ARE HUMAN RIGHTS PROTECTED IN TIMES OF EMERGENCY UNDER THE AFRICAN CHARTER ?

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ABSTRACT

A state of emergency is a situation in which a government is empowered to perform actions that it would normally not be permitted to do. A government can declare such as a state during a disaster, civil unrest or armed conflict. Such declarations alert citizens to change their normal behavior and orders government agencies to implement emergency plans. **Justitium** is its equivalent in Roman Law – a concept in which the senate could put forward a final decree (**senatus consultum ultimum**) that was not subject to dispute. States of emergency can also be used as a rationale or pretext for suspending rights and freedoms guaranteed under a country's constitution or basic law. The procedure for and legality of doing so vary by country.

INTRODUCTION

A state of emergency derives from a governmental declaration made in response to an extraordinary situation posing a fundamental threat to the country. The declaration may suspend certain normal functions of government, may alert citizen to alter their normal behavior, or may authorize government agencies to implement emergency preparedness plans as well as to limit or suspend civil liberties and human rights.

The need to declare a state of emergency may arise from situations as diverse as an armed action against the state by internal or external elements, a natural disaster, civil unrest, an epidemic, a financial or economic crisis or a general strike. States of emergency are not uncommon occurrences, particularly in dictatorial regimes where the state of emergency may endure as long as the regime lasts. In some situations, marital law is also declared, allowing the military greater authority to act. Other terms for referring to emergency situations are **state of exception, state of alarm and state of siege.**

Under international law, rights and freedoms may be suspended during a state of emergency. For example, a government can detain persons and hold them without trial. All rights that can be derogated from are listed in the **international covenant for civil and political rights**. Non- derogable rights cannot be suspended.[1] Non-derogable rights are listed in **Article 4 of the ICCPR, they include right to life, the rights to freedom from arbitrary deprivation of liberty, slavery, torture and ill-treatment**.[2] At this juncture, it is worthy to note that some countries have made it illegal to modify emergency law or the constitution during the emergency, other countries have the freedom to change any legislation or rights based constitutional frameworks at any time that the legislative chooses to do so. It must be recalled that constitutions are contracts between the government and the private individuals of that country. **The international covenant for civil and political rights (ICCPR)** is an international law document signed and ratified by states. Therefore, the covenant applies to only those persons acting in an official capacity, not private individuals. However, states parties to the covenant are expected to integrate it into national legislation. The state of emergency (within the ICCPR Framework) must be publicly declared and the secretary – General of the united Nations and all other states parties to the covenant must be notified

[1] (In French) D. Premont, C. Stenersen, I. Oseredczuk, Bruylant, Brussels, Droits, Intangibles et etats d'exception (fr) 1996, 644p., ISBN 2 – 8027 – 0766 – 3, Editions Bruylant.

[2] Article 4, International covenant on civil and political rights

immediately to declare the reasons for the emergency, the date in which the emergency is to start, the derogations that may take place, with the timeframe of the emergency and the date in which the emergency expected to finish. Although this is common protocol stipulated by the ICCPR, its monitoring committee of experts has no sanction power and its recommendations are therefore not always strictly followed, enforcement is therefore' better regulated by the **American and European conventions and courts on human right.**[3] Though fairly uncommon in democracies, dictatorial regimes often declare a state of emergency that is prolonged indefinitely for the life of the regime, or for extended periods of time so that derogations can be used to override human rights of their citizens usually protected by the **international covenant on civil and political rights**.[4] In some situations, martial law is also declared, allowing the military greater authority to act. In other situations, emergency is not declared and de facto measures taken or decree – law adopted by the government.

In this paper, however the focus shall be: **are human rights protected in time of emergency under the African Charter.**

This seminar paper is divided into five (5) parts, the first being introduction, followed by the essential principles which must be respected during emergency rule, human rights that cannot be limited even under state of emergency. The third part deals with the question, **are human right protected in times of emergency under the African Charter** and factors justifying absence of derogation clause. The fourth part deals with implication of derogating from constitutional rights under the African charter, while the fifth and final part deals with conclusion.

2.0 ESSENTIAL PRINCIPLES THAT MUST BE RESPECTED DURING EMERGENCY RULE

It is worthy to note that, a country's constitution or legislation normally describes the circumstances that can give rise to a state of emergency, identifies the procedures to be

[3] (in Italian) Declaratoria dello stato di emergen za e consiglio supremo di diffesa nuovi studi politici, gennaio – giugno 2005, n. ½, p. 107

[4] See Judson, 2012, "where is R2P grounded in international law"

followed and specifies limits on the emergency powers that may be invoked or the rights that can be suspended.[5] While each country will want to define its own practices, international norms have developed that can provide useful guidance. For example, important international treaties such as the **European Convention of Human Rights and Fundamental Freedom (ECHR) and the International Covenant on Civil and Political Rights (ICCPR)** stipulate that states are to observe the following principles.[6]

* **Temporality**: This refers to the exceptional nature of the declaration of a state of emergency.

* **Exceptional Threat:** The crisis must present a real, current or at least an imminent danger to the community.

* **Declaration**: The state of emergency must be announced publicly; this informs citizens of the legal situation and reduces the possibility of a de facto state of emergency, that is, a situation whereby the state restricts human rights without officially proclaiming a state of emergency.

* **Communication**: Notification of the measures taken must be made to other states and relevant treaty-monitoring bodies; for example, if a state is to derogate from its obligations under the **ECHR or ICCPR** then it must inform the **Secretary General** of respectively the **Council of Europe or the UN** of its derogation, the measures it has taken and the reasons therefore, as well as the termination of the derogation,

* **Legality**: Human rights and fundamental freedoms during a state of emergency must respect the limits provided for by the relevant instruments of international and national law; furthermore, a state of emergency does not imply a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality, by which they are bound at all times.

* **Intangibility**: This concerns the fundamental rights from which there can be no derogation, even during times of emergency.

[5] www,dcaf.ch/publications.backgrounders
[6] Ibid

2.0.1 HUMAN RIGHTS THAT CANNOT BE LIMITED EVEN IN THE EVENT OF A STATE OF EMERGENCY?

Certain human rights are non-derogable under any circumstances. **The ECHR and the ICCPR** identify these rights as follows.[7]

- The right to life
- Prohibition of Torture
- Freedom from Slavery
- Freedom from post facto legislation and other judicial guarantees
- The right to recognition before the law
- Freedom of thought, conscience and religion.

The UN Human Rights Committee has recognized that, in addition to the non-derogable rights listed above, there are several other humanitarian provisions that must remain inviolable.

- The Human treatment of all persons deprived of their liberty
- Prohibitions against hostage-taking and unacknowledged incarceration
- Protection of the rights of persons belonging to minorities
- The prohibition of propaganda advocating war or national, racial, or religious hatred
- Procedural guarantees and safeguards designed to ensure the integrity of the judicial system.

3.0 ARE HUMAN RIGHTS PROTECTED IN TIMES OF EMERGENCY UNDER THE AFRICAN CHARTER?

It is worthy to note that **Article 4(1)** of the **International Covenant on civil and political rights provides that: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that**

[7] www.yalellawjournal.org/pdf/113-5/Acker.man% 20 Final. Pdf

such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

In contrast to **Article 27(1)** of the **American Convention of Human Rights, Article 15(1)** of the **European Convention** on **Human Rights** and lastly, **Article 30 of the 1961 European Social Charter,** the **African Charter on Human and Peoples' Rights (African Charter)** does not contain a clause permitting suspension of human rights during times of emergency, while major human rights instruments allow state parties to suspend some rights.[8] **The African Commission on Human and People's Right (African Commission or Commission)** has repeatedly held that a declaration of a state of emergency cannot be invoked as a justification for violations or permitting violations of the African charter.[9] These silences of the African Commission have not been welcomed by some scholars.[10] It should be noted that the African charter enjoys universal ratification as all member states of the African Union are parties thereto.[11] Upon ratification, state parties have undertaken to adopt legislative and other measures to give effect to the rights recognized therein.[12] However, an examination of their constitutions reveals that state parties have not taken sufficient legislative measures to ensure compatibility of their laws with the African charter. As a result, many African constitution contain derogation clauses.[13] To this end, this seminar paper noticed that the omission of a derogation clauses from the African charter was not a mistake. And it is not a defect in the charter. Rather, it shows positive development of human rights norms in African and should not be seen as a defect. However, the incorporation of a derogating clause in the African constitutions and consequently derogating from constitutional rights are violations of the African charter and other international human rights treaties including the **International Covenant on Civil and Political Rights (ICCPR).**

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[8] African charter on Human and people's Rights, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU DOC. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982).

[9] African charter, art 30 and 45. See constitutional rights project and others v. Nigeria (2000) AHRLR 227 (ACHPR 1999), Para 41

[10] Heyns. C. (2001) "The African regional human rights system: in need of reform 3"

[11] List of countries which have signed, ratified, acceded to the African charter on Human and people's rights, at http//www.au.int/en/sites/defaults/files/African % 20 charter % 20 on % 20 Human % 20 and % 20 people 2% 27% 20 Rights. Pdf (accessed 17 April 2013)

[12] See African charter, Article 1

[13] See for example, constitution of Nigeria (1999), See 45(2), constitution of Ethiopia (1995) Art 93(4), Constitution of Angola (1992) art 52

3.1 FACTORS JUSTIFYING ABSENCE OF DEROGATION CLAUSES

The attack launched against the **African Charter** for excluding a derogation clause ignores several factors that may justify its absence. First, the trends of expanding non-derogable rights in human rights instruments may be cited as one of the factors. Since the adoption of the **Universal Declaration of Human Rights**, the promotion and protection of human rights are on an upward trajectory as evidenced by the adoption of several global and regional human rights instruments and the establishment of organs that monitor their implementation. A review of these human rights instruments that contain derogation clauses shows that non-derogable rights had been increasing before the adoption of the **African Charter**.

Secondly, the **African Charter**, unlike other general human rights instruments, incorporates **economic, social and cultural rights**. The division of human rights into civil and political rights on the one hand and economic, social and cultural rights on the other hand was based on Cold War politics rather than "Legal or empirical rationality"[14] and African countries have rejected that division in favour of indivisibility of human rights. The African Charter itself declares that "**civil and political rights** cannot be dissociated from **economic, social and cultural** rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.[15]

Thirdly, the incorporation of derogation clauses in human rights treaties does not advance the realization of human rights. Derogation clauses are States' license to violate human rights as they "officially condone a deviation from pre-existing treaty commitments precisely when those commitments are most at risk of being undermined."[16] They may undermine the raison d'etre of human rights treaties.[17]

[14] Ssenyonjo M Economic, Social and Cultural Rights in International Law (2009) at 12.
[15] African Charter, Preamble.
[16] Hafner-Burton et al (2011) at 678
[17] Joseph S et al The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (2005) at 824.

Fourthly, "{a} II **human rights are universal, indivisible and interdependent and interrelated." [18]** However, a derogation clause creates unnecessary division between derogable rights and non-derogable rights.[19] Since, "the substance of human rights is one and the same thing", "there is no justification in dividing them."[20] As the African States rejected a more controversial division between economic, social and cultural rights, and civil and political rights, they did not have any problem rejecting division between derogable rights and non-derogable rights.

Fifthly, the right of States to derogate from human rights treaties is usually misused. There is, according to **Nowak**, "an incurable tendency, particularly on the part of military dictatorships, to misuse the tool of emergency to maintain their own positions of power.[21] In Africa, experience shows that derogation from human rights, even under stringent requirements, is likely to be abused.[22] Many African States that are parties to the **ICCPR** have failed to notify the other States parties although they have made several declarations of a state of emergency.[23] A perusal of practices in a few selected countries **(e.g. Nigeria, Sierra Leone, Cote d'ivoire, Egypt, Zambia and Ethiopia)** demonstrates their failure to comply with the requirement of notification as required by the ICCPR. For example, in Nigeria, a state of emergency was declared in the areas of the **Yobe and Borno States in the North-East, Plateau State in Central Nigeria and Niger State in the West in December 2011**.[24] **In May 2013**, a state of emergency which was criticized as unnecessary was declared

[18] Vienna Declaration and Programme of Action, adopted by the 171 countries participating in the World Conference on Human Rights, held in Vienna from 14 June until 25 June 1993, Para 5.
[19] Sermet (2007) at 160
[20] Ibid
[21] Nowak M UN Covenant on Civil and Political Rights: CCPR Commentary (1993) at 72
[22] Viljoen (2007) at 252
[23] Viljoen (2007) at 253. The exception include Algeria, Namibia and Sudan. Algeria remained in a state of Emergency for almost 20 years (1991-2011). In Namibia, the declaration establishing a state of emergency in the Caprivi region was made in August 1999 and lifted in September 1999.
[24] Onuah F & Cocks T "Nigeria's Jonathan declares state of emergency" Reuters 31 December 2011 Abuja, at http://www.reuters.com/article/2011/12/31 us-nigeria-emergency-idUSL6E7NV07T20111231; BBC News: Africa "Boko Haram attacks prompt Nigeria state of emergency" 1 January 2012, at http://www.bbc.co.uk/news/word - africa-16373531 (accessed 28 May 2013).

in **Borno, Adamawa, and Yobe States**.[25] Nevertheless, none of them was notified to other States through the **Secretary – General of the United Nations**.[26]

4.0 IMPLICATION OF DEROGATING FROM CONSTITUTIONAL RIGHTS UNDER THE AFRICAN CHARTER

Derogation from constitutional rights in Africa implies violation of the African Charter at least in two ways. First, African States have undertaken to "adopt legislative or other measures to give effect" to rights recognized under the **African Charter**.[27] On its fifth ordinary session, the African Commission recommended that State parties should introduce the provisions of **Articles 1 to 29 of the African Charter** in their "Constitutions, laws, rules and regulations and other acts relating to Human and People's Right."[28] The Commission's recommendation was buttressed by two ministerial conferences on human rights in Africa.[29]

In making its recommendation, the **African Commission** was mindful of the differences among state parties in their reception of **International Law**.[30] The distinction between monist and dualist systems in receiving international law is outdated as the reality is more complex.[31] In some African States, duly ratified treaties automatically have domestic effect. The **African Charter** forms part of the Laws of such states and is superior to their domestic laws.[32] In other African countries "specific legislation is required to incorporate international

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[25] BBC News: Africa "Nigeria: Goodluck Jonathan declares emergency in States" 15 May 2013, at http://www/bbc.co.uk/news/world-africa-22533974; Ozekhine M "Jonathan violates Nigerian Constitution in declaring State of Emergency" Premium Times 15 May, 2013 (accessed 28 May 2013).

[26] See Notifications under Article 4(3) of the Covenant (n 76 above).

[27] The African Charter, art 1

[28] Resolution on the Integration of the Provisions of the African Charter on Human and People's Rights into National Laws of states, Fifth Ordinary Session, in Benghazi, Libya from 3 to 14 April, 1989, reproduced in Murray R and Evans M (eds) Documents of the African Commission on Human and People's Rights (2001) 186.

[2929] Grand Bay (Mauritius) Declaration and Plan of Action, adopted by the First OAU ministerial conference on Human Rights, held in April 1999 in Grand Bay, Mauritius, Para 14, Kigali Declaration, adopted by the AU Ministerial Conference on Human Rights in Africa, May 2003 in Kigali, Rwanda, Para 25, Both documents are reproduced in Heyns C & KIlander M (eds) Compendium of Key Human Rights Documents of the African Union (2010) 155 and 169.

[30] Resolution on the Integration of the African Charter into Domestic Law (n 153 above).

[31] Boerefijn I "International Human Rights in National Law" in Krause C & Scheinin M (eds) International Protection of Human Rights: A Text Book (2012) at 631.

[32] Manby B 'Civil and Political Rights in the African Charter on Human and People's Rights: Article 1 – 7' in Evans M and Murray R (eds) The African Charter on Human and People's Rights: The System in Practice 1986 – 2006 (2008) at 172 – 173.

treaties into domestic law, and the **African Charte**r has generally a lower status.[33] Nigeria, for example, passed an act domesticating the **African Charter.**[34] In **Abacha and Other v Fawehinmi**, the Supreme Court of Nigeria held that "an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the **National Assembly**.[35] Regarding the position of the **African Charter** in the hierarchy of **Nigerian Laws, the Court placed** the Charter above other statutes but below the constitution.[36]

Second, derogating from constitutional rights in Africa even during a state of emergency is a violation of the African Charter. In several communications, the African Commission has emphasized that derogation from charter rights are not allowed. In **Commission Nationale des Droits de I'Homme et des Libertes v Chad, the African Commission** dealt with a communication alleging killings, disappearances, torture, arbitrary arrest and harassment of journalists and consequently, violations of **Articles 4, 5, 6, 7 and 9 of the African Charter**.[37] **Chad**, the respondent state, did not justify its violation as suspensions made during a state of emergency. Rather, it claimed that "it had not control over violations committed by other parties, as Chad (was) in a state of civil way."[38] **The African Commission held that "even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter" since the later "does not allow for state parties to derogate from their treaty obligations during emergency situations."**[39] The commission found violations of the provisions alleged to have been violated as the respondent state did not make substantive response.[40]

5.0 CONCLUSION

The African Charter does not permit derogation from human and people's rights. Although the African Commission did not give a rationale for the absence of a derogation clause, it

[33] See Constitution of the Republic of Benin (1999), preamble, constitutional law of the Republic of Cape Verde, art 12; the Constitutional Law of Burkina Faso (1991), art 151.
[34] Ibid. See, for example, the constitution of the Federal Republic of Nigeria (1999), See 12(1); constitution of Zimbabwe, art 111B(1)(b); and the constitution of Swaziland (2005), See 238(4).
[35] Abacha and others v Fawehinmi (2001) AHRLR 172 (NgSC 2000), Para 12.
[36] Abacha and others v Fawehinmi, Para 14 – 15.
[37] Commission Nationale Des Droits de l'Homme et des Libertes v Chad, Paras 2-6 and Para 23.
[38] Commission Nationale Des Droits de l'Homme et des Libertes v Chad, Para 19.
[39] Commission Nationale Des Droits de l'Homme et des Libertes v Chad, Para 21.
[40] Commission Nationale Des Droits de l'Homme et des Libertes v Chad, Paras 24-27.

repeatedly stated that suspension of rights is not permitted under the Charter. Since a derogation clause is incorporated in human rights instruments to ensure political stability than to realize human right, its absence from the African Charter should be taken as a normal development of human rights norms. It is also consistent with the international trend of expanding non-derogable rights. The tendency of African States to abuse states of emergencies and their practical failure to comply with notification requirements under the **ICCPR** further justify the absence of a derogation clause.

All State members of the African Union are parties to the African Charter and they have undertaken to adopt legislative and other measures to give effect to rights guaranteed therein. Almost all African States are also parties to the **ICCPR** and they have undertaken similar obligations. Both the African Commission and the Human Rights Committee emphasized that it is the obligation of States to harmonize their domestic law including their constitutions with the **African Charter and the ICCPR**. However, African States, with the exception of few states, have failed in this regard as they are maintaining derogation clauses in their constitutions. Therefore, African states do not comply with the African Charter and other human rights treaties for maintaining incompatible domestic laws.

Although States do not seem to have apparent reasons for their failure to ensure the conformity of their constitutions with the African Charter and other human rights treaties, it may be surmised that constitution framers are not aware of the symbiotic relationship of domestic and international law. It also shows lack of commitment to implement international human rights obligations. The African Commission has not also required States to bring their constitution in conformity with the Charter in this respect.

African States declare states of emergencies by regularly relying on their domestic laws and derogate from constitutional rights. Such derogation is a violation of both the African Charter and other International human rights treaties. Therefore, they should harmonize their laws with the African Charter, and refrain from suspending human rights.