

Scrutinizing Funding Restrictions of the Charities and Societies Proclamation of Ethiopia in light of International Human Rights Standards

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Abstract

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) under Art.31 has guaranteed the right to freedom of association. The details of such right are provided by the Charities and Societies Proclamation (Proclamation No.621/2009) adopted by the government. Under the Proclamation, only Ethiopian Charities and Societies are allowed to work on human rights. However, the Proclamation restricts access to funding of such organizations as it requires them to generate not more than 10% of their funds from foreign sources. In this article, it is argued that such restriction entails violation of the right to freedom of association and hinders the protection and promotion of human rights in Ethiopia.

Key words: Access to funding, Civil Society organizations, freedom of association, Charities and Societies Proclamation

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I would like to thank internal and external reviewers of my manuscript for their constructive comments. In particular, i would like to extend my heartiest gratitude to Mr.Getahun Alemayehu for his insightful and critical comments on the first draft of this article.

I. INTRODUCTION

Few months before the writing of this article, the African Commission on Human and Peoples' Rights (the African Commission/Commission, hereafter) passed a ground breaking decision which held the government of Ethiopia liable for failing to comply with its obligations laid down under Articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights.¹ The communication was brought to the Commission by civil society organizations(CSOs) which were operating in Ethiopia called: 'Ethiopian Women's Lawyers Association' (EWLA) and 'Equality Now' (a foreign civil society organization),on behalf of *Makeda*, who was abducted, raped and forced into marriage in Ethiopia at age thirteen.² The Commission required the government of Ethiopia to pay 150,000 US\$ to *Makeda* for the violation she sustained fifteen years ago.³ The decision was considered by some authorities as a precedent setting as it was the first time the Commission dealt with abduction, rape and forced marriage case.⁴

Currently, the work of EWLA has significantly reduced due to the restriction on access to funding made on it by the Proclamation.⁵ Equality

¹ Equality Now and Ethiopian Women Lawyers Association (EWLA) v. The Federal Democratic Republic of Ethiopia, (Communication 341/2007).The decision was passed during the 57th Ordinary Session of the African Commission held from 4 to 18 November 2015. (Look at Report presented to the 58th Ordinary Session of the African Commission on Human and Peoples' Rights, held in Banjul, the Gambia(6-20, April 2016)

² EWLA is a non-profit women's advocacy group founded by Ethiopian women lawyers. It began its work in 1996 after being registered in 1995.EWLA operates under three core programs: Legal Aid and representation, public education and capacity building and *research and law reform advocacy*. <http://www.ewla-et.org/index.php/about-us/brief-history/135-brief-history>, accessed on 15/03/2016

³ <http://www.equalitynow.org/AGLDF#ethiopia>, accessed on 26/04/2016

⁴ www.equalitynow.org/victory_makeda_triumphs_in_ethiopia_justiceforgirls,(Dec 12,2016)

⁵ The Observatory for the Protection of Human Rights Defenders, Violations of the Rights of NGOs to funding: From Harassment to Criminalization(2013) at 11,(Dec 15,2016), http://www.omct.org/files/2013/02/22/162/obs_annual_report_2013_uk_web.pdf

Now has also ceased to operate in Ethiopia as the Proclamation prohibits foreign CSOs from working on human rights.⁶ Among the kinds of CSOs recognized under the Proclamation, only Ethiopian Charities and Societies are permitted to work on human rights.⁷ However, such organizations are not allowed to generate more than 10% of their funding from foreign sources.⁸ This has abruptly reduced the source of funding and scope of activities of a number of Ethiopian Charities and Societies working on human rights in Ethiopia.⁹ Given the fact that engagement on human rights issues is reserved to Ethiopian Charities and societies, the restriction on access to funding made on such organizations may hinder the overall protection of human rights by CSOs in Ethiopia.

Access to funding of CSOs which comprises the ability to solicit, receive and use funding is an inherent element of the right to freedom of association.¹⁰ Unjustifiable restriction of access to funding will, therefore, result in violation of the right to freedom of association. On the other hand, international human rights treaties to which Ethiopia is a party provide that restrictions on the right to freedom of association may not be carried out arbitrarily.¹¹ Accordingly, the laws of Ethiopia that govern

⁶ Cumulative reading of Art.2 (2) and Art.14 (5) reveals that foreign CSOs and Ethiopian Residents Charities/Societies are not allowed to work on human rights.

⁷ Kinds of CSOs recognized under the Proclamation as can be noted from Art.2 (2) of the Proclamation are: Ethiopian Charities/Societies, Ethiopian Residents Charities/Societies and Foreign Charities.

⁸ Read Art.2 (2) of the Proclamation. Note that the Proclamation has not made funding restriction on the rest of CSOs. Instead, the law has made restriction on the areas that these organizations may engage. This article has not examined the underlying reason and legality of such restrictions.

⁹ International Center for Not-for-Profit Law, Global Trends in NGO Law,(Dec 20,2016) <http://www.icnl.org/>

¹⁰ Art.22 of the ICCPR guarantees the right to freedom of association. This Article protects all activities of associations including fundraising activities(UN Special Rapporteur ,*Freedom of Peaceful Assembly and Association*,(Dec 30,2016),at <http://www.freeassembly.net>,

¹¹ Look, for example, Art.22 of the ICCPR and Art.8 of the *International Covenant on Economic Social and Cultural Rights*.

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access to funding of CSOs should not bring about violation of the right to freedom of association.

This article has critically examined whether the restrictions on access to funding made on Ethiopian Charities and Societies under the Charities and Societies Proclamation of Ethiopia conform to international human rights standards. It has also considered the implication of such restriction on the protection and promotion of human rights in Ethiopia. In so doing, the Article has attempted to respond to the following key questions: What is the normative framework for civil society in Ethiopia? What is the conceptual framework underlying access to funding of CSOs? Are restrictions on access to funding made on Ethiopian Charities and Societies compatible to international human rights standards?

The study has used books, articles, UN documents and other literatures as key sources of information. Moreover, legal instruments (national and international) as well as decisions and commentaries of the Human Rights Council and the African Commission have been considered for the purpose of looking at the issues in a broader perspective. The discussions are presented in the following chronological order: the first part unpacked the notion underlying civil society. Next, the normative framework for civil society at an international and national level has been considered. Then, the restrictions made on access to funding by the existing legal frameworks of Ethiopia has been examined in light of international human rights standards. The final part summarized the main issues raised in the discussion part.

II. DEFINING CIVIL SOCIETY

Various definitions of civil societies have been advanced by authorities. However, no significant difference exists among such definitions. The World Bank adopted the definition of the term developed by a number of leading research centers which defined it as: “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".¹² According to this definition, CSOs include a wide array of organizations: community groups, non-governmental organizations (NGOs), labor unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations.¹³ The IMF also made no major difference from the definition considered above. It defined CSOs as:

...a wide range of citizens' associations that exist in virtually all member countries to provide benefits, services, or political influence to specific groups within society. CSOs include business forums, faith-based associations, labor unions, local community groups, NGOs, philanthropic foundations, and think tanks.¹⁴

In the same manner, the World Health Organizations elaborated that the term CSOs captures wide range of organizations, networks, associations, groups and movements that are independent from government and that sometimes come together to advance their common interests through collective action.¹⁵ There is generally wide consensus that branches of government (government agencies and legislators), individual businesses, political parties, and the media are usually excluded from the definition of CSOs.¹⁶

III. INTERNATIONAL AND NATIONAL LEGAL FRAMEWORKS FOR CIVIL SOCIETY: A BRIEF OVERVIEW

The right to freedom of association is an important entitlement that enables individuals to form and join CSOs. At present, the right is guaranteed under both binding and non-binding international instruments.

¹² [http://web.worldbank.org/wbsite/external/topics/cso/0,,contentmdk:\(Nov.12,2016\)20101499~menuPK:244752~pagepk:220503~pipk:220476~thesitepk:228717,00.html](http://web.worldbank.org/wbsite/external/topics/cso/0,,contentmdk:(Nov.12,2016)20101499~menuPK:244752~pagepk:220503~pipk:220476~thesitepk:228717,00.html)

¹³ *ibid.*

¹⁴ <http://www.imf.org/external/np/exr/facts/civ.htm> accessed on 19/03/2016(Oct.8,2016)

¹⁵ <http://www.who.int/trade/glossary/story006/en/>,(Oct.11,2016)

¹⁶ [http://web.worldbank.org/wbsite/external/topics/cso/0,,contented:20101499~menu\(Dec13,2016\)](http://web.worldbank.org/wbsite/external/topics/cso/0,,contented:20101499~menu(Dec13,2016))

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Among the non-binding international instruments, the *Universal Declaration of Human Rights* (UDHR) has included the right under Article 20(1). This Provision reads: “Everyone has the right to freedom of peaceful assembly and association”. Though the UDHR is a non binding international human rights instrument, it is hardly possible to undermine its role in the promotion of human rights since it has influenced a number of States in framing their national legal frameworks.¹⁷ The other non-binding international instrument that guarantees the right to freedom of association concerns the *Declaration on Human Rights Defenders*.¹⁸ Though the declaration is adopted with the prime emphasis of protecting the right to defend human rights, it also reaffirms rights that are instrumental to the defence of human rights, including, *inter alia*, freedom of association.¹⁹ The Declaration entitles everyone to form, join and participate in NGOs, associations or groups at national and international level.²⁰

The binding international human rights treaties which Ethiopia ratified such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Convention against Racial Discrimination* (ICRD) have also guaranteed the right to freedom of association. Article 22 of the ICCPR reads: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” The ICRD under Article 5 requires States Parties to ensure the right to freedom of association. The *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW) under Article.7 also demands States Parties to take all appropriate measures to ensure to women, on equal terms with men, the right to participate in non-governmental organizations and associations. The *Convention on the Rights of the Child* (CRC) and the *International*

¹⁷ Koen De Feyter and George Pavlakos (eds.), *The Tension between Group Rights and Human Rights: A Multi-disciplinary Approach*, 15 (2008)

¹⁸ <http://www.ohchr.org/english/law/treedom.htm>. (Nov.21,2016)

¹⁹ Look at Art.5 of the Declaration

²⁰ *ibid.*

Covenant for the Protection of all Persons from Enforced Disappearance (CPED) likewise enshrine the right to freedom of association under Articles 15 and 24 respectively.

Regional human rights instruments also guarantee the right to freedom of association. Article 15 of the *African Charter on Human and Peoples' Rights* (ACHPR) to which Ethiopia is a party stipulates: "Every individual shall have the right to free association provided that he abides by law." The *American Convention on Human Rights* (ACHR) deals with the right in a more detailed fashion. It entitles everyone the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.²¹ The *European Convention on Human Rights* (ECHR) used similar wordings with the ICCPR in articulating the contents of the right. Like the ICCPR, Article.11 provides:"Everyone has the right to... freedom of association with others, including the right to form and to join trade unions for the protection of his interests" The Arab Charter on Human Rights adopted by the Council of the League of Arab States on 22 May 2004 also guarantees the right to freedom of association. Unlike other regional human rights treaties, the Charter makes the right to be applicable only to citizens.²²

The right to freedom of association is offered a constitutional recognition in Ethiopia. The FDRE constitution which is the supreme law of the land entitles every one the right to freedom of association for any cause or purpose.²³ As it will be considered in the subsequent sections in a relatively deeper sense, such entitlement is subject to restrictions. The constitution provides that the restrictions on the enjoyment of the right will be carried out by appropriate laws.²⁴ In 2009, the government of Ethiopia adopted Charities and Societies Proclamation that provides restrictions in the enjoyment of the right. The Law is adopted to regulate

²¹ Look at Art.16(1) of the ACHR

²² Look at Art.24 of the Charter

²³ Look at Art.31 of the FDRE constitution

²⁴ *ibid.*

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the registration and other aspects including, but not limited to, access to funding of CSOs.

IV. ACCESS TO FUNDING OF CIVIL SOCIETY ORGANIZATIONS: AN INTEGRAL PART OF THE RIGHT TO FREEDOM OF ASSOCIATION

As considered above, the right to freedom of association, which is the legal basis for CSOs, is safeguarded under international and regional human rights treaties as well as the national laws of Ethiopia. In order for such legal recognition of the right to be meaningful, however, it is essential that CSOs should have the ability to seek, receive and use resources from domestic, foreign, and international sources that enable them to accomplish their objectives.²⁵ Financial resource (fund), which is the subject of treatment in this article, is part of the resource necessary for the operation of CSOs. Access to funding includes access to monetary transfers, in-kind donations and other forms of financial assistance.²⁶

As elaborated by the Special Rapporteur on the rights to freedom of peaceful assembly and of associations (the special Rapporteur, hereafter), access to funding is an integral element of the right to freedom of association.²⁷ This is due to the critical importance of access to funding for the effective exercising of the right to freedom of association. Without funding, CSOs cannot properly carry out their activities and meet their

²⁵ UN Special Rapporteur on Human Rights Defenders, 'Commentary to 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' (Dec 20,2016), <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>

²⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai(2013) A/HRR/23/39

²⁷ *ibid*, Some authorities argue that access to funding is not only an element of the right to freedom of association, but is protected as a substantive self-standing right. Read, International Service for Human Rights, 'Right to Access Funding'(2009),P.3,(Dec 16,2016), <http://www.icnl.org/research/resources/foreignfund/right-to-access-funding.pdf>

objectives. It is by using their resources (including financial resources) that CSOs will be able to accomplish their basic activities such as facilitating public meetings, organizing advocacy campaigns, coordinate workshops and conferences, running programs in communities, conducting research etc.²⁸ If CSOs are denied the means and resources to pursue their legitimate objectives as an association, then their right to freedom of association cannot be considered to be effectively protected in concrete terms.²⁹ The Supreme Court of US in *Buckley v. Valeo* pointed out that: “The right to join together for the advancement of beliefs and ideas ... is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective”.³⁰

Among international instruments, *The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Defend Universally Recognized Human Rights and Fundamental Freedoms* has clearly articulated that access to funding is indispensable for the enjoyment of the right to freedom of association. Article 13 of the Declaration enunciates: “everyone has the right, individually and in association with others, to solicit, receive and utilize resources...” As noted above, the term *resource* is broad and includes human, material and financial resources.

The Human Rights Committee, in *Viktor Korneenko et al vs. Belarus* elaborated that the right to freedom of association protected under the ICCPR relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory

²⁸World Movement for Democracy, Civil Society and the Right to Access Resources, (Dec 16,2016), <http://www.movedemocracy.org/sites/default/files/WMD%20Right%20to%20Access%20Resources%20Infographic%20Text%20Only.pdf>

²⁹ International Service for Human Rights, *supra* note 27, P.3,

³⁰ *Buckley v. Valeo*, 424 U.S. 65–66; 1976, cited in Robert J. Bressler, Freedom of Association: Rights and Liberties under the Law, 3(2004)

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activities.³¹ According to the Committee, hence, fundraising activities of CSOs are also protected by the right to freedom of association guaranteed under the ICCPR.³² In the concluding observation it passed on Egypt, the Committee has further clarified on the inextricable link between access to funding and the right to freedom of association. It held that the legislation adopted by the government of Egypt which requires CSOs to obtain approval from the concerned authorities of Egypt before receiving foreign funds contradicts the right to freedom of association.³³ In the same vein, the International Labor Organization (ILO) has underscored that laws requiring official approval of funds from abroad may be incompatible with Convention No. 87 on Freedom of Association and Protection of the Right to Organize.³⁴

Similarly, other treaty bodies and organs of the UN have stressed on the need to ensure access to funding of CSOs for the effective exercising of the right to freedom of association.³⁵ The Committee on Economic Social and Cultural Rights has, for example, considered that *the control on foreign funding* available for associations infringes their right to freedom of association and the right to form trade unions.³⁶ The Committee on the Rights of the Child in its concluding observation on the Central African Republic has also suggested that the State party should make every effort to strengthen the role played by civil society, *inter alia*, through the provision of support to civil society in *accessing resources*.³⁷ In its Resolution adopted in 2013, the Human Rights Council of the UN has called up on member States of the UN to ensure that they do not

³¹ Communication 1274/2004, Para 7.2

³² CESRC, Summary record of the 11th meeting, cited in International Freedom for Human Rights, 'Freedom of Association in the Arabian Gulf: The Case of Bahrain, Kuwait and Yemen', at 67, (Dec 15,2016) <https://www.fidh.org/IMG/pdf/etude.pdf>

³³ International Service for Human Rights, *supra* note 27, at 3

³⁴ *ibid*

³⁵ *ibid*

³⁶ The Observatory for the Protection of Human Rights Defenders, *supra* note 5, at 11

³⁷ Committee on the Rights of the Child, Concluding Observations on the Central African Republic, CRC/C/15/Add.138, 18 October 2000, Paras 22 and 23.

discriminatorily impose restrictions on potential sources of funding aimed at supporting the work of human rights defenders.³⁸ The UN Special Rapporteur on the situation of human rights defenders considered that “Governments should allow access by human rights defenders...to foreign funding as a part of international cooperation to which civil society is entitled to the same extent as Governments”.³⁹

At regional levels, the Inter-American Commission on Human Rights has averred that freedom of association may not be realized without permitting CSOs to access funding. In its two reports on the situation of human rights defenders, the Commission considered that: “One of the State’s duties stemming from freedom of association is to refrain from restricting the means of financing of human rights organization”⁴⁰ The Council of Europe through its recommendation adopted in 2007 affirmed that the right to freedom of association entitles NGOs to solicit donations in cash or in kind.⁴¹ The African Commission has also highlighted on the need to facilitate access to funding of CSOs for the exercising of the right to freedom of association. The Special Rapporteur on the situation of Human Rights Defenders in Africa recommended that States should provide both financial and material support for human rights defenders.⁴²

³⁸ Human Rights Council, Protecting human rights defenders, A/HRC/RES/2/6

³⁹ UN General Assembly, Report of the Special Rapporteur on the situation of human rights defenders, UN Document A/66/203, July 28, 2011, Para 70

⁴⁰ The Observatory for the Protection of Human Rights Defenders, supra note 5, at 15

⁴¹ Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe, Para.50, (Dec 16,2016), [https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2007\)14E_Legal%20status%20of%20NGOs.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)14E_Legal%20status%20of%20NGOs.pdf)

⁴² African Commission on Human and Peoples’ Rights, Intersession Report, November 2011 - April 2012, Para 50.(Dec 16,2016), <http://www.achpr.org/sessions/51st/intersession-activity-reports/human-rights-defenders/>

V. RESTRICTIONS ON ACCESS TO FUNDING OF CIVIL SOCIETY ORGANIZATIONS IN ETHIOPIA

A. PRELIMINARY

The FDRE Constitution, as alluded to above, guarantees the right to freedom of association. Article 31 outlines:

Every person has the right to freedom of association *for any cause or purpose (emphasis added)*. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited.

The phrase ‘for any cause or purpose’ is not commonly used in other international and regional human rights treaties. At first glance, the phrase seems to confer broader right to beneficiaries. However, the following statement makes it clear that the exercising of the right may be subject to restrictions. As indicated in the Article, restrictions may be made by the instrumentality of appropriate laws. Understandably, the term ‘appropriate laws’ is meant to refer to laws adopted by the government of Ethiopia to regulate issues associated with CSOs. The Charities and Societies Proclamation is a law adopted to govern the registration and operation of CSOs. The Proclamation incorporates specific rules relating to CSOs. Among such rules are those relating to foreign funding of CSOs.

As highlighted above, access to funding is an integral part of the right to freedom of association. It follows that unreasonable restrictions on access to funding of CSOs will nullify the essence of the right to freedom of association. Restrictions on access to funding of CSOS are, hence, expected to comply with international human rights standards.

B. THE NATURE OF CIVIL SOCIETY ORGANIZATIONS RECOGNISED UNDER THE CHARITIES AND SOCIETIES PROCLAMATION

The Charities and Societies Proclamation introduced 3 categories of CSOs:

- i. Ethiopian Charities/Societies:** Those charities or societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians.⁴³ However, they may be deemed as Ethiopian Charities or Ethiopian Societies if they use not more than ten percent of their funds which is received from foreign sources.⁴⁴
- ii. Ethiopian Residents Charities/Societies:** Are charities or societies that are formed under the laws of Ethiopia and which consist of members who reside in Ethiopia and who receive more than ten percent of their funds from foreign sources.⁴⁵
- iii. Foreign Charities:** Are those charities that are formed under the laws of foreign countries or which consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign sources.⁴⁶

“Charity” is defined in the Proclamation as an institution which is established exclusively for charitable purposes and gives benefit to the public. ‘Charitable purpose’ includes: the prevention or alleviation or relief of poverty or disaster, the advancement of the economy and social development and environmental protection or improvement, the advancement of human and democratic rights and etc.⁴⁷ On the other hand, ‘Society’, is defined as an association of persons organized on non-

⁴³ Charities and Societies Proclamation, Art.2(2)

⁴⁴ *ibid*, It should be emphasized that ‘use’ of funds of a CSO may relate to use of funds for administrative activities or implementation of purposes of the organization (look at Article 88 of the Proclamation) Foreign sources as defined under Art.2(15) of the Proclamation include the government, agency or company of any foreign country; international agency or any person in a foreign country.

⁴⁵ *id*,Art.2(3) The distinction between Ethiopian Charities/Societies and Ethiopian Residents Charities/Societies is that the former comprises members who are only Ethiopians. The latter can have members who are not Ethiopians. Furthermore, Ethiopian charities and Societies generate income from Ethiopia. They are allowed to generate not less than 10% of their funds from foreign sources. Ethiopian residents charities and societies, on the other hand, generate more than 10% of their funds from foreign sources.

⁴⁶ *id*,Art.2(4)

⁴⁷ *id*,Art.14(2)

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profit making and voluntary basis for the promotion of the rights and interests of its members and to undertake other similar lawful purposes as well as to coordinate with institutions of similar objectives.⁴⁸

Pursuant to Article 14 (5) of the Proclamation, only Ethiopian Charities and Societies are allowed to participate on human rights and governance issues listed under Article.14(2)(j),(k),(l),(m) and (n) of same, namely: the advancement of human and democratic rights, the promotion of equality of nations, nationalities and peoples and that of gender and religion, the promotion of the rights of the disabled and children's rights, the promotion of conflict resolution or reconciliation and the promotion of the efficiency of the justice and law enforcement services. Ethiopian Residents Charities or Societies and Foreign Charities cannot carry out the above activities.

Although the Proclamation authorizes Ethiopian Charities and Societies to work on human rights, it has limited their access to funding as they are allowed to generate not more than 10% of their funding from foreign sources. If such CSOs contravene such restriction on funding, the Charities and Societies Agency established by the Proclamation (hereafter 'the Agency') is empowered to suspend them until they comply with the requirements of the law.⁴⁹ Later, the Agency may cancel the licenses of the organizations if they fail to rectify the causes of suspension within the time limit set by it.⁵⁰ The following part will examine such restriction in light of international human rights standards. It will also assess the potential impacts (if any) of the restrictions on the protection and promotion of human rights in Ethiopia.

⁴⁸ id,Art.55(1)

⁴⁹ Read Arts 4 and 92(1)(C) of the Proclamation

⁵⁰ Art.92(2)(c) of the Proclamation

C. EXAMINING THE RESTRICTIONS ON ACCESS TO FUNDING IN LIGHT OF INTERNATIONAL HUMAN RIGHTS STANDARDS

Under Article 13(2) of the FDRE Constitution, it is stated that interpretation of the rights specified under Chapter 3 of it should be made in a manner conforming to the principles of the UDHR, International Covenants on Human Rights and international instruments adopted by Ethiopia. This provision gives the opportunity to interpret Article 31 of the Constitution (which guarantees the right to freedom of association) in light of the normative standards specified under international human rights treaties ratified by Ethiopia.

Accordingly, in order to determine the content and scope of the right to freedom of association, it is essential to interpret Article 31 of the FDRE Constitution in light of Article 22 of the ICCPR which guarantees the right to freedom of association. States Parties of the ICCPR are allowed to impose restrictions on justifiable grounds.⁵¹ Restrictions will be dubbed justifiable: if they are *necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others*. They are also expected to be *prescribed by law*.⁵² Accordingly, through the cumulative reading of Article 31 of the FDRE Constitution and Article 22 of the ICCPR, one can discern that access to funding (which is an integral element of the right to freedom of association) can be legitimately restricted by the government if such restriction helps prevent

⁵¹ Look at Art.22 of the ICCPR, Art.10 of ACHPR, Art.11 of ECHR and Art.16(1) of the ACHR

⁵² It is elaborated in the ‘Siracusa Principles’ that the law should be consistent with the ICCPR (Siracusa Principles on the Limitation and Derogation of Provisions in the *International Covenant on Civil and Political Rights* (UN Doc E/CN.4/1984/4 (1984)). As Article 60 of the ACHPR requires the African Commission to draw inspiration from, among others, the Universal Declaration of Human Rights and other instruments adopted by the United Nations, it is possible to deduce that the ACHPR also requires States Parties to ensure the existence of the above mentioned justifiable grounds while carrying out restrictions.

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or avert the illegal activities of CSOs such as illegal subversion of constitutional order and maintain public safety, public order, public health or moral.

The Proclamation is promulgated to ensure the realization of citizens' right to association enshrined in the FDRE Constitution and aid and facilitate the role of charities and societies in the overall development of Ethiopian people.⁵³ In the opinion of the present writer, however, the restrictions on access to funding placed on Ethiopian Charities and Societies will hamper the effectiveness of the Proclamation in realizing the right to freedom of association. It will also diminish the role of CSOs in protecting and promoting human rights.

The above discussion has clarified that Ethiopian Charities and Societies are precluded from generating more than 10% of their funds from foreign sources. The restriction applies at all conditions. For example, Ethiopian Charities and Societies will not be permitted to receive an amount exceeding 10% of their fund from foreign sources irrespective of the fact that they are going to use the fund for lawful purposes, such as running their statutory activities. As the restriction is placed unconditionally, the government is relieved from proving that denying Ethiopian Charities and Societies from receiving more than 10% of their funds from foreign sources helps to achieve legitimate purposes laid down under the FDRE Constitution and the ICCPR, i.e., *national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others*.

This modality does not conform to the requirements of the FDRE Constitution and the ICCPR. These instruments do not authorize the government of Ethiopia to restrict access to funding without showing justifiable grounds for doing so. As the Special Rapporteur rightly expounded, justifiable grounds that warrant governments to undergo legitimate restrictions on access to funding include those carried out for

⁵³ Paras 1 and 2 of the Charities and Societies Proclamation

the purpose of preventing unlawful activities, such as money-laundering and terrorism.⁵⁴ Similar circumstances which fall within the justifiable grounds mentioned under the FDRE Constitution and the ICCPR should exist for the government of Ethiopia to lawfully restrict access to funding. The underlying reason for imposing funding restrictions on Ethiopian Charities and Societies can be gathered from the Policy document adopted by the government in 2006. The document views NGOs as organizations established by individuals mainly for personal benefits, accountable to, and advancing the interests of foreign agencies.⁵⁵ The government believes that CSOs receiving significant amount of funding from foreign sources could be an instrument for the illicit advancement of the interests of foreign powers.⁵⁶

As argued above, however, it is only the presence of justifiable grounds that entitles the government to legitimately carry out restrictions on access to funding. The government is expected to show clear and concrete grounds that justify restrictions. Mere allegation as to the potential manipulation of CSOs by foreign powers will not justify the government to restrict access to funding of Ethiopian Charities and Societies. In Communication No. 1119/2002 (*Mr. Jeong-Eun Lee v. Republic of Korea*), the Human Rights Committee stressed that in restricting the right to freedom of association, States should demonstrate that the restrictions are in fact necessary to avert *a real, and not only hypothetical danger* to the national security or democratic order.⁵⁷

In the presence of provisions introduced under the Proclamation that authorize the government to regulate registration and operation of CSOs, moreover, the restriction on funding appears to be unnecessary. The

⁵⁴ Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, UN Document A/HRC/20/27, May 21, 2012, Para 94

⁵⁵ Debebe Hailegebriel, 'Restrictions on Foreign Funding of Civil Society', *International Journal of Not-for-Profit Law* / vol. 12, no. 3, May 2010 / 18, at.20

⁵⁶ *ibid*

⁵⁷ *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005)

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Proclamation has granted power to the Agency to decline from registering CSOs if it considers that the proposed charity or society is likely to be used for unlawful purposes or such organization is prejudicial to public peace, welfare or good order in Ethiopia.⁵⁸ The Agency is also authorized to cancel and dissolve CSOs if, among others, they have been actually used for unlawful purposes or purposes prejudicial to public peace, welfare or security.⁵⁹ In addition, the proclamation has enshrined that any person who violates the provisions of it will be held liable in accordance with the provisions of the Criminal Code.⁶⁰

As with the case in Ethiopia, a number of governments around the world have placed barriers that hinder CSOs' access to foreign funding. This trend is attributable to several factors including: (i) pressure posed on governments by the international community to address terrorist financing and money laundering; (ii) a desire to coordinate and increase the effectiveness of foreign aid; and;(iii) concerns about national sovereignty.⁶¹The forms of funding restrictions are manifold. *Venezuela*, for example, has adopted legislation that totally prohibits NGOS dedicated to the 'defense of political rights' from possessing assets or receiving any income from foreign sources.⁶² In other States like *Egypt, Bangladesh and India*, access to foreign funding is subject to specific authorization from the government or a government agency.⁶³ Civil

⁵⁸ Art.69(2) of the Proclamation

⁵⁹ Art.92(2)(b) and 93(1)(b) of the Proclamation

⁶⁰ Art.102(1) of the Proclamation.' Person' as defined under Art.2(8) of the Proclamation includes both physical and artificial persons

⁶¹International Center for Not-for Profit Law, 'Global Trends in NGO Law', supra note 9,at 4

⁶² Civil Society and the Rights to Access Resource,(Dec 23,2016),

<http://www.movedemocracy.org/sites/default/files/WMD%20Right%20to%20Access%20Resources%20Infographic%20Text%20Onl y.pdf>

⁶³ The Observatory for the Protection of Human Rights Defenders, supra note 5, at42.Law No 84 adopted by the government of Egypt in 2000,for example, prohibits any association from receiving funds from domestic or foreign sources without the authorization of the Ministry of Solidarity or Social Justice.

Society laws in States like *Algeria, Bahrain, Belarus and Iran* render impossible all foreign funding.⁶⁴ The laws of States like *Uzbekistan and Sierra Leone*, on the other hand, require foreign funding to be channeled through government-controlled banks or institutions.⁶⁵ In the Russian Federation, the law governing civil societies labels foreign-funded non-commercial local organizations as ‘foreign agents’.⁶⁶

As the International Center for Not-for-Profit Law underscored, funding restrictions that stifle the ability of CSOs to pursue their goals may constitute unjustifiable interference with freedom of association.⁶⁷ Decline in the number of associations, reduction of activities or extinction of other associations likewise indicates unlawful restriction of the right.⁶⁸ Since such funding restrictions came in to force, the activities of a number of Ethiopian Charities/Societies have been constrained.⁶⁹ Some of them have already been forced to reduce their staff and close their branch offices.⁷⁰ Other CSOs have effectively ceased to function.⁷¹ The Proclamation, hence, clearly deviates from international standards which require restrictions not to impair the essence of rights.⁷²

In fact, it is important to bear in mind that CSOs also owe obligations. They are bound to work with integrity and ethically as a way of

⁶⁴ *ibid*, In Belarus, Article 21 of Law on Public Associations, as amended, Prohibits Belarusian NGOs from keeping in funds in Banks or other financial institutions on the territory of foreign states.

⁶⁵ *ibid*

⁶⁶ Art.2(6) of No 7-FZ of the Russian law which was amended several times defines a ‘foreign agent’ as a Russian non-commercial organization which receives monetary assets and other property from foreign sources.

⁶⁷ *10 Int'l J. Not-for-Profit L. 30 2007-2008, at.37*, <http://heinonline.org>

⁶⁸ UN Special Rapporteur, *supra* note 25

⁶⁹ Debebe Hailegebriel, *supra* note 55, at.20

⁷⁰ *ibid*.

⁷¹ The Observatory for the Protection of Human Rights Defenders, *supra* note 5, at 45. See also International’s written statement to the 20th Session of the UN Human Rights Council (18 June – 6 July 2012), p.2, <http://www.refworld.org/pdfid/4fd7092f2.pdf>

⁷² Human Rights Committee, General Comment No. 27 (1999), .N. Doc CCPR/C/21/Rev.1/Add.9 (1999)

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generating trust within the sector.⁷³ The scope of their operation should be limited to the extent which enables them to achieve their goals and objectives. This will not, however, entitle governments to unnecessarily interfere with their activities. Specific laws which governments adopt to regulate CSOs should merely aim at reinforcing their efficiency and accountability instead of constraining their activity. Governments should present tangible grounds and justifications for putting in to place restrictions on the exercise of the right to freedom of association.

Treaty bodies of the UN and the African Commission have expressed concern over the restriction on access to funding made on Ethiopian Charities and Societies. In its concluding observations on Ethiopia(November 2010),the Committee Against Torture considered that the Proclamation curtailed the activities of local human rights NGOs previously active in those areas, including the Ethiopian Human Rights Council, EWLA, the Ethiopian Bar Association and the Rehabilitation Centre for Victims of Torture in Ethiopia. The Committee, hence, called on the government to consider lifting the funding restriction imposed by the Proclamation.⁷⁴ Likewise, the Committee on Economic, Social and Cultural Rights and the CEDAW Committee recommended that the government of Ethiopia should amend the Proclamation with a view, among others, to lifting funding restrictions.⁷⁵ Scrutinizing the periodic report of Ethiopia (2010), the African Commission on its part recommended that the government should review the Proclamation which proscribes human rights organizations from getting more than 10% of their funding from abroad.⁷⁶

⁷³ *id*, Para 13

⁷⁴ Report of the Committee Against Torture,(A/66/44),Para 34

⁷⁵ Look at *Concluding observations of the Committee on Economic, Social and Cultural Rights*, E/C/12/ETH/CO/1-3,Para 7 and *Concluding observations of the Committee on the Elimination of Discrimination against Women*, CEDAW/C/ETH/CO/6-7,Para 29

⁷⁶ Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia, Para 72

It is worthwhile to analyze that unjustifiable restriction of access to funding of CSOs will bring about serious violations of other human rights guaranteed under the FDRE Constitution and international human rights treaties ratified by Ethiopia. The decline in the number of CSOs working on human rights will, for instance, greatly impede the right to access to justice of individuals in Ethiopia.⁷⁷ Undeniably, CSOs have significant role in assisting individuals to bring their claims before international adjudicatory organs. Particularly, their contribution is quite visible in developing regions like Africa where significant number of individuals lack the necessary financial resource and knowledge to defend their case at an international or regional level. The records of human rights adjudicatory organs in Africa such as the African Court on Human and Peoples' Rights and the African Commission indicates that the majority of cases presented to them are initiated by CSOs representing individuals.⁷⁸

So far, the African Commission has entertained very insignificant number of individual communications involving Ethiopia. Given the poor human rights record of the State,⁷⁹ it would be illogical to assume the cause of such less degree of involvement to be absence of human rights violations. Rather, it would be tenable to argue that the very limited number of individual communications filed against Ethiopia so far is attributable to absence of proper mechanisms for individuals to access international and regional adjudicatory organs. With the restrictive approach it followed in

⁷⁷ The right to access to justice is guaranteed Art.37 of the FDRE Constitution, Art.14 of the ICCPR and Art.7 of ACHPR

⁷⁸ Look at the decisions of the African Commission at <http://www.chr.up.ac.za/index.php/ahrlr-downloads.html> information about communications submitted to the African Court on Human and Peoples' Rights can be found at: www.african-court.org

⁷⁹ Look at the Report of the US Department of State at <http://www.state.gov/documents/organization/236570.pdf> and the 2015 Report of Human Rights Watch at: <https://www.hrw.org/world-report/2015/country-chapters/ethiopia>

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dealing with foreign funding, the Proclamation will potentially exacerbate the problem instead of mitigating it.

The existing restrictions on access to funding adopted in the Proclamation will also minimize the contribution of CSOs in the promotion and protection of human rights. CSOs play significant role in challenging government law or policy, and advocating for human rights and fundamental freedoms.⁸⁰ Ethiopian Charities/Societies, the only CSOs allowed working on human rights and governance issues, as noted before, are prevented from generating more than ten percent of their funding from foreign sources. This will force such organizations to heavily rely on local sources to generate their funding. Given the fact that Ethiopia is among the poorest countries of the world, it would be quite challenging for CSOs to get adequate funding from domestic sources.⁸¹ The resulting effect is that quite insignificant number of CSOs will work on human rights. This will undermine the protection and promotion of human rights in Ethiopia. In particular, it will jeopardize the protection of the human rights of vulnerable groups who need special protection such as children, persons with disabilities and women.⁸²

In addition, CSOs facilitate the effective examination of periodic reports of States through submitting shadow/alternative reports to UN treaty bodies.⁸³ In most cases, CSOs make laudable contribution in the process

⁸⁰ “Global Trend in NGO Law: A quarterly Review of NGO Legal trends around the World”, www.icnl.org

⁸¹ As the International Center for Not-for-Profit Law observed, Many Ethiopian NGOs depend on foreign funding to conduct and maintain their operations(International Center for Not-for-Profit Law, *supra* note 9)

⁸² Read, for example, Meskerem Geset, “The New Charities and Societies Proclamation and its Impact on the Operation of Save the Children Sweden-Ethiopia” to analyze the impact of the Proclamation on the rights of children.

⁸³ Shadow report and alternative report have slight technical differences. Alternative reports are reports made by CSOs where no government report is available (e.g. either because the concerned government has not written one or it writes it too late). The reports describe progress (shortcomings) in the fulfillment of rights enshrined in the relevant international treaty. Shadow reports, on the other hand, are a civil society critique of the government reports, highlighting issues that may have been neglected or

of examination of state reports through providing both reliable and independent information to the treaty bodies on issues which may be overlooked or misrepresented in the reports.⁸⁴ Shadow/alternative reports enable treaty bodies to come up with comprehensive and reliable concluding observations developed on the basis of diversified source of information. The restriction on access to funding brought in the Proclamation, as considered above, greatly hinders the participation of CSOs on human rights. Consequently, the UN treaty bodies will be forced to mainly rely on the periodic report of the government of Ethiopia in monitoring the implementation of the treaties which Ethiopia ratified. This will impede the international monitoring of human rights implementation by the government of Ethiopia.

VI. CONCLUDING REMARKS

In this article, the restrictions on access to funding of CSOs under the legal frameworks of Ethiopia have been analyzed in light of international human rights standards. It has been noted that the right to freedom of association, an important human rights entitlement that enables individuals to form and join associations, is guaranteed under the FDRE Constitution and international human rights instruments ratified by Ethiopia. The Charities and Societies Proclamation of Ethiopia is adopted to provide details of the right to freedom of association. Among the specific rules governed under the Proclamation concerns the restrictions on access to funding of CSOs.

In the Proclamation the following kinds of CSOs are recognized: Ethiopian Charities/Societies, Ethiopian residents Charities/Societies and Foreign Charities. The Proclamation does not allow Ethiopian Charities

misrepresented in the government reports. Alternative reports are usually presented when a government fails to submit a report or does not make its report available to CSOs in time for a critique. For further detail, Visit <http://www.endvawnow.org/en/articles/1302-alternative-and-shadow-reporting-as-a-campaign-element.html?next=1303>

⁸⁴ The Advocates for Human Rights, (Nov 21,2016):
http://www.stopvaw.org/a_note_about_shadow_reports

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and Societies to generate more than 10% of their funds from foreign sources. It has been argued that this modality of restriction on access to funding violates the right to freedom of association as it contradicts with the requirements of the FDRE Constitution and the ICCPR. Cumulative reading of Article 31 of the FDRE Constitution and Article 22 of the ICCPR reveals that the government cannot restrict access to funding of CSOs without proving that the restrictions are *necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others*. The Proclamation, however, imposes restriction on access to funding without requiring the government to show the presence of justifiable grounds.

Apart from violating the right to freedom of association, funding restrictions introduced under the Proclamation entails violation of other human rights. In the Proclamation, involvement on human rights and governance issues is reserved to Ethiopian Charities and Societies. As these CSOs are not allowed to generate more than 10% of their funds from foreign sources, they will be forced to depend on local sources to finance their activities. Given the practical difficulty in generating significant portion of income from a developing nation like Ethiopia, the existing legal framework will greatly constrain their engagement on human rights. This will create difficulty in ensuring access to justice and protecting the human rights of individuals including women, children and persons with disabilities. Recent findings have also revealed that a number local CSOs have ceased to work on the protection and promotion of human rights as a result of the foreign funding restriction introduced in the Proclamation.

The restriction will also hinder the activities of the UN treaty bodies in monitoring the implementation of human rights treaties by the government of Ethiopia. In the absence of sufficient number of CSOs working on human rights in Ethiopia, treaty bodies will not be able to get alternative/shadow reports explaining the performance of the government

of Ethiopia in implementing human rights. They will solely rely on official reports submitted by the government in monitoring the implementation of ratified treaties. This will undermine the overall process of monitoring the implementation of human rights treaties by the government of Ethiopia.