



ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW

**UPHOLDING INTERNATIONAL HUMAN RIGHTS
OBLIGATIONS DURING A STATE OF EMERGENCY: AN
APPRAISAL OF THE ETHIOPIAN EXPERIENCE**

**A Thesis Submitted to the School of Law, Addis Ababa University,
in Partial Fulfillment of Master of Laws Degree
(LL.M) in International Human Rights Law**

By
Yibeltal Assefa

February, 2019
Addis Ababa

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Declaration

I, **Yibeltal Assefa**, hereby declare that this work is original and has not been presented in any other institution before. To the best of my knowledge and belief, I also declare that any information used here has been duly acknowledged and cited.

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Verification

I, **Mizanie Abate**, have read this thesis and approved it for examination.

Advisor: Mizanie Abate (PhD)

Acknowledgment

First and above all, I praise God for blessing me with good health and strength that was necessary to complete this Thesis. Second, I would like to express my great appreciation to my advisor Dr. Mizanie Abate, who has been a wonderful guide for me.

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List of Acronyms

ACHPR African Charter on Human and Peoples' Rights

ACHR American Convention on Human Rights

ECHR European Convention on Human Rights

ECoH European Commission on Human Rights

ECtHR European Court of Human Rights

EHRP Ethiopian Human Rights Project

FDRE Federal Democratic Republic of Ethiopia

HoF House of Federation

HoPR House of people's Representatives

HRC Human Rights Committee

HRCO Ethiopian Human Rights Council

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ICJ International Commission of Jurist

ILA International Law Association

ILC International Law Commission

MoFA Ministry of Foreign Affairs

NGO Non-Governmental Organization

U.K United Kingdom

U.S United States of America

UDHR Universal Declaration of Human Rights

UK United Kingdom

UN United Nation

UPR Universal Periodic Review

Abstract

State of emergency is a sudden and extraordinary situation that threatens the life of a nation and which requires taking extraordinary measures to averting such dangers. Some of the major international human treaties recognize the power of states to derogate human rights during state of emergencies. However, states have to fulfil a set of internationally established substantive and procedural requirements in order to legitimately suspend human rights by declaring state of emergency. The requirements of necessity, proportionality, notification, publicity, non-discrimination, and protection of certain non-derogable rights are the major ones. Between 2016 and 2018, Ethiopia declared states of emergencies twice and suspended a bunch of human rights and freedoms. This paper has analyzed Ethiopia's experience in declaring, implementing, and monitoring state of emergency in the light of the above mentioned international requirements and argues that the country has failed to uphold some of the fundamental requirements while exercising its emergency powers.

CHAPTER ONE

INTRODUCTION

1.1. Background

The history of the world shows that every state, at one stage or another sustains peace time and war time, albeit with varying nature, intensity and frequency.¹ State of emergency is a sudden and exceptional situation which “by definition challenges the very foundation and threatens the life of the nation.”² When states are faced with emergency situations, they are morally and legally entitled to take extraordinary measures to averting such an emergency.³ The right to declare states of emergency and derogate from human rights is also considered as an important aspect of sovereignty and a tool of accommodation between individual rights and public interests.⁴

With the exception of some human right instruments such as the African Charter on Human and Peoples Rights (ACHPR) and International Covenant on Economic Social and Cultural Rights (ICESCR), the power of states parties to derogate human rights during a state of emergency is recognized by major international and regional human right instruments.⁵ Notably, Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European

¹Emmanuel Gross, *How to Justify an Emergency Regime and Preserve Civil Liberties in Times of Terrorism*, S.C. J. Int'l L. & Bus. 1, at 3 (2008); Oren Gross, “Once More unto the Breach”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L 438, (1998).

² Yehenew T. Walilegn, *State of Emergency and Human Rights under 1995 Ethiopian Constitution*, 21 JOURNAL OF ETHIOPIAN LAW 78, at 79, (2007).

³ Id at 78

⁴ Frederick Cowell, *Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR*, 1 BIRKBECK LAW REVIEW 1, at 136, (2013), (available at <http://www.bbkrlr.org/1-1-6.html>) (accessed Oct 28, 2018).

⁵ See International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171, art 4 (hereinafter ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocol No. 11 E.T.S.5; U.N.T.S. 221, art 15 (hereinafter ECHR); the American Convention on Human Rights adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969 and entered into force on 18 July 1978; O.A.S.T.S. 36; 1144 U.N.T.S. 123, art 27 (hereinafter ACHR).

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and Article 27 of the American Convention on Human Rights (ACHR) recognizes such power of States to derogate some of their human rights obligations during state of emergencies.⁶ The power of states to derogate human rights is also recognized by most national constitutions.⁷ For instance, the Ethiopian Constitution under Article 93 provides that the government can declare state of emergency and suspend political and democratic rights “*should an external invasion, a breakdown of law and order which endangers the Constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occur.*”⁸

However, neither international human rights instruments nor domestic liberal constitutions grant States an unconstrained power to derogate from human rights. Rather, there are rigorous substantive and procedural requirements (principles) that derogating states parties need to fulfill before, during, and after declaring of a state of emergency.⁹ The principles of existence of exceptional threat; official proclamation of the emergency; non-derogability of certain rights; strict necessity; compatibility of emergency measures with other international legal obligations of the derogating state; non-discrimination; and international notification are the major international principles governing a state of emergency and derogation of human rights.¹⁰

⁶ See ICCPR, art 4; ECHR, art 15; ACHR, art 27.

⁷ See, for example, the Constitutions of Ethiopia (1995), art 93(4); Angola (1992), art 52; Nigeria (1999), sec 45(2); Rwanda (2003), art 137; Finland, art. 16 (1919); France, Art. 36 (1958); Greece, art. 48 (1975); the Netherlands, art. 202 (1972); Turkey, art. 124 (1961); Spain, Art. 55 (1978); Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 AM. U. INT’L L. REV. 35 (1986).

⁸ CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, PROCLAMATION NO 1/1995, FED. NEGARIT GASETTE, 1st Year No.1, (1995) art 93(1)(a), [hereinafter FDRE Constitution].

⁹ See art 4 of ICCPR, art 15 of ECHR, and art 27 of ACHR.

¹⁰ Ibid; see also UN Human Rights Committee, General Comment 29, A State of Emergency (Article 4) CCPR/C/21/Rev.1/Add.11, adopted on 31 August 2001, para 2, [Hereinafter General Comment 29]; The Paris Minimum Standards of Human Rights Norms in a State of Emergency, sec (A) 1(b), reproduced in Lillich R B, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. OF INT’L L. 1072, (1985) [hereinafter Paris Minimum Standards]; UN 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, para 39 [hereinafter Siracusa Principles], (available at <http://www.unhcr.org/refworld/docid/4672bc122.html>) (accessed Sep. 15, 2018).

Following a series of political turmoil between October 2016 and June 2018 in the country, Ethiopia declared, executed and lifted nation-wide state of emergency and took different emergency measures twice in less than two years. The first state of emergency was declared on 9th October 2016.¹¹ This state of emergency decree was extended for an additional four months on 10th March 2017 and lifted on 4th August 2017. Yet, again on 16th February 2018, another round of nationwide state of emergency was declared¹² which was lifted on 5th June 2018, two months earlier than its planned life span. In both rounds of states of emergencies, the government claimed that a breakdown of law and order which endangers the constitutional order is the major cause for the emergency decree and the former added that it was impossible to control it through the regular law enforcement organs. A State of Emergency Command Post (Command Post) was established with a power to enforcing the decree.¹³ As per Article 93(5) of the FDRE Constitution, a State of Emergency Inquiry Board (Inquiry Board) was established with a task of supervising and inspecting emergency measures taken during the state of emergency period.¹⁴

The states of emergencies in Ethiopia were accompanied with a suspension of most of the fundamental human rights and freedoms enshrined under the FDRE Constitution and ratified international human right instruments. Notably, the emergency decree curtailed fundamental right and freedoms including freedom of speech, movement, the right to peaceful assembly and demonstration. In addition, it gave sweeping powers to the Command Post such as to arrest suspects without a court warrant; determine the measures to be taken on perpetrators of prohibited acts; issue Directives which further restricts human rights and freedoms; and put arrested individuals into the so-called “rehabilitation centers”¹⁵

¹¹ See the preamble of The State of Emergency Proclamation for the Maintenance of Public Peace and Security, Proc. No.1/2016 [hereinafter Proclamation No.1/2016].

¹²Constitution and Constitutional order Defence from Threat State of Emergency Proclamation No.2/2018 [hereinafter Proclamation No.2/2018]; Constitution and Constitutional order Defence from Threat State of Emergency Proclamation No.2/2018 Approval Proclamation No. 1083/2018” [hereinafter Proclamation No 1083/2018].

¹³ Proclamation 1/2016, art 6; Proclamation 1083/ 2018, art 2.

¹⁴ Proclamation No .1/2016, arts 8-9; Proclamation 2/2018, arts 8-9.

¹⁵ See Proclamation No .1/2016, art 4; Proclamation 2/2018, art 6; Regulation No. 391/2016, art 3; Directive No.1 for the Execution of the State of Emergency Issued by the State of Emergency Command Post, art 31 [hereinafter Directive No 1/2016].

The state of emergency and its measures in Ethiopia drew the attention of domestic and international human rights experts and organizations where some have criticized it as unjustifiable, disproportionate, and a tool used by the government to silence dissenting voices.¹⁶ Unfortunately, experience elsewhere also shows that derogating states frequently violate fundamental human rights and freedoms “under the pretext of averting emergencies and restoring [public] order.”¹⁷ The UN Special Rapporteur on the Question of Human Rights and State of Emergency once stated that “in many cases state of emergency merely became the legal means of “legalizing” the worst abuses and most pernicious form of arbitrariness.”¹⁸ The state of emergency in Ethiopia, a country with an ill-reputed human rights record, further intricate the challenges of ensuring human rights and freedoms in the country. There were series of allegations that the government used its emergency powers far beyond what the exigencies of the situation needed which is a violation of international human right obligations.¹⁹ During the emergency periods, different human right groups have reported that hundreds of people have been illegally killed and thousands have been arrested and subjected to involuntarily “rehabilitation measures.”²⁰

¹⁶Ethiopian Human Rights Project (EHRP), *The State of Emergency (2016-2017): Its Cause and Impact*, (2018); Human Rights Council (HRCO), *142nd Special Report: Human Rights Violations committed during the State of Emergency in Ethiopia*, (2017), [hereinafter HRCO, Special Report 142], (available at <https://www.uwyo.edu/law/files/docs/international%20human%20rights/reports/ethiopia-human-rights-report-2-july18.pdf>), (accessed on June 12, 2018); Human Rights Watch, *Legal Analysis of Ethiopia’s State of Emergency*, (2016), <http://www.hrw.org/report/2016>, (accessed Oct 30, 2016); Amnesty International, *Commentary on Ethiopian State of Emergency*, (2018) available at <https://www.amnesty.org/download/Documents/AFR2579822018ENGLISH.PDF> (accessed on March 3, 2018).

¹⁷ Charles M. Fombad, *Cameroon's Emergency Powers: A Recipe for (Un)Constitutional Dictatorship?* 48 JOURNAL OF AFRICAN LAW 1, at 62, (2004).

¹⁸ Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Tenth Annual Rep.*, 11, 20, 33, 48, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/19, para 3 (June 23, 1997) [hereinafter Special Rapporteur's Tenth Report].

¹⁹ See Human Rights Watch, *supra* note 16; Amnesty International, *Commentary on the Ethiopian State of Emergency* (2018), (available at <http://www.amnesty.org/documents/2018>) (accessed Sep 15, 2018).

²⁰ See HRCO, *The State of Emergency*, *supra* note 16; Amnesty International, *Concerns over the State of Emergency Declaration, Letter for the Members of HoPR of Ethiopia*, (2018).

With the ongoing unprecedented political reforms in Ethiopia, we are found in an interesting time for human rights protection where some drastic positive steps, such as amending repressive laws, strengthening the judiciary, and prosecuting perpetrators of human rights violations are taking place. However, on the other side, the factual situation in many parts of the country remains volatile which probably could give the government reasons for declaring another round of state of emergency and suspend human rights and freedoms. In fact, even after the lifting of the *de jure* emergency decree, there has been some signs of a *de facto* states of emergency in some parts of the country. For example, the federal government was requested to intervene and control a deadly conflicts and massive internal displacements in the borders of Oromia and Benishangul Gumez regional states.²¹ The arbitrary mass arrest and detention of thousands of youths from Addis Ababa and subsequently subjecting them to an involuntary “rehabilitation training” was another act which apparently sounded like a measure of a state of emergency.²² Most recently, following a violent conflicts, the Somali Regional State banned public gathering and imposed a curfew in some parts of the region.²³

In general, the concept of a state of emergency and its practical implication on human rights is a developing but relatively unexplored matter in Ethiopia without sufficient scholarly and empirical debate. The international experience shows that states which declared a state of emergency once are likely to do so again. Hence, this study is done with such past, present, and prospective developments on the concept of state of emergency and derogation of human rights in Ethiopia.

²¹ *Benishangul Gumuz Requests More Federal Troops as Death Toll Reaches 44*,

<https://www.ezega.com/News/NewsDetails/6665/Benishangul-Gumuz-Requests-More-Federal-Troops-as-Death-Toll-Reaches-44>, (accessed Oct. 10, 2018)

²² Amnesty International, *Ethiopia: Mass Arbitrary Arrest and Detention of Youth Threaten a New Era of Human Rights in Ethiopia Again*, <http://www.amnesty.org>, (accessed Sept. 24, 2018).

²³ *Curfew, Ban on Public Gathering Imposed in Somali Region After Death of Two at Religious Festival*, Addis Standard (AS), Jan. 31, 2018, <https://allafrica.com/stories/201902010848.html> (accessed Feb. 1, 2019).

1.2. Research Objectives

General Objective

- To critically analyze the efficacy of Ethiopia's domestic normative and institutional frameworks in upholding its international human rights obligations during states of emergency.

Specific Objectives

- To comparatively analyze the (in) compatibility of Ethiopia's a legal and institutional framework for declaring state of emergency in the light of the international requirements governing the matter?
- To make a critical analysis of Ethiopia's experience in declaring, implementing, and monitoring state of emergency and identify the major gaps faced.

1.3. Research Questions

General Research Question

- Does Ethiopia maintain the necessary normative and institutional frameworks to uphold its international human right obligations during states of emergency?

Specific Research Questions

- Looking at its recent experiences, to what extent Ethiopia observed the international substantive and procedural requirements that regulates derogation of human right during a state of emergency?
- As a state party to different international human right treaties, what are the major international obligations that Ethiopia owe during a state of emergency and derogations of human rights?

1.4. Research Methodology

This is mainly a doctrinal research which attempts to make a critical legal analysis of Ethiopia's normative and institutional frameworks regarding a state of emergency and derogation of human rights. The domestic legal and institutional framework will be analyzed in comparison with international standards and jurisprudence governing state of emergency and derogation of human rights. The research attempts to analyze Ethiopia's recent state of emergency experience against

its international human rights obligations. As a result, this research will have an aspect of non-doctrinal as it also, albeit cursorily, analyze how the international and domestic human right principles have been applied during the states of emergency in Ethiopia. As a source of primary data, a thorough analysis of relevant domestic laws, international human rights instruments, domestic and international cases will be analyzed. In addition, an in-depth interview with purposefully selected members of the State of Emergency Inquiry Board, Judges, and other legal experts with firsthand experience on the matter is conducted. The interviews are done with a purpose of supplementing the legal analyses and getting some important practical insights on how the legal principles have been put in place during the state of emergency. To gather secondary data, an analysis of relevant scholarly books, journal articles, reports, and online resources is done.

1.5. Literature Review

Internationally, there is an enormous scholarly work on the concept of state of emergency and its implications on human rights. One notable scholar on the subject matter is Jaime Oraa who did a comprehensively study on the international regime of states of emergency and its implication on human rights where he identified the major problems in international law with regard to safeguarding human rights during states of emergency.²⁴ Another notable scholar with a relevant scholarly work on the matter is Joan Fitzpatrick who studied how well international and regional human right organs are monitoring abuses of human rights during *de facto* or *de jure* states of emergencies.²⁵

Different scholars have also discussed the implication of the absence of derogation clauses under the ACHPR and the jurisprudence of the African Human Rights Commission. For instance, Abdi Jibril, argues that the omission of derogation clause under the ACHPR is not a mistake nor a defect, but rather a deliberate positive move by the Charter for the better protection and promotion human rights.²⁶ Abd's argument bases on the jurisprudence of the African Human

²⁴ JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, (1992).

²⁵ JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY, (1994)

²⁶ Abdi Jibril, *Derogation from Constitutional Rights and Its implication und the African Charter on Human and Peoples' Rights*, 17 LAW DEMOCRACY AND DEVELOPMENT 78, at 79 (2013).

Rights Commission. However, scholars such as Rachel Murry argues that absence of a derogation clause from the African Charter decreases the powers of States only in theory and provides states with more discretion by failing to set any standards at all, allowing states to act as they please.²⁷ Likewise, Ouguerouz, argues that absence of derogation clause will not prohibit a state party from derogating human rights during emergencies because this right is recognized under general international law.²⁸ Hynes also argues that the absence of a derogation clause is one of the weaknesses of the Charter because it contains no restraining mechanism if states disregard it at all.²⁹

When we come to the Ethiopian context, there is only a handful of literature on the subject matter. Few scholars have done some positivist legal analyses on the derogation clause of the FDRE Constitution. For example, Abdi Jibril, in his commentary on the *CUD vs Meles Zenawi* case, discussed the difference between limitation and derogation of human rights and pointed out that the Ethiopian Council of Constitutional Inquiry (CCI) confused limitation with derogation while handling the case.³⁰ In addition, Abdi boldly argues that derogation of any of the human rights provision recognized under the Constitution would be completely incompatible with the country's obligation under the ACHPR because, in his view, the later completely forbids derogation of human rights.³¹ Adem Kassie has also done a brief description of “derogation in cases of emergencies”³² as stipulated under the FDRE Constitution but without making detail analysis on its impact or the adequacy of safeguarding mechanisms. In his Master's Thesis, Gebreabzgi W/slase studied the extent of reason of state under the Ethiopia constitutional order.

²⁷ RACHEL MURRAY, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INTERNATIONAL LAW*, at 123 (2000).

²⁸ F. OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEVELOPMENT* (2003).

²⁹ C Heyns, *The African regional human rights system: In need of reform?* 1 *AFRICAN HUMAN RIGHTS LAW JOURNAL* 155, at 161 (2001). See also L Sermet, *The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion*, 7 *AFRICAN HUMAN RIGHTS LAW JOURNAL* 142 (2007).

³⁰ Abdi Jibril, *Distinguishing limitation on constitutional rights from their suspension: A Comment on the CUD Case* 1 *HARAMAYA LAW REVIEW*, at 23 (2012).

³¹ *Id* at 22.

³² Adem Kassie, *Human Rights under the Ethiopia Constitution: A Descriptive Overview*, 5 *MIZAN LAW REVIEW*, 41, at 60 (2011).

Gebreabzgi investigated and identified one specific constitutional gap: the existence of a *power lacuna* if a state of emergency is to be declared while the HoPR, an organ with an approval power, is dissolved.³³ Another valuable piece of domestic literature on the matter is done by Yihewew Tsegaye who provided us an overview of the legal and institutional framework for declaration and implementation of a state of emergency in Ethiopia.³⁴ However, as also admitted by himself, Yehewew's article is limited to "studying principles rather than making case study of their applications."³⁵ Besides, all the above mentioned domestic literatures were done before Ethiopia recently declared and executed a *de jure* nation-wide state of emergency. Hence, since Ethiopia's legal and institutional frameworks on state of emergency have been recently tested, a critical analysis of how far they managed to be in line with international human rights principles is missing, and this research modestly intends to fill in such gap.

1.6. Significance of the Study

State of emergency has become a common practice in all continents of the world and it is one of the major challenges for protecting human rights and freedoms.³⁶ As evidenced in different parts of the world, states of emergencies are "associated with severe human rights violations."³⁷ Thus, in order to minimize the negative impacts of state of emergency, there is a compelling need to establish an effective legal and institutional mechanism that regulate the matter.

Ethiopia declared a nation-wide states of emergencies and suspended most of the fundamental human rights and freedoms recognized under the FDRE Constitution and ratified international human rights instruments.³⁸ Even though some human rights experts and organizations made some commentaries on the legality and proportionality of Ethiopia's state of emergency decree³⁹,

³³Gebreabzgi W/slase, *The Extent of Reason of State in the Ethiopian Constitutional Order: The Quest for Restraining and Legitimizing*, (Unpublished LLM Thesis, Addis Ababa University, 2011); FDRE Constitution, art 93(2).

³⁴ Yehewew, *supra note 2*, at 78-113.

³⁵ *Id* at 113.

³⁶ Scott P. Sheeran, *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 491 (2013).

³⁷ *Id*, at 491.

³⁸ See Proclamation 1/2016, arts 4 &10.

³⁹ See EHRP, *The State of Emergency*, *supra note 16*.

there has not been a critical analysis on the compatibility of the country's legal and institutional frameworks with that of international requirements governing state of emergency. Therefore, by assessing Ethiopia's normative and institutional frameworks against the international principles, this research aims to humbly contribute for the knowledge base and scholarly discourse on these pertinent concepts. In so doing, the major gaps of the recent states of emergencies in Ethiopia will be highlighted and some recommendations will be forwarded that suggests better ways of dealing with emergency situations. In this regard, besides being a valuable addition to the academic discussion, the findings of this research could also provide some useful inputs for legislatures and executives in dealing with future emergency situations by complying with international obligations of the state.

1.7. Limitation of the study

This research is limited to studying the major domestic and international principles that regulates derogation of human rights during state of emergency by analyzing the recent experience of Ethiopia. Thus, the permitted space and scope of the research would not allow the writer to conduct a comprehensive analysis on the practical impact of the states of emergencies on each substantive human right in Ethiopia. On the course of doing this research, the writer also faced challenges in accessing required data, especially while the state of emergency was active. In addition, lack of sufficient domestic literature and jurisprudence on the subject matter forced the writer to utilize more foreign resources/cases.

1.8. Organization of the Study

This research is organized into five chapters including conclusion and recommendations. Accordingly, Chapter one deals with the background of the study, research questions, objectives, significance, limitations, and methodology of the research. Chapter two is dedicated to providing historical and theoretical foundations of state of emergency and derogation of human rights under the international human rights system. The definition, evolution, conceptual background, and principles of state of emergency and derogations of human rights are discussed under this chapter. The discussion under this Chapter will be substantiated with relevant international jurisprudences on the matter. Chapter three deals with Ethiopia's normative and institutional frameworks on state of emergency, with emphasis on the derogation clause of the FDRE Constitution and recent emergency laws. The discussion under this chapter will include a

comparative analysis of domestic legislation and institutions with international principles that regulate the declaration, implementation, and monitoring systems of the state of emergency and its measures. Chapter four, as a case study, discusses the recent experiences of Ethiopia in declaring and implementing state of emergency and tries to provide a critical analysis of how far the country managed to uphold basic international principles. Lastly, chapter five raps up the discussion by providing a conclusion and recommendations based on the major gaps and lessons identified in the research.

CHAPTER TWO

STATE OF EMERGENCY AND DEROGATION UNDER INTERNATIONAL HUMAN RIGHTS SYSTEMS

This chapter is dedicated to discussing how the international human rights system tries to regulate state of emergency and derogation from human rights by state parties. In so doing, the chapter will provide an overview of the definitions, evolution and conceptual foundations of the state of emergency and emergency measures at the international level. This chapter gives more emphasis to discussing the major international requirements (also called principles) that regulate the proclamation, implementation, and supervision of state of emergency and derogation from human rights obligations.

2.1. The Definition, Evolution and Conceptual Foundation of State of Emergency

2.1.1. Definition of State of Emergency

Clearly defining state of emergency and the situations which justify its invocation is important because of its impact human rights, and the potential abuse of emergency powers beyond what is permitted under the law.⁴⁰ However, many scholars agree that defining a state of emergency is a difficult and perhaps meaningless task for different reasons.⁴¹ For example, Oren Gross states that every attempt to provide a working definition for a state of emergency will eventually be vague and open to manipulation which lacks providing clear parameters to differentiate emergency from normalcy.⁴² The International Law Association (ILA) also notes that “it is neither desirable nor possible to stipulate what particular type or types of event will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merit taking into account the overriding concern for the continuance of a democratic society.”⁴³

Alexander Hamilton has persuasively described the reasons for lack of a universally applicable and an objective definition for the concept of “state of emergency” in the following statements:

⁴⁰ Oren Gross, “*Once More unto the Breach*”, *supra* note 1, at 237.

⁴¹ *Ibid*; *See also* Yehenev, *supra* note 2, at 85; Emanuel Gross, *supra* note 1, at 8.

⁴² Oren Gross, “*Once More unto the Breach*”, *supra* note 1 at 438. (Gross noted that the difficulty of defining state of emergency partly comes from the elastic nature of the term “emergency”); *See also* Emanuel Gross, *supra* note 1, at 8.

⁴³ International Law Association (ILA) Report 59 (1984) as cited by ORAA, *supra* note 23, at 31.

*It is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.*⁴⁴

Thus, state of emergency has not yet been defined in an objective and descriptive manner that could clearly illustrate its nature, scope, and application.⁴⁵ However, there are various definitions given to the concept of state of emergency under international and regional human right conventions as also elaborated by respective treaty monitoring organs. Here, it should be mentioned that state of emergency is also known by other names such as “public emergency,” “states of exception,” “states of siege,” and “martial law”.⁴⁶ Save for exceptions, the term “state of emergency” will be used in this paper as it’s also the used by the FDRE Constitution and other domestic state of emergency decrees.

Now, let’s see the major definitions given to the concept of “state of emergency” by international human right instruments and related soft laws. Article 4 the ICCPR defines “public emergency” as “situations that threaten the life of the nation.”⁴⁷ The HRC describes states of emergency as a time of an exceptional and temporary nature.⁴⁸ The ECHR under Article 15(1) defines state of emergency as a time of war or other public emergencies that threatens the life of the nation.⁴⁹ The European Court of Human Rights (European Court) in its judgment on the case of *Lawless vs Ireland* defines “public emergency” as “a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the State in question.”⁵⁰ In the *Greek case* the European Commission on Human Rights (European Commission) has identified the

⁴⁴ ALEXANDER HAMILTON, THE FEDERALIST NO. 23 (Clinton Rossiter ed., 1961), as cited in Oren Gross, “*Once More unto the Breach*”, *supra* note 1, at 439.

⁴⁵ See Emanuel Gross, *supra* note 1, at 4.

⁴⁶ See Oren Gross, “*Once More unto the Breach*”, *supra* note 1, at 501.

⁴⁷ ICCPR, art 4(1).

⁴⁸ General Comment 29, para. 2

⁴⁹ ECHR, art. 15(1).

⁵⁰ *Lawless v. Ireland*, 1 Eur. Ct. H.R. (Ser. B) at 56(1960-1961).

following four features of public emergency: (1) it must be actual or imminent; (2) its effects must involve the whole nation; (3) the continuance of the organized life of the community must be threatened; and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health, and order, are plainly inadequate.⁵¹ The ACHR under Article 27 defines times of emergency as situations of war, public danger, or other emergencies that threatens the independence or security of the state.⁵²

In addition, state of emergency has been also defined by some relevant international soft laws. For example, the *Paris Minimum Standards of Human Right Norms during States of Emergency (Paris Minimum Standards)* defines “public emergency” as “an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.”⁵³ Furthermore, the *Siracusa Principles on the Limitation and Derogation Provisions (Siracusa Principles)* defines a state of public emergency as “a situation of exceptional and actual or imminent danger which threatens the life of the nation.”⁵⁴ The above definitions of state of emergency, albeit with some differences, provide us basic concepts regarding the nature, justification, and scope of application of emergency powers including derogation of human rights as will be discussed in detail in the forthcoming parts.

2.1.2. Origin and Evolution

As Sheeran rightly noted, tracing the historical origin and application of state of emergency is good so as to gain a full understanding of the concept.⁵⁵ Regarding the historical origin of state of emergency, many scholars agree that it originates from the Roman Empire in their practice of appointing a temporary dictator to provide an *ad hoc* leadership in a national emergency to resist

⁵¹ 1 Eur. Ct. of Hrt., *The Greek Case: Report of the Commission (1969)* [hereinafter *The Greek Case*].

⁵² ACHR, art. 27(1), *supra* note 5.

⁵³ *Paris Minimum Standards*, para. 1(b).

⁵⁴ *Siracusa Principles*, para. 39.

⁵⁵ Sheeran, *supra* note 36, at 496.

foreign attacks or control internal rebellion.⁵⁶ Scholars also argue that the modern legal regime of state of emergency began during the French Revolution and consequently found its way in most national legal systems by the mid-twentieth century.⁵⁷ According to Scheppele, most European national constitutions introduced the concept of a state of emergency in their constitutions during the 18th and 19th century.⁵⁸ In 1789, the French Constituent Assembly included the concept of “state of siege,” by declaring that “all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility.”⁵⁹ Around the same time, Article 48 of the then Germany Constitution gave the President an extraordinary powers “to take measures necessary to reestablish law and order, if necessary using armed force and including the suspension of a particular and limited set of rights” during exceptional threats to the system.⁶⁰ Under Article I, Section 9 of the U.S, Constitution, the Congress is authorized to suspend the privilege of “habeas corpus” during internal rebellion or foreign invasion the that put the safety of the public at risk.⁶¹

Fabian Klose notes that during colonization period, the major colonial powers, particularly France and UK, had extensively used emergency powers in their colonies to quash anticolonial struggles.⁶² Another significant turning point in relation to the resurgence of invoking emergency powers in the contemporary world is the 9/11 terrorist attack on the United States. Gross notes that the 9/11 terrorist attacks and the ensuing “war on terrorism” brought to center stage issues that have previously lurked in a dark corner at the edge of the legal universe, such as

⁵⁶ GIORGIO AGAMBEN, *THE STATE OF EXCEPTION*, (2005) as cited by Evan J. Criddle et al, *Human Rights, Emergencies, and the Rule of Law*, (Faculty Publications. Paper 1531, at 45, 2012), available at <http://scholarship.law.wm.edu/facpubs/1531>,(accessed Aug. 10, 2018). See also JAIME ORAA, *supra* note 24, at 7.

⁵⁷ Sheeran, *supra* note 36, at 496.

⁵⁸ Kim L. Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004).

⁵⁹ AGAMBEN, *supra* note 56, at 5.

⁶⁰ GERM. FED. CONST., (Weimar Constitution, 1919) pt. I & 3, as cited by Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STANFORD LAW REVIEW, at 60797, (2003).

⁶¹ U.S. CONST. art. I & 9.

⁶² Fabian Klose, *Source of Embarrassment” Human Rights, State of Emergency, and the Wars of Decolonization*, in HUMAN RIGHTS IN 20th CENTURY 238 (Stefan-Ludwig Hoffmann eds., 2011).

how a constitutional regime should respond to violent challenges.⁶³ The 9/11 event has led for the revival of the old argument about balancing governments' emergency power and human rights protection.⁶⁴

A review of the *Travaux Préparatoires* of ICCPR shows that the inclusion of the derogation clause under Article 4 had been one of the points of disagreement among states during the drafting stage. As noted by Hartman, it was the United Kingdom who first submitted a proposal to include derogation clause in the treaty in 1947 but it was initially defeated for different reasons.⁶⁵ The main disagreement between states regarding the proposal for “derogation clause” was whether a “limitation clause” was preferable to derogation.⁶⁶ The United Kingdom and others argued that emergency situations “would not fall within the scope of the limitations provided for in the various articles of the Covenant, or could they are adequately covered by a general limitations clause.”⁶⁷ The United States proposed non-inclusion of derogation clause in the treaty.⁶⁸ The group which proposed for inclusion of derogation clause argued that states parties would not be bound by their treaty obligations during emergency situations and suggested to have an escape clause but with a controlled and predefined principles to “preventing arbitrary suspensions of rights.”⁶⁹ In the end, the French delegate came up with a draft of Article 4 offering compromises between the two groups by including general restriction and supervision on invoking derogation clause, such as respect for non-derogable rights, requiring notification, and ensuring non-discrimination.⁷⁰

⁶³ Oren Gross, *Chaos and Rules, Should Responses to Violent Crises Always Be Constitutional?* 112 YALE LAW JOURNALS, at 1014, (2003).

⁶⁴ See Eric Posner & Adrian Vermeulen, *supra* note 60, at 605.

⁶⁵ U.N. Doc. E/CN.4/21, Annex B (1947); Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUMAN RIGHTS QUARTERLY 1, at 96 (1985).

⁶⁶ Sheeran, *supra* note 36, at 506.

⁶⁷ *Ibid.*

⁶⁸ U.N. Doc. E/CN.4/37 (1947).

⁶⁹ Hartman, *supra* note 65, at 96.

⁷⁰ *Ibid.*

2.1.3. Conceptual Basis

State of emergency has a conceptual foundation not only in international human rights law but also in political theory and philosophy.⁷¹ Clinton Rossiter argues that governments must “temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions in times of crisis.”⁷² He added that the sole purpose of such alternations on the normal legal system is for “the preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people.”⁷³ State of emergency shows an aspect of temporariness and exceptional nature whereas normalcy signifies the general rule and ordinary course of things.⁷⁴ The International Commission of Jurists (ICJ) noted that the “state of emergency is the counterpart in international law of self-defense in penal law.”⁷⁵

According to Oren Gross, there are two major approaches on the issue of how states should respond to emergency situations: “Business as Usual Model” and “Models of Accommodation”. The Business as Usual Model holds that “ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis.”⁷⁶ Though this model appears to be an ideal choice for human rights protection for its insistence in maintaining clear and intact rules, it is criticized for its rigidity during emergencies.⁷⁷ On the other hand, the Models of Accommodation argues that the ordinary laws need to be relaxed or temporarily suspended during an emergency to accommodate security issues.⁷⁸ This approach suggests that while the ordinary legal systems remain applicable, some exceptional adjustments are justified during an exigency which aspires to achieve double purposes: maintains the rule of law and democratic principles while, at the same time, offering states with necessary emergency powers

⁷¹ Ibid.

⁷² CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948), at 5 as cited in Sheeran, *supra* note 36, at 499.

⁷³ *Id.*, at 5-7.

⁷⁴ See Oren Gross, “*Once More unto the Breach*”, *supra* note 1, at 440.

⁷⁵ International Commission of Jurists [ICJ], *States of Emergency: Their Impact on Human Rights*, (1983), at iii, 413.

⁷⁶ See Oren Gross, *Chaos and Rules*, *supra* note 63, at 1021.

⁷⁷ Ibid,

⁷⁸ Ibid.

to deal with the crisis.⁷⁹ This approach commended for its flexibility in expanding necessary powers for states to control exigencies, but criticized for being open and unprincipled.⁸⁰

2.2. The Principles Governing State of Emergency under International and Regional Human Rights Treaties

Derogation of human rights and altering some aspects of democratic are the common features of state of emergency. As stated elsewhere, international human rights law prescribes a set of substantive and procedural limitations on emergency powers.

At this point, it's important to remind that the ACHPR neither expressly allow nor prohibit derogation of human rights during a state of emergency. However, the African Commission, in its decisions on different communications⁸¹ and in one of its resolution,⁸² interpreted the silence of the ACHPR as a prohibition of derogation even during state of emergencies.⁸³ In the case of *Commission Nationale des Droits de l'Homme et des Libertes v Chad*, the Commission stated that unlike other human rights instruments, the ACHPR does not allow state parties to derogate human rights during emergency situations.⁸⁴ The Commission reiterated similar position, in *Media Rights Agenda and Others v Nigeria*, stating that derogation of human rights is prohibited under the ACHPR.⁸⁵ Nevertheless, scholars such as Hynes, Ouguergouz, and Sermet have criticized the omission of derogation clause as deficiency of the ACHPR.⁸⁶

⁷⁹ Ibid.

⁸⁰ Id, 1022.

⁸¹ Commission Nationale des Droits de l'Homme et des Libertes v Chad (2000) AHRLR 66 (ACHPR 1995), [hereinafter Commission Nationale Case], para 2; Media Rights Agenda and Others v Nigeria (2000) AHRLR 200 (ACHPR 1998), [hereinafter Media Rights Case], para 67.

⁸² The African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), Section R.

⁸³ Commission Nationale case, para 2.

⁸⁴ Id, para 21.

⁸⁵ Media Rights case, para 67.

⁸⁶ See C Hynes, *supra* note 28, at 161-162; F Ouguergouz, *supra* note 27, at 425-427; Sermet, *supra* note 28, at 153-155.

Be that as it may, the major substantive and procedural international requirements for declaring state of emergency and derogating human rights comes Article 4 of the ICCPR as elaborated by the HRC General Comment 29. Generally, from the reading of relevant provisions of the treaty and the jurisprudence of treaty monitoring bodies, it's possible to identify at least five major requirements which shall be observed by states whenever they intend to invoke the derogation clause of ICCPR. The principles of strict necessity and proportionality; non-discrimination; consistency with other international obligations; respecting non-derogable rights; proclamation; and notification are the five major requirements. These requirements can be categorized into two: substantive and procedural. While recognizing states power to take extraordinary measures, they also serve as a mechanism of minimizing the danger of abuse of such measures.⁸⁷ Hence, the underlining concept here is that declaring a state of emergency and derogating from human rights will only be justified if states comply with these principles.⁸⁸ Now, let's see each requirement in detail.

2.2.1. Substantive Requirements

The substantive requirements are those rules which govern the material, temporal, and geographical scope of the state of emergency and the emergency measures, including derogation of human rights.

2.2.1.1. The Requirements of Strict Necessity

The principle of strict necessity is one of the basic requirements that any state party intending to invoke to the right to derogate from human rights has to fulfill. The main idea of this requirement is that exceptional crisis that "threatens the life of the nation" must occur before a state party declares state of emergency and derogate from its international human rights obligations.⁸⁹ Thus, any state party has to answer the question of whether there is a grave situation that justifies declaring a state of emergency and derogating human rights. Notably, the HRC states that "not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation."⁹⁰ According to Fitzpatrick, the alleged threat to life of the nation must "imperil some

⁸⁷ Oren Gross, "once more onto the Breach", *supra* note 1, at 448.

⁸⁸ *Ibid.*

⁸⁹ ICCPR, art 4(1); General Comment 29, para 2; ECHR, Art 15(1)

⁹⁰ General Comment 29, para 5.

fundamental elements of statehood or survival of the populations.”⁹¹ Some of the common grounds for declaring a state of emergency are war, armed conflict, acts of subversion and insurrection, natural disasters, public health threats. economic calamities. natural disaster, and “anything that puts the security of the state imperil.”⁹² International law doesn’t allow governments to declare a state of emergency and suspend human rights based on “theoretical or potential dangers which are not imminent.”⁹³

In addition to justifying the existence of a grave situation, a derogating state must also show that it has become impossible to control the danger through the regular laws before derogation of right.⁹⁴ The European Court, in *Ireland v. United Kingdom* case held that the derogating State, U.K, was reasonably entitled to contemplate that the enforcement of ordinary laws “were not suitable or adequate to meet the danger posed by the IRA terrorist activities.”⁹⁵ The European Commission has also set important jurisprudence in the *Greek* case where it stated the following three main conditions necessary for the existence of a state of public emergency :(1) it must be actual or imminent; (2) its effects must involve the whole nation; and (3) the continuance of the organized life of the community must be threatened.⁹⁶ In the *Lawless* case, the European Court held that the application of ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland.”⁹⁷

2.2.1.2 The Requirement of Proportionality

The proportionality requirement asks a basic question of whether the measures taken to avert the crisis are proportional to the threat posed by the emergency.⁹⁸ The proportionality requirement prescribes that an emergency measure should be directed to achieve a legitimate public interest and it must be proportionate to the danger posed which helps to making a proper balance between individual rights and public interests. As stated by the HRC, this requirement is mainly

⁹¹ See FITZPATRICK, HUMAN RIGHTS IN CRISIS; *supra* note 25, at 56.

⁹² See Yehenew, *supra* note 2, at 89.

⁹³ See Emmanuel Gross, *supra* note 1, at 10.

⁹⁴ See Yehenew, *supra* note 2, at 90.

⁹⁵ *Ireland v. United Kingdom*, 25 Eur. Ct.H.R. (ser A) at 84 (1987).

⁹⁶ *Greek Case*, as cited in Sheeran, *supra* note 35, at 7.

⁹⁷ *Lawless case*, para 56.

⁹⁸ See Yehenew, *supra* note 2, at 90.

important in evaluating the duration, geographic and material scope of state of emergency, and the measures taken.⁹⁹ Proportionality also requires a derogating state that “where less restrictive alternative measures can tackle the problem effectively, the government may not employ more draconian means to fight off the crisis.”¹⁰⁰ Including effective safeguard mechanism in the emergency decree itself is useful in order to reduce usurpation of emergency power and limit the measures proportional to the exigencies on the ground. In this regard, the European Court in the *Lawless* case held that real and effective safeguards must also be provided in order to curtail any possible abuse of emergency powers.¹⁰¹

International human rights system have rightly acknowledged the crucial roles that domestic constitutions play in regulating state of emergency by signifying that states must exercise emergency powers in compliance with applicable requirements of municipal law, including requirements governing the declaration of a state of emergency.¹⁰² In this regard, the *Paris Minimum Standards* state that the constitution of every state shall define the conditions and procedure for declaring a state of emergency.¹⁰³ The proportionality principle prohibits unwarranted suspension of human rights and freedoms beyond what the situation strictly demands.¹⁰⁴ In addition, the *Siracusa Principles* suggest that any measures a state undertakes to restrict or suspend human rights during emergencies must be supported by a valid state ground, a pressing public need, a legitimate aim, and proportionality.¹⁰⁵

2.2.1.3. The Requirement of Non-Derogability of certain Human Rights

International human rights law put further limitations on emergency powers by stating some rights as non-derogable at any time.¹⁰⁶ The major international and regional human rights instruments, namely the ICCPR, ECHR, and ACHR have listed out, albeit with some differences,

⁹⁹ General Comment 29, para 2.

¹⁰⁰ See Oren Gross, “*Once More unto the Breach*”, *supra* note 1, at 450.

¹⁰¹ *Lawless Case*, para. 42.

¹⁰² General Comment 29, para 2; See also Evan J. Criddle & Evan ox-Decent, *supra* note 54, at 49.

¹⁰³ Paris Minimum Standards, Sec A, paras 2&3.

¹⁰⁴ See Yehenew, *supra* note 2, at 90.

¹⁰⁵ Siracusa Principles, at 4, 10.

¹⁰⁶ ICCPR, art 4(2); ECHR, art 15(2); ACHR, art 27 (2).

some human rights as non-derogable at all times.¹⁰⁷ For instance, the ICCPR states that rights and freedoms stipulated under article 6, 7, 8 (1 and 2), 11, 15, 16, and 18 are non-derogable.¹⁰⁸ Importantly, the HRC noted that the fact that some of the provisions of the Covenant have been listed as non-derogable does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists.”¹⁰⁹

In addition to what is stated under the main instruments, there is an international efforts to expand the list of non-derogable rights by treaty monitoring and other advisory bodies.¹¹⁰ For example, the HRC suggested that the rights of fair trial and writ of *habeas corpus* are non-derogable rights.¹¹¹ Furthermore, the *Paris Minimum Standards* came up with sixteen rights and freedoms including the right to fair trial, right to remedy, and right to participate in government as non-derogable.¹¹² *The Siracusa Principles* also recommended the right to fair trial to be non-derogable.¹¹³ The *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* adopted by the African Commission states that “no circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial.”¹¹⁴

In the opinion of the HRC, the reason for making selected rights non-derogable is partly to recognize the peremptory nature of some fundamental rights ensured in treaty form in the Covenant. (e.g., articles 6 and 7). In line with this, Jamie Oraa argues that the rights to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the rule of no ex post facto criminal laws have attained the status of *jus cogens* norms of international law.¹¹⁵ Likewise, Fitzpatrick suggested two

¹⁰⁷ Ibid.

¹⁰⁸ ICCPR, art 4(2); General Comment 29, para 7.

¹⁰⁹ General Comment 29, para 6.

¹¹⁰ See Yehnew, *supra* note 2, at 96.

¹¹¹ General Comment 29, para 8.

¹¹² Paris Minimum Standards, Sec C, arts 1-16.

¹¹³ Siracusa Principles, Sec D.

¹¹⁴ African Commission on Human and Peoples’ Rights, *Guidelines and Principles*, *supra* note 86.

¹¹⁵ JAIME ORAA, HUMAN RIGHTS, *supra* note 24, at 96.

potential reasons for non-derogability status of some rights: first, some of these rights are absolutely fundamental and indispensable for the protection of human beings; second, derogation from some of those rights during states of emergency would never be justified because they have no direct bearing on the emergency.¹¹⁶

2.2.1.4. The Requirement of Consistency with other International Obligations

This requirement prescribes that a derogation measure taken based on a certain international treaty must be consistent with the derogating States' obligations under other international treaties. In this regard, the HRC notes that a state party's right to derogate human rights as per the ICCPR cannot be justified "if such derogation would entail a breach of its other international obligations, whether based on treaty or general international law."¹¹⁷ The requirement is also good to ensure compatibility and complementarity among the different obligations of the derogating State under international law and maintain better protection of human rights in crisis situations.¹¹⁸ A certain State could be party to many international and regional treaties imposing different obligations on member states. For example, Ethiopia is a state party to both the ICCPR and ACHPR where the former allows derogation from certain human rights during state of emergency while the later is silent on the matter. Hence, according to the consistency requirement, Ethiopia must evaluate its powers and obligations under both treaties before invoking the derogate clause included under ICCPR. Furthermore, there is a developing concept on the complementarity and non-exclusiveness of international human rights law and international humanitarian law.¹¹⁹ Some scholars argue that states are not allowed to suspend the four Geneva Conventions and their Additional Protocols even during states emergency, mainly because the very purpose of these IHL rules is governing situations of armed conflict which causes the emergency declaration.¹²⁰ But it should also be noted that state of emergency could be

¹¹⁶ Joan Fitzpatrick, *Protection against Abuse of Concept of "Emergency"* in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 203, 209 (Louis Henkin et al, eds., 1994).

¹¹⁷ General Comment 29, para 9.

¹¹⁸ Yehenew, *supra* note 2, at 93.

¹¹⁹ *Id.*, at 94

¹²⁰ Hernan Monteategre: *Compatibility of State Party's Derogation under Human Rights Conventions with Its Obligations under Protocol II and Common Article 3*, 33 AM. U. L. REV. 41 (1983); General Comment 29, para 3.

declared for reasons other than armed conflicts which may not call for the application of IHL rules.

2.2.1.5. The Requirement of Non-discrimination

The ICCPR prescribes the principle of non-discrimination not only under Article 4(1) but also under Articles 2(1) and 26. This principle proscribes discriminatory measures on the grounds of race, color, sex, language, religion, or social origin during state of emergencies.¹²¹ According to Grossman, the multiple references to the principle of non-discrimination in international instruments shows that the principle has already attained a status of *jus cogens* which could render a legitimate suspension of human rights invalid if done in a discriminatory manner based on the above grounds.¹²² Hence, each emergency laws and acts by a derogating state must not discriminate individuals or groups on the above mentioned grounds.

2.2.2. Procedural Requirements

The procedural requirements are those norms determining the procedures for initiation, execution, and termination of the emergency powers. Two major procedural requirements are discussed below.

2.2.2.1. The Requirement of Official Proclamation

As per Article 4 (1) of the ICCPR, official proclamation is one of the procedural requirements that should be fulfilled during state of emergency. Similarly, the HRC notes that official proclamation of the state of emergency is a fundamental prerequisite for invoking derogation power by states.¹²³ The purpose of this requirement is to be aware the public of the declaration of state of emergency and its territorial, material, and temporal consequences which also helps to “[maintain] the principles of legality and rule of law.”¹²⁴ It is also important to reduce the incidence of *de facto* states of emergency by requiring states to follow formal procedures set forth in their own municipal laws.¹²⁵

2.2.2.2. The Requirement of International Notification

¹²¹ ICCPR, art 4(1); ACHR, art 27(1).

¹²² Grossman, *A Framework for the Examination of State of Emergency*, *supra* note 7, at 52.

¹²³ General Comment 29, para 2.

¹²⁴ *Ibid*

¹²⁵ *See* Yeheneu, *supra* note 2, at 101.

According to this requirement, a derogating state must notify other state parties of the derogations through the depositary of the instrument, the U.N Secretary-General in the case of ICCPR,¹²⁶ This requirement is useful to ensuring international supervision over derogation measures by other state parties or treaty monitoring organs.¹²⁷ A relevant question regarding the requirement of notification is what kind of information should be included in the notification letter. According to the *Siracusa Principle* states' notifications should include information regarding the derogated provision of the Covenant; a copy of the emergency proclamation together with the constitutional provisions, legislation or decrees governing the state of emergency; the date of proclamation and effective date of the state of emergency; the reasons for derogation; and effect of the derogation on the Covenant rights.¹²⁸ The HRC also notes that “states parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.”¹²⁹

¹²⁶ ICCPR, art 4.

¹²⁷ Ibid.

¹²⁸ Siracusa Principles, Sec. II, para B.

¹²⁹ General Comment 29, Para 2.

CHAPTER THREE

THE LEGAL AND INSTITUTIONAL FRAMEWORKS OF STATE OF EMERGENCY IN ETHIOPIA

This chapter tries to provide a comparative analysis of the Ethiopia's domestic legal and institutional frameworks on state of emergency and derogation of human rights in light of the international requirements and jurisprudence discussed under the foregoing Chapter. Specifically, this chapter tries to answer pertinent questions like how the FDRE Constitution and other domestic legislation regulate the state of emergency. Does the Constitution incorporate the basic international requirements that apply during state of emergency and derogation of human rights? Are there effective institutional controlling mechanisms against potential abuse of emergency powers?

3.1 Legal Framework of State of Emergency in Ethiopia

The legal framework refers to substantive and procedural domestic laws which regulate the declaration, implementation, termination, and monitoring of the state of emergency and its measures. The FDRE Constitution, state of emergency proclamations and subsequent regulations and directives, and relevant domesticated international treaties are the legal framework of the state of emergency in Ethiopia. The FDRE Constitution sets down the basic normative and institutional rules that govern the state of emergency in Ethiopia.¹³⁰ Under Article 93, it specifies rules regarding situations which call for declaring a state of emergency; the branches of the government with the power to declare, implement, monitor, and terminate a state of emergency; substantive and procedural requirements for declaring a state of emergency; and the constitutional rights that are non-derogable during the emergency period.

3.1.1. Constitutional Requirements for Declaring State of Emergency

3.1.1.1 Causes for Declaring State of Emergency under the FDRE Constitution

As mentioned elsewhere, the occurrence of external invasion, a breakdown of law and order which endangers the Constitutional order and which cannot be controlled by the regular law enforcement systems, a natural disaster, or an epidemic are the constitutionally recognized causes for declaring state of emergency.¹³¹ However, the Constitution uses some generic terms

¹³⁰ FDRE Constitution, Art. 93 (1) (a).

¹³¹ Id, art. 93(1)(a).

such as “breakdown of law and order” “constitutional order” which remains vague and open for manipulation. The Constitution also recognizes the power of States’ executives to decree a state-wide state of emergency only when a natural disaster or an epidemic occur.¹³² The reason why States are not empowered to declare a state of emergency for reasons of breakdown of law and order within their jurisdiction is not clear. This may unduly force States to seek the intervention of the federal government when they are faced with a breakdown of a law and order which could have controlled by themselves by declaring a state of emergency.

While the FDRE Constitution mentions “breakdown of law and order which endangers the constitutional order” as a ground of declaring a state of emergency, it doesn’t, however, define what the phrase refers to. The matter is left for subjective interpretation by a political organ, the Council of Ministers. In practice, a breakdown of law and order could include public disturbance or violence caused by riots or rebellions.¹³³ But, it has been noted that not all kinds of a breakdown of law and order justify declaring state of emergency and suspending human rights.¹³⁴ The *Siracusa Principles* defines “public order” as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society are founded.”¹³⁵ The HRC notes that if states parties invoke the power to derogate from the covenant for reasons of a mass demonstration including instances of violence, they must be able to justify that such situations constitute a threat to the life of the nation.¹³⁶

The FDRE Constitution implies that the breakdown of law and order should be grave enough to the extent that it endangers the constitutional order and cannot be controlled by the regular law and law enforcement organs.¹³⁷ By regular law, it may refer to such laws like the FDRE Criminal Code which under Articles 238-243 deals with crimes of outrages against the constitutional order, abstraction of the exercise of constitutional powers, armed rising or civil war, attack on the

¹³² Id, art. 93(1(b).

¹³³ See Abdi, *Commentary on CUD case*, *supra* note 30, at.14; Yehenew, *supra* note 2, at 105.

¹³⁴ Ibid. See also General Comment 29, para 3.

¹³⁵ Siracusa Principles, para 22.

¹³⁶ General Comment 29, para 5.

¹³⁷ Ibid.

political or territorial integrity of the state, violation of territorial or political sovereignty.¹³⁸ The FDRE Constitution provides stricter standard than the ICCPR as the former requires the actual occurrence of the danger while the later allows derogation for imminent dangers.¹³⁹ According to the *Siracusa Principles*, strictly necessary measure shall be directed to an actual, clear, present, or imminent danger and restriction on human rights may not be imposed merely because of an apprehension of potential danger.¹⁴⁰

3.1.1.2. The Principle of Proportionality under the FDRE Constitution

The proportionality test is measured against the severity of the danger, duration of the emergency decree, and scope of application of the emergency declaration.¹⁴¹ The FDRE Constitution under 93(4) reflects the principle of proportionality by stating that “[the] Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.” According to the proportionality requirement, any emergency measures must be taken to achieve a legitimate public interest and it must be proportional to the danger posed. Hence, any measure taken beyond what the emergency required is unconstitutional. However, Ethiopia’s state of emergency proclamations had some clear gap in terms of meeting the requirement of proportionality. For example, the 2016 State of Emergency Proclamation, under its preamble, stated that illegal activities committed in “some parts of the country” as justification for declaring state of emergency.¹⁴² But, the same Proclamation under Article 3 stated that “this Proclamation shall be applicable in all parts of the country.”¹⁴³ Thus, the emergency measures covered the whole nation while the causes that triggered the state of emergency decree took place in some parts of the country which is violation of proportionality principle.

¹³⁸ CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, PROCLAMATION NO. 414/2004, Fed. Negarit Gazzete, Year No, 9 May 2005, arts 238-243 [hereinafter FDRE Criminal Code].

¹³⁹ FDRE Constitution, art 93(1); ICCPR art 4.

¹⁴⁰ Siracusa Principles, para 54.

¹⁴¹ General Comment 29, para 4.

¹⁴² See the preamble of Proclamation No 1/2016.

¹⁴³ Id, art 3 (1).

3.1.1.3. The Principle of Non-discrimination under the FDRE Constitution

Unlike Article 4 of the ICCPR, Article 93 of the FDRE Constitution does not explicitly prescribe non-discrimination as a requirement during a state of emergency and derogation of human rights. However, the Constitution recognizes the right to equality under Article 25 and prohibits any form of discriminations on grounds of race, nation, nationality, or other social origins, colour, sex, language, religion, political or other opinion, property, birth or another status.¹⁴⁴ The right to equality is a non-derogable right as stated under Article 93(4)(c) of the Constitution. Internationally, it is argued that non-discrimination has attained the status of international *jus cogens*.¹⁴⁵ Therefore, from the reading of Article 25 and 93(4) of the FDRE Constitution and its *jus cogens* status, we can argue that the principle of non-discrimination is incorporated in the Constitution. Therefore, any emergency law or measures taken by the government which discriminates on the above grounds is illegal even if it fulfills other requirements. The 2016 State of Emergency Directive prohibited “refuges from leaving campus without the necessary authorization”¹⁴⁶ Even if citizenship is not listed as a prohibited ground of discrimination under Article 25 of the FDRE Constitution, the list under the same provision is only illustrative and we may argue that unjustified restrictions on refugees’ freedom of movement on ground of citizenship is also prohibited.¹⁴⁷

3.1.1.4. Non-derogable Rights under the FDRE Constitution

The FDRE Constitution under Article 93 (4) lists the following rights as non-derogable: the right to protection against cruel, inhuman and degrading treatment or punishment; the right to be protected against slavery, servitude and the trafficking of human beings; the right to equality; the right to self-determination up to secession, their right to speak, to write and to develop their own language as well as to express, to develop and promote their culture and to preserve their history.¹⁴⁸ The nomenclature of the State is also non-derogable under the Constitution even though it’s not a human right.¹⁴⁹

¹⁴⁴ FDRE Constitution, art.25

¹⁴⁵ See Claudio Grossman, *supra* note 7, at 52.

¹⁴⁶ State of Emergency Directive No 1/2016, arts. 5, 28(7), 30.

¹⁴⁷ See Human Rights Watch, *legal Analysis of the State of Emergency*, *supra* note 16, at 10.

¹⁴⁸ FDRE Constitution, art 93(4)(c).

But, when we compare the list of non-derogable rights under the FDRE Constitution with that of the ICCPR, the former failed to include some basic rights in the list.¹⁵⁰ Notably, the Constitution failed to include the right to life in the non-derogable list though this right is considered to be the foundation of others right and freedoms. In addition, unlike the ICCPR, the Constitution failed to recognize the right to recognition everywhere as a person before the law; freedom against imprisonment for contractual debt; and the prohibition against a non-retroactive application of criminal law as non-derogable.¹⁵¹

When we look at the derogation clause of the FDRE Constitution in the light of ACHPR and the jurisprudence of the African Commission, we can argue that the former is incompatible with the later. As discussed elsewhere, the ACHPR is silent on the issue of derogation of human rights but this silence has been repeatedly interpreted by the African Commission as a prohibition of derogation altogether.¹⁵² If we adopt the position of the Commission, Ethiopia could not legally justify its derogation of human rights recognized under the ACHPR on the basis that it is allowed under Article 4 (1) of ICCPR because the same provision dictates that states parties must make their emergency measures compatibility with their other obligations under international law.¹⁵³ Ethiopia, as a member of both ICCPR and ACHPR, bears obligations from both instruments, hence, its emergency measures must be compatible with all treaties. Ethiopia cannot either escape international obligation by invoking its constitutional provision that allows derogation because international law prohibits states invoking domestic laws to justify their failure to perform a treaty obligation.¹⁵⁴

From the perspective of its treaty obligation to make its domestic laws and practices compatible with international instruments, one would have expected Ethiopia to remedy such constitutional gap through the amendment of the constitutional or, at least, by using the tool of interpretation as envisaged under Article 13 (2) of the same Constitution. Article 13(2) of the Constitution states

¹⁴⁹ Ibid.

¹⁵⁰ FDRE Constitution, Art 93(4) (c); ICCPR, Art 4(2).

¹⁵¹ See ICCPR, Art. 4(2)

¹⁵² Commission Nationale case, *para 2*; Media Rights Case, *para 67*.

¹⁵³ ICCPR, art 4(1).

¹⁵⁴ See Vienna Convention on Law of Treaties (May 1969), art 27.

that the human rights provisions under Chapter three *shall* be interpreted in a manner conforming to the principles of international human rights instruments adopted by Ethiopia.¹⁵⁵ However, during the state of emergency in 2016 and 2018, the lists of non-derogable rights under both Proclamations¹⁵⁶ were just the replica the Constitutional provision on the matter.

3.1.1.5. The Requirement of International Notification

The FDRE Constitution does not put a duty on the government to make international notification to member states of treaties that the emergency affects. In practice, Ethiopian didn't submit an official letter of notification to UN Secretariat-General regarding its derogation of human rights during the 2016 and 2018 state of emergency.¹⁵⁷ In an interview with Muluaem Getachew, a legal expert at the Ethiopian Ministry of Foreign Affairs (MoFA), it was confirmed that the government didn't submit letter of notification to the U.N Secretariat-General regarding the state of emergency decree.¹⁵⁸ What the MoFA did during the state of emergency was calling on foreign diplomats residing in Ethiopia and making briefings regarding the emergency decrees and its ramifications on their movement. However, such awareness creation events by the MoFA to foreign diplomats couldn't substitute the requirement of international notification prescribed under Article 4(3) of the ICCPR. Therefore, we can conclude that a rule on making international notification of the derogation of human rights is missing from the relevant domestic laws that govern state of emergency in Ethiopia.

3.1.1.6. The Requirements of Official Proclamation and Publicity

Even though it's an international requirement, the FDRE Constitution doesn't clearly require the official proclamation and publicity of state of emergency decrees. But, the Federal Negarit Gazette Establishment Proclamation states that all laws of the federal government shall be published in the Federal Negarit Gazeta both in Amharic and English versions.¹⁵⁹ Since the States of Emergency Proclamation are also federal laws, the regular rule of official proclamation

¹⁵⁵ FDRE Constitution, art 13(2).

¹⁵⁶ Proclamation No.1/2016, art. 5; Proclamation No.2/2018, art. 5.

¹⁵⁷ United Nations Treaty Collection, <http://www.treaties.un.org/pages/showDetails.aspx?objid=0800000280004bf5> (accessed Dec.12, 2018.)

¹⁵⁸ Telephone Interview with Muluaem Getachew, Legal Expert at the Ethiopian Ministry of Foreign Affairs (Dec 31, 2018).

¹⁵⁹ FEDERAL NEGARIT GAZETA ESTABLISHMENT PROCLAMATION NO. 3/1995, arts. 2(2) & (4).

and publicity also applies to them. However, if declared while the HoPR is in recess, an emergency decree could take effect for fifteen days before being approved by the House.¹⁶⁰ In such cases, the rules of official proclamation and publicity that applies to regular federal laws will not be mandatorily applicable to state of emergency decree for that specific period. Thus, except for cases where emergency decree is declared while HoPR is in recess, we may conclude that the requirement of official proclamation and publicity are tacitly incorporated under Ethiopia's domestic legislation. However, lack of accessibility and language barriers remains a perpetual limitation for every law in Ethiopia. In addition, State of Emergency Directives are required to be published on the official Negarit Gazette.

3.2. Institutional Frameworks Regulating State of Emergency in Ethiopia

The institutional framework refers to the domestic organs, permanent or ad hoc, that are entrusted with the legal power to declare, implement, monitor, and terminate a state of emergency. The Council of Ministers, HoPR, State of Emergency Inquiry Board, and the Judiciary are the primary institutions with direct role during state of emergency declared at the federal level.

3.2.1. The Council of Ministers: Source of State of Emergency

Without prejudice to the powers of the HoPR, the Council of Ministers is the core governmental body with a legal power to lead the declaration, implementation, and termination of state of emergency at the federal level.¹⁶¹ The Council of Ministers comprises the Prime Minister, the Deputy Prime Minister, Ministers, and other members as may be determined by law.¹⁶² The Council of Ministers is responsible to the HoPR.¹⁶³ The Council of Ministers determines the two fundamental questions of whether there exists a danger which warrants a declaration of state of emergency and the kind of emergency measures that are necessary to avert such danger. The Council enjoys a considerable margin of appreciation while assessing the situation to declare emergency and determining the type and scope of emergency measures needed.

¹⁶⁰ FDRE Constitution, art 93(2) (b).

¹⁶¹ Id, arts 93 & 77(10).

¹⁶² Id, art. 76(1).

¹⁶³ Id, art. 76(3)

3.2.2. The Powers and Functions of the State of Emergency Command Post

One of the staple names we often heard during the state of emergency periods in Ethiopia was a “State of Emergency Command Post”, a body established by the Council of Ministers but unknown by Constitution. Article 93(4) of the FDRE Constitution states that “When a state of emergency is declared, the Council of Ministers shall, in accordance with regulations it issues, have all necessary power to protect the country’s peace and sovereignty, and to maintain public security, law, and order.” As part of exercising such wide powers, the Council of Ministers established a State of Emergency Command Post (Command Post) which is led by the Prime Minister.¹⁶⁴ The Command Post was granted a wide range of powers in implementing the state of emergency decree.¹⁶⁵ For instance, as per Article 4 of Proclamation No.1/2016, the Command Post has been empowered to prohibit any act of public incitement; close any means of communication; prohibit public assembly and demonstrations; arrest any person without court warrant; search any person, place or carrier; impose curfew; and take proportional measures proportional force which it finds necessary for the execution of state of emergency measures provided in this Proclamation.¹⁶⁶

The Council of Ministers tried to provide some direction to be followed by the Command Post when it discharges its powers and responsibilities.¹⁶⁷ For example, during the first state of emergency period, the Command Post was directed to determine the geographic scope of emergency prohibitions; to determine emergency measures to be taken when prohibited acts are committed, and to determine condition under which perpetrators may be brought to justice and released after receiving rehabilitation.¹⁶⁸ However, when we look these directions, they are more about expanding the powers of the Command Post instead of setting standards to constrain the it. For instance, the Command Post was directed (empowered) to determine the measures to be

¹⁶⁴Proclamation No.1/2016, art. 6.

¹⁶⁵ Id, art 4.

¹⁶⁶ Id, art 4 (1-6 & 11). (This Proclamation empowered the Command Post to take all these measures as long as it believes that it is necessary for the observance of the constitutional order and for maintenance of peace and security of the public and citizens.)

¹⁶⁷ Regulation No.391/2016, art 3.

¹⁶⁸ Id, arts 1,2, &4.

taken when prohibited acts committed. However, most of the prohibited acts by the state of emergency decree are already prohibited by the regular criminal law which also predetermined the measures to be taken on perpetrators of such criminal acts.¹⁶⁹ It would be appropriate, if the measures for violation of prohibited acts were identified and included during the approval process of the state of emergency where their constitutionality is evaluated by the HoPR, than to do so after the approval of the decree.

Furthermore, the Command Post was directed to “determine the condition under which perpetrators may be brought to justice and are released after receiving rehabilitation.”¹⁷⁰ This leaves the arguably non-derogable due process rights of detained individuals for the discretion of a desperate security organ. Bringing suspects to justice and involuntarily subjecting them to the so-called “rehabilitation” are not complementary acts, rather, the latter is found to be contrary to the former. The Command Post was also empowered to issue State of Emergency Directives by the state of emergency proclamations and regulations, and it did so.¹⁷¹ But the Directives introduced sweeping and vaguely worded restrictions on, among others, freedom of expressions, assembly, and movement where some argued that some of the restrictions went far beyond what the exigency required.¹⁷²

3.2.3. The Approval Role of the House of People Representatives (HoPR)

The HoPR is constitutionally empowered to approve or reject, and extend or terminate a state of emergency decree initiated by the Council of Ministers.¹⁷³ When the Council of Ministers declares a state of emergency, it must provide justifications to convince the HoPR on the necessity of the emergency decree and proportionality of proposed measures. As per Articles 93(2) and 55(8) of the FDRE Constitution, the ultimate power to approve, nullify, extend or terminate a state of emergency decree lies on the HoPR.¹⁷⁴ The Constitution provides that if a

¹⁶⁹ Comparing Articles 238-243 of FDRE Criminal Code v. the prohibited acts by Directive No.1/2016 and Directive No.1/2018 shows that most of these acts are already criminalized by the former.

¹⁷⁰ Regulation No.391/2016, art 3(4).

¹⁷¹ See for example Directive No.1/2016; Directive No.1/2018.

¹⁷² See Human Rights Watch, *Legal Analysis*, *supra* note 16; Amnesty International, *Commentary*, *supra* note 16 at 1.

¹⁷³ FDRE Constitution, art 93(2 &3).

¹⁷⁴ *Id.*, arts. 55(8) & 93(2).

state of emergency is declared while HoPR is in session, the decree shall be submitted to the house within forty-eight hours of its declaration.¹⁷⁵ If the emergency is declared while the HoPR is not in session shall be submitted to it within fifteen days of its declaration.¹⁷⁶ The decree must get the assent of a two-thirds majority vote of members of the HoPR in order to be approved.¹⁷⁷ If approved, an emergency decree could remain in force for a maximum of six months with a possibility of extension for an additional four months by HoPR.¹⁷⁸ Here, we notice that the FDRE Constitution prescribes the same number of parliamentary votes both to initially approve and renew an emergency decree. But, experiences in some countries shows that a higher number of votes is required for renewal than introducing an emergency decree.¹⁷⁹ The FDRE Constitution doesn't put an upper limit on the number of renewals of an emergency decree and it could pave the way for entrenched emergencies.

The FDRE Constitution clearly states that if the emergency decree is not approved by the two-thirds majority vote of the members of the HoPR, it shall be repealed forthwith.¹⁸⁰ A relevant question worth asking here is what if the Council of Ministers declares a state of emergency while the HoPR is in recess but the later annuls the decree after its implementation for fifteen days? It appears that the FDRE Constitution overlooked the implication of such possibilities where a lot could happen in fifteen days such as unwarranted intrusion on the rights and liberties of individuals without any clear remedy. Some argue that there is a mechanism of an *Ex post* control of the emergency measures taken by the executive either through the judiciary or another entity.¹⁸¹ As per Article 2 (3) of the ICCPR, every State party is required to provide remedies for any violation of the provisions of the Covenant.¹⁸² Also, the HRC states that the obligation of

¹⁷⁵ Id, art, 93(2) (a).

¹⁷⁶ Id, art. 93(2) (b).

¹⁷⁷ Id, art 93 (2).

¹⁷⁸ Id, Art. 93(3).

¹⁷⁹ See for example the South African Constitution, Art 37(2)(b). (In South Africa, a state of emergency can be introduced with the assent of a simple majority of the National Assembly (50+1) but it must be renewed every three-months by the assent of 60 per cent of the members which makes renewal more rigorous than initial declaration.)

¹⁸⁰ FDRE Constitution, art. 93(2) (a).

¹⁸¹ Kebene Wodajo, *Making Extraordinary Power Part of the Ordinary Discourse? The Case of Ethiopian State of Emergency Declared on February 16*, at 5, available at <http://www.abbyssinialaw.com> (accessed Dec. 28, 2018.)

¹⁸² ICCPR, art 2(3).

state parties to give a remedy for victims of human rights violations is part of the non-derogable provisions of the Covenant.¹⁸³

As per Article 59 (1) of the Constitution, unless provided otherwise, all decisions of the House shall be passed by a majority vote (50+1) of the members present and voting.¹⁸⁴ Hence, it worth noting that the Constitution prescribes a higher threshold (two-thirds majority) for approving and renewing a state of emergency decree submitted by the council of ministers. During the approval process of the 2018 state of emergency, there was some confusion on the number of votes required to approve the emergency decree where the vote counting result had to be corrected more than once by Speaker of the House. Initially, the Speaker announced that the decree is approved by getting the assent of 346 members which is apparently below two-third of the total number of members of the parliament (539). The issue of contention was whether the number of votes required to approve emergency decree is two-thirds of the total number of the parliament seats or two-thirds of members who are present and vote. The Constitution is not clear on the matter. While the 2016 emergency was approved with unanimous vote, 88 members of the parliament voted against the 2018 emergency decree and there was a contention saying the decree didn't get the required number of votes to be approved. However, the Speaker, admitting a mistake in the vote counting, finally said that the decree has gotten the assent of 395 members and this fulfils the required two-thirds vote requirement for approving state of emergency decree.

Parliamentary control of emergency powers is recommended by different international soft laws. For example, the *Paris Minimum Standards* recommends that during a state of emergency, the legislature shall remain unaffected and it must “give guidelines to regulate executive discretion in respect of permissible measures of delegated legislation.”¹⁸⁵ In this regard, the FDRE Constitution can be commended for putting a rigorous parliamentary control over the executive's decision to declare state of emergency. However, in the present Ethiopia, we can't expect a genuine legislative control over the executive because all the seats of HoPR are occupied by members of the ruling party where top executive members also sit and vote on laws, including state of emergency decrees. In addition, there is a long-standing allegation that the members of

¹⁸³ General Comment 29, para 14.

¹⁸⁴ FDRE Constitution, art 59 (1).

¹⁸⁵ Paris Minimum Standards, para 3 (a & b).

the House are mostly loyal to the party discipline than to the people and to their own self-conscious.¹⁸⁶ Interestingly, the Deputy Speaker of the HoPR recently conceded that the House has been under serious political pressure from the ruling party and the executive forcing it to serve just as a rubber-stamp.¹⁸⁷

3.2.4. The Inspection Role of the State of Emergency Inquiry Board

The FDRE Constitution mandates the HoPR to establish a State of Emergency Inquiry Board while approving a state of emergency.¹⁸⁸ The Inquiry Board shall have seven members chosen and assigned by the HoPR from among its members and from legal experts.¹⁸⁹ Practically, an Inquiry Board which comprised of seven members was established during the state of emergency periods in 2016 and 2018.¹⁹⁰ Nevertheless, detail criteria on the impartiality and integrity of the members of the Inquiry Board, and their work procedure is neither indicated in the Constitution nor referred as a matter to be determined by subsidiary laws. The Constitution is also silent on the proportion of the Inquiry Board members to be chosen from members the HoPR and legal experts. During the state of emergency periods, the HoPR elected four parliamentarians and three legal experts as members of the Inquiry Board.¹⁹¹ Bruce Ackerman finds the Ethiopian system of establishing such an Inquiry Board as a unique and commendable step as it will reduce abuse of information by the executive during emergency periods.¹⁹²

¹⁸⁶ As per Art 54 (4) of the FDRE Constitution, the members of HoPR are governed by: The Constitution; The will of the people; and Their conscience.

¹⁸⁷ House Speaker Admits Ethiopia's Parliament Used As 'Rubber-Stamp', *Newsbusinessethiopia*, Jan. 11, 2019, <https://newbusinessethiopia.com/house-speaker-admits-ethiopias-parliament-used-as-rubber-stamp/>(accessed Jan. 15, 2019.)

¹⁸⁸ FDRE Constitution, art 93(5).

¹⁸⁹ *Id.*, art. 93(5)

¹⁹⁰ *See* Proclamation. No.1/2016, art. 8; Proclamation No. 984/2016, art.3; Proclamation No. 1083/2018, art. 3.

¹⁹¹ The Three legal experts chosen as members of the Inquiry Board were: 1. Kifletsion Mamo –currently Federal Supreme Court Judge and member of the Council of Constitutional Inquiry who also participated in the drafting of the FDRE Constitution. 2. Habte Fichala, Federal Supreme Court V/President during the state of emergency period and currently a Head of the Courts' V/President Office. 3. Seid Hassen, Head Judge of the Supreme Court of Somali Region, and Dire Dawa town Appeals Court.

¹⁹² Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J.1029, at 1056 (2004).

As per Art 93(6) of the Constitution, the Inquiry Board will have the following powers and responsibilities:

- (a) To make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest;*
- (b) To inspect and follow up that no measure taken during the state of emergency is inhumane;*
- (c) To recommend to the Prime Minister or to the Council of Ministers corrective measures if it finds and case of inhumane treatment;*
- (d) To ensure the prosecution of perpetrators of inhumane acts and;*
- (e) To submit its views to the House of Peoples' Representatives on a request to extend the duration of the state of emergency.¹⁹³*

By looking at the above listed constitutional powers and responsibilities of the Inquiry Board, we can expect it to play a crucial role of minimizing abuse of emergency power. For example, the Board is mandated to announce, within a month time, the names of all arrested persons as a result of the emergency measures together with the reasons for their arrest. This is important to ensure transparency and avoid unaccounted detention of individuals by the executive.

Judge Habte Fichala, former V/president of the Federal Supreme Court and member of the Inquiry Board, stated that the Inquiry Board has practically exercised its constitutional powers and discharged its responsibilities, albeit with many challenges.¹⁹⁴ According to him, the Board has performed the following major activities during the state of emergency: it made public the names of arrested persons; supervised and inspected the conditions of arrested persons through onsite visits; suggested corrective measures to the Command Post; and submitted its views on the extension of the state of emergency to HoPR.¹⁹⁵ During their on-site inspections, the Board members discovered that some of the emergency measures were inhuman and beyond what is

¹⁹³ FDRE Constitution, art. 93(6).

¹⁹⁴ Interview with Habte Fichala, former member of the State of Emergency Inquiry Board and V/president of the Federal Supreme Court of Ethiopia (Dec. 27, 2018) (Hereinafter Interview with Habte Fichala).

¹⁹⁵ Ibid.

permitted by the law.¹⁹⁶ Some of the major findings of the inspections by the Board were: overcrowded detentions rooms including arresting women and men, youth and adults in same rooms; insufficient food, water, health, and hygiene facilities; beatings of detainees by security forces; forced and heavy physical exercises; and killing of one arrested person.¹⁹⁷ As per its constitutional mandate, the Inquiry Board also submitted its views to the HoPR on the extension of the 2016 State of Emergency stating “the state of emergency decree shall be extended but its geographic coverage should be limited to specific regions which are affected by the violence.”¹⁹⁸ However, against the suggestion of the Board, the state of emergency was extended by the House with a nation-wide geographic and material coverage.¹⁹⁹

Regarding the effectiveness and independence of the Inquiry Board, some legal experts and opposition political leaders expressed their concerns as the selection of the members is done by the ruling party which declares the very emergency decree to be monitored.²⁰⁰ According to Habte Fichala, the major challenge of the Inquiry Board was lack of institutional capacity, specifically insufficiency of financial and human resources.²⁰¹

3.2.5. The Role of the Judiciary during State of Emergency

In general, state of emergency is a situation where the judiciary is somehow expected to restrain itself so as to give a legal breath to the executive where the later can take extraordinary measures

¹⁹⁶State of Emergency Inquiry Board, Supervision and Inspection Report (unpublished, Nov. 26, 2016.) (This report was compiled after onsite inspections in the Awash 7 Killo, Alagie, Abosto, Dilla and Yirgalem detention centers shows that there were emergency measures which are considered as inhumane.)

¹⁹⁷ Interview with Habte Fichala.

¹⁹⁸ Ibid.

¹⁹⁹ Report of the Inquiry Board; Interview with Habte Fichala.

²⁰⁰ Menna Asrat, *State of Emergency Inquiry Board's First Report Expected in November*, Addis Fortune Oct. 25, 2016) available at <https://addisfortune.net/articles/state-of-emergency-inquiry-boards-first-report-expected-in-november/>,(accessed Nov 10, 2018). Mulugeta Aregawi, a legal scholar, is quoted saying “If you are drawing from the same well, then it is not reasonable to expect something different.” Similarly, Merera Gudina (PhD), Chair of the Oromo Federalist Congress, an opposition party, stated that “the Board is established by the ruling party and it will be as trustworthy as the Front is.”

²⁰¹Interview with Habte Fichala.

to avert a danger which triggered the emergency.²⁰² Nonetheless, ensuring the protection of non-derogable rights demands the availability, at all times, of effective domestic remedies to victims of human right violations. The *Paris Minimum Standards* recommends the right to get remedy be considered as non-derogable rights during state of emergency.²⁰³ In Ethiopia, judicial power, both at federal and state level is vested in the courts.²⁰⁴ The Constitution prescribes that all federal and state judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of chapter three fundamental rights and freedoms incorporated in the constitution.²⁰⁵ The Supremacy Clause of the Constitution under Article 9 (1) provides that “any law, customary practice or a decision of an organ of state or a public official which contravenes the Constitution shall be of no effect.”²⁰⁶ On the other hand, the 2016 State of Emergency Proclamation under Article 10 (1) provided that “without prejudice to diplomatic immunities provided for under the Vienna Convention, substantive and procedural laws inconsistent with this Proclamation shall remain suspended during the implementation of this Proclamation.”²⁰⁷ A juxtaposition reading of the two provisions quoted above demands us to ask one pertinent question: in case of incompatibility between the Constitution and State of Emergency Proclamation, which one should prevail?

To answer the above questions, there is a need to evaluate the very purpose of the state of emergency decrees and official statements by top executive members during the emergency period. State of emergency in Ethiopia was declared because the government claimed that the constitution and constitutional order was endangered and there was an urgent need to take special measures in order to avert such danger.²⁰⁸ Thus, the state of emergency laws and measures shouldn't be incompatible with the constitution because it's in defense of later that they came to life in the first place. In addition, the supremacy clause of the constitution doesn't provide any

²⁰² Emilie M. Hafner-Burton et al, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INTERNATIONAL ORGANIZATION 4, at 673-707 (2011).

²⁰³ Paris Minimum Standards, Sec C, art 16.

²⁰⁴ FDRE Constitution, Art 79(1)

²⁰⁵ Id, art. 13(1)

²⁰⁶ Id, art. 9(1)

²⁰⁷ Proclamation No.1/2016, art 10.

²⁰⁸ The preamble of Proclamation No. 1/2016 states that endangering the constitutional order, public peace and security are among the main reasons for declaring state of emergency.

exception when it proclaims that “any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.”²⁰⁹ Hence, we may strongly argue that under the current Ethiopian legal system, state of emergency laws and measures can’t justifiably suspend the constitution altogether except the provisions on “political and democratic rights” as provided by the Constitution itself.²¹⁰

The Constitution also provides that everyone has the right to bring a justiciable matter to obtain a decision or judgment by, a court of law or any other competent body with judicial power.²¹¹ In practice, during the emergency periods, the regular courts have been handling cases that are related to the emergency decree by setting up special benches to give expeditious decisions.²¹² The role of the courts during the emergency is even more indispensable in Ethiopia because there is no another independent and competent body with judicial power to safeguard human rights by countering abuses power by the executive. The state of emergency inquiry board does not have judicial power except recommending possible corrective measures to the executive. Hence, it can’t replace the role of courts during a state of emergency. The emergency proclamations didn’t suspend the regular courts during the emergency period and courts have been applying the regular laws and procedures even though their independence remains questionable. The Siracusa Principles also recommend that “the ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.”²¹³

Nevertheless, the courts in Ethiopia cannot question whether the substantive and procedural requirements to declare state of emergency are fulfilled because doing so may require interpreting the constitution. The power to interpret the Constitution lies with the HoF which is a political organ consisting of representatives of nations, nationalities, and peoples.²¹⁴ The Constitution states that ‘all constitutional disputes’ shall be decided by the HoF.²¹⁵ Assefa Fiseha

²⁰⁹ FDRE Constitution, art 9(1).

²¹⁰ Id, art. 93(4) (b).

²¹¹ Id, art. 37(1)

²¹² Interview with Mulusew Dires, Judge at the Federal High Court of Ethiopia (Dec 15, 2018).

²¹³ Siracusa Principles, para 60.

²¹⁴ FDRE Constitution, Art. 83(1).

²¹⁵ Ibid.

argues that even though the judiciary in Ethiopia does not have the power to review the constitutionality of subsidiary laws, it can, however, review executive measures which could include the annulment of any act or enforcement directive made by the executive which does not need any constitutional interpretation.²¹⁶ Leaving aside the debate on the role of the judiciary with regard to constitutional interpretation and reviewing executive measures, the courts in Ethiopia can and should play an indispensable role in safeguarding non-derogable rights during state of emergency and prescribing remedies in cases of violations.

²¹⁶Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (HoF)*, 1 MIZAN LAW REVIEW (2007).

CHAPTER FOUR

THE STATES OF EMERGENCY LAWS AND DEROGATION OF HUMAN RIGHTS: ANALYSIS OF ETHIOPIA'S EXPERIENCE

This chapter is devoted to providing a critical analysis of Ethiopian's experience in declaring and implementing state of emergency. Specific issues such as the compatibility of the state emergency laws, measures, and implementing and monitoring organs will be analyzed in the light of international principles and requirements discussed in the foregoing Chapters. In so doing, the major gaps of the state of emergency decrees and practices will be pointed out.

4.1 The Requirement of Necessity- was there a real threat to the life of the nation?

As discussed under the previous chapters, the principle of necessity an established requirement both under international and domestic laws. The requirement of necessity, as envisaged by international instruments, gives importance to the life of the nation, but not the power of an incumbent government.²¹⁷ However, the doctrine of the margin of appreciation gives governments a considerable margin of appreciation in assessing the existence of a danger warranting a declaration of an emergency and identifying emergency measures required to avert such danger.²¹⁸

While declaring a state of emergencies, the Ethiopian government repeatedly claimed that a breakdown of law and order which endangers the constitutional order had occurred and it was impossible to control it through the regular law and law enforcement bodies.²¹⁹ In both rounds of the emergency declarations, the alleged purposes of the state of emergency measures were safeguarding the constitution and constitutional order.²²⁰ The emergency proclamations also stated that the major cause which triggered the declaration of emergency was the prevalence of illegal activities committed in some parts of the country with the support of foreign forces.²²¹

²¹⁷ General Comment 29.

²¹⁸ Oren Gross. "Once more Unto the Breach." *supra* note 1, at 465.

²¹⁹ See for example the preambular provisions of Proclamation No 1/2016 & Proclamation No.1083/2018.

²²⁰ Ibid.

²²¹ Ibid

According to the government, those illegal activities endangered the constitutional order, public peace, and security especially by targeting to weaken investment and development activities.²²² The emergency proclamation mentioned economic damage as part of justification for declaring the state of emergency but the Constitution does not clearly recognize such justification to declare state of emergency.

Regarding the recent past state of emergency decrees in Ethiopia, the questions of whether the constitutional order (the life of the nation) had been actually threatened by the public protests and whether it was impossible to control them through the regular law enforcement mechanisms lacks consensus among politicians and legal scholars.²²³ In this regard, Abdi Jibril states that the question of whether there was an actual threat to the constitutional order in Ethiopia is more of political than a legal matter, and hence the answer depends from which side you see the matter.²²⁴ According to him, if you see it from the governments' side, the facts could be exaggerated to justify the emergency decree, but if you strictly evaluate the situation against the international and constitutional norms, there was no sufficient ground to declare state of emergency in Ethiopia.²²⁵ Zelalem Kibret, a legal expert, argues that the illegal activities which caused the declaration of the state of emergency could have been controlled by the regular law and law enforcement bodies without resorting to declaring a state of emergency.²²⁶ This may indicate that the government intended to use the state of emergency as a tool to silencing dissent and evading legal responsibility for doing so. The then prime minister, Hailemariam Desalegn consequentially admitted that rampant corruption, maladministration and “rent seeking” acts of within the government system were the root causes for the public grievances.²²⁷ Finally, the public protests has forced the government to conduct what it called “deep reforms” and take progressive measures such as opening up the political space and releasing thousands of prisoners.

²²² Ibid

²²³ Kebene Wodajo *supra note* 181, at 5

²²⁴ Interview with Abdi Jibril, Ass. Professor of Law at Addis Ababa University (Jan. 2, 2019)

²²⁵ Ibid.

²²⁶ Zelalem Kibret, as quoted by EHPR, *state of Emergency*, *supra note* 16.

²²⁷ Abdulbasit Abdusemed, *Good Governance Deficit: Facts behind the protest in some parts of Oromia*, The Ethiopian Herald, Dec. 29, 2017, available at <https://allafrica.com/stories/201512290923.html> (accessed on June 4, 2017.)

Unusually, the government also officially admitted its own wrongdoings (mainly its rampant human right abuses) against the people over the years and offered a public apology.²²⁸ The declaration of the state of emergency had further incentivized abuse of power by the securities and ushered a greater danger on the stability of the country rather than addressing the root causes of the internal unrest.²²⁹

For all the above reasons, I argue that Ethiopia's the state of emergency decrees and emergency measures in 2016 and 2018 have failed to comply with the international requirements of necessity. In the writers' view, what has happened in Ethiopia since 2015 was a legitimate claim by citizens against a repressive government calling for respect and protect human rights and freedoms. Strictly speaking, what was threatened by the protests was not the "life of the nation" but the power of an incumbent government which in its admittance failed to discharge its constitutional duties to the satisfaction of citizens. As illustrated above, the government itself have justified the legitimacy of the public grievances and it's not acceptable to deal with legitimate questions through declaring state of emergency and suspending individual human rights. Furthermore, almost all the prohibited acts during the state of emergency were already forbidden by the regular criminal law of the country and they could have been controlled by effectively applying the regular law without resorting to declaring the states of emergencies.²³⁰

4.2 The Proportionality of the States of Emergency Measures

As discussed elsewhere, the proportionality requirement is related to the duration, geographic coverage, and material scope of the state of emergency and any measures taken as a result of the emergency decree.²³¹ According to this principle, each emergency measures must be strictly proportional to the danger faced. When we evaluate Ethiopia's states of emergency laws and measures against the above elements of proportionality principle, we can find some clear

²²⁸ Prime Minister Abiy Ahimed, Inaugural Address to the HoPR, (Apr. 2, 2018) *available at*

<https://www.opride.com/2018/04/03/english-partial-transcript-of-ethiopian-prime-minister-abiy-ahmeds-inaugural-address/> (accessed on May 13, 2018.)

²²⁹ *Analysis: Ethiopia: the slow death of a civilian government and the rise of a military might*, Addis standard (A.S) Jan 24, 2017, available at <http://addisstandard.com/category/5/> (accessed Feb 05, 2017).

²³⁰ Directive 1/2016, arts 1-20.

²³¹ General Comment 29, para 4.

deviations from the principle. In both the 2016 and 2018, the government violated the requirement of proportionality by declaring a nationwide state of emergency while its causes took place in some parts of the country. The 2016 state of emergency proclamation provided contradictory statements by stating, under its preamble provision, that “illegal activities [are] committed in some parts of the country” but under Article 3(1) it states that “[Emergency]Proclamation shall be applicable in all parts of the country.”²³² As mentioned before the Inquiry Board suggested for limiting the geographic coverage of the emergency only to violent hit parts of the country but the House rejected the recommendation and extended the emergency with nation-wide coverage.²³³

When we see the material effect of the state of emergency proclamations and subsequent decrees, they widely suspended freedom of expression, assembly, peaceful demonstration, movement of everyone in the nation irrespective his or her location.²³⁴ The emergency laws have also given the Command Post a sweeping power to arbitrarily search, seizure, arrest individuals, among others.²³⁵ In violation of the principle of non-retroactivity of criminal laws, the state of emergency directives had been used to detain people for their participation in protests which took place long before the State of Emergency is issued.²³⁶ Human Rights Watch rightly noted that the state of emergency directive imposes sweeping and vaguely worded restrictions on basic rights beyond what is permitted by international law.²³⁷ A study by the Ethiopian Human Rights Project also shows that the government used the state of emergency to silence opposition and evade legal responsibility.²³⁸ Therefore, for all the above reasons, we can argue that some of the emergency measures were not proportional and went beyond what the exigency demanded. Being cognizant of this, Speaker of the Parliament ordered a full-scale investigation into alleged

²³² ²³² See the Preambular Provision of Proclamation No.1/2016 & art 3(1).

²³³ Interview with Habte Fichala.

²³⁴ See Proclamation No 1/2016, arts 4&5; Directive No 1/2016, Sec 1; Directive No 1/2018, Section 1, para 1.

²³⁵ Proclamation 1/2016, art. 4.

²³⁶ Ethiopian Human Rights Project, *Human Rights Violations committed during the State of Emergency in Ethiopia*, 142 Special Report, at 3 (Jan. 12, 2017).

²³⁷ See Human Rights Watch, *Legal Analysis*, *supra* note 16; Directive No.1/2016, Sec 1, arts 1-20.

²³⁸ Ethiopian Human Rights Project, *State of Emergency*, *supra* note 16, at 4.

human rights violations during the state of emergency at the time of lifting the second state of emergency on 5th June 2018.²³⁹

4.3. The States of Emergency Laws v. The Requirements of Official Proclamation and Publicity

Prior official proclamation is a condition *sine qua non* for derogating human rights. This requirement is designed to force derogating states parties to act openly from the outset of the emergency and to delegitimize after-the-fact justifications for violations of human rights.²⁴⁰ It also facilitates domestic supervision over the executive, in particular, by the legislative and judicial branches.²⁴¹

When it comes to the Ethiopian experience, the requirement of official proclamation and publicity was partially fulfilled. The 2016 State of Emergency Proclamation and Regulation have been published on the official Federal Negarit *Gazette*²⁴² but not the 2018 State of Emergency Proclamation.²⁴³ Nevertheless, the approval Proclamation of the 2018 State of Emergency has been published Federal Negarit *Gazette*.²⁴⁴ However, all the publication on the official Negarit *Gazette* came days after the emergency decree took effect. For example, the 2016 state of emergency proclamation was published on Negart *Gazette* on 25th October 2016 while its effective date started on 8th October 2016. In addition, the implementing Emergency Directives issued by the Command Post had not been published in an official and accessible form but only announced on different media outlets. Article 14(5) of State of Emergency Proclamation No.1/2016 required the Prime Minister to declare the promulgation of the State of Emergency Proclamations through mass media and it was practically done accordingly.²⁴⁵ Given the limited accessibility of media to the majority of Ethiopians, we can say that the emergency laws were not sufficiently communicated to the people. In fact, lack of accessibility of legislation in Ethiopia is

²³⁹ Ethiopian Parliament lifts State of Emergency, Ethiopian Broadcasting Corporation (EBC) June 5, 2018, <http://www.ebc.et/web/news-en/-/ethiopian-parliament-lifts-state-of-emergency> (accessed June 7, 2018.)

²⁴⁰ Angelika Siehr, *supra* note 188 at. 15

²⁴¹ Ibid

²⁴² Proclamation No. 1/2016; Regulation 391/2016.

²⁴³ Proclamation No.1/2016; Ratification Proclamation No. 984/2016.

²⁴⁴ Proclamation No.1083/2018

²⁴⁵ Proclamation No.1/2016, art. 14(5)

not peculiar to a state of emergency decrees but also to other regular legislation and administrative directives that constantly failed to be officially published despite the requirement of the Federal Negarit Gazette Establishment Proclamation.²⁴⁶

4.4. State of Emergency Legislations v. The Requirement of International Notification

Article 4 (3) of the ICCPR requires a derogating state to immediately inform the other states parties to the Covenant, through the UN Secretary-General, of the provisions from which it has derogated and the reason for these measures. However, Ethiopia failed to fulfill the requirement international notification in both rounds of state of emergency decrees. In apparent disregard of Article 4 (3) of the ICCPR, no official letter of notification had been submitted to the Secretary-General of the United Nations by Ethiopia until the laps of the emergency periods.²⁴⁷ In fact, neither the derogation clause of the FDRE Constitution nor the state of emergency proclamations prescribes for the fulfillment of the international notification requirement.

4.5 Protection of Non-derogable Rights during the State of Emergency

The FDRE Constitution under Article 93(4) (b) empowers the Council of Ministers to suspend such “political and democratic rights” contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.” The then Prime Minister of Ethiopia expressly stated that the state of emergency will not affect ‘human rights.’²⁴⁸ However, unlike the Constitution, the Emergency Proclamation didn’t make any distinction between human rights and democratic/political rights. In practice, as well, there were a lot of concerns regarding the violation of non-derogable rights by the Command Post during the emergency period. State of Emergency Proclamation No.1/2016 under Article 5 stated that:

Any law enforcement organ or its officials shall, in the application of this Proclamation, be prohibited to change the name of the government, to commit inhuman and degrading treatment, to perform any activity violating the right to equality and to transgress the

²⁴⁶ Proclamation No 3/1995, art. 2(2& 4).

²⁴⁷ U.N Treaty Collections, <http://www.treaties.un.org/pages/showDetails.aspx?objid=0800000280004bf5> (accessed Dec. 12, 2018.)

²⁴⁸ Elias Meseret, *Ethiopia declares state of emergency to stop protests*, Associated Press (AP), Oct. 9, 2016, <https://apnews.com/cd10e2198ded4ccaaf6ea249b4aad740> (accessed on Jan 10, 2017).

*right of nation, nationalities and people in contravention to the provisions of Article 1, 18, 25 and 39 (1) and (2) of the Constitution of the Federal Democratic Republic of Ethiopia.*²⁴⁹

The same Proclamation under Article 10 stated that “without prejudice to diplomatic immunities provided for under the Vienna Convention, substantive and procedural laws inconsistent with this Proclamation shall remain suspended during the implementation of this Proclamation.”²⁵⁰ When we read Article 5 and 10 of the Proclamation together, we can see that the fate of many fundamental human rights and freedoms is left for the discretion of the Command Post which may suspend them whenever it believes they are incompatible with the Proclamation.²⁵¹ The Report of the Inquiry Board reveals that there were inhuman treatments of detained persons; involuntary and heavy physical exercise; lack of sufficient food, water, and health services; and beatings which resulted in physical injuries (could be categorized as torture) of detainees by security forces during investigations in 2016.²⁵² A study on the conducted on Ethiopia state of emergency by the EHRP has revealed that there were, among others, arbitrary killings and forceful investigations causing psychological and physical harm on detainees during the state of emergency.²⁵³ A joint submission to the U.N UPR system by CIVICUS also reported that more than 20,000 detained protestors were released between November 2016 and March 2017 in which many of whom reported being subjected to torture, harsh prison conditions and other forms of ill-treatment while in detention.²⁵⁴ My interview with a member of the Inquiry Board also confirms the violation of some of the nation-derogable rights during the states of emergency.²⁵⁵ Therefore, all the above analysis shows that Ethiopia’s state of emergency laws and measures have failed to effectively safeguard non-derogable rights during the emergency periods.

²⁴⁹ Proclamation No.1/2016, art 5.

²⁵⁰ Id, art 10.

²⁵¹ Article 6 of Proclamation No.1/2016 mandated the Command Post to implement the state of emergency decree.

²⁵² State of Emergency Inquiry Board, Supervision and Inspection Report (unpublished, Nov. 26, 2016.)

²⁵³ See Ethiopian Human Rights Project, *State of Emergency*, *supra* note 16. at 1.

²⁵⁴ CIVICUS, *5000 Face Trial for Taking Part in Anti-Government Protests*, June 9, 2017, <https://monitor.civicus.org/newsfeed/2017/06/09/ethiopia-5000-protestors-face-trial>. (accessed on August 2, 2017.)

See also Human Rights Watch, *Legal Analysis*, *supra* note 16, at 8.

²⁵⁵ Interview with Habte Fichala.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

Once states become parties to international human rights treaties, they are duty-bound to uphold certain obligations mainly to respect, protect, and promote fundamental rights and freedoms enshrined under such treaties. However, the major challenge for the international human rights system has been states parties' unwillingness or inability to effectively discharge their respective international obligations. This challenge becomes more acute when those states parties face exigencies which call for declaring a state of emergency and suspending some of their international obligations. Experience elsewhere shows that state of emergency has been used to legalize some of the most heinous human rights violations and escape justice. Ethiopia, a country with an infamous human rights record, declared nation-wide state of emergencies and suspended substantial size of human rights and freedoms twice between the years 2016 and 2018. This paper tried to analyze Ethiopia's state of emergency decrees and measures in the light of internationally established principles/requirements that govern the matter.

As the analysis under the previous chapters reveals, Ethiopia failed to fulfil some of the major requirements that applies during state of emergency and derogation from human rights. Among others, in this paper, I argued that the requirement of strict necessity was not properly met by the Ethiopian government because the public protests which triggered the states of emergencies were legitimate public questions rather than being a serious threat to the life of the nation or constitutional order so to say. In fact, those public grievances have been recognized as legitimate questions by the same government which declared the emergencies and the government is currently working to properly address them. Furthermore, even if one may argue that the then situation in Ethiopia warranted declaring state of emergency, I further contended that the state of emergency has failed to fulfil the requirement of proportionality because it's geographic and material effect of the emergency covered the entire nation while its causes took place mainly in two regions out of the nine regional states and two city administrations members of the federation. The proportionality issue was also raised by the Inquiry Board during the renewal of the 2016 state of emergency decree but disregarded by the HoPR. Another major gap of the state of emergency decree was Ethiopia's failure to discharge its obligation to do an international

notification of the emergency and derogation from human rights by failing to submit an official letter of notification to other states parties to the ICCPR via the Office of the U.N Secretariat-General. Since Ethiopia failed to officially notify other parties of the ICCPR of the declaration of state of emergency and suspension of majority of its provisions, there has not been a proper international supervision and scrutiny regarding the compatibility of the emergency with international requirements. Ethiopia's state of emergency measures also violated some of the non-derogable rights enshrined under international treaties. As discussed under Chapter Four of this paper, the Command Post violated some non-derogable rights by inhumanely treating detained individuals, beating and forcing them to self-incrimination, and other similar prohibited acts. This was also confirmed by the Inquiry Board during its onsite inspection in detention centers. Even though the Constitution prescribes the establishment of a State of Emergency Inquiry Board with a task of preventing potential abuse of emergency powers by the executive, the practical experience of the Board shows that it lacked the necessary institutional and legal capacity to effectively discharge its aspired roles. In summary, Ethiopia's legal and institutional frameworks as well as its practical experiences on declaring state of emergency and derogating from human rights reveals that the country failed to fulfill some of the major international principles that govern the matter.

5.2. Recommendations

Having identified the major legal, institutional, and practical gaps faced during the state of emergency in Ethiopia, some recommendations are in order.

First, the FDRE Constitution, while it can be commended for setting up relatively clear substantive and procedural requirements for declaring a state of emergency, it, however, failed to be in line with some international principles on derogation of human rights. Unlike the ICCPR, the Constitution failed to clearly recognize some fundamental rights as non-derogable, notably the right to life. Hence, the Constitution needs to be amended to incorporate the right to life and other internationally recognized non-derogable rights under its non-derogable list. If amending the Constitution is to be considered as an ambitious call, this gap should be rectified by relevant state of emergency laws by following the interpretation rule provided under Article 13(2) of the same Constitution. The Constitution neither clearly prohibits derogation of the right to life nor allow for its suspension during state of emergency. Hence, if the Council of Ministers declares

state of emergency, it should refer to Article 13(2) of the Constitution which states that the human rights provisions of the Constitution shall be interpreted in conformity with international human rights treaties adopted by Ethiopia so as to make its emergency measures compatible with international human right treaties, such as respecting the non-derogability of the right to life.

Second, there should be an independent, impartial, and strong institution that could effectively supervise and control emergency power so that it wouldn't be abused by the executive organ. The Constitution uniquely provides for setting up an ad hoc Inquiry Board during state of emergency but the recent experience shows that the board lacked the necessary institutional capacities and legal powers to effectively monitor emergency measures. Specifically, the Board was not provided with sufficient financial, human and logistical support during the 2016/18 state of emergency period in Ethiopia. Hence, in the absence of another constitutional mechanism to check-and-balance the Executive's emergency powers, the inquiry board should be given all necessary support it needs in cases emergency periods. In addition, during state of emergency, the regular judiciary should step up its role in safeguarding human rights, especially the non-derogable ones.

Third, Ethiopia, being a state party to many international and regional human right instruments, must learn to honour its international human rights obligations, be it in times of peace or crisis, if it aspires to establish a viable democracy where the rights and freedoms of individuals are ensured. Among others, the fact of derogation from international human rights during states of emergency must be communicated to other state parties of a certain treaty so that the country's measures could be scrutinized by the international human right system. In the absence of such international scrutiny, domestic laws and systems may be abused to justify an illegitimate declaration of state of emergency and suspension of human rights by repressive governments.

Fourth, while the HoPR is deliberating on a proposed state of emergency decree, it must strictly evaluate each provision of the decree and the proposed measures not only against the requirements under the Constitution but also the international treaties adopted by Ethiopia because as per Article 9(4) of the same Constitution, the later are an integral part and parcel of the law of land. Doing so will provide the House an important guideline to approve only those emergency laws and measures which fulfil the constitutional and international principles governing state of emergency and derogation from human rights.

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