

**A CRITICAL ANALYSIS OF NON-DEROGABLE RIGHTS IN A STATE OF EMERGENCY
UNDER THE AFRICAN SYSTEM: THE CASE OF ETHIOPIA AND MOZAMBIQUE**

**Submitted in partial fulfilment of the requirements of the degree LLM (Human Rights And
Democratisation In Africa)**

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DECLARATION

I, Belay Frenesh Tessema, declare that this dissertation is original and has never been presented in any institution or university. In addition, I also declare that all secondary information used in this study has been duly acknowledged.

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLR	African Human Rights Law Reports
AU	African Union
CRC	Child Rights Convention
CUD	The Coalition for Unity and Democracy
ECHR	European Convention on Human Rights
EPRDF	Ethiopian People's Revolutionary Democratic Front
HPR	Houses of Peoples' Representatives
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
OHCHR	Office of the Higher Commissioner for Human Rights
TPLF	Tigray People's Liberation Front
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United States
VCLT	Vienna Convention on the Law of Treaties

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CHAPTER ONE

INTRODUCTION

1.1 Background

State of emergency is one of the decisive moments, which opens the door to possible abuses of human rights. In recent years many countries had declared a state of emergency due to civil wars, natural disaster or for other situations affecting the life of the nation.¹ For instance, Egypt has declared a state of emergency since 1981 for about 22 years.² In February 2003, the government further extended this continuous emergency rule for another three years.³ In 2004, due to violence between Christians and Muslims in Plateau State and the city of Kano, the Nigerian government has declared a state of emergency.⁴ Previously, on 30 December 1998 the government had declared a state of emergency in the Delta in response to threats of violence and interference with oil production.⁵ Zambia under president Chilumba has declared state of emergency in 1997 in situation of attempted coup.⁶ In Ethiopia, the Prime Minister has recently banned demonstration and public gatherings after the May 2005 election to prevent any threat against 'public order'.⁷ On the basis of a report submitted by the Special Rapporteur on Human Rights and States of Emergency, between January 1985 and May 1995, some 90 states have experienced either *de facto* or *de jure* states of emergencies.⁸ Between the years 1999-2001, 15 countries including Botswana, Cote d'Ivoire and Sudan have declared a state of emergency.⁹ Pursuant to a report of the Office of the Higher Commission for Human Rights (OHCHR) between the year 2003-2005, among others, Iraq, Jamaica, Nepal, Peru, United Kingdom (UK) and Ireland have declared a state of emergency.¹⁰

The declaration of emergency and the derogation of human rights is one of the clauses found in International Covenant on Civil and Political Rights (ICCPR) article 4, the European Convention on Human Rights (ECHR) article 15 and the American Convention on Human Rights (ACHR) article 27. State parties to these instruments may take measures derogating from their obligations under the instruments in times of public

¹ FN Aolain 'The emergence of diversity: differences in human rights jurisprudence' (1995) 19 *Fordham International Law Journal* 101.

² E/CN.4/Sub.2/1995/20 The eight annual report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (Report of the Special Rapporteur) <<http://www.unhchr.ch/huridocda/huridoca.nsf/b617b62bcb39ea6ec1256610002eb7a6/9d7accedf228e4a3802566bf00556e7f?OpenDocument>> (accessed on 13 October 2005).

³ Human Rights Watch 'Essential background' <<http://hrw.org/english/docs/2005/01/13/egypt9802.htm>> (accessed on 30 August 2005).

⁴ Human Rights Watch 'Essential background' <<http://hrw.org/english/docs/2005/01/13/nigeri9883.htm>> (accessed on 30 August 2005).

⁵ S Dolezal 'Notes and comments the systematic failure to interpret article IV of the International Covenant on Civil and Political Rights: is there a public emergency in Nigeria?' (2000) 15 *American University International Law Review* 1163.

⁶ Human rights watch 'Essential background' <<http://0-www.hrw.org.innopac.up.ac.za/worldreport99/africa/zambia.html>> (accessed on 30 August 2005).

⁷ 'Government imposes one-month outdoor gathering, demonstration ban in Addis' News and views from Ethiopia <<http://www.ethiopia.ottawa.on.ca/NEWSLETTERmay2005.pdf>> May 2005 v 4 issue 2> (accessed on 6 October 2005).

⁸ Report of the Special Rapporteur (n 2 above).

⁹ Economic and Social Council Distr. GENERAL E/CN.4/Sub.2/2001/6 12 June 2001 <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/77094388c5a21daec1256a8d0028e3fe/\\$FILE/G0114195.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/77094388c5a21daec1256a8d0028e3fe/$FILE/G0114195.pdf)> (accessed on 6 October 2005). This figure does not show states that were in state of emergency during that period.

¹⁰ Economic and Social Council Distr. GENERAL E/CN.4/Sub.2/2005/6 7 July 2005. <<http://daccessdds.un.org/doc/UNDOC/GEN/G05/147/76/PDF/G0514776.pdf?OpenElement>> (accessed on 6 October 2005).

emergencies. The situation that activates the power of the state to derogate from its obligations under human rights, in the case of the ICCPR and the ECHR is a threat to the life of the nation, in the case of the ACHR is a threat to the independence or security of the state.¹¹

However, in practice, many countries, declare a state of emergency not to protect the nation or safeguard human rights but to maintain their power, to silence opposition and to abuse human rights.¹² Derogation clause is of paramount importance for the system of protection for human rights.¹³ On the one hand, it allows for a state party unilaterally to derogate temporarily from part of its obligations.¹⁴ On the other hand, it subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards.¹⁵ Hence, international human rights law had come up with a balanced system to protect the rights of individuals on the one hand and to maintain state sovereignty on the other hand. The power of the state to derogate from its obligations under human rights is not limitless nor is it open-ended.¹⁶ Some rights are considered basic and fundamental that no crisis justifies their derogations.¹⁷ Consequently, the three systems specify non-derogable rights that must not be derogated in times of emergency.

Astoundingly, the African Charter on Human and Peoples' Rights (ACHPR) does not contain derogation clause. Furthermore, it has been established by the African Commission on Human and Peoples' Rights (the Commission) in the case of *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (*Commission Nationale* case) that a member State of the ACHPR cannot derogate human rights in case of emergencies.¹⁸ Hence, the Commission's view may lead to a conclusion that all rights under the ACHPR are non-derogable. This raises the issue of whether it is tenable to conclude that a state facing a situation that endangers the nation, should not at all derogate from the provisions of the ACHPR.

Emergency clauses, which permit derogation of human rights in times of emergencies, are also found in most domestic legal instruments. Most African states also encompass this clause in their constitutions. Although the levels of compliance by states are questionable, some of these constitutions also include a list of non-derogable rights. The Constitutions' of Ethiopia and Mozambique also provide for a derogation clause and a list of non-derogable rights.

The aim of the study is to make a critical analysis of the African derogation system. Firstly, the study will analyse the concept of derogation and non-derogable rights in general. Secondly, the jurisprudence and the

¹¹ N Jayawickrama *The judicial application of human rights law, national regional and international jurisprudence* (2002) 202.

¹² Aolain (n 1 above).

¹³ General Comment No. 29: States of Emergency (General Comment 29) (article 4) : . 31/08/2001. CCPR/C/21/Rev.1/Add.11. <<http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361?Opendocument>> (accessed on 1 September 2005).

¹⁴ As above.

¹⁵ As above.

¹⁶ Aolain (n 1 above).

¹⁷ As above.

¹⁸ *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.

law of the African system with regard to derogation and non-derogable rights will be examined. In analysing the jurisprudence of the Commission effort will be made to critically study the cases that have been examined by the Commission in relation to derogation and non-derogable rights. Lastly, the compatibility of the Ethiopian and Mozambique Constitutions in light of the African system and international standards will be discussed.

1.2 Research questions

The main research question is as followed:

To what extent are the constitutions of African states compatible with African and international standards with respect to non-derogable rights?

The study will also try to discuss the following questions:

Should the ACHPR and the jurisprudence of the African Commission accommodate derogation of rights in state of emergency? Are all rights non-derogable in state of emergency?

1.3 Research methodology

A critical analysis using literature reviews and case studies would be employed. The jurisprudence of the Commission, the Constitutions and the practice of Ethiopia and Mozambique as well as the constitutions of other African countries would be explored.

1.4 Literature review

Many scholars have discussed derogation of human rights in times of emergency under the ICCPR, the ECHR and the ACHR. With regard to the African system many authors and experts have discussed the absence of derogation clause in the Charter. Murray devotes one chapter on the derogation of human rights under the ACHPR and the approach taken by the Commission.¹⁹ In particular, Murray praises the Commission stand on derogation stating that the non-derogability of human rights in times of war might be the most beneficial approach to international community.²⁰ Ouguergouz devotes one chapter on the derogation of human rights under the ACHPR.²¹ Ouguergouz takes the view that the absence of derogation clause under the ACHPR does not necessarily mean that a state party is deprived of the power to derogate from its obligations.²² And suggests that the absence of derogation clause can be resolved if raised in the framework of international responsibility.²³ Heyns also discussed the absence of the derogation clause under the ACHPR and consider it as a weakness of the ACHPR.²⁴

¹⁹ R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000).

²⁰ Murray (n 19 above) 135.

²¹ F Ouguergouz *The African Charter on Human and Peoples' Rights A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003).

²² Ouguergouz (n 21 above) 477.

²³ As above.

²⁴ C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights the system in practice, 1986-2000* (2002) 139.

With regard to the constitutional provisions of emergency, Keith & Poe discuss the effectiveness of the constitutional state of emergency clauses.²⁵ The study focuses on analysing the impact of derogation clause on government's actions. It is an empirical study, which set out to prove, among other things, the impact of the presence of non-derogable rights in constitutions. Be it as it may, a critical analysis of the African system with regard to derogation and non-derogable rights, in particular, dealing with the Constitutions of Ethiopia and Mozambique has not been discussed.

1.5 Limitations of the study

Derogation of human rights is a wide concept encompassing wide range of areas and state practices. The study, therefore, will focus on the laws and the jurisprudence of the African system with regard to derogation and non-derogable rights. In assessing the compatibility of the constitutions of African states with the African and international standard with regard to non-derogable rights, it may not be possible to exhaustively deal with all the constitutions of African states. Hence, although the study will by way of example try to assess the constitutions of other African states, it will mainly focus on Ethiopia and Mozambique as case studies.

1.6 Overview of chapters

Chapter one highlights the basis and structure of the entire study. Chapter two presents a brief historical evolution as well as conceptual framework of the system of derogation and non-derogable human rights in state of emergency. Chapter three focuses on the ACHPR and the jurisprudence of the Commission with regard to derogation and non-derogable rights in state of emergency. Chapter four assesses the compatibility of the non-derogable rights provided in the constitutions of African states with African and international standard. This Chapter will analysis in particular the Constitutions and the practices of Ethiopia and Mozambique. Chapter five is a conclusion of the overall study stating specific recommendations.

²⁵ LC Keith & SC Poe 'Are constitutional state of emergency clauses effective? An empirical exploration' (2004) 26 *Human Rights Quarterly* 1071–1097.

CHAPTER TWO
BRIEF HISTORICAL EVOLUTION OF THE SYSTEM OF DEROGATION OF HUMAN RIGHTS
IN STATE OF EMERGENCY

2.1 Introduction

The declaration of emergency and the subsequent derogation of human rights has been the normal form of exercise of state sovereignty.²⁶ This is due to the fact that states at some period face up some form of emergencies that threatens the life of the nation. In such situations it will be necessary for states to take required measures to safeguard the life of the nation. These measures, however, may derogate basic human rights recognised under the different human rights instruments as well as the constitutions of states. The discussion in this chapter will focus on a brief historical background of derogation under the international system as well as provide conceptual framework of derogation and non-derogable rights.

2.2 Historical background

The Universal Declaration of Human Rights (UDHR) is the first international instrument that affirms the inalienable, inviolable and the indivisible nature of human rights. Article 29(2) of the UDHR, a general limitation provision, clearly stipulates that human rights can be limited for the purpose of securing 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. Apart from this general limitation clause, the UDHR does not contain any derogation clause.

The ICCPR is the first international human rights convention that contains derogation clause under article 4 of the Convention.²⁷ This clause is traced to a British draft in the drafting committee from 1947.²⁸ The drafters of the ICCPR, learning their lessons during a long and vicious war, wanted to leave room for possible derogation of human rights and at the same time protect the rights of individuals in cases of serious emergencies.²⁹ They, therefore, included, after much negotiation a provision allowing state parties to resort to derogation on certain strict conditions.³⁰ These strict conditions include both procedural and substantive protective measures against possible abuses. Similar provisions were also included in the ECHR and the ACHR. The ICCPR and the ECHR have strong resemblance in that they were drafted simultaneously.³¹ While the ECHR was adopted in 1950 the drafting of the ICCPR continued.³²

²⁶ M Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (1993) 73.

²⁷ As above. Prior to the ICCPR, the Geneva Convention on International Humanitarian Law protects the right of non-combatants from the prohibition of torture, killing, taking hostages etc. Report of the Special Rapporteur (n 2 above).

²⁸ Nowak (n 26 above) 77.

²⁹ University of Minnesota 'The administration of justice during states of emergency' (the administration of justice) <<http://hei.unige.ch/humanrts/monitoring/adminchap16.html>> (accessed on 20 August 2005).

³⁰ As above.

³¹ As above.

³² As above.

In the drafting process of the derogation clause in the ECHR, a committee of experts was established to examine its need in the light of draft article 4 of the ICCPR.³³ The proposal to insert derogation clause in the ECHR was first considered superfluous due to the presence of the general limitation clause. However, in the Committee's meetings, held in Strasbourg in February 1950, the representative of the UK introduced a derogation clause similar to that in article 4 of the ICCPR.³⁴ Agreement was then reached on the utility of the derogation clause and, with minor changes this draft formed the basis of article 15 of the derogation clause of the ECHR.³⁵

The drafting negotiation of ACHR derogation clause, which was held around 1969, was less difficult.³⁶ The emergency concept in the ACHR is a bit different from the ICCPR and the ECHR in that the former refers to derogations in time of war, public danger, or other emergencies that threatens the independence and or security of the a state party.³⁷ During the drafting of the ACHR Mexico proposed to delete among other things, the principle of non-derogable rights from the Convention.³⁸ However, other member states did not agree to this suggestion.³⁹

2.3 The concept of derogation

Derogation of human rights is a temporary deviation in the way of detracting from many of the rights provided in the law, international or domestic law.⁴⁰ Condé defines derogation as 'the act of a state suspending the application and enjoyment of certain human rights upon its declaration of a state of public emergency affecting the life of a whole nation'.⁴¹ Derogation allows a state to take necessary measures to deal with the emergency without fear of violating human rights norms during the derogation period.⁴² Derogation clause is 'a treaty clause wherein in it sets forth the right and criteria for a state to derogate from its obligations under a treaty'.⁴³

The rationale behind the derogation clause permitting the suspension of the exercise of certain rights is only for the sole and unique purpose of restoring normality and to guarantee the exercise of the most fundamental human rights.⁴⁴ It entails the possibility of legally suspending the exercise of certain rights as the only means of guaranteeing the effective enjoyment of the most fundamental ones.⁴⁵

³³ RSt J Macdonald 'Derogations under art 15 of the European Convention on Human Rights' (1997) 36 *Columbia Journal of Transnational Law* 225.

³⁴ As above.

³⁵ As above.

³⁶ The administration of justice (n 29 above).

³⁷ The administration of justice (n 29 above).

³⁸ The administration of justice (n 29 above).

³⁹ The administration of justice (n 29 above).

⁴⁰ HJ Steiner & P Alston *International human rights in context* (eds) (2000) 144.

⁴¹ HV Condé *A handbook of international human rights terminology* (1999) 34 & 35.

⁴² As above.

⁴³ As above.

⁴⁴ Association for the protection of torture 'Protecting human rights in times of emergency: position paper' <<http://www.apr.ch/>> (accessed on 20 August 2005).

⁴⁵ The administration of justice (n 29 above).

Nevertheless, it is exactly in states of emergency that human rights run a greater risk of being violated and require greater protection.⁴⁶ Faced with an internal conflict or with terrorism states can be easily inclined to take harsh measures to overcome a crisis on the basis that the end justifies the means.⁴⁷ When a state declares, legalises and limits freedoms, in the interest of the general well being, it is only fulfilling its duty and is acceptable and legitimate.⁴⁸ But when it intervenes to repress, restrain and limit freedoms for reasons of state; to protect itself according to the political tendency, which it represents, against an opponent, which it considers dangerous; to destroy fundamental freedoms then it is against public interest.⁴⁹ Then the laws, which it passes, are contrary to the principle of the international guarantees.⁵⁰

2.4 Limitation and derogation

Earlier debates in the drafting of derogation clause under the ICCPR and the ECHR reveal that there has been confusion on the real application of these terms. In the drafting of the ICCPR it was argued that the eventualities of the derogation clause were sufficiently covered by the relevant limitation clause and that limitation clause can be invoked in times of emergency.⁵¹ However, it was disputed that in times of emergency such as war states should not be bound by the obligation of the convention and it would become essential for the well being of the general public to deviate from the basic human rights.⁵²

Derogation and limitation clauses are similar in that they limit states obligation towards human rights.⁵³ However, the two concepts serve different purposes. The limitation clause highlight that rights are not absolute and must be balanced between individual and public interest.⁵⁴ Limitation differs from derogation in that limitation is usually embodied in the rights and is applicable in times of peace.⁵⁵ Mostly, the rights as well as its limitation are laid down in the law and these restrictions are necessary as the UDHR clearly provides, for the purpose of securing 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.⁵⁶ Derogation, however, may suspend a right completely. Hence, states can impose limitation on the enjoyment of rights and are often referred as ordinary as they can be imposed permanently and are legitimate.⁵⁷ Whereas, derogation are usually permitted in times of crisis in order to meet the exigencies of the situations and are temporary.⁵⁸

⁴⁶ The administration of justice (n 29 above).

⁴⁷ The administration of justice (n 29 above).

⁴⁸ D McGoldrick 'The interface between public emergency powers and international law' (2004) 2 *International Journal of Constitutional Law* 380.

⁴⁹ As above.

⁵⁰ As above.

⁵¹ The administration of justice (n 29 above).

⁵² The administration of justice (n 29 above).

⁵³ Steiner & Alston (n 40 above) 144.

⁵⁴ The administration of justice (n 29 above).

⁵⁵ The administration of justice (n 29 above).

⁵⁶ R Pati 'Rights and their limits: The Constitution for Europe in international and comparative legal perspective' (2005) 23 *Berkeley Journal of International Law* 2.

⁵⁷ The administration of justice (n 29 above).

⁵⁸ The administration of justice (n 29 above).

2.5 Non-derogable rights

There is common understanding that human rights are interdependent, interrelated and indivisible. The Vienna Declaration and Programme of Action of 1993 had affirmed this basic characteristic of human rights.⁵⁹ For the effective realisation of human rights, all rights should be protected on equal footing. However, in state of emergency most rights can be suspended or derogated for the same purpose of protecting the nation.⁶⁰

The non-derogable rights as are embodied in the ICCPR in article 4 were a result of long debates, where about 11 states, including France, the United States (US) and the UK voted in favor.⁶¹ During the debate on the ICCPR, the UK's proposal for non-derogable rights closely reflected the list in the ECHR (the right to life, freedom from slavery or servitude, freedom from torture, cruel and inhuman treatment or punishment and the non-retroactivity of criminal law), with an additional ban on involuntary medical treatment.⁶² The French delegation submitted an extensive list of non-derogable rights, including protection against arbitrary arrest, non-imprisonment for contractual obligations as well as guarantees of the right to emigrate, the right to a fair trial and the right to judicial personality.⁶³

There was disagreement as to whether the list should be limited to only the most fundamental rights or should include all rights the suspension of which was unnecessary in an emergency.⁶⁴ In its final form, article 4 of the ICCPR represents an uneasy concession, recognising in addition to non-derogable rights in the ECHR, the right to freedom of thought conscience and religion, the right to recognition as a person before the law and the right not to be imprisoned solely on the ground of liability to fulfil a contractual obligations.⁶⁵

The list of non-derogable rights in article 4 of the ICCPR is partly related to the question of whether certain human rights obligations bear the nature of peremptory norms⁶⁶ of international law, for instances, the right to life, freedom from slavery or servitude and freedom from torture.⁶⁷ In addition, other provisions were included in the list of non-derogable rights because it will not be necessary to derogate from these rights

⁵⁹ Distr. GENERAL A/CONF.157/23 12 July 1993 Vienna Declaration and Programme of Action 1993.

⁶⁰ O Gross "Once more unto the breach": The systemic failure of applying the European Convention on Human Rights to entrenched emergencies' (1998) 23 *Yale Journal of International Law* 437.

⁶¹ The administration of justice (n 29 above).

⁶² The administration of justice (n 29 above).

⁶³ Macdonald (n 33 above).

⁶⁴ JF Hartman 'derogation from human rights treaties in times of emergencies-A critic of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1991) 22 *Harvard International Law Journal* 1.

⁶⁵ Macdonald (n 33 above).

⁶⁶ Peremptory norms are fundamental principle of international law considered to have acceptance among the international community of states as a whole. Report of the Special Rapporteur (n 2 above).

⁶⁷ The HRC in its General Comment 29 has stated that the category of peremptory norms extends beyond the list of non-derogable rights under the ICCPR. And State parties can not in any circumstances invoke ICCPR as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments etc. General Comment 29 (n 13 above).

during a state of emergency.⁶⁸ For example a state cannot be justified to imprison someone on the ground of contractual obligations to meet any emergencies.⁶⁹

The non-derogable rights under the ACHR also include many rights which are not necessarily fundamental but whose suspension cannot be justified by an emergency.⁷⁰ In addition to the rights recognised as non-derogable in the ECHR, the ACHR recognises the right to marry and found a family, the right to a name, the right of children to special protection, the right to nationality, and the right to participate in government.⁷¹ In the process of defining the list of the non-derogable rights there is a progressive development in that later human rights documents, such as the ICCPR and the ACHR, which were adopted after the ECHR, expanded the list of non-derogable rights.⁷²

Freedom from discrimination is derogable under the EHRC but non-derogable under the ACHR and to a certain extent under the ICCPR.⁷³ Consequently, the Human Rights Committee (HRC) has stated that even though non-discrimination has not been listed among the non-derogable rights, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances.⁷⁴ In particular, the HRC opined that states should take into consideration that measures taken in times of emergency do not involve discrimination solely on the basis of race, colour, sex, language, religion or social origin.⁷⁵ In the jurisprudence of the ECHR, the principle of non-discrimination has been read into application of article 15, the derogation clause.⁷⁶ Overall, there is a growing consensus that the principle of non-discrimination has attained the status of a fundamental norm of international law, possibly the character of peremptory norm.⁷⁷

It is only the ACHR that refers to the judicial guarantees essential to protect other rights as non-derogable right.⁷⁸ However, the HRC has also taken the same position by adding some elements of the right to a fair trial on the list of non-derogable rights.⁷⁹ The justification for fair trial as non-derogable rights was based on the

⁶⁸ General Comment 29 (n 13 above).

⁶⁹ McGoldrick (n 48 above).

⁷⁰ McGoldrick (n 48 above).

⁷¹ Art 27 of the ACHR.

⁷² Although the ICCPR and ECHR were drafted simultaneously the ECHR was the one that was first adopted. Nowak (n 26 above).

⁷³ Other provisions prohibiting discrimination in the ICCPR such as art 26 are not in the list of non-derogable rights. Under art 4 (1) discrimination based on national origin was left out with the aim of controlling enemy aliens. Hartman (n 64 above).

⁷⁴ General Comment 29 (n 13 above).

⁷⁵ General Comment 29 (n 13 above). The term solely was added to art 4 (1) with the aim of avoiding intentional discrimination based on the mentioned grounds. Nowak (n 26 above) 86.

⁷⁶ RStJ Macdonald (1997) 'Human right inquiry derogations under art 15 of the European Convention on Human Rights' 6 *Columbia Journal of Transnational Law* 225.

⁷⁷ Macdonald (n 33 above).

⁷⁸ Pati (n 56 above). Judicial guarantees include, habeas corpus, competent independent and impartial judiciary, access to court, legal counsel within a reasonable time, appeal, sufficient time to prepare a defence and amparo. Advisory opinion OC-9/87 of October 6, 1987 judicial guarantees in state of emergency (Arts 27 (2), 25 and 8 American Convention on Human Rights).

⁷⁹ General Comment 29 (n 13 above). It has also included habeas corpus, presumption of innocence and judicial review in the set of non-derogable rights.

assumption that it is not possible to protect other basic rights if this right is derogated.⁸⁰ Thus, for example, the right to life which is non-derogable in its entirety, if not made inline with the right to fair trial or presumption of innocence may lead to the imposition of the death penalty during a state of emergency.⁸¹ The HRC view is that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.⁸²

2.6 The Siracusa Principles

The Siracusa Principles was adopted in the year 1984 in Siracusa, Italy.⁸³ International law experts from seventeen countries met, to consider the ICCPR's limitation and derogation provisions.⁸⁴ The Siracusa Principles, although an outcome of a non-governmental conference, contains a valuable reference for the interpretation of the derogation clause provided in the ICCPR.⁸⁵ It reflects a need for the examination of particular circumstances warranting derogation to effectively implement the rule of law.⁸⁶ It clarifies among other things, the meaning of public threat affecting the life of the nation, proclamation, notification and termination of state of emergency and non-derogable rights.

2.7 The Paris Minimum Standards

In 1985, the International Law Association adopted a set of minimum standards to govern the declaration and administration of a state of emergency.⁸⁷ These minimum standards are intended to ensure among other things, that even when a government declares a *bona fide* state of emergency, the basic human rights, continue to be observed and respected.⁸⁸ In addition it calls upon states that are in a state of emergency to be subject to judicial or other review.⁸⁹ Overall, the Paris Minimum Standards are set with the purpose of providing a guideline to both government and non-governmental organisations in state of emergency.⁹⁰

2.8 Conclusion

This chapter tried to give a highlight on the historical evolution of the derogation clause under international human right law. It analysed the ICCPR drafting process as well as the ECHR and the ACHR. In addition the development of the concept of non-derogable rights as are embodied in the different international and regional instrument as well as the general comment of the HRC have been discussed. Important development in recent

⁸⁰ Pati (n 56 above).
⁸¹ McGoldrick (as 48 above).
⁸² General Comment 29 (n 13 above).
⁸³ Dolezal (n 5 above).
⁸⁴ As above.
⁸⁵ Nowak (as 26 above) 76.
⁸⁶ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984 <<http://hei.unige.ch/~clapham/hrdoc/docs/siracusa.html>>(accessed on 20 September 2005).
⁸⁷ Dolezal (n 5 above).
⁸⁸ RB Lillich 'The Paris Minimum Standards of Human Rights Norms in a state of emergency' (1985) 79 *American Journal of International Law* (1072). The Paris Minimum Standards tried also to expand the list of non-derogable rights.
⁸⁹ Keith & Poe (n 25 above).
⁹⁰ Dolezal (n 5 above).

years has been the reinforcement and expansion of the non-derogable rights under the ICCPR.⁹¹ In particular the right to fair trial and the principle of non-discrimination have gained momentum in the jurisprudence and general comments of the HRC.

⁹¹ Report of the Special Rapporteur (n 2 above).

CHAPTER THREE

THE AFRICAN CHARTER AND THE JURISPRUDENCE OF THE COMMISSION WITH REGARD TO DEROGATION AND NON-DEROGABLE RIGHTS IN STATE OF EMERGENCY

3.1 Introduction

Non-derogable rights, which are the focus of this study, can only be raised in the context of the system of derogation. Hence, this chapter will first discuss the ACHPR and cases examined by the Commission with the purpose of analysing derogation under the African system. Secondly, the Chapter will try to discuss the status of the non-derogable rights under the African system and also examine the Commission's jurisprudence with regard to some of the non-derogable rights.

3.2 Derogation

3.2.1 The African Charter

As seen earlier the three main universal and regional human rights instruments include derogation clauses. Apart from these conventions a number of international human rights conventions contain no derogation clause.⁹² Some of these are the International Covenant on Economic, Social and Cultural Rights (ICESCR), Child Rights Convention (CRC) and Convention on the political rights of women. When it comes to the African human rights instruments neither the ACHPR nor the other two human rights instruments contain derogation clauses.⁹³ Nevertheless, the ACHPR does not also expressly prohibit derogation of rights in state of emergency. The absence of derogation clause in the ACHPR had instigated a lot of controversies among different authors.⁹⁴ The earlier confusion rose in the drafting of the ICCPR and the ECHR, that a limitation clause will serve the purpose of derogation under the ACHPR has also been raised.⁹⁵

Derogation clause included in the ICCPR are neither anomalous nor a reflection of customary law.⁹⁶ They were inspired by the domestic emergencies legislation of states such as the UK.⁹⁷ According to Hart, one of the justifications of the derogation clause is that the exercise of individual rights cannot be unlimited. There is a reasonable limit when there is tension between individual rights and the need of the community.⁹⁸ In addition, there is the impression that derogation clause attempts to control government's action from suspending fundamental rights.⁹⁹ Within the framework of a convention, derogation clause acknowledges the possibility of a signatory state derogating from some of the individual rights protected under the convention

⁹² Ouguergouz (n 21 above) 425.

⁹³ These are the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Protocol). Some authors argue that art 38 of the CRC prohibits derogation of right in times of emergencies. If this argument holds tight then one can also say that the Protocol and the ACRWC also prohibit derogations, as they provide the same kind of provision such as art 38 of the CRC. Report of the Special Rapporteur (n 2 above).

⁹⁴ For some of the arguments see Ouguergouz (n 21 above), Murray (n 19 above) and Heyns (n 24 above).

⁹⁵ Murray has pointed out that it could be argued that derogation might be permitted through the use of the claw back clause. See R Murray (n 19 above) 126. Ouguergouz held the opposite view stating that the limitation clause cannot be used as a derogation clause. Ouguergouz (n 21 above) 434.

⁹⁶ Hartman (n 64 above).

⁹⁷ Hartman (n 64 above).

⁹⁸ Hartman (n 64 above).

⁹⁹ Hartman (n 64 above).

in extraordinary times and under specified conditions.¹⁰⁰ Hart argued that there is a widespread perception that in time of emergency suspension of a treaty obligation is inevitable and realities demand that treaties acknowledge and provide such emergencies. The ACHPR failed to acknowledge this possibility; whereas the fact on the ground is that many African states are in a constant and frequent state of emergencies.

Ouguergouz argued that the absence of a derogation clause in the ACHPR does not mean that states cannot derogate from the provision of the ACHPR.¹⁰¹ He argued that states wishing to derogate might rely on the rules relating termination and suspensions of treaties by taking into account international law, in particular the Vienna Convention on the Law of Treaties (VCLT).¹⁰² Leandro Despouy, the Special Rapporteur on state of emergency, has also tried to analyse the consequence of the absence of derogation clause in international instruments.¹⁰³ He concluded that states that are in state of emergency could avail themselves of international law of treaties by invoking *force majeure* or impossibility of performance.¹⁰⁴ However, he stated that this requirement should not be strictly followed as state of emergency may be used to prevent crisis without there actually being *force majeure* or impossibility of performance.¹⁰⁵ He stated ‘derogation sets a lower threshold for absolving a State of responsibility for non-compliance with a treaty than impossibility’.

3.2.2 The jurisprudence of the African Commission

3.2.2.1 Individual communications

The African Commission has taken a firm stand on derogation under the ACHPR. It has held the view that the ACHR does not allow derogation and that states cannot avail themselves of situation of war or other emergencies to derogate from their obligations under the ACHPR. The first case that the Commission suggested that derogation is not allowed under the ACHPR is *Commission Nationale* case.¹⁰⁶ The case involves the harassment of journalists by unidentified persons whom the complainants claim to be security service agents of the government.¹⁰⁷ Arbitrary arrest and detention, several accounts of killings, disappearances, and torture as a result of the civil war between the security services and other groups were also the gist of the complaint.¹⁰⁸ In addition, a man by the name of Bisso Mamadou was killed, for lack of protection, despite the fact that the Minister responsible was warned of the danger.¹⁰⁹ The government on its

¹⁰⁰ Hartman (n 64 above).

¹⁰¹ Ouguergouz (n 21 above) 477.

¹⁰² Ouguergouz argued that fundamental change of circumstances (art 62 VCLT) would be best applicable for African states derogating from the Charter obligations. Ouguergouz (n 21 above) 467. Hart argued that the doctrine of necessity would best fit to describe the derogation concept.

¹⁰³ He analysed the CRC, ICESCR, International labour Conventions and the ACHPR. He stated that the Chairman of the Committee on Economic Social and Cultural Rights justified the absence of derogation clause in the ICESCR by stating that, among other things, the right to food or health is inherently less compelling than the right to peaceful assembly. With regard to the ACHPR the experts he consulted suggested that the limitation clauses in the ACHPR are so broad that there is no need for a derogation clause. Report of the Special Rapporteur (n 2 above).

¹⁰⁴ Report of the Special Rapporteur (n 2 above).

¹⁰⁵ Report of the Special Rapporteur (n 2 above).

¹⁰⁶ *Commission Nationale* case (n 18 above) para 2

¹⁰⁷ *Commission Nationale* case (n 18 above) para 2.

¹⁰⁸ *Commission Nationale* case (n 18 above) para 4.

¹⁰⁹ *Commission Nationale* case (n 18 above) para 5.

part argued that no violation were committed by its agents and that it had no control over violations committed by other parties as Chad is in a state of war.¹¹⁰

The Commission noted that the government's failure to protect rights due to negligence, constitute violations of the ACHPR, even if the state or its agent are not the immediate cause of the violation.¹¹¹ The Commission further stated that the ACHPR, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations.¹¹² The Commission's view that a state is responsible for acts of others for failure to provide protection is a well-recognised jurisprudence. States are bound to protect their citizens and negligent from the state side would surely trigger state responsibility. In *Delgado Paes v Colombia*, the HRC have clearly stated that ignoring threats to the personal security of a person within its jurisdiction render totally ineffective the guarantees of the ICCPR.¹¹³ The African Commission has also ample jurisprudence on obligation of the state to protect citizens from damaging acts committed by private individuals.¹¹⁴ But would failure by a state to provide adequate protection further lead to a conclusion that no derogation is allowed even at time war?

Derogation entails the suspension of rights because the state has no choice other than to suspend rights to protect more fundamental rights. It has nothing to do with negligence or failure to provide protection for citizens. Hence the Commission view underlining the fact that derogation is not allowed under the ACHPR by linking it with a case of failure of the state to provide protection cannot be taken indisputably.

However, there is some grain of truth in the Commission's view that derogation is not allowed in times of war. The fact that a state is in time of war or emergencies does not automatically relieve the government from derogating from its obligations.¹¹⁵ Firstly, derogation is only allowed if the state of emergency is a threat to the survival of the nation.¹¹⁶ Situations such as simple riots or internal disturbance would not justify derogations.¹¹⁷ Secondly, states must justify that all measures derogating from their obligations are strictly required by the exigencies of the situation.¹¹⁸ The Commission had analysed the measures taken by the government and found the government negligent in protecting fundamental rights, which are not even subject to derogation at times of war, the right to life.¹¹⁹

¹¹⁰ *Commission Nationale* case (n 18 above) para 19.

¹¹¹ *Commission Nationale* case (n 18 above) para 22.

¹¹² *Commission Nationale* case (n 18 above) para 21.

¹¹³ Digest of jurisprudence of the UN and regional organizations on the protection of human rights while countering terrorism <<http://www.unhchr.ch/html/menu6/2/digest.doc>> (accessed on 15 September 2005).

¹¹⁴ See for instance case of the Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001) para 57 where the Commission cited a well known case from the Inter American Court of Human Rights, *Velásquez Rodríguez v Honduras*.

¹¹⁵ General Comment 29 (n 13 above).

¹¹⁶ In the drafting of the ICCPR a threat to the survival of the nation was precisely included to emphasis that derogation should not be made in the interest of a regime against its citizens. Hartman (n 96 above).

¹¹⁷ The administration of justice (n 29 above).

¹¹⁸ General Comment 29 (n 13 above). The HRC had pointed out that states could not evade their obligation under a treaty by simply invoking the existence of exceptional circumstances. The existence of emergency that affects the nation and the measures taken by government are both of paramount importance in analysing derogation of rights in times of emergency.

¹¹⁹ *Commission Nationale* case (n 18 above) para 20.

In another case, *Media Rights Agenda and Others v Nigeria (Media Rights case)*, the Commission confirmed its view of the prohibition of derogation under the ACHPR.¹²⁰ In this case, the communication involved the issuance of several decrees, after the annulment of the Nigerian elections of 12 June 1993, which violate fair trial, freedom of expression and other rights.¹²¹ These decrees proscribed the publication of magazines and the subsequent seizures of copies of magazines critical of the government's decisions and arrest of newspaper vendors selling such magazines.¹²²

The government in response to the complaint stated that it is in the public interest that all newspaper providers or publishers should ensure registration of their enterprises.¹²³ And that it is convinced that such registration fees are reasonable and justifiable in any democratic society.¹²⁴ The government, on the issue of registration of newspaper providers or publishers is availing itself of limitation clause, as is evidence from its wording 'such registration fees are reasonable and justifiable in any democratic society'.¹²⁵

The Commission then noted that, 'the African Charter does not contain a derogation clause and, therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances'.¹²⁶ It is true that Nigeria may be in a state of chaos at the time, but the government has not raised the issue of public emergency to justify its curtailing of rights. Despite this, however, the Commission brought up the issue of derogation by using it interchangeably with limitation. Ouguergouz argued that the Commission had mistakenly confused derogation with limitation.¹²⁷ By the same token, the Commission's view on derogation cannot be taken indisputably if it is mixing derogation with limitation.¹²⁸ Although it is unquestionable that the two concepts are closely linked, they are meant to serve separate and distinct situations.¹²⁹

In *Amnesty International and Others v Sudan (Amnesty International case)*, where the complainants alleged massive human rights violation including summary killings, arbitrary arrests following the coup d'état of 30 July 1989 in Sudan, the Commission also held the same opinion.¹³⁰ The Commission in its decision stated that 'while aware that states may face difficult situations, the Charter does not contain a general provision permitting states to derogate from their responsibilities in times of emergency, especially for what is generally referred to as non-derogable rights'.¹³¹ The Commission in this case has been a little bit cautious. It did not out rightly stated, as in the *Commission Nationale* case that derogation is not allowed even at time of war. It had acknowledged the difficulties that states might face under difficult situations.

¹²⁰ *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200(ACHPR 1998) para 67.

¹²¹ *Media Rights case* (n 120 above) para 1.

¹²² *Media Rights case* (n 120 above) para 2.

¹²³ *Media Rights case* (n 120 above) para 13.

¹²⁴ *Media Rights case* (n 120 above) para 13.

¹²⁵ *Media Rights case* (n 120 above) para 13

¹²⁶ *Media Rights case* (n 120 above) para 67.

¹²⁷ Ouguergouz (n 21 above) 434.

¹²⁸ It could be argued, however, that the Commission was simply using limitation as a general term to refer both to derogation and limitation.

¹²⁹ The administration of justice (n 29 above).

¹³⁰ *Amnesty International and Others v Sudan* (2000) AHRLR 297(ACHPR 1999) paras 42 & 79.

¹³¹ *Amnesty International case* (n 130 above) para 42.

Considering the history of African governments, the Commission did not seem to appreciate the abuse by governments of the use of emergency powers. This had led the Commission to confirm time and again its position that derogation is not permitted under the ACHPR.¹³² However, if the Commission followed this interpretation consistently, even in cases of real emergencies, it might lead a way for states to suspend the rights under the ACHPR without any safeguards against possible abuses.¹³³

The inclusion of derogation clause under the ICCPR is an outcome of fear of suppression of human rights on the pleas of national emergency.¹³⁴ The derogation clause should not be used by authoritarian regimes seeking to eliminate human rights nor used to save specific government.¹³⁵ That is precisely why the drafters of the ICCPR did not want to give government a free hand to manage crisis.¹³⁶ Derogation clause embodies an uneasy compromise between the protection of individual rights and the protection of national needs in times of emergencies.¹³⁷ They provide a balanced approach to safeguard the most fundamental rights on the one hand and the need of the state on the other.¹³⁸ Unless the ACHPR or the jurisprudence of the Commission accommodates derogation of rights in times of emergency the derogation of the ACHPR's provision seems inevitable.

3.2.2.2 State reports

The Commission followed a completely different position in its examination of state reports on derogation of rights during state of emergencies.¹³⁹ Firstly, the guide line for state reporting to follow up the measures taken by states to give effect to the rights in the ACHPR requests states to report whether there are provisions in their constitutions for derogation of rights under the ACHPR and in what circumstances.¹⁴⁰ Secondly, the Commissioners in their dialogues with representatives of governments request states to report on which rights the states allows derogation from the obligation of the ACHPR.¹⁴¹ This is commendable as it is an effective way for monitoring states compliance of the ACHPR in times of emergencies.

However, at the session of state reporting the Commissioners seemed to use interchangeably the words derogation and limitation.¹⁴² For instance, on the hearing of the state report of Ghana, one Commissioner was

¹³² See also *Malawi African Association and others v Mauritania* (2000) ACHPR 2000) para 84. 61/91: 98/93: 164/97 à 196/97:210/98 in the 13 activity reports.

¹³³ Heyns had pointed out that it could be argued that the absence of derogation clause would result in the ACHPR being ignored in states of emergency. Heyns in Evans & Murray (n 24 above) 139.

¹³⁴ Nowak (n 26 above) 74.

¹³⁵ The administration of justice (as n 29 above).

¹³⁶ The administration of justice (as n 29 above).

¹³⁷ Gross (n 60 above).

¹³⁸ Hartman (n 96 above).

¹³⁹ The Commission does not expressly say in its examination of state reports that derogation is not allowed under the Charter.

¹⁴⁰ General guidelines regarding the form and contents of reports from states on civil and political rights 1988, C Heyns *Human Rights Law in Africa* Vol 1 (2004) 508.

¹⁴¹ The state reports analysed for the purpose of this study are a bit outdated due to the inaccessibility of recent country reports examined by the Commission.

¹⁴² The African Commission on Human and Peoples' Rights examination of state reports 14th session December 1993: Ghana (report of Ghana) <<http://wwwserver.law.wits.ac.za/humanrts/achpr/sess14-complete.htm>> (accessed on 12 September 2005).

asking on how Ghana have tackled the problem of the ACHPR that provides for rights and yet goes on to say that those rights may be reduced or derogated from by law.¹⁴³

In the state report of Togo, the Commissioners were concerned about the possible derogation of the rights in state of emergency.¹⁴⁴ In assessing the report of Egypt, which has been in a state of emergency for a decade at the time of examination of the report, the Commission did not reflect its view that derogation is not allowed under the ACHPR.¹⁴⁵ The government of Egypt has tried to justify the emergency law, by referring to the ICCPR and stating that the emergency law of Egypt abides the requirement of the ICCPR and its jurisprudence.¹⁴⁶

With regard to the state report of Gambia, the Commission did not raise any question on derogation, despite the fact that the Gambian delegate specifically mentioned that the right to non-discrimination on the ground of race is derogable during state of emergency.¹⁴⁷ The Commission, in its observation of the report of Zimbabwe, did not contest the detention of person under the emergency law. It however asked clarifications if there were detainees who remained behind bars after the court had repeatedly ordered their release, and if persons held in detention have faced any kind of torture or sexual abuse.¹⁴⁸ Overall, in its state reporting procedure the Commission has tried to monitor states action and constitutional guarantees with regard to derogation, however, it is quite lenient in affirming its stand on derogation.

3.3 Non-derogable rights

3.3.1 The African Charter

The ACHPR encompasses both civil and political as well as economic social and cultural rights. Unlike the other universal and regional human rights instruments the ACHPR does not clearly stipulate which rights are non-derogable in times of emergency. These rights, as seen earlier, are usually embodied in the derogation clause itself. Some authors have suggested that the absence of a derogation clause entails that all rights under the ACHPR are non-derogable even at times of war.¹⁴⁹ Although this suggestion seems the best way to safeguard human rights under any emergencies, derogation of rights is, however, inevitable in times of real crisis.

¹⁴³ As above.

¹⁴⁴ The African Commission on Human and Peoples' Rights examination of state reports 13th session April 1993: Nigeria – Togo <<http://www.law.wits.ac.za/humanrts/achpr/sess13-complete.htm> > (accessed on 12 September 2005).

¹⁴⁵ The African Commission on Human and Peoples' Rights examination of state reports 11th Session March 1992: Egypt – Tanzania <<http://www.law.wits.ac.za/humanrts/achpr/sess11-complete.htm>> (accessed on 12 September 2005).

¹⁴⁶ In the year 1984 and 1993, the HRC has observed the fact that Egypt have been in a state of emergency for quite longer period and urged Egypt to review the need to maintain the state of emergency. The Human right CCPR A/39/40 (1984) & CCPR A/48/40 (1993) <http://www.bayefsky.com/./pdf/egypt_t4_ccpr.pdf>(accessed on 13 September 2005).

¹⁴⁷ The African Commission on Human and Peoples' Rights examination of state reports 12th Session October 1992: Gambia - Zimbabwe – Senegal (report of Gambia & Zimbabwe) <<http://www1.umn.edu/humanrts/achpr/sess12-complete.htm>>(accessed on 12 September 2005). The report was referring to the 1970 Constitution; the 1997 Constitution, which came into force later, does not derogate the right to non-discrimination (art 35 of the Constitution). Heyns (n 140 above) 1119.

¹⁴⁸ Report of Gambia & Zimbabwe (n 147 above).

¹⁴⁹ Murray (n 19 above) 133.

Nevertheless, not all rights are derogable by their nature, since to derogate this right will never justify any emergency situation. Moreover, the jurisprudence of the International Court of Justice (ICJ) has at least recognised freedom from slavery and servitude, cruel and inhuman treatment while in detention, and racial discrimination as non-derogable rights under customary law.¹⁵⁰ Jurists also agree that the four rights, which are non-derogable under the ICCPR, ECHR and the ACHR, are also non-derogable under customary law.¹⁵¹ These are freedom from slavery and servitude, prohibition of torture, and non-retroactivity of criminal offences and punishment and the right to life.

3.3.2 The jurisprudence of the African Commission

The Commission, in *Amnesty International* case, has noted that suspension of right is not an answer to emergencies.¹⁵² Similarly, the ICCPR by reserving some rights as non-derogable had clearly showed that suspension of rights is not a response to public emergencies.¹⁵³ This should be underlined for emergencies should not be used as a means of legitimatising derogation or suspension of rights.

Although it seems paradoxical, as the Commission had prohibited derogation from the provisions of the ACHPR, the Commission's jurisprudence suggests that it recognises some rights as non-derogable. This is inferred from the wording of the Commission in *Amnesty International* case, where it stated that 'especially derogation is not allowed for what is generally referred to as non-derogable rights'.¹⁵⁴ The Commission had not clearly stated what the phrase 'generally referred to as non-derogable rights' means. Does it mean the non-derogable rights, which have been recognised as customary law, or is it referring to the non-derogable rights as are embodied in the ICCPR. Since the ICCPR is an international convention dealing with derogation and non-derogable rights for the purpose of this study 'the generally referred to as non-derogable rights' is taken to mean those rights recognised as non-derogable under the ICCPR.¹⁵⁵ With this background it is important to analyse the jurisprudence of the Commission with regard to these rights.¹⁵⁶

3.3.2.1 The right to life

The right to life is provided under article 4 of the ACHPR.¹⁵⁷ The right as a whole is not absolute under the ACHPR as the word 'arbitrarily' implies recognition of some exceptions that could justify deprivation of

¹⁵⁰ Report of the Special Rapporteur (n 2 above). See the *Corfu Channel* Case, the *Barcelona Traction* case and *Hostages in Teheran* case in the Report of the Special Rapporteur.

¹⁵¹ Report of the Special Rapporteur (n 2 above).

¹⁵² *Amnesty International* case (n 130 above) para 79. The Commission stated: the Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law. The Commission has held states responsible for violations of both civil and political rights and economic social and cultural rights during times of disturbances. R Murray (n 19 above) 126.

¹⁵³ Dolezal (n 5 above).

¹⁵⁴ *Amnesty International* case (n 130 above) para 42. The Commission has also stated that the right to appeal is a general and non-derogable principle of International law. *Amnesty International* case (n 133 above) para 37.

¹⁵⁵ The ICCPR is regarded as the primus inter pares of the universal international human rights treaties, which is widely ratified by states. Hence it is reasonable to refer to it. MacGoldrick (n above).

¹⁵⁶ The prohibition of imprisonment on the ground of inability to fulfil contractual obligation, which is one of the non-derogable rights under the ICCPR, is not provided under the ACHPR, thus discussion on this right is omitted.

¹⁵⁷ Art 4 reads: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

life.¹⁵⁸ The Commission has taken the view that extra judicial killings, failure to protect civilians in time of war, shooting by police and executions of persons without fair trial constitute arbitrary denial of the right to life. In addition, the right to life has been interpreted broadly to protect not only against the termination of life itself, but also against activities whose effects may cause any injury to life.¹⁵⁹

In *Amnesty International* case, the communications alleged extra-judicial executions where thousands of civilians have been killed in Southern Sudan in the course of the civil war.¹⁶⁰ The government is alleged to have executed suspected members of the Sudan People's Liberation Army without trial and there has been no investigation into or prosecution for such incidents.¹⁶¹ The Commission's view was that extra judicial killing and failure to protect civilians in areas of strife to ensure that they are treated in accordance with international humanitarian law is a violation of the right to life.¹⁶²

In another case, *Achuthan and Another (on behalf on Banda and others) v Malawi*, which involves the shooting and killing by the police of peacefully striking workers, the Commission decided that shooting and killing by the police is a violation of the right to life.¹⁶³ In *Organisation Mondiale Contre La Torture v Rwanda (Organisation Mondiale case)*, the complaint alleged widespread massacres, extra judicial executions and arbitrary arrests against the Tutsi ethnic group.¹⁶⁴ The Commission decided that the massacre of a large number of Rwandan villagers by the Rwandan armed forces and the extra judicial executions for reasons of their membership of a particular ethnic group is a violation of the right to life.¹⁶⁵

In *Forum of Conscience v Sierra Leone (Forum case)* the complainant alleged that 24 soldiers were tried and sentenced to death by a Court Martial for their alleged roles in the coup that overthrew Government.¹⁶⁶ The communication alleged that the trial of the soldiers by the Court Martial was flawed in law and in violation of Sierra Leone's obligation under the ACHPR.¹⁶⁷ The Commission noted that the right to life is the fulcrum of all other rights.¹⁶⁸ And hence, being the fountain through which other rights flow any violation of this right without due process amounts to arbitrary deprivation of life.¹⁶⁹

¹⁵⁸ NJ Udombana 'between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105.

¹⁵⁹ As above.

¹⁶⁰ *Amnesty International* case (n 130 above) para 6.

¹⁶¹ *Amnesty International* case (n 130 above) para 6.

¹⁶² *Amnesty International* case (n 130 above) para 50.

¹⁶³ *Achuthan and another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995) para 6.

¹⁶⁴ *Organisation Mondiale Contre La Torture v Rwanda* (2000) AHRLR 282 (ACHPR 1996) para 4.

¹⁶⁵ *Organisation Mondiale case* (n 164 above) para 24.

¹⁶⁶ *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000) para 2.

¹⁶⁷ *Forum case* (n 166 above) para 3.

¹⁶⁸ *Forum case* (n 166 above) para 19.

¹⁶⁹ *Forum case* (n 166 above) para 19.

In *International Pen and others (Saro-Wiwa) v Nigeria (International Pen case)* the Commission broadened the right to life to include a duty for the state not to purposefully let a person die while in its custody.¹⁷⁰ In this case one of the victims' lives was seriously endangered by the denial of medication during detention.¹⁷¹

3.3.2.2 Slavery

Freedom from slavery is the first human rights to be recognised and protected under international law.¹⁷² This right is provided under article 5 of the ACHPR.¹⁷³ The ACHPR unlike the ICCPR does not provide this right in a single provision but merges it with freedom from torture, inhuman and degrading treatment and the right to the respect of dignity.

In *Malawi African Association and Others v Mauritania (Malawi African case)*, the communication alleged that a number of Mauritanian population is composed of slaves.¹⁷⁴ The government claimed that slavery as being abolished under the French colonial regime.¹⁷⁵ However, the Commission in its mission to Mauritania noted that it was still possible to find people considered as slaves in certain particles of the country.¹⁷⁶ The Commission noted that the government has not taken effective measure to do away with the practice.¹⁷⁷

In analysing what constitutes practice of slavery the Commission noted that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in human being. The Commission underlined the fact that everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented if necessary by other means of social protection.¹⁷⁸ It further considered that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation.¹⁷⁹

3.3.2.3 Torture, cruel and inhuman treatment

Freedom from torture, degrading and inhuman treatment and punishment is provided in the same provision as the prohibition of slavery under the ACHPR.¹⁸⁰ The merger of many rights into one will contribute to the vagueness of the meaning of a right. However, the Commission has been progressive in its interpretation of these rights. The Commission has broadly interpreted degrading and inhuman treatment to include, among other things, holding of persons in custody without permitting them contact with their family. The

¹⁷⁰ *International Pen and Others (Saro- Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 104.

¹⁷¹ *International Pen case* (n 170 above) para 104.

¹⁷² Nowak (n 26 above) 356.

¹⁷³ Art 5 reads every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All form of exploitations and degradation of man particularly slavery, slave trade, torture, cruel inhuman and degrading treatment and punishment shall be prohibited.

¹⁷⁴ *Malawi African case* (n 132 above) para 133.

¹⁷⁵ *Malawi African case* (n 132 above) para 133.

¹⁷⁶ *Malawi African case* (n 132 above) para 134.

¹⁷⁷ *Malawi African case* (n 132 above) para 135.

¹⁷⁸ *Malawi African case* (n 132 above) para 135.

¹⁷⁹ *Malawi African case* (n 132 above) para 135.

¹⁸⁰ Art 5 of the Charter. Art 5 of the ACHPR unlike the ICCPR art 7 does not expressly provide for the prohibition of medical or scientific experiment with out ones free consent.

Commission has also held that lashing of persons as a result of court ordered punishment constitutes degrading and inhuman punishment and tantamount to state sponsored torture.¹⁸¹

In *Amnesty International case* the communication alleged widespread torture and ill treatment in the prisons and ‘ghost houses’ in Sudan. Acts of torture include, among other things, forcing detainees to lie on the floor and being soaked with cold water, deliberately flooding cells to prevent detainees from lying down, forcing individuals to face mock executions, and prohibiting them from washing.¹⁸² The Commission noted that all of the alleged acts of physical abuses constitute violations of article 5.¹⁸³ Additionally, the Commission decided that holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held is inhuman treatment of both the detainee and the family concerned.¹⁸⁴

In *International Pen case*, the complainants alleged that Ken Saro-Wiwa was kept in leg irons and handcuffs and subjected to ill-treatment including beatings and being held in cells which were airless and dirty and denied medical attention, during the first days of his arrest.¹⁸⁵ The Commission noted that cruel, inhuman or degrading treatment includes, not only actions, which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.¹⁸⁶

In *Huri-Laws v Nigeria (Huri-Laws case)*, the Commission noted that the prohibition of torture, cruel, inhuman or degrading treatment or punishment is absolute.¹⁸⁷ In this case, the complainant alleged that he was tortured and rigorously interrogated, he was not informed of any charges against him, nor were any charges ever brought against him.¹⁸⁸ The Complainant further alleged, detention in a sordid and dirty cell under inhuman and degrading conditions.¹⁸⁹ He was denied medical attention and access to his family and lawyer.¹⁹⁰

The Commission, sharing the view of the European Court of Human Rights, noted that that the term cruel, inhuman or degrading treatment or punishment is to be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.¹⁹¹ Also, the Commission noted that the denial of

¹⁸¹ See *Curtis Francis Doebbler v Sudan* 236/2000, Sixteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights 2002 – 2003 <http://www.achpr.org/english/activity_reports/activity16_en.pdf#search='SIXTEENTH%20ANNUAL%20ACTIVITY%20REPORT%20OF%20THE%20AFRICAN'> para 42. The Commission also held that article 5 not only prohibit cruel but also inhuman and degrading treatment. This according to the Commission not only prohibits serious physical or psychological suffering but which humiliate or force the individual against his will or conscience para 36.

¹⁸² *Amnesty International case* (n 130 above) para 5.

¹⁸³ *Amnesty International case* (n 130 above) para 54.

¹⁸⁴ *Amnesty International case* (n 130 above) para 54 .

¹⁸⁵ *International Pen case* (n 170 above) para 80.

¹⁸⁶ *International Pen case* (n 170 above) para 79.

¹⁸⁷ *Huri-Laws v Nigeria* (2000) AHRLR 273(ACHPR 2000) para 41.

¹⁸⁸ *Huri-Laws case* (n 187 above) para 9.

¹⁸⁹ *Huri-Laws case* (n 187 above) para 8.

¹⁹⁰ *Huri-Laws case* (n 187 above) para 8.

¹⁹¹ *Huri-Laws case* (n 187 above) para 41.

medical attention under health threatening conditions and access with the outside world do not fall into the province of the respect of the dignity inherent in a human being and to the recognition of his legal status.¹⁹²

In *Modise v Botswana (Modise case)*, a case involving the illegal deportation of the complainant without due process of law, the Commission found a violation of article 5. As a result of the deportation the complainant was forced to live for eight years in the homeland of Bophutatswana, and then for another seven years in no-man's land.¹⁹³ This according to the Commission, not only expose him to personal suffering, it deprived him of his family, and it deprived his family of his support.¹⁹⁴ Such inhuman and degrading treatment, according to the Commission, offends the dignity of a human being.¹⁹⁵

3.3.2.4 The right to fair trial

Although the right to fair trial is not in the list of non-derogable rights under the ICCPR, the HRC in its General Comment 29 has given emphasis to the non-derogability character of this right, as it is essential in protecting more fundamental rights. The Commission has also recognised the importance of the right to fair trial as embodied in article 7(1)¹⁹⁶ of the ACHPR on complaints involving the death penalty. Additionally, it has expressly stated that the right to appeal and the right to fair trial are a general non-derogable principle of international law.

In *Civil liberties v Nigeria (Civil liberties case)*, the authors alleged their arrest, detention and trial and conviction in a Special Military Tribunal was unlawful, unfair and unjust.¹⁹⁷ The Commission noted that in conscious of the fact that Africa continues to have military regimes who are inclined to suspend the constitution and govern by decree whatever system of governance may be in place must abide by the international norms as well as duties established in international human rights law.¹⁹⁸

The Commission then held that in its opinion 'the provisions of article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable and undemocratic military regime.'¹⁹⁹ According to the Commission, the assignment of military lawyers to accused persons against their will, is capable of exposing the victims to a situation of not being able to communicate, in confidence, with counsel of their choice.²⁰⁰ Thus violating article 7(1)(c).

¹⁹² *Huri-Laws case* (n 187 above) para 41.

¹⁹³ *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1997) para 32.

¹⁹⁴ *Modise case* (n 193 above) para 32.

¹⁹⁵ *Modise case* (n 193 above) para 32.

¹⁹⁶ Art 7(1) reads 'Every individual shall have the right to have his case heard. This comprise

- (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by convention, laws, regulation and customs in force;
- (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
- (c) the right to defence, including the right to be defended by counsel of his choice;
- (d) the right to be tried within a reasonable time by an impartial court or tribunal.

¹⁹⁷ *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria*, African Comm. Hum. & Peoples' Rights, Comm. No. 218/98 <<http://hei.unige.ch/humanrts/africa/comcases/218-98.html>> (accessed on 22 September 2005) para 11.

¹⁹⁸ *Civil liberties case* (n 197 above) para 26.

¹⁹⁹ *Civil liberties case* (n 197 above) para 27.

²⁰⁰ *Civil liberties case* (n 197 above) para 31.

With regard to article 7(1)(b), the Commission noted that the presumption of innocence including the right to silence is universally recognised and no accused should be required to testify against himself or to incriminate himself or be required to make a confession under duress.²⁰¹ The Commission cited the case of *Krause v Switzerland* where the European Commission noted that presumption of innocence constitutes a fundamental principle, which protects everybody against being treated by public officials as if they were guilty of an offence even before a competent court establishes such guilt.²⁰²

In *Amnesty International* case, the Communication alleged among other things, the detention of anyone ‘suspected of being a threat to political or economic security’ under a state of emergency.²⁰³ The Complainant alleged that the President could order the arrest of anyone without the need to give reasons for such detention.²⁰⁴ No judicial challenge of such decisions is permissible.²⁰⁵ Decree No. 2 also provides for the creation of special courts to try those arrested under the state of emergency legislation.²⁰⁶ Section 9 of the Decree ousts the jurisdiction of the ordinary courts in cases arising from its enforcement.²⁰⁷ It is further alleged that the right to defence before these special tribunals is restricted.²⁰⁸ The communications also indicate that people brought before these tribunals were denied the right to contest the grounds for their detention under emergency legislation.²⁰⁹

The Commission stated that the right of individual to have his case heard constitutes all the element of article 7 of the ACHPR.²¹⁰ This provision, according to the Commission, are all mutually dependent, and where the right to be heard is infringed, other violations may occur, such as detentions being rendered arbitrarily.²¹¹ The Commission further stated that, the right to freely choose one’s counsel is essential to the assurance of a fair trial.²¹² The Commission noted that to give the tribunal the power to veto the choice of counsel of defendants is an unacceptable infringement of this right.²¹³ In this case, the Commission concluded the very fact that the accused’s choice is subject to the assent of the Court before which he is to appear constitutes a violation of the right to be represented by counsel of one’s choice.²¹⁴ The Commission on the composition of the Special Courts stated that the composition alone creates the impression, if not the reality, of lack of impartiality and as a consequence, violates article 7 (1)(d).²¹⁵

²⁰¹ *Civil liberties* case (n 197 above) para 40. In *Pagnouille v Cameroon* the Commission had also stated that holding of a person on the ground that a person may cause problems is against the presumption of innocence. *Pagnouille v Cameroon* (Pagnouille case) (2000) AHRLR 57(ACHHR1997) para 21.

²⁰² *Civil liberties* case (n 197 above) para 41. In *Pagnouille v Cameroon* the Commission had also stated that holding of a person on the ground that a person may hold problems is against the presumption of innocence. *Pagnouille* case (n 228 above) para 21.

²⁰³ *Amnesty International* case (n 130 above) para 3.

²⁰⁴ *Amnesty International* case (n 130 above) para 3.

²⁰⁵ *Amnesty International* case (n 130 above) para 3.

²⁰⁶ *Amnesty International* case (n 130 above) para 3.

²⁰⁷ *Amnesty International* case (n 130 above) para 3.

²⁰⁸ *Amnesty International* case (n 130 above) para 3.

²⁰⁹ *Amnesty International* case (n 130 above) para 3.

²¹⁰ *Amnesty International* case (n 130 above) para 62.

²¹¹ *Amnesty International* case (n 130 above) para 62.

²¹² *Amnesty International* case (n 130 above) para 64.

²¹³ *Amnesty International* case (n 130 above) para 64.

²¹⁴ *Amnesty International* case (n 130 above) para 66.

²¹⁵ Art 7(1)(d): The right to be tried within a reasonable time by impartial court or tribunal.

In *Constitutional Rights Project v Nigeria (Constitutional Rights case)*, the communication alleged that Wahab Akamu, Gbolahan Adeaga and others are sentenced to death under the Robbery and Firearms (Special provision) Decree No. 5 of 1984, which creates special tribunals, composed of one serving or retired judge, one member of the armed forces and one member of the police force.²¹⁶ They alleged that the decree does not provide for any judicial appeal of sentences.²¹⁷ The Commission noted:

While acknowledging the punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any avenue of appeal to ‘competent national organs’ in criminal cases bearing such penalties violates article 7(1)(a) of the African Charter and increases the risk that severe violations may go unredressed.²¹⁸

3.3.2.5 Freedom of conscience, the profession and free practice of religion

Freedom of conscience, the profession and free practice of religion is provided under article 8 of the ACHPR.²¹⁹ Unlike the ICCPR or the UDHR the rights protected under this article omits freedom of thought and replace it with freedom of profession. The African Commission has interpreted freedom of religion and conscience in its individual communications.

In *Amnesty International* case, the complainant alleged that Non-Muslims were persecuted in order to cause their conversion to Islam.²²⁰ The communication further alleges the trial of Non-Muslims by Sharia law.²²¹ The Commission decided that these attacks on individuals on account of their religious persuasion considerably restrict their ability to practice freely the religion.²²² Also, the Commission stated that it is fundamentally unjust that religious laws should be applied against non-adherents of the religion.²²³ And decided that tribunals that apply only Shari'a are not competent to judge Non-Muslims, and everyone should have the right to be tried by a secular court if they wish.²²⁴

In *Free Legal Assistance Group and Others v Zaire (Free Legal Assistance case)*, the complainant alleged the persecution of the Jehovah’s Witnesses, including arbitrary arrests, appropriation of church property and exclusion from access to education.²²⁵ In view of the fact that the government has presented no evidence that the practice of their religion in any way threatens law and order, the Commission found a violation of article 8.²²⁶ It is important to note that freedom of religion although non-derogable has its inherent limitation. In

²¹⁶ *Constitutional Rights Project v Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 60/91 (1995). <<http://www1.umn.edu/humanrts/africa/comcases/60-91.html>> (accessed on September 12 2005) para 1.

²¹⁷ *Constitutional Rights case* (n 216 above) para 1.

²¹⁸ *Constitutional Rights case* (n 216 above) para 13.

²¹⁹ Art 8 reads: Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

²²⁰ *Amnesty International case* (n 130 above) para74.

²²¹ *Amnesty International case* (n 130 above) para73.

²²² *Amnesty International case* (n 130 above) para74.

²²³ *Amnesty International case* (n 130 above) para73

²²⁴ *Amnesty International case* (n 130 above) para73

²²⁵ *Free Legal Assistance Group and Others v Zaire (Free Legal Assistance case)*(2000) AHRLR 74 (ACHPR 1995) para 3.

²²⁶ *Free Legal Assistance case* (n 225 above) para 45.

another case, *Amnesty International v Zambia* the Commission held that deportation of political opponents, among other things, is a violation of their freedom of conscience.²²⁷

3.3.2.6 Non-retroactivity of the criminal offence and punishment

Article 7(2) of the ACHPR prohibits the condemnation of a person for an act or omission, which did not constitute a legally punishable offence at the time it was committed. In *Jawara v the Gambia*, the government imposed a retroactive legislation infringing the rule of law and due process of law.²²⁸ Thus, the Commission held that the legislation, which came into force, violates this right.²²⁹ The justification for the prohibition of retroactive law, pursuant to the Commission, is to ensure that citizens are aware of the state of the law under which they are living.²³⁰

3.3.2.7 Recognition as a person before the law

Personhood or the recognition of legal status is provided under article 5 of the ACHPR.²³¹ In *Modise v Botswana* the complainant alleged denial of citizenship. The Commission held that the denial of citizenship by the government is a violation of the right to the respect to the recognition of legal status.

3.4 Conclusion

The ACHPR does not provide for a derogation clause. The Commission did not also try to accommodate this weakness in its interpretation of the ACHPR under individual complaints. The Commission has assertively insisted that states could not derogate from the provisions of the ACHPR in state of emergencies. Although the prohibition of violating states from derogating the ACHPR is to be applauded, the practicality of this position is questionable. Perhaps it is in view of this fact that the Commission seemed to hold different opinion in its state reporting procedures. Rather than out rightly condoning states for derogating the ACHPR, the Commission has tried to examine governments' action and constitutional provisions with regard to derogations.

With regard to non-derogable rights, it can be concluded that the Commission is of the opinion that all the rights under the ACHPR are non-derogable. However, the Commission has in particular given emphasis to what it referred as those rights 'generally recognised as non-derogable rights'²³². Furthermore, the Commission has expressly recognised the right to fair trial and the right to effective appeal as non-derogable rights. The Commission has ample jurisprudence on the generally recognised non-derogable rights and this chapter has tried to examine the interpretation given by the Commission with regard to these rights.

²²⁷ C Heyns (n 24 above) 164.

²²⁸ *Jawara v the Gambia (Jawara case)* (2000) AHLRR 107(ACHPR 2000) para 7.

²²⁹ *Jawara case* (n 228 above) para 63.

²³⁰ *Jawara case* (n 228 above) para 63.

²³¹ Art 5 partly reads: Every individual has the right to the respect of his dignity inherent in a human being and to the recognition of his legal status.

²³² Taken to refer to the non-derogable under the ICCPR, as it is the only international convention as opposed to the two regional Conventions.

CHAPTER FOUR

THE COMPATIBILITY OF THE CONSTITUTIONS OF AFRICAN STATES WITH THE INTERNATIONAL AND AFRICAN STANDARDS: ETHIOPIA AND MOZAMBIQUE

4.1 Introduction

Most domestic laws contain emergency clause that provide for derogation of human rights in state of emergency.²³³ African states are no exceptions and most constitutions of African states provide emergency clause. As we have seen earlier the ACHPR does not contain derogation clause but the jurisprudence of the African Commission suggests that it recognises the generally accepted non-derogable rights. Basically, this chapter will discuss in brief to what extent the generally recognised non-derogable rights are incorporated in the constitutions of African states. In particular, emphasis will be given to the constitutions and the practice of Mozambique and Ethiopia. In analysing the non-derogable rights under the Constitutions' of Ethiopia and Mozambique only selected rights will be discussed based on their relevance for the discussion.

4.2 Overview of the constitutions of African states

Most legal scholars recommend for constitutions to clearly set out the conditions under which states of emergency may be declared with the purpose of knowing in advance the extent of states emergency powers.²³⁴ A brief look at the constitutional provisions of the African states shows that almost all the constitutions, with exception of Benin, DRC, contain emergency clause.²³⁵ Most African states constitutions fulfil the requirement of the Paris Minimum Standards, which clearly call for states of emergency be expendable only by the legislature's approval, and that legislature should not be dissolved during emergency.²³⁶ However, only some of the constitutions contain two or more of the non-derogable rights discussed in the previous chapters. These are the Constitutions of Angola, Cape Verde, Chad, Eritrea, Ethiopia, the Gambia, Guinea Bissau, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Sudan, Tanzania, Zambia and Zimbabwe.²³⁷ The Constitution of Algeria contains provision for the suspension of the constitution in times of emergency.²³⁸ The Constitution of Sao Tome and Principe, Ghana and Uganda provides for the suspension of fundamental rights during emergency.²³⁹ The Constitution of Kenya, Lesotho and Mauritius do not follow the principle of non-discrimination in state of emergency.²⁴⁰ Overall, most African states constitutions do not conform to the international and African standards with regards to non-derogable rights.

²³³ M Nowak (n 26 above) 73.

²³⁴ Keith & Poe (n 25 above).

²³⁵ C Heyns (n 140 above) 854. Excluding Somalia and Swaziland.

²³⁶ In this study the constitutions are analysed using the reference material by Heyns (as 140 above).

²³⁷ This study did not examine in depth the content of all non-derogable rights under all the constitutions of African states. However, a glance look of most of the constitution of African states shows that most of them lack all the set of non-derogable rights in their constitutions. South Africa has the most expanded list of non-derogable rights, followed by Namibia and Seychelles.

²³⁸ Art 96 of the Constitution. Heyns (n 140 above) 871.

²³⁹ Sao Tome and Principe art 18(2), Ghana art 31(10) and Uganda art 46(1) Heyns (n 140 above) 1436,1148 &1664.

²⁴⁰ Kenya art 83(1), Lesotho art 21(1), Mauritius art 18(1) Heyns (n 140 above) 1192,1219 &1324.

4.3 The Ethiopian Constitution

4.3.1 The bill of rights

The current Constitution of Ethiopia is promulgated in the year 1995. This Constitution contains a bill of rights that provides for civil and political rights as well as economic social and cultural rights under Chapter three of the Constitution. This Chapter classifies rights into human rights and democratic rights. Although the Constitution classifies rights into these categories, the rights embodied under both titles are the well-recognised human rights under international human rights law.

4.3.2 State of emergency

The emergency clause, article 93, of the Constitution is not part of the bill of rights provisions. It is written under Chapter 11 under the heading miscellaneous provisions. Article 93 provides, among other things, which branch of government has the power to declare emergency, the time limit for the state of emergency and non-derogable rights under state of emergency.

Ethiopia being a federal state, the power of the government to declare a state of emergency is vested both on the states government and the federal government.²⁴¹ The federal government can declare a state of emergency if the crisis is caused by external invasion, a break down 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.²⁴² The states can only declare a state-wide state of emergency if a natural disaster or epidemic occur.²⁴³ The power to decree a state of emergency at the federal level is vested on the Council of Ministers subject to the approval of House of People's Representatives (HPR).²⁴⁴ At the State level it is the state executives that have the power to declare a state of emergency.²⁴⁵ The HPR by a two third majority have to approve the decree within 48 hrs of the declaration of the state of emergency.²⁴⁶ If the HPR is not in session the decree will have to be approved within 15 days of its adoption.²⁴⁷ The period for the state of emergency is up to six months, with the possibility of renewal every four months by the HPR.²⁴⁸ The Constitution provides for the establishment of state of emergency inquiry board, which has the power, among other things, to inspect and follow up all the measures taken during state of emergency and ensure the prosecution of perpetrators of inhuman acts.²⁴⁹ This is highly commendable as it provides for a sort of checking mechanism against abuse, which will protect human rights in times of emergency.

4.3.3 The non-derogable rights: the law and the practice

The Constitution recognises five rights as non-derogable rights during state of emergency. These are the nomenclature of the state, equality, freedom from slavery, self-determination and the right not to be subjected

²⁴¹ Art 93(1) of the Constitution.

²⁴² Art 93(1)(a) of the Constitution.

²⁴³ Art 93(1)(b) of the Constitution.

²⁴⁴ Art 93(1)(a) of the Constitution.

²⁴⁵ Art 93(1)(b) of the Constitution.

²⁴⁶ Art 93(2)(a) of the Constitution.

²⁴⁷ Art 93(2)(b) of the Constitution.

²⁴⁸ Art 93(3) of the Constitution.

²⁴⁹ Art 93 (6) of the Constitution

to inhuman and degrading treatment.²⁵⁰ The Constitution does not recognise the right to life, prohibition of torture, freedom of religion, thought and conscience, the non-imprisonment for contractual obligation, non-retroactivity of criminal law and recognition as a person before the law as non-derogable rights. Despite this, the Constitution adds to the list a set of rights that are not embodied in the ICCPR, the right to equality, self-determination and prohibition of trafficking in person.

4.3.3.1 The right to life

The right to life is protected under the Constitution with the exception for the punishment for a serious criminal offence determined by law.²⁵¹ In other words, death penalty is permitted pursuant to the Constitution. The right to life is derogable under the Constitution, as it is not provided in the list of non-derogable rights.²⁵² Additionally, in practice, this right seems to be breached by the government in time of crisis. In a recent demonstration held by University students in the city of Addis Ababa, after the Prime Minister declared a ban on demonstration and public gathering, the security forces shot and killed around 36 protestors.²⁵³ The Prime Minister banned demonstration and public gathering on the excuse of securing peace and order.²⁵⁴ Although the rights to association and demonstration is derogable to the extent the exigencies of the situation warrants, both under the Constitution and the ICCPR, a state of emergency has not been declared by the Council of Ministers pursuant to the Constitution.²⁵⁵ Be it as it may, the shooting and killing of demonstrators in defiance of a ban on demonstration would not be justified under any circumstance or exigency, since the right to life is a non-derogable right. In addition, the jurisprudence of the African Commission shows that shooting and killing of demonstrators is a violation of the right to life.

4.3.3.2 Cruel, inhuman or degrading treatment or punishment

The Constitution under article 18 provides that everyone has the right to protection against cruel, inhuman or degrading treatment or punishment. However, torture, which has, attended the status of *jus cogens* or peremptory norms, is not included in this provision or in other provisions of the Constitution.²⁵⁶

²⁵⁰ Art 93 (4) (C) of the Constitution.

²⁵¹ Art 14 & 15 of the Constitution.

²⁵² Art 93(4)(b) of the Constitution.

²⁵³ 'High stakes in Ethiopia stand-off' BBC NEWS <<http://news.bbc.co.uk/1/hi/world/africa/4122350.stm>>(accessed on 14 October 2005).

²⁵⁴ The Prime Minister declared the ban on 16 May 2005. In addition, the Prime Minister announced that all the security forces to be under his direct command. The reason for the ban pursuant to the Prime Minister is taking into cognisance the possible chaos that may ensue and to avoid danger to a single man or property. In protest of the banning of demonstration and public gathering in the aftermath of the election, an opposition party the Coalition for Unity and Democracy (CUD) brought a case against the Prime Minister, Meles Zenawi, questioning the legality of the order given by him.

²⁵⁵ At the Woreda court, the complainant alleged that the Prime Minister couldn't order ban on demonstration, as there was no emergency calling for derogating this right. In addition, the complainant alleged that the Prime Minister had no authority to order the ban and hence his action is illegal. The Constitutional Inquiry analysed the case in light of limitation of rights despite absolute ban of a rights entails derogation and not limitation. Moreover, the Constitutional Inquiry without assessing the fact of the case in detail, had opined that the exigency of the situation warrants limitation of these rights. (However on the issue of assessing whether the exigencies of the situation warrants limitation, the Constitutional Inquiry has referred the case back to the lower Woreda court. *CUD v Meles Zenawi* (2005) Council of Constitutional Inquiry.

²⁵⁶ One could argue that torture identifies an extreme end of range of prohibited ill treatment. CM Grosso 'International law in the domestic arena: the case of torture in Israel' (2000) 86 *Iowa Law Review* 305.

4.3.3.3 Nomenclature of the state

The nomenclature of the state declares the type of government that is established, a federal and democratic state. This provision of the Constitution is non-derogable under the Constitution. 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 a right? If the answer is yes, will that not defeat the right to self-determination, the right to political participation and other rights that are recognised under the Constitution. There is no provision both in the ACHPR or the ICCPR that designates this as a right. A structure of the state is based on the will of the people, which is expressed through participation. It is a dynamic concept and is not one that is fixed and applicable throughout. The African Commission in the case of *Katangese peoples' congress v Zaire* has expressed this view by stating that self-determination may be exercised in the form of independence, self government, federalism or unilateralism or any other form.²⁵⁷ Hence, to hold that federalism is a non-derogable right would be tantamount to limiting the right to self-determination and refusal to recognise the continuing nature²⁵⁸ of the right.

4.3.3.4 Slavery or servitude

The Constitution under article 18 provides for the prohibition of slavery or servitude including forced or compulsory labour. Moreover, trafficking in human being for whatever purpose is prohibited. Unlike the ICCPR, prohibition of trafficking is a non-derogable right under the Constitution.²⁵⁹ With regard to forced labour, though it is listed under article 18, service exacted during emergency or calamity threatening the life or well being of the community fall under the exception of forced labour.²⁶⁰ The ACHPR is silent on the prohibition of forced labour. However, since all kind of exploitation is prohibited under the ACHPR one can argue that it includes the prohibition of forced labour. The ICCPR, similarly, provides for the prohibition of forced labour except for certain practices.²⁶¹

4.3.3.5 Self-determination

The right to self-determination provided under article 39 of the Constitution of Ethiopia, goes further to allowing all Nations, Nationalities, and People in Ethiopia the unconditional right to secede from the nation.²⁶² 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. On the basis of a thorough study of the practice of states, Special Rapporteur Gros Espiell has concluded that self-determination is a rule of *jus cogens*, as a peremptory norm of international law that is binding on all

²⁵⁷ *Katangese people's Congress v Zaire (Katangese case)* 2000 ACHPR 72 (ACHPR 1995) para 4.

²⁵⁸ Jayawickrama (n 11 above) 232.

²⁵⁹ 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. Jayawickrama (n 11 above) 358.

²⁶⁰ Art 18(4) of the Constitution.

²⁶¹ Art 18(3) of the Constitution, one of these exceptions is the work performed during emergencies.

²⁶² Haile believes that the right to self-determination until secession is copied from the Soviet Union which eventually disintegrated. M Haile 'Comparing human Rights in two Ethiopian Constitutions: The Emperor's and the "Republics"--*Cucullus non facit monachum*' 13 *Cardozo Journal of International and Comparative Law* 1 (2005). McCracken argued 'that the new theory is: the TPLF-dominated EPRDF intentionally included article 39 in Ethiopia's 1994 Constitution so that the Tigray region could loot Ethiopia of its resources, use the Ethiopian military to expand the borders of Tigray, and then secede from Ethiopia'. MJ McCracken 'abusing self-determination and democracy: how the TPLF is looting Ethiopia' (2004) 36 *Case Western Reserve Journal of International Law* 183.

members of the international community and from which no suspension is allowed.²⁶³ The ACHPR also provides for the right to self-determination under article 20, which states that all people have the unquestionable and inalienable right to self-determination. The African Commission in the case of *Katangese peoples' Congress v Zaire* has laid down the ground for possible secession. The only ground for secession pursuant to the Commission is the presence of human rights violation and the denial of the right to participate in government.²⁶⁴

The right to secede is recognised for nation, nationality or people under the Constitution. The Constitution defines nation, nationality or people as a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological makeup and who inhabit an identified, predominately contiguous territory.²⁶⁵ Taking into account the heterogeneous society of Ethiopia, this definition includes more than the states that make up the federal government.²⁶⁶ Self-determination until secession as embodied in the Constitution can be exercised by two third majority votes of the members if the legislative council of the nation nationalities or people concerned followed by a support of a majority vote by referendum.²⁶⁷ In contrast to the jurisprudence of the African Commission that only allows secession where there is a violation of human rights the Constitution does not lay down any ground for secession. It only provides a very lenient procedure for the exercise of the right.²⁶⁸

The Constitution, in addition, under article 39 provides for the rights of all national's, nationalities and people in Ethiopia the right to speak and develop its own language, to express, to develop and to promote its culture and to preserve its history. This right takes into account the vast number of people of Ethiopia especially people belonging in the minority groups. Although this right is not included in the list of non-derogable rights under the ICCPR, the HRC in its general comment is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances.²⁶⁹

4.3.3.6 Equality

Article 25 of the Constitution 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 colour or sex, language, religion, political or other opinion, property, birth or other status. The ACHPR under article 3 states that

²⁶³ Report of the Special Rapporteur (n 2 above).

²⁶⁴ *Katangese* (case n 257 above) para 6. Lloyd also argued that the right to self-determination under the African Charter is not limited to colonised territories but includes oppressed people for the right to self-determination. AM Lloyd 'the Southern Sudan: a compelling case for secession' (1994) 32 *The Columbia Journal of Transnational Law Association* 419.

²⁶⁵ Art 39(5) of the Constitution.

²⁶⁶ There are nine states that make up the Federal Democratic Republic of Ethiopia (Art 47 of the Constitution). People who share the same language for instance are about 84 in Ethiopia. See Wikipedia, the free encyclopedia < <http://en.wikipedia.org/wiki/Ethiopia> > (accessed on 22 October 2005).

²⁶⁷ Art 39 (4) of the Constitution.

²⁶⁸ McCracken (n 262 above).

²⁶⁹ General Comment 29 (n 13 above).

everyone is equal before the law and is entitled to equal protection of the law.²⁷⁰ A violation of the right to equality before the law and equal protection of the law has been interpreted by the African Commission in the case of *constitutional rights project and another v Nigeria* to refer to laws made to apply to specific individuals or legal entity.²⁷¹ Despite the fact that equality is not included as one of the non-derogable rights under the ICCPR, the HRC has opined that there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances.²⁷²

4.4 The Mozambique Constitution

4.4.1 The bill of rights

The current Constitution of Mozambique was adopted in 2004 and came into force on January 2005. The Constitution has a bill of rights that provides for civil and political rights as well as economic social and cultural rights under title 3 of the Constitution.

4.4.2 State of emergency

The emergency clause is provided under title XV of the Constitution. Article 72 of the Constitution provides that individual freedoms and guarantees may only be temporarily limited or suspended in the event of the declaration of a state of emergency. The period of the state of emergency cannot exceed thirty days with a possibility of extension three times for the same period.²⁷³ In matters of national defence and public order, the President has the power to declare state of emergency.²⁷⁴ However, the Assembly of the Republic (the Assembly) has the power to ratify the suspension of the right and the declaration of emergency.²⁷⁵ The Assembly should decide on the ratification of the state of emergency within 48 hrs.²⁷⁶ If the Assembly is not in session then the Standing Commission of the Assembly has the power to authorise or confirm state of emergency subject to subsequent ratification by the Assembly.²⁷⁷

4.4.3 The non-derogable rights: the law and the practice

The Constitution under article 286 lists down rights that are not derogable in state of emergency. These are the right to life, the right to personal integrity²⁷⁸, and non-retroactivity of criminal law, civil capacity and citizenship, the right of accused person to a defence and freedom of religion. Freedom of thought and conscience, prohibition of slavery, prohibition of imprisonment for contractual obligation and recognition as a person before the law are not included in the list of non-derogable rights.

²⁷⁰ Art 3 is said to supplement art 2 of the ACHPR, which provides the right against discrimination, by providing a general equality requirement.

²⁷¹ *Constitutional Rights* case (n 216 above) para 59.

²⁷² General Comment 29 (n 13 above).

²⁷³ Art 284 of the Constitution.

²⁷⁴ Art 161(a) of the Constitution.

²⁷⁵ Art 285(1) of the Constitution, the President has to submit for ratification within 24 hours of the declaration of emergency. If the parliament is not in session extra-ordinary meeting shall be conveyed within 5 days art 285(2) of the Constitution.

²⁷⁶ Art 285(3) of the Constitution.

²⁷⁷ Art 195(d) of the Constitution.

²⁷⁸ This right is not defined or clearly provided under the Constitution. It is provided under the right to life as a prohibition of physical and moral integrity.

4.4.3.1 The right to life

The right to life, which is provided under article 40 of the Constitution, also prohibits death penalty.²⁷⁹ Unlike the Ethiopian Constitution the right to life is an absolute right under the Mozambique Constitution. Countries, which have abolished the death penalty, cannot derogate this right in state of emergency.²⁸⁰ Thus, Mozambique cannot impose the death penalty even at times of emergencies. However, despite the fact that the right to life is absolute under the Constitution acts committed by government officials shows that this right has not been given due respect. For instance, in *Montepuez Case* a number of people were arrested following demonstration claiming frauds of the 1999 election and put into a small cell where overnight a hundred people died.²⁸¹

4.4.2.2 Freedom of religion

The Constitution protects the right to practice or not to practice religion.²⁸² The right to practice religion seems to be observed by the government diligently. In the *religious holidays case* the Constitutional Council has given an advisory opinion that government should not draft law regulating religious holiday, as the government of Mozambique is secular.²⁸³

4.4.2.3 Civil capacity and citizenship

Nowhere in the Constitution is the right to civil capacity defined.²⁸⁴ This right is defined in the civil code of Mozambique.²⁸⁵ The right to citizenship, assuming that it means nationality, covers vast area of the Constitution. The Constitution sets out various criteria on how Mozambican nationality can be held or acquired.²⁸⁶ The Constitution further clearly states that the rules governing nationality cannot be amended with a view to restrict citizenship.²⁸⁷

4.4.2.4 The right of accused to a defence

The counsel for defence, which is just one aspect of fair trial, is non-derogable under the Constitution.²⁸⁸ Pursuant to the African Commission jurisprudence aspect of the right to fair trial, which is a non-derogable right, includes all the elements of article 7 of the ACHPR. This encompasses the right to an appeal, the right

²⁷⁹ Similar provision is found in the 1990 Constitution. Art 40, of the new Constitution, also prohibits torture and cruel and inhuman treatment and punishment. However since the list of non-derogable right does not expressly mention torture or refer to article 40 expressly, it is difficult to state whether or not torture and cruel and inhuman treatment is among the list of non-derogable rights.

²⁸⁰ General Comment 29 (n 13 above).

²⁸¹ *Processo 325/2002-A*, Tribunal Provincial de Cabo Delgado Case 325/2002-A at cabo delgado provincial court. See Heyns (n 140 above)1342. Although this case was brought before the court when the 1990 Constitution was in force there is no significant change on the content of the right to life in both Constitutions.

²⁸² Art 54 of the Constitution. Despite the fact that the right to religion is provided under the title 'right to conscience, religion and worship' this provision does not include the right to conscience.

²⁸³ *Ocaso dos feriados religiosos processo1/96* CCAAHF. See C Heyns (n 140 above)1342. This case was based on the previous constitution, however, the new constitution also contains the same right.

²⁸⁴ The Constitution of Angola art 52(2) and Guinea-Bissau art 31(2) also provide the right to civil capacity and citizenship as non-derogable rights. Heyns (n 140 above) 882,1175. Nevertheless these rights are also not clearly defined in these Constitutions.

²⁸⁵ Art 123 of the civil code, *Codigo Civil Portuguese* (2004).

²⁸⁶ See art 5 & title two of the Constitution.

²⁸⁷ Art 292 (1).

²⁸⁸ Art 286 of the Constitution.

to be presumed innocent, right to defence including the right to be defended by counsel of ones choice and the right to be tried within a reasonable time²⁸⁹ by an impartial court or tribunal.

4.5 Status of international treaties under Ethiopian and Mozambique laws

The Constitutions' of Ethiopia and Mozambique both lack more than one of the generally recognised non-derogable rights. Making these rights derogable in times of emergencies conflicts with international standard and the jurisprudence of the Commission.²⁹⁰ At the international level, a treaty is binding on the state party to the treaty in accordance with the treaty's terms.²⁹¹ However, the extent to which human rights treaties are given internal effect depends upon the status of treaties under that state's constitution and laws.²⁹² Hence, it is important to analyse the status of international treaties in these states.

4.5.1 Ethiopia

Under the Constitution of Ethiopia, international law ratified by Ethiopia is considered to be part of the law of the land.²⁹³ Ethiopia acceded the ICCPR in 11 June 1993 and ratified the ACHPR in 15 June 1998.²⁹⁴ Hence, they are considered to be part of the law of the land.²⁹⁵ The Constitution makes no reference to the status of customary international law under domestic law of Ethiopia.²⁹⁶ Nevertheless, the main issue here is the non-conformity of the Constitutional provisions with the generally recognised non-derogable rights as are stipulated in the ICCPR. This raises the question of hierarchy of laws. Does the Constitution prevail over international treaties that are part of the law of the land?

As said earlier, the Constitution of Ethiopia gives international treaties the status of ordinary laws. The Constitution is the supreme law of the land; hence any law inconsistent with it is not binding.²⁹⁷ Nevertheless, since the Constitution states that the bill of rights will be interpreted in a manner conforming to the principles of the UDHR, ICCPR and international instruments adopted by Ethiopia, there may be possibility that these non-derogable rights provided in the Constitution will be interpreted according to the international standard.²⁹⁸ Be it as it may, the Constitution, as the supreme law of the land, will prevail over international

²⁸⁹ The Constitution set a maximum of ten days to appear before a judge, art 288(c).

²⁹⁰ As seen in Chapter 3 the Commission has held the view that derogation as not allowed especially from the generally recognised non-derogable rights.

²⁹¹ Haile (n 262 above).

²⁹² Haile (n 262 above).

²⁹³ Art 9(4) of the Constitution.

²⁹⁴ OHCHR status of ratification <<http://www.ohchr.org/english/countries/ratification/4.htm>> (accessed on 23 October 2005) and African Union (AU) list of countries, which have signed, ratified or acceded to the ACHPR < <http://www.africa-union.org/home/Welcome.htm>> (accessed on 23 October 2005).

²⁹⁵ However, the Federal Negarit Gazette proclamation no 3/1995 provides that judicial organs to take judicial notice of laws published in the Negarit Gazette. These instruments have not been translated and published in the Negarit Gazette. C Heyns (n 140 above) 1080.

²⁹⁶ Haile (n 262 above). It is to be noted that four of the non-derogable rights have attended the status of customary law.

²⁹⁷ Art 9(1) of the Constitution.

²⁹⁸ Art 13(2) of the Constitution. Haile argued that 'there is no practical value in interpreting the human rights provisions of the Constitution in conformity with the Universal Declaration, the legal status of which is ignored under internal law, or with treaties that may be superseded, for internal purposes, by ordinary legislation'. Haile (n 262 above). In addition one could argue that interpretation does not entail the inclusion of rights that are not provided under a constitution.

treaties. The only way to held Ethiopia accountable to international treaty is, therefore, through the term of the treaty that Ethiopia ratified to be bound.²⁹⁹

4.5.2 Mozambique

Under the Mozambique Constitution, approved and ratified international treaties and agreements have the status of law provided that they have been published in the official gazette.³⁰⁰ Mozambique has ratified the ACHPR on 22 August 1989 and acceded the ICCPR on 21 July 1993.³⁰¹ In addition, both treaties are published in the official gazette.³⁰² Hence, both treaties have the status of ordinary laws. Nevertheless, the Constitution is the supreme law of the land and courts may not apply laws or principles that are contrary to it.³⁰³ Hence, the generally recognised non-derogable rights can only be binding in Mozambique as long as they comply with the Constitution. Thus making these rights mostly ineffective. However, the Constitution under article 43 provides that fundamental rights will be interpreted and integrated in harmony with the UDHR and with the ACHPR. This implies that at least the ACHPR will be used as interpretative guides when there is ambiguity in the meaning of fundamental rights.³⁰⁴

4.6 Conclusion

Most African states constitutions do not include the generally recognised non-derogable rights in their constitutions. The Ethiopian and the Mozambique Constitutions also verify this point. However, the non-derogable rights under both Constitution goes beyond the generally recognised non-derogable rights. All the same, the generally recognised non-derogable rights, as provided in the ICCPR and given due recognition by the African Commission have no legal effect under domestic law of both countries. This is in view of the fact that international treaties have the status of ordinary laws in both Ethiopia and Mozambique.

²⁹⁹ According to art 26 of the VCLT treaties are binding on states and must be performed in good faith.
Vienna Convention on the Law of Treaties < <http://www.un.org/law/ilc/texts/treaties.htm>> (accessed on 20 October 2005).

³⁰⁰ Art 18 of the Constitution.

³⁰¹ OHCHR status of ratification <<http://www.ohchr.org/english/countries/ratification/4.htm>> (accessed on 23 October 2005) and AU list of countries, which have signed, ratified or acceded to the ACHPR <<http://www.africa-union.org/home/Welcome.htm>> (accessed on 23 October 2005) and official resolution 5/91/12 December No.50 official gazette of the Peoples' Republic of Mozambique (ICCPR).

³⁰² Official resolution 5/91/12 December No. 50 Official Gazette of the Peoples' Republic of Mozambique (ICCPR).

³⁰³ Art 214 of the Constitution.

³⁰⁴ Although one may argue that they serve more than an interpretative guide and that there may be possibility that non-derogable rights provided in the Constitution will be interpreted according to the international standard.

CHAPTER FIVE

FINAL CONCLUSIONS AND RECOMMENDATIONS

5.1 Final Conclusions

The ACHPR, unlike the two regional human rights conventions and the ICCPR, does not encompass derogation clause that permits states to derogate human rights in times of emergencies. Derogation clause in the ICCPR is a result of compromise between state sovereignty on the one hand and individual rights on the other hand. It is an attempt to regulate state's action in time of crisis from derogating or suspending fundamental rights. Although the level of frequency and intensity may differ from place to place state of emergency is certain to happen in any community. Thus, derogation of the ACHPR is inevitable in time of real crisis. This is also evidenced from most constitutions of African states that provide for derogation of human rights in states of emergencies.

The Commission has opined on numerous occasions that derogation is not allowed under the ACHPR and states should not raise the presence of war or emergencies to justify their violations of rights under the ACHPR. This interpretation of the ACHPR is a relatively extreme position, as the ACHPR does not expressly prohibit derogation. In addition, under international law on the law of treaties there is nothing prohibiting states from suspending treaty obligations when faced with situations such as *force majeure* or state of necessity that warrant suspension of a treaty.

The Commission's view is commendable in situations of fictitious emergencies where governments' motive is simply to control power at the expense of its citizens. In all the cases that the Commission has examined none of the states action derogating from fundamental rights is justified under emergency situations. It is against this background that the Commission tried to protect individual rights by emphasising the impermissibility of derogation from the provisions of the ACHPR.

Taking into account the jurisprudence of the Commission that derogation as not allowed in the ACHPR, it follows that all African constitutions should not incorporate a clause for the derogation of human rights. Moreover, it also means that all rights provided under the ACHPR are non-derogable and hence the constitutions of African states should not designate only some rights as non-derogable. Again, this position is also relatively extreme. However, the Commission in one of the cases brought before it had stated that derogation is not allowed especially from the generally recognised non-derogable rights. Non-derogable rights are embodied in the ICCPR and the two regional conventions; hence the generally recognised non-derogable rights can be taken to refer to those non-derogable rights embodied under the ICCPR. These non-derogable rights are the right to life, freedom from slavery or servitude, prohibition of torture, cruel and inhuman treatment, non-retroactivity of criminal law, recognition as a person before the law and the right of thought, conscience and religion. In addition, the Commission has expressly stated that the right to fair trial and the right to effective appeal are among the general and non-derogable principles of international law.

The Commission has broadly interpreted the right to life to include situations whose effects may cause any injury to life. Cruel and inhuman treatment has also been broadly interpreted to include situations where a detainee is prohibited visit from his or her family. In analysing what constitutes practice of slavery, the Commission noted that working without just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity reflects situations that are analogues to slavery. Generally, the Commission has been progressive in its interpretation of the non-derogable rights.

Most constitutions of African states embody a clause for emergency and the derogation of human rights in times of emergency. However, only some of the constitutions have expressly included a set of non-derogable rights in their constitutions. Additionally, most constitutions do not stipulate one or more of the non-derogable rights as are provided in the ICCPR. The Ethiopian and Mozambique Constitutions clearly show the trend followed by most African states constitutions. Under the Ethiopian Constitution the right to life, freedom from torture, recognition as a person before the law and the non-imprisonment for contractual obligation is absent from the set of non-derogable rights. In the Mozambique Constitution, freedom from slavery, the non-imprisonment for contractual obligation and the recognition as a person before the law is absent in the list of non-derogable rights. This clearly shows that at least, the Constitutions of Ethiopia and Mozambique are inconsistent with the generally recognised non-derogable rights. Remarkably, both Constitutions include a set of rights that are not recognised as non-derogable under the ICCPR. The Ethiopian Constitution provides for the right to self-determination with the unconditional right to secede and trafficking, and the Mozambique the right of civil capacity and citizenship. The status of international treaties in both Ethiopia and Mozambique is that of ordinary laws. Hence, domestically the generally recognised non-derogable rights being inconsistent with the provisions of the Constitutions, which are the supreme law of the land, are not binding.

In practice, the strict adherence to the constitutional procedure of emergencies and the protection of some of the non-derogable rights is questionable in both Ethiopia and Mozambique. In Ethiopia the Prime Minister banned public gathering and demonstration without following the requirement of the Constitution, which calls for the declaration to be effected by the Council of Ministers followed by the ratification of the HPR. In addition, despite the fact that the right to life is one of the fundamental non-derogable rights, the security forces shot and killed 34 people who were in defiance of the ban on demonstration. In Mozambique despite the fact that the right to life is absolute and non-derogable, as illustrated in the case of *Montepuez*, the detention of people in a small cell has led to the death of more than 100 people over night.

5.2 Final Recommendations

In Africa where many states are often in state of coup, civil war or other form of emergencies, the need to regulate state of emergency under regional level is called for. The ACHPR fails to recognise this historic and practical reality by not specifically including derogation clause to regulate member parties in their observance of fundamental rights such as the non-derogable rights recognised under the ICCPR in times of emergencies.

Unless derogation is clearly defined it leaves room for states to do as they please in situation of real emergencies affecting the life of the nation. Hence, the ACHPR should be amended to accommodate derogation of rights in times of emergencies.

Additionally, the African Commission should like the HRC, monitor states of emergency powers and the compatibility of the derogation and non-derogable rights in the constitutions of African states. The Commission has tried to oversee states derogation measures and constitutional provision when examining states reports. In Africa where coup and civil war are predominant, the Commission could play crucial role by overseeing governments emergency action do not override individual rights especially with respect to the non-derogable rights.

The Commission should follow a more stringent and consistence approach in its dialogue and observation of state reports. It should come up with a guideline or a standard to review, supervise and monitor if government's measures and constitutional provisions in state of emergency meet the accepted standards. In addition, it is recommended that the Commission appoint Special Rapporteur on state of emergency to frequently update the Commission on situations of state of emergencies and the measures taken by state parties in times of emergencies.

It is evident form the constitutions of African states that measures of state of emergency will lead to derogation of rights. For a government who has less respect of law chaos creates conducive atmosphere for derogating fundamental rights. Since the Commission has recognised the generally recognised non-derogable rights, the constitutions of African States should at least give these rights the status of non-derogability. Thus, African states including Mozambique and Ethiopia should amend their Constitutions to accommodate the generally recognised non-derogable rights. In addition, Mozambique should clarify some of the non-derogable rights recognised under the Constitution with the purpose of decreasing any possible ambiguities.

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