

The Implications of 2009 Ethiopian CSOs Law on the Right to Freedom of Association

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1. Introduction

Before the adoption of the 2009 Charities and Societies Proclamation (hereinafter the Proclamation)¹, the laws that governed charities and societies or civil society organizations (hereinafter CSOs)² were the Civil Code of 1960 and the Associations Registration Regulation of 1966. Later on, these laws were unable to accommodate the level of development, characteristics and activities of CSOs in Ethiopia. Consequently, several problems were observed regarding registration, control and administration of CSOs.³ As a response to these problems, the Ministry of Justice prepared various drafts for a new legislation concerning the registration and regulation of CSOs and presented them for discussion in different years.⁴ The discussion on various draft legislations culminated in the adoption of the Proclamation by the parliament of the Federal Democratic Republic of Ethiopia on 6 January 2009. The adoption of this Proclamation has faced strong criticism from national civil society organizations, regional and international human rights activists and global and African regional treaty monitoring bodies. Although some of

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¹ Charities and Societies Proclamation, 2009, Proclamation No. 621, Neg. Gaz. Year 15, no. 25.

² The term CSOs has quite diverse definitions. This article adopted the definition used by the World Bank. According to the World Bank, CSOs 'refer to the wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations.' See The World Bank, Defining Civil Society, (<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html>), last visit June 12, 2015 As discussed below, while the Proclamation defines the term 'charity' or 'society' separately, both can be subsumed under CSOs. Thus, this article uses the term 'charities and societies' and 'CSOs' interchangeably.

³ Ethiopian Civil Society Organizations, Comments of Ethiopian Civil Society Organizations on the Charities and Societies Draft Proclamation (13 May 2008),

(<http://www.fssethiopia.org.et/CSO%20Bill%20-%20Gen%20Comts%20-%20Eng.pdf>) last visit on September 2, 2009

⁴ Ibid, the years on which the draft laws were tabled for discussion include: 2002, 2003, 2004 and 2008.

criticisms were raised against the draft Proclamation, they equally work for the adopted Proclamation as it was passed without making any change on the controversial articles.

The Ethiopian civil society organizations, in commenting on the draft law, argued that the new law could restrict funding and the scope of charities' activities and deny the appeal right of international non-governmental organizations to courts.⁵ Among international human rights groups, Amnesty International⁶ and Human Rights Watch⁷ regarded the Proclamation as repressive and meant not only to undermine and frustrate the work of independent civil society organizations in Ethiopia, particularly the work of human rights defenders and CSOs, both Ethiopian and international but also to bar foreign nongovernmental organizations. Both Amnesty and Human Rights Watch argued that the Proclamation contravenes fundamental human rights guaranteed by international law and by the FDRE Constitution, notably the right to freedom of association. Recalling that the Proclamation was passed by the Parliament despite considerable efforts on behalf of national, regional, international organizations as well as the diplomatic community to bring about significant amendments to the bill, the East and Horn of Africa Human Rights Defenders Network deplored the passing of the law arguing that the Proclamation threatens the very future of human rights work in Ethiopia.⁸

In response to the Ethiopian initial and periodic report, the African Commission on Human and Peoples' Rights in its concluding observation has expressed the concern that "the Charities and Societies Proclamation No.

⁵ Ethiopian Civil Society Organizations, Comments of Ethiopian Civil Society Organizations on the Draft Charities and Societies Proclamation (16 Nov.2008)

(<http://www.crdaethiopia.org/Documents/Comments%20of%20the%20CSO%20Task%20force%20on%20the%20Fourth%20Draft%20Legislation.pdf>) last visit on September 2, 2009

⁶ Amnesty International, Comments on the Draft Charities and Societies Proclamation (1 October 2008), (<http://www.amnesty.org/en/library/asset/AFR25/008/2008/en/6ec4fbd7-a748-11dd-8899-8f759187dd0e/afr250082008en.html>) last visit on August 21, 2009

⁷ Human Rights Watch, Human Rights Watch's Analysis of Ethiopia's Draft Civil Society Law (13 October 2008) ([http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/CJAL-7N4SXA_full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/CJAL-7N4SXA_full_report.pdf/$File/full_report.pdf)) last visit on September 12, 2009

⁸ The East and Horn of Africa Human Rights Defenders Network, Regional rights network condemns charities and societies law (17 January 2009) (<http://en.ethiopianreporter.com/content/view/561/1/>) last visit on September 13, 2009

621/2009 has the potential to violate the rights of freedom of expression as specified by the African Charter, especially the provision that requires CSOs not to raise more than ten percent of their funding outside of Ethiopia.”⁹ Once again, the Commission, deeply concerned with the human rights situations of Ethiopia, adopted a specific resolution on Ethiopia in May 2012.¹⁰ In this resolution, the Commission, *inter alia*, denounced ‘the excessive restrictions placed on human rights work by the Charities and Societies Proclamation, denying human rights organizations access to essential funding...’¹¹ and it urged the Ethiopian Government to amend the Proclamation in a manner consistent with the United Nations (hereinafter the UN) Declaration on Human Rights Defenders.¹²

The CEDAW Committee in its concluding observations on Ethiopia has also raised similar concern. According to the Committee, the proscription of foreign and foreign funded CSOs from engaging in human rights and gender activism by the Proclamation ‘has obstructed the capacity of local women’s rights organizations to provide legal aid and other support to women victims of human rights violations.’¹³ Apart from the recommendation to amend the law, the Committee urged Ethiopia to put in place provisional ‘strategies to mitigate the adverse impact of the CSO Law on the capacity of local human rights CSOs,’¹⁴ Moreover, the UN Special Rapporteur on the Rights to Freedom of Assembly and Association and the Human Rights Committee opined that the actual enforcement of the provisions of the Proclamation that restrict foreign funding of local human rights CSOs and prohibit foreign CSOs from engaging

⁹ African Commission on Human & Peoples’ Rights, Consideration of Reports Submitted by States Parties under Article 62 of the African Charter on Human and Peoples’ Rights, Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia Para. 45

¹⁰ Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, *the African Commission on Human and Peoples’ Rights (the African Commission), meeting at its 51st ordinary Session held in Banjul, The Gambia from 18 April to 2 May 2012* (<http://www.achpr.org/sessions/51st/resolutions/218/>), last visit on December 20, 2014

¹¹ *Id.*, Preamble, 8th paragraph.

¹² *Id.*, Para iv.

¹³ Committee on the Elimination of Discrimination against Women, Forty-ninth session 11 – 29 July 2011 Concluding observations of the Committee on the Elimination of Discrimination against Women, Para 28.

¹⁴ *Id.*, para. 29.

in human rights works in Ethiopia has seriously obstructed individuals' ability to form and run associations.¹⁵

The Ethiopian Government has dismissed the aforementioned criticisms. In an interview with the Voice of America, Ato Bereket Simon, the former Minister of Government Communications Affairs said that the criticisms are simply ridiculous assertions.¹⁶ The former Prime Minister, in highlighting the position of the Government, has also defended the Proclamation firmly arguing that the restriction on foreign funding of local human rights CSOs and the embargo on foreign human rights CSOs from engaging in human rights activities in Ethiopia are instrumental to curb foreign political influence in the domestic affairs of the country.¹⁷ Moreover, the Ethiopian Government entrained a position that the proscription of foreign and foreign funded CSOs from participating in human rights works is a reflection of the "stipulation of the FDRE Constitution' that limits the right to freedom of association (as a 'democratic right') only to Ethiopian citizens.¹⁸

The purpose of this article is not to entertain the whole debate on the entire provisions of the Proclamation. Instead, its intention is to reflect on one of the most controversial issues in the Proclamation; viz., whether the prohibition of foreign and foreign funded local CSOs from engaging in promotion of human rights constitutes a violation of the right to freedom of association. None of the

¹⁵ Human Rights Committee 102nd session Geneva, July 2011 Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee Ethiopia, para 25. See also UN Human Rights Council, Report of the Special Rapporteur on the Right to Freedom of Assembly and Association, Maina Kiai, April 24, 2013).

¹⁶ P. Heinlein, "US Says Draft Ethiopian CSO Law Would 'Close Political Space'" Voice of America, Oct. 21, 2008.

¹⁷ A cited in, M. Sekaggya, Report submitted by the Special Rapporteur on the situation of human rights defenders: Addendum Summary of cases transmitted to Governments and replies received, A/HRC/10/12/Add.1 (2009) Para. 979. This position of the Government was also reiterated by the Ethiopian delegate during the dialogue with members of the CEDAW Committee. See Committee on the Elimination of Discrimination against Women, cited above at note 13, para. 28. See also Ministry of Justice, Commentary on the Draft Charities and Societies Proclamation, September 2009, P. 11.

¹⁸ This argument of the Government is expressed in Users' Manual for the Charities and Societies Law, 2011, prepared by the Taskforce on Enabling Environment for Civil Society in Ethiopia, available at [http://csf2.org/sites/default/files/Users%20Manual%20for%20the%20Charities%20and%20Societies%20Law%20\(1\).pdf](http://csf2.org/sites/default/files/Users%20Manual%20for%20the%20Charities%20and%20Societies%20Law%20(1).pdf)), last visit June 12, 2015

existing literature on this issue meticulously and deeply analyzes the matter relying on national and international human rights standards.

This article canvasses the issue under its five sections. Section one highlights the global, European, African regional and domestic human rights standards relating to the right to freedom of association. Because the right to freedom of association is not an absolute right, states may limit the enjoyment of the right. However, the fact that the right could be limited does not give states a free license to deny the enjoyment of the right-by-right holders arbitrarily. Section two is devoted to analyzing the extent to which Ethiopia is permitted to restrict the enjoyment of the right to freedom of association. Section three introduces the reader to the relevant provisions of the Proclamation. In section four, the writer turns his attention to the crux of the matter. In this section, the author investigates the issue of whether the prohibition of foreign and foreign funded CSOs from working on promotion of human rights constitutes an interference with the right to freedom of association. The author also addresses the issue of whether or not the interference is a permissible interference in light of the relevant human rights standards. Finally, the author concludes the discussion in section five.

2. Human Rights Standards Governing the Right to Freedom of Association

2.1 Global and European Human Rights Standards

The right to freedom of association is recognized in a number of human rights instruments.¹⁹ The Universal Declaration of Human Rights (hereinafter the UDHR)²⁰, under article 20, provides that ‘everyone has the right to freedom

¹⁹ Besides the human rights treaties mentioned below, the right to freedom of association is dealt in many International Labor Organization (ILO) conventions, such as ILO 87 concerning the Freedom of Association and Protection of the Right to organize (1948); and ILO 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (1949).

²⁰Universal Declaration of Human Right, adopted in 1948. Despite the fact that the Universal Declaration of Human Rights was not meant to be a binding document, scholars argued that most of the provisions therein attained the status of customary international law. Under international law, rules of customary international law impose obligations on all states. See J. Dugard, *International Law: The South African Perspective*, (2005), p. 315.

of... association’, and that ‘no one may be compelled to belong to an association.’ Using similar wording, the same right is enshrined in article 22 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR).²¹ From trade unions point of view, article 8 of the International Covenant on Economic, Social and Cultural Rights (hereinafter the ICESCR)²² guarantees ‘the right of every one to form trade unions and join the trade union of his choice’ and ‘right of trade unions to function freely’. The right to freedom of association is also incorporated in other specialized human rights conventions, such as the United Nation Convention on the Rights of the Child (hereinafter the CRC)²³ and the International Convention on the Protection of the rights of All Migrant Workers and Members of Their Family.²⁴

The most recent UN document dealing with the right to freedom of association is the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter the UN Declaration on Human Rights Defenders).²⁵ The Declaration stipulated a series of principles and standards aimed at ensuring that states fully support the efforts of human rights defenders and ensure that they are free to conduct their activities for the promotion, protection and effective realization of human rights without hindrance or fear of reprisals. The term ‘human rights defender’ within the meaning of the Declaration refers to ‘any person or group of persons working

²¹ Adopted and open for signature, Ratification, and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976. Ethiopia acceded to it on 11 June 1993. For ratification status of international human rights treaties, visit <http://treaties.un.org/>

²² Adopted and open for signature, ratification, and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976. Ethiopia acceded to it on 11 June 1993.

²³ Adopted and open for signature, Ratification, and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990, Art. 15. Ethiopia acceded to it on 21 October 1991.

²⁴ Adopted by General Assembly resolution 45/158 of 18 December 1990, enters into force on 1 July 2003, Art. 26.

²⁵ UN Declaration on Human Rights Defenders, Adopted by the General Assembly in 1998, A/RES/53/144, and 9 Dec. 1998. The UN Declaration on Human Rights Defenders, as a General Assembly Resolution, is not legally binding. Significantly, however, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments and was adopted by consensus—therefore representing a strong commitment by states to its implementation.

to promote human rights.²⁶ This definition indisputably includes human rights CSOs and their members.

As can be deduced from the above international human rights documents, the right to freedom of association enables individuals to join together to pursue common interests in groups.²⁷ Although the right to freedom of association is framed in different treaties as an individual right, it has been increasingly argued that the right has a hybrid character.²⁸ That is, it has an aspect of both an individual and a collective right.²⁹ As a right of individuals, it encompasses the right of individuals to form and join any association freely. For this individual right to be fully enjoyed, however, the collective aspect of this right must be protected. That is, the associations formed must be able to function freely without unjustifiable governmental intrusion.³⁰ In support of this, it is further argued that article 8 of the ICESCR that requires State Parties to ensure ‘the right of the trade union to function freely’ “shows an understanding that the right to ‘form and join’ an organization may not be sufficient to enable an individual to fully realize his or her right to freedom of association” even if it specifically refers only to trade unions.³¹

Neither the Human Rights Committee nor other international treaties monitoring bodies address the issue of whether and how the right to freedom of association, a right typically formulated in various convention as a right of individuals, can be extended to other entities, such as CSOs.³² The landmark

²⁶ H. Jilani, Promotion and Protection of Human Rights: Human Rights Defenders, Report submitted by the Special Representative of the Secretary-General on human rights defenders, E/CN.4/2006/95 (2006) Para 29. This definition can also be implied from article 1 of the UN Declaration on Human Rights Defenders.

²⁷ M. Sepulveda, T. Banning, G. D. Gudmundsdottir, C. Chamoun and W. Genugten, Human Rights Reference Handbook, (2004), PP. 302-303.

²⁸ Id, P.303. See also, Human Rights First, The Neglected Right: Freedom of Association in International Human Rights Law (1997) (<http://www.humanrightsfirst.org/pubs/descriptions/neglrt.aspx>) last visit on September 13, 2009

²⁹ Id, P.302-303.

³⁰ Human Rights First, cited above at note 28.

³¹ Ibid

³² This does not include trade unions. In a number of conventions negotiated under the auspices of the International Labor Organizations (ILO), it is unambiguously affirmed that trade unions have the right to freedom of association. See, Freedom of Association and Protection of the Right to Organize Convention (ILO No. 87); Right to Organize and Collective Bargaining

decisions of the European Court of Human Rights have, however, affirmed that international law recognizes the right of individuals to form associations and that, once the associations are formed; the associations have the right to function freely.

In the *United Communist Party of Turkey and Others v. Turkey*³³, the Court, in deciding that Turkey could not dissolve a political party that had engaged in no illegal activities, *inter alia*, said that:

*[T]he Convention [the European Convention on the Protection of Human Rights and Fundamental Freedoms] is intended to guarantee rights that are not theoretical or illusory, but practical and effective. . . . The right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention. It follows that the protection afforded by Article 11 lasts for an association's entire life and that dissolution of an association by a country's authorities must accordingly satisfy the requirements of paragraph 2 of that provision.*³⁴

The European Court of Human Rights has also addressed the right of individuals to require registration of legally recognized associations that are not political parties. In the *Sidiropoulos and Others v. Greece*³⁵, in holding that Greece could not refuse to register an association named the 'Home of Macedonian Culture' the purposes of which were exclusively to preserve and develop the traditions and folk cultures of the Florina Region, the Court, *inter alia*, said that:

Convention (ILO No. 98); Workers' Representatives Convention (ILO No. 135); and Labor Relations (Public Service) Convention (ILO No. 151).

³³ *United Communist Party of Turkey and Others v Turkey*, (19392/92, European Court of Human Rights, January 30, 1998), available at (<http://www.unhcr.org/refworld/docid/4721cf132.html>) last visit on September 15, 2009

³⁴ *Id.*, Para. 33.

³⁵ *Sidiropoulos and Others v. Greece*, (57/1997/841/1047, European Court of Human Rights: Chamber decision, July 10, 1998), available at (<http://www.icnl.org>) last visit on September 15, 2009

[T]he right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.³⁶

By finding in the latter case that ‘the right to form legally registered associations was ‘inherent’ in the right of individuals to freedom of association, the Court avoided the disputes over whether legal entities themselves enjoy the right to freedom of association.’³⁷ Moreover, by finding in the former case that the protection of Article 11 of the European Charter on Human Rights ‘extends throughout the life of an association, the Court has effectively conferred the protections of the right to freedom of association on legal entities.’³⁸

Although the decisions of the European Court of Human Rights do not set precedents other than for States Parties to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR), the fact that the wording of Article 22 of the ICCPR to the wording of Article 11 of the ECHR are identical can serve as a basis of a strong argument that article 22 of the ICCPR must be interpreted in a manner similar to Article 11 of the ECHR.³⁹

2.2 African Regional Human Rights Standards

The leading African regional human rights treaty is the African Charter on Human and Peoples’ Rights (hereinafter the ACHPR).⁴⁰ The ACHPR, under article 10, recognizes the right to freedom of association as ‘every individual shall have the right to free association provided that he abides by the law’ and

³⁶ Id, Para. 40.

³⁷ L. E. Irish and K.W. Simon, Freedom of Associations: Recent Developments Regarding the ‘Neglected Rights’ (<http://www.iccs1.org/pubs/promotingthefreedomofassociation.pdf>) last visit on September 10, 2009

³⁸ Ibid

³⁹ Ibid

⁴⁰ Adopted in June 1981 and came into force in October 1986. Ethiopia acceded to the Charter on 15 June 1998.

that ‘no-one may be compelled to join an association’. The right to freedom of association is also recognized under article 8 of the African Charter on the Rights and Welfare of the Child (hereinafter the ACRWC).⁴¹

Availing its power of monitoring the implementation of the ACHPR, the African Commission on Human and Peoples’ Rights (hereinafter the African Commission) has passed two resolutions pertinent to the right to freedom of association. One of these resolutions is the Resolution on the Right to Freedom of Association.⁴² This Resolution, among others, provides that, ‘in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom.’⁴³ The second resolution is the Resolution on Protection of Human Rights Defenders in Africa⁴⁴, which was adopted by the African Commission in response to the persistent human rights violations that human rights defenders face in Africa with regard to their rights such as freedom of association.⁴⁵ In this Resolution, the African Commission urged State Parties to promote and give full effect to the UN Declaration on Human Rights Defenders⁴⁶ and to take all necessary measures to ensure the protection of the rights of human rights defenders.⁴⁷

The African Commission has also decided on a few communications pertaining to the right to freedom of association. In *Civil Liberties Organization in Respect of the Nigerian Bar Association v Nigeria*,⁴⁸ the African Commission held that a governmental decree establishing a governing body for a bar association appointing the majority of nominees itself violated the freedom of association. The African Commission has also found in *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria* that the right to freedom of association

⁴¹ Adopted in July 1990 and came into force in November 1999. Ethiopia acceded to the Charter on 2 October 2002.

⁴² Resolution on the Right to Freedom of Association (1992), ACHPR/Res 5 (xI) 92.

⁴³ Ibid.

⁴⁴ Resolution on Protection of Human Rights Defenders in Africa (2004), 35th Ordinary Session, Banjul, the Gambia.

⁴⁵ Id, Preamble Para. 2.

⁴⁶ Id, Para 4.

⁴⁷ Ibid.

⁴⁸ *Civil Liberties Organization in Respect of the Nigerian Bar Association v Nigeria* (Communication No. 101/93, African Commission on Human and Peoples’ Rights, 1995).

is violated when the state unjustly tried and convicted members of a community organization.⁴⁹ In another communication, *Interights and others v Mauritania*,⁵⁰ the African Commission finds that the dissolution of the main political party by the Mauritanian Government is disproportional to the nature of the acts committed by the political party and, thus, a violation of Article 10 of the ACHPR.

In these communications, the African Commission, the main African regional human rights body, allied itself with its European counterpart, the European Court of Human Rights, in defining the scope of the right to freedom of association. That is, the right not only entitles individuals to form associations freely but also safeguards the association from unacceptable government intrusion.

2.3 National Human Rights Standards

The supreme domestic Ethiopian legislation that prescribes human rights principles is the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter the FDRE Constitution).⁵¹ The specific provision that deals with the right to freedom of association is article 31 which provides that ‘[e]very person has the right to freedom of association for any cause or purpose.’ It further provides that ‘[o]rganizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited.’

It is apparent from article 31 that the right to freedom of association clause is generally applicable to everyone without regard to one’s color, race, nationality or other factors. Such formulation is different from the formulation of some other constitutional rights, such as the right to vote and to be elected and the

⁴⁹ International Pen, Constitutional Rights Project, *Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria* (Communications Nos. 137/94, 139/94, 154/96 and 161/97, African Commission on Human and Peoples’ Rights, 1998).

⁵⁰ *Interights and Others v Mauritania* (Communication No., 242/2001, African Commission on Human and Peoples’ Rights, 2004).

⁵¹ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proc. No. 1, Neg. Gaz. Year 1, no. 1.

right to property,⁵² which are guaranteed only to Ethiopian nationals. Article 31 does not prescribe specific purposes for which associations must be established. It guarantees freedom of association regardless of the purpose for which the association is set up as long as the association is established for lawful purposes.

At this point, it is important to note the position of the Ethiopian Government on the scope of applicability of the right to freedom of association. The Government recognizes the right to freedom of association only as a right of Ethiopian citizens.⁵³ This position of the Government is reflected in the Proclamation itself. The preamble of the Proclamation, in stipulating the purpose of the law, partly provides that the law is meant ‘to ensure the realization of *citizens*’ right to association enshrined in the Constitution of the Federal Democratic Republic of Ethiopia.’ (Emphasis added) What is implicit in this provision is that the Government does not have a duty arising out of the freedom of association to of non-citizens.

This position stems from the classification of fundamental rights and freedoms into two categories in the FDRE Constitution; namely, human rights guaranteed in articles 14–28 and democratic rights recognized in articles 29–44. Partly supported by article 10 of the Constitution, the Government contended that since the right to freedom of association, recognized under article 31, is a democratic right; only citizens can exercise it. Put differently, its position is that ‘since freedom of association is a right that exclusively pertains to citizens, foreigners cannot exercise it either directly by establishing a CSO, or indirectly by funding local CSOs.’⁵⁴

This position of the Government is indefensible on two counts.⁵⁵ First, even if the right to freedom of association is placed under category of democratic rights, this

⁵² These rights are recognized under article 38 and article 40 of the FDRE Constitution respectively.

⁵³ Taskforce on Enabling Environment for Civil Society in Ethiopia, cited above at note 18. See also Ministry of Justice, cited above at note 17, p.11.

⁵⁴ Debebe Hailegebriel, Restrictions on Foreign Funding of Civil Society, (<https://chilot.files.wordpress.com/2011/08/restrictions-on-foreign-funding-of-civil-society.pdf>), last visit June 12, 2015.

⁵⁵ For further discuss on this or related issue, see Debebe Hailegebriel, Restrictions on Foreign Funding of Civil Society; Adem Kassie Abebe, “Human Rights under the Ethiopian

in itself does not take away its status as a human right. A number of human rights including the right to freedom of movement, rights of children, rights of women, right to property, marital and family rights and right of access to justice are placed under the democratic rights category. It is bizarre to argue that all these rights are democratic rights that non-citizens are disallowed to exercise. As mentioned above, the FDRE Constitution indicates, on article-by-article basis, whether a certain right is applicable to everyone or citizens only. For instance, the Constitution clearly indicate that rights to nationality, electoral rights, the right to self-determination and the right to property as guaranteed under articles 33, 38, 39 and 40 respectively are citizens' rights.⁵⁶ On the contrary, the Constitution unequivocally states that everyone can exercise the right to freedom of association: citizens and non-citizens. Second, the position that supports relegating the right to freedom of association only to citizens' right is at odd with Ethiopian international human rights commitments. All international human rights treaties including those ratified by Ethiopian including the ICCPR and the ACHPR treat the right to freedom of association as the right of both citizens and non-citizens.

Being a constitutional provision, article 31 does not set out the detailed content of the right to freedom of association and the specific obligation of Ethiopia in protecting and promoting the same. Nor do we have jurisprudence interpreting this constitutional provision. The good thing, however, is that as provided under article 13 (2), 'the rights and freedoms envisaged in the FDRE shall be interpreted in a manner conforming to the principles of the Universal

Constitution: A Descriptive Overview", Mizan Law Review, Vol. 5(1) (Spring 2011), p. 57; Gedion Timothewos, "Freedom of Expression in Ethiopia: The Jurisprudential Dearth", Mizan Law Review, 4(2) (2010), pp. 207-213; and Sisay Alemayehu Yeshaneh, "The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia", African Human Rights Law Journal, 8(2) (2008), pp. 275 &276.

⁵⁶ With respect to the right to property, although the FDRE Constitution seems to confine its application to citizens, other laws of the country give foreigners the right to acquire, use and alienate private property in Ethiopia. According to article 390 of the Civil Code, foreigners can own immovable property upon securing special government permit and movable property without meeting this requirement. The restriction on ownership of immovable property by the Civil Code is set aside by Proclamation No. 270/2002. This Proclamation, under article 5(4), states that articles 390-393 do not apply to foreign nationals of Ethiopian origins. Put differently, this Proclamation extends the rights of Ethiopian nationals to own immovable property to foreign nationals of Ethiopian origin. The restriction that the Civil Code imposes on ownership of immovable property by foreigners is also eased by the Investment Proclamation No.769/2012. This Proclamation, under article 24, allows a foreign national investing in Ethiopia 'to own a dwelling house and other immovable property requisite for his investment.'

Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.’ Thus, the norms enshrined in international human rights instruments, resolutions and declaration of the political organs of the UN adopted by Ethiopia and the jurisprudence of human rights treaties monitoring bodies can be used to interpret article 31 of the FDRE Constitution.⁵⁷

3. Can the Right to Freedom of Association Be Restricted?

In the preceding section, I have shown that the right to freedom of association is guaranteed under the FDRE Constitution and international and African human rights treaties to which Ethiopia is a party. The next issue worth addressing is whether and how this right may be restricted. The brief answer to this question is that the right to freedom of association may be limited. Under human rights regime, there are only few absolute rights, which permit no qualification under any state of affairs.⁵⁸ The right to freedom of association is not among this category of rights.

If the right to freedom of association can be restricted, what are the circumstances under which it can be restricted? To begin with the FDRE Constitution, article 31 places two restrictions to the right to freedom of association. Firstly, individuals are prohibited from setting up associations, which aim at illegally subverting the constitutional order, or promoting such activities. Secondly, restrictions may be imposed on the right to freedom of association by appropriate laws. As to what should be the ‘appropriate laws’ that may legitimately restrict the right to freedom of association are not clearly and specifically figured out under article 31. Since the phrase ‘appropriate laws’ is too broad, it warrants interpretation. However, since there is no domestic jurisprudence as to how this phrase shall be interpreted, it is quite

⁵⁷ A reference to ‘principles’ in article 13(2) of the Constitution should itself be construed to cover not only the general principles recognized in human rights instruments adopted by Ethiopia but also the jurisprudence of human rights treaties monitoring bodies, such as their general comments, their findings in response to communications and concluding observations. As long as the cross-reference to human rights instruments adopted by Ethiopia is aiming at giving detailed content to provisions of chapter three of the Constitution in case where the provisions are too general, silent, etc, such liberal understanding of ‘principles’ is quite significant.

⁵⁸ The classic absolute right is freedom from torture, inhuman, or degrading treatment.

sound to refer to the relevant provisions of international human rights instruments and the interpretations of these instruments by the bodies that are meant to supervise their implementation and enforcement.

A case in point is article 22 (2) of the ICCPR, which prescribes the permissible grounds of limitation to the right to freedom of association. It states that:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22 (2) of the ICCPR conveys a message that while the right to freedom of association is not unlimited, governments are prevented from arbitrarily restricting the right. In particular, it emphasizes that governments that seeks to restrict or interfere with the right to freedom of association are supposed to justify their actions or inactions by satisfying certain requirements.

The Human Rights Committee reiterates these requirements. In respect of the rights contained in the ICCPR including freedom of association, the Human Rights Committee stated that:

States Parties must refrain from violation of the rights recognized by the Covenant and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.⁵⁹

As can be observed from article 22(2) of the ICCPR and the Comment of the Human Rights Committee, any interference with the right to freedom of

⁵⁹ Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant (May 26, 2004, CCPR/C/21/Rev.1/Add.1), Para. 6.

association should comply with five requirements, namely, legality, justification, necessity, proportionality, and non-discrimination. The final requirement, the prohibition on discrimination, is applicable to all claims of human rights violations.

The UN Declaration on Human Rights Defenders, echoing what has been stated by article 22(2) of the ICCPR and the Human Rights Committee, also specifies the acceptable grounds of limitations to the right to freedom of association and other rights from human rights defenders point of view. It provides that human rights defenders, whether individuals or organizations, 'shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'⁶⁰

Similar to the FDRE Constitution and the ICCPR, the ACHPR allows limitation to the right to freedom of association. Article 10 of the same guarantees everyone's right to freedom of association 'provided that he abides by the law'. From this, it is clear that the law can limit the right to freedom of association. In absence of any reference to certain interests, which the law is supposed to protect, however, such kinds of limitation may open the door to unwarranted limitations. States are the lawmakers and the most frequent violators of human rights. In view of this fact, attaching this limitation amounts to putting the right to freedom of association under the mercy of the very institution, which attacks them.⁶¹ Cognizant of the adverse effect of such open-ended limitation clauses, the African Commission has developed a strict interpretation of these clauses. In doing so, the Commission invoked article 27 of the ACHPR in support of its argument. In its view, 'the only legitimate reasons for limitations to the rights and freedoms of the Charter are found in

⁶⁰ UN Declaration on Human Rights Defenders, cited above at note 25, Art. 17.

⁶¹ In the context of ACHPR, the phrase 'claw-back clauses' has been used to generally refer to those provisions of the Charter that tend to limit some of the rights guaranteed under the Charter. See, V. Nmeielle, The African Human Rights System: Its Laws, Practice, and Institutions, (2001) p. 114.

article 27(2)',⁶² which stipulates that the rights of the Charter 'shall be exercised with due regard to the right of others, collective security, morality and common interest'.⁶³ It went on and held that 'the reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.'⁶⁴ In another communication, the Commission remarked that article 27 (2) is the only legitimate reason for limitations to the rights and freedoms of the Charter,⁶⁵ which in effect amounts to including other article-specific limitation clauses with the ambit of article 27(2). Now, let us examine the content of the five requirements.

3.1 The Requirement of Legality

In ascertaining whether the limitation to the right to freedom of association is acceptable or not, the first requirement is that the interference must be prescribed by a law of general application. The essence of this requirement, as indicated in the Siracusa Principles⁶⁶ is that limitations should have a formal legal basis and must be precisely formulated so as not to confer upon authorities wide discretionary powers. The requirement of legality also means that the laws limiting rights must be accessible to everyone so that an individual or association will have an opportunity to know the prohibited action and consequent penalties for violating the prohibition. The requirement of legality also entails that laws must be passed by an organ that has a mandate of making laws following proper procedures.

⁶²Media Rights Agenda and others v Nigeria (Comm. Nos. 105/93, 128/94, 130/94 and 152/96, African Commission on Human and Peoples' Rights, 1998) Para. 68.

⁶³ Ibid

⁶⁴ Id, Para 69.

⁶⁵ Prince v South Africa (African Commission on Human and Peoples' Rights, 2002) African Human Rights Law Report 105(2000) Para. 43.

⁶⁶ "Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights", doc. E/CN.4/1985/4 (1985). Para. 17. These principles were developed in 1984 by a panel of 31 international experts who met in Siracusa (Italy) to adopt a uniform set of interpretations of the limitation clauses contained in the ICCPR. While they do not have the force of law, they offer important and authoritative guidance as to the meaning of the terms contained in the Covenant, especially in areas not covered by a general comment of the Human Rights Committee.

3.2 The Requirement of Legitimate Justification

The second test requires that restriction to the right to freedom of association not only shall have a legal basis, but also must have a legitimate aim that can justify the interference. These acceptable grounds of restriction include: national security, public order or safety, protecting the rights and freedoms of others, and protecting public health and morals.

With a view to avoiding a loose interpretation of these purposes, the Siracusa Principles stipulate various guidelines on how these purposes should be interpreted. The Principles, for instance, state that ‘national security may be invoked by states to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force.’⁶⁷ ‘National security cannot be invoked as a reason for imposing limitations on rights if the threats to law and order are local or relatively isolated.’⁶⁸ The Siracusa Principles defines Public order as ‘the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded’⁶⁹

3.3 The Requirement of Necessity in a Democratic Society

The existence of one or more legitimate purpose, although a necessary condition for government interference with the right to freedom association, is not a sufficient condition to justify the interference. In order to justify the interference with freedom of association, it should be shown that the interference is necessary in a democratic society. It is up to the state that imposed the limitations ‘to demonstrate that the limitations do not impair the democratic functioning of the society.’⁷⁰ According to the Siracusa Principles, a certain society can be taken as a democratic society where it ‘recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights.’⁷¹

⁶⁷ Id, Para. 29.

⁶⁸ Id, Para. 30.

⁶⁹ Id., Para 22.

⁷⁰ Id, Para. 20.

⁷¹ Id, para. 21.

3.4 The Requirement of Proportionality

Both the Human Rights Committee⁷² and the African Commission⁷³ have found out that any measures that restrict the right to freedom of association must be proportionate to the legitimate aim to be pursued, and should be imposed to the extent, which is absolutely necessary for the advantages to be obtained. Thus, interference may be deemed to be proportional only if the means employed is actually necessary to achieve one of the legitimate purposes, and that the means employed is the least restrictive means among those that might achieve the desired results.

Applying these yardsticks, the African Commission, in *Interights and others v Mauritania*,⁷⁴ found out that the dissolution of the main political party by the Mauritanian Government on the ground that the leaders of the Party engaged in actions and undertakings which were damaging to the good image and interests of the country; incited Mauritians to violence and intolerance; and led to demonstrations which compromised public order, peace and security is disproportionate to the nature of the breaches and offences committed by the political party and, thus, a violation of Article 10 of the ACHPR.

3.5 The Requirement of Non-discrimination

As part of the requirement of acceptability of any restrictions on human rights including the right to freedom of association, the issue of discrimination must be addressed. The principle of non-discrimination is a basic principle incorporated in the FDRE Constitution,⁷⁵ various international⁷⁶ and African regional⁷⁷ human rights documents. These documents require states to ensure

⁷² Human Rights Committee, cited above at note 59, Para. 6.

⁷³ Media Rights Agenda and others v Nigeria, cited above at note 62, Para. 69.

⁷⁴ Interights and Others v Mauritania, cited above at note 50.

⁷⁵ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, cited above at note 70, Art. 25.

⁷⁶ Such as, the Universal Declaration of Human Rights (Articles 2 and 7), the ICCPR (Articles 2(1) and 26) and the CRC (Article 2). Some instruments are expressly aimed at addressing specific prohibited grounds for discrimination, such as the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

⁷⁷ See, for example, article 2 of the ACHPR and article 3 of the ACRWC.

that all persons within their territory and subject to their jurisdiction enjoy the guaranteed rights without distinction on grounds, such as race, religion, nationality or ethnicity. Even when a state is allowed to limit a right as the case of the right to freedom of association, such measures must not be discriminatory.⁷⁸ Nevertheless, not all distinctions amount to discrimination. According to the Human Rights Committee, a differentiation of treatment will not constitute discrimination ‘if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.’⁷⁹

4. An Overview of the Pertinent Provisions of the Proclamation

The Proclamation is meant to deal with the formation and operation of CSOs. The two broad purposes of the Proclamation, as set forth in the Preamble, are ensuring ‘the realization of citizens’ right to association’⁸⁰ and aiding and facilitating ‘the role of Charities and Societies in the overall development of Ethiopian peoples.’⁸¹ The Proclamation divided CSOs into two broad categories known as ‘Charity’ and ‘Society.’ It defines a ‘Charity’ as ‘institution...established exclusively for charitable purposes and gives benefit to the public.’⁸² In similar vein, it defines a ‘society’ as ‘an association of persons organized on non-profit making and voluntary basis for the promotion of the rights and interests of its members and to undertake other similar lawful purposes.’⁸³ Depending on their place of registration, source of income, composition of members’ nationality, and place of residence, the Proclamation also creates three categories of charities and societies, namely, ‘Ethiopian Charities’ or ‘Ethiopian Societies’, ‘Ethiopian Residents Charities’ or ‘Ethiopian Residents Societies’ and ‘Foreign Charities’.

‘Ethiopian Charities’ or ‘Ethiopian Societies’ are ‘Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians,

⁷⁸ This is implied from Para. 2 of General comment No. 18 of the Human Rights Committee.

⁷⁹ Human Rights Committee, cited above at note 59, Para. 13.

⁸⁰ Charities and Societies Proclamation, cited above at note 1, Preamble, para 1.

⁸¹ Id, Preamble, para 2.

⁸² Id, Art. 14(1). The definition of charity is the same as the definition of CSOs in most literature.

⁸³ Id., Art. 55 (1).

generate income from Ethiopia, and wholly controlled by Ethiopians.’⁸⁴ With respect to funding, the law envisages a strict qualification. That is, charities or societies shall be regarded as an Ethiopian charities or societies on condition that ‘they receive not more than ten percent of their funds...from foreign sources.’⁸⁵ ‘Ethiopian Residents Charities’ or ‘Ethiopian Residents Societies’, on the other hand, are ‘Charities or Societies that are formed under the laws of Ethiopia and consist of members dwelling in Ethiopia, and who receive more than 10 percent of their funds from foreign sources.’⁸⁶

The third category is ‘Foreign Charities’. Charities that fall under this category are ‘those charities that are formed under the laws of foreign countries or consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign sources.’⁸⁷ Foreign sources include ‘the government, agency or company of any foreign country; international agency or any person in a foreign country.’⁸⁸

One of the upshots of the above classification is that only Ethiopian Charities or Societies are allowed to engage in promotion of human rights.⁸⁹ Other categories of charities and societies (non-Ethiopian CSOs) are authorized to carry out only service delivery undertakings, such as: ‘the prevention or alleviation or eradication of poverty or disaster’;⁹⁰ the advancement of animal welfare,⁹¹ education,⁹² health or the saving of lives,⁹³ arts, culture, heritage or

⁸⁴ Charities and Societies Proclamation, cited above at note 1, Art.2 (2).

⁸⁵ Ibid

⁸⁶ Id, Art. 2(3).

⁸⁷ Id, Art.2(4).

⁸⁸ Id, Art. 2(15).

⁸⁹ Id, Art. 14 (5) cum (2). For the purpose of this article, promotion of human rights is comprised of those activities that are listed under article 14 (2) (j), (k) and (l). These activities are the advancement of human and democratic rights; promotion of equality of nations, nationalities, peoples, gender and religion; and promotion of the rights of the rights of the disabled and children. Although the Proclamation treats these activities separately, the latter two can be subsumed in the former. Apart from promotion and protection of human rights, promotion of conflict resolution or reconciliation and, promotion of the efficiency of justice and law enforcement services are reserved to Ethiopian Charities and Societies.

⁹⁰ Id, Art. 14 (2)(a).

⁹¹ Id, Art. 14 (2)(c).

⁹² Id, Art. 14 (2)(d).

⁹³ Id, Art. 14 (2)(e).

science,⁹⁴ amateur sport or welfare of the youth,⁹⁵ ‘capacity building on the basis of the country’s long term development directions’,⁹⁶ and ‘the economy and social development and environmental protection or improvement’,⁹⁷ and ‘the relief of those in need by reason of age, physical and mental disability, financial hardship or other disadvantage.’⁹⁸

5. Analysis

Having briefly discussed the content and limitations to the right to freedom association and the pertinent provisions of the Proclamation, this section is devoted to an in-depth analysis of the issue of whether the prohibition of foreign and foreign funded CSOs from working on promotion of human rights constitutes an interference with the right to freedom of association. This section is also intended to address the issue of whether or not the interference is a permissible interference in light of the applicable human rights standards. For the sake of convenience, the issue will be scrutinized under the following two headings. First, does the restriction on foreign funding of local human rights CSOs amount to an interference with their right to freedom of association? If the answer is in the affirmative, is the interference valid? Second, does the exclusion of non-Ethiopian charities and associations from carrying out activities to promote human rights constitute an interference with their right to freedom of association? If so, is such interference a legitimate one in the light of the appropriate human rights principles?

5.1 Restriction on Foreign Funding

A close scrutiny of the provisions of the Civil Code of Ethiopia⁹⁹ reveals that a CSO established in accordance with Ethiopian law and by Ethiopian nationals is regarded as an Ethiopian CSO without considering its activities and sources of funding. According to article 2(2) of the Proclamation, however, a CSO

⁹⁴ Id, Art. 14 (2)(f).

⁹⁵ Id, Art. 14 (2)(g).

⁹⁶ Id, Art. 14 (2)(i).

⁹⁷ Id, Art. 14 (2)(b).

⁹⁸ Id, Art. 14 (2)(h).

⁹⁹ Civil Code of the Empire of Ethiopia, 1960, Arts. 545-549, Proclamation No.165, Neg. Gaz. Gezette Extraordinary, Year 19, no.2.

‘formed under the laws of Ethiopia’ and ‘all of whose members are Ethiopians’ is regarded as an Ethiopian CSO provided that not more than ten percent of its funds are received from foreign sources annually. If the latter requirement is not satisfied, the CSO will not be qualified as an Ethiopian CSO with a consequence that it cannot carry out activities of promotion of human rights. The question worth asking is: what is the implication of restricting access of domestic human rights CSOs to foreign funding on the right to freedom of association of these CSOs?

As discussed in section one, the right to freedom of association is not confined to guaranteeing individuals’ right to form associations for lawful purposes. It also confers upon the organizations themselves the right to function effectively without unreasonable government interference. The organizations will operate effectively only when they have sufficient funds to carry out their activities. Prohibition or restriction on funding may have the effect of rendering the organization inoperative.¹⁰⁰ Given the indispensability of funding, it can convincingly be argued that the right to freedom of association shall include the right of CSOs ‘to seek and secure funding from legal sources’.¹⁰¹ ‘Legal sources should include individuals and businesses, other civil society actors and international organizations, as well as local, national, and foreign governments.’¹⁰²

In spite of the fact that the availability of sufficient fund is vital to the active functioning of CSOs, restrictions on the receipt of funding, and especially on the receipt of foreign funding by human rights CSOs have grown increasingly in many countries.¹⁰³ In response to such growing trend, various bodies of the

¹⁰⁰Unlike business enterprises, CSOs do not undertake income generating activities. In order to run their day-to-day activities, they heavily rely on contributions from their members and funding from others sources, such as donors.

¹⁰¹ World Movement for Democracy *et al*, Defending Civil Society: A Report of World Movement for Democracy (2008).

(<http://www.wmd.org/documents/Defending%20Civil%20Society%20-%20English.pdf>) last visit on August 12, 2009.

¹⁰² Ibid

¹⁰³ For example, in the Transnistria region of Moldova, the president of the separatist government signed a decree in 2006 prohibiting foreign funding of CSOs registered in Transnistria. Specifically, CSOs were prohibited from receiving funding directly or indirectly from any international or foreign organization, foreign government, Transnistrian organization with a foreign capital share in excess of 20 percent, foreign citizen or stateless person, or any

UN made direct statements on the right of human rights CSOs to solicit and receive funding, particularly foreign funding.

The UN Declaration on Human Rights Defenders addresses this point explicitly. Article 13 provides that ‘[e]veryone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means.’ Interpreting article 13 of the UN Declaration on Human Rights Defenders, the Office of the UN High Commissioner for Human Rights, in Fact Sheet 29,¹⁰⁴ elucidated that ‘the Declaration provide[s] specific protections to human rights defenders, including the right to... solicit, receive and utilize resources for the purpose of protecting human rights (including the receipt of funds from abroad)’. It went on and contended that legislation banning or hindering the receipt of foreign funds for human rights activities curtail human rights defenders including human rights CSOs from legitimately exercising and enjoying their rights, such as the right to freedom of association.¹⁰⁵

The Special Representative of the Secretary-General on human rights defenders, in her 2006 Report, identified ‘the trend in many countries to pass laws and regulations’ that impose restriction on funding as a measure that stifles operations of human rights defenders.¹⁰⁶ The Special Representative asserted that ‘[g]overnments must allow access by CSOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same

anonymous source. An CSO Bill was enacted in Zimbabwe in 2004 (though never signed into law) that would have prohibited local CSOs engaged in “issues of governance” from accessing foreign funds. In Eritrea, the government issued Administration Proclamation No. 145/2005 that broadly restricts the UN and bilateral agencies from funding CSOs. Egypt’s Law No. 153 of 1999, which “gives the Government control over the right of CSOs to manage their own activities, including seeking external funding. See World Movement for Democracy, cited above at note 101.

¹⁰⁴ See, Office of the U.N. High Commissioner for Human Rights, Fact Sheet No. 29: Human Rights Defenders: Protecting the Right to Defend Human Rights, (2004) PP. 21-22.

¹⁰⁵ *Id.*, p.13.

¹⁰⁶ Jilani, cited above at note 26, Paras 50-51.

extent as Governments. The only legitimate requirements of such CSOs should be those in the interest of transparency.’¹⁰⁷

To sum up, restricting access of local human rights CSOs to foreign funding fatally affects their operation and amounts to an interference with their right to freedom of association. The ramification of restricting access of local human rights CSO to foreign funding in Ethiopia (which includes funding from Ethiopians residing abroad) is extremely severe. Although the country has been showing tremendous economic growth over the past few years and per capita income has increased to some extent, a sizeable number of its people are still living in poverty.¹⁰⁸ Ethiopian is also a country where ‘[t]here is little societal tradition of giving funds to CSOs’¹⁰⁹ even for the business people and other affluent members of the society. Given these facts, the author does not think that local human rights CSOs will be able to raise the funds that are necessary to run their day-to-day activities from local sources. This is evident from the reality at hand. For example, in 2009, about 95 percent of the local CSOs received more than 10 percent of their budget from foreign sources.¹¹⁰ Let alone the CSOs, assistance and loans from foreign sources covers a significant portion of the Ethiopian Government’s capital and recurrent expenditures.¹¹¹ In

¹⁰⁷ Id., Para 31.

¹⁰⁸ According to the 2014 Ethiopian National Human Development Report of the United Nations Development Program, the GDP per capita of Ethiopia for 2014 was US \$ 550. The same report showed that 26% Ethiopian people were living with poverty in 2012/2013. See United Nations Development Program, National Human Development Report 2014, Ethiopia: Accelerating Inclusive Growth for Sustainable Human Development in Ethiopia, Addis Ababa, Ethiopia, p. 4 & 44, (<http://hdr.undp.org/sites/default/files/nhdr2015-ethiopia-en.pdf>), last visit June 4, 2015

¹⁰⁹ Jeffrey Clark, Civil Society, CSOs, and Development in Ethiopia: A Snapshot View, The World Bank Washington, D.C., 2000, p. 14,

(<http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/873204-1111663470099/20489508/CSandDevEthiopiaSnapshotView.pdf>), last visit June 4, 2015

¹¹⁰ See, the Observatory for the Protection of Human Rights defenders, The Observatory for the Protection of Human Rights defenders denounces the adoption on January 6, 2008 of a law that considerably restricts the activities of CSOs in Ethiopia (http://www.fidh.org/IMG/article_PDF/Ethiopia-Freedom-of-association-in.pdf) last visit October, 2009

¹¹¹ For example, out of the 137.8 billion birr budget approved by the parliament for the 2012/13 Ethiopian budget year, 79% was expected to be financed from domestic sources while the remaining 21 % was expected to come from foreign sources in the form of donations and loans. See Capital, House endorses 137.8 bln birr budget a week after schedule, Monday, 23 July 2012,

brief, it was obvious that requiring local CSOs working on human rights issues to cover more than ninety percent of their finances from local sources under the Proclamation would undoubtedly result in the closure of most such organizations.. This has been borne out in reality since the coming in to force of the Proclamation. For example it is in the aftermath of the coming into effect of the CSOs Proclamation and the freezing of 90% of their assets by the Government, the activities of the two notable local human rights CSOs, EWLA and Human Rights Council (HRCO), have been gravely curtailed.¹¹² Out of more than 127 CSOs working in human rights issues in Ethiopia in 2008,¹¹³ most of them were forced to change their mandates to other “non-human rights activities” or were dissolved entirely.¹¹⁴ An empirical study conducted in 2012 to assess the impact of the Proclamation on the perception, growth and programs of non-governmental organizations disclosed that there is a decrease on the total number of CSOs as a result of the coming into force of the Proclamation.¹¹⁵ It also revealed that ‘the financial restriction imposed has limited the opportunity to form new CSOs.’¹¹⁶

It is true that in order to fill the gap created by the weakening of human rights CSOs, the Government has tried to fund the limited CSOs that decided to

(http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=1424:house-endorses-1378-bln-birr-budget-a-week-after-schedule-&catid=54:news&Itemid=27) last visit June 6, 2015.

¹¹² Committee on the Elimination of Discrimination against Women, cited above at note 13, para. 29. See also Amnesty International, Ethiopia: Briefing to the UN Committee on Elimination of Discrimination Against Women, 2011, http://www2.ohchr.org/english/bodies/cedaw/docs/CSOs/AI_for_the_session_Ethiopia_CEDA_W49.pdf (last visited Sep. 30, 2011). See also Human Rights Council, The Impact of the CSO Proclamation on the Human Rights Council, July 2011, 9.

¹¹² Human Rights Council, The Impact of the CSO Proclamation on the Human Rights Council, July 2011, 9.

¹¹³ European Commission Civil Society Fund in Ethiopia, Updated Mapping Study of Non State Actors in Ethiopia, September 2008, p. 3 July 2011, http://eeas.europa.eu/delegations/ethiopia/documents/eu_ethiopia/ressources/main_report_en.pdf, last visit October 10, 2012

¹¹⁴ Human Rights Council, cited above at note 112, p. 1.

¹¹⁵ Abiy Chelkeba, Impact Assessment of the Charities and Societies Law on the Perception, Growth and Programs of Non-Governmental Organizations: A Survey Study of Addis Ababa City Administration, Addis Ababa, Ethiopia, (LL.M Dissertation, 2011, Unpublished, AAU Library), p.76. According to this study, just between four years (2007-2011), the total number of CSOs decreases dramatically by about 43 percent (2586 in 2007 and 1761 in 2011).

¹¹⁶ Ibid

continue working on human rights issues or newly established human rights NGOs through the Ethiopian Human Rights Commission.¹¹⁷ However, the support from the Ethiopian Human Rights Commission is extremely inadequate to fill the gap.¹¹⁸ Moreover, the support from the government is limited to mainly on projects aiming at providing legal aid and awareness creation.¹¹⁹

Thus, it can be concluded that the labeling of local CSOs that receive more than ten percent of their funding from foreign sources as non-Ethiopian CSOs with the concomitant prohibition from engaging in human right related works is an interference with their right to freedom of association.

In the preceding paragraphs, it has been shown that foreign funding restrictions provided in the Proclamation that have the effect of stifling the ability of local human rights CSOs to pursue their goals constitutes an interference with their right to freedom of association. Now, the focus of the article will turn to an analysis of the issue of whether the interference is a justifiable one or not.

Definitely, the interference with the right to freedom of association has the Proclamation as its legal basis. Thus, the fulfillment of the requirement of legality is not as such controversial. The fulfillment or otherwise of the requirement of a legitimate aim that can justify the interference, however, requires a meticulous scrutiny.

The specific rationale of the Ethiopian Government to put in place a restriction on foreign funding of local human rights CSOs cannot be traced from the preamble or provisions of the Proclamation. It can, however, be discerned from the utterances of senior Government officials and pertinent documents emanating from the Government. The former Prime Minister, for example,

¹¹⁷ For example, in 2010, the Commission signed a memorandum of understanding with the Ethiopian Women Lawyers' Association as well as regional Women's Association to support to support five projects focusing on: legal support project for vulnerable sections of the society; awareness raising project on human rights, especially on women's and children's rights; legal support service project for the destitute section of the society; awareness creation project in the area of the rights of persons with disabilities; and awareness creation and Alternative Dispute Resolution service projects. The Commission spent a total of 817,500 birr (more than \$ 20,000) to fund these five projects. See Ethiopian Human Rights Commission, Annual Performance Report, June 2010-July 2011.

¹¹⁸ Committee on the Elimination of Discrimination against Women, cited above at note 13, para 28.

¹¹⁹ Ethiopian Human Rights Commission, cited above at note 117, p.65.

took the position that the provision of the Proclamation against foreign funding of local CSOs is a way of protecting Ethiopia against foreign political interference.¹²⁰ The Ethiopian delegate to CEDAW Committee also reiterated this position of the Prime Minister during the dialogue with members of the Committee.¹²¹ According to the commentary of the Ministry of Justice on the draft Proclamation, because protection of human rights is a ‘political issue’, it is an exclusive matter reserved to citizens; consequently, foreigners are not allowed to undertake human rights related activities.¹²² The main concern of the Government is that foreign organizations or individuals, by sponsoring local CSOs, would manipulate these CSOs and unduly influence domestic political affairs of Ethiopia. In a nutshell, the restriction on foreign funding of local human rights CSOs aims at curbing foreign political interference. Protecting Ethiopia from foreign political interference is one of the policy objectives and principles enshrined in the FDRE Constitution,¹²³ and, thus, one can argue that the limitation fits in with one of the legitimate ground of restricting the right to freedom of association, which is the preservation of public order. It can also be argued that the limitation is indispensable in a democratic society. Conducting of internal affairs without foreign interference does not hamper the democratic order of the country.

It is contended, however, that imposing a restriction on foreign funding of local human rights CSOs and thereby muzzling their operation is highly disproportionate to the nature of the threat that may arise in relation to the operation of these CSOs, namely, the risk that local CSOs may be used by their sponsors to interfere in the political affairs of Ethiopia. As elsewhere, while CSOs in Ethiopia have a pivotal role in terms of ensuring socio-economic development and good governance; they have also problems of financial

¹²⁰ A cited in, M. Sekaggya, Report submitted by the Special Rapporteur on the situation of human rights defenders: Addendum Summary of cases transmitted to Governments and replies received, A/HRC/10/12/Add.1 (2009) Para. 979.

¹²¹ See Committee on the Elimination of Discrimination against Women, cited above at note 13, para. 28.

¹²² Ministry of Justice, cited above at note 17, p.16.

¹²³ Promoting ‘mutual respect for national sovereignty and equality of states and non-interference in the internal affairs of other states’ is one of the national principles and objectives of Ethiopia as set out under article 86(2) of the FDRE Constitution.

mismanagement and absence of transparency.¹²⁴ Moreover, there are also times when human rights CSOs were blamed by the Government for aligning themselves with opposition parties.¹²⁵ The Government has not only the power but also the duty to control and take appropriate and reasonable measures to ensure that CSOs are living up to their responsibilities. However, imposing foreign funding restriction on local human rights CSOs is not an indispensable measure to avert the threat that CSOs may be used by their funders to interfere in Ethiopian political affairs. In fact, there are other less restrictive means that are envisaged in the Proclamation that might achieve the same aim. The Proclamation gives the Charities and Societies Agency (the Agency)¹²⁶ and Sector Administrators¹²⁷ the power to supervise and control Charities and Societies.¹²⁸ With a view to discharging its power of supervision, the Agency has been given with the power to institute inquiries and conduct an investigation on any charity or society and compel the charity or society or an officer or employee thereof to furnish the Agency with the required documents and information.¹²⁹ If the inquiry or search discloses that any Charity or Society has been used for illegal motives, it shall result in the cancellation of the license of the Charity or Society¹³⁰, which may also give the Agency with the power of dissolving the Charity or Society.¹³¹ The Agency can effectively employ this track to guarantee, in a case-by-case basis, that local human rights CSOs will not be used by their foreign funders to unjustifiably interfere in the domestic political affairs of Ethiopia. In view of this strong mechanism of control, restricting access of local human rights CSOs to foreign funding is based on a warranted presumption that all local CSOs may be subject to

¹²⁴ Dessalegn Rahmato, Akalewold Bantirgu, Yoseph Endeshaw, CSOs/CSOs IN ETHIOPIA Partners in Development and Good Governance: A Report Prepared for the Ad Hoc CSO/CSO Task Force, Addis Ababa, 2008, p. 31, (<http://www.crdaethiopia.org/Documents/CSOs-CSOs%20in%20Ethiopia%20%20Partners%20in%20Development.pdf>), last visit June 7, 2015

¹²⁵ Debebe Hailegebriel, cite above at note 54.

¹²⁶ The Agency is set up by article 4 of the Proclamation as an institution of the Federal Government to be accountable to the Ministry of Justice.

¹²⁷ Article 2(12) read together with article 66 tells us that Sector Administrator are relevant Federal Executive organs that shall be assigned by the minister of Justice as Charities and Societies Sector Administrators.

¹²⁸ Charities and Societies Proclamation, cited above at note 1, Art. 6(1) (a) and Article 67(3).

¹²⁹ Id, Art. 84 and 85.

¹³⁰ Id, Art. 92 (2)(b).

¹³¹ Id, Art. 93 (1)(b).

manipulation by their foreign sponsors does not serve any public good. It rather seriously obstructs the work of local human rights CSOs that would otherwise significantly contribute for the protection and promotion of human rights in Ethiopia.

5.2 The Prohibition on Non-Ethiopian CSOs from Working on Human Rights fields

As discussed above, the Proclamation has taken the position that even if a CSO has Ethiopians as its exclusive members and is established under Ethiopian laws, is not an Ethiopia CSO (Charity or Society) if it receives more than ten per cent of its funding from foreign sources. One of the consequences of such stipulation is that the CSO faces the same restrictions that would be placed on foreign CSOs under the Proclamation, including the prohibition from working in the field of human rights, save circumstances where that particular CSO entered a special agreement with the Ethiopian Government.¹³² In other words, the Proclamation excludes local CSOs that receive more than ten percent of their funding from abroad and foreign CSOs from carrying out activities of human rights protection and promotion. Now, a question worth pondering is: does not this exclusion amount to an interference with freedom of association? The international human rights documents highlighted in section one have made everyone a beneficiary of the right to freedom of association. In particular, article 31 of the FDRE Constitution guarantees this right '*for any cause or purpose*'. (Emphasis supplied) The phrase '*for any cause or purpose*' seems to imply that the right to freedom of association can be exercised to establish any association for any purpose without any restriction. Of course, the purposes for which the associations are established must be lawful purposes. In democratic society, the whole purpose of guaranteeing the right to freedom of association is to foster societal goals through the associations. If the associations are established to pursue illegal purposes, such as commission of crimes, it will be against the *raison d'être* of their establishment.

It is an obvious fact that the promotion of human rights both at national and international spheres is a lawful activity. That is why such activity has been taken as one of the purposes of different international, regional and national institutions, such as the UN, African Union and the Ethiopian Human Rights Commission. Given the fact that the right to freedom of association is

¹³² Id, Art. 3(2) (b).

guaranteed to everyone for any legal goal and given the fact that engagement in the promotion and protection of human rights is a lawful activity, this author is of the opinion that the banning of non-Ethiopian Charities and Societies (within the meaning of the Proclamation) from engaging in human rights fields in the proclamation is an interference with right to freedom of association.

The next question is: is this interference a permissible interference in the light of pertinent norms of human rights law?

As is the case with foreign funding restriction, the exclusion of non-Ethiopian Charities and Societies from engaging in the protection and promotion of human rights has an unequivocal legal basis that is meant to have a general application. The reason forwarded for the exclusion is also similar to the limitation on funding, that is, involvement of foreign CSOs in human rights fields in Ethiopia will open a Pandora's Box for foreign political intrusion.¹³³

Restraining foreign interference in the political affairs of Ethiopia is a legitimate ground to limit the right to freedom of association. In this particular situation, however, I contend that the outright barring of non-Ethiopian CSOs from taking part in the protection and promotion of human rights is excessively disproportionate to the gravity of the concern. It is not in any way acceptable to impose a blanket prohibition on all non-Ethiopian CSOs from carrying out human rights related activities contending that this may open a room for foreign interference. The consequence of such exclusion is particularly grave in countries like Ethiopia where there are no well organized and autonomous governmental institutions for human rights protection¹³⁴ and local human rights CSOs that can raise their funds from local sources.

The sovereignty of states that prohibits outside interference in its domestic affairs is not relevant and valid with respect to the protection and promotion of human rights. The protection and promotion of human rights is not a task that

¹³³ Sekaggya, cited above at note 120, Para. 979.

¹³⁴ The Ethiopian Human Rights Commission is the primary government institution in charge of monitoring the implementation of human rights. However, it is difficult to say that it is living up to its legal mandate. The Human Rights Committee opined that the Commission undertook 'very few investigations on alleged human rights violations.' The Committee also indicated that the Commission does not comply with Paris Principles regarding its independence. See Human Rights Committee, cited above at note 15, Para. 6. For more discussions on the roles and challenges of the Ethiopian Human Rights including its independence, see Yemisrach Endale, The Roles and Challenges of Ethiopian National Human Rights Institutions in the Protection of Human Rights in the Light of the Paris Principles, (Unpublished LL.M Thesis, 2010, Central European University).

is entirely reserved to states and their nationals. The UN Charter¹³⁵ and the 1993 Vienna Declaration and Programme of Action¹³⁶ made it clear that human rights are a matter of legitimate international concern and, thus, foreign human rights activists and human CSOs have a right to react in the event of human rights violations in Ethiopia. They are entitled to engage in human rights activities in Ethiopia and express their concern to the Ethiopian Government when it infringes human rights and freedoms recognized in the FDRE Constitution and other human rights treaties to which Ethiopia is a party. This does not, however, mean that foreigners can interfere in other domestic affairs under the guise of human rights protection. In such a case, the Ethiopian Government has the power to take measures to prohibit and forestall such interference. Applying the less restrictive supervision approach already discussed in the preceding sub-section can effectively do this.

The prohibition of non-human rights CSOs from carrying out human rights activities is not only disproportionate but also discriminatory. As I have tried to show in section 1.3 above, in a manner consistent with human rights conventions, article 31 of the FDRE Constitution guarantees the right to freedom of association to everyone irrespective of one's nationality or place of residence. To put in other words, Ethiopians and foreigners alike are entitled to enjoy the right to freedom of association. This is self evident from the wording of article 31 itself which reads as '*[e]very person* has the right to freedom of association' (Emphasis added). With particular reference to the enjoyment of the right to freedom of association for the purpose of promoting and protecting human rights and fundamental freedoms, the UN Declaration on Human Rights defenders unequivocally affirmed that every person, be he or she a national of a given country or not, is entitled, 'individually and in association with others, at the national and international levels, to form, join and participate in non-governmental organizations, associations or groups.'¹³⁷ Since the right to

¹³⁵ Article 55 of the UN Charter proclaimed that 'the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'; and pursuant to article 56 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'

¹³⁶ Article 4 provides that 'the promotion and protection of all human rights is a legitimate concern of the international community'.

¹³⁷ UN Declaration on Human Rights Defenders, cited above at note 25, Art. 5 (b).

freedom of association is guaranteed to every person under the FDRE Constitution, the prohibition of non-Ethiopian CSOs from engaging in the field of human rights in Ethiopia amounts to differentiation on the basis of nationality and source of funding. It is true that a differentiation may not constitute discrimination as long as the grounds of differentiation are reasonable, objective and intends to achieve a legitimate purpose. However, given that the aim of banning of non-Ethiopian CSOs from engaging in the field of human rights is the desire to curb foreign interference in the domestic political affairs of Ethiopia and given that this aim can be achieved by the supervisory mechanisms that are put in place in the Proclamation, the exclusion is an unjustifiable discrimination.

6 Conclusion

Following the collapse of the Military Socialist Regime in 1991, CSOs proliferated and played an unprecedented role in the economic, social and political sphere in Ethiopia. At that time the Ethiopian Government had created an enabling environment for their smooth operation. In 2009, however, the Ethiopian parliament adopted a Proclamation that reverses the remarkable achievements in this area. The Proclamation denies local CSOs that receive more than ten percent of their funds from foreign sources the status of Ethiopian nationality and excludes them from working on human rights advocacy. Such funding limitation on local human rights CSOs by itself contravenes the right to freedom of association as envisaged under the FDRE Constitution, international and African regional human rights conventions to which Ethiopia is a party. Likewise, the prohibition on foreign and foreign funded CSOs from carrying out human right advocacy in the proclamation imposes illegitimate restriction on the right to freedom of association. Under international law, a state cannot invoke its domestic laws to justify its non-compliance with its international obligations. Therefore, to ensure that the Proclamation is in conformity with Ethiopian obligations and commitments under international and African regional human rights instruments, article 14(5) of the Proclamation that proscribes foreign and foreign funded CSOs from carrying out human rights related activities should be repealed.