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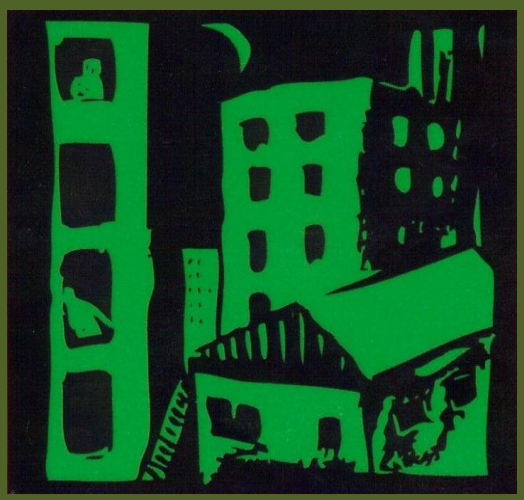

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Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights[1]

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1 INTRODUCTION

The African Charter on Human and Peoples' Rights (African Charter or Charter) does not contain a clause permitting suspension of human rights during public emergency, while major human rights instruments allow state parties to suspend some rights.[2] The African Commission on Human and Peoples' Rights (African Commission or Commission) has repeatedly held that a declaration of a state of emergency cannot be invoked as a justification for violations or permitting violations of the

[1] An earlier version of this article was presented to an Essay Group at the Institute for Human Rights, Åbo Academi University, Finland, and benefited from comments from the participants. The author specially thanks Prof Frans Viljoen and Ms Ahila Sornarajah for their constructive comments on the earlier version of this article.

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

African Charter.[3] The silence of the African Charter and the position of the African Commission have not been welcomed by some scholars.[4]

The African Charter enjoys universal ratification as all member states of the African Union are parties thereto.[5] Upon ratification, state parties have undertaken to adopt legislative and other measures to give effect to the rights recognised therein.[6] However, an examination of their constitutions reveals that state parties have not taken sufficient legislative measures to ensure compatibility of their laws with the African Charter. As a result, many African constitutions contain derogation clauses.[7]

This article argues that the omission of a derogation clause from the African Charter was not a mistake. And it is not a defect in the Charter. Rather, it shows positive development of human rights norms in Africa and should not be seen as a defect. The arguments calling for incorporation of a derogation clause fail to consider factors that may justify its absence. The incorporation of a derogation clause in the African constitutions and consequently derogating from constitutional rights are violations of the African Charter and other international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR).

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[3] African Charter, arts 30 and 45. The African Commission was established under the African Charter with the mandate to promote and protect human and peoples' rights and interpret the African Charter. See *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 84; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995), para 21 ; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 67; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 41; *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), 42; *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007), para 87; *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), paras 165 & 167; *Zegveld and Another v Eritrea* [(2003) AHRLR 84 (ACHPR 2003)], para 60.

[4] Heyns C "The African regional human rights system: In need of reform?" (2001) 1 *African Human Rights Law Journal* 155; Ouguergouz F *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable development* (2003); Sermet L "The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion" (2007) 7 *African Human Rights Law Journal* 142; Murray R *The African Commission on Human and Peoples' Rights and International Law* (2000); Allo A K "Derogation or limitation? Rethinking the African human rights system of derogation in light of the European system" (2009) 2 *Ethiopian Journal of Legal Education* 50.

[5] List of countries which have signed, ratified/acceded to the African Charter on Human and People's Rights, at http://www.au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples%27%20Rights.pdf (accessed 17 April 2013). Fifty-three states, out of fifty-four, are party to the African Charter. The only exception is South Sudan which signed the Charter on 24 January 2013. Even South Sudan is bound by the African Charter as it succeeds to human rights treaties accepted by the Sudan. The Human Rights Committee has taken similar position in its General Comment No. 26, para 4.

[6] African Charter, art 1. As discussed below, ways of incorporating the African Charter and other treaties in domestic laws of States parties depends on types of their legal system. In most civil law African states, the African Charter has a direct domestic effect upon ratification while in most common law African States the African Charter must be domesticated by acts of their legislature. For example, Nigeria promulgated the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act in 1983.

[7] See, for example, Constitution of Nigeria (1999), sec 45(2); Constitution of Ethiopia (1995), art 93(4); Constitution of Angola (1992), art 52; Constitution of Cape Verde (1992), art 26; Constitution of Guinea-Bissau, (1984), art 31; Constitution of Mozambique (2004), art 72; Constitution of Eritrea (1997), art 27(5)(a); Constitution of Namibia (1990), art 24(3); Constitution of Rwanda (2003), art 137; Constitution of Swaziland (2005), sec 38; Constitution of Uganda (1995), art 44.

The article is organised in seven sections. The first section introduces the issues to be explored. The second section discusses the meaning of important terms such as "derogation" and "public emergency," and the purpose served by derogating from human rights. The third section presents arguments against the absence of derogation clauses together with the factors that may justify their absence. The fourth section makes a brief survey of the African constitutions to examine their compatibility with the African Charter. The fifth and sixth sections discuss the implication of derogating from the constitutional rights under the African Charter and other human rights instruments respectively. The last section makes some concluding remarks.

2 DEROGATION AND ITS PURPOSE

Derogation from human rights refers to a temporary suspension of certain rights recognised in human rights instruments or constitutional bill of rights. It is a right of States to depart from their treaty obligation in certain exceptional circumstances. It "enables the government to resort to measures of an exceptional and temporary nature" during a state of emergency.[8] A "state of emergency,"[9] as opposed to normalcy, is a situation "outside an ordinary course of events."[10] It refers to "a sudden, urgent, usually unforeseen event or situation that requires immediate action, often without time for prior reflection and consideration."[11] It may include "armed conflicts, civil wars, insurrections, severe economic shocks, natural disasters, and similar threats."[12]

Human rights treaties require the existence of public emergency, war or similar situations before taking measures derogating from human rights.[13] Public emergency refers to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[14] As the Human Rights Committee implies "a natural catastrophe, a

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[8] Jayawickrama N *The judicial application of human rights law: national, regional and international jurisprudence* (2002) at 202.

[9] The terms "state of emergency" is not uniformly used across constitutions of African States. For example, the 1991 Constitution of Burkina Faso refers to "a state of siege and a state of urgency," art 58; the 2001 Constitution of Senegal provides for "exceptional power," art 52; the 1992 Constitution of Madagascar also refers to a "state of national necessity or martial law."

[10] Gross O "'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 at 439.

[11] Gross (1998) at 439.

[12] Hafner-Burton E M *et al* "Emergency and escape: Explaining derogations from human rights treaties" (2011) 65 *International Organization* 673 at 673.

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

[14] *Lawless v Ireland* (No. 3) Judgment (Application no 332/57), the law, European Court of Human Rights, para 28.

mass demonstration including instances of violence, or a major industrial accident" may constitute public emergency.[15] Thus, sporadic violence may be regarded as public emergency when it constitutes a threat to life of a nation. Under the ICCPR, war or international armed conflict may fall under public emergency if it "constitutes a threat to the life of the nation."[16] In other treaties, war is an independent ground for declaration of a state of emergency whether or not the life of the nation is threatened.[17]

The Siracusa Principles and the Paris Minimum Standard Norms in State of Emergency, albeit non-binding, shed some light on public emergency and threat to the life of the nation. The Paris Minimum Standard Norms in State of Emergency defines public emergency as "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed."[18]

Under the Siracusa Principles, states should not take derogation measures unless they face "a situation of exceptional and actual or imminent danger which threatens the life of the nation."[19] The Principles describe "threat to the life of the nation" based on subjects of the threat and area of its coverage. A threat endangers the life of the nation when it is directed against the elements of a State which includes population, territory, government and sovereignty. A danger to "the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect" human rights is a threat to the life of the nation.[20] Such threat may affect "the whole of the population and either the whole or part of the territory of the State."[21]

A distinction is usually made between *de jure* and *de facto* state of emergency. *De jure* state of emergency exists when States comply with legal requirements for its declaration. If states exercise their emergency power without complying with preconditions prescribed in their constitutions and international human rights

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[15] Human Rights Committee, General Comment 29, A State of Emergency (Article 4) CCPR/C/21/Rev.1/Add.11, adopted on 31 August 2001, para 3.General Comment No. 29, para 5.

[16] General Comment 29.

[17] European Convention on Human Rights, art 15; American Convention on Human Rights, art 27. See Mokhtar A "Human rights obligations v. derogations: art 15 of the European convention on human rights" (2004) 8 *The International Journal of Human Rights* 65, at 66.

[18] The Paris Minimum Standards of Human Rights Norms in a State of Emergency, sec (A) 1(b), reproduced in Lillich R B "The Paris Minimum Standards of Human Rights Norms in a State of Emergency" (1985) 79 *American Journal of International Law* 1072 at 1072.

[19] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, para 39, at http://www.unhcr.org/refworld/docid/4672bc122.html [accessed 2 July 2012]

[20] *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.*

[21] *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.*

instrument, they are in a *de facto* state of emergency.[22] A *de jure* state of emergency becomes *de facto* when emergency "measures are extended beyond the formal termination of a declared state of emergency."[23]

The purpose of derogation is to protect communities, States and their institutions.[24] States resort to derogation to preserve the essential fabric of a society.[25] In the process of treaty making, incorporating derogation clause in the text of human rights treaties serves the purpose of facilitating "the negotiation of broader and deeper agreements and makes ratification more palatable to a larger number of countries" since it allows States to escape their international obligation during crisis situation.[26]

Derogation from human rights enables States that face "serious threats to buy time and legal breathing space from voters, courts, and interest groups to confront crises while signalling to these audiences that rights deviations are temporary and lawful."[27] Thus, it is "a rational response to domestic political uncertainty."[28] Derogations have strong correlation with level of democracies as "stable democracies and countries where domestic courts can exercise strong oversight of the executive are more likely to derogate than other regimes."[29]

Although derogation helps the making of human rights treaties, it does not help their enforcement. Rather, a derogation clause has "potentially negative consequences" as it "condones a deviation from pre-existing treaty commitments."[30] It is one of the techniques that states use to limit their international obligations.[31] It serves a purpose different from protection of human rights. For example, one of the reasons for the incorporation of derogation clause in the ICCPR and the European Convention on Human Rights was "the need to cope with the political situation in several countries."[32]

3 DEROGATION UNDER THE AFRICAN CHARTER

The African Charter does not contain a derogation clause and as such distinct from other human rights instruments including the ICCPR, the European Convention on

[22] Walilegne Y T "State of emergency and human rights under 1995 Ethiopian Constitution" (2007) 21 *Journal of Ethiopian Law* 78, at 87.

[23] Walilegne (2007) at 87.

[24] Müller A "Limitations to and derogations from economic, social and cultural rights" (2009) 9 *Human Rights Law Review* 557, at 592.

[25] Jayawickrama (2002) at 202.

[26] Hafner-Burton *et al* (2011) at 678.

[27] Hafner-Burton *et al* (2011) at 675.

[28] Hafner-Burton *et al* (2011) at 675.

[29] Hafner-Burton *et al* (2011) at 675.

[30] Hafner-Burton *et al* (2011) at 678.

[31] Ouguergouz (2003) at 423.

[32] Macdonald R St J "Derogations under Article 15 of the European Convention on Human Rights" (1997) 36 *Columbia Journal of Transnational Law* 225 at 226.

Human Rights, and the American Convention on Human Rights.[33] As discussed below, the African Commission confirmed that the African Charter does not allow derogation from human and peoples' rights in its decision on communications and in one of its resolutions.[34]

However, the African Charter has been subjected to serious criticisms for omitting derogation clause from its text. Heyns identifies the absence of derogation clause from the African Charter as one of its problems.[35] He takes issue with the African Commission's interpretation that the African Charter does not allow derogation. For Heyns, prohibiting States from suspending human rights during emergencies is hardly "conducive to the protection of human rights."[36] He argues that the African Charter has "no restraining influence on states" when they ignore the Charter.[37] Heyns recommends the amendment of the African Charter so as to make explicit provision for derogation and calls upon the African Commission and the African Court on Human and Peoples' Rights (African Court) to set out "the conditions for legitimate derogation."[38]

Ourguergouz observes that interpreting the silence of the African Charter on derogation as a prohibition cannot be defended because the Charter does not contain a provision prohibiting States from suspending human rights during emergencies.[39] By excluding a derogation clause, States "reserved the right to invoke the derogations which may be possible under general international law."[40] He argues that States parties can invoke fundamental change of circumstances to suspend provisions of the African Charter.[41]

According to Sermet, the absence of a derogation clause from the African Charter is a deficiency "as the system of derogation brings with it specific guarantees of protection."[42] The absence of a derogation clause "renders exceptional circumstances commonplace, leading to their improper perpetuation."[43] Incompatibility of the African Charter with African constitutions and ICCPR is one of the disadvantages of excluding a

[33] Compare art 4 of the ICCPR, art 15 of the European Convention on Human Rights and art 27 of the American Convention on Human Rights. The absence of derogation clause from the African Charter has been identified as one of its features that 'reflect a particularly African "fingerprint" or its distinctive feature. See Viljoen F *International human rights law in Africa* (2007) at 237; Murray (2000) at 123;

[34] See 3 above. See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), para R.

[35] Heyns (2001) at 161.

[36] Heyns (2001) at 162.

[37] Heyns (2001) at 162.

[38] Heyns (2001) at 162.

[39] Ouguergouz (2003) at 425.

[40] Ouguergouz (2003) at 427.

[41] Ouguergouz (2003) at 449.

[42] Sermet (2007) at 153. Sermet offers justifications for excluding derogation clause from the African Charter.

[43] Sermet (2007) at 154.

derogation clause from the African Charter.[44] It is not also realistic to expect the same level of human rights protection in a normal situation and in a crisis situation.[45] Jurisprudential inclusion of derogation clause may remedy the deficiency of the African Charter.[46]

Murray argues that the absence of a derogation clause from the African Charter decreases the powers of States only in theory.[47] In reality, the silence of the African Charter on derogation provides "states with more discretion by failing to set any standards at all, allowing states to act as they please."[48] Through Articles 60 and 61, the African Commission can interpret the African Charter in favour of States despite the absence of a derogation clause.[49]

Allo sees the absence of a derogation clause from the African Charter as "lack of commitment and genuine respect for human rights."[50] Given that "the most vibrant democracies of the world do have" a derogation clause, Africa also needs one because such a clause is "good for human rights" and "gives opportunity to African institutions to supervise emergencies."[51] Allo suggests that the African Commission and the African Court should develop "a clear regional jurisprudence" on derogation from the African Charter.[52]

The attraction of these arguments lies in their confirmation of position already stated in the ICCPR, the European Convention on Human Rights and the American Convention on Human Rights. However, they are weak as they fail to explain the absence of a derogation clause from human rights instruments that were adopted later. Besides, they also fail to consider other relevant factors, such as, the increase of non-derogable rights as discussed below.

3.1 Factors justifying absence of derogation clause

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

[44] Sermet (2007) at 154.

[45] Sermet (2007) at 155.

[46] Sermet (2007) at 155.

[47] Murray (2000) at 123.

[48] Murray (2000) at 123.

[49] Murray (2000) at 124.

[50] Allo (2009) at 50.

[51] Allo (2009) at 50.

[52] Allo (2009) at 52.

contain derogation clauses shows that non-derogable rights had been increasing before the adoption of the African Charter.

Adopted in 1950, the European Convention on Human Rights is the first to incorporate derogation clause. Article 15 of the Convention prohibits derogation from Article 2 (right to life), Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour) and Article 7 (prohibition of retrospective criminal law). The list of non-derogable rights under the European Convention on Human Rights is limited when compared with instruments adopted later.

Informed by the experiences of the Council of Europe, the international community seems to have felt the necessity to expand the scope of non-derogable rights from four rights in the European Convention to seven in the ICCPR.[53] The new additions are prohibition of imprisonment for inability to fulfil contractual obligation, right to be recognised as a person, and freedom of thought, conscience and religion.

In its General Comments, the Human Rights Committee further expanded the list of non-derogable rights by adding Articles 10 and 19 to the list.[54] In the provisions of the ICCPR "that are not listed in article 4, paragraph 2, there are elements that cannot be made subject to lawful derogation under article 4."[55] The Committee provides an illustrative list of non-derogable rights including the right of prisoners to be treated with humanity (Article 10), the prohibitions against the taking of hostages, abductions or unacknowledged detention, and the rights of persons belonging to minorities.[56] Regarding freedom of opinion, Article 19 has an element that "cannot be made subject to lawful derogation under article 4, paragraph 2."[57] The Committee observed that "it can never become necessary to derogate from it during a state of emergency." [58]

Chronologically, the American Convention on Human Rights comes next.[59] The Convention further expanded the list of non-derogale rights.[60] Although it omitted the prohibition of imprisonment for inability to fulfil contractual obligation, it has added

[53] The ICCPR was adopted in 1966, after the European Convention entered into force. The Covenant incorporated derogation clause under art 4 which prohibits derogation from art 6 (right to life), art 7 (prohibition of torture), art 8 (prohibition of slavery and servitude), art 11 (prohibition of imprisonment for inability to fulfil contractual obligation), art 15 (prohibition of retrospective criminal law), art 16 (right to be recognised as a person), and art 18 (freedom of thought, conscience and religion).

[54] General Comment No. 29 State of Emergency (Article 4), para 13; General Comment No. 34 Article 19: Freedom of opinion and expression, para 5.

[55] General Comment No. 29, para 13.

[56] General Comment No. 29, para 13.

[57] General Comment No. 34, para 5.

[58] General Comment No. 34, para 5.

[59] American Convention on Human Rights was adopted in 1969, three years later than the adoption of the ICCPR.

[60] Article 27 of the Convention prohibits derogation from art 3 (right to be recognised as a person), art 4 (right to life), art 5 (prohibition of torture), art 6 (freedom from slavery), art 9 (prohibition of retrospective criminal laws), art 12 (freedom of conscience and religion), art 17 (rights of the family), art 18 (right to a name), art 19 (rights of the child), art 20 (right to nationality), and art 23 (right to participate in government).

four other rights to non-derogable rights category: the right of family, the right to a name, rights of the child, the right to nationality and the right to participate in government.

Secondly, the African Charter, unlike other general human rights instruments, incorporates economic, social and cultural rights. The division of human rights into civil and political rights on the one hand and economic, social and cultural rights on the other hand was based on Cold War politics rather than "legal or empirical rationality"[61] and African countries have rejected that division in favour of indivisibility of human rights. The African Charter itself declares that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."[62]

The African Charter was obviously influenced by the International Covenant on Economic, Social and Cultural Rights (ICESCR) which does not contain a derogation clause. The nature of economic, social and cultural rights, the inclusion of a general limitation clause, and the nature of States' obligations may justify the absence of a derogation clause from the ICESCR.[63] It is not necessary to suspend economic, social and cultural rights as such suspension does not help States to cope with public emergencies.[64] The general limitation clause under Article 4 of the ICESCR gives States the necessary latitude to respond to situations of crisis.[65]

Under the ICESCR, States' obligations to fulfil economic, social and cultural rights are not immediate as they have undertaken to progressively achieve full realisation of the rights therein. Thus, States parties have the discretion to postpone their obligations during public emergencies or any time when they face resource constraints given that they do not take retrogressive measures.[66] However, States have minimum core obligations to ensure satisfaction of minimum essential levels of rights in the ICESCR.[67] Such obligations are non-derogable.[68]

The inclusion of economic, social and cultural rights under the African Charter further expanded non-derogable rights. Therefore, if the drafters took into account international and regional experiences of expanding non-derogable rights and considered the level of recognition and protection of human rights in the 1980s, it can

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[61] Ssenyonjo M *Economic, Social and Cultural Rights in International Law* (2009) at 12.

[62] African Charter, preamble.

[63] Ssenyonjo (2009) at 40.

[64] Müller (2009) at 593.

[65] Ssenyonjo (2009) at 40.

[66] Committee on Economic, Social and Cultural Rights, General Comment 3, The Nature of States Parties' Obligations, (Fifth Session, 1990), U.N. DOC. E/1991/23, para 10.

[67] General Comment 3, para 9.

[68] Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health, (Twenty-Second Session, 2000), U.N. DOC. E/C.12/2000/4 (2000), para 47; Committee on Economic, Social and Cultural Rights, General Comment 15, The Right to Water, (Twenty-Ninth Session, 2003), U.N. DOC. E/C.12/2002/11 (2002), para 40.

be submitted that they intentionally left out a derogation clause from the African Charter.

Thirdly, the incorporation of derogation clauses in human rights treaties does not advance the realisation of human rights. Derogation clauses are States' license to violate human rights as they "officially condone a deviation from pre-existing treaty commitments precisely when those commitments are most at risk of being undermined."[69] They may undermine the raison d'être of human rights treaties.[70]

Fourthly, "[a]ll human rights are universal, indivisible and interdependent and inter-related."[71] However, a derogation clause creates unnecessary division between derogable rights and non-derogable rights.[72] Since "the substance of human rights is one and the same thing," "there is no justification in dividing them."[73] As the African States rejected a more controversial division between economic, social and cultural rights, and civil and political rights, they did not have any problem rejecting division between derogable rights and non-derogable rights.

Fifthly, the right of States to derogate from human rights treaties is usually misused. There is, according to Nowak, "an incurable tendency, particularly on the part of military dictatorships, to *misuse* the tool of emergency to maintain their own positions of power."[74] In Africa, experience shows that derogation from human rights, even under stringent requirements, is likely to be abused.[75] Many African States that are parties to the ICCPR have failed to notify the other State parties although they have made several declarations of a state of emergency.[76] A perusal of practices in a few selected countries (e.g. Nigeria, Sierra Leone, Côte d'Ivoire, Egypt, Zambia and Ethiopia) demonstrates their failure to comply with the requirement of notification as required by the ICCPR.

In Nigeria, a state of emergency which seriously restricted freedom of assembly was declared in Bayelsa State in 1998.[77] Following Boko Haram's series of bombing across

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[69] Hafner-Burton *et al* (2011) at 678.

[70] Joseph S *et al The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2005) at 824.

[71] Vienna Declaration and Programme of Action, adopted by the 171 countries participating in the World Conference on Human Rights, held in Vienna from 14 June until 25 June 1993, para 5.

[72] Sermet (2007) at 160.

[73] Ibid.

[74] Nowak M *UN Covenant on Civil and Political Rights: CCPR commentary* (1993) at 72.

[75] Viljoen (2007) at 252.

[76] Viljoen (2007) at 253. The exception include Algeria, Namibia and Sudan. Algeria remained in a state of Emergency for almost 20 years (1991—2011). In Namibia, the declaration establishing a state of emergency in the Caprivi region was made in August 1999 and lifted in September 1999. Sudan declared a state of emergency in 1989 and notified the Secretary-General in 1992 and extended it twice. It has not notified the Secretary General of the United Nations of the termination of the state of emergency. See Notifications under Article 4(3) of the Covenant (Derogations) at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en#13 (accessed on 20 May 2013).

[77] See "State of Emergency Declared in the Niger Delta", 1 January 1999 at http://www.hrw.org/news/1998/12/31/state-emergency-declared-niger-delta (accessed 27 May 2013).

Nigeria, a state of emergency was declared in the areas of the Yobe and Borno states in the north-east, Plateau State in central Nigeria and Niger State in the west in December 2011.[78] In May 2013, a state of emergency which was criticised as unnecessary was declared in Borno, Adamawa, and Yobe states.[79] Nevertheless, none of them was notified to other States through the Secretary-General of the United Nations.[80]

Sierra Leone declared a state of emergency in 1998, two years after its accession to the ICCPR.[81] The state of emergency remained in force until it was lifted in March 2002.[82] During the state of emergency, many human rights guaranteed under its Constitution were suspended.[83] As a result, there were prolonged pre-trial detentions, long delays in trials and searches without warrants.[84] However, no notification was made to the other States through the Secretary-General of the United Nations.[85]

Côte d'Ivoire declared a state of emergency which was said to ensure the smooth running of the poll in a referendum on new constitution on 21 July 2000.[86] Few months later, another state of emergency was declared on "the eve of an expected ruling on who can run in presidential elections to restore civilian rule."[87] The state of emergency gave the interior minister the authority to restrict traffic, ban meetings and shut down venues.[88] However, Côte d'Ivoire has not notified other States about declaration of a state of emergency since its accession to the ICCPR in 1992.

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[78] Onuah F & Cocks T "Nigeria's Jonathan declares state of emergency" *Reuters* 31 December 2011 Abuja, at http://www.reuters.com/article/2011/12/31/us-nigeria-emergency-idUSL6E7NV07T20111231; BBC News: Africa "Boko Haram attacks prompt Nigeria state of emergency" 1 January 2012, at http://www.bbc.co.uk/news/world-africa-16373531 (accessed 28 May 2013).

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

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

[81] See Human Rights Watch "World Report 1999: Sierra Leone" at http://www.hrw.org/legacy/worldreport99/africa/sierraleone.html (accessed on 28 May 2013). Sierra Leone acceded to the ICCPR on 23 August 1996. See status of ratification of ICCPR at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 28 May 2013).

[82] Johnson C "Sierra Leone lifts state of emergency after war" 02 Mar 2002 *Reuters* Freetown, at http://reliefweb.int/report/sierra-leone/sierra-leone-lifts-state-emergency-after-war (accessed on 28 May 2013).

[83] US Bureau of Democracy, Human Rights, and Labor "Sierra Leone: Country Reports on Human Rights Practices 2001" 4 March 2002, at <http://www.state.gov/j/drl/rls/hrrpt/2001/af/8402.htm> (accessed on 28 May 2013).

[84] Ibid.

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

[86] "State of emergency in Ivory Coast as referendum approaches" *Reuters* 21 July 2000, at http://archives.cnn.com/2000/WORLD/africa/07/21/ivorycoast.emergency.reut/ (accessed 30 May 2013).

[87] "State of Emergency in Ivory Coast" *Associated Press* 6 October 2000, at http://www.apnewsarchive.com/2000/State-of-Emergency-in-Ivory-Coast/id-7da7097b192e0855faae99e7531aa3fe (accessed 30 May 2013).

[88] "State of Emergency in Ivory Coast" (n 87 above).

Zambia remained under a partial state of emergency since its independence in 1964 until 1991 when a regime change occurred after a contested election.[89] Another partial state of emergency was declared on 4 March 1993 and followed by a full state of emergency four days later.[90] After the attempted coup of October 1997, a state of emergency which was said to have been unnecessary was declared on 29 October 1997 and lifted on 17 March 1998.[91] Zambia's accession to the ICCPR in 1984 does not seem to have affected the partial state of emergency that had already been in force by then.[92]

In Egypt, a state of emergency had been in force since 1981 for 31 years.[93] Egypt turned a deaf ear to repeated calls from the United Nations treaty bodies that it should bring an end to that state of emergency.[94] The Human Rights Committee noted that "the state of emergency in force in Egypt without interruption since 1981 constitutes one of the main difficulties impeding the full implementation of the Covenant by the State party."[95] The Committee disapproved Egypt's failure to inform "the other States parties to the Covenant, through the Secretary-General, of the provisions from which it has derogated and of the reasons by which it was actuated."[96] Even after lifting the state of emergency that had been in force since 1981, Egypt continued declaring a state of emergency without complying with the notification requirements.[97]

Interestingly, Ethiopia did not declare a state of emergency in 1998 when war with Eritrea was started although external invasion is one of the grounds of declaring a state of emergency under its Constitution.[98] Following the 2005 national election, Ethiopia

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[89] Human Rights Watch "Zambia: model for democracy declares state of emergency" Volume V, Issue 8 10 June 1993, at http://www.hrw.org/sites/default/files/reports/ZAMBIA936.PDF (accessed 31 May 2013).

[90] Ibid.

[91] Amnesty International "Zambia: Misrule of law: Human rights in a state of emergency" 2 March 1998 at http://www.amnesty.org/en/library/asset/AFR63/004/1998/en/70497d03-db00-11dd-903e-e1f5d1f8bceb/afr630041998en.html; BBC News "Zambia lifts state of emergency" 17 March 1998, at http://news.bbc.co.uk/2/hi/africa/66527.stm (accessed 31 May 2013).

[92] Status of ratification of the ICCPR (n 76 above).

[93] BBC News: Middle East "Egypt state of emergency lifted after 31 years" 31 May 2012, at http://www.bbc.co.uk/news/world-middle-east-18283635 (accessed 31 May 2013).

[94] Report of the Committee on the Elimination of Racial Discrimination, General Assembly Official Record, A/49/18(SUPP), 5 August 1994, para 365; Reports of the Committee Against Torture, General Assembly Official Record, A/49/44(SUPP), 12 July 1994, para 85; Concluding observations of the Committee on Economic, Social and Cultural Rights: Egypt, 23 May 2000, E/C.12/1/Add.44, para 10; Concluding observations of the Human Rights Committee: Egypt, 28 November 2002, CCPR/CO/76/EGY, para 6; Conclusions and recommendations of the Committee against Torture: Egypt, 23 December 2002, CAT/C/CR/29/4, para 5-6.

[95] Human Rights Committee "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee: Egypt", CCPR/C/79/Add.23, 9 August 1993, para 7.

[96] Human Rights Committee "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee: Egypt (1993).

[97] Kirkpatrick D "Egypt's Leader Declares State of Emergency in Three Cities" *The New York Times*, 27 January 2013, at http://www.nytimes.com/2013/01/28/world/middleeast/morsi-declares-emergency-in-3-egypt-cities-as-unrest-spreads.html?pagewanted=all&_r=0 (accessed 31 May 2013).

[98] Constitution of Ethiopia (1995), art 93(1)(a).

suspended freedom of assembly for one month.[99] Nevertheless, Ethiopia did not notify the Secretary General of the United Nations about its act of suspension.

In addition, African States regularly invoke domestic provisions allowing for a state of emergency.[100] Thus, "it would be risky to introduce a derogation clause in the African Charter as certain states with evil intent could simulate a serious crisis" to escape their international obligations.[101]

Finally, a historical account of human rights treaties reveals that a derogation clause was introduced into the European Convention on Human Rights and the ICCPR to legitimise an instrument of colonial control.[102] The derogation clauses were included in both instruments at the initiation and insistence of Britain that developed the notion of emergency in its colonies and "faced with increasing resistance to its rule from subjugated populations" in Africa and Asia.[103] The Derogation clause under the ICCPR was proposed by the United Kingdom.[104] Its proposal which did not contain any non-derogable rights was principally criticised by the United States.[105] A compromise, "a general limitations provision with a derogation clause containing non-derogable rights, a notification requirement, and a non-discrimination proviso," was France's proposal.[106] Thus, incorporating a derogation clause in the African Charter would have meant a subscription of Africa to a method of colonial suppression.

3.2 Can limitation clauses replace a derogation clause?

Limitation clauses usually restrict human rights guaranteed in a particular instrument. Because of limitation clauses, most human rights are not absolute. Limitation to and derogation from human rights share some common features since both are justified violation of human rights.[107] For example, States should comply with the principles of necessity and proportionality when they are limiting or derogating from human rights.[108]

However, limitation is fundamentally different from derogation. Limitation is usually a permanent restriction that partly takes away particular rights whereas derogation is a temporary suspension that completely eliminates certain rights in exceptional

[99] See *Addis Zemen*, 64th year No. 248, 16 May 2005, page 1 & 6.

[100] Viljoen (2007) at 253.

[101] Sermet (2007) at 161.

[102] Reynolds J "The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law" York University Osgoode Hall Law School, CLPE Research Paper 19/2010 Vol. 06 No. 5 (2010), at http://ssrn.com/abstract=1625395.

[103] Reynolds (2010) at 39.

[104] Nowak (1993) at 76.

[105] Nowak (1993) at 76; see also Macdonald (1997) at 227.

[106] Nowak (1993) at 76.

[107] See Conte A and Burchill R *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2009) at 43-51.

[108] Conte and Burchill (2009) at 47-50.

circumstances.[109] States should determine limitations by law whereas they should officially proclaim a state of emergency to maintain principles of legality and rule of law.[110]

The African Charter contains specific and general limitation clauses. Specific limitation clauses take the form of right-specific claw-back clauses or right-specific norm based limitations although the African Commission does not seem to make such distinction.[111] The claw-back clauses were included in certain provisions of the Charter.[112] For example, Article 9 requires individuals to enjoy freedom of expression "within the law."[113] The critic of the African Charter understood the claw-back clauses to give States "almost unbounded discretion" to restrict their treaty obligations by giving primacy to domestic laws.[114]

However, the jurisprudence of the African Commission proves that the critics were wrong. The Commission rejects respondent States' arguments justifying violations of the Charter rights on domestic laws. In *Jawara v The Gambia*, the author complained of The Gambian law that "gives the Minister of Interior the power to detain and to extend the period of detention *ad infinitum"* and arbitrary arrests and detentions based on that law.[115] The respondent State did not deny the allegations but argued that it was "acting within the confines of legislation 'previously laid down by law'" according to Article 6 of the Charter.[116] The Commission rejected the argument of the respondent and found violation of Article 6.[117]

In *Amnesty International v Zambia*, the respondent State relied on claw-back clause of Article 12(2) to defend its deportation of victims.[118] The Commission opined that "the 'claw-back' clauses must not be interpreted against the principles of the Charter."[119] Emphasising the importance of cautioning "against a too easy resort to the limitation clauses in the African Charter," it required states to prove that they are "justified to resort to limitation clause."[120] The Commission acted in accordance with

[109] Müller (2009) at 564-566.

[110] Müller (2009) at 565.

[111] Viljoen (2007) at 348.

[112] African Charter, arts 6, 8, 9(2), 10(1), & 12(1).

[113] The African Charter uses similar formulation in arts 6, 8, 10 and 12.

[114] Bondzie-Simpson E "A critique of the African Charter on Human and Peoples' Rights" (1988)31 *Howard Law Journal* 643, at 660-661.

[115] *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), para 5.

[116] *Jawara v The Gambia*, paras 13 & 58.

[117] *Jawara v The Gambia*, para 75.

[118] *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999), para 41.

[119] *Amnesty International v Zambia*, para 42.

[120] *Amnesty International v Zambia,* para 42.

the Charter provisions that required it to draw inspiration from other human rights instruments including the Universal Declaration of Human Rights.[121]

In *Media Rights Agenda v Nigeria,* the African Commission was of the opinion that claw back clauses do not allow States to set aside the Charter rights through national laws since such permission would render those rights ineffective.[122] It stated that "[t]o allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter."[123] Thus, the African Commission adopted a restrictive interpretation of the claw-back clauses.[124]

The right-specific norm based limitations require laws restricting Charter rights to serve certain objectives. For instance, laws restricting freedom of assembly should be "enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."[125] Since Article 11 permits only "necessary restrictions," States must comply with the principle of necessity. Given that the other provisions do not follow similar formulations, the Charter is not clear on the requirement of principles of necessity and proportionality.

The African Charter requires individuals to exercise their rights "with due regard to the rights of others, collective security, morality and common interest" under Article 27(2). The Charter indirectly confers on States the power to ensure that individuals comply with their duties. This indirect State power has been understood as a general limitation clause.[126] The African Commission consistently held that Article 27(2) provides the only legitimate reasons for limitations on rights under the Charter.[127]

The African Charter does not give any direction on procedures to be followed or criteria to be applied while imposing limitations on rights. In *Media Rights Agenda and Others v Nigeria,* the African Commission laid down some criteria that States should apply while limiting Charter rights. The Commission held that "[t]he reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for

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[121] *Amnesty International v Zambia* para 42; African Charter, arts 60 & 61, but the Commission cites arts 61 & 62.

[122] *Media Rights Agenda and others v Nigeria,* para 66.

[123] *Media Rights Agenda and others v Nigeria,* para 66

[124] Viljoen (2007) at 349.

[125] African Charter, art 11. See also art 12(2) of the Charter provides for "law and order, public health or morality" as grounds of restricting freedom of movement.

[126] Viljoen (2007) at 350.

[127] *Media Rights Agenda and Others v Nigeria,* para 68; *Constitutional Rights Project and Others v Nigeria*, para 42; *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), para 43; *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004), para 78; *Sudan Human Rights Organisation and Another v Sudan,* para 166.

the advantages which are to be obtained."[128] The African Commission used the same criteria in other subsequent cases.[129]

The African Commission adopted legitimacy of state interest, proportionality and necessity of limitations as criteria to be observed. Although the position of the Commission is not clear, it seems that States should enact laws of general application to impose limitations on the enjoyment of rights.[130] That can be implied from the Commission's holding that "[l]aws made to apply specifically to one individual or legal personality raise the serious danger of discrimination and lack of equal treatment before the law."[131] Thus, unlike derogations, States cannot make limitations within a very short period because they must resort to ordinary process of law-making.

The African Commission determined the extent of justified infringement of the Charter rights through limitations. The Commission held that "a limitation may never have as a consequence that the right itself becomes illusory."[132] Thus, limitation does not eliminate any right even temporarily. Therefore, limitation clauses under the African Charter should not be taken as a substitute for a derogation clause.

However, States can impose limitations that meet the criteria of legitimacy of State interest, proportionality and necessity. In cases of natural disasters or epidemics, for example, common interest of the society outweighs individual rights and allows more restrictive limitations which would not have been necessary or proportional in normal situations. Similarly, collective security at times of break-down of law and order warrant restrictive limitations that would not have been necessary during peace time.

4 DEROGATION FROM CONSTITUTIONAL RIGHTS IN AFRICA

In attempting to categorise constitutions of African states depending on how they regulate a state of emergency and suspend constitutional rights, one notices some similarities among constitutions of States that have a common legal tradition. Such similarities indicate that sharing constitutional experiences is more common among States that belong to the same legal tradition. It also implies that constitutions from the same legal tradition have a common source which is usually the constitutional traditions of former colonial powers. In addition, the familiarity of the framers with constitutional laws of the former colonial powers may have also resulted in similarities among constitutions of States within a common legal tradition. Therefore, constitutions of African states may fall under three categories: constitutions of Francophone, Lusophone, and Anglophone legal traditions.

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[128] *Media Rights Agenda and Others v Nigeria,* para 69.

[129] *Constitutional Rights Project and Others v Nigeria,* para 42; *Prince v South Africa*, para 43; *Interights and Others v Mauritania,* para 78; *Sudan Human Rights Organisation and Another v Sudan,* para 166.

[130] Viljoen (2007) at 350.

[131] *Media Rights Agenda and Others v Nigeria,* para 71. Such understanding is also in line with the Siracusa Principles, para 5 &15.

[132] *Media Rights Agenda and Others v Nigeria,* para 70.

Most constitutions of Francophone and Arabic speaking North African countries do not contain derogation clauses although they authorise declaration of a state of emergency or a state of siege without referring to their effect on constitutional rights.[133] Despite the absence of limitation clauses in their constitutions, these States derogate from constitutional rights. For example, the Constitution of Algeria authorises declaration of a state of emergency in "case of urgent necessity" without specifying the effect of emergency measures on constitutional rights.[134] Algeria declared a state of emergency in 1992 and notified the Secretary General of the United Nations of its derogation from "right to a prompt trial, freedom of movement, privacy, freedom of expression, and freedom of assembly" which are guaranteed under its Constitution.[135]

Constitutions of Lusophone countries contain clauses that permit derogation from constitutional rights.[136] The lists of non-derogable rights under these constitutions are similar with the list in the ICCPR. They include "the right to life, the right to personal integrity, the right to civil capacity and to citizenship, the non-retroactivity of criminal law, the right of accused persons to a defence, and freedom of religion."[137] The prohibition of torture or cruel, inhuman or degrading treatment or punishment is

[133] The Constitution of Burkina Faso, adopted on 2 June 1991, promulgated on 11 June 1991, amended on 27 January 1997 and on 11 April 2000, art 58; Constitution of the Republic of Cameroon adopted on 18 January 1996, amendment to the Constitution of 2 June 1972, art 9; Constitution of the Central African Republic, adopted on 28 December 1994, promulgated on 14 January 1995, art 29; Constitution of the Republic of the Congo January 2002,, art 131; Constitution of the Republic of Cote d'Ivoire, adopted on 24 July 2000, art 48; Constitution of the Republic of Equatorial Guinea, adopted on 17 January 1996, Item 41; Constitution of the Gabonese Republic, adopted on 26 March 1991, amended on 22 April 1997, art 25; Fundamental Law of the Second Republic of Guinea, approved on 23 December 1990, art 74; The Constitution of the Republic of Mali, art 49; Constitution of the Fifth Republic of Niger, adopted on 18 July 1999, promulgated on 9 August 1999, art 54 & 86; Constitution of the Republic of Senegal, adopted on 7 January 2001, art 69; Constitution of the Fourth Republic of Togo, adopted on 27 September 1992, promulgated on 14 October 1992, art 94; Constitution of the Republic of Madagascar, adopted on 19 August 1992, amended in 1995 and 1998, art 59; Constitution of Djibouti, approved on 4 September 1992, art 62; Constitution of the Republic of Seychelles, approved on 18 June 1993, amended by Act No 14 of 1996, art 41. See for example, The Constitution of the People's Democratic Republic of Algeria, adopted on 19 November 1976, and amended on 28 November 1996 and on 10 April 2002, art 91; Constitution of Mauritania, adopted on 12 July 1991, arts 39 & 71. However, the 1998 Constitution of Sudan authorises derogation from constitutional rights under art 132.

[134] The Constitution of the People's Democratic Republic of Algeria, adopted on 19 November 1976, and amended on 28 November 1996 and on 10 April 2002, art 91.

[135] Algeria's President of High State Council declared a state of emergency by Presidential Decree No. 92-44 of 9 February 1992, which was extended by Legislative Decree No. 93-02 of 6 February 1993 until the latter was repealed by Presidential Ordinance No. 11-01 of 23 February 2011. See Algeria: Derogations: Notifications under Article 4 (3) of the Covenant at <http://www.bayefsky.com/pdf/algeria_t2_ccpr.pdf> (accessed 10 December 2012); Viljoen (2007) at 253.

[136] Constitutional Law of the Republic of Angola, adopted on 25 August 1992, art 52; Constitutional Law of the Republic of Cape Verde, adopted on 25 September 1992, amended on 23 November 1995 and in 1999, art 26; Constitution of the Republic of Guinea-Bissau, adopted in 1984, amended in 1991, 1993, 1996, art 31; Constitution of the Republic of Mozambique, approved on 16 November 2004, art 72; Political Constitution of São Tomé and Príncipe, adopted on 5 November 1975, amended on 10 September 1990 through Law 7/90, art 18.

[137] Constitution of Mozambique, art 286. Art 52(2) of the Constitution of Angola, art 31(2) of the Constitution of Guinea-Bissau, and art 269 of the Constitution of Cape Verde contain an almost identical list of non-derogable rights.

included under the right to personal integrity in the Constitution of São Tomé and Príncipe while it is included under the right to life in the Constitution of Mozambique.[138] These constitutions do not refer to freedom from slavery as non-derogable rights.

The constitutions of Francophone countries are relatively uniform in failing to establish the effect of a state of siege or a state of emergency on the protection of constitutional rights while constitutions of Lusophone African countries are also uniform in terms of regulating derogation from constitutional rights. That relative uniformity is hardly evident among constitutions of Anglophone countries. Still, establishing some groups within this category is not impossible.

The first group of Anglophone African constitutions lay down a general derogation clause that permits derogation from all rights and freedoms guaranteed therein. For example, the Constitution of Ghana permits derogation from all rights contained in the Bill of Rights chapter.[139] The president has very wide discretionary power of suspending fundamental rights and freedoms since the Constitution does not provide lists of non-derogable rights.[140] Thus, the text of the Ghanaian Constitution does not evince conformity with the ICCPR, let alone the African Charter.

The constitutions in the second group frame their derogation clauses following the format used by the ICCPR.[141] They provide that emergency measures may suspend certain rights guaranteed in these constitutions. They also provide lists of rights that cannot be suspended even during state of emergencies. However, the lists of non-derogable rights differ from one constitution to another. The rights that are regarded as non-derogable in ICCPR are not listed as non-derogable rights in some of these constitutions. For example, the right to life is not listed among non-derogable rights under the constitutions of Eritrea, Ethiopia, and Uganda.[142] Similarly, freedom of thought, conscience and religion is not listed among non-derogable rights under the

[138] The Constitution of São Tomé and Príncipe, art 22; the Constitution of Mozambique, art 40.

[139] The Constitution of the Republic of Ghana, adopted on 8 May 1992, art 31(10). The Constitution guarantees fundamental rights and freedoms under art 12—30. Art 31(10) provides that:

> Nothing in, or done under the authority of, an Act of Parliament shall be held to be inconsistent with, or in contravention of, articles 12 to 30 of this Constitution to the period when a state of emergency is in force, of measures that are reasonably justifiable for the purposes of dealing with the situation that exists during that period.

[140] The Ghanaian Constitution, art 31.

[141] The Constitution of Eritrea, ratified by the Constituent Assembly on 23 May 1997, art 27(5)(a); the Constitution of the Federal Democratic Republic of Ethiopia, art 93(4)(c); the Constitution of Namibia, adopted in February 1990 and amended on 24 December 1998, art 24(3); the Constitution of the Republic of Rwanda, adopted on 26 May 2003, art 137; the Constitution of the Kingdom of Swaziland Act, 2005, sec 38; the Constitution of the United Republic of Tanzania, 1977, art 31; and the Constitution of the Republic of Uganda, adopted on 22 September 1995, art 44.

[142] The Constitution of Eritrea, art 27(5); the Constitution of Ethiopia, art 93(4)(c); and the Constitution of Uganda, art 38. These constitutions do not include the right to life among non-derogable rights.

constitutions of Ethiopia, Swaziland, Tanzania and Uganda.[143] In particular, the Human Rights Committee called upon Tanzania to amend its Constitution.[144]

The constitutions in the third group provide list of derogable rights. Examples include constitutions of Botswana, Zambia, Zimbabwe, and The Gambia.[145] The Constitution of The Gambia permits derogation from rights that are non-derogable under the ICCPR including prohibition of retroactive criminal law and freedom of thought, conscience and religion.[146] The Constitution of Zambia also allows derogation from freedom of thought, conscience and religion.[147]

The constitutions of Malawi, South Africa and Kenya are found in the last group.[148] Seen from the way they treat derogation from constitutional rights, these constitutions are unique from the other constitutions because they take into account international obligations. The Constitution of Malawi permits derogation from certain rights.[149] Nevertheless, it requires the derogation to be consistent with Malawi's obligation under international law.[150] Obviously, the obligation of Malawi under international law includes its obligation under the African Charter.

The South African Constitution provides a table of non-derogable rights which include the right to equality, human dignity, life, freedom and security of person, rights of arrested, detained and accused persons, and the right to protection against slavery, servitude and forced labour. A comparison of the list of non-derogable rights with those under the ICCPR shows that the South African Constitution does not include freedom of thought, conscience and religion in the list of its non-derogable rights. That would not have any impact as derogation from constitutional rights should be in line with South Africa's obligations under international law. Given that South Africa had already been

[143] The Constitution of Ethiopia, art 93(4)(c); the Constitution of Tanzania, art 31; the Constitution of Swaziland, sec 38; and the Constitution of Uganda, art 44.

[144] Human Rights Committee, Concluding Observation, United Republic of Tanzania, ICCPR, A/48/40 vol. I (1993) 35, para 171.

[145] The Constitution of Botswana, commenced on 30 September 1996, sec 16; Constitution of the Second Republic of The Gambia, adopted on 8 August 1996, entered into force in January 1997, sec 35; the Constitution of Zambia, art 25; and the Constitution of Zimbabwe, art 25. The Constitution of Botswana allows derogation from right to liberty (sec 5) and prohibition of discrimination (sec 15).

[146] Constitution of the Gambia permits derogation from sections 19, 23, 24 and 25. Sec 24(5) prohibits retroactive criminal law while sec 25 guarantees the freedom of thought, conscience and religion.

[147] The Constitution of Zambia allows derogating from arts 13, 16, 17, 19, 20, 21, 22, 23, and 24. Art 19 guarantees freedom of thought, conscience and religion.

[148] Constitution of the Republic of Malawi (1994), sec 45; Constitution of the Republic of South Africa, Act 108 of 1996, assented to on 16 December 1996 and commenced on 4 February 1997, sec 37; and the Constitution of Kenya (27 August 2010), art 58.

[149] Constitution of Malawi, sec 45(3)(a). It permits derogation from freedom of expression, freedom of information, freedom of movement, freedom of assembly, right of arrested person to be brought before courts within 48 hours and right to freedom and security of the person including the right not to be detained without trial.

[150] Constitution of Malawi, sec 45(3)(a).

party to the African Charter before the adoption of the 1996 Constitution,[151] it seems that the framers of the Constitution had taken into consideration obligations under the African Charter and they had foreseen future international obligations under global and regional human rights instruments.

The Kenyan Constitution does not even refer to derogation from constitutional rights or their suspension. It provides for limitation of rights during a state of emergency instead of their suspension. It seems that the framers of the Kenyan Constitution had the African Charter in mind. Since Kenya is party to the African Charter, a consideration of Kenya's obligation under international law requires Kenya to refrain from suspending any rights even during period of a state of emergency. That is why, it seems, the Kenyan Constitution avoided distinguishing between derogable rights and non-derogable rights.

5 IMPLICATION OF DEROGATING FROM CONSTITUTIONAL RIGHTS UNDER THE AFRICAN CHARTER

Derogation from constitutional rights in Africa implies violation of the African Charter at least in two ways. First, African States have undertaken to "adopt legislative or other measures to give effect" to rights recognised under the African Charter.[152] On its fifth ordinary session, the African Commission recommended that State parties should introduce the provisions of Articles 1 to 29 of the African Charter in their "Constitutions, laws, rules and regulations and other acts relating to Human and Peoples' Rights."[153] The Commission's recommendation was buttressed by two ministerial conferences on human rights in Africa.[154]

In making its recommendation, the African Commission was mindful of the differences among state parties in their reception of international law.[155] The distinction between monist and dualist systems in receiving international law is

[151] South Africa acceded to the African Charter on 9 July 1996 while the Constitution of the Republic of South Africa, Act 108 of 1996, was assented to on 16 December 1996. See List of countries which have signed, ratified/acceded to the African Charter on Human and Peoples' Rights at <http://www.au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples'%20Rights_0.pdf> (accessed on 10 December 2012); Dugard J *International law: A South African perspective* (2005) at 316.

[152] The African Charter, art 1.

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

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

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

outdated as the reality is more complex.[156] In some African States, duly ratified treaties automatically have domestic effect.[157] The African Charter forms part of the laws of such States and is superior to their domestic laws.[158] In other African countries "specific legislation is required to incorporate international treaties into domestic law, and the African Charter has generally a lower status.[159] Nigeria, for example, passed an act domesticating the African Charter.[160] In *Abacha and Others v Fawehinmi*, the Supreme Court of Nigeria held that "an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly."[161] Regarding the position of the African Charter in the hierarchy of Nigerian laws, the Court placed the Charter above other statutes but below the Constitution.[162]

The decision of the Nigerian Supreme Court and other similar decisions of national courts clearly conflict with the position of the African Commission. In *Malawi African Association and Others v Mauritania,* the African Commission held that the African Charter creates for a State party "an obligation of consequence, deriving from the customary principle *pacta sunt servanda*."[163] States parties have the duty to adjust their legislation to harmonise them with their international obligations.[164] Thus, States parties "are required to amend their domestic laws to conform to and facilitate the domestic application of the Charter."[165]

However, retaining derogation clauses in States parties' constitutions indicates that the states have not brought their laws in conformity with the African Charter. Although Senegal, South Africa and Zambia conducted pre-ratification compatibility studies,[166] it does not seem that such studies have been conducted in most African states. Even Zambia, which is said to have conducted studies to ascertain compatibility of its laws

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

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

[158] See Constitution of the Republic of Benin (1990), preamble; Constitutional law of the Republic of Cape Verde, art 12; the Constitutional Law of Burkina Faso (1991), art 151; the Constitution of the Central African Republic (1995), art 69; Constitution of Djibouti (1992), art 37; Fundamental Law of the Second Republic of Guinea; art 79; Constitutional of the Republic of Madagascar (1992), preamble; the Constitution of the Republic of Mali, art 116; Constitution of Mauritania; art 80; Constitution of the Fifth Republic of Niger (1999), art 132; Constitution of the Republic of Rwanda (2003), art 190; Constitution of the Republic of Senegal (2001); and Constitution of the Fourth Republic of Togo (1992), art 50.

[159] Ibid. See, for example, the Constitution of the Federal Republic of Nigeria (1999), sec 12(1); Constitution of Zimbabwe, art 111B(1)(b); and the Constitution of Swaziland (2005), sec 238(4).

[160] The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.

[161] *Abacha and Others v Fawehinmi* (2001) AHRLR 172 (NgSC 2000), para 12.

[162] *Abacha and Others v Fawehinmi*, paras 14-15.

[163] *Malawi African Association and Others v Mauritania,* para 84.

[164] *Malawi African Association and Others v Mauritania,* para 84.

[165] Bulto T S "Exception as norm: the local remedies rule in the context of socio-economic rights in the African human rights system" (2012) 16 *The International Journal of Human Rights* 555, at 560.

[166] Bulto (2012) at 560.

with the African Charter before embarking on ratification, maintained a derogation clause in its constitution.[167] Thus, African States have not taken sufficient legislative measures.

Second, derogating from constitutional rights in Africa even during a state of emergency is a violation of the African Charter. In several communications, the African Commission has emphasised that derogation from Charter rights are not allowed. In *Commission Nationale des Droits de l'Homme et des Libertés v Chad,* the African Commission dealt with a communication alleging killings, disappearances, torture, arbitrary arrest and harassment of journalists and, consequently, violations of articles 4, 5, 6, 7 and 9 of the African Charter.[168] Chad, the respondent State, did not justify its violation as suspensions made during a state of emergency. Rather, it claimed that "it had no control over violations committed by other parties, as Chad [was] in a state of civil war."[169] The African Commission held that "even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter" since the latter "does not allow for state parties to derogate from their treaty obligations during emergency situations."[170] The Commission found violations of the provisions alleged to have been violated as the respondent state did not make substantive response.[171]

The African Commission confirmed this holding in *Malawi African Association and Others v Mauritania* although the respondent State did not advance any argument on the grounds of emergency situations.[172] Similarly, in two communications brought against Nigeria, the African Commission held that even limitations on rights in the African Charter "cannot be justified by emergencies or special circumstances."[173] The African Commission reiterated the absence of a derogation clause in *Amnesty International and Others v Sudan.*[174] In *Zegveld and another v Eritrea*, the African Commission held that rights under the African Charter are non-derogable.[175]

In *Article 19 v Eritrea*, the African Commission considered a communication alleging *incommunicado* detention of journalists and the banning of the entire private press in the country.[176] Eritrea argued that it had a duty to take certain precautionary measures including suspension of rights during war when its existence is threatened.[177]

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[167] The Constitution of Zambia, art 25.

[168] *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, paras 2-6 and para 23.

[169] *Commission Nationale des Droits de l'Homme et des Libertés v Chad,* para 19.

[170] *Commission Nationale des Droits de l'Homme et des Libertés v Chad,* para 21.

[171] *Commission Nationale des Droits de l'Homme et des Libertés v Chad,* paras 24-27.

[172] *Malawi African Association and Others v Mauritania*, para 84.

[173] *Media Rights Agenda and Others v Nigeria*, para 67; and *Constitutional Rights Project and Others v Nigeria*, para 41

[174] *Amnesty International and Others v Sudan*, paras 42 & 79.

[175] *Zegveld and Another v Eritrea*, para 60.

[176] *Article 19 v Eritrea*, paras 2 & 6.

[177] *Article 19 v Eritrea,* para 87.

Nevertheless, Eritrea did not specify particular provisions of its Constitution or the African Charter which were suspended as a result of war with Ethiopia. In rejecting Eritrea's argument, the African Commission referred to its earlier decisions and held that the "existence of war, international or civil, or other emergency situation within the territory of a state party cannot therefore be used to justify violation of any of the rights set out in the Charter."[178]

In *Sudan Human Rights Organisation and Another v Sudan*, the complainants alleged gross, massive and systematic violations of human rights including large-scale killings, displacement of populations and destruction of properties in Darfur, the western region of Sudan that had been under a state of emergency since 1989.[179] It is not clear from the case whether the respondent state derogated from particular provisions of the African Charter. The African Commission cited its decisions in earlier communications and reminded States that they have a duty to respect the African Charter in all times, both at time of peace and war.[180]

The African Commission confirmed the same position in the Resolution on Rights to Fair Trial and Legal Assistance in Africa. The Commission resolved that 'a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency" cannot be used as grounds for suspension of the right to fair trial.[181]

In *Jawara v The Gambia*, the African Commission dealt with communication alleging "the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree no 30/31" and determined the consequence of derogating from constitutional rights under the African Charter.[182] The complainant, a former Head of State ousted in military *coup d'état*, argued that suspension of the Bill of Rights in the 1970 Gambian Constitution was a violation of Articles 1 and 2 of the African Charter.[183] The African Commission held that

> By suspending chapter 3 (the Bill of Rights), the government therefore restricted the enjoyment of the rights guaranteed therein, and, by implication, the rights enshrined in the Charter. ... It should, however, be stated that the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter. ... The suspension of the Bill of Rights and consequently the application of the Charter was not only a violation of article 1 but also a restriction on the enjoyment of the rights and freedoms enshrined in the Charter, thus violating article 2 of the Charter as well. [184]

Therefore, African States cannot invoke provisions of their constitutions as a defence before the African Commission or the African Court for suspending rights

[178] *Article 19 v Eritrea* paras 98-99.

[179] *Sudan Human Rights Organisation and Another v Sudan*, paras 2-4.

[180] *Sudan Human Rights Organisation and Another v Sudan,* paras 165 & 167.

[181] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), para R, reproduced in Heyns & Killander (2010) at 370.

[182] *Jawara v The Gambia*, para 2.

[183] *Jawara v The Gambia,* para 44.

[184] *Jawara v The Gambia,* paras 48-50.

during state of emergency. As discussed below, a State cannot plead its municipal laws for its failure to perform its obligation under international law. The African Commission expressed the same position in its decision on communications. In *Legal Resources Foundation v Zambia*, the African Commission held that "international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations."[185] In *Civil Liberties Organisation v Nigeria*, the African Commission held that "Nigeria cannot negate the effects of its ratification of the Charter through domestic action."[186]

The African Commission has been consistent in upholding the prohibition of derogation under the African Charter. Although it "has acknowledged that states may have provisions" permitting derogation in their domestic laws and "has questioned states about these during the examination of their reports,"[187] it has not come out boldly to say that derogation clauses in the African constitutions are in violation of the African Charter.

6 DEROGATION AND ITS IMPLICATION UNDER OTHER HUMAN RIGHTS INSTRUMENTS

African States' derogation from human rights by regularly relying on their constitutions not only violates the African Charter but also contravenes the ICCPR and other international human rights instruments. African States wishing to derogate from human rights will not be able to fulfil the requirements under the ICCPR. Article 4(1) allows States to take measures derogating from human rights only if such measures are consistent with their obligations under international law.[188] The Human Rights Committee observed that Article 4 of the ICCPR cannot justify "derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law" which include the African Charter.[189] It requires States parties invoking Article 4 to "present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency."[190]

The African Charter does not contain a derogation clause. All African countries are parties to the African Charter and none of them made reservation/declaration on the

[185] *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001), para 59.

[186] *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995), para 12.

[187] Murray (2000) 125.

[188] Art 4(1) of the ICCPR that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that *such measures are not inconsistent with their other obligations under international law* and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (Italics added.)

[189] General Comment No. 29, para 9; Nowak (1993) 85.

[190] General Comment No. 29, para 10.

absence of a derogation clause.[191] Even in other human rights instruments derogation clauses provide an exception to respect for human rights. Thus, States parties cannot read into the African Charter a derogation clause (an exceptional clause) where none exists.

Moreover, States parties mandated the African Commission to interpret the Charter.[192] The Commission repeatedly held that derogation from human and peoples' rights violates the African Charter. The Commission's holdings have been considered and approved by the Assembly of Heads of State and Government or the Executive Council of the African Union which shows States' consent to the position of the African Commission. Some States, particularly Malawi, South Africa and Kenya, have gone even further as they took individual steps to reflect the position of the African Charter and the Commission into their constitutions. In sum, it can be submitted that States parties assumed obligation to avoid suspending human rights under the African Charter.

Therefore, suspension of human rights even during state of emergency in Africa is a violation of ICCPR because African States cannot fulfil the *proviso* under Article 4(1) since derogation is a violation of their obligation under the African Charter and, therefore, inconsistent with their other international obligations.

Derogation from the rights of children and women would not also be consistent with the African Charter on the Rights and Welfare of the Child, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child as they do not contain derogation clauses.[193] The CEDAW Committee clearly observed that the "obligations of States parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters."[194] Derogation from economic, social and cultural rights would also be inconsistent with the International Covenant on Economic, Social and Cultural Rights as it does not contain a derogation clause.

Some constitutions of African States, as discussed above, permit derogation from certain rights which are non-derogable under the ICCPR although most of these States

[191] Although Morocco is geographically on the African continent, it is not a member of African Union since 1984. South Sudan has succeeded to the African Charter. Only three countries namely, Egypt, South Africa and Zambia had made reservation/declaration under the African Charter. See Murray and Evans (2001) 18-20.

[192] African Charter, art 45(3).

[193] African Charter on the Rights and Welfare of the Child, OAU DOC. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999; Convention on the Elimination of All forms of Discrimination Against Women, adopted by the United Nations General Assembly on 18 December 1979 and entered into force on 3 September 1981, 1249 UNTS 13; Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990, 1577 UNTS 3.

[194] Committee on the Elimination of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para 11.

are parties to the latter.[195] The texts of these constitutions are inconsistent with the ICCPR. Such inconsistencies violate their obligations since Article 2 requires States parties to ensure the conformity of their domestic laws to the ICCPR. In cases of inconsistencies, States parties have the obligation to change their domestic laws.[196]

Relying on Article 27 of the Vienna Convention on the Law of Treaties, the Human Rights Committee emphasised that States cannot plead provisions of their domestic law as a defence for their failure to perform international obligations.[197] The Committee observed that

> Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.[198]

The Committee also underlined that the executive branch cannot relieve a State party from its responsibility by attributing "an action incompatible with the provisions" of the ICCPR to legislative or judicial branch.[199] The position of the Human Rights Committee on Article 2 of the ICCPR is a statement of well settled rule of international law. Brownlie observed that a "state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law."[200] This rule has been established by judicial decisions and State practice.[201]

In all, African States frequently rely on their constitutions to justify declaration of a state of emergency and derogation from constitutional rights. The suspension of bill of rights consequently suspends application of the African Charter and, of course, other international human rights instruments. Therefore, the reliance of the African States on domestic provisions to suspend human rights contravenes international human rights law.

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[195] All African countries are party to the ICCPR except Comoros, and São Tomé and Príncipe. See status of ratification, at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (accessed 14 December 2012). South Sudan has succeeded to the ICCPR.

[196] Human Rights Committee, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, adopted on 26 May 2004, para 13.

[197] General Comment No. 31, para 4.

[198] General Comment No. 31, para 4.

[199] General Comment No. 31, para 4. See also Brownlie I *Principles of public international law* (2003) 34. Brownlie observed that the 'acts of the legislature and other sources of internal rules and decision-making are not to be regarded as acts of third party for which the state is not responsible, and any other principle would facilitate evasion of obligations.'

[200] Brownlie (2003) at 34.

[201] Shaw M N *International law* (2008) at 134. See *Polish Nationals in Danzig* case PCIJ, Series A/B, No. 44, pp. 21, 24; 6 AD, p. 209, cited in Shaw at 135; *Applicability of the Obligation to Arbitrate* case ICJ Reports, 1988, pp. 12, 34, cited in Shaw at 135;*Greco-Bulgarian Communities* case (1930) PCIJ, Ser. B, No. 17, p. 32, cited in Brownlie (n 199 above) at 34; *Free Zone* case (1932) PCIJ Reports, Ser.A/B, No. 46, 167, cited in Bulto (n 165 above) at 558; *Fisheries* case, ICJ Reports (1951), 116 at 132; and *Nottebohm* case ICJ Reports (1955), 4 at 20–21, cited in Bulto (n 165 above) 559.

7 CONCLUSION

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

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

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

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

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