

Non-derogable Rights during State of Emergency: Evaluation of the Ethiopian Legal Framework in Light of International Standards

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Abstract

Human rights are entitlements everyone enjoys merely for being human. These rights are inter alia, inalienable, irreducible and inherent in every human being who lives in society by its nature. Yet, the claims of the individual members of the society to exercise these inherent rights cannot be treated in isolation for human kind is a social being. Rather, it is conceived in the light of the network of rights and duties within the society at large, and thus, there are also potential conflicts between the claims of individuals and society at large. This requires the need to have, at least, temporal suspension on fundamental human rights and freedoms for the sake of social interests, the claims of other members of the society, and to make the exercise of such claims (rights) meaningful. However, there are certain human rights (non-derogable) that may never be suspended or restricted even during a state of emergency. This article deals with how the Ethiopian Constitution addresses these non-derogable human rights during a state of emergency. Accordingly, the only non-derogable [human] rights under the Ethiopian Constitution are the prohibition against inhuman treatment (Art.18), and the rights to equality (Art.25). The Ethiopian constitutional listing of non-derogable rights is far less than what the core international human rights instruments enumerate. Remarkably, the Ethiopian Constitution includes a set of rights–nomenclature of the state and self-determination– as non-derogable rights that are not recognized as non-derogable under the core international human right instruments.

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1. Introduction

Human right is a concept derived from the doctrine of natural rights, which holds that individuals, by virtue of their humanity, possess fundamental rights beyond those prescribed by law.¹ Thus, the natural law approach asserts that human rights emanate from the fact of being human and are, therefore, inherent in individuals² whereas legal positivists do not agree on the view that human rights are rooted in the natural law and natural rights.³ Currently, it is widely accepted that natural law played a dominant part in the development of the notion of human rights.

Several scholars have developed alternative definitions of human rights. For example, Jacques Maritain, in his book “The Right of Man”, stated that the human person possesses rights because of the fact that is a person a whole master of himself and of its acts, and which consequently is not merely a means to an end.⁴ Henry defined human rights as every one’s minimum reasonable demands up on the rest of humanity....enjoyment of them is essential to the enjoyment of all other rights.⁵ The reason for this variance of the definition of human rights in modern times seems to be the ideological,⁶ moral, economic, legal and other differences existing among nations and individuals.

¹George, W. *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, (Transnational Publishers 2003) <<https://www.semanticscholar.org/paper/Human-Rights-in-Africa%3A-Enhancing-Human-Rights-the-Mugwanya/096b8426160276be9c20baa8aae77955970e2c45>>accessed 27 July 2021.

²Paul, S. *The International Law Human Rights, Human Rights Committee* (Clarendon Press · Oxford 1983)<<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1148&context=yjil>> accessed 02 January 2021.

³ Ibid

⁴Jacques M., *The Man and the State*, (CUA Press, 1998)<https://books.google.com.et/books?id=7Pv_GF8ofGwC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false> accessed 12 February 2021.

⁵Henry, S. *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (1980).

⁶ Indeed, a number of theories can be identified on the nature of rights. Prominent among these are the will theory, the interest theory, the claims theory, the entitlement theory and entitlement- plus

Despite some divergence of definitions on the nature of human rights, there are commonly accepted concepts pertaining to human rights. Currently, the notion that human rights are grounded in natural law has got significance. Thus, human rights are, by definition, rights in the strict sense of the term, entitlements that one has simply for being human. The term human rights points to a source of humanity, human nature, being a person or a human. Thus, apparently human rights have humanity or human nature as their source.

Although everyone has the right to enjoy human rights, there may be conditions that necessitate suspending the enjoyment of such (derogable) rights temporarily so as to protect the interests of the public, the moral fabrics of the society and the state itself. However, there are fundamental human rights, under international human rights law that cannot be suspended even during a state of emergency and these rights are non-derogable rights. Signatory states (including Ethiopia) to these international legal instruments are also obliged to ensure the protection of fundamental rights and freedoms.

The current Constitution of Ethiopia, promulgated in the year 1995, contains *inter alia* a bill of rights that provides for the protection and promotion of fundamental rights.⁷ In addition to the Constitution, Ethiopia has ratified different regional and international human right instruments including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights (hereafter the African Charter) and other standards.⁸ The Ethiopian

theory. For summary and the details of their difference from one another, see James W. Nickel, *Making Sense of Human Rights* (2nd ed, Oxford: Blackwell publishing 2006).

⁷ The Constitution of the Federal Democratic Republic of Ethiopia (Ethiopia Constitution) of 1995. See Ethiopian Constitution from Art.14 —28 for Human Rights and from Art. 29-44 for Democratic Rights. <https://www.wipo.int/edocs/lexdocs/laws/en/et/et007en.pdf>.

⁸ Ethiopia has signed up to six of the core international human rights instruments. These are the International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural

Constitution, under Article 9, recognizes all these international agreements ratified by Ethiopia to be an integral part of the law of the land. The Ethiopian Constitution, under Article 13, also reaffirms that fundamental rights and freedoms of the Constitution shall be interpreted in a manner conforming to the principles of such international instruments.

The constitutional guarantee of human rights and fundamental freedoms, however, are not without derogations. Such derogations have been provided in the constitutional provisions due to various considerations such as protection of rights, human dignity, national security, public health and protection of democratic values on which the state is founded.⁹ Derogations to fundamental human rights are not made arbitrarily but should be justifiable within the established grounds and there are fundamental rights—*non-derogable human rights*— that cannot be suspended even during a state of emergency and remain non-derogable. The crux of this research is to evaluate the Ethiopian constitutional protection of non-derogable human rights and compare its (in) compatibility in light of the international standards.

2. Protection of Non-Derogable Rights under the International and Regional Legal Frameworks

The 1948 Universal Declaration of Human Rights (UDHR) is the first international instrument that affirms the inviolable, inalienable and indivisible nature of human rights. The UDHR reaffirms that these rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations. It further states, “nothing in the declaration may be interpreted as implying for any state,

Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Convention on the Rights of the Child.

⁹ The International Human Rights Instruments, HRI/CORE/ETH/2008, Core Document Forming the Initial Part of the Reports of States Parties Ethiopia <<https://www.refworld.org/docid/4ad57afd0.html>> accessed 12 February 2021.

group or person any right to engage in any activity or perform any act aimed at the destruction of any the rights and freedoms set forth herein” (UDHR, Art. 29(3) and 30). The UDHR does not have any such derogation clause aiming to permanently suspend those fundamental human rights but UDHR under Article 29(2) has a general limitation provisions which unequivocally stipulate that human rights can be limited on the ground of safeguarding due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. However, UDHR, under its Article 29(3) and 30, specifically imposed duties on states to observe the extent of limitations, which are provided in the covenant and limit the power of a state from abusing the extent of limitations so as to destroy any of the rights and freedoms recognized in the instrument.

Since the adoption of the UDHR, several global and regional human right instruments have been devised and incorporated non-derogative clauses in their provisions. One of the commonly cited legal frameworks,¹⁰ which include non-derogable provisions, is ICCPR. ICCPR incorporated derogation clause under Art 4 and prohibits derogation from Art 6 (right to life), Art 7 (prohibition of torture), Art 8 (prohibition of slavery and servitude), Art 11 (prohibition of imprisonment for inability to fulfill contractual obligation), Art 15 (prohibition of retrospective criminal law), Art 16 (right to be recognized as a person), and Art 18 (freedom of thought, conscience and religion).

The UN Human Rights Committee, in its General Comment Number 29, identified additional non-derogable provisions, including: Article 2(1) (non-discrimination);

¹⁰ Actually, the first (regional) legal document that included non-derogable human rights in its provision is the European Convention on Human Rights. Adopted in 1950, the European Convention on Human Rights enumerates exclusively non-derogable rights. Article 15 of the Convention prohibits derogation from Article 2 (right to life), Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour) and Article 7 (prohibition of retrospective criminal law).

Article 3 (the right to an effective remedy); Article 14 (right to fair trial); and the right to take proceedings before a court to challenge the lawfulness of detention (Article 9(4) on *habeas corpus*). Unlike the previous international human right legal frameworks, the African Charter does not have any derogation clause at all.¹¹ Regarding the implication of the absence of derogation clauses under the African Charter, Heyns 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.¹² However, Abdi Jibril argues that the omission of the derogation clause under the African Charter is a deliberate positive move for the better protection and promotion of human rights and is neither a mistake nor a defect.¹³

3. The Principles Governing State of Emergency

Derogation of human rights is the common feature of a state of emergency. The above international and regional human right instruments, however, do not provide a *carte blanche* to state's parties. These treaties (with slight variations) lay down the following conditions and requirements for a valid state of emergency and any government's resort to emergency powers must ascertain, among other, the existence of an exceptional threat to the security of the state or its people. As a governing principle, there should not be incompatibility of all emergency measures

¹¹ Ouguergouz, F. *The African Charter on Human and Peoples' Rights A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) <<https://brill.com/view/title/8983?language=en>> accessed 22 August 2020.

¹² C Heyns, *The African regional human rights system: In need of reform?* (2001)155, (1) AFRICAN HUMAN RIGHTS LAW JOURNAL <https://www.ahrlj.up.ac.za/images/ahrlj/2001/ahrlj_vol1_no2_2001_shadrack_gutto.pdf>accessed 23

Septemeber 2020. See also L Sermet, *The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion*, (2007)7 African Human Rights Law Journal 142

¹³ Abdi Jibril, *Derogation from Constitutional Rights and its Implication under the African Charter on Human and Peoples' Rights* (2013) 17 Law Democracy and Development 78 <<https://law.uwc.ac.za/all-publications/ldd-items/derogation-from-constitutional-rights-and-its-implication-under-the-african-charter-on-human-and-peoples-rights-pg-78> > accessed 27 February 2021.

[Note] Non-derogable Rights during State of Emergency ...

with the state's other international obligations and that the emergency measures should not be used in a discriminatory manner. There will not also be derogation from fundamental rights, listed as non-derogable rights under Article 4 of the ICCPR. The other principle is that the emergency measure must be proportional to the threat posed. Essentially, proportionality requires a court to ultimately determine whether a measure of interference which is aimed at promoting a legitimate public policy is either unacceptably broad in its application or has imposed an excessive or unreasonable burden on certain individuals.¹⁴ 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.¹⁵ Necessity requires a balancing act to be made of the rights of the individual on the one hand and the state or the community interests on the other. In order to make that assessment, the government should justify its actions by making them establish that interference is necessary in a democratic society. International mortification is also a governing principle that 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.¹⁶ This requirement is useful to ensure international supervision over derogation measures by other state parties or treaty monitoring organs.

4. State of Emergency as a Ground for Derogation of Human Rights under the Ethiopian Constitution

Emergency situations, which cannot be brought under control using the regular law enforcement mechanism, might happen either in the whole country or a particular

¹⁴ In General Comment 31, the Human Rights Committee has affirmed the notion of proportionality to the application and implementation of the ICCPR, adding that, "In no case may the limitations be applied or invoked in a manner that would impair the essence of a Covenant right."

¹⁵ Art. 4 of ICCPR, Art. 15 of ECHR and Art.27 of the American Convention of Human Rights.

¹⁶ ICCPR Art.4

locality. Such emergency situations require the action of the state in question to declare a state of emergency. Under such circumstances, the state is excused from complying with some of its constitutional and international provisions that are necessary to avert the imminent danger the country faces.¹⁷ The Paris Minimum Standards of Human Rights¹⁸ defines ‘state of emergency’ as an exceptional situation of crisis or public danger, actual, or imminent, which affects the whole population of the area to which the declaration applies and constitutes threat to the organized life of the community. With the notable exception of the African Charter, the ICCPR recognizes the right of states to suspend human rights’ norms during the state of emergency that threatens the life of the nation.¹⁹

Then, there comes the duty of a state to weigh between an individual’s rights to exercise his or her fundamental right and social (national) interest at large because the interest of citizens cannot be independent and self-sufficient apart from the state. In a condition where the state's foundation is shaken and its very existence is threatened, there is a need to declare a state of emergency and derogate most rights until the normalization of the situation.²⁰

The conditions that can rationalize derogations– as per the Ethiopian Constitution under Article 93– are breakdown of law and order, which cannot be controlled by the regular law enforcement agencies, incidence of an external invasion or the occurrence of a natural disaster or an epidemic. The Ethiopian Constitution gives the Council of Ministers the power to decree a state of emergency should external

¹⁷Joan, H. *Derogation from Human Rights Treaties in Public Emergencies* (1981).

¹⁸ The Paris Minimum Standards of Human Rights Norms in a state of Emergency which is meant to help States and human rights monitoring bodies to better appreciate the meaning, scope, and effects of states of emergency on human rights obligations of states.

¹⁹Nicolas, H, *State of Emergency in the Post-Apartheid South Africa* (1990) 21 Colum. Hum. RTS. L Rev 139- 142.

²⁰ Scott, P. *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics* (2013) 34 MICH. J. INTL L. 491 <<https://repository.law.umich.edu/mjil/vol34/iss3/1/>> accessed 09 January 2021.

invasion, breakdown of law and order, which endangers the constitutional order, and which cannot be controlled by regular law enforcement agencies and personnel; and natural disasters, or an epidemic occurs.²¹ While the Ethiopian Constitution refers to ‘breakdown of law and order which endangers the constitutional order’ to justify declaring a state of emergency, the Constitution does not demonstrate what these vague phrases mean. As a result, the Council of Ministers which has the power to declare a state of emergency has used this ground as a pretext to suspend fundamental rights ‘to the extent necessary’ to avert the conditions.²² Being a subjective interpretation and left for a political organ, the Council of Ministers has so far manipulated it to decide on its whims and protected the existing regimes at the expense of basic human rights. In practice, a breakdown of law and order could include public disturbance or violence caused by riots or rebellions.²³

During a state of emergency, the Ethiopian Constitution under Art 93 authorizes the Council of Ministers to suspend most fundamental human rights (including the right to life) under the guise of ‘*the extent necessary*’ to avert the situation. Only few rights, less than what ICCPR and other international legal instruments decree, remain non-derogable during a state of emergency. The exclusive listing of non-derogable rights during a state of emergency under Article 93 of the Ethiopian Constitution are: Article 1 which describes the nomenclature of the state ‘the Federal Democratic Republic of Ethiopia’; Article 18 which prohibits inhumane

²¹ The Council of Ministers has the power to decree a state of emergency. The decree should be presented to the House of Peoples’ Representatives within forty-eight hours if it is in session and within fifteen days if it is not in session. After consideration, the Council of Ministers’ decree has to be accepted by a two third majority of the House of Peoples’ Representatives to remain in effect through a State of Emergency Proclamation, see Ethiopian Constitution, Art.93.

²² Ethiopia Constitution Art 93(3)(C) states that in the exercise of its emergency powers the Council of Ministers can suspend or limit all fundamental rights except those rights provided under Articles 1,18,25 and sub-articles land of Article 39 of this Constitution.

²³Abdi, Jibril, ‘*Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the CUD Case*’ (2013) *Haramaya Law Review* 1(2) <<https://www.ajol.info/index.php/hlr/article/view/98577>> accessed 10 December 2020.

treatment; Article 25 which guarantees equality of everyone before the law and equal protection of the law, and Article 39 which guarantee every Nation, Nationality and People in Ethiopia to have an unconditional right to self-determination, including the right to secession.

Although the ICCPR under Article 4(3) obliges state parties (including Ethiopia) to give international notification and about its legality, the Ethiopian Constitution does not have any provision that puts the responsibility to do so. When it comes to the Ethiopian practical experience, the requirement of official proclamation and publicity was partially fulfilled. The 2016 State of Emergency Proclamation and Regulation had been published on the official Federal Negarit *Gazette*²⁴ but not the 2018 State of Emergency Proclamation.²⁵ Nevertheless, the approval Proclamation of the 2018 State of Emergency was published in the Federal Negarit *Gazette*.²⁶ 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 the Negart *Gazette* on 25th October 2016 while its effective date started on 8th October, 2016. Ethiopia also did not give a letter of notification to the UN when it derogated even fundamental rights including freedom of speech, movement, the right to peaceful assembly and demonstration during the last 2016 and 2018 state of emergencies.²⁷ 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.²⁸

²⁴ Proclamation No. 1/2016; Regulation 391/2016.

²⁵ Proclamation No.1/2016; Ratification Proclamation No. 984/2016.

²⁶ Proclamation No.1083/2018

²⁷United Nations Treaty Collection (2018).

<http://www.treaties.un.org/pages/showDetails.aspx?objid=0800000280004bf5>

²⁸ Proclamation No.1/2016, art. 14(5)

The principle of legality requires that laws shall be available and accessible to the public. Apart from reports in the media, the exact content of the State of Emergency Proclamation was not immediately officially available to the public, in violation of this principle of legality. The failure to make the text publicly available also fails to meet requirements of national law, specifically, the requirement that all legal proclamations be published in Ethiopia's Gazette.

The fact that the Constitution under Article 93(5) empowers the House of Peoples' Representatives (Ethiopia's lower House), while approving the declared state of emergency to establish a State of Emergency Inquiry Board having seven persons from its members and legal experts, there had practically been a 'State of Emergency Command Post' established. It gives 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 restrict human rights and freedoms; and put arrested individuals into the so-called 'rehabilitation centers'.²⁹ Of course, the legal establishment of such a State of Emergency Command Post is unconstitutional. The detailed establishment benchmarks on the neutrality 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.³⁰ The Constitution is also silent on the proportion of the Inquiry Board members to be chosen from the members of the House of Peoples' Representatives and legal experts.

²⁹See 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; Proclamation 3/2020, a State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact 2(6).

³⁰Yibeltal Assefa, *Upholding International Human Rights Obligations during a State of Emergency: An Appraisal of the Ethiopian Experience (2019)* Addis Ababa University, MA thesis unpublished <<http://213.55.95.56/bitstream/handle/123456789/16609/Yibeltal%20Assefa%20LLM%20Thesis.pdf?sequence=1&isAllowed=y>> accessed 20 October 2020.

The Constitution states that a state of emergency decreed by the Council of Ministers, if approved by the two-thirds majority vote of the House of Peoples' Representatives, can remain in effect up to six months and there is a possibility that the state of emergency will be renewed every four months successively. The wording of 'renewing successively' may give the Council of ministers, the political body, to have unlimited power to extend the state of emergency eventually paving the way for entrenched emergencies. This is because the Ethiopian Constitution neither puts a maximum limit on the number of renewals of an emergency decree nor mentions circumstances to extend emergency declarations.³¹ The extensions of state of emergency, according to the Paris Standards, should be subjected to a priori legislative approval. However, the 2016 state of emergency declared in Ethiopia – that had been in force for ten months – was extended without prior legislative approval and did not meet majority support of the parliament.³²

In terms of proportionality, both in 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

³¹ According to Article 93(3) of the Ethiopia Constitution 'a state of emergency decreed by the Council of Ministers, if approved by the House of Peoples' Representatives, can remain in effect up to six months. The House of Peoples' Representatives may, by a two-thirds majority vote, allow the state of emergency proclamation to be renewed every four months successively'.

³² Ethiopian 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.uwo.edu/law/_files/docs/international%20human%20rights/reports/ethiopia-human-rights-report-2-july18.pdf), (accessed on June 12, 2020); Human Rights Watch, *Legal Analysis of Ethiopia's State of Emergency*, (2016), <http://www.hrw.org/report/2016>, (accessed July 30, 2020); Amnesty International, *Commentary on Ethiopian State of Emergency*, (2018) available at <https://www.amnesty.org/download/Documents/AFR2579822018ENGLISH.PDF> (accessed on May 3, 2020).

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under Article 3(1) it states that “[Emergency] Proclamation shall be applicable in all parts of the country.”³³

Thus, State of Emergency Provisions under the Ethiopian Constitution fail to meet the requirements of legality, notification, necessity and proportionality set out in the ICCPR and the country has failed to uphold some of the fundamental requirements while exercising its emergency powers. Generally, unless the Ethiopian Constitution is compatible with the international legal instruments when it comes to state of emergency, the government may violate even those fundamental rights under the guise of state of emergency. This is because there is a plethora of evidence that shows the direct correlation between state of emergency and gross human rights violations.

5. Non-Derogable Human Rights under the Ethiopian Constitution

The Ethiopian Constitution under Article 9 accepts all international agreements ratified as an integral part of the law of the land. Hence, those non-derogable human rights under ICCPR are supposed to be non-derogable under the Ethiopian Constitution as well. Hence, the Ethiopian Constitution recognizes the following rights as non-derogable rights during a state of emergency: the right to equality and prohibition of inhuman treatment, the nomenclature of the state and self-determination. The Ethiopian Constitution does not recognize the generally recognized non-derogable human rights in international instruments of human rights which include the right to life, freedom of religion, thought and conscience, the non-imprisonment for contractual obligation, non-retroactivity of a criminal law and recognition as a person before the law as non-derogable rights. Despite this, the Constitution under Article 93 adds to the list a set of rights that are not non-derogable embodied in the ICCPR: the nomenclature of the state and self-

³³See the Preambular Provision of Proclamation No.1/2016 & art 3(1).

determination. But the very right to life³⁴ with its pre-eminence nature having a value of infusing the entirety of other human rights is not provided in the list of non-derogable rights under the Ethiopian Constitution. This is in violation of ICCPR as Ethiopia is a state party to it and the Ethiopian Constitution under Article 13(2) states that the bill of rights will be interpreted in a manner conforming to the principles of international instruments adopted by Ethiopia.³⁵

The Human Rights Committee, whenever legal inconsistencies exist between the international legal frameworks and states; require such states to change even their constitutions when the latter allows derogation from rights that are listed under Article 4 of the ICCPR as non-derogable. For example, the Constitution of Tanzania expressly allows derogation from the right to life.³⁶ In its concluding observation on Tanzania's report, the Human Rights Committee observed that "[c]oncern is expressed over the constitutional provisions allowing derogations from the right to life, which are not compatible with Article 4 of the Covenant. In this regard, changes are clearly necessary."³⁷ This is because the ICCPR in Article 4(1) and 5(2) expressly prohibits derogations, which are inconsistent with other obligations under international law. Thus, it is unjustifiably making the right to life as a derogable right under the Ethiopian Constitution in violation of its commitment to the international and regional human rights legal instruments. This is because it is, of course, self-evident that without the right to life, it is not possible to enjoy other human rights.

³⁴ The right to life is fundamental and non-derogable. The right to life is given particular pre-eminence in international law because all other rights are rendered meaningless in its absence. The pre-eminence nature of the right to life is recognised as a value which then infuses the entirety of human rights. See *Building Human Rights Into Practice A Training Manual on International Human Rights Law* The Bingham Centre for the Rule of Law London, UK, February 2012.

³⁵ Ethiopian Constitution under Article 13(2)

³⁶ Constitution of the United Republic Of Tanzania (as amended), passed on 25 April 1977, Art. 31(1).

³⁷ *Concluding Observation ICCPR*, United Republic of Tanzania, A/48/40 vol. I (1993) 35 at para 171.

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Another right that should have been non-derogable even during a state of emergency is child rights. Since the Convention on the Rights of the Child (CRC) to which Ethiopia is a state party³⁸ has no derogation clause, the state shall accord special protection to children and all actions (including state of emergency) undertaken by the state shall be to the best interest of the child. Accordingly, the [right of Children] under Art 36 of the Ethiopian Constitution should have been non-derogable status but one cannot, in fact, find the right of children under the lists of non-derogable rights from the Ethiopian Constitution.

Concerning non-derogable rights, one can easily read two self-contradictory constitutional provisions from the Ethiopian Constitution i.e. Art 13 and 93. While the former accepts all non-derogable rights set under ICCPR, the latter restricts these rights only to four non-derogable rights. This section examines these non-derogable rights recognized by the Ethiopian Constitution and the justifications provided.

One of the four non-derogable rights listed under Article 1 of the Ethiopian Constitution is the nomenclature of the state ‘the Federal Democratic Republic of Ethiopia’. Under the nomenclature of the state, the Ethiopian Constitution declares the type of ‘state’ to be established ‘a federal and democratic Republic of Ethiopia’. This implies that a state of emergency will not, in any way, affect the federal structure of Ethiopia. Question will arise if, at all, this is human right. The Ethiopian Constitution, unlike ICCPR and the African Charter, remarkably deviates from the generally agreed legal frameworks and allows each ethnic group to exercise their self-determination. But one may still ask how the group rights of ‘self-determination, including secession’ can be achieved during a state of

³⁸ Ethiopia ratified the Convention on the Rights of the Child (CRC) on 14 May 1991. See United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed on 13 September 2020).

emergency as far as fundamental rights including the right to movement is restricted.

The second non-derogable right, according to the Ethiopian Constitution, is ‘the prohibition of inhuman treatment’. The Constitution under Article 18 provides that everyone has the right to protection against cruel, inhuman or degrading treatment of punishment. The Constitution, under Article 18, provides for the prohibition of slavery or servitude including forced or compulsory labor. Unlike the ICCPR,³⁹ prohibition of trafficking is a non-derogable right under the Ethiopian Constitution. With regard to forced labor, though it is listed under Article 18, service exacted during an emergency or calamity threatening the life or wellbeing of the community falls under the exception of forced labor. The ICCPR, similarly, provides for the prohibition of forced labor except for certain practices.

The third non-derogable right, unlike any other regional and international human rights frameworks, designated under the Ethiopian Constitution is the right to ‘self-determination, including secession’. The Ethiopian Constitution under Article 39 allows each nation, nationality and people to have the right to self-determination. The Constitution further goes to give unconditional rights to these different groups to exercise the right of secession.⁴⁰ Although the right to self-determination is provided under the ICCPR and other human rights instruments, the unconditional right to secede is not incorporated in the conventions. The African Charter under Article 20 allows the right to self-determination; which states that all people have the inalienable and unquestionable right to self-determination. Although self-determination is not included in the list of non-derogation rights under the ICCPR

³⁹ In the drafting process of the ICCPR it was suggested that trafficking be included in the definition of slavery but was suggested that it should only deal with slave trade.

⁴⁰ Haile believes that the right to self-determination until secession is copied from the Soviet Union which eventually disintegrated. Minasse Haile, 'comparing human rights in two Ethiopian constitutions: The Emperor's and the Republic's';--*Cucullus non facit monachum*'13 (2005) *Cardozo Journal of International and Comparative Law*.

[Note] Non-derogable Rights during State of Emergency ...

and the African Charter, the Ethiopian Constitution listed [self-determination including secession] as one of the non-derogable rights during a state of emergency. This is due to Ethiopia, as a federal state, proclaims self-determination including secession as the two important pillars of the current Constitution. States can give a wider protection of rights by expanding the list of absolute rights in their respective constitutions and the inclusion of self-determination and secession under the Ethiopian Constitution as non-derogable is commendable. Of course, exercising secession is practically impossible during a state of emergency while other rights, including the right to life and movement, are derogated by the Ethiopian Constitution. However, it can be understood as the framers of the Ethiopian Constitution tried to signify the place and position of Art 39 by making it non-derogable, even knowing the exercise might be difficult in times of emergency.

The fourth and the last non-derogable right under the Ethiopian Constitution is the ‘the right to equality’. The Ethiopian Constitution under Article 25 affirms equality of all persons before the law and equal protection of the law without any discrimination based on race, nation, nationality or other social origin color or sex, language, religion, political or other opinion, property, birth or status. The African Charter under Article 3 states that everyone is equal before the law and is entitled to equal protection of the law.⁴¹ Despite the fact that equality is not included as one of the non-derogable rights under the ICCPR, the United Nations Human Rights Committee (UNHRC) has opined that there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstance.⁴² In line to this, the Ethiopian Constitution to make the right to equality as non-derogable right is appreciable.

⁴¹African Charter Art. 3, which provide the right against discrimination, by providing a general equality requirement.

⁴² Human Rights Committee General Comment (1982) 8(16) Article 9 adopted at its 378th meeting sixteen sessions.

Generally, the above analysis depicts that the government, when declaring state of emergency, always disregards Article 9 and 13 of the Ethiopian Constitution, which oblige all international agreements ratified by Ethiopia to be an integral part of the law of the land and the fundamental rights to be interpreted in a manner conforming to the principles of UDHR and ICCPR. The reliance of Ethiopia on its whims and domestic provisions to derogate human rights contravenes international human rights norms. The government uses the state of emergency as a pretext to silence dissent and evading legal responsibility for doing so. As a result, the government violates even those fundamental rights under the guise of a state of emergency. Of course, the government officially admitted its own wrongdoings (mainly its rampant human right abuses) during the state of emergency against the people over the years and offered a public apology.⁴³ Human Rights Watch also rightly noted that the state of emergency directive in Ethiopia imposes sweeping and vaguely worded restrictions on basic rights beyond what is permitted by international law.⁴⁴ Thus, the Ethiopian Constitution fails to comply with ICCPR's norms when it comes to the non-derogable human rights during a state of emergency.

⁴³ 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-abiya-ahmeds-inaugural-address/> (accessed on May 13, 2020.)

⁴⁴ Ethiopian 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.uwo.edu/law/_files/docs/international%20human%20rights/reports/ethiopia-human-rights-report-2-july18.pdf), (accessed on June 12, 2020); Human Rights Watch, *Legal Analysis of Ethiopia's State of Emergency*, (2016), <http://www.hrw.org/report/2016>, (accessed Aug 30, 2020); Amnesty International, *Commentary on Ethiopian State of Emergency*, (2018) available at <https://www.amnesty.org/download/Documents/AFR2579822018ENGLISH.PDF> (accessed on March 3, 2020).

Conclusion

The Ethiopian Constitution accepts all international agreements ratified as an integral part of the law of the land but the Constitution does not incorporate the most generally recognized non-derogable rights as *non-derogable rights*. The Ethiopian Constitutional listing of non-derogable rights is far less than what the core international human rights instruments enumerate under Art 4. Under the Ethiopian Constitution, the right to life is recognition as a person before the law and the non-imprisonment for contractual obligation is absent from the set of non-derogable rights. The Ethiopian Constitution recognizes only two human rights as non-derogable rights during a state of emergency: the right to equality and prohibition of inhuman treatment. Remarkably, the Ethiopian Constitution includes a set of rights – nomenclature of the state and self-determination (group rights)–as non-derogable rights that are not recognized as non-derogable under the core international human rights instruments. Of course, these rights are not human rights. Although the core international human rights instruments oblige state parties (including Ethiopia) to give international notification, the Ethiopian Constitution does not have any provision that puts the responsibility to do so. As a result, Ethiopia did not give a letter of notification to the UN when it declared a state of emergency and derogated fundamental rights.

A *bona fide* proclamation of the public emergency permits derogation from specified obligations in the ICCPR, but does not authorize a general departure from international obligations. Therefore, Art. 93 (4)(C) of the Ethiopian Constitution needs to be amended since it fails to list those non-derogable rights envisaged by international human rights instruments to which Ethiopian is a party. In the meantime, the failure of the Ethiopian Constitution to list explicitly all non-derogable rights as envisaged by core international human rights instruments can be solved by citing Art. 9(4) and 13(2) of the Constitution, which accepts

international agreements to be an integral part of the law of the land. The fundamental rights also should be interpreted in a manner conforming to the principles of those core international human rights instruments adopted by Ethiopia.