicial oversight and other means of independent and external accountability;⁶¹ and the ability to seek redress for improper surveillance in judicial, administrative and other forums.⁶²

B. The international community has emphasized the importance of the State's duty to protect human rights defenders and activists from improper government surveillance.

The digital communications and data of human rights defenders and activists are at heightened risk of unlawful restriction and interference. The General Assembly recently expressed concern that “information and communications technologies are increasingly being used to monitor and hamper the work of human rights defenders.”⁶³ Such digital interferences, the General Assembly noted, are part

⁵⁸ See *Malone v. United Kingdom*, App. No. 8691/79, Judgment, 82 Eur. Ct. H.R. 10, ¶¶ 71-80, (Aug. 2, 1984).

⁵⁹ See *id.* ¶ 64; *Kruslin v. France*, App. No. 11801/85, 176 Eur. Ct. H.R. 10, ¶ 33, (Apr. 24, 1990); *Escher v. Brazil*, *supra* note 23, ¶ 132, (July 6, 2009); see also La Rue Report, A/HRC/23/40, *supra* note 30, ¶ 81.

⁶⁰ See *Iordachi and Others v. Moldova*, App. No. 25198/02, 2009 Eur. Ct. H.R. 256, ¶ 48 (Feb. 10, 2009) [hereinafter "*Iordachi v. Moldova*"]; *Weber and Saravia v. Germany*, App. No. 54934/00, Decision (Admissibility), 2006-XI Eur. Ct. H.R. 1173, ¶¶ 45-50 (June 29, 2006) [hereinafter "*Weber v. Germany*"].

⁶¹ See *Iordachi v. Moldova*, *supra* note 60, ¶ 49; Ass'n for European Integration and Human Rights and Ekimdzhiev, No. 62540/00, Judgment, 2007 Eur. Ct. H.R. 533, ¶¶ 85, 87-88 (June 28, 2007).

⁶² See *Shimovolos v. Russia*, App. No. 30194/09, Judgment, 2011 Eur. Ct. H.R. 987, ¶ 68 (June 21, 2011); *Weber v. Germany*, *supra* note 60, ¶ 106.

⁶³ G.A. Res. 70/161, at 3 (Dec. 17, 2015).

of a wider “prevalence of impunity for violations and abuses against them in many countries.”⁶⁴ The High Commissioner has raised similar concerns, observing that States have “reportedly made use of surveillance of telecommunications networks to target political opposition members and/or political dissidents.”⁶⁵ The Special Rapporteur’s global survey of threats to human rights defenders also identifies digital surveillance as part of a panoply of repressive tools used to “disregar[d] and indeed endange[r]” the safety and security of defenders.⁶⁶

The close connection between improper government surveillance and the repression of human rights defenders and activists is evident in Ethiopia. In 2016, the State Department raised concern that authorities were monitoring the telephone calls, text messages, and e-mails of Ethiopians both at home and abroad, and that “such surveillance [had] resulted in arrests.”⁶⁷ It also reported a “pattern of surveillance and arbitrary arrests of Oromo University students based on suspicion of their holding dissenting opinions or participation in peaceful demonstration.”⁶⁸

⁶⁴ *Id.*

⁶⁵ U.N. High Comm'r for Human Rights, *supra* note 36, ¶ 3.

⁶⁶ Michel Forst (Spec. Rapporteur on the Situation of Human Rights Defenders), Good Practices in the Protection of Human Rights Defenders, U.N. Doc. A/HRC/31/55 (Feb. 1, 2016).

⁶⁷ U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Ethiopia Country Report on Human Rights Practices for 2015, § 2(a) (2016).

⁶⁸ *Id.*

These reports are consistent with the findings of the Special Rapporteur on Human Rights Defenders, and other international human rights monitors and groups.⁶⁹

Improper government surveillance is not only inimical to the safety, security and livelihood of human rights defenders and activists, but also the fundamental tenets of democratic society which they seek to defend. The General Assembly, the Human Rights Council and various Special Rapporteurs have found that threats and attacks against human rights defenders hinder advocacy and development in a wide range of fields, including the realization of economic, social and cultural rights; environmental protection; conflict prevention; corporate responsibility; gender equality; the defense of sexual orientation and gender identity rights; and the protection of indigenous peoples.⁷⁰ These threats undermine the free flow of information and public dialogue necessary to secure government accountability and

⁶⁹ Michel Forst, *supra* note 66, ¶¶ 25-29; Human Rights Watch, Joint Letter to UN Human Rights Council on Ethiopia, HUMAN RIGHTS WATCH (September 08, 2016), <https://www.hrw.org/news/2016/09/08/joint-letter-un-human-rights-council-ethiopia> (Joint letter from international civil society organizations).

⁷⁰ *See generally* G.A. Res. 70/161, *supra* note 63; U.N. Secretary-General, Note transmitting the report of the Special Rapporteur on the Situation of Human Rights Defenders, Michel Forst, to the General Assembly, ¶¶ 7, 11, U.N. Doc. A/70/217 (July 30, 2015) [hereinafter “Forst Report, A/70/217”].

opportunities for reform on these issues.⁷¹ They have also weakened local collaboration with regional and international bodies, including the United Nations.⁷²

Against this backdrop of heightened repression, the General Assembly has called upon States to ensure that “[i]nformation and communications technologies are not used in a manner that amounts to arbitrary or unlawful interference with the privacy of individuals or the intimidation of human rights defenders.”⁷³ The Human Rights Council has urged States to acknowledge “the important and legitimate role of human rights defenders,”⁷⁴ and called upon them “to take all measures necessary to ensure the rights and safety of human rights defenders who exercise the rights to freedom of opinion, expression, peaceful assembly and association, which are essential for the promotion and protection of human rights.”⁷⁵ The State Department has duly acknowledged the heightened duty to “[p]rotect and support human rights defenders,” which it also affirms as “a key priority of U.S. foreign policy.”⁷⁶

⁷¹ See La Rue Report, A/HRC/23/40, *supra* note 30, ¶ 27; Inter-Am Comm'n H.R., Spec. Rapporteur for Freedom of Expression, Declaration of Principles on Freedom of Expression, ¶¶ 1, 5 (December 31 2013).

⁷² Forst Report, A/70/217, *supra* note 70 ¶¶ 7, 11.

⁷³ G.A. Res. 70/161, *supra* note 63 ¶ 10(h).

⁷⁴ Human Rights Council Res. 31/32, U.N. Doc. A/HRC/RES/31/32, ¶ 4 (April 20, 2016).

⁷⁵ *Id.* ¶ 2.

⁷⁶ U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Fact Sheet: U.S. Support for Human Rights Defenders 1 (2014).

CONCLUSION

Amici respectfully urge this Court to recognize that United States law establishes jurisdiction and provides a civil cause of action in this case, which concerns a foreign State's interference with a U.S. citizen's rights on U.S. soil. A reversal of the decision below will give effect to the obligation of the United States to ensure respect for fundamental human rights guaranteed to individuals within its jurisdiction under international law, and place it on equal footing with the international community.

Respectfully submitted,



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