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**THE IMPLICATIONS OF THE ETHIOPIAN CIVIL SOCIETY LAW ON EFFORTS  
OF NON-GOVERNMENTAL ORGANIZATIONS TO ENHANCE THE  
IMPLEMENTATION OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S  
RIGHTS IN ETHIOPIA**

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**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS  
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## DECLARATION

**I, Rediet Yaschalew**, hereby declare that this Master's thesis is original and has never been presented in any other institution. To the best of my knowledge and belief, I declare that any information used in the thesis has been duly acknowledged.

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## List of Acronyms

ACHR	American Convention on Human Rights
AI	Amnesty International
COE	Council of Europe
CSO/S	Civil society Organization/s
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FDRE	Federal Democratic Republic of Ethiopia
FOA	Freedom of Association
HRW	Human rights Watch
IACHR	Inter-American Convention
ICtHR	Inter-American Court of Human Rights
NGO/s	Non-governmental Organization/s
NHRIs	National Human Rights Institutions
UN	United Nations
AU	African Union
ICCPR	International Covenant on Civil and Political Rights
ICNL	International Centre for-not-for-profit-law
UDHR	Universal Declaration on Human Rights
VDPA	Vienna Declaration and Program of Action

## **Abstract**

*Protection and promotion of human rights need a far-reaching effort of all stakeholders. It is rather not left to states and treaty bodies only. Individuals often face financial and other constraints to bring claims to treaty bodies or domestic courts while states may not always be able to protect and promote human rights of individuals. Regrettably, treaty bodies and other international organizations may be unable to witness and investigate human right violations that occur in different states across the globe. In such instances, NGOs play a momentous role in protecting individuals from human rights abuse and violations. In the African context, NGOs often make concrete proposals to the African Commission on Human and Peoples' Rights on measures it could adopt to investigate the specific country situations on human rights or violations or mechanisms it could establish to deal with thematic issues.*

*Ethiopia, as a party to the African Charter on Human and Peoples' Rights is expected to implement the Charter nationally, which entails the need for NGOs to enhance this implementation emanates. Hence, this study seeks to evaluate the human right implication of the Ethiopian NGOs laws specifically, the Charities and Societies Proclamation and its implementing directives in enhancing the domestic implementation of the Charter.*

*The thesis questions whether there is enough space for NGOs to nationally implement the African Charter in Ethiopia and argues that there is no adequate space for NGOs to do so due to the operational and funding impediments under the Ethiopian charities and societies law imposed on NGOs that are working and intending to work on human rights.*

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**Key words:** CSOs, NGOs, association, implementation.

# Chapter One

## 1. Background

The concept of Non-governmental organization (*hereinafter* NGO) came into currency in 1945 following the establishment of the United Nations Organizations (*hereinafter* the UN) which recognized the need to give a consultative role to organizations which were classified as neither government nor member states. NGOs take different forms and play different roles in different continents and their structures vary considerably.<sup>1</sup>

Despite the fact that there is no generally accepted definition of an NGO and the term carries different connotations in different circumstances, at the very least an NGO must be a group that is private, independent, non-profit, goal oriented, and not founded by or controlled by a government and work for the interest of the public.<sup>2</sup> Although literatures have put different connotations of NGOs and Civil societies (*hereinafter* CSOs), this study considers NGOs as a prominent constituent of the broad civil society organizations.

NGOs are an essential part of the proper functioning of the state, *inter alia*, helping to initiate, promote, and strengthen comprehensive and objective discussion between governments and their people. In this way, NGOs encourage promotion of human rights, conflict resolution, and uphold better democratization processes.<sup>3</sup>

A strong NGO sector has over the past decades been considered of increasing importance for democratization, the protection of human rights, and for demanding accountability of states.<sup>4</sup> Scholars as well as practitioners with in NGOs and bilateral development cooperation have increasingly explored the varying forms in which people engage politically, outside the state to pursue their concerns and interests, seeking an understanding of NGOs and its multifaceted appearances throughout the world.<sup>5</sup>

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<sup>1</sup>George E. Edwards, 'Assesing the Effcetiveness of of Human Rights Non-Governmental Organizations(NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs ' (2010) 18(2) *Michigan State Journal of International Law*

<sup>2</sup>Ibid

<sup>3</sup>Michael Edwards, ' Introduction: Civil Society and the Geometry of Human Relations' in Micheal Edwards (ed), *Civil Society* (Oxford University Press, 2011) See also, World Economic Forum in Collaboration with KPMG International, 'The Future Role of Civil Society ' (2013) *World Senario Series*2-5

<sup>4</sup>Lisa Jordan, 'Global Civil Society ' in Michael Edwards (ed), *Civil Society* (Oxford University Press, 2011) 1

<sup>5</sup>Ibid 93-101

CSOs represent a wide ranging section of organizations that cover the space between the individuals and the state.<sup>6</sup> They include *inter alia* charity and advocacy organizations (NGOs), cultural and religious societies, informal community groups, youth and women organizations, trade unions, business and professional associations, and the media.<sup>7</sup> These institutions serve in most countries of the world as platforms for peoples' participation in matters of individual as well as societal interest.<sup>8</sup> 'Their importance in addressing social, economic, and political issues, through securing livelihood and providing services, creating social capital, and counter weighting state and corporate power, has also been widely recognized'.<sup>9</sup>

In the aftermath of the World War II especially after the ends of the Cold War, governments and international organizations have developed interest in co-operating with CSOs including NGOs.<sup>10</sup>

The history of NGOs in many of the African countries including Ethiopia, may not be a long one in many African states, however there have been 'informal community-based structures, faith-based organizations, and tribal associations in many of the states for a long time'<sup>11</sup>. Since the 1980s, NGOs played significant roles in many African countries in leading movements against totalitarianism, advocating for peace and non-discrimination, participating in relief and rehabilitation activities and, more recently, in advocating for respect and protection of human rights and democracy.<sup>12</sup> 'The number of NGOs in many of these African countries boomed as a result of the increased use of NGOs for the transfer of development aid and the 'wave of democratization' which took place in Africa in the 1990s.'<sup>13</sup> Despite such a progress, the influence of NGOs as service providers and development agents and their amplified engagement in rights and governance advocacy, especially in more recent years, have created tensions with governments in many African states and one of the manifestations of the tensions has been the adoption of laws that restrict

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<sup>6</sup> Sisay Alemahu Yeshanew, 'CSO Law in Ethiopia: Considering its Constraints and Consequences' (2012) 8(4) *Journal of Civil Society* 369

<sup>7</sup>Ibid

<sup>8</sup>Steven Rathgeb Smith, 'The Nonprofit Sector' in Michael Edwards (ed), *Civil Society* (Oxford University Press, 2011) 1

<sup>9</sup>M Edwards, *Civil Society* (Cambridge: Polity Press, 2009)

<sup>10</sup>M. Ottaway, 'Civil Society ' in P. Burnell & V. Randall (ed), *Politics in the Developing World* (Oxford University Press, 2005) 121-135.

<sup>11</sup>Teshome B. W., 'Civil society and Democratization in Africa: The role of the civil society in the 2005 election in Ethiopia' (2009) 4(2) *International Journal of Human and Social Sciences* 82

<sup>12</sup>Ibid

<sup>13</sup>Yeshanew, above n .6 369-384

the activities and operational spaces of NGOs in these states.<sup>14</sup> On the other hand, these governments used the gaps in accountability frameworks and the calls for harmonization of the development efforts of governments, NGOs, and donors to target organizations that do not conform to their choices.<sup>15</sup>

The entry of hundreds of modern ‘international NGOs such as CARE, Catholic Relief Services, Oxfam, Save the Children and World Vision into Ethiopia has been a comparatively recent phenomenon which was mainly induced by the major drought and famine situations of 1974 following the collapse of the monarchical rule under His Majesty Haile Selassie I and later as a result of the famine of 1984 under the military-socialist regime of Colonel Mengistu Haile Mariam.<sup>16</sup> Most of these modern NGOs ‘assumed predominantly, ‘interventionist’ roles and implemented various humanitarian, rehabilitation and food security projects in the most vulnerable parts of the country. The downfall of the socialist-military regime of Mengistu Haile Mariam and the coming to power of the Ethiopian People Revolutionary Democratic Front (EPRDF), under the late Melese Zenawi, in 1991, coincided with the end of the Cold War and heralded a new chapter in the history of NGOs in Ethiopia.<sup>17</sup> EPRDF’s conception of NGOs in the country became a new reality by creating a new paradigm shift of NGOs role to disengage from emergency relief operations to development assistance on selective areas like agriculture, environment, education, and health as an early priority and new organizations were formed and increased in number and scopes.<sup>18</sup>

During the EPRDF’s regime, Ethiopia acceded to numerous international and regional instruments in particular to the African Charter on Human and Peoples Rights (*hereinafter*

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<sup>14</sup>Ibid

<sup>15</sup> Africa CSO Platform for Principled Partnership (2011) Democracy, Aid and Disabling Environment: Motivation and Impact of Disabling Environment on Development Work in Africa, available at [http://www.cso-effectiveness.org/IMG/pdf/disabling\\_environment-2.pdf](http://www.cso-effectiveness.org/IMG/pdf/disabling_environment-2.pdf). accessed 17 July 2017

<sup>16</sup>Jeffrey Clark, 'Civil Society, NGOs, and Development in Ethiopia' (2000)

<sup>17</sup>This was evidenced by the proliferation of modern” CSOs. However, the civil society space is arguably being controlled by the government deriving its power from the promulgation of the CSO law and the subsequent policy instruments in 2011. At the same time, the Government of Ethiopia has been criticized by western governments and, human rights” focused organizations for favouring the creation of mass-based organizations loyal to the political party while closing down human rights focused NGOs. This creates a crisis of allegiance for both the government and the NGOs and, in turn, the communities under their care.

<sup>18</sup>Clark, above n.16

*the African Charter or the Charter*)<sup>19</sup>; in June 1998 which paved the way for the constitutional recognition of freedom of association as a self-standing right.<sup>20</sup>

The Charter, being firmly convinced of states' duty to promote and protect human and people's rights, imposes general obligation on state parties to the Charter to recognize the rights, duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give effect to them.<sup>21</sup> It further puts obligation on state parties to allow the establishment and the improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.<sup>22</sup> It can thus be deduced that Ethiopia has also obligation to ensure the protection and promotion of freedom of association as envisaged in the Charter through adopting legislative or other measures to give effect to the right.

Aiming at further 'ensuring the realization of citizens' right to association enshrined in the Constitution', Ethiopia enacted the Charities and Society Proclamation (*hereinafter* the CSO law or the law) in February 2009.<sup>23</sup> The CSO law has been condemned for being against the Charter<sup>24</sup> because of the activity and the funding restrictions it puts discriminately on the basis of citizenship and source of funding.<sup>25</sup> It established barriers to NGO entry, determined permissible areas of activities and dictated organizational structures.<sup>26</sup>

The CSO law imposes limitations on the activities of all CSOs including NGOs that do not fit the law's definition of "Ethiopian" Charities/Societies. Under the law, 'Ethiopian'

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<sup>19</sup>Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev.5, 21 I.L.M.58 (1982), available at: [http](http://www.africanunion.org), accessed 10 December 2017. The Charter was adopted by the OAU in Nairobi, Kenya, on June 1981 and entered into force on 21 October

<sup>20</sup>Ethiopia has given constitutional recognition to freedom of association for any cause or purpose without discrimination on any basis under its article 31. It provides that every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited.

<sup>21</sup>African Charter above n .19 General Obligation Clause Article 1

<sup>22</sup>Ibid, article 26

<sup>23</sup>Charities and Societies Proclamation no 621 /2009, *Federal Negarit Gazeta*, Year 15, no.25, Preamble

<sup>24</sup>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

<sup>25</sup>Preamble of the CSO proclamation above n.23 puts it is found necessary to enact a law in order to ensure the realization of **citizens'** right to association enshrined in the Constitution of the Federal Democratic Republic of Ethiopia; and article 2 puts classification of CSOs based on their source of funding and put activity restrictions under article 14 based on the classification.

<sup>26</sup>Ron Dupuy and A. Prakash, "Who Survived? Ethiopia's Regulatory Crackdown on Foreign-Funded NGOs" (2014) *Review of International Political Economy* 11

Charities/Societies are NGOs formed under Ethiopian law that consist exclusively of Ethiopians and receive no more than ten percent of their income from foreign sources.<sup>27</sup> ‘Ethiopian Resident’ Charities/Societies are NGOs formed under Ethiopian law that receive more than ten percent of their funds from foreign sources.<sup>28</sup> ‘Ethiopian Resident’ NGOs, though formed under Ethiopian law and by Ethiopians, are regarded by the CSO law as foreign merely because they obtain more than ten percent of their income from foreign sources, which encompasses Ethiopians who reside outside of Ethiopia.<sup>29</sup> ‘Foreign’ Charities, on the other hand is a third category of NGOs, which includes NGOs whose members include foreign nationals, NGOs formed under foreign laws or NGOs that receive funds from foreign sources.<sup>30</sup>

Once an NGO is labelled ‘Foreign’ or ‘Ethiopian Resident’ under the above definitions a of the CSO law, it is prohibited from participating in a plethora of essential activities reserved exclusively for ‘Ethiopian’ Charities/Societies, among others, the advancement of human and democratic rights, the promotion of the rights of disabled and children’s rights and the promotion of efficiency of justice and law enforcement services.<sup>31</sup> While the African Charter under its article 10 puts that everyone has the right to freely associate with others provided that he abides by the law, the CSO law’s distinctions between ‘Ethiopian’, ‘Ethiopian Resident’ and ‘Foreign’ NGOs have far-reaching consequences on the right to freely associate. Article 2(2)-(3) of the law, when read in conjunction with article 14(2) (j)-(n), effectively silences the activities of independent human rights NGOs mainly by incapacitating the functions of foreign funded human rights NGOs through rationing the funds they raise and through prohibiting them from engaging in the broad spectrum of human rights work if they generate more than 10% of their funds from a foreign source.<sup>32</sup>

In justifying the funding restrictions, the government (the ruling party) relates foreign funding to the independence of NGOs and characterizes NGO work on human rights, democracy, the rule of law, and conflict resolution as ‘political activities’ that should not be

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<sup>27</sup> CSO Law above n.23, article 2(2), 2(15), defining ‘income from foreign source’ as a donation or delivery or transfer made from foreign source of any article, currency or security. Foreign source include the government, agency or company of any foreign country; international agency or any person in foreign country.

<sup>28</sup> Ibid, article 2(3)

<sup>29</sup> Ibid

<sup>30</sup> Ibid article 2(4)

<sup>31</sup> Cherice Hopkins Yalemzewed Bekele, Liane Ngini, ‘Sounding the Horn: Ethiopia’s Civil Society Law Threatens Human Rights Defenders’ (Northwestern University, 2009)

<sup>32</sup> Ibid

done with foreign fund and it claimed that the restrictions are aimed at avoiding foreign political intrusion.<sup>33</sup>

Availing its power of monitoring the implementation of the Charter, the African Commission on Human and Peoples' Rights (*hereinafter* the African Commission or the Commission) has passed two resolutions pertinent to the right to freedom of association. The first is the 'Resolution on the Right to Freedom of Association',<sup>34</sup> which among others, provides that, in regulating the use of this right, competent authorities should not enact laws that would limit the exercise of this right and the regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter.<sup>35</sup> The second resolution is the 'Resolution on Protection of Human Rights Defenders in Africa'<sup>36</sup> which was adopted in response to the persistent violations human rights violations that human rights defenders face in Africa, such as freedom of association. In this Resolution, the Commission urged state parties to promote and give full effect to the UN Declaration on Human Rights Defenders and to take all necessary measures to ensure the protection of human rights defenders.<sup>37</sup> In some of its Communications, the Commission has outlined that, although the right to freely associate with others is not absolutely guaranteed, measures to limit the right shall not be disproportional to the legitimate aim which caused the limitation and shall not deprive the very essence of the right itself.<sup>38</sup>

Ethiopia's has the obligation to work collaboratively with NGOs to promote and protect human rights and obligation to create an enabling environment for the promotion and protection of human rights that facilitates, rather than hindering, the participation of human

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<sup>33</sup>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. This position of the Government was raised by the Ethiopian delegate during the dialogue with members of the CEDAW Committee. See also 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.

<sup>34</sup> Resolution on the Right to Freedom of Association (1992), ACHPR/Res 5 (xI) 92, 11th Ordinary Session in Tunisia, available at [http://old.achpr.org/english/state\\_reports/news/english/doc\\_target/documentation.html?../resolutions/resolution\\_10\\_en.html](http://old.achpr.org/english/state_reports/news/english/doc_target/documentation.html?../resolutions/resolution_10_en.html), accessed 15, September 2017.

<sup>35</sup>Ibid

<sup>36</sup>Resolution on Protection of Human Rights Defenders in Africa (2004), 35th Ordinary Session, Banjul, The Gambia, available at <http://www.achpr.org/sessions/35th/resolutions/69/>, accessed 15, September 2017.

<sup>37</sup>Ibid

<sup>38</sup> See, Civil Liberties Organization in Respect of the Nigerian Bar Association v Nigeria (Communication No. 101/93, African Commission on Human and Peoples' Rights, 1995). See also, 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).

rights NGOs to work for the observance and implementation of the Charter nationally. It has also an affirmative obligation to enable NGOs to function and carry out work that promote the implementation of human rights under the Charter.<sup>39</sup> However, for many years, Ethiopian human rights NGOs have endured government harassment and the government has frequently used its CSO law to effectively ban the work of human rights defenders.<sup>40</sup> In response to the Ethiopian initial and periodic report, the African Commission in its concluding observation has expressed the concern that the CSO law has the potential to violate the rights of freedom of expression as specified by the African Charter, especially the provision that requires NGOs not to raise more than ten percent of their funding outside of Ethiopia.<sup>41</sup> Once again, the Commission, at its 51st Ordinary Session, passed a resolution on Ethiopia “condemning” and expressing “grave concern” at a number of serious human rights concerns in the country. The resolution condemned ‘the excessive restrictions of funding and activities placed on human rights work by the CSO law’ and called on the government of Ethiopia to amend the legislation to make it consistent with the UN Declaration on Human Rights Defenders.<sup>42</sup> Yet, until now Ethiopia has not made any move to amend or revise its CSO legislation.

## **1.2 Statement of the Problem**

The number of NGOs in Ethiopia has been smaller and less diverse than elsewhere in Africa and the NGO sector has been largely limited to relief operations<sup>43</sup>. It however underwent important transformation since the relative liberalization in terms of the activities they take part in the 1990s.<sup>44</sup> Despite the relative augmentation of NGO engagement in Ethiopia, the CSO law and its directives dramatically reshaped the country’s NGO population while most foreign-aid dependent human rights groups have disappeared, while surviving domestic NGOs have “rebranded” their activities by abandoning their explicit interest in human rights, or “restructured” operations into less sensitive domains.<sup>45</sup> The CSO law has not only put

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<sup>39</sup> African Charter, above n.19, Part II, article 45(3) 55-56

<sup>40</sup> Yalemzewed Bekele, above n .31,4

<sup>41</sup> African Commission, Concluding Observations and recommendations, above n 24 Para. 45

<sup>42</sup> Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, 2 May 2012: Available at <http://www.achpr.org/sessions/51st/resolutions/218/>, accessed 15 November 2017

<sup>43</sup> Akalewold Bantirgu and Yoseph Endeshaw, 'CSOs/NGOs in Ethiopia: Partners in Development and Good Governance' (CSO Task Force, 2010), p.10

<sup>44</sup> Sarah Vaughn, and Kjetil Tronvoll, 'The Culture of Power in Contemporary Ethiopian Political Life' (SIDA Studies, 2003) 15

<sup>45</sup> Prakash, above n .26, 26-27

human rights activism and mobilization beyond the reach of NGOs but also threatened the very existence of NGOs in the country by controlling and limiting their income source.<sup>46</sup>

The existing funding and activity restrictions on human rights NGOs together with other administrative impediments and harassments from Ethiopian government has curtailed the active involvement of NGOs in particular human rights NGOs in protecting and promoting rights and freedoms enshrined under international and regional laws specifically the rights under the African Charter.<sup>47</sup> These and many other measures under the law beg the question of compatibility of these measures with the African Charter and their impact on enhancing the domestic implementation of the African Charter through active participation of human rights NGOs in Ethiopia.

### 1.3 Research Question

Many organizations around the world dedicate their efforts to protecting human rights and ending human rights abuses. Major human rights organizations maintain extensive websites documenting violations and calling for remedial action, both at a governmental and grass-roots level.<sup>48</sup>

At national level, NGOs take part in the implementation of the human rights standards through supporting states in undertaking legislative or other measures and putting pressure thereof.<sup>49</sup> They play a crucial role in the creation of the political atmosphere and context to stimulate action in the field of human rights by governments and contribute to drawing the attention of the public to human rights issues, influence the setting of the public agenda in this respect and help governments and Inter-Governmental Organizations (IGOs) to identify and prioritize key human rights issues.<sup>50</sup> They further help to safeguard human rights against government infringement ‘through techniques such as diplomatic initiatives, fact-finding missions, reports, public statements and mobilization of public opinion’.<sup>51</sup> They are more independent from political forces than States or IGOs and thus are more able to identify and criticize human rights violations.<sup>52</sup> Once NGOs bring a problem to a state’s attention, it

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<sup>46</sup>Mihret Alemayehu Zeleke, *Civil Society and Freedom of Association Threatened? A Critical Examination of Ethiopian Charities and Societies Law* (University of Oslo, 2010)

<sup>47</sup>Ibid

<sup>48</sup>United for Human Rights, Human Rights Organizations, <http://www.humanrights.com/voices-for-human-rights/human-rights-organizations/non-governmental.html>, accessed 15 September 2017.

<sup>49</sup>ICNL, Civil Society and National Human Rights Institutions, available at [www.icnl.org/research/journal/vol13iss4/special\\_1.html](http://www.icnl.org/research/journal/vol13iss4/special_1.html), accessed 15 September 2017.

<sup>50</sup>Jan Wouters & Ingrid Rossi, Human Rights NGOs: Roles, Structure and Legal Status, *Institute for International Law, K.U. Leuven, Faculty of Law, 2001*, available at <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP14e.pdf>, accessed 17 September 2017.

<sup>51</sup>Ibid

<sup>52</sup>Ibid

becomes more difficult to ignore human rights violations. Most NGOs ‘publicly report the results of their missions and thus provide valuable information about violations of human rights and contribute to the enforcement of human rights by carrying out research and provide it to treaty monitoring bodies including the African Commission’.<sup>53</sup>They also lobby for and monitor the actual implementation of the rights and freedoms enshrined in the Charter [Emphasis added].<sup>54</sup>Accordingly, it can be said that they in general monitor the actions of governments and pressure them to act in accordance with human rights principles enshrined in any of the human rights instruments for our case in the African Charter.<sup>55</sup>

In view of that, member states to the Charter including Ethiopia are expected to allow NGOs to take part in legislative or other measures in order to give effect to the rights and freedoms enshrined under the Charter. In other words, NGO legislations need to be liberalized in order to create a broader civic space and ensure the domestic implementation of the Charter. With the presence of restrictions under the CSO law on those NGOs that seek to engage on human rights and related activities, the following research questions are posed in order to address the research problem:

- Do the CSO law and its implementing regulation align with guaranteed freedom of association under the African Charter?
- Does the current domestic legal framework in Ethiopia provide an enabling environment for the active involvement of local and foreign human rights NGOs working in Ethiopia in human rights protection and promotion?
- How do the Ethiopian CSO law affect the efforts of NGOs to enhance the national implementation of the African Charter?

#### **1.4 Objective of the Study**

The study will have the following general and specific objectives:

##### **General Objectives**

- It aims to analyse the provisions and implications of the CSO law and its pertinent regulation on the activities of human rights NGOs in Ethiopia in light of the Charter provisions; articles 10, 26, 45 and 55 which make direct or indirect reference to significance of NGOs in implementing the Charter at domestic level.

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<sup>53</sup>Ibid

<sup>54</sup>Ibid

<sup>55</sup>United for Human Rights, above n. 48

- It seeks to discern the below par standards adopted in the CSO law and the threat it poses to the fundamental freedom of association and human rights work carried out by NGOs.

### **Specific Objectives**

- Examining the implication of the CSO law on efforts of NGOs to facilitate the implementation of the Charter in light of the African Commission Rules of Procedure and other relevant case laws of the Commission.
- Evaluating the performance of human rights NGOs working in Ethiopia in advancing the domestic application of the Charter within the available regulatory framework governing functions of NGOs in Ethiopia.
- Appraising the participation of human rights NGOs in Ethiopia in the African Commission's mandates and functions

### **1.5 Scope of the Study**

The scope of this study is limited to assessment of the domestic implementation of the African Charter in Ethiopia through various efforts of NGOs. Although the study will make reference to international and regional regulatory frameworks on right to freedom of association, it substantively addresses the implementation of the African Charter through efforts of NGOs working on issues of human rights in Ethiopia by specifically assessing the impact of the Ethiopian CSO law of 2009 and its regulation on NGOs that work on realization of human rights. Despite there are numerous NGOs registered and active in different sectors in contemporary Ethiopia, the researcher has chosen to focus on those who work on human rights and democratization which are directly related to the enhancement of the national implementation of the African Charter and the Commission's mandates. Accordingly, this study does not include faith based CSOs, cultural associations, international or foreign organizations operating in Ethiopia by virtue of an agreement with the government of FDRE Ethiopia, and societies that are governed by other laws than the CSO law. It does not also cover other bodies in the African human rights system other than the Commission.

### **1.6 Organization of the Study**

To achieve its objectives, the study is divided in to five chapters. The introductory chapter gives a brief background to the study, its objective, statement of the problem and methodology used. The second chapter will provide a brief overview about the foundation of NGOs with a focus on the fundamental freedoms necessary for their operation enshrined in international and regional human rights standards and specific declarations on protection and

responsibility of NGOs. The third chapter will deal with the role and involvement of NGOs in the international human rights mechanisms including the Universal Periodic Review and in the prominent regional human rights system with a particular focus on the African Commission. The fourth chapter will examine the operating environment for human rights NGOs in Ethiopia. The CSO law as well as political and ideological issues that may possibly explain the implication of the CSO law on NGO efforts in enhancing the domestic implementation of the African Charter will also be assessed. The final chapter of the study will provide concluding remarks that are drawn from the findings and recommendations.

### **1.7 Significance of the Study**

This work is significant in terms of solving the existing problem with regard to the domestic implementation of the African Charter through various efforts of human rights NGOs in Ethiopia. The research adds a new insight for the current regulatory regime applicable to NGOs in Ethiopia and their roles in enhancing the domestic application of the Charter and helping the Ethiopia to fulfil its treaty obligations enshrined under the Charter and other human rights instruments by extension. It can also serve as a literature for upcoming works concerning on the issue.

### **1.8 Methodology**

Primarily, this study intends to be analytical as the techniques involve legal analysis and case analysis. Treaties, domestic laws, cases are consulted as a primary source materials. Books, journals, articles and other sources are also consulted as secondary materials. Relevant literature is also browsed so as to identify what has been done and what is left however, due to lack of previous studies on the subject concerned, the researcher will use personal arguments, analogy and experiences of other countries whenever necessary.

## **CHAPTER TWO: A CONCEPTUAL FRAMEWORK OF THE MEANING, DISTINCTIVE FEATURES AND FUNDAMENTAL FREEDOMS OF NGOS UNDER INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS**

### **2. Introduction**

This chapter is aimed at giving a conceptual understanding of NGOs in relation to their historical emergence and their functions. Its purpose is to highlight basic freedoms needed for the operations of NGOs and their side limitations under the relevant international and regional human rights instruments. The chapter seeks to achieve this by giving reference to international and regional human rights instruments, resolutions, declarations and general comments from treaty monitoring bodies on freedom of association, assembly, expression and other related rights of NGOs. It also examines these laws with relevant case laws of treaty bodies. In doing so, it will establish state obligations with regard to ensuring the rights and freedoms of NGOs and further their role to supplement state obligation in implementing human rights instruments nationally.

### **2.1 Concepts and Foundation of NGOs**

The term NGO is broad and ambiguous and its clear definition still remains contested. However, it can be argued that all NGOs can be regarded as CSOs though not all CSOs are NGOs as civil society is the broader concept to cover all social activity by individuals, groups and movements.<sup>1</sup> The term NGO was not in general currency before the formation of the UN<sup>2</sup> When 132 international NGOs decided to co-operate with each other in 1910, they did so under the label, the 'Union of International Associations'.<sup>3</sup> The first draft of the UN Charter did not make any mention of maintaining co-operation with private bodies.<sup>4</sup> Nonetheless, a variety of groups, mainly but not solely from the United States, lobbied to resolve this at the San Francisco conference<sup>5</sup>, which established the UN in 1945 and the conference recognized the need to give a consultative role to organizations 'which were classified as neither

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<sup>1</sup>Nazneen Kanji, *Non-Governmental Organizations and Development* (Routledge, 2009)18-25

<sup>2</sup>Willems Peter, What is a Non-Governmental Organization, (2002), Article 1.44.3.7 in UNESCO *Encyclopedia of Life Support Systems*.

<sup>3</sup>Ibid

<sup>4</sup>Ibid

<sup>5</sup>The San Francisco Conference of the UN, Forty-six nations, including the four sponsors, were originally invited to the San Francisco Conference, available at <http://www.un.org/en/sections/history-united-nations-charter/index.html>, accessed 15 September 2017

government nor member states'.<sup>6</sup> 'The need for the UN to differentiate in its Charter between participation rights for intergovernmental specialized agencies and those for international private organizations was also one of the contributing factors for the preliminary recognition given to NGOs'.<sup>7</sup>

Although NGOs have existed in various forms for centuries, 'the set to a high prominence in international development and their dramatic increase in numbers had been observed in the 1980s and 1990s'.<sup>8</sup> However, there is contestation of the definition of an NGO and no precise definition has been given up until now.

NGOs play multifaceted roles and take different shapes within and across different societies and are driven by range of motivations and values which make their classification unclear.<sup>9</sup> In other words, a single NGO may combine several elements which make its category complex and unclear.<sup>10</sup> For instance, 'an NGO may pursue change but can equally work to maintain the existing social and political system'.<sup>11</sup>

According to Turner and Hulme: 'NGOs are generally registered organizations, community groups, professional associations, trade unions, cooperate charity organizations whose aim is to improve the wellbeing of their members and of those areas in which they exists and that are not motivated by commercial considerations'.<sup>12</sup> Dupuy and Parakash viewed NGOs as 'formal organizations that are not part of the government and the profit sector and which seek to provide services for those groups that are marginalized and advocate for social or policy reforms'<sup>13</sup> while Adam MCBeth defines NGO as a 'not-for-profit, voluntary citizens' group, which is organized on a local, national or international level to address issues in support of the public good.'<sup>14</sup> The World Bank, on the other hand, sees NGOs as 'private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the

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<sup>6</sup>David Lewis, *Non-Governmental Organizations, Management and Development* (Johns Hopkins University 3ed, 2014) See also Willets P, What is a Non-Governmental Organization, (2002), Article 1.44.3.7 in UNESCO *Encyclopedia of Life Support Systems*. World Bank

<sup>7</sup> Willets, above n.2

<sup>8</sup>David Lewis, Non-governmental Organizations, Definitions and History, available at [https://www.researchgate.net/publication/302391474\\_Nongovernmental\\_Organizations\\_Definition\\_and\\_History](https://www.researchgate.net/publication/302391474_Nongovernmental_Organizations_Definition_and_History) [accessed 13 January, 2018].

<sup>9</sup>Ibid

<sup>10</sup>Ibid,

<sup>11</sup>See Morris-Suzuki T, 'For and Against NGOs' (2000) *New Left Review*, 63-84

<sup>12</sup> David Hulme and Mark Turner 'NGOs and their Concepts' 1997: 200).

<sup>13</sup>Paraksh, above n.24

<sup>14</sup>Sarah Joseph and Adam MCBeth, 'Research Handbook on International Human Rights Law', (2012), Research Handbooks in International law, Edward Elgar Publishing Inc

environment, provide basic social services, and/or undertake community development'.<sup>15</sup> It also classifies NGOs as either operational which are mainly concerned with development projects or advocacy NGOs that are primarily concerned with promoting a cause.<sup>16</sup>

As Haans wrote, NGOs are also described as non-profit entities whose 'undertakings are determined by the collective will of their members who belong to one or more communities with which the NGO cooperates'<sup>17</sup> and predominantly count on the solidarity between its members and this solidarity is supported by them through decentralized management sustained by voluntary local participation'.<sup>18</sup> It is also widely accepted that these organizations among others pursue activities to alleviate the suffering, promote or protect interests of the poor, protect the environment, provide basic social services, protect the environment and undertake community development.<sup>19</sup>

Despite all these definitional contestations, it can be understood that NGOs, are established for non-profit purposes, do not constitute part of the government and share some activities in common which seek to provide services and advocate for social and policy changes on behalf of the public and themselves. **2.2 Distinctive Features and Impacts of Human Rights NGOs on the Protection of Human Rights**

As there is no generally accepted definition of an NGO, the term carries different connotations in different circumstances. Hence, many diverse types of bodies are now described as being NGOs. However, there are some fundamental features that make an NGO 'a Human Rights NGO'. At the very least, 'a human rights NGO must fit the definition of NGO; it must be a group that is private, independent, non-profit which defines its voluntary character, goal oriented, and not founded by or controlled by a government'.<sup>20</sup> It also goes further by requiring that the group's primary concern has to be promoting and protecting internationally guaranteed human rights norms as incorporated into the 1948 Universal

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<sup>15</sup>See World Bank, Operations Evaluation Department (OED), Non-Governmental Organizations and Civil Society Engagement in World Bank Supported Projects: Lessons from OED Evaluations (2002) 18 available at: [http://lnweb90.worldbank.org/OED/OEDDocLib.nsf/DocUNIDViewForJavaSearch/851D373F39609C0B85256C230057A3E3/\\$file/LP18.pdf](http://lnweb90.worldbank.org/OED/OEDDocLib.nsf/DocUNIDViewForJavaSearch/851D373F39609C0B85256C230057A3E3/$file/LP18.pdf), accessed 12 October 2017. See also Justine Nolan and Simon Rice Adam McBeth, *The International Law of Human Rights* (Oxford University Press, 2 ed, 2011) 318, See also M.Lekorwe and Mpabanga, 'Managing Non-Governmental Organisations in Botswana' (2007) 12(3) *The Public Sector Innovation Journal* 45

<sup>16</sup> Ibid, World Bank

<sup>17</sup> Freddy Haans J., 'Human Rights Non-Governmental Organisations: Protection and Promotion of Human Rights in Sri Lanka' (2012) 1(2) *International Research Journal of Social Sciences* 1-7

<sup>18</sup> Ibid

<sup>19</sup> J.A. Dada & M. Ibanga, 'Human Rights Protection in Nigeria: From Rhetoric to Pragmatic Agenda' (2011) 1(2) *African Journal of Law and Criminology* 93

<sup>20</sup> Edwards, above n 172

Declaration of human rights (UDHR)<sup>21</sup>, International Covenant on Civil and Political Rights (ICCPR)<sup>22</sup>, International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>23</sup> and regional human rights treaties such as the African Charter and the customary international law of human rights.<sup>24</sup> Hence, the definition of human rights NGO is broad and includes NGOs that endeavour for the protection human dignity rights in all these infinite substantive areas of law.<sup>25</sup>

Therefore, it can be agreed that human rights NGOs should be first, an NGO; should be privately founded and adequately sovereign in its activity and independent of direct governmental control. Secondly, it should not be a political party or a politically affiliated entity with an aim of attaining political power and thirdly it should advocate for law and policy reform and safeguard fundamental rights and freedoms representing the society in which it is formed for; which demonstrates its public interest character.

The abundance of NGOs is now one of the most striking features of modern-day international politics. ‘While states remain the major protectors and abusers of human rights, NGOs such as Amnesty International (*hereinafter* AI) have emerged as central players in the promotion of human rights around the world’.<sup>26</sup> Over the last 60 years an almost volatile growth of NGOs for the promotion and the defence of human rights have taken place.<sup>27</sup> At the time of the drafting of the UDHR, some 15 NGOs with consultative status were involved in the process.<sup>28</sup> In 1993, about 841 NGOs from throughout the world participated at the ‘World

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<sup>21</sup>Ibid, UDHR is nor a common standard of achievement for all peoples and nations’ It addresses human rights in several categories with utmost protection (Articles 3-21); economic, social and cultural rights (Articles 22-27); and third generation rights (Articles 28) These rights are the foundations for the rest of the UN human rights treaties came into force subsequently after the UDHR in particular the ICCPR and ICESCR.

<sup>22</sup>See, International Covenant on Civil and Political Rights [*hereinafter* ICCPR], G.A. Res. 2200A (XXI), Article 17, U.N. Doc. A/6316, December 16, 1966, entered into force March 23, 1976

<sup>23</sup> See, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (December 19, 1966)[*hereinafter* ICESCR], entered into force March 23, 1976)

<sup>24</sup> George E. Edwards, above n.20

<sup>25</sup> See, The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society sheds light on NGOs that have competence in the area of human rights. For e.g. Article 18 (2) of the Declaration puts individuals, groups, institutions and NGOs have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.

<sup>26</sup>Jr Claude E Welch, *NGOs and Human Rights : Promise and Performance*, Human Rights Quarterly (University of Pennsylvania Press, 2000)1-2

<sup>27</sup>Ibid

<sup>28</sup>Theo van Boven, ‘The Role of Non-governmental Organizations in International Human Rights Standard-Settings :A *Pre-requisite of Democracy* (Scholarly Commons, 1990)210-225

Conference on Human Rights in Vienna' all of which described them working on human rights mission.<sup>29</sup>

In a very direct sense, the contribution of these NGOs is important not only in terms of the results that are achieved and therefore for the sanguinity that people may deem about the defence of human rights in the world, 'but also they are tools that are available to be used by individuals throughout the world'.<sup>30</sup> In fact, NGOs take part in the protection of human rights at many different stages or levels, and the strategies they employ may also vary according to the nature of their objectives and their specificity or generality.<sup>31</sup> In some instances, human rights NGOs offer direct backing to those who are victims of human rights violations such as humanitarian aid and advocacy while others take other forms of activism such as collecting and disseminating accurate information, campaigning and lobbying.<sup>32</sup>

As advocacy organizations, human rights NGOs may work with or against governments in developing agendas for actions through mobilizing public opinion, investigating and reporting human rights abuses and offer direct assistance to those who are victims of the abuses<sup>33</sup> and in effect try to influence politicians to make decisions in favour of better and more efficient human rights protection.<sup>34</sup> They further lobby regional, international governmental bodies to take some actions with respect to human rights violator states.<sup>35</sup> Hence, it can be said that the NGOs lobbying has both an internal and external dimension.<sup>36</sup> Thus, although their typologies differ depending on their nature and strategies, their impact has far reaching advantages in terms of creating a pro-human rights world.

Besides, with the recognition and consensus on the importance of human rights promotion and protection globally, 'the lack of fidelity to human rights from states among other reasons

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<sup>29</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, June 14-25, 1993, 38, U.N. Doc. A/CONF.157/23 (July 12, 1993)

<sup>30</sup> Council of Europe, 'Human Rights Activism and the Role of NGOs' (2002) *Manual on Human Rights Education with Young People* 305-306, available at [https:// www.eycb.coe.int/compass/en/pdf/4\\_4.pdf](https://www.eycb.coe.int/compass/en/pdf/4_4.pdf)

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Claude Welch, above n.26

<sup>34</sup> Ibid, in large part the lobbying takes through the NGOs participation in the negotiations or consultations processes on the new human rights standards.

<sup>35</sup> Molly Beutz Land, 'Networked Activism' (2009) 22 *Harvard Human Rights Law Journal*; 206 available at <http://harvardhrj.com/wp-content/uploads/2009/09/land.pdf>, accessed 13 September 2017.

<sup>36</sup> Lina Marcinkutė, 'The Role of Human Rights NGO'S: Human Rights Defenders or State Defenders or State Sovereignty Destroyers?' *Baltic Journal of Law and Politics* 4 (2) (2011), 59 The best known of such organizations, at least on the international stage, include AI, HRW, the International Federation for Human Rights, Human Rights First and Inter-rights. The actual number of NGOs engaged in human rights protection, in one form or another, runs into the hundreds of thousands throughout the world.

provides a unique validation for the existence of human rights NGOs.<sup>37</sup>, ‘Governments across the globe despite the level of their economic development and advancement are deemed to have failed to demonstrate the needed trustworthiness and pledge to the promotion and protection of human rights and they in fact, remain the greatest human rights violators across the globe.’<sup>38</sup>In view of that, it has been noted that nowhere in the world is the genuine observance of human rights and that the great violators of the most human rights are sovereign governments fanatical with national security and are considered as the major human rights predators.<sup>39</sup>

Specifically, the influence of human rights NGOs might involve several functions such as:

- Information, definition and mobilization: one of the main tasks of human rights NGOs is to collect and provide information for (governmental) institutions, international organizations and other stakeholders and this information allows a problem to be defined in terms of human rights.<sup>40</sup>
- Agenda setting, norm making and policy development: NGOs are to a large extent involving in setting the international human rights agenda, developing new human rights norms and contributing to the policy processes in this field.<sup>41</sup>
- Advocacy, education and operation: these functions include assistance to and representation of victims of human rights violations, ‘enhancing human rights education and training or carrying out operational activities together with or on behalf of international institutions’.<sup>42</sup>

In general, human rights NGOs endeavour for positive changes in protecting human rights. They attempt to convince ‘the local and national governments, inter-governmental bodies, international community or other non-state actors to take some or refrain from some actions in protecting human rights or to change their policy in the human rights field towards the greater protection of human rights and to create a human rights friendly environment in

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<sup>37</sup>Jacob Abiodun Dada, 'The Significance and Limits of NGOs in Human Rights Protection in Nigeria' (2013) 19 *Journal of Law, Policy and Globalization*; P.82 Dr Dada explained that the Charter of the United Nations, 1945 in imprecise language makes reference to human rights in 6 sections. Authoritative articulation of human rights is provided in the Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights 1966 and a host of Conventions, Declarations and Resolutions, online available at <https://www.iiste.org>, accessed 13 September 2017.

<sup>38</sup>J .A. Dada & M. Ibanga, above n.19

<sup>39</sup>C.A. Odinkalu, 'Back to the Future, the Imperative of Prioritizing for the Protection of Human Rights' (2003) *Journal of African Law* 1

<sup>40</sup>Jan Wouters & Ingrid Rossi, 'Human Rights NGOs: Role, Structure and Legal Status', *Institute for International Law, Working Paper*, (2001) 4-7, available at <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP14e.pdf>, accessed 16 October 2017.

<sup>41</sup>Ibid

<sup>42</sup>Ibid

which NGOs can be considered as a catalyst for human rights policy changes.<sup>43</sup> The establishment of legal frameworks and erection of institutional infrastructure at domestic level for the promotion and protection of human rights is however particularly important because states remain primarily responsible in international law for ensuring protection of human rights within their jurisdictions.<sup>44</sup>

Today, progress in the international protection of human rights depends largely on national measures of implementation.<sup>45</sup> Since, international and domestic jurisdictions complement each other in the constant struggle against manifestation of arbitrary power, international protection requires national measures to implement human rights treaties and to strengthen national institutions linked to the full observance of human rights and rule of law which includes human rights NGOs.<sup>46</sup>

## **2.3 The Normative Framework: Basic Freedom for the Operation of NGOs and Limitations**

### **2.3.1 Fundamental Freedoms of NGOs in International Laws**

The first formal commitments by the international community to protect rights that strengthen the individual's ability to freely form associations and act collectively to pursue a commonly identified goal were rooted in the earliest international human rights standards.<sup>47</sup> Since the 1945 San Francisco conference<sup>48</sup>, in which NGOs played a major role in influencing world powers in shaping the UN, NGOs have continued to play a major role in UN conferences and have made substantial contributions to the work of the UN in many areas, 'including development, peace, health, rights of women and children, international crimes, racism and race discrimination, global finance, and human settlements all of which directly or indirectly concern international human rights issues.'<sup>49</sup>

The UN has created several instruments that are essential for the work of human rights defenders including NGOs. Among these is the UDHR of which articles 19, 20 and 28 refer to freedom of opinion and speech, the right of peaceful assembly and association and the right to an established social and international order in which these rights and freedoms are

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<sup>43</sup> Lina Marcinkutė, above n.37

<sup>44</sup> Ibanga, above n.37

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> See for example, Universal Declaration on Human Rights, Article 20, available at [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf), accessed 13 August 2017

<sup>48</sup> The San-Francisco Conference 1945, available at <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html>, accessed 16 September 2017.

<sup>49</sup> K. Sikkink, 'Human Rights' in Amitav Acharya (ed), *Who Govern? :Rethinking Demand and Progress in Global Governance* (Cambridge University Press, 2016) 126-127

can be fully effective. The ICCPR in its articles 19, 21 and 22 further recognizes and guarantees freedom of opinion and speech as well as the right to peaceful assembly and association.<sup>50</sup> It broadly protects the right to freedom of association<sup>51</sup>, expression<sup>52</sup> and permits only narrowly drawn limitations on the rights.

### 2.3.1.1 Freedom of Association and Assembly

Freedom of association (*hereinafter* FOA) is the most essential in relation to NGOs. FOA refers to ‘the right of individuals to interact and organize among their selves to collectively express, promote, pursue and defend common interests.’<sup>53</sup> It enables persons to organize around certain interests and participate in them. It is recognized as a fundamental freedom in international and regional human rights instruments.<sup>54</sup> Article 22 (1) of the ICCPR reads:

*‘[e]very one shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest.’*

This stipulation signifies the individual and a collective dimension of FOA which is the ‘subjective right of the individual to form an association with those like-minded and to join an existing association’<sup>55</sup> and as long as an association is established lawfully, there is no limitation regarding the purpose for which an association can be established.<sup>56</sup>

In *Belyatsky* and others case, the Human Rights Committee (*hereinafter* the HRC) affirmed that: ‘...the right to freedom of association 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 activities and that the protection afforded by article 22 of the ICCPR extends to all activities of an

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<sup>50</sup>María Martín Quintana and Enrique Eguren Fernández, ‘Protection of Human Rights Defenders: Best Practices and Lessons Learnt’ (2012) *Research and Training Unit, Protection International*,

<sup>51</sup> UN General Assembly, International Covenant on Civil and Political Rights *hereinafter* ICCPR, 16 December 1966, United Nations, Treaty Series, vol.999, p.171, available at: <http://www.refworld.org/docid/3ae6b3aao.html> [accessed 13 November 2017]; See also UN General Assembly, Universal Declaration of Human Rights *hereinafter* the UDHR, 10 December 1948, 217 A (III), article 10, available at <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 13 November 2017]; Organization of American States (OAS), American Convention on Human Rights *hereinafter* the American Convention, ‘Pact of San Jose’, 22 November 1969, article 16, available at: <http://www.refworld.org/docid/3ae6b36510.html> [accessed 13 November, 2017]; African Charter on Human and Peoples’ Rights (Banjul Charter), above n 17 article 10, available at: <http://www.refworld.org/docid.3ae6b3630.html>, [accessed 13 November], Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>, accessed 13 November, 2017

<sup>52</sup> Ibid, See ICCPR at art. 19; see also UDHR art. 19, the African Charter, art.9, ECHR, article. 10

<sup>53</sup>Mihret Alemayehu Zeleke, *Civil Society and Freedom of Association Threatened?* (Master of Philosophy Thesis, University of Oslo, 2010), 11

<sup>54</sup>See, UDHR art 20, ICCPR art 22, ACHPR art 10, ECHR art 11

<sup>55</sup>Zeleke above n. 53, 12

<sup>56</sup> Ibid

association....’’<sup>57</sup>[Emphasis added.]. Hence, it can be deduced that FOA mainly pertains to the organizational and operational independence of associations to carry out the function they are established for and interference in organizational and operational independence of associations denies meaningful exercise and enjoyment of the freedom of association.

Freedom of Assembly on the other hand is also recognized in international and regional human rights instruments as one of the foundational rights for the functioning of NGOs<sup>58</sup> and facilitates participation, dialogue and gathering without fear of state repression or intrusion and ensures all people in a society have the opportunity to express opinions they hold in common with others.<sup>59</sup> It is inextricably linked to the FOA to the extent that instruments like the UDHR treat them in a single provision.<sup>60</sup> It entitles ‘members of NGOs to hold assemblies for various reasons including expression of views, protest and defence of common interest or to promote and protect public interest and human rights’.<sup>61</sup>

### 2.3.1.2 Freedom of Expression

Freedom of expression (*hereinafter* FOE) anchors a multitude of rights including the right to seek, receive, impart and disseminate information and ideas of all sorts, through any media and without borders.<sup>62</sup> The protection of FOE extends not just to the content of the expression but also to the forms or mediums of expression such as oral, written, in print communications or art forms.<sup>63</sup> The freedom to seek information entitles NGOs to look for, investigate, acquire and study information on human rights. This right is particularly important for human rights NGOs as the freedom to impart information enables them communicate the result of their research and study with anyone. They may also make public statements; prepare publications, etc. on current and ongoing human rights situations.

Airing views and comments on topical issues is thus a right guaranteed in the international human rights treaties, and such statements, if based on facts and truth, are lawful even if they are against government stand or policy.<sup>64</sup>

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<sup>57</sup>See, *Belyatsky v. Belarus*, Comm.1296/2004, and U.N. Doc.A/62/40, (2) Para. 7.2 ,Human Rights Committee *hereinafter* HRC 2007

<sup>58</sup>See, ICCPR article 21, UDHR article 20(1), and ECHR article 11, ACHPR article. 11

<sup>59</sup>See, Guidelines on Freedom of Peaceful Assembly 2007, Office for Democratic Institutions and Human Rights, 2<sup>nd</sup> Edition, 15-11, available at, <https://www.ode.org>, accessed 13 November 2017.

<sup>60</sup> UDHR, Article 20

<sup>61</sup>Zelege, above n .53

<sup>62</sup> See, ICCPR, article 19

<sup>63</sup> Ibid

<sup>64</sup>*Belyatesky et al*, above n .57 para7.3

In short, the right of individuals to associate and assemble is protected by the freedom of association and assembly, and the content of their discussion, expression of concern or view and dissemination of information is protected by the freedom of opinion and expression. These freedoms are thus the basis for any grouping of individuals or NGO groups to come in to existence and undertake their role in society. The exercise of these rights is nonetheless subject to some limitations.<sup>65</sup>

### 2.3.1.3 Right to Access to Funding

The right to access funding is a direct and essential component of the right to FOA, which is protected by Article 22 of the ICCPR. Access to funds is crucial for NGOs to operate and implement their objectives in a sustainable way.<sup>66</sup> Most NGOs, and especially human rights NGOs, function on a 'not-for-profit' scheme and therefore depend heavily on external sources of funding to carry out their work.<sup>67</sup> Consequently, 'barriers and restrictions to funding sources directly undermine the ability of NGOs to function and thus the right of their members to FOA and the right to freedom of expression'.<sup>68</sup>

Given the strict interpretation of allowable restrictions under the ICCPR by the UNHRC, and the UN rhetoric surrounding the importance of NGO, it is improbable an overly broad law restricting foreign funding for NGOs would be defended without a state party proving a strong legitimate aim and that the restriction is proportional.

The UN Special *Rapporteur* on Human Rights Defenders maintains that access to funding 'is an inherent element of FOA'<sup>69</sup> and lack of it denies operational independence and cripples the association itself and the freedom to associate. For these reasons, UNHRC has consistently expressed concern over foreign funding restrictions as an impediment to the right to freedom of association. For example, after reviewing Egyptian legislation which required NGOs receiving foreign funding to register with the government, the Committee stated that:

*The State Party [Egypt] should review its legislation and practice in order to enable NGOs to discharge their functions without impediments which are inconsistent with the provisions of article 22 of the Covenant, such as prior authorization, funding controls, and administrative dissolution.*<sup>70</sup>

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<sup>65</sup> Guidelines on Freedom of Assembly, above n.59, at 17

<sup>66</sup> International Service for Human Rights (ISHR), Right to Access Funding: Human Rights Defenders Briefing Paper Series, 2009, Pp 3-8, available at [http://www.icnl.org/research / resources/foreign fund/right to access funding.pdf](http://www.icnl.org/research/resources/foreign_fund/right_to_access_funding.pdf).

<sup>67</sup> Ibid

<sup>68</sup> Ibid

<sup>69</sup> Ibid, 3-8,

<sup>70</sup> U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Egypt*, at. 21, U.N. Doc. ICCPR/CO/76/ EGY (November282002), Available

The UN General Assembly echoed this conclusion in the Declaration on Human Rights Defenders which states, “[e]very one 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.”<sup>71</sup>

Furthermore, the right to access funding requires ‘states to adopt a legislative and administrative framework facilitating, or at least not impeding, solicitation, receipt, and use of resources’.<sup>72</sup> The only limitation provided for in the Declaration on human rights defenders refers to the purpose and means for the use of funds, which have to be used ‘for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means’.<sup>73</sup>

The Special Representative of the Secretary-General on the Situation of Human Rights Defenders has also stated that ‘governments must allow access by NGOs to foreign funding as a part of international cooperation, to which NGOs are entitled to the same extent as governments’.<sup>74</sup> Likewise, the UN Special *Rapporteur* on the right of freedom of assembly and association<sup>75</sup> has stated that:

.....the ability for associations to access funding and resources is an integral and vital part of the right to FOA and any association, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, CSOs, Governments and international organizations’.<sup>76</sup>

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at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument) accessed 13, November, 2017.

<sup>71</sup>U.N. General Assembly, U.N. Doc. G.A. Res. 53/144, 9 December 1998, art. 13 (under this framework, States are supposed to adopt legislation to facilitate and not impede the solicitation, receipt and use of resources, *Hereinafter* Declaration on Human Rights Defenders], available at <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>, accessed 13 September 2017.

<sup>72</sup>See, ISHR, above n.66, 6

<sup>73</sup>Article 13 of the Declaration protects access to funding ‘in accordance with article 3 of the present Declaration’. Article 3 states:

Domestic law consistent with the Charter of the UN and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion and effective realisation of those rights and freedoms should be conducted.

<sup>74</sup>Hina Jilani, ‘Report of the Special Representative of the Secretary- General on Human Rights Defenders ’ (United Nations General Assembly, 2004), PP 20-24, available at [https://www.hrichina.org/sites/default/files/human\\_rights\\_defenders\\_note\\_by\\_secretary\\_general.pdf](https://www.hrichina.org/sites/default/files/human_rights_defenders_note_by_secretary_general.pdf)

<sup>75</sup>Maina Kiai, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, United Nations General Assembly, 2013), 4-7, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf), accessed 13 September 2017

<sup>76</sup>Jilani, above n .74

It therefore follows that restrictions on access to funding for those who work in the human rights discourse must meet the requirements set forth in the ICCPR, which only permits restrictions on freedom of association and expression under narrowly tailored circumstances. Subsequently, and after a long discussion process strongly encouraged by NGOs, the UN also took into account the important work of human rights defenders and the need to guarantee their security. As a result, on 9 December 1998 under Resolution 53/144, the General Assembly of the UN adopted 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.<sup>77</sup>

The Declaration explicitly recognizes the right of associations, human rights defenders in particular, to have access to funding. Article 13 provides:

*“[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....”*<sup>78</sup>

Very specifically, it stipulates that NGOs have an important role and responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.<sup>79</sup>

#### *2.3.1.4 Right to Communication and Cooperation*

NGO representatives, individually and through their organizations, have also the right to communicate and seek cooperation with other representatives of NGOs, the business community and international organizations and governments both within and outside their home countries.<sup>80</sup> Individual NGOs have the right to form and participate in networks and

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<sup>77</sup>UN General Assembly, *Human rights defenders in the context of 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* : resolution / adopted by the General Assembly, 10 February 2016, A/RES/70/161, available at: <http://www.refworld.org/docid/56dd31954.html> [accessed 6 November 2017]

<sup>78</sup>Two years later the United Nations Human Rights Commission asked the Secretary General to appoint a Special Representative on human rights defenders to monitor and support the implementation of the declaration. On 26 April 2000 Resolution E/CN.4/RES/2000/61 led to the creation of the post of Special Representative for Human Rights Defenders. In 2008 Resolution 7/8 led to a renewal of the mandate on the special procedure for the situation of human rights defenders but this time appointing a special rapporteur rather than a special Representative of the Secretary General.

<sup>79</sup>Ibid. Article 18

<sup>80</sup>Defending Civil Society, International Centre for Not-for-Profit Law (ICNL) & World Movement for Democracy Secretariat at the National Endowment for Democracy (NED), (2010)

coalitions in order to enhance communication and cooperation, and to pursue legitimate aims.<sup>81</sup>

## **2.4 Other International Declarations**

### **Vienna Declaration and Program of Action and the Vienna (VDPA) +20 CSO**

Building on the UDHR, the VDPA recognized that the promotion and protection of human rights must be a matter of the highest priority for both states and the international community.<sup>82</sup> It envisaged a strengthening of human rights norms and institutions at the national and international levels, and recognized the critical role that human rights defenders have to play in the realization of fundamental rights and freedoms.<sup>83</sup>

The VDPA contributed to the formal recognition of NGOs as key players in the promotion of human rights at international, regional and national levels. It provides further authority of NGOs to participate in the UN affairs, proclaiming that NGOs should be free to carry out their human rights activities, without interference, within the framework of national law and the UDHR.<sup>84</sup> The Declaration remarkably confirmed ‘the promotion and protection of human rights’ as a matter of priority for the international community and called states and international organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment to human rights.

Paragraph 38 of the VDPA contains a crucial recognition regarding the role that NGOs play in the promotion of all human rights and in humanitarian activities at national, regional and international levels. Hence, deterring NGOs from exposing human rights violations undermines the call in the VDPA which urges that NGOs involved in the field of human rights should enjoy the rights and freedoms recognized in the UDHR, and the protection of the national law.

The Vienna+20 CSO Declaration also depicts that a strong CSO, including human rights NGOs that are well-connected domestically, regionally and globally is fundamental for the protection of human rights.<sup>85</sup>

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<sup>81</sup>Ibid

<sup>82</sup>World Conference on Human Rights (1993) *Vienna Declaration and Programme of Action*, P.38, U.N. Doc.A/CONF.157/23 (July 12, 1993)

<sup>83</sup>Vienna Declaration and Program of Action +20, Human Rights Monitor Quarterly: Issue 1 | 2013, International Service for Human Rights, PP 7-18.

<sup>84</sup> World Conference on Human Rights, above n.82

<sup>85</sup> The Vienna+20 CSO Declaration, adopted in Vienna on June 26, 2013. On June 25 and 26 June 2013, the Vienna+20 CSO Conference of more than 140 persons from various CSOs around the world gathered at Vienna on the occasion of the 20th anniversary of the 1993 World Conference on Human Rights and its Vienna Declaration and Programme of Action issued on June 25, 1993, available at <https://viennaplus20.files.wordpress.com/2013/04/vienna20-cso-declaration-final.pdf>, accessed 15 September 2107.

## 2.5 Regional Normative Framework

### 2.5.1 European Convention on Human Rights

The European Convention on Human Rights and Fundamental Freedoms (*hereinafter* the ECHR)<sup>86</sup> is the most important, binding, supra-national legal instrument to establish human rights within Europe<sup>87</sup> guarantees the right to the freedoms of association and expression, as rights that are essential for a NGOs to exist and operate.

Article 11 of the ECHR establishes the right to the freedom of association as:

- (1) *Everyone has the right to freedom of peaceful assembly and with others, including the right to form and to join trade unions for the protection of his interests.*
- (2) *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of to freedom of association national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

The European Court of Human Rights (*hereinafter* ECtHR) in the Turkish communist party case noted that FOA has a mixed feature.<sup>88</sup> It has a feature of political rights; making it indispensable for the existence of a functioning democracy as political interests can be effectively promoted collectively. But it also has a characteristic of civil rights sanctioning the state and private parties from arbitrary interference with individuals' right of association.<sup>89</sup> On the other hand, Article 10 of the ECHR also establishes the right FOE which includes freedom to hold opinions and to receive and impart information and ideas without interference by public and regardless of frontiers.<sup>90</sup> Paragraph (2) of both Articles 10 and 11 of the ECHR provide an exhaustive set of circumstances that allow member states to

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<sup>86</sup>Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 16 September 2018] See also Stephen George and Simon Bulmer IAN Bache, *Politics in the European Union* (Cambridge University Press, 2011) 999

<sup>87</sup>The European human rights system consists of separate entities with distinct functions. The relevant jurisprudence is derived from three separate institutions; the Council of Europe ("COE"), the European Court of Human Rights ("ECtHR") and the European Union ("EU").

<sup>88</sup> *United Communist Party of Turkey and Others v. Turkey*, 19392/92, Council of Europe: European Court of Human Rights, 30 January 1998, available at: <http://www.refworld.org/cases,ECHR,4721cf132.html> [accessed 14 November]

<sup>89</sup>*Zelevke*, above n .53,15

<sup>90</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. No. 5, amended by Protocols Nos. 11, C.E.T.S. No. 155, and 14 Article. 10, C.E.T.S. 194, article 11; This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. It puts that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

restrict the rights enjoyed under Articles 10 and 11. While permissible, restrictions on the rights established in Articles 10 and 11 as they apply to NGO funding would be narrowly construed in recognition of the role that NGOs play in protection of human rights and promoting participation in a democratic society.<sup>91</sup>

In 1986, the Council of Europe (*hereinafter* COE) introduced the European Convention on the Recognition of the Legal Personality of International NGOs (“NGO Convention”) to ‘recognize that NGOs carry out work of value to the community, particularly in the scientific, cultural, charitable, philanthropic, health and education fields, and that they contribute to the achievement of the aims and principles of the UN Charter and the Statute of the COE’.<sup>92</sup> It requires those member states that have ratified that Convention to recognize the legal status of each other’s national NGOs.<sup>93</sup>

### **2.5.2 The Inter-American Convention**

The American Convention of Human Rights (*hereinafter* ACHR) is the binding human rights treaty for the Organization of American States (OAS) which came into effect in 1978.<sup>94</sup> It has been ratified by 25 of the 35 Member States of the OAS.<sup>95</sup> The American Convention protects the right to FOA under its article 16 with similar language to the ICCPR and the ECHR: it puts

- 1. Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, and cultural, sports, or other purposes*
- 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public*

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<sup>91</sup>See, *Gorzelik and Others v. Poland*, 44158/98, Council of Europe: European Court of Human Rights, 17, February, 2001, available at : <http://hudoc.echr.coe.int/rus/pages.search.aspx?i=001-60003>

<sup>92</sup>The Council of Europe (“COE”) is an intergovernmental organization of 47 European countries (the “Member States”) with a broad mandate to agree on minimum legal standards on a range of issues. In addition to the ECHR, the COE has introduced a number of other measures aimed at protecting the role of NGOs. The COE also performs a monitoring and reporting function to assess how well signatory countries are meeting the agreed standards.

<sup>93</sup>See, Stefano Silingardi, 'From Theory to Practice: Role of Disaster Response Missions' in Marco Gestri and Gabriella Venturini Andrea de Guttry (ed), *International Disaster Response Law* (2012) 479; the Convention has been ratified by Austria, Belgium, Cyprus, France, Greece, Macedonia, The Netherlands, Portugal, Slovenia, Switzerland, and the United Kingdom, and it has been extended to Guernsey, Jersey, and the Isle of Man.

<sup>94</sup>Organization for American States (OAS), American Convention on Human Rights, ‘Pact of San Jose’, Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docis/3ae6b36510.html> [accessed 4 June 2018] The Inter-American Human Rights System encompasses the Inter-American Commission of Human Rights (“IACHR”) and the Inter-American Court of Human Rights (“IACtHR”), which protect and enforce the rights enshrined in the American Convention of Human Rights.

<sup>95</sup>Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago (Denunciation), Uruguay, Venezuela (Denunciation).

*safety or public order, or to protect public health or morals or the rights and freedoms of others.*

3. *The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police*<sup>96</sup> which have similar implication to the above conventions regarding the rights and privileges of NGOs.

### **2.5.3 African Charter on Human and Peoples Rights**

The African Charter which came into force in 1986 under the auspices of what is now known as the African Union (*hereinafter* the AU) has been ratified by every AU Member State except for South Sudan.<sup>97</sup> The Charter stipulates that everyone has the right to form societies and other associations, as long as they respect the law. The Charter protects the right to FOA in article 10:

*1. Every individual shall have the right to free association provided that he abides by the law.*

*2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.*

The African Commission has reiterated the state's obligations under the Charter with regards to FOA, and has further expressed that these principles apply to all rights guaranteed by the African Charter.<sup>98</sup> Although the Commission has not officially had the chance to review foreign funding restrictions, it has made statements expressing concern over the proposed budget limits on foreign funding for NGOs. The Commission has made statements expressing concern over budget limit on foreign funding for NGOs.<sup>99</sup> It has also passed resolutions regarding human rights situations in Egypt and Ethiopia where it condemned foreign funding restrictions for NGOs.<sup>100</sup> It has also passed a resolution on the right to freedom of association and in Africa and enshrines specific provisions on each and every aspect of article 10 of the Charter.

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<sup>96</sup> American Convention, above n.94 article 16

<sup>97</sup> African Commission on Human and People's Rights, *Ratification Table: African Charter on Human and People's Rights* (2018), available at <http://www.achpr.org/instruments/achpr/ratification/>, accessed 15 November 2017

<sup>98</sup> See, *Dawda K. Jawara v. The Gambia*, African Commission Communication No. 147/1995 and 149/96 at para 68, available at, [www.achpr.org/files/sessions/27th/communications/147.95-149.96/achpr27\\_147.95\\_149.96\\_eng.pdf](http://www.achpr.org/files/sessions/27th/communications/147.95-149.96/achpr27_147.95_149.96_eng.pdf)

<sup>99</sup> Press Release on the NGO and Media Bills in Kenya, African Commission (April 3, 2014), available at <http://www.achpr.org/press/2014/04/d198/>, Kenya Parliament Passes draconian media laws which was contentious anti-press legislation in December 2013

<sup>100</sup> Resolution on the Right to Freedom of Association, African Commission on Human and People's Rights, Res. No. 5, 11th Session, (2 March 1992), available at, <http://www.achpr.org/sessions/11th/resolutions/5/>, See also *Huri-Laws v. Nigeria*, Africa Commission Communication. no. 225/98, at Para 48 (2000), and *Lawyers for Human Rights v. Swaziland*, African Commission Communication No. 251/2002 at Para 60 (2005), available at [www.achpr.org/communications/](http://www.achpr.org/communications/), accessed 15 November 2017

### 2.5.3.1 Resolution on the Right to Freedom of Association in Africa and Guidelines on Freedom of Association and Assembly in Africa)

The African Commission Resolution on Freedom of Association<sup>101</sup> observes that:

- (1) *The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard;*
- (2) *In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;*
- (3) *The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter.*

The guidelines on freedom of association and assembly in Africa of the African Commission, were developed in accordance with the relevant provisions of the African Charter, which stipulates under Article 45 (1) (b) that the African Commission is mandated “to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms...” the guidelines strengthen the obligations set forth in Article 10 of the Charter on the right to freedom of association. They among others protect the right of associations to seek receive and use funds freely in compliance with not-for-profit aims.

## 2.6 Justifications for Infringing NGO Rights (Legitimate Limitations)

International instruments not only recognize the fundamental freedoms but also provide legitimate limitations in exercising such freedoms. The limitations on the fundamental freedoms emanate principally from the necessity to protect. However, for any limitation to be legitimate, it should fulfil certain requirements provided in human rights instruments protect the rights and freedoms of others and the collective interest of the society/public. The law thus takes a delicate act of balancing: it provides rights and freedoms to be exercised without interference by other individuals or the state but at the same time limits its exercise not to affect the rights of others.<sup>102</sup>

The ICCPR puts a high standard of three cumulative conditions to justify restrictions: it underscores that measures must be put by law and are necessary in a democratic society to protect legitimate aims (protection of national security or public safety, public order, public

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<sup>101</sup>See, the Guidelines on Freedom of Association and Assembly in Africa, adopted in the 60<sup>th</sup> Ordinary Session of the Commission, May 2017, Para.37

<sup>102</sup> See, ICCPR arts. 22 (2), 19(3) and 21; ECHR arts 10(2) & 11 (2); African Charter arts 9, 10 (2) &11, the latter only provides claw back clauses, the right to be exercised within the law which may subject the exercise of rights to repressive laws.

health or moral, or the rights and interests of others). Any measure short of these standards is not permissible limitation on FOA.<sup>103</sup>

First, any limitation should be *prescribed by law* and governments cannot legitimately impose any restriction without a law passed following the normal legislative procedure. Second, the limitations should be *necessary in a democratic society*. The measures taken must be in line with “the basic democratic values of pluralism, tolerance, broadmindedness, and peoples’ sovereignty”<sup>104</sup> Limitations must also be proportional to the objective sought to be achieved and severe restrictions like prohibition of formation or dissolution of an association would be disproportionate when less serious actions are sufficient to avert the danger.<sup>105</sup> Measures of prohibition or dissolution can be legitimately taken only as a last resort. Third, the restrictions must be justified by the legitimate purposes: it should be 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”<sup>106</sup>

Finally, these requirements must be fulfilled cumulatively to justify any limitation on FOA or other freedoms.

The UNHRC in *Belyatsky* case underscored:

*...the mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose.*<sup>107</sup>

It has also explained that the restrictions on FOA and expression must be proscribed by law, imposed solely to protect national security or public safety, public order, public health or morals, or the rights and freedom of others and necessary in a democratic society.<sup>108</sup>

The restrictions on these fundamental rights are only imposed if they are ‘necessary in a democratic society’ and the restrictions must be proportional.<sup>109</sup> The HRC has further

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<sup>103</sup>See, *Belyatsky et al v. Belarus*, above n.57, Para 7.3

<sup>104</sup>Ibid, See also *Zeleke*, above n .53, 77

<sup>105</sup> Ibid

<sup>106</sup>See, ICCPR art 22(2). See also arts 19(3) and 21.

<sup>107</sup>*Belyatsky et al v. Belarus*, above n .57, Para. 7.3

<sup>108</sup> Ibid, See *Keun-Tae Kim v. Republic of Korea*, ICCPR/C/64/D/574/1994, UN Human Rights Committee (HRC), 4 January 1999, available at: <http://www.refworld.org/cases,HRC,3f588eff7.html> [accessed 14 November 2017] it is indicated that any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.)

elaborated that ‘the mere existence of reasonable and objective justifications for limiting the right to FOA is not sufficient. The state party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose’.<sup>110</sup>

The difficulty however is that the terms used to define the so called “legitimate purposes” lack specificity in scope and clarity which has often been exploited to impose restrictions that frustrate the fundamental freedoms including freedom to associate. The limitations have been used by states as a means to prevent or discourage citizens from ‘joining undesirable groups’ and to ‘restrict criticism and silence dissent.’<sup>111</sup>

The European court of human rights (*hereinafter* ECtHR) has developed a robust framework to ensure that any restrictions on freedom of association and expression are justified. Any restriction on protected rights must: (1) be prescribed by law, (2) Serve a legitimate aim (as set out in Articles 10 and 11); and (3) be necessary and proportionate to the measure’s stated aim.<sup>112</sup> “All three conditions must be met cumulatively. Should only one of them not be met, there will have been a violation of the Convention.”<sup>113</sup> The court has acknowledged that any restriction on an NGO’s access to foreign funding, however, would have to be precisely drafted so as to eliminate the possibility of arbitrary or overly-broad interpretations of its terms in order for the ECtHR to consider the restriction appropriately prescribed by law.<sup>114</sup>

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<sup>109</sup> UN Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: <http://www.refworld.org/docid/45139c394.html> [accessed 16 November 2017]

<sup>110</sup> UN Human Rights Committee, Jeong-et al v. Republic of Korea, 1642-1741/2007, para.7.2

<sup>111</sup> Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (Human Rights Council, 2010) p. 12.

<sup>112</sup> See, *Koretsky v. Ukraine*, Application no. 40269/02, Council of Europe, European Court of Human Rights, (2008), P. 43, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85679>, accessed 14 November 2017.

<sup>113</sup> Zvonimir Mataga, 'The Right to Freedom of Association under the European Convention on the Protection of Human Rights and Fundamental Freedoms ' (2006) 15-18.

<sup>114</sup> Besides, any restriction on the rights to the freedoms of association and expression would have to meet one of the legitimate aims provided for in Articles 10 and 11 of the ECHR. Under Article 11(2), with respect to FOA, these aims are the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. As indicated in *Freedom and Democracy Party (ÖZDEP) v. Turkey*, App. No. 23885/94, European Court of Human Rights. (1999), P. 44, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58372>, accessed 14 November, 2017, The most commonly cited legitimate aims regarding NGOs are national security and the prevention of disorder. Where restrictions on FOA based on national security concerns must refer to the specific risks posed by the association; it is not enough for the state to refer to the security situation in the specific area

The court has also outlined, an NGO having separatist objectives cannot automatically be restricted on national security grounds.<sup>115</sup> The ECtHR requires that any member state measure seeking to restrict the rights afforded under the ECHR including right to freedom of association must be both necessary in a democratic society and proportionate to the legitimate aim pursued.<sup>116</sup> In other words, ‘the state measure must pursue a pressing need, and it must be the least severe (in range, duration, and applicability) option available to the public authority in meeting that need’.<sup>117</sup>

The ECtHR has recognized on numerous occasions the vital role NGOs play in a properly functioning and healthy democracy.<sup>118</sup> The ECtHR has confirmed that a member state measure that restricts an NGO’s access to funding may infringe its right to the freedom of association. For instance, in *Ramazanova v. Azerbaijan*,<sup>119</sup> the ECtHR found that ‘even assuming that theoretically the association had a right to exist pending the state registration, the domestic law effectively restricted the association’s ability to function properly without legal entity status.’<sup>120</sup>

Similar to the jurisprudence adopted by the UNHRC and ECtHR regarding allowable restrictions to FOA, the Inter-American Commission of Human rights and Court [*hereinafter* IACHR and IACtHR respectively which are the authoritative bodies for interpretation and enforcement for the American Convention has similar guidance. The IACHR emphasizes the ‘role of FOA as a fundamental tool that makes it possible to fully carry out the work of human rights defenders, who, acting collectively, can achieve a greater impact’.<sup>121</sup> Furthermore, this right has been interpreted by the IACtHR as including ‘the right to ‘set up

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<sup>115</sup>See, *Parti Nationaliste Basque-Organization Regionale D’Iparralde v. France*, App. No. 71251/01, European Court of Human rights (2007), P.47, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80897>, accessed 14 November 2017.

<sup>116</sup>See, *Ahmet Arslan and Others v. Turkey*, App. No. 23462/94, European Court of Human Rights, (1999), P.46, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271>, accessed 14 November 2017.

<sup>117</sup> Ibid

<sup>118</sup>See, *Gorzelik v. Poland*, above n .91

<sup>119</sup> Ibid

<sup>120</sup>See, *Ramazanova and Others v. Azerbaijan*, App. No. 44363/02, European Court of Human Rights (2007), P.54, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79301> accessed 14 November 2017. The plaintiffs founded an NGO aimed at aiding the homeless in Azerbaijan. They filed a request for its registration, but it was repeatedly returned because the Ministry of Justice claimed that the NGO’s Charter failed to satisfy relevant national legislation. The Court ruled that the delay in the NGO’s registration constituted a violation of Article 11 of the Convention.

<sup>121</sup> Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*; para 152, OEA/Ser.L/V/II Doc. 66 (December 31 2011), [*Hereinafter* IACHR Report]

and participate freely in NGOs, associations or groups involved in human rights monitoring, reporting and promotion.’<sup>122</sup>

The IACHR has determined that “the right to receive international funds in the context of international cooperation for the defence and promotion of human rights is protected by freedom of association, and the State is obligated to respect this right without any restrictions that go beyond those allowed by the right of freedom of association.”<sup>123</sup> Allowable restrictions on the right to freely associate, including restrictions to access to foreign funding require that “such restrictions [be] established by law that have a legitimate purpose and that, ultimately, may be necessary in a democratic society.”<sup>124</sup> The IACHR has also advised that in order to meet this principle of legality the law should not use vague, imprecise, or broad definitions of legitimate motives for restricting the establishment of an NGO<sup>125</sup>. Furthermore, all restrictions on this right must be for a legitimate purpose, namely “in the interest of national security, public safety, or public order or to protect public health or morals or the right and freedoms of others.”<sup>126</sup>

## **2.7. *Siracusa* Principles on Limitations and Derogations of Rights under the ICCPR<sup>127</sup>**

A comprehensive interpretative effort has been made in the *Siracusa* Principles, regarding the limitations and derogation rules provided in the ICCPR.<sup>128</sup> Among other rules of interpretation of the limitation and derogation provided in the Covenant, the *Siracusa* Principles laid down that ‘all limitation clauses shall be interpreted strictly and in favour of the rights at issue.’ While elaborating the issue of limitation and derogation, it further sets out that ‘all limitations shall be interpreted in the light and context of the particular right concerned’ and that ‘all

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<sup>122</sup> See, *Kawas-Fernandez v. Honduras*, Merits, Reparations and Costs; Inter-American Court of Human Rights. No. 196, Para 146 (April 3, 2009)

<sup>123</sup> Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela*, (2009), Para. 585, OEA/Ser.L/V/II. Doc. 54

<sup>124</sup> See, *Escher et al. v. Brazil*, Preliminary Objects, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 200, Para 173 (July 6, 2009).

<sup>125</sup> IACHR report, Recommendation 17

<sup>126</sup> American Human rights Convention, above n.95 article 16

<sup>127</sup> Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, available at: <http://www.refworld.org/docid/4672bc122.html>, [accessed 28 August 2017]The *Siracusa* Principles on the limitation and derogation provisions of ICCPR was an attempt of a group of international experts from various States and international human rights organizations, who met at *Siracusa*, Italy, in 1984. Among the delegates a consensus developed to examine the conditions and justifications for permissible limitations and derogations, allowed by the Covenant.

<sup>128</sup> *Ibid*

limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant'.<sup>129</sup>

Hence, what it means to legitimize limitations under the *Siracusa* principles includes being "...in accordance with the law; based on a legitimate objective; strictly necessary in a democratic society; the least restrictive and intrusive means available; and not arbitrary, unreasonable, or discriminatory. Thus, rights of NGOs shall not be limited unless a state invokes any of the above circumstances within a particular permissible context.

## **2.8 Conclusion**

Despite there are different definitions forwarded to describe what NGOs are, human rights NGOs work towards creating a human rights friendly environment and ensure fidelity of countries to observe their human rights obligations. As the proliferation of NGOs is one of the striking features of the contemporary world, human rights NGOs are accorded fundamental freedoms to their existence and operation under international and regional human rights instruments. These instruments impose obligations on state to respect basic freedoms of NGOs and create a robust legal environment for their proper functioning. This would mean states are bound to abide by these international and regional human rights instruments not to interfere in the functions of human rights NGOs unless for legitimate justifiable grounds.

As is clear from the foregoing chapters, for obvious treaty law reasons, from the time when a state ratified a treaty, it immediately assumes obligation to implement the rights and freedoms enshrined under the treaty nationally and are the primary duty bearers for their national implementation.<sup>130</sup>

This chapter has basically sought to examine the normative framework on basic freedoms of NGOs under international and regional human rights instruments. It has also outlined basic freedoms for the operation of NGOs among others, freedom of association, assembly, expression and the right to access funding. From the discussion in the foregoing, it can be inferred that the legal framework for governing the establishment and operation of NGOs is one of the most crucial factors affecting the conduciveness of the environment for their

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<sup>129</sup> Aman Ullah and Samee Uzair, 'Derogation of Human Rights under the Covenant and their Suspension During Emergency and Civil Law Martial Law, in India and Pakistan' (2011) 26(1) *A Research Journal of South Asian Studies* 183

<sup>130</sup> Vienna Convention on Law of Treaties 1931

efficient and effective operation and to enhance the potential influence and vibrancy of NGOs'.<sup>131</sup> The chapter has also examined what has been highlighted by different treaty bodies with respect to the importance of active and functioning CSOs for the full implementation of the treaties, and that states should create an enabling environment for human rights defenders to operate freely and without hindrance.<sup>132</sup>

In general terms, the legislative framework thinly delineates what is allowed for NGOs from what is not. However, despite the fact that the right is limitable on different legitimate grounds, the chapter has outlined that regulatory frameworks on NGOs shall observe the basic tenets of freedom of association as enshrined in these human rights instruments which put the realization of the rights at stake.

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<sup>131</sup>R. Hayman, Lawo, T., Crack, A., Kontinen, T., Okitoi, J. & Pratt, B., 'Legal Frameworks and Political Space for Non-Governmental Organisations: An Overview of Six Countries' (2014) *Policy Paper*, available at [http://www.eadi.org/fileadmin/research\\_highlights/res/NGO-BMZ\\_Final\\_draft\\_11\\_July.pdf](http://www.eadi.org/fileadmin/research_highlights/res/NGO-BMZ_Final_draft_11_July.pdf), accessed 12 November 2017. Moreover the national political systems in sub-Saharan Africa, which range widely from the relatively stable democracies of South Africa and Ghana to relatively less stable states such as Guinea and Zimbabwe, have a direct impact on the role that law plays in enabling or impeding civil society activity and the freedom of association

<sup>132</sup>International Service for Human Rights (ISHR), *Right to Access Funding: Human Rights Defenders Briefing Series*, 2009,7-8



## **CHAPTER THREE: ROLES OF NGOS IN DIFFERENT HUMAN RIGHTS SYSTEMS IN RELATION TO THE IMPLEMENTATION OF HUMAN RIGHTS STANDARDS NATIONALLY**

### **3.1 Introduction**

The purpose of this chapter is to clearly show how different human rights systems create platforms to involve human rights NGOs and how NGOs facilitate the protection and respect of human rights and the implementation of human rights standards in these human rights systems. It seeks to correlate the functions of NGOs in the wider international and regional levels with the functions of NGOs in national contexts. It also aims at delineating the extent of NGO participation in protecting and promoting human rights in these human rights systems and expounding how they assist treaty monitoring bodies. It seeks to achieve this by giving reference to the roles of NGOs in the UN human rights system including their involvement in the Universal Periodic Review, in regional human rights systems of Europe and America yet giving a specific emphasis to the roles of NGOs in the African human rights system specifically in the African Commission.

### **3.2 Roles of NGOs in UN Human Rights System**

‘In 1945, Article 71 of the UN Charter formalized NGO involvement in UN process and activities and some NGO seven contribute to the drafting of the Charter itself. But NGOs again began to lose influence, hampered by Cold War tensions and by the institutions weakness of the UN Economic and Social Council (*hereinafter* ECOSOC).<sup>1</sup> It was not until the 1970s when NGO roles again intensified and they played key roles within a succession of UN conference from the Stockholm Environment Conference in 1972 to the Rio Environment and Development (UNCED) in 1992, where NGOs were active in both the preparation and the actual conference relating to the roles of NGOs’.<sup>2</sup>

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<sup>1</sup>David Lewis, Non-governmental Organizations, Definition and History, available from: [https://www.researchgate.net/publication/302391474\\_Nongovernmental\\_Organizations\\_Definition\\_and\\_History](https://www.researchgate.net/publication/302391474_Nongovernmental_Organizations_Definition_and_History) [accessed Feb 23 2018].

<sup>2</sup> Ibid

Today, several thousand human rights NGOs are recognized by international and regional organizations.<sup>3</sup>In the last fifteen years the UN has been working to enhance collaboration with NGOs across the entire UN system and in all areas of its activity.<sup>4</sup>The UN and its agencies have grown increasingly dependent on NGOs to carry out field services, as well as implement UN resolutions and goals.<sup>5</sup> This reliance on NGOs has helped them gain influence and importance in the international community and international organizations and such reliance has contributed in shaping the discourse within which international decision making and action occurs.<sup>6</sup>

The recognition given to NGOs in article 71 of the Charter of the UN provides that '[t]he ECOSOC may make suitable arrangements for consultation with NGOs which are concerned with matters within its competence'. These arrangements, which are a major entry for NGO involvement in UN processes, are known as ECOSOC Consultative Status.<sup>7</sup>Within the UN system NGOs perform a wide range of activities; they participate in UN Conferences, present shadow reports to UN treaty bodies and participate in international complaints mechanisms.<sup>8</sup>As of September 2013, 3900 NGOs had consultative status with ECOSOC<sup>9</sup> while as of December 2016, 4507 NGOs enjoy active consultative status with ECOSOC which endow NGOs with access to not only ECOSOC, but also to its many subsidiary bodies, to various human rights mechanisms of the UN as well as special events organized by the General Assembly.<sup>10</sup>

An important purpose of this system is to enable organizations representing important elements of public opinion in a large number of countries to express their views as well as to 'secure expert information or advice from organizations having special competence in the subjects for whom consultative arrangements are made'.<sup>11</sup>In view of that, NGOs may participate as observers or with consultative status at meetings of the UN specialised agencies, UN conferences and special sessions of the General Assembly. In addition, NGOs

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<sup>3</sup>Karla W. Simon, *Civil Society: The Legal Framework from Ancient Times to the 'New Reform Era'* (Oxford University Press, 2013) 262

<sup>4</sup>D. Otto, 'Nongovernmental Organizations in the United Nations System: The emerging role of the international civil society' (1996) 18 *Human Rights Quarterly*

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> See United Nations Department of Economic and Social Affairs, *Basic Facts about ECOSOC Status NGO Branch* <<http://perma.cc/VQ4R-FFRL>>.

<sup>8</sup>Edwards, above n 183-190)

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> ECOSOC Res. 1996/31 of 25 July 1996). As early as 1946 ECOSOC established a Committee on Non-Governmental Organizations (CONGO) entrusted with the examination of NGO applications for consultative status.

with consultative status may be requested to carry out specific studies or papers for commissions.<sup>12</sup>

Except for the Convention on the Rights of Child (CRC), most UN human rights treaties do not give express authorization for NGO cooperation with treaty monitoring bodies.<sup>13</sup> Under article 45(a) of the CRC, the Committee on CRC may invite specialized agencies, UNICEF, and other competent bodies to provide expert advice on the implementation of the Convention. The term “other competent bodies” includes NGOs<sup>14</sup> which expressly gives NGOs a role in monitoring its implementation.<sup>15</sup> The CRC Committee has also systematically encouraged NGOs to submit reports, documentation or other information in order to provide it with a comprehensive picture of how the Convention and its optional protocols are being implemented in a particular country.<sup>16</sup>

Despite the absence of formal mechanisms for NGOs in other UN treaties, ‘most Committees have now recognized the need for the involvement of human rights NGOs and have introduced a variety of methods formal and informal, which allow them to tap into the wealth of talent, information and expertise that only NGOs possess’.<sup>17</sup> NGOs in the UN apply various strategies in the work of these treaty bodies towards achieving compliance with international human rights standards.<sup>18</sup> In nutshell, in the UN human rights system, some NGOs may concentrate on a particular activity, such as standard-setting, promotion or technical assistance, while others may combine several of these activities in their programmes.<sup>19</sup>

### **3.2.1 Standard Setting**

An important aspect of NGO activities in the UN is their involvement in the law-making process. Even though NGOs are not included in the formal process of creating international law, they may influence it by initiating discussion on topics within the scope of their

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<sup>12</sup> It should also be mentioned that several special procedures of the Human Rights Council and the Sub Commission allow for direct access of NGOs without consultative status. ECOSOC Resolution 1996/31 (Part VIII) also indicates the circumstances under which consultative status may be suspended or withdrawn.

<sup>13</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 17 September 2017]

<sup>14</sup> A Guide for Non-Governmental Organizations Reporting to the Committee on the Rights of the Child, (2006), available at [www.ohchr.org/docs/guide-NGO-E](http://www.ohchr.org/docs/guide-NGO-E), accessed 17 September 2017.

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Makau Mutua, ‘Standard Setting and NGOs’ (2007), *Human Rights Quarterly*, 590

<sup>18</sup> Maja Kirilova Eriksson, ‘Non-Governmental Organizations’ in *Manual on Human Rights Monitoring An Introduction for Human Rights Field Officers* (Norwegian Centre for Human Rights, 2008) 3-4

<sup>19</sup> Ibid

interests, proposing and drafting conventions/declarations, lobbying and providing expertise to governments. Several NGOs, such as the International Council of Women, actively influenced the drafting of UDHR and later the corresponding provisions of ICCPR and ICESCR.<sup>20</sup> On several occasions thereafter NGOs have also identified new areas that require norm-setting.<sup>21</sup> As acknowledged by the former UN Special *Rapporteur* Theo van Boven, the contribution of NGOs to the development of human rights norms concerning the prohibition of torture through United Nations Convention against Torture (*hereinafter* UNCAT)<sup>22</sup> is worth mentioning in which<sup>23</sup> Amnesty's campaign for the abolition of torture has had great impact in the drafting of the UNCAT.<sup>24</sup> Another issue where NGOs have initiated the law-making process concerns the rights of indigenous peoples<sup>25</sup> and humanitarian law in which ICRC has played a crucial role in the development of humanitarian law.<sup>26</sup> Similarly, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>27</sup> which entered into force on 22 December 2000 was an NGO initiative<sup>28</sup> and the diligent engagement and active participation of several

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<sup>20</sup>Theo van Boven, 'The Role of Non-governmental Organizations in International Human Rights Standard-Settings :A Pre-requisite of Democracy ' (1990) *Scholarly Commons* 210

<sup>21</sup>Eriksson, above n .18

<sup>22</sup>UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 19 September 2017]

<sup>23</sup> *Ibid*, UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 19 September 2017]

<sup>24</sup> Amnesty International Annual Report, 1974/75, available at <http://www.amnesty.org/ph/wp-content/uploads/2014/11/pol100011975eng.pdf>, accessed 17 September 2017. The Swiss Committee against Torture, now the Association for the Prevention of Torture (APT), and the International Commission of Jurists (ICJ) were also the initiators of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Amnesty International became the first organization to develop the definition of torture.

<sup>25</sup> NGOs have also been catalysts in advancing the rights of indigenous peoples. In 1982, the UN created a Working Group on Indigenous Populations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Working Group immediately started work on a draft declaration on the rights of indigenous peoples. Indigenous peoples had been largely invisible to the UN human rights until the late 1980s when José Martínez Cobo, the Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, produced a report on their predicament.

<sup>26</sup>See, Steve Charnovitz, 'Non-governmental Organizations and International Law' (2006), 100 A, *J.Int'l* 348, 353, Philip Alston, 'Non-State Actors and Human Rights (2005). Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 *Am. J. Int'l L.* 348, 353 (2006); *Non-State Actors and Human Rights* (Philip Alston ed., 2005); Van Boven, *supra* note 138, at 209–10. NGOs have also done much to initiate the drafting of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

<sup>27</sup>UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> [accessed 18 September 2017]

<sup>28</sup>Steve Charnovitz, above n.26

specialized NGOs in the preliminary work on the CRC is also worth to mention.<sup>29</sup> These efforts have given NGOs' role in encouraging new thinking and interpretation of existing standards in modern international law and an apparent recognition of NGOs as partners of international treaty bodies.

Moreover, through 'their participation in the pre-conferences and the parallel activities to the main UN thematic conferences, NGOs have in later years gained a dais from which to influence the discussions and the outcome of the UN conferences by the submission of common recommendations'.<sup>30</sup> Accordingly, the final documents from the Rio, Vienna, Cairo, Copenhagen, Beijing and Istanbul conferences contain many of the NGOs' demands.<sup>31</sup>

### **3.2.2 Implementation and Monitoring**

Human rights NGOs fulfil several important tasks in regard to the observation and implementation of existing international law standards at the domestic level which in fact constitutes the main area of activity for most human rights NGOs in the UN.<sup>32</sup> NGOs in the UN have also a key role in providing information and opinions that has an educative and preventive function. 'They make an invaluable contribution to the raising of public awareness of existing legal norms in particular awareness on existing human rights norms, the possibilities of redress and dissemination of information both to the public in general which is of crucial importance to prevent violations of human rights and promoting their implementation'.<sup>33</sup> There are also NGOs which are specialized in providing other human rights NGOs with updated and relevant information needed to work within the international human rights system.<sup>34</sup> They also engage in education on human rights which is significant in promoting and protecting human rights through incorporating human rights research, teaching and service into their mission statements, and creating programs and centres to further these goals.<sup>35</sup>

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<sup>29</sup>For instance, Defence for Children International (DCI), has successfully influenced the deliberations of the UN Working Group on the Rights of the Child. Their contribution turned out to be instrumental in the inclusion of a number of important articles in the Convention. Moreover, the International Commission of Jurists, working in conjunction with other NGOs, took an active part in drafting these instruments.

<sup>30</sup>Angela Zettler, 'NGO Participation at the United Nations: *Barriers and Solutions*', (2009), available at <http://csonet.org/content/documents/BarriersSolutions.pdf>, accessed 18 September 2017

<sup>31</sup>Ibid

<sup>32</sup>Ibid

<sup>33</sup>Ibid

<sup>34</sup> For example, the International Service for Human Rights (ISHR) situated in Geneva makes *information services* available, including summaries and analyses of all human rights meetings held within the UN system. In 1997 the ISHR and Amnesty International published an excellent sourcebook, *The UN and Refugees' Human Rights: a Manual on How UN Human Rights Mechanisms Can Protect the Rights of Refugees*.

<sup>35</sup>Henry J. Steiner, 'The University's Critical Role in the Human Rights Movement' (2002) *Harvard Human Rights Journal* 317

With regard to monitoring, most NGOs provide independent monitoring, i.e., the search for and gathering of information on the human rights situation and receive complaints from individuals and groups in respective countries.<sup>36</sup> As Eriksson noted, these NGOs further ‘collect information by reviewing relevant domestic laws, court decisions etc., and gather press releases, newspapers and reports by other NGOs’ which let them have a lucid picture of the human rights situation in a given country and/or region.<sup>37</sup>

Most importantly, as an aspect of monitoring, human rights NGOs in the UN may file complaints on behalf of themselves as aggrieved parties or on behalf of individual or group victims and may serve as legal advisors, experts, or *amicus curiae* of these cases.<sup>38</sup>

### **3.2.3 Publicity and Assistance**

Human rights organizations such as AI, HRW and other NGOs produce annual reports on countries or themes, which give invaluable information about human rights violations; HRW, for example, conducts regular, systematic investigations of human rights abuses in some seventy countries around the world and publicize.<sup>39</sup> ‘Rehabilitation of victims of human rights violations is also the other important aspect of NGO assistance which also have a humanitarian aspect’.<sup>40</sup>

### **3.3 Role of NGOs in the Universal Periodic Review (UPR)<sup>41</sup>**

There are opportunities for NGO input into HRC processes that do not require ECOSOC consultative status. This is NGOs involvement in the UPR; the submission of a stake holders

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<sup>36</sup>UN Human Rights, ‘Working with United Nations Human Rights Programme’: *A Handbook for Civil Society* (2008), 153-170 available at [http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook\\_en.pdf](http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf), accessed 18 September 2017.

<sup>37</sup>Eriksson above n. 18

<sup>38</sup> See for instance, international human rights laws that permit individuals or states to file complaints include: the ICCPR, Convention against Torture [hereinafter CAT], the Women’s Convention or CEDAW, the Race Convention or CERD, ECHR, ACHR and the African Charter. In particular, the Committee on CRC, the other monitoring bodies have developed extensive relations with the NGO community on an informal basis.

<sup>39</sup>See for example, Human Rights Watch, World Report 2017 (events of 2016), available at [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2017-web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf), accessed 20 October 2017.

<sup>40</sup>Eriksson, above n. 18 7-9

<sup>41</sup> The Universal Periodic Review (UPR) is a mechanism established under General Assembly Resolution 60/251 of 15 March 2006, which also created the Human Rights Council (HRC). The resolution states that « the review should be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the State concerned and with consideration given its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies

report is available to all NGOs, including those who hold ECOSOC's consultative status.<sup>42</sup> The UPR is a platform to ensure the participation of all stakeholders which include NGOs.<sup>43</sup> Although the UPR is a state-driven process in which NGOs have a limited role and the state's under review have the right to accept or reject the recommendations made by other States during the review<sup>44</sup>, they have an important role to play in relevant stages of the UPR in preparing submissions for the reviews, in attending reviews, and by contributing to follow-up to the implementation of UPR recommendations and conclusions.<sup>45</sup>

The UPR gives NGOs 'the opportunity to demand a structured dialogue with the government and especially to raise awareness on grave human rights violations in the stakeholder report.'<sup>46</sup> Despite they have a limited role during the review; their presence is useful to keep a 'watch' on the state concerned.<sup>47</sup> As a result, lobbying processes of NGOs can have a huge effect and influence on the Outcome Report significantly.<sup>48</sup>

Furthermore, participating in state consultations on the national report is one of the opportunities for stakeholder involvement including NGOs in the UPR process since states are encouraged to prepare the information they submit 'through a broad consultation process at the national level with all relevant stakeholders'. Notwithstanding the fact that limited research has been undertaken on this point in the context of the UPR, it has been revealed that although the UPR is, at its heart, a state-run and state-led process, 'the NGO partaking has the potential to enrich the process and strengthen impacts'.<sup>49</sup> It has also been pointed that even if states showed considerable resistance to accepting NGO recommendations, NGOs had substantial success in infusing their human rights concerns into the UPR process.<sup>50</sup>

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<sup>42</sup>Office of the High Commissioner for Human Rights, 'Information and Guidelines for Relevant Stakeholders on the Universal Periodic Review Mechanism' (2008); this gives NGOs and National Human Rights Institutions ('NHRIs') as illustrations of stakeholders.

<sup>43</sup> Ibid, National Human Rights Institutions (NHRIs), human rights defenders, academic institutions and research institutes, regional organizations and CSO representatives also constitute the relevant stakeholders.

<sup>44</sup> 'The Universal Periodic Review-Handbook', 1-5, available at [https://www.fidh.org/IMG/pdf/UPR\\_HANDBOOK.pdf](https://www.fidh.org/IMG/pdf/UPR_HANDBOOK.pdf), accessed 15 October 2017.

<sup>45</sup>Handbook on Civil Society, above n.36

<sup>46</sup>The Universal Periodic Review-Handbook, above n .42

<sup>47</sup>Ibid

<sup>48</sup>Ibid

<sup>49</sup>McMahon Edward, 'The Universal Periodic Review :Do Civil Society Organization-Suggested Recommendations Matter?' (2013), 12-13

<sup>50</sup>Lawrence C Moss, 'Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council' (2010) 2 *Journal of Human Rights Practice*,122, 123

In general, as Baird observed, with all the roles discussed above it can certainly be said that the international human rights system would not be where it is today without the input of NGOs.<sup>51</sup>

### **3.4 NGOs in the European and Inter-American Human rights Systems**

Human rights NGOs are also actively involved at regional levels in the Europe while there are well-established participatory mechanisms within the Council of Europe (CoE) and the European Union (EU). As of 2013, 198 NGOs with human rights competences are registered with the CoE. NGOs holding participatory status constitute the ‘Conference of NGOs’ of the CoE which was acknowledged as one of the four political pillars of the CoE in 2005’.<sup>52</sup> ‘The poor compliance rate of some of the member states to the ECHR has increased the participation of NGOs through the lobbying’.<sup>53</sup> NGOs have been active in many CoE member states to pressure for reforms in areas that align with their interest, most actively in states with bad human rights records.<sup>54</sup> For instance, in Russia, human rights NGOs have been of great importance to the domestic education on ECtHR case law and the giving reference to the ECtHR case law in their rulings. By and large, NGOs in the European human rights system among others participate in observing states’ compliance to the ECHR and the ECtHR case laws and in calling reform of the system.

On the other hand, the Inter-American Commission relied to a great extent on the assistance of national and local NGOs to arrange interviews with victims, witnesses of human rights abuses, representative labour leaders, political dissidents and so forth. For example, its on-site investigations in Chile and Argentina signify the Commission’s reliance on efforts of NGOs.<sup>55</sup> ‘This role of monitoring essentially involves observing the level of compliance with human rights especially by government and non-governmental agencies’ which is one of the significant aspects of monitoring.<sup>56</sup>

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<sup>51</sup>Natalie Baird, ‘The Role of International Non-Governmental Organizations In the Universal Periodic Review of Pacific Island States: Can ‘Doing good ‘be done better?’ 16 *Melbourne Journal of International Law* 27

<sup>52</sup>In 1952, the CoE granted consultative status to NGOs. The status was changed to participatory status by the Committee of Ministers’ Resolution Res(2003)8, which allows for addressing memoranda to the Commissioner for Human Rights, providing expert advice on CoE policies, programmes and actions or being invited to activities such as seminars, conferences.

<sup>53</sup>M.F. Rietveld, ‘NGO Participation in Regional Human Rights Systems: A Comparison of Europe and the Americas’ 9(2015), Universiteit Leiden, available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/33629/Rietveld-Myrinne-s1580868-MA%20Thesis-2015.pdf?sequence=1>, accessed 10 November 2017

<sup>54</sup>Ibid

<sup>55</sup>See, ‘Strengthening of the United Nations: An Agenda for Further Change’, UN Doc. A/57/387; See also NGOs and the ‘Human Rights Movement, The Advocate for Human Rights,’ available at: [www.stopvaw.org/ngos-and-the-human-rights-movement](http://www.stopvaw.org/ngos-and-the-human-rights-movement).

<sup>56</sup>Ibid

In order to enforce the protection of individuals, the OAS frequently cooperates with human rights defenders and NGOs to develop a regional effort to face human rights violations.<sup>57</sup> NGOs were also invited to contribute to the reform of the IACHR's Rules of Procedure.<sup>58</sup> As of 2013, 418 NGOs are registered with the OAS and more often than not, victims of human rights violations who present cases to the Inter-American Commission are represented by NGOs.<sup>59</sup> In their role as litigants, some NGOs have also come to request precautionary measures from the IACHR, according to article 25 of the IACHR Rules of Procedure while other NGOs have also asked for provisional measures from the IACHR in order to protect human rights defenders.<sup>60</sup>

### **3.5 NGOs and the African Commission on Human and Peoples' Rights**

#### **3.5.1 The African Charter and the Commission**

In 1981, the OAU adopted the African Charter also known as the 'Banjul Charter', to stand as the primary human rights instrument for the African continent.<sup>61</sup> Upon receiving the required number of ratifications by OAU member States, the Charter came into force on 21 October 1986. The Charter is an international treaty that is legally binding on those states that have ratified it and is intended to set international standards that African states are required to observe.<sup>62</sup> It is the principal instrument for the promotion and protection of human rights in Africa and marks the beginning of an organized commitment to protecting human rights in Africa.

As a human rights instrument specifically designed to respond to African concerns, traditions, and African conditions, the Charter is an all-encompassing international human

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<sup>57</sup>As indicated in its *Guidelines for Participation by Civil Society Organisations in OAS Activities*, the OAS has taken a special interest in potential contributions by CSOs to the activities of its organs, agencies, and entities (OAS, 1999: 5).

<sup>58</sup> See [http://www.oas.org/en/ser/dia/civil\\_society/registry.shtml](http://www.oas.org/en/ser/dia/civil_society/registry.shtml), [7 Nov 2013], accessed 17 November 2017

<sup>60</sup>The IAHRS has recognised the significant role of civil society organisations on several occasions. For example, it emphasised the importance of people and organisations "dedicated to promoting, monitoring, and providing counsel in the area of human rights" (IACHR, 1999) and called upon Member States to take all necessary measures to protect human rights defenders and to make sure that they can work in appropriate conditions (*ibid.*, see also IACHR, 2006).

<sup>61</sup>African Charter on Human and Peoples' Rights, article 30, June 27, 1981, 21 I.L.M. 58 (1982) [hereinafter African Charter, available at: <http://www.achpr.org/english/info/historyen.html>], accessed on May 2017, See also the Protocol to the African Charter which entered into force in 2004 created the African Court of Human and Peoples' Rights.

<sup>62</sup>The Charter contains two primary categories of rights and freedoms in Part I, Chapter I, as well as some general provisions applicable to both categories. The first category is individual rights, which apply to each human being as an individual. The individual rights guaranteed by the Charter are found in Articles 3-18. The second category is peoples' rights or collective rights, which apply to peoples as a collectively. These rights are found in Articles 19-24. The general provisions of Chapter I which apply to all rights are found in Articles 1, 2 and 26.

rights instrument with a special significance to the African continent owing to the provision of three generations of rights, namely civil and political rights<sup>63</sup>, economic, social and cultural rights<sup>64</sup> and peoples' rights.<sup>65</sup>

Basically, the current African human rights system operates under a dual commission/court structure in which the African Commission is the focus of this study. The African Commission is the main body responsible for the protection of human rights in Africa mandated by the African Charter to conduct fact-finding missions, issue resolutions and declarations; consider state reports and provide recommendations on what measures state parties need to take to live up to the commitments they have made through ratification of the Charter and other regional human rights instruments.<sup>66</sup>

The Commission began operations in 1987 under the auspices of Article 30 of the African Charter to promote human and people's rights and ensure their protection throughout Africa. It is a quasi-judicial body composed of 11 Commissioners elected by the assembly of Heads of State and Government of the AU as a treaty supervisory body of the Charter. The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia while its secretariat has subsequently been located in Banjul, The Gambia.<sup>67</sup>

The Commission holds two ordinary sessions a year, usually for 10 to 15 days each in March/April and October/November and extraordinary sessions may also be held and the working sessions may be open or closed to the public.

### **3.5.2 Mandates, functions and Procedures of the African Commission**

The mandate of the Commission is spelled out in Articles 45 and 46 of the Charter itself which charges the commission with three major functions, the promotion of human and peoples' rights (article 45(1); the protection of human and peoples' rights (article 45(2); the interpretation of the African Charter (article 45(2) of the Charter.<sup>68</sup>

#### *3.5.2.1 Promotional Mandates*

Within the framework of its promotional mandate, the functions of the Commission are <sup>69</sup>

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<sup>63</sup> Articles 2-13 of the Charter

<sup>64</sup> Ibid, Articles 14-18

<sup>65</sup> Ibid, Articles 19-24

<sup>66</sup> Ibid, Article 45

<sup>67</sup> See, The African Union Hand Book, 'A Guide for Those Working With and Within the African Union, Judicial, Human Rights, and Legal Organs', (2017) 104-106. See also [www.africancommission.org](http://www.africancommission.org), accessed 13 November 2017.

<sup>68</sup> The function may also include any other tasks which may be entrusted to it by the Assembly of HOSG

<sup>69</sup> See African Charter, articles 45-49

- to collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organize seminars, and disseminate information, encourage national and local institutions concerned with human and people's rights and give its views or make recommendations to governments;
- to collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences,
- To formulate and lay down principles and rules at solving legal problems relating to human rights and fundamental freedoms upon which African governments may base their legislations; and
- Cooperate with other African and international institutions concerned with the promotion

In addition, article 62 of the Charter, read together with rule 73 of the Commission's ROP, state parties are required to submit reports to the Commission every two years on the legislative or other measures they have taken to with a view to giving effect to the rights and freedoms guaranteed by the Charter. NGOs that have the observer status can thus prepare 'shadow' reports on the human rights situations in their countries which enable the Commission to have a constructive dialogue with a state representative when that country's periodic report is being considered.<sup>70</sup> The Commission then issues concluding observations, which are recommendatory in nature. Once the Commission forwards its recommendations NGOs have a particular role to play in ensuring that the recommendations are implemented and followed up at the national level by monitoring governments' compliance with the Commission's recommendations and provisions of this information to the Commission.

To enhance its promotional mandate, the Commission has established many special *rapporteurs* and working groups (composed of Commissioners) on different thematic issues.<sup>71</sup> Although they are not integral members of the working groups, experts from CSOs particularly from NGOs assist the working group and the Commission on these thematic areas. This strategy has proved to be an excellent promotional tool, which also enables the Commission to have a better understanding of the extent to which human rights are respected

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<sup>70</sup>Centre for Human Rights, *Obtaining and the Benefits of Observer Status with the African Commission on Human and Peoples Rights*, University of Pretoria, South Africa, (2008), 2-4

<sup>71</sup>See, Mangus Killander, 'African Human Rights Law in Theory and Practice' in Sarah Joseph & Adam McBeth (ed), *Research Handbook on International Human Rights Law* (2010) 388, See also Article 45 of the African Charter on Human Rights and Peoples Rights

in the continent.<sup>72</sup> Freedom of Expression and Access to Information; Human Rights Defenders are amongst the main thematic issues in which the Commission appointed Special *rapporteurs*. These *rapporteurs* also undertake missions focusing on human rights violations within their mandates.

Article 46 of the Charter on the other hand, requires the Commission to use 'any appropriate method of investigation'. Based on this, The Commission also undertakes fact-finding missions (promotional missions) to state parties on its own initiative or at the request of AU Policy Organs. Promotional visits or missions are undertaken by the Commission or its special mechanisms to sensitize states about the role of the Charter, encourage states which have not ratified the Charter or any other human rights instruments to ratify them or to persuade non-reporting states to comply with their reporting obligations. For the purpose of these promotional visits, the 53 states parties of the Charter are distributed among the Commissioners.<sup>73</sup>

#### 3.5.2.2 *The Protective Mandates*

The Charter also provides for a 'communication procedure', under which states (under articles 48–49), organisations and individuals (under article 55) may take a complaint to the Commission alleging that a state party to the Charter has violated one or more of the rights contained in the Charter. Following consideration of complaints, the Commission can make recommendations to the state party concerned and to the AU Assembly.

The Commission offers important avenue for victims of human rights violations committed in Africa to bring cases against the state(s) responsible. Hence, it can indeed be said that the Commission is at the front of advancing human rights and that the protection mandate of the Commission is largely composed of complaints of violations of human and peoples' rights contained in the Charter. It considers petitions (communications) on human rights violations, which do not need to be submitted by a victim of a violation (thus allowing *actiopopularis*).<sup>74</sup> The Commission has considered three inter-state complaints and around 400 communications that are submitted predominantly by NGOs since it was established in 1987.

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<sup>72</sup> It currently has six Special *Rapporteur* dealing with main thematic issues illustratively, Prisons and Place of Detention in Africa; Rights of Women in Africa; Refugees, Asylum Seekers and Internally Displaced Persons; Summary, Arbitrary and extrajudicial killings.

<sup>73</sup> See , African Commission on Human and People's Rights, Missions undertaken by the Commission, available at [www.achpr.org/mission-reports](http://www.achpr.org/mission-reports), accessed 15 April, 2018

<sup>74</sup> See, 'Guidelines on the Submission of Communications', Information Sheet No 2 of the African Commission on Human and Peoples' Rights. These guidelines may be used by NGOs to assist victims of human rights violations.

The Commission has a very broad approach to standing-in other words, to ‘who can bring a complaint’. It has emphasized that persons wishing to file a communications need not be victims or members of the victim’s family, or that violations of human rights need not amount to serious or massive violations. Persons other than victims can hence file communications and NGOs helping victims do not need to be located in the state in question. Following from the above, it can be seen that, through this open-door approach to standing, NGOs play very important role in the Commission’s fulfilment of its protective mandate.<sup>75</sup> In addition, the Commission undertakes protective missions (on-site and fact finding missions).<sup>76</sup> It takes on-site mission to a state against which a number of communications have been submitted while it may undertake fact-finding missions whenever there is an allegation of a general nature or widespread reports of human rights violations against a state party.<sup>77</sup>

### **3.6 NGOs in the African Commission**

The African Commission relies on state parties to the Charter and other stakeholders in the effective execution of its mandate, because it values human rights as a collective responsibility. As a key stakeholder, NGOs have a variety of ways in which they could participate in the African Human Rights System (*hereinafter* AHRS). NGOs dealing with human rights in Africa can be divided into different categories.

First, there are national general human rights NGOs focusing on the human rights situation in a specific country. Second, many national human rights NGOs focus on a particular issue, e.g. women’s rights or children’s rights or the particular problems faced by a particular community. Third, a smaller group of African human rights NGOs have a regional or sub-regional focus depending on whether they deal with human rights in general or with a specific group or theme. Finally, many international NGOs with their headquarters outside Africa are also active on the African continent’.<sup>78</sup>

The Commission may invite different human rights stakeholders; state delegates, representatives of international organizations, NHRIs, NGOs, national liberation movements, specialised institutions, or individuals to take part in its sessions. As of April 2016, the

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<sup>75</sup> A Complaint’s manual, ‘Filing a Communication before the African Commission on Human and Peoples’ Rights (2013).

<sup>76</sup> See, Missions undertaken by the African Commission, above n.70

<sup>77</sup> The purpose of such mission is usually to explore avenue for amicable settlement or to investigate specific facts relating to the communications. Fact-finding missions do not require any prior communication to have been submitted to the Commission before the mission is undertaken.

<sup>78</sup> The African Union Hand Book, above n.67

Commission had granted affiliate status to 27 NHRIs and observer status to 498 NGOs.<sup>79</sup> In terms of the resolution adopted by the Commission during its 25<sup>th</sup> ordinary session, held in Bujumbura, Burundi, the Commission subjects the granting of observer status to set criteria. The criteria for a grant of such status are

- Submission of a documented application to the secretariat of the Commission, with a view to showing their willingness and capability to work for the realization of the objectives of the Charter<sup>80</sup>
- Have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter (now the Constitutive of the African Union) and in the Charter;
- Be NGOs working in the field of human rights
- Declare the financial resources

Amongst others, Observer Status entails the invitation of all observers to be present at the opening and closing sessions of all sessions of the Commission.<sup>81</sup> They can prepare ‘shadow report’ on the human rights situation in their countries. These ‘shadow reports’ enable the Commission to have a constructive dialogue with a state representative when that country’s periodic report is being considered. They can have access to the documents of the Commission subject to the condition that such documents shall not be of a confidential nature and deal with issues that are of relevance to their interests.<sup>82</sup> An Observer may be invited specially to be present at closed sessions dealing with issues of particular interest to them. Organizations enjoying observer status shall also undertake to establish close relations of co-operation with the Commission and to engage in regular consultations with it on all matters of common interest and present their activity reports to the Commission every two years.

The session of the Commission and the NGO Forum that precedes each ordinary session provides NGOs with the opportunity to engage the main regional human rights body. The origin of many of the resolutions adopted by the Commission can be traced to resolutions

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<sup>79</sup> Ibid

<sup>80</sup>To this effect, such an NGO is requested to provide, a written application addressed to the secretariat stating its intentions, at least three months prior to the Ordinary Session of the Commission which shall decide on the application, in order to give the Secretariat sufficient time to process the said application, its statutes, proof of its legal existence, a list of members, its constituents organs, its sources of funding its last financial statement as well as a statement on its activities, , the statement of activities shall cover the past and present activities of the NGO, its plan of action and any other information that may help to determine the identity of the organization, its purpose and objectives, as well as its field of activities

<sup>81</sup>First, an Observer accredited by the Commission shall not participate in its proceedings in any manner other than as provided for in the Rules of the Procedure governing the conduct of sessions of the African Commission.

<sup>82</sup>The distribution of general information documents of the Commission shall be free of charge; the distribution of specialised documents shall be on a paid-for basis, except where reciprocal arrangements are in place.

adopted by the NGO Forum.<sup>83</sup> NGOs also regularly submit cases to the African Commission, the African Court, the African Children's Committee and sub-regional courts.<sup>84</sup> Yet, as there is no clear indication on each of the NGO activities in the Commission, examining important decisions issued by the Commission are of paramount importance.<sup>85</sup>

### **3.6.1 Promotional Activities of NGOs in the Commission**

NGOs play an important role by getting involved in the preparation of a periodic report of a State party to the Charter; they urge the responsible ministry to submit the report on time and ensure that the report is disseminated in the country concerned as well as the minutes of the Committee's debates on the report and the concluding observations; submit a parallel ("shadow") report to the report of a state party; submit information to the pre-session working groups which meet at the end of each session to prepare the following session; attend the meetings where the reports of states parties are examined (although no statements can be made, it is possible to consult committee members outside the meeting and to propose questions for them to pursue with the reporting State party)<sup>86</sup>. For instance, the report of the Zimbabwe Human Rights Forum is very relevant in terms of highlighting the real human rights situation of the country and urging the Commission to call upon the government of Zimbabwe to expeditiously are draconian and repressive laws that curtail the enjoyment of the freedoms of expression and association enshrined in the Constitution of Zimbabwe and the African Charter.<sup>87</sup>

Their engagement in the state reporting process can play a vital role in improving the State reporting process, 'both by providing information to governments and the Commission, and by following up on the implementation of recommendations'.<sup>88</sup> When a report is received, the

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<sup>83</sup> See for example Resolutions of the NGO forum on Strengthening International Justice in Africa, resolution as forced eviction, Resolution on the Effect of Climate Change on the Full Enjoyment of Human and Peoples' Rights in Africa and call the Commission for action.

<sup>84</sup> As of November 2013, 456 NGOs had observer status with the African Commission on Human and Peoples' Rights. Forty two of these made statements on the human rights situation in Africa at the 54th ordinary session of the Commission in October 2013 (Final Communiqué of the 54th ordinary session of the African Commission on Human and Peoples' Rights).

<sup>85</sup> Carole J. Petersen, 'Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific' (2011) 13(1) *Asian-Pacific Law & Policy Journal* See also for, e.g., the African Commission's decision in Communication number 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (2001), published by the University of Minnesota's Human Rights Library.

<sup>86</sup> The African Union Hand Book, above n.67

<sup>87</sup> Zimbabwe Human Rights Forum, Report to the African Commission on Human and Peoples' Rights on the Situation on Human Rights Defenders in Zimbabwe – 51<sup>st</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, 18 April – 2 May 2011

<sup>88</sup> Rules of Procedure of the African Commission on Human and Peoples' Rights, 'The State Reporting Procedure under article 62 of the Charter' See also Association Justice, Peace and Democracy (Angola) *Conectas* Human Rights (Brazil) and International Service for Human Rights (Switzerland), 'Road Map for

Commission may take a number of steps at the initiation of the examination process.<sup>89</sup> According to the Commission's rules of procedure<sup>90</sup>, once the Secretary has received a report from a particular State, he or she may, in consultation with the Commission, transmit it to relevant specialized mechanisms and solicit comments.<sup>91</sup> The rules of procedure are not completely clear on which institutions are to be approached, but the Commission has, in practice, shared reports with credible NGOs working on respective countries.

Once the Commission has gathered all available information (including the state's national report, reports provided by NGOs and responses to questions posed by commissioners), it conducts a final consideration of the report. If the Commission decides that the State in question has not discharged its obligations under the Charter, it makes concluding observations and recommendations to the State concerned.<sup>92</sup> For example, in response to the Ethiopian initial and periodic reports (1<sup>st</sup> to 4<sup>th</sup> periodic reports), the African Commission made a concluding observation that asserted the potential of the Ethiopian CSO law to violate the rights of freedom of expression as specified by the African Charter, especially the provision that requires NGOs not to raise more than ten percent of their funding outside of Ethiopia.<sup>93</sup> Moreover, it recommended the Ethiopia on wide ranging points that are very relevant to the rights and freedoms enshrined in the Charter and on the publication of the Charter as well as the work of the Commission in the whole country, encouraging the state to take steps translate and make the Charter available in many local languages.<sup>94</sup> In spite of the fact that the African system has failures such as lack of availability of the reports for NGOs to make meaningful input into the process and the lack of dissemination of the concluding observations adopted to NGOs which still calls for states to ever more involve their NGOs in state reporting system, it can be asserted that the contribution of NGOs in the Commission's promotional functions is of substantial importance.<sup>95</sup> Most importantly, NGOs contribute to

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Civil Society Engagement: *State reporting procedure of the African Commission on Human and Peoples' Rights* (2011). 15

<sup>89</sup> Rules of Procedure of the African Commission above n. 88, Rules 73-75

<sup>90</sup> The Rules of Procedure were adopted by the African Commission on Human and Peoples' Rights during its 2<sup>nd</sup> ordinary session held in Dakar (Senegal) from February 2 to 13, 1988 and it was revised during its 18<sup>th</sup> ordinary Session held in Praia (Cape-Verde) from October 2 to 11, 1995 but Approved by the African Commission on Human and Peoples' Rights during its 47<sup>th</sup> ordinary session held in Banjul (The Gambia) from May 12 to 26, 2010

<sup>91</sup> Ibid, Rule 74

<sup>92</sup> Ibid, Rule 77

<sup>93</sup> African Commission, Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th (1998-2007) Periodic Report of the Federal Democratic Republic of Ethiopia Para. 45, 46<sup>th</sup> Ordinary Session, available at <http://www.achpr.org/states/ethiopia/reports/1st-to-4th-1998-2007/>, accessed 1 March 2011, Para. 45

<sup>94</sup> Ibid

<sup>95</sup> Killander, above n .71

the introduction of domestic laws that are in line with Charter that are relevant for the creation of legal systems for the protection of human rights enshrined thereof.<sup>96</sup>

### 3.6.2 Protective Activities of NGOs in the Commission

One of the overarching achievements of the Commission is the creation of a constructive and strategic partnership with human rights stakeholders including human rights NGOs.

The Commission considers individual communications alleging violations of human and peoples' rights protected under the Charter. Article 55 of the Charter refers these communications to 'other communications'. These communications are brought by individuals, group of individuals and NGOs which can be recognized as '**NGO Standing and Influence in African Commission**'. 'Bringing communications falls under the protective mandate of the Commission as provided for under article 45(2) of the Charter and the communication procedure before the Commission potentially offers a concrete, result-oriented approach to human rights practice'.<sup>97</sup>

NGOs submit communications on behalf of natural persons; they also bring communications on their own behalf for violations of human and peoples' rights in Africa.<sup>98</sup> As a matter of practice, they may also bring a communication on behalf of other NGOs as well.<sup>99</sup> 'The importance of making use of NGOs, especially those who have the observer status, in bringing communications on human rights violations before the Commission is premised on the right of NGOs to participate in the public sessions of the Commission'<sup>100</sup> where they may be able to lobby the Communications for the speedy considerations of the complainants of human rights violations before the Commission'.<sup>101</sup>

Out of the complaints, brought to the Commission cases that have been brought by NGOs through the individual communications procedures outweigh complaints brought under inter-

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<sup>96</sup>As a result of the efforts of several NGOs, including the Association of African Women in Research and Development, female genital mutilation (FGM) was outlawed in Togo, Côte d'Ivoire and Senegal which is an important aspect of human rights promotion.

<sup>97</sup> See, SabeloGumedze, 'Bringing Communications before the African Commission on Human and Peoples' Rights, *African Human Rights Law Journal*, 3, 118-123.

<sup>98</sup> See, Communication no 159/96, *Union inter Africaine des droits de l'hommeand others v Angola*, Eleventh Annual Activity Report; Communication no 218/98, *Civil Liberties Organization and Others v Nigeria*, Fourteenth Annual Activity Report.

<sup>99</sup>See, Communication 225/98, *Huri-Laws v Nigeria*, Fourteenth Annual Activity Report, where Communication was submitted by Huri-Laws, an NGO registered in Nigeria on behalf of the Civil Liberties Organization, an NGO also based in Nigeria.

<sup>100</sup>Zimbabwe Human Rights NGO Forum, 'Report on the Zimbabwe Human Rights NGO Forum's Participation in the 44th Session of the African Commission on Human and People's Rights' (Zimbabwe Human Rights NGO Forum 2008).

<sup>101</sup> Rule 75 of the Rules of Procedure of the Commission provides that NGOs, granted observer status by the Commission, may appoint authorised observers to participate in the public sessions of the Commission and of its subsidiary bodies.

state complaint procedure<sup>102</sup> and there have been only three (3) Inter-State Communications since its inception.

The *Serac* Case has remarkably come up with allegations on the violation of Socio-economic rights under articles 2, 4, 14, 16, 18(1), 21 and 24 of the Charter. The Social and Economic Rights Centre (*SERAC*) and Centre for Economic and Social Rights (*CESR*) brought a communication on behalf of the Ogoni people of Nigeria<sup>103</sup>. The complainants alleged that Nigeria failed to protect right to clean and health environment of the Ogoni communities which had caused respiratory health problems. The government has withheld from the Ogoni communities information on the dangers created by oil activities and the communities have not been involved in the decisions affecting the development of their land.<sup>104</sup> While the Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of *Endorois* Welfare Council instituted one of the benchmark on violation of rights of indigenous people to the Commission on behalf of the *Endorois* communities in Kenya.<sup>105</sup>

### **3.6.3 Investigative and Monitoring Roles**

Despite such involvement of NGOs in the Commission is not as such robust, both international and national NGOs somehow involved themselves in fact finding missions in areas where human rights violation are taking place in a State Party to the Charter. In Communication 60/91, *Constitutional Rights Project v Nigeria in Akamu and Others*), the Commission applied old Rule 109 of the Rules of Procedure, where the Constitutional Rights Project of Nigeria, which is an NGO, submitted a communication on behalf of individuals who were sentenced to death in Nigeria and were awaiting execution. This Communication revealed this emergency situation which informed the Commission to intervene and request Nigeria not to carry out the execution pending the full consideration of the Communication.<sup>106</sup>

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<sup>102</sup>To date, the African Commission has received five hundred and eighty-one (581) Communications, out of which it has finalized three hundred and ninety-two (392), and transferred three (3) to the African Court on Human and Peoples' Rights (the Court). There are currently one hundred and seventy-six (176) Communications pending before the Commission, available at [www.achpr.org](http://www.achpr.org), accessed 18 September 2017.

<sup>103</sup> The communication alleged that the military government of Nigeria failed to protect right to clean and healthy environment of the Ogoni communities which had caused health and respiratory problems for the people of Ogoni. The government of Nigeria has neither monitored operations of the oil companies in the Ogoni communities nor required safety measures that are standard procedure within the industry

<sup>104</sup> 155/96 Social and Economic Rights Action Centre (*SERAC*) and Centre for Economic and Social Rights (*CESR*)/ Nigeria, 30 Ordinary Session, 13-27 October, Banjul, the Gambia

<sup>105</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at : <http://www.refworld.org/cases>, ACHPR,4b8275a12.html, accessed 19 September 2017

<sup>106</sup>The Commission finally declared that there had been a violation of articles 7(1) (a), (c) and (d) of the Charter.

### **3.7 Conclusion**

This chapter has sought to signify the roles of NGOs in different human rights systems across the globe. It has outlined that the involvement of NGOs in maximizing implementation of human rights standards takes different shape in different human rights systems. Most commonly, human rights NGOs participate in standard setting (norm making) in providing policy statements to governments, in implementation and monitoring. They conduct human rights research and publicize human rights violations and maintain the *Statusquo*. They also set in humanitarian intervention to assist victims of human rights violations to rehabilitate and so forth

The chapter has shown that NGOs especially those working on protection and promotion of human rights, have a multi-faceted task in the UN including the UPR and other regional human rights systems. Most notably, it has made a specific reference to the role of NGOs in the African human rights system above all in the African Commission. It examined the key roles of NGOs in the promotional and protective mandates of the Commission and the paramouncy of their contribution to in states' observance of the rights and freedoms enshrined in the Charter.

On one hand, the chapter has depicted that, the involvement of NGOs that have the observer status in the Commission's state reporting procedure provide an independent complementary report (shadow report) to the report of a state party to the Charter and endow the Commission with information on the Country under examination. On the other, the individual Communication procedure was discussed as an arrangement whereby NGOs involve in the protective activities of the Commission and contribute to the human rights jurisprudence of the Commission. The chapter has signified that the while the communication procedure is primarily designed for individuals that allege violation of human rights protected under the Charter, NGOs who have the observer status bring communications as a representative of alleged victims of human rights violations human rights violations before the Commission which is premised on the right of NGOs to participate in the public sessions of the Commission and taking into consideration their ability to push the Commission to be speedily considered.

Finally, the chapter has pointed out that although not resilient and vigorous as it should be, NGOs in Africa take part in fact finding missions in areas where human rights violations are taking place and informs the intervention of the Commission in a State Party concerned.



## **CHAPTER FOUR: THE IMPLICATION OF THE ETHIOPIAN CSO LAW ON NGOS EFFORTS TO ENHANCE THE IMPLEMENTATION OF THE AFRICAN CHARTER IN ETHIOPIA**

### **4.1 Introduction**

This chapter seeks to draw an understanding on Ethiopia's implementation of the African Charter through the involvement of NGOs in measures that are expected to be taken so as to give effect to the rights and freedoms enshrined under the Charter. It will scrutinize the features, scope of application of the CSO law and permitted activities and requirements for NGOs working on human rights in Ethiopia. It will then examine the processes leading to the enactment of the Ethiopian CSO law, the drafting history and policy reasons for limitations and restrictions on NGOs functions under the law. It will also highlight basic freedoms of NGOs, areas of operation and restrictions under the CSO law in light of the African Charter and the Commission's developed case law on permissible limitations on freedom of association. The chapter will specifically focus on how the CSO law impacts the roles of NGOs working in Ethiopia and their involvement in the broad spectrum of human rights with a particular focus on their efforts to enhance the implementation of the Charter nationally. In doing so, it analyzes the CSO law provisions relevant to NGOs work on human rights and the domestic implementation of the Charter in line with the state obligation under the Charter.

While doing so, it will also examine the CSO law vis-à-vis the Commissions' Rules of Procedure, trends and efforts of NGOs that could facilitate the national implementation of the Charter. It will further explore best practices from three (3) member states to the Charter and their current initiatives to enhance the participation of NGOs in implementing State obligations under the Charter nationally. Although, the Ethiopian CSO law does not refer to the term 'NGO' the study for this chapter, has preferred to use the term NGO interchangeably with charities and societies since it has drawn an insight from the Commission's usage of the term and the relevant Charter provisions on NGOs.

### **4.2 Freedom of Association in Ethiopia**

The Ethiopian political background remained unpleasant to the NGO sector and 'has been known to be rough with completely new ideologies surfacing following violent change of regimes: imperial monarchy, military Marxist-socialism and Revolutionary Democracy'<sup>1</sup>As

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<sup>1</sup>Debebe Hailegebriel, 'Restrictions on Foreign Funding of Civil Society' (2010) 12(3) *Ethiopia, International Journal of Not-for-Profit Law* 9

Hailegebriel wrote, ‘the voluntary sector has been trying to sail through these violent terrains’ and has faced several obstructions such as a total ban during the socialist regime. Following the transition to democracy in 1991, NGOs were able to operate in the country with relatively favourable policies and operating environment.<sup>2</sup>

The 1960 Civil Code introduced a comprehensive legal framework to regulate voluntary organizations and ‘its regulation of these organizations were forward looking’<sup>3</sup>. The innovative features of the Code were discernible in the technical rules governing the three forms of voluntary organizations it set up’.<sup>4</sup> The Civil Code governed organizations that did not generate profit to their members designating them as ‘associations’. Six years after the adoption of the Civil Code, the Ministry of Interior issued the Associations Registration Regulations of 1966<sup>5</sup> with the aim of subsidizing the implementation of the Civil Code.<sup>6</sup>

After 1995, Ethiopia as a part of its treaty obligations has domesticated most of the international and regional human rights instruments and the rights and freedoms guaranteed thereof. The 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE) guarantees among others the right to association of everyone for any cause or purpose.<sup>7</sup> In view of that, every person is entitled to form or join associations for any reason or purpose including the advancement of the rights and interests of members, rights and interests of other people, or any other personal conviction. So far as it is lawful there is no restriction as to the purpose for which an association may be established and activity it carries out. Besides, under its article 9(4), the Constitution makes treaties ratified by the country part of the law of the land further entrenching the legal space for the proper functioning of NGOs in the country to international and regional human rights instruments including the African Charter.

Conversely, the Constitution provides three permissible grounds for interference in the right. The first is the constitutional classification freedom of association as a democratic right under the section of fundamental rights and freedoms which limits such a freedom to Ethiopian nationals only. The second interference is formation of an association in ‘infringement of

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<sup>2</sup>Ibid

<sup>3</sup> The 1960 Civil Code of the Empire of Ethiopia, Section 5 Rights and Obligations of an Association

<sup>4</sup> See, Yitayew Alemayehu Taye, *The State, Non-governmental Organizations and the Making of the Charities and Societies Proclamation No. 621 of 2009 in Ethiopia: Historical and Institutional Perspectives* (P.h.D Thesis, NorthEastern University 2010)

<sup>5</sup> Associations Registration Regulation Legal Notice no. 321/1966 *Negarit Gazetta* year 26, No. 1, 1966

<sup>6</sup>Taye, above n .4

<sup>7</sup> Proclamation No 1/1995, FDRE Constitution, article 31: Every person has the right to freedom of association for any cause or purpose. Organizations formed in violation of appropriate Laws or to illegally subvert the constitutional order or which promote such activities are prohibited.

appropriate laws’, or involvement ‘to illegally threaten the constitutional order’ which justify prohibition of an association whereas, the third ground of interference can fall under the legitimate purposes specified in the ICCPR. Yet, the first ground of the formation of association in ‘violation of appropriate laws’ will inevitably raise a question of conformity with article 10 of the African Charter as ‘the term is yet vague and broad thereby allowing subjective and intrusive interference’ which will be discussed in the following sections of the chapter.<sup>8</sup>

### **4.3 The Charities and Societies Proclamation**

The need for an updated law outlining NGOs’ rights and responsibilities and an efficient regulatory framework in which they can operate has long been one of the critical issues for the development of NGOs in Ethiopia. In 1995 ‘the Ministry of Justice issued a Guideline for NGO Operations, which outlines the major classifications for the sector as development, advocacy, professional associations, and religious organizations’.<sup>9</sup> Since 2000, the government has made periodic attempts, such as the organizing public discussions with NGOs and relevant stakeholders, the establishment of an enabling task force on the draft CSO law sometimes together and in consultation with NGOs, to enact a special NGO law.<sup>10</sup>

The government of Ethiopia with the interest of enacting a law that ensures ‘ the realization of citizen’s right to association as enshrined in the FDRE Constitution’, and that ‘aids and facilitates the role of charities and societies in the overall development of Ethiopian peoples’,<sup>11</sup> promulgated a far-reaching proclamation which is the Charities and Societies Proclamation No.621/2009 (*hereinafter* the CSO law or the law) in February 2009 governing the registration and regulation of charities (organizations with charitable purposes) and societies (associations mainly promoting the interests of their members). The law was aimed at facilitating and strengthening the role of CSOs including NGOs in the socio-economic development of the country.<sup>12</sup> It is deemed to have incorporated new development realities in

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<sup>8</sup>Hailegebriel, above n .1

<sup>9</sup>Sisay Alemayehu Yeshanew, 'CSO Law in Ethiopia: Considering its Constraints and Consequences' (2012) 8(4) *Journal of Civil Society* 369

<sup>10</sup>Ibid

<sup>11</sup>Preamble of the Proclamation no 621/2009 Federal *NegaritGazeta* 15<sup>th</sup> Year, No.25, Addis Ababa,13 February 2009, Council of Ministers Regulation for the Administration and Registration of Charities and Societies, Regulation

No. 168/2009, Federal *NegaritGazeta*, 15th Year, No. 66, Addis Ababa, 9 November 2009.

<sup>12</sup>The Fifth and Sixth Periodic Country Report (2009-2013) to the African Commission on the Implementation of the African Charter On Human And Peoples’ Rights in Ethiopia, 56<sup>th</sup>ordinary session, 21 April to 7 May 2015, Banjul, the Gambia

the country and adopted best practices from other nations.<sup>13</sup>The idea of enacting separate law also gained ‘an impetus within government out of the desire not to merely to provide for a comprehensive legislation but to codify a growing discontent and distrust towards increasingly critical CSOs primarily NGOs’.<sup>14</sup> The CSO law was deemed to have two main objectives: first, to ensure ‘the realization of citizen’s right to association as enshrined in the FDRE Constitution’ and to support and facilitate the role of charities and societies, and that of NGOs [.Emphasis added], in the overall development of Ethiopian peoples.<sup>15</sup>

Despite the fact that the draft of the CSO law had caused dissatisfaction among NGOs working in the country and frustration of some international partners, it was passed into law after limited consultation with stakeholders and with many of its criticised provisions.<sup>16</sup>While the government claimed that the law facilitates the realization of the freedom of association of citizens and the role of NGOs in development processes, critics observe that it has adversely affected the operation, and even the existence, of NGOs and the broader human rights work and democratic space’.<sup>17</sup>

#### **4.3.1 Features and Scope of Application**

The CSO law is considered by the government of Ethiopia as one of the prominent legislative measures Ethiopia had taken to protect citizens’ freedom to associate and assemble as envisaged under the Charter. Apparently though, the CSO law has introduced many new developments to the NGO sector. The classification of NGOs, area of operation, financial matters, supervisory activities and so forth were introduced to the sector.<sup>18</sup> The law introduced a multifaceted system of classification of CSOs as Charities and Societies in which NGOs take one or the other form as charity or charitable society [Emphasis added]. A Charity is ‘an institution which is established exclusively for charitable purposes and gives benefit to the public’<sup>19</sup>while public benefit is deemed to exist where the ‘‘purposes of the charity can generate an identifiable benefit to the public’, and does not create a situation where in its benefits exclude those in need’’ and generates private benefits only

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<sup>13</sup> Ibid

<sup>14</sup>Hailegebriel, above n .1

<sup>15</sup>The Fifth and Sixth Periodic Country Report , above n. 12

<sup>16</sup>Yeshanew, above n .9 The Proclamation is considered to be among the wave of recent legislations in Africa that introduced organizational and operational constraints to CSO work.

<sup>17</sup>Ibid

<sup>18</sup>Proclamation no 621/2009, above n.11 Article 2

<sup>19</sup>Ibid , Article 14

incidentally.<sup>20</sup> The law further gives illustrative list of charitable purposes under its article 14(2) and puts that charities can be incorporated in one of the four forms: charitable endowments, charitable institutions, charitable trusts and charitable societies.<sup>21</sup>

On the other hand, the law defines what it calls '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 as well as to coordinate with institutions of similar objectives.'<sup>22</sup>

The law provides that it does not apply to religious organizations (excluding charities established by them), international and foreign organizations operating in Ethiopia by virtue of an agreement with the government, and to *Edir, Equb*, and other similar cultural or religious associations under its articles 3(2) and 2(16). This shows that some CSOs other than NGOs fall out of the scope of application of the law. The CSO law treats Ethiopian Societies such as professionals', women's, and youth associations as a special type of charities and societies called 'Mass-Based Societies' that 'may actively participate in the process of strengthening democratization and election' articles 2(5) and 57(7)).

Hence, under the CSO law NGOs can be classified into:

- 1) "Ethiopian Charities or Societies"<sup>23</sup>: those that are 'formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia [or 'use not more than ten percent of their funds which is received from foreign sources'] and wholly controlled by Ethiopians';
- 2) "Ethiopian Residents Charities or Societies"<sup>24</sup>, those "formed under the laws of Ethiopia and which consist of members who reside in Ethiopia and who receive more than 10% of their funds from foreign sources"
- 3) "Foreign Charities"<sup>25</sup>, those "Charities 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."

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<sup>20</sup> Ibid, article 14(3)

<sup>21</sup> Ibid, Article 15(1)

<sup>22</sup> Ibid, Article 55(1) Societies are also membership-based organizations established to promote rights and interests of its members and undertake similar purposes. Charitable Societies have a mixed feature: they are membership based like societies and carry out charitable purposes like charities

<sup>23</sup> Ibid, Article 2(2)

<sup>24</sup> Ibid, Article 2(3)

<sup>25</sup> Ibid, Article 2(4)

The law makes the above classification based on source of income, residence and nationality of members, law of incorporation and control. Although the criteria may have a varying weight, NGOs may take one of these forms.

To illustrate, if a Charity or Society uses more than ten percent of its funds from abroad, it becomes Ethiopian Residents Charity or Society even if all of its members are Ethiopian, incorporated in Ethiopia and is controlled by Ethiopians. Likewise, if a Charity has a foreign national member, it becomes Foreign Charity irrespective law of incorporation, source of income and control. Thus, ‘the law heavily relies on source (percentage) of income and residence and nationality of members in classifying NGOs. However, practically, there is no difference between Foreign and Ethiopian Residents NGOs and both can expediently be called ‘foreign’ NGOs.<sup>26</sup>

The other feature of the law is that it has established a special agency (administrative organ) for the administration of NGOs and the Agency has a General Director as a chief executive and a Charities and Societies Board (Board) as its higher body.<sup>27</sup> The law also provides for a Sector Administrator, a specialized executive organ assigned by the Minister of Justice (*hereinafter* the Ministry) to supervise and control operational activities of NGOs in its specialty area, and support the Agency.<sup>28</sup>

NGOs and their advocates however view the law as not enabling invoking that it cuts huge resource NGOs used to mobilize for marginalized and disadvantage millions, curbs positive development efforts, and violates citizens’ freedom of association.<sup>29</sup> ‘They underscore that NGOs are institutions engaged in areas that are not covered by the government either for lack of interest or capacity and by the private sector for lack of profit’<sup>30</sup>

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<sup>26</sup>Cherice Hopkins Yalemzewed Bekele, Liane Ngin, 'Sounding the Horn: Ethiopia's Civil Society Law Threatens Human Rights Defenders' (Northwestern University, 2009), 5-6. See also Human Rights Watch, “*Ethiopia: New Law Ratchets up Repression*,” news release, January 8, 2009. 5-6. See also Human Rights Watch, “*Ethiopia: New Law Ratchets up Repression*,” news release, January 8, 2009.

<sup>27</sup> Proclamation no 621/2009, above n .11 arts 4-11

<sup>28</sup>*Ibid*, art. 2(12), 66-67. See also *Mabrarya*(Explanation) by the Ministry of Justice to the Draft Charities and Societies Proclamation (2008) 25. NGOs are not required to pay tax on grants they receive, but just like business organizations they are liable to pay tax on revenue from economic activities.

<sup>29</sup> Comments of Ethiopian Civil Society Organizations on the Draft Charities and Societies Proclamation (16 November 2008). Ethiopian CSOs Ad-hoc Taskforce Commentaries and Recommendations on the Latest Draft Charities and Societies Proclamation (Addis Ababa October 2008).

<sup>30</sup> Solomon Goshu, ‘Resurrecting the Hapless CSO in Ethiopia’ *The Reporter Newspaper*, available at, <file:///F:/new%20dcouments%20for%20research/Resurrecting%20the%20hapless%20CSOs%20in%20Ethiopia%20-%20The%20Reporter%20Ethiopia%20English.html>, accessed December, 2017.

Nevertheless, the government has been defending its virtue<sup>31</sup> by saying ‘NGOs are rent-seekers and only promote the donors’ agenda and it defined them as institutions established by the free consent of citizens to promote the rights and benefits of its members’.<sup>32</sup> It believes that the law is imperative to ensure the realization of citizens' right to association, the transparency and accountability of NGOs, the legality of NGOs operation and provide measures to be taken against them in case of fault; to smooth the progress of the role of NGOs in the overall development of Ethiopian peoples, to improve NGOs understanding of their rights and obligations and promote indigenous organizations.<sup>33</sup>

### **4.3.2 NGOs under the CSO Law**

#### *4.3.2.1 Operational Autonomy (Activity Restrictions)*

Before the adoption of the CSO law, ‘the non-profit sector in Ethiopia was broadly divided into four categories: development organizations, advocacy organizations, professional associations and religious organizations’<sup>34</sup> while the classification in the current CSO law has a distinct outcome on the areas in which NGOs can intervene.<sup>35</sup> In other words, foreign and Ethiopian Residents NGOs cannot take part in the advancement of human rights, efficiency of the justice and law enforcement services and conflict resolution as these areas are only reserved or locally funded Ethiopian NGOs.<sup>36</sup> In effect, only Ethiopian Charities and Societies may work on the broad spectrum of human rights work in Ethiopia specified as: 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; the promotion of the efficiency of the justice and law enforcement services.<sup>37</sup> This limitation

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<sup>31</sup> See Government’s response to HRW 2010 report entitled ‘‘No amount of external pressure can force Ethiopia to abandon its independent path of Democracy and Development’’. <http://www.eprdf.org.et/EPRDFE/document/Response%20to%20HRW%20English.pdf>, accessed 16 November 2017

<sup>32</sup> Solomon Goshu, above n .30

<sup>33</sup> Ibid, See also the Preamble of Proclamation no 621/2009 above n .10 and *Mabrarya/* Explanation, above n.27 and Report by Council of EPRDF to the 6th Organizational Congress (2006) 37, the Government believes that ‘‘the principal source of their [CSOs] finance should be membership contribution or other domestic sources’’.

<sup>34</sup> USAID, ‘2009 NGO Suitability Index for Sub-Saharan Africa’ (2010) 1(1), United States Agency for International Development, Bureau for Africa ,38-113

<sup>35</sup> Ibid

<sup>36</sup> See, proclamation no 621/2009 above n.11 , article 14 (2(j-n)), Charities and societies Proclamation, No 621/2009

<sup>37</sup> Human rights work restricted in the law comprises ‘‘the advancement of human and democratic rights; the promotion of equality of nations, nationalities ... peoples ... gender and religion; the promotion of the rights of the disabled and children’s rights; the promotion of conflict resolution or reconciliation; the promotion of the efficiency of the justice and law enforcement services.’’

inevitably necessitates a brief mention of the rationale behind the limitation and how it had superseded the opinion from NGO counter parts

In early May 2008, ‘the Ministry invited a few NGOs for a discussion on a draft legislation that was essentially similar to the one that had been making the rounds among NGOs earlier.’<sup>38</sup> Although, meetings were arranged with the Minister Assefa Kesito at the time, ‘they failed to live up to expectations due to absence of common position among the NGO groups attending the meeting.’<sup>39</sup>

It however became clear to the members of the taskforce that the Minister did not have much say in the preparation of the draft ‘as he was unable to answer the questions they raised.’<sup>40</sup> The NGOs therefore requested to meet with the late Prime Minister MelesZenawi and the Taskforce decided to prepare a memorandum summarizing what they viewed as the concerns of NGOs in relation to the draft legislation’.<sup>41</sup>

The Taskforce, ‘now with increased participation from other NGOs, coordinated the preparation of the memorandum and submitted it summarizing the objections of NGOs to the draft to the Office of the Prime Minister and the objections were framed on the basis of what the memorandum referred to as ‘internationally accepted benchmarks’ for a ‘progressive’ legislation regulating NGOs’.<sup>42</sup> In June 2008, two meetings were held with the Prime Minister, the oppositions raised in these meetings were in fact regarded as those that have a broad legal and Constitutional implications of which is contention on the classification of NGOs as Ethiopian or foreign based on their source of funding is the major one.<sup>43</sup> In the summer and fall of 2008, ‘many NGOs were going through a process of restating their mission statements, reorienting their programs and in general distancing themselves from activities that could be viewed as “advocacy” or fall under any one of the activities proscribed for foreign funded NGOs’. In several cases, the ‘rights based approach’ that was adopted by many NGOs over the past few years before the proposed draft was set aside quickly.<sup>44</sup>

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<sup>38</sup>Taye, above n .4, 213

<sup>39</sup> Ibid, Some NGOs focused on the implications of the draft legislation on their particular organizations or projects, while others wanted the discussion to be about the broader implications of the draft to the NGO sector as a whole.

<sup>40</sup> Taye, above n.4

<sup>41</sup>Ibid

<sup>42</sup> Ibid

<sup>43</sup> Ibid

<sup>44</sup> Among those NGOs that were engaged in “advocacy” activities and especially the prohibited activities in the draft legislation, the period following the discussion with the Prime Minister was one of both and frenzied activity.

It had been pointed that the rationale behind this proscription of foreign and foreign funded NGOs from participating in human rights work is a reflection of the ‘stipulation of the FDRE Constitution’ that limit the right to freedom of association as a democratic rights only to Ethiopian citizens.<sup>45</sup> The perceived unfavourable attitudes of government emanated from factors that are also internal to the NGO sector such as weak accountability with regard to mismanagement of funds and collections and transparency of NGOs to their constituencies and the public.<sup>46</sup>

The late Prime Minister of Ethiopia Meles Zenawi in response to the memorandum of objection of NGOs during the drafting process, underscored ‘the rationale behind such restriction is the constitutional reservation of the right to participate in the political process to Ethiopians only and that organizations that are funded by foreigners cannot be considered as truly Ethiopian’.<sup>47</sup> He argued that the right to participate in the political process was ‘constitutionally guaranteed to Ethiopians only and that organizations that are funded by foreigners cannot be considered as truly Ethiopian’<sup>48</sup>. It means the government considers engagement in the broad human rights work as a purely political activity and creates foreign intrusion.

It thus follows that, as per article 14 of the law, those who generate more than 10% of their income from a foreign source, are legally restricted from being involved in the human rights issues of Ethiopia. In the stricter sense, infringements of the law in such funding issues can also lead to heavy fines or terms of imprisonment for NGO staff.<sup>49</sup> Though improbable, foreign organizations that operate in the country by virtue of an agreement with the government may still operate in those areas as the law is not applicable to them.<sup>50</sup>

#### 4.3.2.2 *Funding Restrictions*

The CSO law explicitly prohibits ‘Ethiopian Charities or Societies’ who may work on human rights from receiving more than ten percent of their funding from foreign sources.<sup>51</sup> ‘The 10% limitation is in fact lower than the limitation that has been indicated in the government policy on charities and societies that preceded and guided the adoption of the law’.<sup>52</sup> During the

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<sup>45</sup> Taskforce on Enabling Environment for Civil Society in Ethiopia, User’s Manual for the Charities and Societies Law, (2011) 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) ), accessed 12 February 2018.

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Taye, above n .4

<sup>49</sup> Proclamation no 621/2009 above n.11 article 102

<sup>50</sup> Ibid, article 3(2) (b)

<sup>51</sup> Article 2 cumulatively read with Article 14 of the CSO law

<sup>52</sup> HialeGebriel, above n .1

drafting process, there were two aspects of the law that were singled out for criticism in which the prohibition of receiving funds from foreign source is major one.<sup>53</sup> The case in which organisations are not permitted to spend more than 30 per cent of their budget on administrative costs, has also been a major concern in the process<sup>54</sup> Since in some human rights organisations all budgeted expenses could be interpreted as ‘administrative costs’ while the law requires at least 70 percent of the budget to be spent on ‘the implementation of its organization’s purposes.’ The lack of definition of ‘administrative costs’<sup>55</sup> would mean that the provision could be interpreted to include, *inter alia*, the associated costs of investigating and documenting human rights abuses, the provision of free legal aid, advocacy activities, and other essential activities conducted by NGOs in the promotion and protection of human rights.<sup>56</sup>

The Agency has issued eight implementing directives on the law<sup>57</sup>, which make the operating environment for NGOs even more difficult. For example, ‘Directive 7-2003 (2011), places a confusing number of complex and time and resource-consuming requirements on the income generating activities of NGOs. ‘These include the need for a separate license for a profit making entity, start-up capital funded by the non-profit NGO, and a full-time accountant and manager separate from those of the non-profit NGO and puts non-compliance or engaging in unethical income generating activities’ can result in the revocation of the license and criminal charges’.<sup>58</sup>

The law further requires that all charities and societies re-register under the Agency. While doing so, human rights NGOs have to make the decision whether to register as an ‘Ethiopian Charity’ and attempt to survive with 90 percent of their budget coming from local sources, or whether to register as an ‘Ethiopian Residents Charity’, receive funding from abroad, but shift from working on human rights aspects. According to studies conducted by the taskforce, NGOs cannot rely on local charity and rather they are heavily dependent on foreign donors for financial and other assistance and for this reason, most NGOs in Ethiopia work on a short-term project basis rather than according to long-term strategies.<sup>59</sup>

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<sup>53</sup>Ibid

<sup>54</sup> Proclamation no 621/2009 above n 205, Article 88(1)

<sup>55</sup>Ibid, Article 2 (14), “‘Administrative costs’ shall mean those costs incurred for emoluments, allowances, benefits, purchasing goods and services, travelling and entertainments necessary for the administrative activities of a Charity or Society.”

<sup>56</sup>Ibid, Article 88(1)

<sup>57</sup>Charities and Societies Agency, available in Amharic at <http://www.chsa.gov.et/resources.html>, accessed 10 November 2017

<sup>58</sup>Hailegebriel, above n. 1

<sup>59</sup>According to a study by the Civil Society Organization Taskforce established to work on the new

One of the proposed changes in the memorandum submitted by the task force during the drafting period was a narrower definition of ‘foreign funds’ that would at least excludes funds provided by international development agencies for the promotion of NGOs under international agreements between the Ethiopian government and international donors. However, this was cast off and the government praised the proposed law as one that would help strengthen NGOs and facilitate their operations.<sup>60</sup> It claimed that comparing the draft to the existing law mainly the Civil Code, the draft law ‘will avoid the shortcomings’ of the latter that denied NGOs “the opportunity to contribute to peace, democracy and development”.<sup>61</sup> During the consultations on the draft, it was further pointed out that, the reason behind such restriction on foreign funding of local NGOs and the embargo on foreign human rights NGOs from engaging in human rights are instrumental to control foreign political influence in the domestic affairs of the country.<sup>62</sup>

Realistically, African human rights NGOs collaborate with the European Union (*hereinafter* EU), notably by taking part in the human rights dialogues. The EU is also an important funder who provides significant financial support to African human rights NGOs through the European Instrument for Democracy and Human Rights (EIDHR).<sup>63</sup> Challenges in accessing such funding as a result undoubtedly exist in some African countries where human rights NGOs may not raise funds from foreign donors which include Ethiopia. This is particularly problematic, as human rights NGOs in Africa tend to source their funding externally rather than through membership fees.<sup>64</sup>

What is worse, in addition to limiting foreign funding, the law puts several arduous restrictions on domestic fundraising activities. It for instance provides that all income generating activities must be sanctioned by the Agency since it is an organ tasked with overseeing implementation and adherence to the CSO law.<sup>65</sup> Without a determined period by which the agency must make a decision or a provision defining acceptable modes of domestic resource mobilization, article 103 of the law gives the agency unfettered power to deny or

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NGO legislation, between 2004 and the first half of 2008, the total amount of money transferred to NGOs from foreign sources amounted to \$1.78 billion, and in 2008 alone, NGOs implemented 2,020 development projects throughout the country during this time

<sup>60</sup>Mizane Abate Tadesse, 'The Implications of 2009 Ethiopian CSOs Law on the Right to Freedom of Association' (2015) 27(1) *Journal of Ethiopian Law*

<sup>61</sup>Taye, above n .4

<sup>62</sup>Tadesse, above n .60

<sup>63</sup>See European Commission, [http://ec.europa.eu/europeaid/how/finance/eidhr\\_en.htm](http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm) [17 November 2017],

<sup>64</sup> Ibid

<sup>65</sup>See, Proclamation no 621/2009, above n.11 Article 103 (1)

delay a NGOs proposal to fund raise. This arbitrary provision amounts to little more than a tacit attempt to undermine NGO's capacity to raise funds domestically.

#### 4.3.2.3 Broad Discretionary Powers and Severe Penalties

The Ethiopian government in its recent periodic report to the African Commission had mentioned that, it had taken institutional measures such as the establishment of the Agency for the task of ensuring citizen's right to freedom for association.<sup>66</sup> The Agency is accountable to the Ministry of Justice (*the current Attorney General*), that gives directives and policy guidelines for the Administration of NGOs.<sup>67</sup> The law basically does not discriminate amongst the categories of NGOs when it comes to the power given to the Agency. It has however accorded the agency with broad discretionary powers over NGOs, including government surveillance and direct involvement in the running of organisations, and the power to suspend licences and confiscate and transfer the assets of any organisation in many of its provisions. For instance, the Agency has extensive power to register, license, supervise and take any decision regarding NGOs including refusing registration, suspending and removing of NGOs officers, calling of general assembly and attending every general assembly meeting of NGOs , instituting inquiries, suspension and dissolution of NGOs and giving order it deems necessary.<sup>68</sup>

The power of the Agency to demand any document in an organization's possession is principally detrimental to the functioning of human rights NGO as this could include the 'testimonies of victims of human rights violations, contravening the essential principle of confidentiality and potentially further endangering victims of human rights violations'.<sup>69</sup> What is worse, even in relation to domestic funds, the law stipulates that NGOs may organize public fund raising activities (public collections) only with prior permission of the Agency by specifying the public collection purpose.<sup>70</sup> Technically speaking, provided that a certain right based NGO seeks to conduct a public collection on behalf people to reinstate individuals whose human rights are violated, it should first specify why it has required the public collections and the Agency being a government organ has a potential to deny the permit. The law also imposes severe penalties on NGOs found violating its provisions For instance,

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<sup>66</sup>See, Ethiopian Fifth and Six periodic report to the African Commission , above n.12

<sup>67</sup> Proclamation No. 621/2009 cumulative of art 11(1) cumulative read with Article 2(6)

<sup>68</sup>Ibid, see articles. 4-6, 69, 76, 84, 86, 91, 92-93.

<sup>69</sup>Hailegebriel, above n .1

<sup>70</sup>Ibid article 98(1)

NGOs that are in violation of the 30/70 allocation for administration and operational costs are required to pay a fine up to 10,000 Birr.<sup>71</sup>

Hence, from the foregoing, it can be understood that the law establishes a complex system of administration and accords unjustified and subjective powers to the administrative bodies which can affect the independence and operation of NGOs.<sup>72</sup>

#### **4.4 Legal Restrictions on Human Rights work: Violations of the African Charter?**

The right to work for a human rights organization and the right to form or join human rights organizations are essential aspects of freedom of association, which is guaranteed under article 31 of the Ethiopian Constitution and under article 10 of the Charter. The Ethiopian government is obliged under article 11 and 26 of the Charter to create an enabling environment for NGOs. However, the regulatory framework applicable to NGOs in working in Ethiopia places a direct legislative impediment on the realisation of this right.

The restrictions under the CSO law on the collection, collation and distribution of human rights information<sup>73</sup> considerably invades on the right of staff members of human rights NGOs and of the Ethiopian people to ‘seek, receive and impart information and ideas of all kinds’ in violation of the right to freedom of expression enshrined in article 9 of the Charter and in article 29 of the Ethiopian Constitution’.<sup>74</sup>

With regard to acquisition of funding, the guidelines for freedom of association and assembly in Africa<sup>75</sup> (*hereinafter* the ‘guidelines’), with few permissible exceptions<sup>76</sup> provide national laws on associations shall clearly state that associations including NGOs have the right to seek, receive and use funds freely in compliance with not-for-profit aims. It recognizes that they be free to conduct fundraising through various means and acquire resources in various

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<sup>71</sup> Ibid, article 103(3)

<sup>72</sup> Ibid, article 56 (1), section 6 provides the government with the means to monitor and control the operations of CSOs. It designates the General Assembly of CSOs as the “supreme and final decision making organ” and empowers it to “enact and amend the rules of the Society” and decide on the “dissolution of the Society. Yet, these provisions may likely hinder the active involvement of NGOs in human rights

<sup>73</sup> The law both restricts who (which organizations) can do this work, and as this work could be interpreted as ‘administrative costs’ it is further restricted as explained above.

<sup>74</sup> Amnesty International, 'STIFLING HUMAN RIGHTS WORK :The Impact of Civil Society Legislation in Ethiopia ' (Amnesty International 2012)59

<sup>75</sup> African Commission on Human and Peoples Rights, Guidelines on Freedom of Association and Assembly in Africa, the guidelines were developed in accordance with the relevant provisions of the African Charter on Human and Peoples’ Rights (African Charter), which stipulates under Article 45 (1) (b) that the African Commission is mandated “to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms....” an Commission on Human and Peoples’ Rights, Guidelines on Freedom of Association and Assembly in Africa ,

<sup>76</sup> Associations shall be subject to the same general laws governing money laundering, fraud, corruption, trafficking and similar offenses as individuals and for-profit enterprises and income generated shall not be distributed as profits to the members of not-for-profit associations

forms such as cash, property, goods, services, investments and other assets.<sup>77</sup> The CSO law's discrimination of NGOs based on source of funding and further prohibiting them from working in the broader spectrum of human rights is therefore against such privilege of NGOs in the case at hand.

Moreover, the guidelines require states to ensure the existence of a multi-faceted access to financing as below

*'Associations shall be able to seek and receive funds from local private sources, the national state, foreign states, international organizations, transnational donors and other external entities and state shall not require associations to obtain authorization prior to receipt of foreign funding'.<sup>78</sup>*

While in Ethiopian scenario, 'foreign funds' is intended to include a donation or delivery or transfer made from foreign source of any article, currency or security<sup>79</sup> whilst under the guidelines foreign sources is intended to include donations from foreign governments, agencies or companies of any foreign country, international agency or any person in foreign country<sup>80</sup> which is against the various forms and means of acquiring resources under the guidelines.

The guidelines without a doubt recognize that associations including NGOs shall be overseen where necessary, by a single body that conducts its functions impartially and fairly and such a body shall have oversight only in relation to essential minimum internal governance. In other words, associations including NGOs are also considered as self-governing and free to determine their internal management structures, their internal rules and regulations and shall not be governed by law or regulation concerning their internal organization.<sup>81</sup> Nonetheless, establishing an Agency with broad discretionary powers over NGOs, including surveillance and direct involvement in the management and operations of organizations, amount to undue interference. To illustrate, article 85 of the law enables the agency to demand the disclosure, at any time, of any information or documents in a charity or society's possession. This article violates the right to privacy as protected in the Charter and organizational integrity and the

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<sup>77</sup> Guidelines on Freedom of Association and Assembly in Africa, above n.75 Para 38, Para 37, Associations shall be free to conduct fundraising through various means, including engaging in economic activities designed to support the aims of the organization.

<sup>78</sup> Ibid, Para.38

<sup>79</sup> Proclamation No. 621/2009, above n.11 article 2(15)

<sup>80</sup> Ibid

<sup>81</sup> a. Law or regulation shall not dictate the internal organization of associations, beyond basic provisions providing that non-discriminatory and rights-respecting principles be followed.

b. Associations shall not be required to obtain permission from the authorities to change their internal management structure or other elements of their internal rules

right to be free from undue surveillance.<sup>82</sup> Furthermore, it contravenes the ‘principle of confidentiality’ which is essential to the conduct of most human rights work, and could seriously jeopardise the security of victims and witnesses of human rights violations’.<sup>83</sup> For example, ‘the provision giving the agency with the power to order human rights NGO to disclose the testimony of a victim of a human rights violation, which could include incidents where the violation reported, involves a member of the authorities would not only breach confidentiality, but would also potentially put the victim at risk of repercussions at the hands of the authorities’.<sup>84</sup>

The inability of human rights monitoring and documenting organizations to guarantee the confidentiality of testimonies they receive therefore certainly restrains victims of violations seeking to report a violation to a human rights NGO which in effect undermines the promotion and protection of all rights enshrined within the Charter.<sup>85</sup>

In addition, the interventions from the agency discussed in the foregoing at times contradict the resolution on the right to freedom of association in Africa, The resolution reads

*‘Competent authorities should not override the Constitutional provisions or undermine fundamental freedoms guaranteed by the Constitution and international standards. It further adds, that, in regulating the use of this right through laws such as the CSO law; the competent authorities should not enact provisions which would limit the exercise of this freedom and the regulation shall be consistent with state’s obligations under the African Charter.’<sup>86</sup>*

In some of the communications where the Commission ruled based on article 10 of the Charter<sup>87</sup> such as *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* the Commission has outlined that, although the right to freely associate with others is not absolutely guaranteed, measures to limit the right shall not be disproportional to the legitimate aim which caused the limitation and shall not deprive the very essence of the right

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<sup>82</sup>See the African Charter Article 15, Guidelines on Freedom of Association and Assembly, above n.75

<sup>83</sup>International, above n .74

<sup>84</sup>Ibid

<sup>85</sup>The restrictions on essential human rights work including monitoring and documenting violations by state and non-state actors, and holding the government to account for their performance and adherence to national and international human rights commitments would leave human rights violations unreported, undocumented and unmonitored.

<sup>86</sup>Resolution on the Right to Freedom of Association, adopted by the African Commission on Human and Peoples' Rights, at its 11th Ordinary Session.,(1992), ACHPR/Res 5 (xI)

<sup>87</sup> African Commission Decision on Communication 101/93: Civil Liberties Organisation (in respect of the Nigerian Bar Association) / Nigeria, See also, Communication no 251/02 Lawyers of Human Rights v Swaziland, *Huri-Laws v Nigeria, Jawara v The Gambia*. The communication is brought by the Civil Liberties Organisation, a Nigerian non-governmental organisation, in protest against the Legal Practitioners’ Decree. This decree establishes a new governing body of the Nigerian Bar Association; the communication argues that the new governing body for the Nigerian Bar Association, established by governmental decree, violates Nigerian lawyers’ freedom of association guaranteed by Article 10 of the African Charter.

itself.<sup>88</sup> It has also a general principle with respect to freedom of association that “competent authorities should not enact provisions which limit the exercise of this freedom and should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution or international human rights standards”.

With all this, the Ethiopian government in its fifth and six periodic report to the African Commission<sup>89</sup> asserted that, the proclamation, in addition to its impact in speeding up the processes of registration and encouraging new NGOs to register is also providing for a legal and conducive working environment for NGOs under which they can discharge their duties in an efficient and transparent manner. It had also asserted that the legislation, for the stated reasons above does not in fact contravene its international commitments. Before proceeding to the position of the Commission in this regard, it is important to draw the concern of many of the UN human rights Committees, which oversee the implementation of international human rights law at country level with respect to the CSO law. For instance, in July 2011 the UN Committee on Human Rights concluded that the law ‘impedes the realisation of the freedom of association and assembly’ as protected in the ICCPR.<sup>90</sup> It further expressed concern about the provisions that prohibit NGOs from obtaining more than 10 percent of their funding from foreign donors and prohibit NGOs considered by the government to be ‘foreign’ from engaging in human rights and democracy related activities. The Committee concluded that the government of Ethiopia must amend the legislation:

*“The state party should revise its legislation to ensure that any limitations on the right to freedom of association and assembly are in strict compliance with articles 21 and 22 of the [ICCPR], and in particular it should reconsider the funding restrictions on local NGOs in the light of the [ICCPR] and it should authorize all NGOs to work in the field of human rights. The State party should not discriminate against NGOs that have some members who reside outside of its borders.”<sup>91</sup>*

In particular the HRC on several occasions has expressed concern at limitations placed by domestic legislation on the ability of NGOs to seek foreign funding, stating its inconsistency with Article 22 of the ICCPR. In the case of Egypt, for example, the HRC expressed its concern on the restrictions placed by Egyptian legislation and practice on the foundation of

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<sup>88</sup> See, Civil Liberties Organization in Respect of the Nigerian Bar Association v Nigeria (Communication No. 101/93, African Commission on Human and Peoples’ Rights, 1995). See also, 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).

<sup>89</sup> See the Fifth and Sixth Periodic Country Report (2009-2013) to the African Commission on the Implementation of the African Charter on Human and Peoples’ Rights in Ethiopia, Submitted in 2014.

<sup>90</sup> International Covenant on Civil and Political Rights, available at, <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 15 November 2017, articles 21 and 22

<sup>91</sup> Concluding Observations of the Human Rights Committee, Ethiopia, and 25 July 2011: available at, <http://daccessods.un.org/TMP/4400946.7959404.html>, accessed 15 November 2017

NGOs and the activities of such organizations such as efforts to secure foreign funding, which require prior approval from the authorities on pain of criminal penalties article 22 of the Covenant.<sup>92</sup> It recommended the State party to review its legislation and practice in order to enable NGOs to discharge their functions without impediments which are

Giving reference to the Declaration on human rights defenders, that codifies access to funding as a self-standing right,<sup>93</sup> states are under an obligation to permit individuals and their organisations ‘to solicit, receive and utilise resources’ from all appropriate sources, both nationally and internationally, receiving funds, and using them for legitimate purposes.<sup>94</sup>

Despite the fact that, states may attempt to justify legislation or practices restricting access to funding on the basis of the reference to domestic law referred to in Article 3, the Special *Rapporteur* on human rights defenders, mandated to monitor the implementation of the Declaration on human rights defenders, has clarified that domestic legislation is the framework within which human rights defenders carry out their activities and enjoy their rights *as long as* domestic law is consistent with international human rights law. As a result, attempts by states to justify restrictions on access to funding on this basis must be rejected.

More specifically, the HRC was also concerned by the CSO law restriction on Ethiopian NGOs from obtaining more than 10 percent of their budget from foreign donors and engaging in human rights activities. It recommended that Ethiopia should revise this legislation to ensure that any limitations on the right to freedom of association and assembly were in strict compliance with the Covenant: reconsider the funding restrictions on local NGOs; and authorize all NGOs to work in the field of human rights.<sup>95</sup>

These observations of the HRC and the special *Rapporteur* are significantly relevant to assess whether Ethiopia is also in violation of the Charter’s provision and basic freedoms of association including expression and assembly.

Availing its power of monitoring the implementation of the Charter, the African Commission has passed two resolutions pertinent to the right to freedom of association. The ‘Resolution on the Right to Freedom of Association’, which among others provides that, in regulating the

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<sup>92</sup>See, U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Egypt*, at P. 21, U.N. Doc. ICCPR/CO/76/ EGY (November 28 2002), Available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument) accessed 13, November, 2017.

<sup>93</sup> Its article 13 reads: *Everyone has the right, individually and in association with others, to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.*

<sup>94</sup> *Ibid*, cumulative reading of article 13 with article 3 The right to access funding requires states to adopt a legislative and administrative framework facilitating, or at least *not* impeding, solicitation, receipt, and use of resources.

<sup>95</sup> Human Rights Committee, *Concluding observations on Ethiopia*, CCPR/C/ETH/CO/1, Para. 25.

use of this right, competent authorities should not enact laws that would limit the exercise of this right.<sup>96</sup> On the other hand, in the ‘Resolution on Protection of Human Rights Defenders in Africa’<sup>97</sup> which was adopted in response to the persistent violations human rights violations that human rights defenders face in Africa, such as freedom of association, the Commission urged State Parties to promote and give full effect to the UN Declaration on Human Rights Defenders and to take all necessary measures to ensure the protection of human rights defenders.<sup>98</sup>

In response to the Ethiopian latest periodic report submitted in 2014, the Commission has expressed the concern that the CSO law has the potential to violate the rights of freedom of expression as specified by the African Charter, especially the provision that requires NGOs not to raise more than ten percent of their funding outside of Ethiopia.<sup>99</sup> At its 51st Ordinary Session in 2012, it passed a resolution on Ethiopia “condemning” and expressing “grave concern” at a number of serious human rights concerns in the country. The resolution condemned “the excessive restrictions placed on human rights work by the CSO law” and called on the government of Ethiopia to amend the legislation to make it consistent with the UN Declaration on Human Rights Defenders.<sup>100</sup> It has also condemned restrictions placed on human rights work by the CSO law, such that denying human rights organizations access to essential funding, endowing the Agency with excessive powers of interference in human rights organizations, and further endangering victims of human rights violations by contravening principles of confidentiality.<sup>101</sup>

For such reasons, it can be inferred that, despite the freedom is limitable, the Ethiopian CSO law clashes with the tenets of freedom of association under the African Charter and the Commission’s guidelines on freedom of association since it imposes harsh and disproportionate restrictions that could have been averted through other less restrictive or proportionate measures and paves the way for repression under the guise of legitimate aims.

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<sup>96</sup>The African Commission on Human and Peoples’ Rights :Resolution on the Right to Freedom of Association (1992), ACHPR/Res 5 (xI) 92

<sup>97</sup>The African Commission on Human and Peoples’ Rights meeting at its 35th Ordinary Session held from 21st May to 4th June 2004, in Banjul, The Gambia: Resolution on Human Rights Defenders in Africa, available at <http://www.achpr.org/sessions/35th/resolutions/69/>, accessed 14 November 2017.

<sup>98</sup> Resolution on Protection of Human Rights Defenders in Africa (2004),35th Ordinary Session, Banjul, the Gambia

<sup>99</sup> 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 5<sup>th</sup> and 6<sup>th</sup> Periodic Reports (2009-2013) of the Federal Democratic Republic of Ethiopia Para. 45, available at <http://www.achpr.org/states/ethiopia/>, accessed 15 November 2017

<sup>100</sup> Resolution on the Human Rights Situation in the Democratic Republic of Ethiopia, 2 May 2012: Available at <http://www.achpr.org/sessions/51st/resolutions/218/>, accessed 15 November 2017

<sup>101</sup> Ibid

#### **4.5 The Implications of the CSO Law on NGO Efforts to Enhance the Implementation of the Charter in Ethiopia**

The influence gained by NGOs as agents of development and their increased engagement in rights and governance advocacy, especially in more recent years, have created tensions with governments in many African states.<sup>102</sup> One of the manifestations of the strains has been the adoption by these states of laws that restrict the activities and operational spaces of NGOs.<sup>103</sup> The degree of actual significance of NGOs as forums of participation depends on the socio-political and legal environment, in which they operate. Established democracies tend to have a relatively relaxed operational environment and more vibrant NGOs, whereas the space narrows in states whose governments view NGO work as one of challenging or antagonizing them.<sup>104</sup> This is reflected in the content and implementation of legal instruments that are meant to govern the establishment and functioning of NGOs. Legally speaking, ‘regulatory frameworks should not normally go beyond what is required to protect and realize the freedom of association and ensure the accountability and transparency of NGOs. However, that is not always the case’.<sup>105</sup>

As discussed in foregoing sections of the chapter, as a result of the restrictions on NGOs that receive foreign funding from working on issues of human rights and on issues considered politically sensitive, organizations with substantial foreign funding will not be able to monitor the government’s record on human rights. For instance, as a result of the funding restrictions in the law, ‘at least 17 organisations, including some of Ethiopia’s leading human rights organisations, have altered their mandate to no longer work on human rights and those organisations that persevere to work on human rights have drastically scaled back their operations’.<sup>106</sup>

These include two of the country’s leading organisations Ethiopian Human Rights Council (the current Human Rights Council or HRCO) and Ethiopian women lawyers association (EWLA).<sup>107</sup> In 2008, there were 127 rights-based, NGOs operating in Ethiopia.<sup>108</sup> By the end

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<sup>102</sup> See, Jeanne Elone, ‘Backlash against Democracy: The Regulation of Civil Society in Africa’ 2009 7(2), Georgetown University: the Centre for Democracy and Civil Society, available at [https://www.africaportal.org/documents/11129/elone\\_civil\\_society1.pdf](https://www.africaportal.org/documents/11129/elone_civil_society1.pdf), accessed 14 November 2017.

<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> Yeshanew, above n.9

<sup>106</sup> Solomon Goshu, above n.30

<sup>107</sup> Amnesty International, ‘Ethiopia: The 2009 Charities and Societies Proclamation as a Serious Obstacle to the Promotion and Protection of Human rights in Ethiopia’ (UN Human Rights Council 2012), written statement to the 20<sup>th</sup> Session of the UN Human Rights Council, 18 June-6 July 2012.

<sup>108</sup> European Commission Civil Society Fund in Ethiopia “Updated Mapping Study of Non State Actors in Ethiopia”, September 2008, available at

of 2009, there were about 3,800 NGOs registered by the Ministry, yet this number declined to 1,850 in February 2010 after the re-registration process was instituted according to the CSO law.<sup>109</sup>

After the coming into force of the law, ‘Ethiopia’s most important human rights groups have been forced to considerably scale-down operations or remove human rights activities from their mandates and an unknown number of organizations have closed entirely’.<sup>110</sup> Then after, ‘largely dependent on foreign donor assistance, Ethiopia’s blossoming human rights community acted as a fortification against the rapidly deteriorating respect for civil liberties and political rights in Ethiopia’.<sup>111</sup>

The CSO law restrictions on receipt of foreign funds were also applied retroactively in late 2009 to freeze the bank accounts of HRCO<sup>112</sup> for example, the Agency froze HRCO’s assets including private bank accounts and sustainability fund which together were in the sum of approximately nine million birr (equivalent of US dollar 566,000.00). These funds had been acquired from both international and domestic sources since 2002.<sup>113</sup> Both organisations have expended significant time and resources in challenging the asset freeze through the Agency and subsequently through the courts. ‘Organisations have also reported that prohibition of anonymous donations has acted as a significant deterrent to donors in a climate where the authorities have shown clear hostility to human rights organisations’.<sup>114</sup> During re-registration under the law, ‘some organisations were forced to remove areas of work from their mandates, such as election monitoring while others were also forced to change their names as a condition of re-registration’.<sup>115</sup>

As of 2014, there are nearly 3000 NGOs that are registered as charities and societies in Ethiopia.<sup>116</sup> According to the National Bank of Ethiopia, the main beneficiaries of foreign

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[http://eeas.europa.eu/delegations/ethiopia/documents/eu\\_ethiopia/ressources/main\\_report\\_en.pdf](http://eeas.europa.eu/delegations/ethiopia/documents/eu_ethiopia/ressources/main_report_en.pdf), accessed 12 November 2017

<sup>109</sup> USAID, above n.34

<sup>110</sup> Human Rights Watch, ‘World Report 2013 : Events of 2012 Ethiopia ’ (Human Rights Watch 2013) 115-117

<sup>111</sup> European Commission Civil Society Fund in Ethiopia, above n.108

<sup>112</sup> African Commission on Human and People’s Rights, Communication 445/13-Human Rights Council and Others v. Ethiopia, Relying on the CSO regulation for registration and administration of CSOs and a circular issued by the Ministry of Justice, the Agency froze the assets of HRCO without a court order or prior notification, This cost the organisations over half a million US dollars each in frozen funds. See also, Amnesty International above n .74

<sup>113</sup> Ibid

<sup>114</sup> Ibid

<sup>115</sup> African Commission, Oral Statement of Amnesty International: Special *Rapporteur* on Human Rights Defenders in Africa: Ethiopia, available at <http://www.achpr.org/sessions/50th/ngo-statements/8/>, accessed 15 November 2017.

<sup>116</sup> Dag Ethiopia, ‘Trends in Donor Funding to the Civil Society Sector’ (2014) Tracking in Ethiopia’s Civil Society, Information Bulletin 7

funds are Ethiopian resident's charities, which in fact constitute the majority of registered charities and societies (over 50%) and include the most active NGOs in Ethiopia.<sup>117</sup> However, it appears that due to the limitation under the CSO law, these NGOs are not in a position to work on human rights and advocacy rather limited to development, care, relief, rehabilitation whereas locally funded human rights organizations such as the HRCO and EWLA and few regional women's associations such as the *Amhara Women's Association* are operating in a right based approach a limited extent due to the absence and inaccessibility of domestic funds or grants.

The law has entrenched further forcing many human rights defenders fled the country when the law it was passed, and self-censorship is widespread out of fear of repercussions. Most human rights defenders are too scared to speak out, or even to have the experiences of their organisation discussed or publicised.<sup>118</sup>

In nutshell, although the government's professed aim of promulgating 'a law to aid and facilitate the role of charities and societies one of which are NGOs [Emphasis added] in the overall development of Ethiopian peoples'<sup>119</sup>, the law creates a number of seemingly insurmountable obstacles including numerous debilitating restrictions on funding, several measures for observation and onerous penalties for noncompliance. Despite the policy reasons for the enactment of the CSO law and its regulations, the restrictions have curtailed NGO's work on human rights promotion, protection and advocacy.

#### **4.5.1 Efforts in Legislative Measures**

Legislative measures are the prominent measures of implementation of which state parties to a certain treaty align their laws to international and regional standards. They are ongoing activities of governments that ensure national legislations and related administrative regulations are in full compliance with the international and regional human rights standards where these have been ratified by a state. It is thus important for governments to review all existing laws and regulations and continue to check compliance.<sup>120</sup> Activist forces and domestic human rights institutions working within their own states have made; 'significant and creative use of the African system, particularly when lobbying for domestic law and

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<sup>117</sup>Ibid

<sup>118</sup>Ibid

<sup>119</sup>Preamble of Proclamation no 621/2009 ,above n.11

<sup>120</sup>They must also have a national plan or policy for harmonization of national laws with international instruments to always maintain compliance. Which have reviewing all existing laws and regulations, systematically check laws for compliance, format and structure of legislative measures, drafting and consultation and implementations of the measures thereafter are the key components a national policy of harmonization.

policy reforms'.<sup>121</sup> NGO groups are key actors in advocating legal reforms.<sup>122</sup> For instance, in reviewing of existing laws and regulations, situation analysis study of existing of legal provisions and regulations, governments need to identify non-compliance and how to fill gaps. In doing so, states need to establish a broad based review committee which includes government representatives, NGOs, UN Agencies and independent experts on customary and religious laws.<sup>123</sup>

Taking into account the fact that the Charter is a primary human rights instrument in Africa, the restriction imposed under the law on foreign funded NGOs not to engage in the promotion of human rights and democratisation, the promotion of children and disability rights the promotion of efficiency of justice and law enforcement services, would impair their legislative and policy engagement on law and policy reforms in these thematic areas and limits the national implementation of the Charter with respect to these areas. It should therefore be noted that when the Charter imposes such obligation to implement these rights domestically, it obliges states to include other stakeholders in the measures of implementation including legislative and policy measures.<sup>124</sup>

To mention few, studies have revealed that Rwanda has an enabling legal environment for active involvement of NGOs in policy making and human rights issues.<sup>125</sup> In 2011 Rwanda has passed new laws governing national NGOs (Law 04/2012), international NGOs (Law 05/2012) and religious based organisations (Law 06/2012), after a lengthy consultation processes which included Rwandan and international NGOs, as well as local and international experts.<sup>126</sup>

The International Centre for Not-for-Profit-Law (*hereinafter* ICNL) assessment of the new law is that it is not perfect but is a positive step in the direction of creating an enabling environment for voice and participation of NGOs.<sup>127</sup> The national NGO law regulates the registration of NGOs, and limits the power of government to deny registration. It also contains provisions to strengthen NGO internal operations and legitimacy, and establishes

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<sup>121</sup>Obiora Chinedu Okafor, *The African Human Rights System: Activist Forces and International Institutions* (2007)

<sup>122</sup>Maria Bakolias, 'Legal and Judicial Development: The Role of Civil Society in the Reform Process' (2000) 24(6) *Fordham International Law Journal*

<sup>123</sup>*Ibid*

<sup>124</sup>The African Charter, Article 26

<sup>125</sup>USAID, above n.33

<sup>126</sup> *Ibid*

<sup>127</sup>See, ICNL, *NGO Law Monitor: Rwanda, 2013*. Rwanda demonstrates that there is space for NGOs to participate in policy-making at some level and citizens in policy-making processes. For example, the decentralisation policy and the 'Ubudehe' programme aiming to strengthen local decision-making has opened up space for citizen engagement with the state at the local level.

rights and procedures for NGOs to participate in policy and legislative development.<sup>128</sup> Despite the situation is particularly problematic for organisations that work on human rights or sensitive governance issues or those that are openly critical of the government, ‘a large number of local and international NGOs do, however, operate in Rwanda, working within the boundaries of a policy-making and political system which is based on unity and consensus, rather than contestation and competition’.<sup>129</sup> In other words, the Rwandan government does accept the involvement of NGOs in the process of national development policy-making.

According to a statement by the Agency, in 2011, about 1600 NGOs have been re-registered under the new CSO law. Of these, more than 1500 are Ethiopian resident and foreign charities working on development and welfare.<sup>130</sup> In addition, in the same year the Agency has also registered close to 98 Ethiopian charities and societies which are allowed to work on human rights and conflict resolution.<sup>131</sup> The question is however whether these few existing organizations are still active and operating and whether they are in fact taking part in steps for law and policy reforms and harmonization of these laws with the Charter. EWLA, which was the only major NGO working on women’s rights advocacy at the national level conducted vital work in the field of women and justice, advancing draft legislation to improve protection of women’s rights, providing free legal aid for women, and researching and publishing on issues of law and gender.<sup>132</sup> Before the adoption of the law, EWLA’s activities reached thousands of beneficiaries. For a case in point, in 2008 EWLA provided free legal aid to 17,357 women. Since the adoption of the law, EWLA has cut 70 per cent of its staff and in 2010-2011 it had effectively ceased to function, with the exception of volunteers providing a small amount of free legal aid to women.<sup>133</sup> Such discontinuance would definitely impair EWLA’s involvement policy engagement on women’s rights under the Charter. To illustrate, EWLA for instance has reduced its in policy consultations and development to few areas such

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<sup>128</sup>See, ICNL, NGO Law Monitor: Rwanda, 2013. Rwanda demonstrates that there is space for NGOs to participate in policy-making at some level and citizens in policy-making processes. For example, the decentralisation policy and the ‘*Ubudehe*’ programme aiming to strengthen local decision-making has opened up space for citizen engagement with the state at the local level.

<sup>129</sup>Rachel Hayman, 'Going in the "Right" Direction? Promotion of Democracy in Rwanda since 1990' (2009) 5(1) *Taiwan Journal of Democracy* 51-71

<sup>130</sup>CSO Taskforce, Users’ Manual for the Charities and Societies Law (2011), Taskforce on Enabling Environment for Civil Society in Ethiopia, Addis Ababa, 1-5

<sup>131</sup>Ibid

<sup>132</sup>Yalemzewed Bekele, above n .26

<sup>133</sup> Ibid

as the recently endorsed National Children's Policy of Ethiopia.<sup>134</sup> However, the debilitated organizational capacity of EWLA because of the limited and inaccessible domestic funds would have been enhanced if it had accessed funds from a foreign source.

With regard to ratification of regional and international instruments, Ethiopia's failure to ratify the Charter's protocol on women's rights in Africa after being a signatory in 2004<sup>135</sup> can be attributed to the inability of NGOs such as EWLA to impact the government on the benefits of adopting the protocol and harmonizing its national laws with the protocol.

Once again, the African Commission in response to Ethiopia's 5<sup>th</sup> and 6<sup>th</sup> periodic report has underscored that Ethiopia has failed to ratify human rights instruments that are relevant to the human rights instruments in which Ethiopia is a party.<sup>136</sup> The CSO law funding and activity restrictions could be one of the contributing factors for the lack of effective and organized NGOs efforts to impact the government on ratification of these instruments.

Hence, with the current condition of the NGO environment, NGOs that domestically generate funds are passive in making efforts to carry out legislative measures that promote the compliance of national laws and policies and their harmonization with the African Charter while the rest of NGOs that generate income from foreign source are merely focused on development and care operations.

#### **4.5.2 Reporting and Monitoring**

Regardless of the policy reasons for activity and funding restrictions under the CSO law and its implementing regulation, the degree of such control, in many cases, reaches draconian proportions and should be carefully scrutinized. The lack of a conducive legal framework and the struggle to survive financially are basically the two particularly troublesome issues for NGOs across most of the sub-Saharan Africa region specifically Ethiopia. Often, however, NGOs that focus on advocacy related to human rights and governance issues find themselves at a disadvantage in terms of obtaining domestic sources of funding or gaining positive recognition compared to their service-providing counterparts. In Ethiopia, where domestic

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<sup>134</sup>For instance, in the recently endorsed National Children's Policy in 2017, the ministry of Women and Children Affairs has called for consultations from respective stakeholders including those from the civil society sector.

<sup>135</sup> See, ratification table of the Maputo Protocol, available at [www.achpr.org](http://www.achpr.org), accessed 2, May, 2018.

<sup>136</sup>See, Concluding Observations and Recommendations on the 5th and 6th Periodic Report of The Federal Democratic Republic of Ethiopia, 56<sup>th</sup> Ordinary Session, Banjul the Gambia, available at [www.achpr.org](http://www.achpr.org), accessed 11 February 2018. Para.33, The Commission mentioned the failure to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights; African Union Convention for the Protection of Internally Displaced Persons in Africa; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; Optional Protocol to the Convention on the Rights of Persons with Disabilities.

fundraising opportunities are extremely limited, these restrictions avoid international human rights organizations and have amounted to the near cessation of independent national human rights activity.

For instance, the HRCO which is the former Ethiopian Human Rights Council (EHRCO)<sup>137</sup> as the first and only national, independent NGO mandated to monitor, investigate and report on human rights in Ethiopia, resolved not to withdraw its right-based initiatives following the adoption of the law. Before the CSO law, ‘it carried out high quality monitoring and documentation of violations through twelve offices across the country. Since the passing of the law EHRCO has closed nine of its offices and has cut at least 75 percent (more than 40 people) from its staff’.<sup>138</sup>

This decision, to forgo most foreign funding in exchange for authorization to continue conducting human rights activities, has significantly reduced HRCO’s capacity to discharge its mandate.<sup>139</sup> HRCO has been forced to either dissolve or reduce all of its operations and programs ‘due to an 80 percent reduction in staff’.<sup>140</sup> The resulting decrease in exposure and institutional capacity has to a great extent diminished HRCO’s ability to provide essential rights based services to individuals and fight repressive and unconstitutional legislations thereafter.<sup>141</sup>

Amnesty International had also reported that ‘despite the fact that NGOs working on human rights issues, are essential to upholding human rights, equality and justice at all levels of society, the law places restrictions putting domestic funding as pre-requisite to human rights work including the collection and dissemination of human rights information the monitoring and documenting of human rights violations perpetrated by state and non-state actors in order to pursue accountability and adherence to national and international human rights commitments. In these and other ways the law jeopardises the promotion and protection of all

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<sup>137</sup>In 1991, to fill the human rights void created by 17 years of military rule, Professor Mesfin Wolde Mariam initiated a movement to establish Ethiopia’s first human rights defenders organization. Composed entirely of private citizens, the Human Rights Council’s founding members represented a diverse stratum of Ethiopian society including intellectuals, academics, professionals and businesspersons. After the CSP, EHRCO was forced to remove the prefix ‘Ethiopian’ from its title.

<sup>138</sup>European Commission Civil Society Fund in Ethiopia, above n.103

<sup>139</sup>Ibid

<sup>140</sup>Amnesty International, ‘Ethiopia: The 2009 Charities and Societies Proclamation As A Serious Obstacle to the Promotion and Protection of Human Rights in Ethiopia’ (2012)

<sup>141</sup>Ibid

rights enshrined in the African Charter ‘through the involvement of NGOs and their participation in the Commission.’<sup>142</sup>

The experience of Nigeria is important here as local and foreign funded NGOs working in Nigeria are extraordinarily active in their involvement at the Commission in any matter of human rights.<sup>143</sup> On the other side, South Africa with its most developed NGO sector in the whole continent, with apparently more than 50,000 NGOs in total, it is estimated that more than hundreds of these can be described as human rights organizations.<sup>144</sup> The largest of these, Lawyers for Human Rights (LHR) is an independent human rights organization with a 38 years track record of human rights activism and public interest litigation in South Africa and has more than 130 paid staff while the Legal Resources Centre has nearly as many. The South African legal framework does not present significant obstacles for NGOs operating in South Africa it is indeed generally enabling and supportive of NGO activity.<sup>145</sup> Technically speaking, there is neither activity nor funding restrictions that are imposed on any section of NGOs working in South Africa. In 1997 the South African Non-profit Organizations Act (NPO Act) was promulgated. The NPO is extraordinary in capturing the state’s commitment to and support for non-profit organisations.<sup>146</sup>

The NPO Act describes the State’s responsibility to not-for-profit organizations as follows: “*Within the limits prescribed by law, every organ of state must determine and coordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of NPOs to perform their functions.*”<sup>147</sup>

According to statistics from the between 2009 and 2012, US Foundations gave over \$300 million in grants to over 400 organizations in South Africa. These 1000 grants ranged from

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<sup>142</sup>African Commission, Oral Statement of Amnesty International: Special Rapporteur on Human Rights Defenders in Africa: Ethiopia, available at <http://www.achpr.org/sessions/50th/ngo-statements/8/>, accessed 15 November 2017.

<sup>143</sup> See, *Interrights and another v Nigeria*(2004) AHRLR 102 (ACHPR 2004), *Inter rights (on behalf of Husaini and others) vs. Nigeria* 2005) AHRLR 56 (ACHPR 2005), *Civil Liberties Organizations and other v Nigeria* (2001) AHRLR 75 (ACHPR 2001)*Civilians unfairly tried, convicted and sentenced to death by a military tribunal*

<sup>144</sup>University of Minnesota, Human Rights Library: The Status of Human Rights Organizations in Sub-Saharan Africa South Africa. Black Lawyers Association/Legal Education Centre, Community Law Centre, Freedom of Expression Institute, Lawyers for Human Rights are the known ones, Available at <http://hrlibrary.umn.edu/africa/safrica.htm>, accessed 12 November 2017.

<sup>145</sup> Ibid

<sup>146</sup>More than 85 000 non-profit organisations were registered in terms of the Non-profit Organisations Act (NPO Act) at the end of March 2012. From October 2012 until January 2013 more than 23 000 organisations were de-registered by the Directorate for Non-profit Organisations which falls under the auspices of the Department of Social Development.

<sup>147</sup>International Centre for Not-for-Profit –Law : Civic Freedom Monitor: South Africa, 2017 , available at <http://www.icnl.org/research/monitor/southafrica.html>, accessed 12 November 2017

\$1000 to nearly \$22 million.<sup>148</sup>The LHR uses the law as a positive instrument for a change to deepen the democratization of South African society. To this end, it provides free legal aid services including legal representation to nationals and non-nationals who are victims of unlawful infringements of their constitutional rights and rights enshrined in the African Charter.<sup>149</sup>

In general, it can be said that the South African non-profit sector plays a vital part in assisting the government to fulfil its constitutional mandate. ‘The socio-economic rights enshrined in the South African Constitution would be out of reach for most South Africans if not for the presence of a vibrant and active non-profit sector’.<sup>150</sup> This has enabled NGOs local and foreign funded NGOs work very closely with the government and the Commission to domestically implement the African Charter through reporting and monitoring status of implementation of fundamental rights and freedoms protected under the Charter.

Hence, the Ethiopian situation would have been at least progressive in terms of allowing NGOs contribute to the effective documentation, monitoring and reporting of human rights violations under the Charter had it not been for the serious impediments on NGOs imposed under the law.

As far as reporting is concerned, a coalition formed to submit parallel reports to the UPR process and four treaty bodies disbanded after only preparing one report to the UPR in 2009.<sup>151</sup> Following the submission of that report, ‘the organisations were subjected to serious harassment to the extent that the Director of EWLA and the Secretary General and three other staff members of HRCO fled Ethiopia’.<sup>152</sup>

Whereas in monitoring the observance of Ethiopia’s obligation under the Charter, there are only few communications brought against Ethiopia before the Commission. *Anuak Justice Council vs. Ethiopia* is amongst the few the relevant communications brought against

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<sup>148</sup>Funds for NGOs: Grants and Resources for Sustainability: Alternative Sources of Funding for South African NGOs, 2016 available at <https://www.fundsforngos.org/developing-countries-2/south-africa/alternative-sources-funding-south-african-ngos/>, accessed November 2017

<sup>149</sup>Ibid

<sup>150</sup>Wyngaard, R., ‘The South African NPO crisis - time to join hands’, SANGO Pulse, 12 March 2013, available at <http://www.ngopulse.org/article/south-african-npo-crisis-time-join-hands>, accessed 12 November 2017.

<sup>151</sup>African Commission, Oral Statement of Amnesty International: Special Rapporteur on Human Rights Defenders in Africa: Ethiopia, available at <http://www.achpr.org/sessions/50th/ngo-statements/8/>, accessed 15 November 2017.

<sup>152</sup>International, above n .102, (written statement to the 20<sup>th</sup> Session of the UN Human Rights Council, 18 June-6 July 2012)

Ethiopia before the Commission prior to the enactment of the CSO law.<sup>153</sup> The complainant states that the *Anuak* are an indigenous minority group living in South-western *Gambella* region of Ethiopia and that despite their dominance in the region, the Ethiopian government has a long history of marginalising, excluding and discriminating against them.<sup>154</sup> This case was a major step taken against Ethiopia's failure to observe human rights obligations under the Charter. Since then, it was only in 2013, where HRCO as a local NGO after the adoption of the law instituted a complaint before the Commission representing its organizational incapacitation as a result of the CSO law.<sup>155</sup>

Moreover, it is almost very rare to find human rights cases instituted by NGOs on behalf of individual victims or from the point of public interest to the Africa Commission notwithstanding the fact that domestic remedies should be exhausted. Pragmatically, the failure to utilize the communication procedure by local NGOs of Ethiopia, does not necessarily imply that there are no violations of the rights and freedoms enshrined under the Charter not does it signifies the full exhaustion of domestic remedies by NGOs. In fact, a comparison can be made between communications that had been brought by international or regional NGOs against Ethiopia *vis-à-vis* the communications brought by local NGOs against Ethiopia before the Commission in which the former is of a very high number which proves that Ethiopia has indeed been violating the Charter.<sup>156</sup> And so, the constant failure of local NGOs to utilize the communication procedure could be attributed to the incapability of local NGOs to document, monitor, report human rights violations and claim for remedies on behalf

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<sup>153</sup>See, Interights (on behalf of Gizaw Kebede and KebedeTadesse) v. Ethiopia (Communication No. 372GTK/2009, 10th Extraordinary Session) see also, Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia (Communication No. 301/05, 50th Ordinary Session)

<sup>154</sup>Communication 299/05Anuak Justice Council v Ethiopia (2006) AHRLR 97 (ACHPR 2006), Decided at the 39th ordinary session, May 2006The communication is submitted by the *Anuak* Justice Council, through Obang Metho, the Director for International Advocacy, *Anuak* Justice Council which was prepared by the International Human Rights Clinic, Washington College of Law in Washington, DC in the United States of America against the Federal Democratic Republic of Ethiopia, the respondent state, a party to the African Charter on Human and Peoples' Rights since 1998. The complainant avers that the respondent through its agents, the Ethiopian Defence Forces, has been engaged in massive discrimination resulting in serious human rights abuses and violations of the people of *Anuak* ethnicity. They claim that the abuses by the Ethiopian Defence Forces include the massacre of over 424 civilians, the wounding of over 200 civilians and the disappearance of over 85 civilians in the *Gambella* region in the three-day period of 13-15 December 2003. The complainant states that the abuses have continued against the Anuak since that period, including extra-judicial killing, torture, detention, and rape and property destruction throughout the *Gambella* region, resulting in 1000 *Anuak* deaths and that over 51,000 *Anuak* have been displaced within the *Gambella* region.

<sup>155</sup> African Commission on Human and People's Rights, Communication 445/13-Human Rights Council and Others v. Ethiopia,

<sup>156</sup> See for example, Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia (Communication No. 301/05, 50th Ordinary Session), Interights (on behalf of Gizaw Kebede and Kebede Tadesse) v. Ethiopia (Communication No. 372GTK/2009, 10th Extraordinary Session),

of victims of violations of rights under the Charter due to financial impediments attributed to the CSO law.

Although the delegate presented that the law was aimed at ensuring accountability and transparency, the CSO law has a far reaching consequences on domestic human rights organizations functioning to monitor and document human rights violations, to conduct human rights advocacy etc which are restricted by the law and to carry out other work vital to safeguarding the enshrined under the Charter. In other saying, human rights violations go largely unmonitored, unreported and un-remedied.

The government does not really see NGOs, especially international NGOs, as important in the country and NGOs are at risk of being replaced with local, party-controlled organizations, which would be friendly and nonthreatening to governments. Indeed, associations like EWLA often institute a case on behalf of individual victims to courts of law but have never challenged the constitutionality of any law or government action including the CSO law itself. Here, it is important to raise the famous case of *Action Professionals' Association for the People APAP) vs. the Environmental Protection authority* in 2005 a case instituted before the enactment of the CSO law in 2005.<sup>157</sup> Regardless of the fact that such kinds of monitoring mechanisms of government's compliance to its obligations to protect rights highly enhance the domestic implementation of the Charter in Ethiopia. So far, neither APAP nor other NGOs are working towards implementing the Charter nationally as needed because of the activity boundaries and the financial restrictions imposed by the law.

With the existence of a jurisprudence of a more liberal standing at the African Commission unlike the European Commission<sup>158</sup>, it could be said be that neither domestic remedies (in

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<sup>157</sup>APAP is a non-profit making, non-partisan, indigenous non-governmental organization established in 1993 with main objectives of providing legal and professional services to the poor, women, and children in Ethiopia and accessing human rights and legal information to these groups so as to enable them use the law and human rights in bringing about an attitudinal change and as resource in the development process. Therefore, making justice accessible to the poor, women and children has been the *raison d'être* for APAP's existence. Accordingly, on the basis of its objective, APAP has initiated the following public interest litigation which is the first case ever in the history of Ethiopia to bring an end to the environmental and human suffering incurred due to the pollution of Akaki and Mojjo Rivers by Governmental and Non-Governmental Industries and Factories.

<sup>158</sup>The African Commission unlike the European Commission follow the jurisprudence of liberal standing. In line with this liberalization of standing, a case was entertained by the African Commission. The case was initiated by a humanitarian organization called SERAC against the Nigerian Government and the Oil Giant Shell. In the case of CERAC vs. Nigerian Government and the Oil Giant Shell, it is revealed that the Farmers' and Fisher folk' livelihood and welfare is intricately bound to the health of the surrounding rivers, streams and soil. Over two decades, the environment and welfare of the *Ogoni* communities have been seriously damaged by irresponsible oil development. The government has contributed to this harm through its dominant role in the oil industry and its violent response to *Ogoni* protests. The oil industry, the NNPC-shell consortium, has simply dumped them into unlined pits from which they regularly flow into nearby lands and streams rather than treating or re-injecting oil production wastes

domestic tribunals) nor regional remedies from the Commission are accessed to the extent needed as few NGOs facilitate the implementation of Ethiopian human rights obligations under the Charter nationally and these few are financially unable to run projects that are initially their establishing area of engagement.

#### **4.5.3 NGOs in Follow –ups and Implementation**

Follow-up on decisions of human rights treaty bodies can be regarded as a process by which a treaty body monitors and seeks information on what steps have been taken at the national level following the delivery of a ‘decision’<sup>159</sup> which broadly includes concluding observations, recommendations and judgements. They can also be a tool to promote and facilitate implementation at national level.

In the second UPR cycle, the Ethiopian delegate presented that the CSO law ensured the realization of the rights to freedom of association and provided an environment conducive to the growth and development of NGOs. The delegate had also indicated that the law ensured accountability through predictability and transparency and that it had created favourable conditions for the establishment and growth of grass-roots advocacy and humanitarian and developmental NGO groups that could thrive and serve their members and society at large. He has also highlighted that the CSO law required charities and societies to allot 70 percent of their budget for programme activities and the remaining portion for overhead costs.<sup>160</sup>

However, this assertion does not reflect how the CSO law could enhance the efforts of NGOs to observe Ethiopia’s human rights obligations under the Charter and other human rights instruments. For instance, during the preparation of this study, there are only three (3) NGOs from Ethiopia that have observer status before the African Commission: the Ethiopian human rights council<sup>161</sup>, Prison Fellowship Ethiopia<sup>162</sup> and the African Child Policy Forum which is granted very recently in 2017.<sup>163</sup>

This has made Ethiopia one of the African countries with least number of NGOs with an observer status before the Commission. One of the rationales for this could be the failure of the NGOs working in Ethiopia to meet the criteria for the grant of such a status. As mentioned in the preceding chapter, those NGOs who seek to apply for such a status before the Commission must show that they are capable enough to work for the realization of the

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<sup>159</sup> Expert Seminar on the Implementation of Decisions by Human Rights Treaty Bodies, ‘Summary of issues and recommendations, (2009), Human rights Implementation Centre, University of Bristol

<sup>160</sup> United Nations General Assembly, Report of the Working Group on the Universal Periodic Review\* Ethiopia, 27<sup>th</sup> Session July 2014.

<sup>161</sup> Ethiopian human rights council, Observer Status granted in 14<sup>th</sup> Ordinary Session, December 1993

<sup>162</sup>Prison Fellowship Ethiopia, 39<sup>th</sup> Ordinary Session , 2006

<sup>163</sup>African Child Policy Forum, 61<sup>th</sup>, Ordinary Session, 2017

objectives of the Charter; they should work in the field of human rights and declare their financial resources which include its source of funding. As a matter of fact, the funding and activity restrictions under the law could be one of the factors for impeding local NGOs from being financially empowered and qualify to obtain the observer status.

In effect, if NGOs do not obtain observer status, there is no potential for them to follow up the national implementation of the Charter and could hardly report on what steps have been taken at the national level once the Commission has passed concluding observations, recommendations or judgements. The lack of NGOs with observer status and their inefficiency would indeed undermine the Commission's ability to come up with independent information the implementation of the rights and freedoms under the Charter in Ethiopia. This scenario has been reflected by various UN human rights bodies and recommended the law to be amended or repealed.<sup>164</sup> To exemplify, during the consideration of Ethiopia under the UPR in December 2009, numerous states expressed concern at the restrictions placed on NGOs [...Emphasis added] by the law and some explicitly recommended that the law be amended.<sup>165</sup> The Netherlands, for instance had raised this advanced question giving reference to what had been recommended on the Committee on the elimination of racial discrimination (CERD).

- *Does the Government of Ethiopia have the intention to revise the recently adopted law on Civil Society Organisations in line with recommendation made by CERD earlier this year?*
- *How will the government ensure that NGOs involved in national programmes are not in any way hindered in their participation in such programmes by the application of the CSO law?*

These concerns from the Netherlands signify the apprehension from different treaty bodies to repeal or amend the law are not given recognition by Ethiopian government and that the intervention from the NGO sector is to the protection of the rights enshrined in the human rights instruments is still immature as a result of the CSO law.

In relation to such failure, the Commission in response to Ethiopia's latest periodic report in 2015 raised the failure of Ethiopian government to observe prior concluding observations and recommendations given by the Commission. The Commission was concerned that:

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<sup>164</sup>The Human Rights Committee (HRC), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on Economic, Social and Cultural Rights (CESCR) have all recommended that the CSP be amended or repealed.

<sup>165</sup>To mention some, Canada, The United Kingdom, the United States, and the Netherlands have raised specific concerns on the law.

*The Report does not provide specific and comprehensive answers to questions and issue raised by the Commission in its 2010 concluding Observations and recommendations on Ethiopia's 1st to 4th Periodic Report; and Ethiopia continues to apply legislation on which the Commission raised concerns in those Concluding Observations*<sup>166</sup>

This concern from the Commission undoubtedly raises a question why did NGOs working in Ethiopia fail to urge the government to enforce the concluding observation of 2010. Accordingly, the inability or reluctance from the side of those few NGOs working on human rights in Ethiopia could be attributed again to the CSO law's debilitating factor on the organization's area of engagement and financial resilience. Despite, the process of monitoring implementation is an on-going one because it is context dependent, impacting governments to constantly follow up implement decisions made by the Commission requires financial capability or subsidy from both local and foreign source.

The forgoing discussions on the implication of the CSO law on the efforts of NGOs to implement the Charter nationally, can be accompanied with the Commission's concern on the latest periodic report of Ethiopia, which condemned the report for lacking information on articles 10 and 11 of the Charter regarding the rights of human rights defenders and freedom of association.<sup>167</sup>

#### **4.6 Conclusion**

This chapter was aimed at analyzing the Ethiopian CSO law and its implementing regulation in relation to freedom of association under the African Charter, the guidelines issued by the Commission on the freedom to associate and the Commission's case law with regard to freedom of association. In spite of the fact that, the rights under the Charter are subject to claw back clauses which makes freedom to associate limitable, the CSO law although aimed at facilitating the roles of NGOs in the socio-economic development of Ethiopia, impeded NGOs that intend to work on promotion and protection of human rights by imposing undue funding and activity restrictions on the freedom to associate under the Charter. Consequently, it was established that the CSO law basically violates the rights to association in the Charter in a very disproportionate manner to the legitimate aim of avoiding foreign intervention in the political process of Ethiopia.

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<sup>166</sup>Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia, 56<sup>th</sup> Ordinary Session, 21 April-7 May, 2015, Banjul, the Gambia. Available at [www.achpr.org](http://www.achpr.org), accessed 11 February 2018.

<sup>167</sup> Ibid

Secondly, the chapter sought to consider the impact of the CSO law in nationally implementing the Charter through the various efforts of NGOs in legislative measures, in reporting and monitoring, in following up of decisions of the Commission their implementation. Hence, the hindrances on NGOs that intend to work on human rights not to raise more than 10% of their funds from a foreign source has practically caused the cessation of the nearly blooming NGO activity in human rights protection and observation in Ethiopia. Many NGOs have shifted to the areas of development, care and welfare and automatically rebranded their identities which wiped away their human rights contribution including the national implementation of the rights and freedoms enshrined under the Charter. Availing the fact that domestic funding is barely available in Ethiopia, NGOs who were highly dependent on foreign aid were prevented from working on human rights; hence forced to change their mandates. Impliedly, the shifting of these human rights NGOs toward other thematic areas on development, deters the effective implementation of the African Charter, as these NGOs have failed to serve the as ‘watch dog’ on ensuring the compliance of the Ethiopian government with its obligations under the Charter. As a result of the limitation under the law, the NGOs lack operational autonomy and they are under serious scrutiny and surveillance from the government through the regulation from the Agency which is the principal government body to regulate the operations of NGOs in Ethiopia. In fact, the policy reasons behind these restrictions have their own explanations; however, while enacting the law the legislature should have taken into account the adverse effects it could create on the observance of Ethiopia’s human rights obligations under the African Charter. As a result of this, human rights violations are not independently reported, documented and monitored and which has made Ethiopia one of the worst in complying with the African Charter.

Therefore, the efforts of NGOs in Ethiopia to enhance the domestic implementation of the Charter through law and policy reforms, through facilitating Ethiopia’s activity in the Commission’s promotional and protective mandates, through follow ups and the implementation of concluding observations and recommendations of the African Commission is negligible for which the CSO law could be deemed as one of the contributing factor.

## **Chapter Five: Conclusions and Recommendations**

### **5.1 Conclusions**

The proliferation of NGOs is one of the most striking features of contemporary international politics. While states remain the major protectors and abusers of human rights, NGOs have emerged as central players in the promotion of human rights around the world. As advocacy organizations, human rights NGOs work with or against governments in developing agendas for action. Through treaty negotiations with governments, they seek to establish international standards for state behaviour. They also work to mobilize public opinion, they investigate and report human rights abuses and offer direct assistance to victims of those abuses, which make human rights NGOs the significant stakeholders of human rights protection and promotion. NGOs are accorded with fundamental freedoms for their operation under different international and regional laws which include freedom of association, assembly, freedom of expression, right to communication and cooperation, right to access funding.

Seeking to create a regulatory framework for the functioning of the civil society sector the Ethiopia has enacted the CSO proclamation in February 2009. This study was aimed at answering three research questions. First, it sought to answer the compatibility of the CSO law with the basic tenets of freedom of association in the African Charter and the Commission. In doing so, it analysed the CSO law with relevant provisions of the Charter, particularly articles 1, 10, 11 and 26. It has also made reference to the Commission's guidelines on freedom of association and case law. Despite, the rights and freedoms under the Charter may legitimately be limited by states when required by the law, the Ethiopian CSO law puts arbitrary restrictions on NGOs especially on those who intend to work on human rights and in effect violates the relevant provisions of the Charter and notion of the freedom to associate. This study has depicted that the CSO law is quite restrictive as it imposes unjustifiable and disproportionate funding and activity restrictions contravening internationally and regionally guaranteed rights of NGOs. Also, it compels NGOs working and intending to work in human rights and democratisation to generate income from domestic source except for only 10% of their funds.

Secondly, the study examined whether the domestic legal framework for NGOs (giving a particular emphasis to the CSO proclamation) is favourable to human rights NGOs to actively participate in the broad human rights work. While assessing this, the study has made reference to the roles of NGOs in different human rights systems across the globe. It has highlighted the supporting roles of NGOs in the international human rights systems in

standards setting, monitoring the implementation of human rights obligations by states, initiating investigations etc and the UPR. It has also made a slight reference to the ECtHR and the ICtHR and how NGOs facilitate the implementation of the rights and freedoms enshrined under these regional instruments through closely working with their respective regional human rights bodies.

The study has given a specific and intensive focus to the African Commission and the engagement of NGOs in thematic areas of human rights and promotion and protection of the rights guaranteed under the Charter. It has assessed the promotional and protective mandates of the Commission and how NGOs working on human rights actually facilitate and enhance these functions of the Commission. The role of NGO in preparing shadow reports during the state reporting procedure, their role in bringing communications on behalf alleged victims of violations has also been discussed. However, in highlighting these roles of NGOs the study has outlined those countries with an enabling legal environment for the participation of NGOs such as South Africa and Nigeria and mentioned their good record of implementing the Charter both domestically and regionally. The study has also shown the disparity between the CSO law and the African Charter by giving reference to the relevant Charter provisions, the Commission's guidelines and case laws on freedom of association.

Taking into account the fact that the CSO law violates the freedom to associate as envisaged in the Charter, it is hardly possible to conclude that the current domestic framework provides an enabling environment for the involvement of local and foreign human rights NGOs working in Ethiopia in the human rights work.

Aiming to answer the third research question on the impact of the CSO law on efforts of NGOs to advance the national implementation of the Charter in Ethiopia, the study has analyzed the ultimate consequences of the funding and operational restrictions imposed on human rights NGOs as barriers to the various efforts of NGOs in providing the government a technical support to undertake legislative and policy measures, in reporting, documenting and monitoring human rights violations under the Charter and in undertaking follow-ups on the implementation of concluding observations and recommendations of the Commission which in nut shell enhance the national implementation of the Charter as envisaged in the general obligation clause of the Charter *per se*. The study has shown also that, those human rights NGOs working in Ethiopia have a very limited participation in supporting or impacting the Ethiopian government to take legislative measures and challenge the constitutionality of laws

to align domestic laws with the African Charter, in the participation of the Commission's protective and promotional mandates, in urging the Commission for investigation and missions and so forth.

As a result, while the existence of a codified legal framework is vital to creating an enabling operating environment, the inclusion of NGO- unfriendly laws such as the CSO law creates an insecure and unpredictable environment to NGOs indirectly curtails their efforts to implement the Charter nationally. As Rachel Hyman wrote, states shall be tolerant enough to the activities of NGOs, especially those vocal and critical of government in observation of their human rights obligation and consider them as gap fillers and development partners.<sup>168</sup>

## **5.2 Recommendations**

The study has provided recommendations from the perspective of the Ethiopian government, the African Commission and the human rights NGOs in order to make legal reforms that can facilitate the national implementation of the Charter in Ethiopia through the efforts of human rights NGOs as below

1. Ethiopia shall be mindful of the concluding observations of the African Commission and amend the impediments under the CSO law to further the active involvement of NGOs in human rights work.
2. Ethiopia shall reconsider the CSO law from a human rights friendly perspective and authorise all NGOs to work on the advancement of human rights.
3. Ethiopia shall create available rooms to NGOs for self-regulation.
4. Ethiopia shall take the experience of other African countries with vibrant and active NGOs in human rights accompanied by a conducive regulatory framework.
5. The Commission shall strictly observe the implementation of previous concluding observations and recommendations and shall continue to put pressure on the Ethiopia as a member state to the Charter.
6. NGOs and NHRIs shall challenge the constitutionality of the law in domestic tribunals and exhaust domestic remedies if any.

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<sup>168</sup> Hayman, Rachel, 'Going in the "Right" Direction? Promotion of Democracy in Rwanda since 1990' (2009) 5(1) *Taiwan Journal of Democracy* 51

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