

Communication 445/13- Human Rights Council and Others v. Ethiopia

Rapporteur:

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Commission) received this complaint at its Secretariat (the Secretariat) on 13 April 2013. It is submitted by Human Rights Council (HRCO, the first Complainant), a Non-Governmental Organisation registered in the Federal Democratic of Ethiopia. HRCO is supported by International Centre for the Legal Protection of Human Rights (INTERIGHTS), which subsequently withdrew from the matter; East and Horn of Africa Human Rights Defenders Project; CIVICUS; International Federation for Human Rights (FIDH); and Word Organisation Against Torture (the Co-complainants).
2. The Complaint is submitted against the Federal Democratic Republic of Ethiopia (the Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the Charter).¹
3. The Complainants state that in January 2009, the Respondent State adopted the Charities and Societies Proclamation No. 621/2009 ("the CSO Proclamation"). The CSO Proclamation came into force on 13 February 2009 (the effective date). The law was promulgated to aid and facilitate the role of Charities and Societies in the overall development of Ethiopian peoples. Among others, the CSO Proclamation establishes the Charities and Societies Agency (the CSO Agency), and a Board. Upon coming into force it required all existing human rights organisations to re-register with the CSO Agency within one year from the effective date.
4. Further to the CSO Proclamation, the Respondent State issued several directives and regulations to facilitate the implementation of the CSO Proclamation. Among them is the Council of Ministers Regulation for the Registration and Administration of Charities and Societies (the Council of Ministers Regulations). Article 10(2) of the Council of Minister Regulations provides that "the effects of re-registration shall commence only one year after the effective date of the CSO Proclamation and not immediately after registration."

¹ Ethiopia ratified the African Charter on 15 June 1999

5. In March 2009 the Ministry of Justice issued a circular indicating that all charities and societies were permitted to continue their work in accordance with the previous legal framework until the Agency was established and the re-registration process commenced.

6. The first Complainant applied for registration on 22 October 2009. On 8 December 2009, without a court order or prior notification, the Agency froze the first Complainant's assets including private bank accounts and sustainability fund which together were in the sum of approximately nine million Birr (equivalent of US\$ 566,000.00). These funds had been acquired from both international and domestic sources since 2002.

7. The first Complainant received its certificate of registration as an Ethiopian charitable society on 11 December 2009. Three days later, on 14 December 2009 the first Complainant received a written notification of the freezing of its assets on the ground that a charitable society cannot convert to an Ethiopian charitable society while still in possession of foreign funds.

8. Relying on the Council of Ministers Regulation and the circular issued by the Ministry of Justice (paragraphs 4 and 5 above), the first Complainant lodged a complaint with the Director of the CSO Agency on 17 December 2009 and subsequently on 1 February 2010, claiming that the Agency's decision to freeze assets was premature and unlawful. The first Complainant also contended that the CSO Agency's decision indiscriminately affected funds lawfully acquired from foreign sources before the effective date as well as funds lawfully sourced domestically, details of which had been clearly provided in its statements of accounts submitted to the CSO Agency on application for re-registration. The Director of the CSO Agency dismissed the entire complaint.

9. On 3 August 2010 the first Complainant submitted an appeal to the CSO Agency's Board (the Board) which, among other functions, considers appeals against decision of the Director General of the CSO Agency. In its appeal, the first Complainant additionally argued that the CSO Proclamation does not give the Agency any power to freeze bank accounts. In its decision on the appeal, the Board endorsed the decision of the Director General of the CSO Agency. Among others, the Board held that by collecting funds from foreign sources in 2009 the first Complainant had contravened the spirit of the regulation which provided for the one year transition period only for purposes of allowing the re-registration process to take place. The Board also held that

the power to freeze assets is within the ambit of Article 6(1) (l) of the CSO Proclamation which vests the Agency with the power to “carry out such other activities necessary for the attainment of its objectives.”

10. The first Complainant appealed to the Federal High Court against the Board’s decision. The appeal challenged the Board’s factual findings and interpretation of various provisions of the relevant law and regulations. The Federal High Court found that there was no error of law and consequently upheld the decision of the Board. Among others, the Court held that the first Complainant could not transfer the funds collected from foreign sources to its new status as re-registered because in terms of Article 18(2) of the Council of Ministers Regulations a foreign or Ethiopian Resident charity that converts to an Ethiopian charity or society shall not transfer the assets that are from foreign sources to the converted charity or society. The Court also held that the CSO Agency properly invoked and used the power to freeze assets because the first Complainant had contravened the law.

11. The first Complainant lodged a further appeal to the Cassation Bench of the Federal Supreme Court against the decision of the Federal High Court. On 19 October 2012 the Cassation Bench of the Federal Supreme Court upheld the decision of the Federal High Court.

12. The Complainants aver that several provisions of the CSO Proclamation contravene the Charter. Among others, Article 88(1) of the CSO Proclamation provides that organisations working on seven rights-based themes cannot receive more than 10% of their funding from international sources. Further, 70% of the annual budget must be allocated to program activities, and 30% for administrative costs. By Article 98(1), all domestic fundraising activities must be permitted by the CSO Agency. Article 77(3) prohibits anonymous donations and requires information clearly identifying all benefactors of charities and societies, members’ details and donors, to be submitted to the Government. The CSO Agency has broad discretionary powers to interfere in the organisational and administrative affairs of charities and societies. For example, under Article 85 of the CSO Proclamation it can enter premises of any charity or society without a court warrant to search the property, take away original documents and interrogate employees. The CSO Agency can also take all necessary measures for purposes of attaining its objectives. The Complainants cite several other provisions of

the CSO Proclamation which they assert are unduly restrictive and inconsistent with the African Charter.²

13. To illustrate the implications of the impugned legal framework, the Complainants state that regional and international human rights bodies have also expressed concern about the limitations that the CSO Proclamation places on human rights activities in Ethiopia in particular concerning the 10% limit on the foreign funding of national NGOs and unanimously called on Ethiopia to abolish such restrictions.

14. Specifically, they state that the CSO Proclamation has negatively impacted the HRCO and other approximately 120 human rights organisations which have been forced to terminate all human rights activities in return for eligibility for foreign funding or continue conducting human rights work and forgo international financial assistance. They aver that domestic funding opportunities are severely limited in Ethiopia. As a result human rights organisations are effectively deprived of the means for undertaking their human rights protection and promotion work.

15. The Complainants also state that the first Complainant was forced to reduce the number of its branches across the country and its staff from 58 to a meagre 12 at its head office and three remaining branches so that it could free up resources for its Human Rights Monitoring and Investigation Department. The first Complainant has also had to scale down its work significantly owing to the limited resources remaining.

Alleged violations of the Charter

16. The Complainants submit “that [the first Complainant’s] rights under Article 1, 7(1), 9(1) and (2), 10, 14 and 15 of the African Charter have been violated. In particular, they plead that:

- (a) by freezing the first Complainant’s funds without affording it a prior chance to be heard, and failing to provide a copy of the judgment of the Supreme Court, the Respondent State has violated Article 7 of the Charter.
- (b) by forcing the first Complainant to scale down its monitoring, investigative and reporting roles, and by granting the CSO Agency the power to demand

² For the present purposes, the Commission does not find it necessary to reproduce all the provisions of the CSO Proclamation alleged to be inconsistent with the Charter.

information from organization, which information may include victims' confidential information and thereby deterring victims from seeking assistance, the Respondent State has violated the right to receive information under Article 9(1) of the Charter.

- (c) by limiting sources of funding and thus forcing the first Complainant to scale down its monitoring, investigative reporting, and thus inhibiting it from expressing its analysis of the human rights situation in Ethiopia, the Respondent State is in violation of Article 9(2) of the Charter on freedom of expression.
- (d) By: (i) forcing the laying off of staff, the CSO Proclamation impacted the right of staff to associate with the organization; (ii) threatening the existence of the organization through its hostility and enactment of the CSO Proclamation which deter people from being employed by the first Complainant and other organisations, the Respondent State is in violation of Article 10 of the Charter; and by (iii) restricting the right to seek, receive and utilize funding the Respondent State is in violation of freedom of association;
- (e) the vagueness of some provisions and the lack of definitions in the CSO Proclamation contravene the principle of legality.
- (f) The freezing of the first Complainant's funds amounts to violation of the right to property guaranteed under Article 14 of the Charter.
- (g) The hostility created by the unrestrained powers to interfere with the first Complainant work contravenes the right to work in a satisfactory environment under Article 15 of the Charter.

Remedies sought

17. The Complainants seek the following remedies:-

- (a) A declaration that the Respondent State is in violation of the first Complainant's rights under Articles 1, 7(1), 9 (1) and (2), 10, 14 and 15 of the Charter,
- (b) That the Respondent State should allow the first Complainant to access its accounts and use or dispose of its assets.

- (c) That the Respondent State should provide compensation, in particular financial compensation to HRCO for damages for the continuing violations.
- (d) A declaration that the CSO Proclamation in Articles 2(2), 14(2) j-n, 53(2), 103(2), 85, 86, and 102(2)(a) and (b), is incompatible with the Charter and other international Instruments to which the Respondent State is a party. Consequently the Respondent State should review the CSO Proclamation and repeal such provisions. Procedure

Procedure

18. The Complaint was received by the Secretariat on 13 April 2013 and acknowledged by letter Ref: **ACHPR/COMM/ETH/690/13** to the Complainants

19. The Commission decided to be seized of the Communication during the 14th Extra-Ordinary Session. By letter Ref: **ACHPR/COMM/ETH/445/13/02/895/13** the Complainants were notified of the Commission's decision and requested to present written submissions on admissibility in terms of Rules 105(1) of the Commission's Rules of Procedure.

20. By Note Verbale Ref: **ACHPR/COMM/ETH/445/13/0.1/896/13** the Communication was transmitted to the Respondent State in terms of the Rules 105(1) of the Commission's Rules of Procedure.

21. By email of 24 December 2013, the Complainants submitted their written arguments and supporting evidence on admissibility, receipt of which was acknowledged by letter Ref **ACHPR/COMM/445/13ETH/09/14** to the Complainants., and by Note Verbale Ref: **ACHPR/COMM/445/13/ETH/08/14** the Secretariat transmitted the Complainants' submissions to the Respondent State with a request to the latter to submit its written observations in terms of Rule 105(2) of the Commission's Rules of Procedure.

22. During its 15th Extra-Ordinary Session held from 07 to 14 March 2014, the Commission deferred consideration of the Admissibility of the Communication pending the Respondent State's written observations. The Secretariat notified both parties of this decision, respectively by letter Ref: **ACHPR/COMM/445/13/ETH/444/14** and Note Verbale Ref: **ACHPR/COMM/445/13/ETH/446/14**.

23. By letter dated 22 April 2014 and received by the Secretariat through e-mail on 25 April 2014, the International Centre for the Legal Protection of Human Rights

(INTERRIGHTS) withdrew from the Communication as a co-Complainant because it was due to cease operations.

24. During the 55th Ordinary Session of the Commission, held from 28 April to 12 May 2014, the Respondent State's through its delegates to the Session informed the Secretariat that the Complainants' submissions on Admissibility were never received by the Respondent State.

25. By Note Verbale Ref: **ACHPR/COMM/445/13/ETH/951/14**, the Complainants' submissions were retransmitted to the Respondent State with a request to the latter to submit its written observations within 60 days of the notification. The Complainants were informed of this development by letter Ref: **ACHPR/COMM/445/13/ETH/950/14**.

26. The Secretariat received the Respondent State's written observation dated 27 July 2014 and transmitted the same to the Complainants by letter Ref: **ACHPR/COMM/445/13/ETH/1437/14** on 11 August 2014 with a request to the latter to submit any reply in terms of Rule 105(3) of the Commission's Rules of Procedure.

27. By email received at the Secretariat on 8 September 2014 the Complainants submitted their Reply to the Respondent State observations.

ADMISSIBILITY

The Complainants' submissions

28. The Complainants submit that the Communication satisfies all the criteria for admissibility under Article 56 of the Charter. They state that they have clearly identified themselves with full contact details in compliance with Article 56(1) of the Charter. They also aver that "the Communication is plainly compatible with the Constitutive Act of the African Union and the Charter in terms of Article 56(2) of the Charter. Further, they contend that the Communication is presented in polite and respectful language in accordance with Article 56(3) of the Charter; and it is based on information provided by the first Complainant and court documents, and not media reports in compliance with Article 56(4) of the Charter. Regarding Article 56(6) of the Charter, they aver that the Communication was submitted within six months of exhaustion of local remedies. With respect to Article 56(7) of the Charter, they state that they have not presented this complainant to any other procedure of international investigation or settlement.

29. Regarding Article 56(5) of the Charter on exhaustion of local remedies, the Complainants refer to the steps taken at domestic level as stated at paragraphs 8 - 11 above, and contend that all local remedies available in the Respondent State were exhausted as there is no further forum to refer the complaint to.

30. In light of the foregoing submissions, the Complainants request that this Communication should be admitted for consideration on the merits.

The Respondent State's observations

31. The Respondent State avers that the CSO Proclamation and related regulations were promulgated to govern societies and charities, replacing the regime under the 1960 Civil Code of Ethiopia. The latter law had become incompatible with the developments in the sector. Among others factors, civil society organisations operated unchecked and there was public outcry about massive financial mismanagement which meant that funds collected by these organisations were not being applied for the amelioration of the intended beneficiaries. There was also a need to enhance and regulate the roles of Non-Governmental Organisations and other Civil Society Actors in the development and governance of the Ethiopian peoples. The new legal framework ensures citizen's realisation of freedom of association as enshrined in its Constitution. It also ensures that civil society organisations operate in a transparent and accountable manner so that the work of these organisations and the resources they collect truly benefit the peoples of Ethiopia.

32. Regarding admissibility, the Respondent State submits that the Communication does not comply with Article 56(5) of the Charter. It states that adequate and effective remedies are available within its legal system and the Complainants have not exhausted such remedies. In terms of the law, the rights alleged to have been violated are guaranteed in its laws including the Constitution. It states that the Charter and other international human rights instruments which it has ratified are part of its domestic law by virtue of Article 9(4) of its Constitution.³

33. Further, the Respondent State affirms that under its constitutional arrangement, courts of law have no power to interpret the Constitution. Instead, it is the House of Federation that is vested with the judicial power to interpret the Constitution. The House of Federation is assisted in its judicial mandate by a Council of Constitutional

³ Section 9(4) of the Constitution of the Federal Democratic Republic of Ethiopia provides that "all international agreements ratified by Ethiopia are an integral part of the law of the land."

Inquiry. Any interested party has a right to challenge federal and regional laws as unconstitutional by submitting a request to the Council of Constitutional Inquiry.⁴ The Council of Constitutional Inquiry is vested with the power to undertake a technical consideration of such requests and provide recommendations to the House of Federation for final decision.⁵

34. Where the challenge relates to fundamental rights and freedoms enshrined in its Constitution, the proposed interpretation of the Constitution and recommendations are required to comply with the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and other international instruments to which Ethiopia is a party.⁶ The House of Federation is required to issue its final decision within 30 days of recommendations being submitted to it.⁷

35. To prove the effectiveness and sufficiency of constitutional review as a remedy, the Respondent State cites the case of a Mr. Melaku Fenta, the former director of the Ethiopian Revenue and Customs Authority who was prosecuted for corruption. Being director, Mr. Melaku Fenta's rank was equivalent to that of a Minister. Article 8(1) of Proclamation No 25/1996 vested the Federal Supreme Court with exclusive first instance jurisdiction to try senior officials of federal government for offences committed in connection with their official duties.

36. The constitutionality of Article 8(1) of Proclamation 25/1996 was referred to the House of Federation on the grounds that it violates the rights to appeal and equality before the law guaranteed under the FDRE Constitution. The House of Federation, upon the recommendation of the Council of Constitutional Inquiry, held the provision to be unconstitutional and accordingly struck down its application. Mr. Melaku Fenta's case was remitted to the Federal High Court for trial.

37. The Respondent State maintains that a constitutional review before the House of Federation such as in *Melaku Fenta's case* must be viewed in light of its judicial nature as a remedy. It contends that the remedy is thus available, effective and sufficient. It states that the Complainants did not use this procedure to challenge the provisions of the CSO Proclamation, the related regulations, and their application. The Respondent State invokes the Commission's view in [Anuak Justice Council v Ethiopia](#)⁸ that "if a remedy

⁴ Council of Constitutional Inquiry Proclamation No. 250/2001 (Proclamation 250/2001), Art. 6(2)

⁵ Ibid

⁶ Constitution, Art. 13(1), Proclamation 250/2001, Art. 20(2)

⁷ Proclamation 250/2001, Art. 7

⁸ [Communication 299/05 - Anuak Justice Council v Ethiopia](#) ACPR (2006), para. 58

has the slightest likelihood to be effective, the applicant must pursue it. Arguing that local remedies are not likely to be successful, without trying to avail oneself of them, will simply not sway this Commission.” To the extent that Complainants did not resort to constitutional, the Respondent State submits that local remedies have not been exhausted. In that regard Article 56(5) of the Charter is not satisfied and the Communication must be declared inadmissible.

38. In any event, so argues the Respondent State, adequate local remedies have been accorded to the first Complainant. It states that the first Complainant appealed its case all through to the Federal Supreme Court, which is the apex court, without success because it had contravened the law. It avers that upon the CSO Proclamation coming into force, Ethiopian societies and charities could not source more than 10% of their funds from outside the jurisdiction. The first Complainant did exactly what the law prohibits. As a result, its assets which had foreign sources were frozen.

39. It further states that the Agency responsible for charities and societies is empowered to transfer seized assets to another society or charity with similar objectives. However, considering the first Complainant’s valuable work of promoting and protecting human rights, the seized funds have not been transfer to another charity or society. Exceptionally, the Agency has allowed the first Complainant to draw an amount equal to 10% of the latter’s annual budget every year. The Agency intends to allow the first Complainant to draw such amount until the entire fund is exhausted.

40. The Respondent State contends that where the domestic jurisdiction has accorded adequate remedies, the Commission should not be used as a court of appeal as it does not have such jurisdiction. It thus submits that this Communication must be declared inadmissible.

The Complainants’ Reply

41. In their reply the Complainants contend that **(a)** a constitutional review was not necessary, **(b)** the Council of Constitutional Inquiry and the House of Federation are not judicial organs for purposes of exhaustion of local remedies; and in any event **(c)** a constitutional review is not an effective and sufficient remedy. A constitutional review was deemed irrelevant because, unlike in the *Melaku Fenta Case*, the first Complainant did not require constitutional interpretation of its grievance, and similarly the courts felt that the grievances in question did not require interpretation of the Constitution. This explains why neither the courts nor the first Complainant referred the matter to the

Council of Constitutional Inquiry as permitted under Article 6(2) of the Council's Proclamation 250/2001. Moreover, the Respondent State which bears the onus has not demonstrated with evidence how a constitutional review can effectively and sufficiently redress the first Complainant's grievances.

42. Further, the Complainants contend that the Council of Constitutional Inquiry and the House of Federation which has the ultimate power to interpret the Constitution and decide constitutional disputes is composed of representatives of the various Ethiopian nationalities. They submit that the two bodies are not courts or judicial organs for purposes of exhaustion of local remedies, citing in aid among others, [Communications 221/98 - Alfred B. Cudjoe v Ghana](#) in which the Commission held that the remedies which ought to be exhausted for purposes of Article 56(5) of the Charter must be those "sought from courts of a judicial nature".⁹ In the circumstances, they were not obliged to pursue a constitutional review..

43. Furthermore, the Complainants contend that a constitutional review would be inadequate and ineffective because the House of Federation being a non-judicial organ would not operate impartially and has no obligation to decide requests according to legal principles.¹⁰ Additionally, it is not sufficiently certain that a constitutional review would succeed and therefore it offers no prospects of success as envisaged in the jurisprudence of the Commission.¹¹ The Complainants submit that for For this reasons also, they were not obliged to pursue a constitutional review of provisions of the the CSO Proclamation and their enforcement on the first Complainant..

The Commission's Analysis on Admissibility

44. This Communication is submitted under Article 55 of the Charter which provides for Communications other than those of State Parties to the Charter. Such a Communications must satisfy the requirements under Article 56 of the Charter to be considered on the merits. It is primordial that the conditions are cumulative and must all be satisfied for this purpose. Consequently if one of the conditions is not satisfied,

⁹ [Communication 221/98 - Alfred B. Cudjoe v Ghana](#) ACHPR (1999), para. 14; and [Communication No. 262/87 - R.T v France](#) (1989) HRC, para. 7.4

¹⁰ Citing [Communication 87/93 - Constitutional Rights Project \(in respect of Zamani Lakwot and six others\) v Nigeria](#) (1995) ACHPR paras. 8 & 9.

¹¹ [Communications 147/95 and 149/96 - Sir Dawda K. Jawara v The Gambia](#) (200) ACHPR paras. 32, 35, & 38; [Communications 48/90, 50/91, 52/91 & 89/93 - Amnesty International and Others v Sudan](#) (2000) ACHPR para. 37

the Communication is declared inadmissible entirely or in the severable respects that it does not satisfy any of the conditions.¹²

45. Further, the threshold admissibility requirements under Article 56 of the Charter broadly espouse fundamental public policy considerations, and examination of a Communication's admissibility does not solely depend on whether compliance with any of the conditions is in dispute between the parties. It is the Commission's duty to ensure, without undue formalism, that all the requirements are satisfied for a Communication to pass for further consideration on the merits.

46. In the present Communication, the Respondent State does not contest admissibility in terms of Article 56(1), (2), (3), (4), (6) and (7) of the Charter. Having examined the Complainant's submissions as summarised at paragraph 28 above, the Commission does not reckon any issue with respect to the uncontested conditions. Accordingly, the Commission is satisfied that the Communication complies with Article 56(1), (3), (4), (6) and (7) of the Charter.

47. Regarding the requirement to exhaust local remedies, Article 56(5) of the Charter provides that Communications must be submitted to the Commission after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. The requirement to exhaust local remedies must be appreciated in light of Article 7(1)(a) of the Charter which provides for the right to appeal to competent national organs against acts violating one's fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.¹³ The requirement to exhaust local remedies entails the exercise of the right to appeal to competent national organs against acts violating one's fundamental rights.

48. As is patent from the language of Article 56(5) of the Charter, the remedy must be available (...if any...) and not obviously unduly prolonged. If the remedy is not available, or if available, the procedure for pursuing it is obviously unduly prolonged, a complainant is absolved from pursuing or exhausting it before impleading the State Party before the Commission. These two are treaty exceptions to the rule. A remedy is

¹² [Communication 304/05 - FIDH and others v Senegal](#) (2006) ACHPR para 38; [Communication 338/07 - Socio-Economic Rights and Accountability Project \(SERAP\) v Nigeria](#) (2010) ACHPR para 43; and [Communication 284/03 - Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe](#) (2009) ACHPR para 81; and [Communication Anuak Justice Council v Ethiopia](#) (2006) ACHPR para. 44.

¹³ [Communication 48/90, 50/91, 89/93 - Amnesty International \[et\] al.v Sudan](#) (1999) ACHPR para. 31; [Communication 299/05 - Anuak Justice Council v Ethiopia](#) (2006) ACHPR para. 49

available if there exists a mechanism(s) by which competent national organs examine the substance and validity of a given complaint and, where the complaint is adjudged valid, grant appropriate relief. For this purpose there must exist relevant substantive and procedural laws, and competent institutions or organs and processes which a complainant can access and utilise in practice without unjustifiable impediments.

49. Further, the remedy to be exhausted must be effective and sufficient.¹⁴ A remedy is effective if it offers prospects of success and, upon success, the appropriate relief is one that is capable of adequately and timely redressing the specific violation suffered.¹⁵ Remarkably, the effectiveness of a remedy does not depend on the certainty or guarantee of a favourable outcome for the complainant.¹⁶ It is enough that the complaint is arguable, in the sense that it is as susceptible to being adjudged valid as it may be to be adjudged unmeritorious upon full examination of supporting and vitiating evidence, and legal arguments. Furthermore, as observed in *Đorđević v. Croatia*,¹⁷ in assessing effectiveness of a remedy, it is necessary to take into account, not only the formal remedies available, but also the general legal and political context in which they operate as well as the nature of the complaint and the personal circumstances of a given complainant.

50. In the present Communication, it clearly is not the case of the Complainant that local remedies are not available. To the contrary, the Complainants initially state that they exhausted local remedies, which is only possible if such remedies are available in the sense enunciated at paragraph 48 above. Indeed the facts stated at paragraphs 8 -11 and 29 above show that the first Complainant consecutively approached the Director of the CSO Agency, the Board of the CSO Agency, the Federal High Court and ultimately the Cassation Bench of the Federal Supreme Court. The Complainants do not allege that there were impediments in those endeavours. The Cassation Bench of the Federal Supreme Court is the final judicial authority of the Respondent State. Before the domestic authorities, the first Complainant's case was that the freezing of its bank accounts was premature and unlawful in terms of the relevant law. Assuming the domestic mechanism engaged by the first Complainant is the appropriate local remedy, it is available and was clearly exhausted upon the decision of the Cassation Bench of the Federal Supreme Court. The Respondent State does not contest this.

¹⁴ Communication 147/95, 149/96 - Sir Dawda K. Jawara v The Gambia (2000) ACHPR para. 31 & 32

¹⁵ Velásquez-Rodríguez v. Honduras (1988) IACtHR (Series C, No. 4) para.66

¹⁶ M.S.S v Belgium and Greece (2011) ECHR (Application No. 30696/09) para. 289

¹⁷ Đorđević v. Croatia, (2011) ECHR (App. No. 41526/10) para. 101

51. Rather, the Respondent State avers that the first Complainant did not engage and exhaust the appropriate remedy for the type of complaint now before the Commission. It maintains that the appropriate remedy is a constitutional review. The competency to deal with a constitutional challenge is of a judicial nature, and unlike in many jurisdictions, this competence is exclusively vested in the House of Federation assisted by the Council of Constitutional Inquiry.

52. The Complainants do not dispute that a constitutional review is provided for under domestic law and that the competent national organ for that purpose is the House of Federation assisted by the Council of Constitutional Inquiry. Instead, as noted in paragraph 41 above, the Complainants advance three arguments to obviate the duty to pursue a constitutional challenge as a remedy for the grievance at hand.

53. The Commission is not persuaded by the Complainants' argument that a constitutional review was not necessary because the grievance did not require interpretation of the Constitution. The domestic courts' judgments indicate that the first Complainant pleaded a case that is in some material respects different from the one pleaded before the Commission. The claims before domestic authorities were substantially threefold: (a) that the freezing of its funds was premature in terms of Article 10(2) of the Council of Ministers Regulations and the circular issued by the Ministry of Justice (see paragraph 5 above); (b) that the seizure indiscriminately and erroneously applied to funds lawfully acquired from foreign sources before the CSO Proclamation came into force, and funds lawfully sourced domestically; and (c) that the CSO Agency has no power to freeze or seize assets under the enabling law and consequently the seizure of its funds was unlawful.

54. Evidently, the first Complainant challenged only the propriety of the practical measures adopted against it. The first Complainant case was that the measures adopted against it were contrary to the CSO Proclamation, the Council of Ministers Regulations and the circular issued by the Ministry of Justice. In doing so, the first Complainant proceeded as though it had no problem with certain provisions of the CSO Proclamation itself. The decisions of the Federal High Court and the Cassation Bench of the Federal Supreme Court indicate that the first Complainant neither pleaded the case that the measures complained of violated any of the fundamental rights guaranteed under the Respondent State's Constitution, nor the case that certain provisions of the CSO Proclamation are inconsistent with the fundamental rights. Yet the complaint now before the Commission is precisely that certain parts of the CSO Proclamation and the measures adopted against the first Complainant are inconsistent with and therefore

violate the rights under the Charter. To determine the present Communication on the merits, the Commission would undertake the same exercise as the one that would have been undertaken by the relevant domestic body: interpreting the rights guaranteed under the Charter alleged to have been violated and assessing whether the impugned provisions of domestic law and the measures taken under them are consistent with the rights so interpreted.

55. To make the point vivid, a “constitutional review” would have entailed determining a constitutional dispute. In terms of domestic law, a constitutional dispute arises when a federal or state law, or a decision rendered by any government organ or official is contested as contradictory to the Constitution.¹⁸ A constitutional challenge could thus have canvassed the measures taken against the first Complainant as well as the impugned provisions of the CSO Proclamation.

56. It is apt to highlight that the Charter rights referenced in the present Communication are also guaranteed under the FDRE Constitution. Specifically, Article 7(1) of the Charter on the right to have one’s cause heard is guaranteed, among others, as a right of access to justice under Article 37 of the Constitution. Article 9(1) and (2) of the Charter guaranteeing the rights to receive information, and express and disseminate opinions are also protected under Article 29(2) of the Constitution. Similarly, Article 10 of the Charter on freedom of assembly is also guaranteed under Article 31 of the Constitution. Further, Article 15 which guarantees labour rights finds its equivalent in Article 42 of the Constitution. Even the general obligation under Article 1 of the Charter has its near equivalent in Article 13(1) of the Constitution. Additionally, Article 40 of the Constitution is the counterpart of Article 14 of the Charter guaranteeing the right to property.

57. In light of the above considerations, the Commission cannot accept that challenging the constitutionality of the measures adopted against the first Complainant

¹⁸ On this, Art. 83(1) of the Constitution provides that “All constitutional disputes shall be decided by the House of Federation.” In terms of Art. 84(2) of the Constitution and Art. 6(2) of Proclamation 250/2001 establishing the Council of Constitutional Inquiry (CCI), a constitutional dispute arises “Where any Federal or State law is contested as being unconstitutional”. Art. 17(1) of Proclamation 250/2001 vests the power to investigate constitutional issues in the CCI. In terms of Art. 17(2) of the same Proclamation, constitutional issues arise “where any law or decision given by any government organ or official is alleged to be contradictory to the Constitution...”

and certain parts of the CSO Proclamation was not relevant at domestic level when that is precisely the nature of the claim now pleaded before the Commission. The Complainants are content to have the complaint examined under the lenses of fundamental rights guaranteed under the Charter as a proper means of redressing the grievance. Inexplicably, they deemed a similar procedure irrelevant at domestic level. Subject to certain factors to be considered below, the Complainants' inexplicable estimation that a constitutional review was not relevant cannot in and of itself absolve the Complainants from the duty to utilise that procedure. Similarly, the fact that domestic Courts did not refer the constitutionality of the relevant parts of the CSO Proclamation to the CCI, when they could have done so *sua sponte*, cannot be pleaded in support of the case that such a referral was irrelevant. It must be recalled that the duty to exhaust local remedies where they are available lies on the Complainant and whether this duty has been satisfied is determined by reference to the steps taken by the Complainant at domestic level.¹⁹

58. By pleading the complaint without invoking any fundamental rights in the domestic proceedings, the Complainant denied the Respondent State the very opportunity Article 56(5) is designed to afford a State to deal with alleged violations using its domestic mechanisms. Accordingly, the Commission is not persuaded by the argument that a constitutional review was not necessary on the facts of this case.

59. Regarding the argument that the CCI and the House of Federation are not judicial organs for purposes of exhaustion of local remedies, indeed [Alfred B. Cudjoe v Ghana](#) is authority for the proposition that "... the internal remedy to which [Article 56\(5\)](#) refers entails remedy sought from courts of a judicial nature."²⁰ This position has been unquestionably restated and applied in subsequent cases including: *Zimbabwe Human Rights NGO Forum / Zimbabwe*²¹; *Bakweri Land Claims Committee v Cameroon*²²; and *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*²³; *Article 19 v Eritrea*.²⁴

¹⁹ Communication 260/02 0 Bakweri Land Claims Commission v Cameroun (2004) ACHPR para. 55; Van Oosterwijck v. Belgium (1980) ECHR (App. No. 7654/76) para. 39

²⁰ Above, n 9

²¹ Communication 245/02 - Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) ACHPR para. 45 (procedure before the Ombudsman rejected as a remedy)

²² Communication 260/02 - Bakweri Land Claims Committee v Cameroon (2004) ACHPR para. 56 (no attempt to seize the courts)

²³ Communication 386/10 - Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan(2013) ACHPR para. 56 (the Civic Judiciary System; Complaints within the National Security Services; The

Notably, *Alfred B. Cudjoe v Ghana* did not supply reasons for limiting the local remedies to be exhausted to “courts of a judicial nature”. Article 56(5) of the Charter does not in itself also hint at the types of local remedies that ought to be exhausted. It is thus necessary to clarify that the essential characteristic of the remedy that ought to be exhausted for purposes of Article 56(5) of the Charter is its demonstrable effectiveness in redressing a particular violation. In this regard, the remedy must primarily conform to and operate in accordance with certain fundamental legal principles. It must operate in strict observance of the procedural guarantees of a fair hearing by a competent, independent and impartial organ.²⁵ It must be based on enforceable law from which the relief it offers earns its mandatory or coercive force, as opposed to being merely discretionary.²⁶

60. *Cudjoe v Ghana*²⁷ is generally good authority and the Commission affirms it. However, the proposition for which it is authority must be understood in light of the standard constitutional model by which the competence to adjudicate complaints/disputes usually vests in national organs known as “courts of law” which in principle by their very design operate or ought to operate according to the standards enunciated at paragraph 59 above. This is the assumption underlying the proposition in *Cudjoe v Ghana*. It obviously is not the mere nomenclature by which the national organ is named that qualifies its mechanism as a remedy for purposes of Article 56(5) of the Charter. Indeed, even where the national organ is “a court” it is still possible that a

Grievances Committee within the National Advisory Council; The National Commission on Human Rights; and Office of the Ombudsman, all rejected as remedies to be exhausted).

²⁴ Communication 275/03 - Article 19 v Eritrea (2007) ACHPR para. 70 (writ of habeas corpus to the Minister of Justice rejected as a remedy to be pursued).

²⁵ The Charter, Art. 7(1)(a) and (d) as read together with Art. 26; Communication 87/93 - The Constitutional Rights Project (in respect of Zamani Lekwot and six Others) v Nigeria (1995) ACHPR para. 8; Communication 147/83 - Lucía Arzuaga Gilboa v. Uruguay (1985) HRC para. 7.2

²⁶ Communication 375/09 - Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya (Echaria v Kenya) (2011) ACHPR para. 53; Communications 48/90-50/91-52/91-89/93 - Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan (1999) ACHPR para. 31; Communication 313/05 Kenneth Good v Botswana (2010) ACHPR para. 88; Communication 87/93 - The Constitutional Rights Project (in respect of Zamani Lekwot and six Others) v Nigeria (1995) ACHPR para. 9; and Communication 231/99- Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v Burundi (2000) ACHPR para. 23; Communication 334/06 Egyptian Initiative for Personal Rights and Interights v. Egypt (2011) ACHPR para. 96; Velásquez-Rodríguez v. Honduras, n 14 above.

²⁷ Above, n 9

given procedure before it does not qualify as a remedy for purposes of Article 56(5) of the Charter. This was the case in *Echaria v Kenya*²⁸ in which the Commission rejected the Supreme Court's discretionary review of its own decision as a remedy which the complainant had an obligation to pursue.

61. The Commission is inspired in this regard by the jurisprudence of the European Court of Human rights which has held that the "national authority" before which a remedy must be pursued does not necessarily have to be a "judicial authority", but if it is not, its powers and the guarantees which it affords are relevant in determining whether the mechanism of the national organ is an effective remedy to be pursued.²⁹ The seminal proposition in *Cudjoe v Ghana* must thus not be treated as a fixed rule limiting domestic space for vindication of rights to procedures before domestic organs termed "courts of law", regardless of the nature of the alleged violations and arrangements in the domestic legal system for dealing with such violations. Indeed an inflexible proposition limiting remedies strictly to courts of law cannot justifiably be drawn from the language of Article 56(5) of the Charter.

62. To the extent that the nature of a given "national organ" is only but an aspect of effectiveness of a given remedy, the Complainants' second and third arguments stated in paragraph 41 will be considered together. The mechanism of the House of Federation as assisted by the Council of Constitutional Inquiry will thus be assessed in light of the foregoing considerations. For this purpose the Commission will consider the Respondent State's constitutional arrangement and how a constitutional review is carried out by this mechanism.

63. The Respondent State is constituted as a federal State³⁰ with executive, legislative and judicial powers.³¹ As a federal Republic it is comprised of regional States.³² At the federal level, it has a Federal Government which is the executive branch; a Federal House which is its parliament comprised of the House of the Peoples' Representatives, and the House of Federation;³³ and a federal judiciary vested with judicial functions and

²⁸ Above, n 24

²⁹ *Kudła v. Poland* (2000) ECHR (App. No. 30210/96) para. 157; *M.S.S. v. Belgium and Greece* (2011) ECHR (Application no. 30696/09) para. 289.

³⁰ FDRE Constitution, Art. 1.

³¹ *Id.*, Art. 50(2)

³² *Id.*, Art. 46

³³ *Id.*, Art. 53

powers³⁴ comprised of the Federal Supreme Court which is the apex court,³⁵ followed by the Federal High Court, and First-Instance Courts.³⁶

64. Remarkably, whereas judicial power principally entails adjudication of disputes according to law by courts, the powers to interpret the Constitution and decide constitutional disputes vest exclusively in the House of Federation as opposed to ordinary courts of law.³⁷ The term “constitutional disputes” includes cases where a federal or regional state law or decision is contested as unconstitutional.³⁸ Apart from interpreting the Constitution and deciding constitutional disputes, the House of Federation also: decides issues relating to self-determination including secession; promotes equality and unity of the peoples of Ethiopia; resolves disputes between States that form the federation; determines the division of revenue; safeguards the constitutional order from being disrupted; and determines civil matters that need legislative intervention by the House of Peoples Representatives.³⁹ Notably, whereas the House of Federation as a second and upper chamber of parliament participates in amendment of the FDRE Constitution, it does not appear to have any legislative functions.

65. For purposes of its function to interpret the Constitution and decide constitutional disputes, there is established the Council of Constitutional Inquiry (CCI)⁴⁰ to undertake a technical examination of such matters and provide recommendations to the House of Federation for final decision.⁴¹ The CCI is comprised of the President and Vice-President of the Federal Supreme Court who are respectively also President and Vice-President of the Council of Inquiry; six legal experts appointed by the President of the Republic on recommendation by the House of Peoples' Representatives, who shall have proven professional competence and high moral standing; and three persons designated by the House of Federation from its members.⁴²

³⁴ Id, Art. 79(1)

³⁵ Id, Art. 80(1)

³⁶ Id, Art. 78(2). There is almost a similar structure at regional State level.

³⁷ Id, Arts. 62(1), 83(1)

³⁸ Id, Art. 84(2); Proclamation No. 250/2001, Arts. 6(2) & 17(2)

³⁹ FDRE Constitution, Art. 62

⁴⁰ Id, Art. 82(1)

⁴¹ Id, Art. 84(1)

⁴² Id, Art. 82(2)

66. In terms of access to justice generally, “everyone has a right to bring a justiciable matter to, and obtain a decision or judgment by, a court of law or any other competent body with judicial power.”⁴³ That right also accrues to any association representing the collective or individual interests of its members; or any group or person who is a member of, or represents a group with similar interests.⁴⁴ Further, matters of constitutional interpretation or constitutional disputes may arise within proceedings before courts of law in which case they may be submitted to the CCI by the Court or a party, or indeed outside of such proceedings.⁴⁵

67. Regarding the procedure before CCI, the requirement is that the request should be in elaborate writing.⁴⁶ The CCI is also permitted to call upon pertinent institutions and legal professionals to appear before it and give their opinions.⁴⁷ The Council members then deliberate on all the submissions made to it regarding a given question.⁴⁸ In terms of the outcome, the CCI is required to detail in its ruling the questions submitted to it, its justification as to why the matter required interpretation of the Constitution or not, and the actual ruling it has made on the questions.⁴⁹ Where the matter relates to fundamental rights, it shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR) and international instruments adopted by Ethiopia.⁵⁰ The House of Federation is also required to identify and implement principles of constitutional interpretation that can aid the examination and determination of constitutional issues submitted to it.⁵¹ Regarding the force of the outcome of a constitutional review, “any government body or official is bound to execute the orders given by the CCI on matters within its jurisdiction”⁵², whereas

⁴³ Id, Art. 37(1), emphasis supplied

⁴⁴ Id, Art. 37(2)

⁴⁵ Id, Art. 84(2) &(3), and Proclamation 250/2001, Arts. 21, 22, & 23

⁴⁶ Proclamation 250/2001, Art. 24

⁴⁷ Id, Art. 27

⁴⁸ Id, Art. 28

⁴⁹ Proclamation 250/2001, Art. 31

⁵⁰ FDRE Constitution, Art. 13(1), Proclamation 250/2001, Art. 20(2),. This also applies to the final decisions of the House of Federation: Proclamation No. 251/2001, Art. 7(2)

Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation (Proclamation 251/2001), Art. 7(2)

⁵¹ Proclamation 251/2001, Art. 7(1)

⁵² Proclamation 250/2001, Art. 35

decisions of the House of Federation on matters submitted to it are final and all concerned parties are required to observe and execute them.”⁵³

68. From the foregoing, it is apparent that despite being a second chamber of a state organ called “parliament”, the House of Federation is a *sui generis* dispute settlement body on constitutional issues. Notably, it does not take part in the law making process, which is the preserve of the House of Peoples’ Representatives.⁵⁴ The House of Federation’s dispute settlement competence specifically includes cases where federal or state law or government decisions are contested as unconstitutional through the procedure of constitutional review. This jurisdiction is exclusive to the House of Federation. Unlike in other jurisdictions, regular courts do not have such competence. The fact that the House of Federation is not a court of law does not obviate its suitability to handle constitutional review as a remedy. Moreover in all the other cases in which the Commission insisted on judicial remedies before courts of law, it was the case, or at least assumed that such domestic courts have the jurisdiction to deal with the complaints in question. This is clearly not the case for constitutional review as a remedy in the Respondent State’s legal system.

69. Further, the Complainants’ assertion that the jurisdiction and power of the House of Federation is discretionary and that it has no obligation to decide cases according to legal principles can hardly be sustained. In the Commission’s view, the House of Federation’s power is of a legal nature and not pure political discretion. Particularly, the House of Federation is mandated to decide constitutional issues in accordance with: (a) the norms in the FDRE Constitution which include fundamental human rights, (b) legal principles of constitutional interpretation specifically developed for that purpose. Further, the decisions are required to conform to the principles of the UDHR and other international human rights treaties which the Respondent State has adopted.

70. Moreover the House of Federation is also assisted by the CCI, a technical advisory body comprised of two senior judges of the apex regular court (the President and Deputy President of the Federal Supreme Court), six jurists of note, and a paltry three members from the House of Federation itself. The CCI itself is also required to examine constitutional disputes and make recommendations that conform to the same principles

⁵³ Proclamation 251/2001, Art. 56.

⁵⁴ To the extent that the House of Federation does not participate in law-making it would not be in a position of conflict of interest when it sits to review the Constitutionality of laws passed by the House of Peoples’ Representatives.

as the ultimate decisions of the House of Federation. Thus both the CCI and House of Federation are required to conduct a constitutional review and decide according law. The decisions are legally binding and all government bodies and officials are legally bound to implement them.

71. Remarkably, the Respondent State has referred the Commission to the case of *Melaku Fenta* to illustrate that the remedy of constitutional review works in practice.⁵⁵ In that case, Art. 8(1) of Proclamation 25/1996 was declared unconstitutional for being inconsistent with the rights to appeal and equal protection of the law. Consequently, the trial of Mr. Melaku Fenta before the Federal Supreme Court was averted and the case was remitted to the Federal High Court. The Commission finds this case comparable to the present complaint in that certain provisions of Proclamation 621/2009 (a federal law) and the measures taken under it (freezing of bank accounts by the CSO Agency, a government body) are challenged as violative of fundamental rights under the Charter, which rights are also guaranteed under the FDRE Constitution.

72. The Commission is satisfied that a constitutional review is clearly a legal action that may lead to the redress of the complainant grievances at the domestic level⁵⁶, and in this regard it is designed for vindication of rights as opposed to obtaining favours. Accordingly, a constitution review ought to have been pursued and exhausted at the domestic level. The Complainants did not even attempt it despite that possibility in the context of proceedings before regular courts or indeed outside of such proceedings. Instead, the first Complainant completely disregarded a constitutional review on its own opinion that such a procedure was not relevant to its grievances. This view as the Commission has concluded above is not supported by the nature of the complaint and constitutional review as a remedy.

73. In light of the nature, practicality and effectiveness of a constitutional review as considered above and illustrated by the *Melaku Fenta Case*, the Complainants' view about the inefficacy of a constitutional review amounts to mere theoretical apprehensions. As held in *Anuak Justice Council v Ethiopia* such apprehensions cannot absolve a Complainant from the obligation to pursue and exhaust local remedies which present a likelihood of success.⁵⁷ The first Complainant outright ignored a constitutional review as a remedy and opted for proceedings before regular courts which do not have

⁵⁵ See above paragraphs 35 and 36

⁵⁶ Communication 299/05 - *Anuak Justice Council v Ethiopia* (2006) ACHPR para. 50

⁵⁷ *Id.*, para. 58;

the competence to deal with the type of complaint now pleaded before the Commission. In so doing, the first Complainant proceeded as though it is not aggrieved by provisions of the CSO Proclamation. In challenging the measures, it did not even plead violation of a single fundamental right guaranteed under the FDRE Constitution. Only to plead such a case for the very first time before the Commission. Thus, the Respondent State was not presented with the opportunity to examine the constitutionality of provisions of the CSO Proclamation and the measures complained of under the prism of fundamental rights. In the Commission's view, this Communication does not comply with Article 56(5) of the Charter on exhaustion of local remedies. The Complainants are at liberty to approach the Commission if a constitutional review of both the CSO Proclamation and the measures taken against the first Complainant does not yield the remedy they are seeking.

Decision of the Commission on Admissibility

74. In light of the above reasons, the African Commission on Human and Peoples' Rights declares this Communication Inadmissible under Article 56(5) of the Charter for failure to exhaust the relevant local remedy.

Done in Nairobi, Kenya this 31st day of July, 2015 during the 18th Extraordinary Session of the African Commission on Human and Peoples' Rights held from 29 July - 8 August 2015