

Absence of a Derogation Clause under the African Charter and the Position of the African Commission

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Abstract

A Derogation clause is an important limitation on state's power during a state of emergency when human rights are in a precarious situation. This article analyses the omission of derogation clause from the African Charter. It examines international and regional human rights instruments, the jurisprudences of human rights monitoring bodies relating to issues of derogation and academic writings. The findings of this article show the absence of a derogation clause in the African Charter is a serious flaw that should be corrected.

Key Words: Derogation Clause, African Charter, African Commission

Introduction

The African Charter on Human and Peoples' Rights (hereafter ACHPR, African Charter or Charter) unlike the other regional and some international human rights instruments contains no derogation clause. The Charter neither explicitly prohibits nor allows state parties to derogate from their human rights obligations under the Charter should they face exceptional situations justifying such action under international law.

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The omission of derogation clause under the African Charter involves a number of issues for the following reasons. First, it has been argued that the Charter's unfettered claw-back clauses render a derogation clause unnecessary.¹ Higgins has defined claw-back clauses as those which "allow in normal circumstances, breach of an obligation for a specified number of public reasons."² Secondly, many constitutions of African States contain provisions on derogation³ and states often resort to such constitutional provisions to proclaim state of emergency thereby derogating from certain rights recognized under the African Charter.⁴ This is considered by Sermet as a common African constitutional standard not reflected under the Charter.⁵

Thirdly, most of the states' parties to the African Charter are also parties to the International Covenant on civil and Political Rights (ICCPR) which contains explicit provision on derogation. It seems that the African Charter and the ICCPR are requiring different legal commitments from African States. Should a state party both to the African Charter and the ICCPR face emergency situation such as in the event of outbreak of war or natural catastrophe, the question arises whether its behaviour would be regulated under the African Charter or the ICCPR. This is particularly problematic since there is some confusion that the lack of a derogation clause under the ACHPR is understood as positive in that the Charter allows only for less

¹ See for instance, D'Sa, R., Human and People's Rights: Distinctive Features of the African Charter, *Journal of African Law*, Vol. 29, No. 2, (1985), p.76.

² Higgins, R., Derogation under Human Rights Treaties, *British Yearbook of International Law*, Vol. 48, (1976/77), p.281.

³ Except the constitutions of Benin and Democratic Republic of Congo almost all constitutions of African States contain a derogation clause.

⁴ To give a more recent example, on 28 January 2013 ex-president Morsi of Egypt declared state of emergency which applies to three cities along Suez Canal and their surrounding regions. The declared emergency involves curfew and lasts for thirty days.

⁵ Sermet, L., The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion, *African Human Rights Law Journal*, Vol. 7, (2007), p.144.

limitation of human and peoples' rights even in extreme cases of emergency situation as implied by some authors and even the African Commission.

These issues raise the following main legal question. Does the absence of a derogation clause under the African Charter mean state parties are prohibited from proclaiming state of emergency and derogating from one or more of their obligations under the Charter in special circumstances threatening the life of the nation? In trying to answer this legal question the following preliminary legal questions would be examined. Do claw-back clauses under the African Charter make derogation clause unnecessary? What is the approach of the African Commission on Human and Peoples' Rights? How can one reconcile international agreements, notably the ICCPR, containing derogation clause and the African Charter? Is the omission of a derogation clause from the Charter to be taken as more or less protective of human and peoples' rights during national emergency which threatens the well-being of the nation? In the face of this omission is there any other legal way out which is potentially helpful in regulating the behaviour of member states to the ACHPR during a state of emergency?

1. Derogation Clause, Related Notion of Claw-back Clauses and the African Charter

1.1. Derogation from Human Rights Treaties: In General

Derogation from human rights obligation is a temporary deviation in a sense of limiting or detracting from one or more of the rights enshrined in human rights instruments.⁶ In other words, a derogation clause allows the violation or

⁶ Steiner, H., Alston, P. and Goodman, R., (eds.) *International Human Rights in Context: Laws, Politics, Morals: Texts and Materials* (3rd edition), Oxford University Press, Oxford (2008), p.154; Higgins, R., [Derogation under Human Rights Treaties], p.281.

suspension of particular human rights obligation in times of war or public emergency.⁷ The Human Rights Committee of the ICCPR points out that measures of derogation from any provision of the ICCPR are of an exceptional and temporary nature.⁸ Some human rights treaties envisage a system of derogation which allows member states to adjust their obligations under such treaties temporarily in order to deal with public emergency which threaten the life of the nation.⁹ However, the prerogative of states in this respect is not unfettered. The validity of measures of derogation from particular human rights obligation is subject to the fulfilment of a number of preconditions set by the human rights treaty concerned.

The existence of public emergency which threatens the life of the nation is one of the fundamental requirements which permit derogation from the obligation to respect and protect human rights.¹⁰ Articles 4(1) and 15(1) of the ICCPR and the ECHR respectively refer to a situation threatening the life of the nation. In the case of *Lawless v. Ireland* the European Court of Human Rights (ECtHR), qualified the term ‘threatening the life of the nations’ as “exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of

⁷ Kufuor, K., *The African Human Rights System: Origin and Evolution*, Palgrave Macmillan, New York, (2010), p.40.

⁸ UN Human Rights Committee (HRC), General Comment No. 29, State of Emergency (Article 4), 24 July 2001, HRI/GEN/1/Rev.9 (Vol. I), p. 234, para. 2.

⁹ See, International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p.171, Article 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, CETS No.: 005, Article 15; American Convention on Human Rights, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 27.

¹⁰ [Covenant on Civil and Political Rights], Article 4(1); [European Convention on Human Rights], Article 15(1).

which the state is composed.”¹¹ This definition and the elements articulated by the European Commission in *Greek Case* are incorporated into Siracusa Principles¹² which, though not binding, can serve as a useful reference as to the precise meaning to be given to the term ‘threatening the life of nation’ in Article 4(1) of the ICCPR. Accordingly, a state party to the ICCPR can resort to measures derogating from its obligations only when confronted with a danger which is of exceptional nature, one that is actual or imminent which affects the entire population and poses a threat to the organized life of the society.¹³

The second prerequisite for taking valid derogation measures involves the proclamation, notification and termination of public emergency. Article 4(1) of the ICCPR, incorporates explicit requirement that state parties can resort to the right to derogate from some or certain selected rights of the Covenant only after the existence of public emergency is officially proclaimed. Putting it in different words, prior proclamation of the existence of an emergency situation is a *conditio sine qua non* (“an essential technical prerequisite”) to put Article 4 of the Covenant into operation.¹⁴

¹¹ *Lawless v. Ireland* (No.3), Chamber Judgment of 1 July 1961, European Court of Human Rights (ECtHR) Reports, 1961, para. 28.

¹² O’Donnell, D., Commentary by the Rapporteur on Derogation, *Human Rights Quarterly*, Vol. 7, No. 1, (1985), p.23. United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

¹³ [Siracusa Principles], Principle 39. See also O’Donnell, D., [Commentary], p.24.

¹⁴ Nowak, M., *UN Covenant on Civil and Political Rights: CCPR Commentary*, (2nd ed.), N.P. Engel Publisher, Kehl, (2005), p.92. The HRC enunciates this proclamation must be in accordance with constitutional and other relevant provisions of domestic law that regulate such proclamation and the exercise of emergency powers. [General Comment No. 29], para. 2.

The duty of international notification is an additional safeguard to prevent abuse of the right of derogation.¹⁵ This requirement serves two purposes. First, it helps the HRC assess whether the measures of derogation being taken is triggered by the exigencies of the emergency situation.¹⁶ Second, notification allows other member states to oversee compliance with the provisions of the ICCPR.¹⁷

The primary objective of suspension of a limited set of derogable rights of the ICCPR on the grounds of public emergency can be invoked only to the extent and for a period of time strictly necessary to return to state of normalcy.¹⁸ This means a state party availing itself of derogation must take immediate measures necessary to be able to restore the full enjoyment of the rights and freedoms when the situation which led to measures of derogation abates.¹⁹

¹⁵ Article 4 paragraph 3 of the ICCPR requires a state party wishing to derogate from its obligations under the Covenant to inform other state parties forthwith “of the provisions from which it has derogated and of the reasons by which it was actuated.” On the requirement of immediacy of such communication the European Court of Human Rights in *Lawless Case*, found the duty to notify derogation measures must be “without delay.” Therefore, it is possible to argue that there is no substantial difference between the three instruments relating to the duty to notify. See, [American Convention on Human Rights], Article 27(3); [European Convention on Human Rights], Article 15(3); [*Lawless v. Ireland*], para. 47.

¹⁶ Even though Article 4(3) of the ICCPR does not clearly envisage, the HRC is of the position that it is for the Committee to monitor whether the domestic laws of member states on derogation enable and secure compliance with the provision of Article 4 of the Covenant. [General Comment No. 29], para. 2.

¹⁷ [General Comment No. 29], para. 17.

¹⁸ [General Comment No. 29], para. 1, Megret, F., Nature of Obligations, In Moeckli, D., Shah, S. & Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, (2010), p.143.

¹⁹ Since duty of international notification equally applies to the termination of derogation, a second notification stating a date on which derogation measures was lifted should be communicated to other states parties. See, [Covenant on Civil and Political Rights], Article 4(3).

The principle of proportionality, the third precondition for taking valid derogation measures, together with the list of non-derogable rights is a very crucial substantive limit on permissible derogation measures imposed on the prerogative of states.²⁰ Proportionality with respect to derogation means no right, despite the fact that it is derogable, will be suspended in its entirety and rendered wholly inapplicable to govern the behaviour of a derogating state party.²¹

Article 4 paragraph 1 of the ICCPR makes explicit reference to this principle by indicating that the Covenant's derogable rights and fundamental freedoms may be derogated from only "to the extent strictly required by the exigencies of the situation."²² This has to do with duration, geographic scope and severity of the state of emergency²³ which are three ways to look at whether measures of derogation are proportional to combat public emergency situation threatening the life of the nation.

Moreover, a situation of emergency where the limitations or restrictions allowed in normal times under various provisions of the Covenant would be sufficient to combat threat to the life of the nation any measure of derogation is not 'strictly required by the exigencies of the situation'.²⁴ This means limitation clauses in normal times must be exhausted before recourse to derogation provisions of Article 4.

The fourth precondition for taking valid derogation measures is the principle of consistency. A state cannot invoke the right to derogation in violation of

²⁰ Nowak, M., [*CCPR Commentary*], p.97.

²¹ [General Comment No. 29], para. 4.

²² See also Article 15(1) of the European Convention and Article 27(1) of the American Convention.

²³ [General Comment No. 29], para. 4.

²⁴[*Siracusa Principles*], Principle 53.

the derogating state's other obligations under international law.²⁵ The phrase 'under international law' refers equally both to customary international law and international treaty law.²⁶

The prohibition against discrimination is another fundamental requirement in taking derogation measures. The ICCPR and the ACHR incorporate express prohibition on discrimination in a sense that states may not impose derogation measures that discriminates on the ground of race, colour, sex, language, religion or social origin.²⁷ Even though provisions of the ICCPR on the prohibition of discrimination are not included in the 'non-derogable rights' list of paragraph 2 of Article 4, elements of non-discrimination which are mentioned under Article 4 paragraph 1 are not subject to derogation measures.

Even when the foregoing preconditions are met, the derogation provisions of the ICCPR and the two other regional conventions indicate there are rights

²⁵ Article 4 (1), Article 15(1) of the ECHR and Article 27(1) of the ACHR prohibit any measure of derogation which is in general departure with the respective member states' obligation under other regimes of international law.

²⁶ Basically these obligations include those which are envisaged under other human rights treaties, and instruments in the area of international humanitarian law, notably the minimum guarantees found in the common Article 3 of the 1949 Geneva Conventions and in the two 1977 Additional Protocols. See, [Siracusa Principles], Principle 67; Nowak, M., [CCPR Commentary], p.99. In addition, these obligations also include state obligations under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto, the ILO Conventions on Forced Labour, Freedom of Association and Equal Rights of Workers as well as the 1998 Rome Statute of the International Criminal Court. Lastly, other provisions of the ICCPR itself other than Article 4 may give rise to an obligation which limits the right to derogate.

²⁷ [Covenant on Civil and Political Rights], Article 4(1); [American Convention on Human Rights], Article 27(1).

which are not subject to derogation in any case.²⁸ Here it must be emphasized that some rights are defined as non-derogable in all circumstances does not mean that other rights can be suspended at will.²⁹ The principle of proportionality mandates states to reduce derogation measures to those strictly required to deal with the emergency situation. Neither does the listing of a given right as non-derogable exclude the application of specific limitation clauses.³⁰

The lists of non-derogable rights, however, differ significantly within the three instruments.³¹ From the lists of Article 4(2) of the ICCPR, Article 15(2) of the ECHR and Article 27(2) of the ACHR it is evident that each later adopted instrument is broadening the scope of non-derogable rights. This has led some authors to conclude that the definition of non-derogable rights is a “progressive development.”³²

Rights and freedoms which are named under paragraph 2 of Article 4 are not subject to suspension by the mere fact that they are listed as such.³³ The HRC

²⁸ See, [Covenant on Civil and Political Rights], Article 4(2); [European Convention on Human Rights], Article 15(2); [American Convention on Human Rights], Article 27(2).

²⁹ See [General Comment No. 29], para. 6-7.

³⁰ For instance, even though freedom of religion is non-derogable, limitations under Article 18(3) do still apply with respect to freedom to express one’s religion. However, any interference with this freedom even during validly declared state of emergency must be justified having regard to limitations under Article 18(3).

³¹ See, [Covenant on Civil and Political Rights], Article 4(2); [European Convention on Human Rights], Article 15(2); [American Convention on Human Rights], Article 27(2).

³² Steiner, H., Alston, P. and Goodman, R., (eds.) [*International Human Rights in Context*], p.388.

³³ Some authors such as Hartman cited in Nowak assumed that the rights listed under Article 4(2) of the ICCPR are *jus cogens*. While the list of non-derogable rights under Article 4(2) of the Covenant is somewhat related with the issue of whether some rights are of the nature of *jus cogens* (such as the right to life, freedom from slavery or servitude and the freedom from torture), there are other rights in the list because their suspension is not relevant to combat

in its second General Comment on Article 4 expands the scope of non-derogable rights.³⁴

At this juncture, it is interesting to look at the nature of supervision since the prerogative of states to derogate from their human rights obligations is subject to international monitoring. This is evident from the requirement of the duty to notify. However the practice of international bodies is not consistent in this respect. While the ECtHR has granted a margin of appreciation to member states of the ECHR,³⁵ the HRC has not made reference to such standard in the context of derogation.³⁶ Despite the difference in approach with respect to domestic margin of appreciation, from the jurisprudences of the ECtHR and the HRC it is clear that international bodies maintain reviewability of states' determination of not only what constitutes state of emergency but also the measures necessary to combat the situation.

1.2. Derogation Clause and Claw-back Clauses under the African Charter

Even though the African Charter contains no derogation clause, the formulation of the Charter's rights is characterized by the predominance of

state of emergency or simply impossible. For instance, a state cannot justify imprisonment on the ground of inability to pay debt or suspending freedom of thought, conscience and religion to deal with any emergency situation. In addition, some rights can never be derogated from because they constitute states' other obligation under international law. It is also true that the scope of *jus cogens* or peremptory norms of international law goes beyond the listing under Article 4(2) of the Covenant. So as Nowak correctly observed "it is doubtful whether these essential rights are all *jus cogens*. [General Comment No. 29], para. 11; Nowak, M., [CCPR Commentary], p.93.

³⁴ See, [General Comment No. 29], para. 9-13, Nowak, M., [CCPR Commentary], p.96-97.

³⁵ See, [Ireland v. United Kingdom], para. 207; [Lawless v. Ireland], para. 28.

³⁶ Landinelli Silva et al. v. Uruguay, Communication No. 34/1978, Human Rights Committee (HRC), CCPR/C/12/D/34/1978, (8 April 1981), para. 8.3.

claw-back clauses. These clauses are attached to the exercise of most rights enshrined in the Charter and are open ended.³⁷ In contrast, in most human rights treaties limitation clauses are qualified by the requirement of “necessity in democratic society” to protect public order, national security, public safety or public health even though quite a few claw-back clauses can be found in these instruments.³⁸ Therefore, limitations to the enjoyment and exercise of individual rights and freedoms must be necessary in democratic society in order to be compatible with such instruments. This requirement makes it difficult for states to simply invoke desirable social goal and take measures which are not necessarily important to further such goal.³⁹ The ECtHR clarifies what this requirement implies in the *Case of Silver and Others v. United Kingdom*, in that any limitation must “correspond to a pressing social

³⁷ The enjoyment of specially civil and political rights under the Charter are guaranteed “except for reasons and conditions previously laid down by law”, “subject to law and order”, “within the law”, “provided that he abides by law”, “subject to the obligation of solidarity provided for in Article 29”, “subject only to necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethics and rights and freedoms of others”, “provided he abides by law”, “in accordance with the laws of those countries and international conventions”, “in accordance with the provisions of the law”, “in accordance with the provisions of appropriate laws”. See, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, Banjul, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Articles 6, 8, 9(2), 10(1) and (2), 11, 12(1) and (3), 13 and 14.

³⁸The ICCPR, ECHR and ACHR require that limitations should be those which are necessary in a democratic society. See, for instance, [Covenant on Civil and Political Rights], Articles 21 and 22(2); [European Convention on Human Rights], Articles 8-11; [American Convention on Human Rights], Articles 15 and 16. A few instances of claw-back clauses can also be found for instance in Article 12 of the ECHR with respect to the right to marry and found a family where the enjoyment of this right is subject to national laws regulating the exercise of this right. Similarly, Articles 12(3) and 30 of the ACHR incorporate claw-back clauses.

³⁹ Megret, F., [Nature of Obligations], p.142.

need and be proportionate” to the legitimate aim sought to be defended.⁴⁰ When it comes to the African Charter, its claw-back clauses provide for limitations to the Charter’s guarantee which are almost totally discretionary in that these clauses seem to give precedence to domestic laws. They tend to give wide discretion to states and recognize the right in question to the extent granted by national laws.⁴¹

However, as the African Commission itself rightly notes for instance in the case of *Media Rights Agenda and Others v. Nigeria* to allow domestic legislations take priority over international law would render the purpose of agreeing on the treaty text non sense.⁴² The Charter should be interpreted in such a manner to give meaningful protection to individuals and should not be taken to allow state parties to take away rights recognized under international instruments, the African Charter in this case, simply by adopting legislation regardless of the interest such law serves.

⁴⁰ *Case of Silver and Others v. United Kingdom*, Chamber Judgment of March 1983, European Court of Human Rights (ECtHR), Reports, 1983, para. 97.

⁴¹ Mugwanya, G., *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System*, Transnational Publishers, Ardsley, New York, (2003), p.348; Heyns, Ch. and Killander, M., *Africa*, In Moeckli, D., Shah, S. & Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, (2010), p.485; Kufuor, K., [*The African Human Rights System*], p.41; Singh, S., *The Impact of Claw-back Clauses on Human and Peoples’ Rights in Africa*, *African Security Review*, Vol. 18, No. 4, (2009), p.100-101.

⁴² *Media Rights Agenda and Others v Nigeria*, Communications 105/93, 128/94, 130/94 and 152/96, (2000) AHRLR 227, (ACHPR 1998), African Commission on Human and Peoples’ Rights (ACmHPR), (12th Annual Activity Report), para. 68. See also, *Constitutional Rights Project, Civil Liberties and Media Rights Agenda v Nigeria*, Communications 140/94, 141/94 and 145/95, (2000) AHRLR 227, (ACHPR 1999), African Commission on Human and Peoples’ Rights (ACmHPR), (13th Annual Activity Report), para. 41.

It has been argued that in the face of the Charter's broadly worded claw-back clauses there is no need for a derogation clause.⁴³ This means claw-back clauses of the Charter apply during public emergency to regulate the behaviour of states in proclaiming state of emergency and derogating from their obligation under the Charter. However, this position is dangerous and difficult to defend. Even though derogation clauses and claw-back clauses both share some common features, they serve different purpose and apply in different context. They both are methods of accommodation in a sense that they restrict rights of individuals in order to allow the states undertake its public duties in the interest of common good.⁴⁴ They are, thus, exceptions to the general principle that rights recognized must be exercised and therefore derogation and claw-back clauses must be narrowly interpreted.⁴⁵

Nevertheless, derogation and claw-back clauses differ fundamentally. Derogation clauses as provided for by other human rights instruments especially the three main general human rights treaties, the ICCPR, ECHR and ACHR, operate during situations of public emergency. Accordingly, derogation clauses are applicable only in exceptional circumstances where the life of the nation is at stake. Such clauses allow the suspension of rights which

⁴³ D'Sa, R., Human and People's Rights: Distinctive Features of the African Charter, *Journal of African Law*, Vol. 29, No. 2, (1985), p.75-76; Mugwanya, G., [Human Rights in Africa], p.352. Mutua, M., The African Human Rights Court: A Two-Legged Stool? *Human Rights Quarterly*, Vol. 21, (1999), p.358. Rachel Murray has also commented "It could be argued that derogations may be permitted through the use of claw-back clauses and the margin of appreciation they give to States." Murray, R., [*The African Commission on Human and Peoples' Rights and International Law*], p.126. See also, Ouguergouz, F., *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy*, Martinus Nijhoff Publishers, the Netherlands, (2003), p.431, with further notes and references.

⁴⁴ Higgins, R., [Derogation under Human Rights Treaties], p.281.

⁴⁵ Mugwanya, G., [*Human Rights in Africa*], p.352.

are already guaranteed.⁴⁶ Claw-back clauses however “restrict rights *ab initio*.”⁴⁷ Claw-back clauses are not triggered by situations of public emergency which threatens the life of the nation. In the words of Mugwanya, claw-back clauses “form part of the day to day normal enforcement and implementation of human rights and freedoms.”⁴⁸ They are permanent in a sense that they come into existence from the moment the human rights treaty in question came into existence and “presumably remain in force unless changed or deleted through subsequent amendment or repeal of the entire treaty regime.”⁴⁹

In contrast to derogation clauses, claw-back clauses offer limited protections. Derogation clauses regulate states’ behaviour in many important ways. As already discussed, it specifies circumstances in which derogation can be possible. Even when the prescribed circumstances are readily apparent derogation clauses require states to go through certain procedural requirements before taking measures which suspend rights of individuals. In addition, derogation clauses define rights which are not subject to derogation in any case and attach the requirement of proportionality with respect to rights which are amenable to derogation. Furthermore, any recourse to derogation measure is subject to supranational supervision. When it comes to claw-back clauses in particular those contained in the ACHPR, the limitations they allow are less protective, in most cases left to the discretion of states parties to the Charter. For example the right to liberty and security of a person is guaranteed except for reasons and conditions previously laid by law.⁵⁰

⁴⁶ Gittleman, R., [The African Charter on Human and Peoples’ Rights], p.692.

⁴⁷ Ibid.

⁴⁸ Mugwanya, G., [*Human Rights in Africa*], p.353.

⁴⁹ Kufuor, K., [*The African Human Rights System*], p.42.

⁵⁰ [African Charter on Human and Peoples’ Rights], Article 6.

Likewise one can express his or her opinion within the law.⁵¹ Neither do claw-back clauses of the Charter require the existence of public emergency, nor do they require the supervision of the African Commission whenever the exercises of rights protected by the Charter are limited.⁵²

Therefore, claw-back clauses are more prone to abuse than to derogation clauses. In light of what has been, said claw-back clauses in the African Charter, no matter how broadly worded,⁵³ may not be applicable to situations involving public emergency which threatens the life of the nation in order to ensure the continued existence of the nation and the safety of people. This does not however mean that claw-back clauses do not apply during state of emergency. They do always apply whether or not there is an emergency threatening the life of the nation as long as the human rights instrument containing them is in force and regardless of whether or not measures derogating from fundamental rights and freedoms are taken. Nevertheless, they do not operate with a view to combating such situations. Even when a given right is qualified as non-derogable, it may still be restricted where this is necessary in the democratic society in the interest of public order, national security, public safety or public health.⁵⁴

⁵¹ Ibid., Article 9. See also Articles 8, 10-14.

⁵² Kufuor, K., [*The African Human Rights System*], p.41.

⁵³ The fact that the Claw-back clauses in the Charter are not qualified by reference to “necessity in democratic society” does not change the nature of such clauses. It only leaves the extent of interference open to debate. Ouguergouz, F., [*The African Charter on Human and Peoples’ Rights*], p.436.

⁵⁴ The HRC illustrates this point by reference to freedom of religion which is one of the non-derogable rights in Article 4(2) of the ICCPR but subject to specific limitation clause under Article 18(3) of the Covenant. Thus, as the Committee observes, “(...) the permissibility of restrictions is independent of the issue of derogability.” [General Comment No. 29], para. 7.

Similarly derogation clauses do not operate in normal daily life. Similar positions were held during the drafting of both the ICCPR and ECHR.⁵⁵ Thus, the argument that claw-back clauses under the ACHPR are applicable to situations of emergency to regulate the conduct of member states to the Charter in such circumstances is not without serious flaws.

2. Absence of a Derogation Clause under the African Charter and the Jurisprudence of the African Commission

The omission of a derogation clause from the African Charter like other features of the Charter, notably its claw-back clauses, has been the source of controversy.⁵⁶ Therefore, it is interesting to examine the issue from different perspectives.

⁵⁵ By the time the ICCPR and ECHR were drafted it was argued that limitations attached to the enjoyment of certain rights also regulate situations which derogation clauses are meant to regulate. However, it was concluded in favour of inserting derogation clause in these instruments on the ground that exceptional circumstances where the life of the nation is at stake do not fall within the scope of limitation clauses. See, Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.435-436.

⁵⁶ See, Murray, R., [*The African Commission on Human and Peoples' Rights and International Law*], pp.123-126; Mugwanya, G., [Human Rights in Africa], pp.352-356; Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], pp.423-479; Sermet, L., [The Absence of a Derogation Clause from the African Charter], pp.142-161; D'Sa, R., Human and People's Rights: Distinctive Features of the African Charter, *Journal of African Law*, Vol. 29, No. 2, (1985), p.75-76; Mugwanya, G., [Human Rights in Africa], p.352. Mutua, M., [The African Human Rights Court], p.358; Gittleman, R., [The African Charter on Human and Peoples' Rights], pp.704-709; Cowell, F., Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR, *Birkbeck Law Review* Vol. 1, Issue 1, (2013), pp.135-162; Umzurike, U., The African Charter on Human and Peoples' Rights, *The American Journal of International Law*, Vol. 77, No. 4 (1983), p.910; Meron, T., [*Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, (1989), pp.218-219; Viljoen, F., *International Human Rights Law in Africa*, (2nd ed.), Oxford University Press, United Kingdom, (2012), pp.333-334.

2.1. Omission of a Derogation Clause: Possible Interpretations

In light of the fact that the ACHPR neither explicitly outlaws nor allows derogation in the event of national emergency such as the outbreak of war or natural catastrophes which threatens the life of the nation, there can be different ways of understanding the omission of a derogation clause from the Charter. Ouguergouz forwards three possible legal interpretations of this omission of a derogation clause from the African Charter. The first line of thinking is that the absence of a derogation clause under the ACHPR means state parties to the Charter are prohibited from violating or allowing violation of some of their obligations under the Charter in any situation.⁵⁷ As the subsequent sub-section demonstrates, this is the position of the African Commission when it comes to individual communications. While it is true that the absence of a derogation clause under the ACHPR is not devoid of any relevance at all, given the fact that the Charter does not specifically outlaw⁵⁸ the right of member states to derogate from certain human and peoples' rights, this line of thinking goes to the extreme and thus difficult to defend provided that there is no clear agreement from which the intention of the state parties to this effect can be gathered.⁵⁹

⁵⁷ "(...) by not including any derogation clause, the African States have precluded the option of derogating from the African Charter, regardless of what the circumstances are." Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.425.

⁵⁸ One can point to the general rule of treaty interpretation envisaged in the Vienna Convention on the Law of Treaties. The terms of the African Charter must be given their natural meaning in their context having regard to the object and purpose of the Charter. In the face of the silence of the Charter, it is difficult to conclude that the Charter outlaws the right to derogation. See generally, Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations, Treaty Series, Vol. 1155, p.331, Article 31.

⁵⁹ Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.425; [Vienna Convention on the Law of Treaties], Article 31(3) (a).

The second way of looking at the omission is, even though the ACHPR is a treaty its normative content is not so strong that the drafters of the Charter never intended to describe the obligation of member states more fully.⁶⁰ Similarly, Rosalyn Higgins after noting the absence of a derogation clause from the Universal Declaration of Human Rights (UDHR) observes:

*In the move to formally binding instruments, it became necessary to consider such a clause. The International Covenant on Economic, Social and Cultural Rights contains no derogation provision, thus implicitly confirming the view that such a clause should only be deemed necessary where there are strong implementation provisions.*⁶¹

This argument with respect to the ACHPR is not sufficiently convincing and can be automatically rejected because, as Ouguergouz also argues, the African Commission and the African Court on Human and Peoples' Rights as the ACHPR's implementation monitoring bodies can give the Charter meaningful "intrinsic legal value."⁶² The third way of interpreting the omission is to conclude that by not including a derogation clause under the ACHPR, member states do not simply want to govern their behaviour during state of emergency which threatens the life of the nation by the provisions of the Charter.⁶³ They instead "reserved the right to invoke the derogations which may be possible under general international law."⁶⁴ In other words, the lawfulness or otherwise of measures taken by state parties to the ACHPR in derogation of their obligation to protect human and peoples' rights in times of

⁶⁰ Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.427.

⁶¹ Higgins, R., [*Derogation under Human Rights Treaties*], p.286.

⁶² Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.427.

⁶³ Ibid.

⁶⁴ Ibid.

emergency can be seen from the point of view of the rules relating to the termination and suspension of treaties under international law particularly the Vienna Convention on the Law of Treaties (breach of the Charter obligation by one party, impossibility of performance of the Charter's obligations and fundamental change of circumstances) and from the perspective of the law of the international responsibility of states.⁶⁵

This is a position held by some authors.⁶⁶ However, this line of thinking like the foregoing ones is difficult to defend because on the one hand defences available under the law of treaties may result in the suspension of the whole treaty regime,⁶⁷ in this case the whole content of the ACHPR and some of the defences available under the law of treaties are not applicable to human rights treaties in general and the ACHPR in particular.⁶⁸ On the other hand, the

⁶⁵ See, generally [Vienna Convention on the Law of Treaties], Articles 60-62; UN International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 20-25.

⁶⁶ See, Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.427. Likewise Benedik argues "the exceptions allowed by international law and spelt out in the Vienna Convention on the Law of Treaties apply." Benedek, W., *The African Charter and Commission on Human and Peoples' Rights; How to Make it More Effective*, *Netherlands Quarterly Human Rights*, Vol. 11, No. 25, (1993), p.27.

⁶⁷ See, for example [Vienna Convention on the Law of Treaties], Article 61(1). However, the entire treaty regime would not be rendered inapplicable by the operation of derogation clause. Derogation clause seeks to carefully limit the right of states to derogate from their human rights obligation by providing for the catalogue of non-derogable rights and by requiring any measure of derogation to be in strict proportion with the reason which necessitated such measures relating to derogable rights. For instance, with respect to the International Covenant on Civil and Political Rights (ICCPR) the proportionality requirement is understood to ensure in practice that no provision of the human rights treaty in question will be inapplicable in its entirety even when validly derogated from. UN Human Rights Committee (HRC), [General Comment No. 29], para. 4.

⁶⁸ For instance a member state to the ACHPR cannot suspend the operation of the Charter simply because one or more of the other member states breached their obligation under the Charter given the nature of the African Charter as human rights treaty governing the

nature and purpose of a derogation clause and that of circumstances precluding wrongfulness are different.⁶⁹ The International Law Commission (ILC) Draft Articles, even though not binding as a matter of treaty law, articulates six grounds for precluding internationally wrongful acts of states. These are consent, self-defence, counter measures in relation to internationally wrongful act, force majeure, distress and necessity.⁷⁰ The first three presuppose reciprocal relationship between states parties to a given treaty. Therefore consent, self-defence and counter measures in relation to internationally wrongful act should be excluded without further examination since unlike other treaties human rights treaties are not based on the principle of reciprocity. Despite the *erga omnes* nature of human rights obligations, states primarily undertake obligation towards individuals.

Likewise, force majeure and distress are not comparable to derogation clauses under human rights treaties. Force majeure involves a situation which renders

obligation of states towards individuals instead of the obligation among states. Accordingly, even when one of the contracting parties acted in breach of the Charter's obligation, the other member states should observe their obligation since human rights treaties and thus the ACHPR is not subject to the principle of reciprocity. See, Megret, F., [Nature of Obligations], pp.124-130. As indicated under Article 60(5) of the VCLT arguably defences available under international law in favour of non-performance of treaty obligations are not applicable to those treaties dealing with the protection of human person. See, [Vienna Convention on the Law of Treaties], Article 60(5).

⁶⁹ "(...) derogation momentarily neutralizes the obligation which no longer has to be complied with, whereas the set of circumstances precluding wrongfulness leaves the obligation intact but removes the wrongful aspect of the conduct of the State and, consequently, exonerates it from all of its responsibility" subject to the obligation to pay compensation for the harm sustained as a result of the act in question. Ouguergouz, F., [The African Charter on Human and Peoples' Rights], p.470; [UN International Law Commission, Draft Articles on Responsibility of States], Articles 20-25 and 27.

⁷⁰ [UN International Law Commission, Draft Articles on Responsibility of States], Articles 20-25.

the performance of treaty obligation absolutely impossible.⁷¹ However, the entire treaty regime cannot be rendered inapplicable by the operation of derogation provision. As discussed in the previous section, the list of non-derogable rights and the condition of strict necessity ensure that the human rights treaty in question still operates regardless of the existence of a validly declared state of emergency. When it comes to distress, it relates to a circumstance where an individual whose acts are attributable to a state commits an internationally wrongful act, being in a state of peril, with a view to saving his life or that of a person under his care.⁷² It has nothing to do with saving the life of the nation and cannot be applicable to human rights obligations in times of public emergency.

The state of necessity somewhat resembles derogation provisions of human rights instruments. The invocation of this ground is subject to stringent requirements as this is evident from the negative formulation adopted by the ILC's in defining it.⁷³ In addition, a state of necessity can only be invoked to safeguard an essential interest against grave and imminent danger.⁷⁴ However, Article 25 of the Draft Article does not define the essential interest a state in question should seek to protect. Thus it highly depends on the subjective assessment of a state invoking state of necessity. On the contrary, derogation provisions of human rights instruments make it clear that derogation measures can only be taken with a view to averting war or other situation of public emergency which pose danger to the life of the nation. This means the defence of state of necessity does not perfectly match to and thus cannot be a

⁷¹ *Ibid.*, Article 23(1).

⁷² *Ibid.*, Article 24(1); UN International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, (2001), p.78.

⁷³ See, [UN International Law Commission, Draft Articles on Responsibility of States], Article 25.

⁷⁴ *Ibid.*

substitute for a derogation clause. Therefore, the silence of the African Charter on the issue of derogation is simply a defect.

2.2. Jurisprudence of the African Commission: Double Standard?

2.2.1. Individual Communications

Confronted with the defence of emergency situation, the African Commission has had the opportunity to pronounce itself on the issue of derogation under the African Charter. In individual complaints, the African Commission rejected the defence of derogation in a series of cases. It has held the opinion that the African Charter does not allow derogation and member states cannot invoke the right to derogate from the human and peoples' rights in times of war or other circumstances where the life of the nation is at risk.

The case of *Commission Nationale des Droits l'Homme et des Liberties v. Chad* is the first communication in which the African Commission held that the ACHPR outlaws the right to derogation.⁷⁵ This communication alleges serious and large scale human rights violations in Chad which involves harassment of journalists by unidentified individuals claiming to be government's security personnel.⁷⁶ The communication also claims arbitrary arrest and detention as well as killings, disappearances and torture because of the civil war between security forces and other groups.⁷⁷ The government of Chad on its part argued that its agents did not commit any violation and it was

⁷⁵ *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Communication 74/92, (2000) AHRLR 66, (ACHPR 1995), African Commission on Human and Peoples' Rights (ACmHPR), (9th Annual Activity Report).

⁷⁶ *Id.*, paras. 1 and 2.

⁷⁷ *Id.*, paras. 3-6.

not able to protect individuals against violations committed by other parties owing to the state of civil war in Chad.⁷⁸

The government of Chad did not clearly invoke the right to derogation, but the African Commission held, in contrast to other human rights treaties, the ACHPR “does not allow for member states to derogate from their treaty obligations during emergency situation.”⁷⁹ Accordingly, the Commission further noted, the civil war in Chad cannot be invoked to excuse violation of rights by the Government, neither does it justify permitting violation of rights in the Charter.⁸⁰ Eventually the Commission came to the conclusion that Chad violated the Charter’s protection of the right to life, prohibition against torture, inhuman and degrading treatment, the right to security of the person, the right to fair trial and the freedom of expression.⁸¹

From this decision, it seems that the Commission would not tolerate any violation of the Charter’s guarantees even in extreme situations⁸² such as civil war in the present case threatening the life of the nations in question. While it is true, as the Commission also noted,⁸³ that it is the duty of state parties to the ACHPR to protect individual rights against violation by third parties and this is also well recognized in the jurisprudence of the other human rights monitoring bodies,⁸⁴ the view of the commission totally rejecting any defence of derogation is contestable.

⁷⁸ Id., para. 19.

⁷⁹ Id., para. 21.

⁸⁰ Ibid.

⁸¹ Id., para. 28.

⁸² Kufuor, K., [*The African Human Rights System*], p.45.

⁸³ [*Commission Nationale des Droits de l’Homme et des Libertés v. Chad*], para. 20 and 22.

⁸⁴ For instance, in the *Case of Velasquez-Rodriguez v. Honduras* the Inter-American Court of Human Rights after noting that States are responsible for violation of human rights perpetrated by public authority or by persons under the authority of States held “An illegal act

Measures derogating from rights of individuals can be actuated only when there is no other means to ensure the continued existence of the life of the nation. In other words, states can invoke the right of derogation only when other available means, particularly limitations attached to the exercise of specific rights in normal times are no longer useful to ensure public safety. As Mugwanya observes, in the day to day implementation of the African Charter, normal limitation clauses allow governments to keep the state alive and ensure the safety of their people.⁸⁵ But such clauses are insufficient to combat exceptional situations which carry danger to the life of the nation, safety of its people and exercise of their human and peoples' rights making it absolutely necessary to derogate from some of the Charter's obligations.⁸⁶

Subsequently, in two similar communications against Nigeria,⁸⁷ the African Commission held the same position on the prohibition of the right to derogation under the African Charter. In *Media Rights Agenda and Others v. Nigeria*, it is alleged that following the annulment of the Nigerian election of 12 June 1993, the government issued a number of decrees whereby the publication of certain magazines and newspapers were banned, their premises

which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." *Case of Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Inter-American Court of Human Rights (IACtHR), Series C No. 4, para. 172. Similarly, the Human Rights Committee in *Delgado Paez v Colombia* stated, States parties cannot ignore threats to the security of the person under their jurisdiction. "They are duty bound to take appropriate and reasonable measures to protect them." *Delgado Paez v Colombia*, Communication No. 195/1985, Human Rights Committee (HRC), U. N. Doc. CCPR/C/39/D/195/1985, (23 August 1990), para. 5.5.

⁸⁵ Mugwanya, G., [*Human Rights in Africa*], p.354.

⁸⁶ *Ibid.*

⁸⁷ [*Media Rights Agenda and Others v. Nigeria*]; [*Constitutional Rights Project, Civil Liberties and Media Rights Agenda v. Nigeria*].

were sealed and the copies of the magazines and newspapers confiscated.⁸⁸ It is also claimed that regular courts are ousted from examining the constitutionality of such decrees and new registration requirement of newspapers is decreed which vests in the board set up under such decree exclusive discretion whether or not to register.⁸⁹ Even though the government of Nigeria did not invoke the defence of derogation at all⁹⁰ the Commission went into the discussion of the issue and held:

*In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.*⁹¹

Likewise, in *Constitutional Rights Project, Civil Liberties and Media Rights Agenda v. Nigeria* involving similar issues⁹² decided a year later, the

⁸⁸ [*Media Rights Agenda and Others v. Nigeria*], paras. 1 and 2.

⁸⁹ *Id.*, para. 3-6.

⁹⁰ The government of Nigeria has not properly addressed all issues involved in the communication either in written or oral submission. But, with respect to the new requirement of registration it seems the government invoked defences available under normal limitation clauses while it argued, "The government is convinced that such registration fees are reasonable and justifiable in any democratic society." *Id.*, paras. 12-15. As some authors observe the Commission confused derogation with limitation. In other words, the Commission seems to consider derogation as one form of limitation. Ouguerouz, F., [*The African Charter on Human and Peoples' Rights*], p.434; Viljoen, F., [*International Human Rights Law in Africa*], (2012), p.334; Sermet, L., [*The Absence of a Derogation Clause from the African Charter*], p. 152. However, the specificity of derogation must be emphasized. Despite the similarity between derogation and limitation clause there is a significant deference between the two.

⁹¹ [*Media Rights Agenda and Others v. Nigeria*], para. 67.

⁹² The Communications involved in this case also alleges the proscription by name of the publication and circulation of certain newspapers within the Country by decrees issued by the Nigerian military government which are also claimed to constitute violation of the rights of Nigerians to receive information and express and disseminate their views. Further it is

Commission once again upheld its position reconfirming the prohibition of derogation under the African Charter with the same statement.⁹³

In *Amnesty International and Others v. Sudan*, the communications submitted allege widespread and large scale violation of human rights including arbitrary arrest and detention, torture and summary executions following the coup d'état of 30 July 1989.⁹⁴ The African Commission said derogation from African Charter is not possible since the Charter does not contain provision permitting state parties to derogate from their obligations in times of emergency.⁹⁵ However, the Commission is not firm in this case in a sense that it did not automatically reject the defence of derogation like in the case of *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*. The Commission in this case is rather careful and took note of the difficulties states may face.⁹⁶

However, in another more recent communication against Sudan involving the mass atrocities committed in the Darfur region of the country, the Commission viewed that armed conflict cannot be invoked to justify a derogation from the ACHPR and found the state party liable for violation of the right to life and the prohibition against slavery under the Charter.⁹⁷ Even

claimed that the decrees banned courts from evaluating the validity of such decrees. [*Constitutional Rights Project, Civil Liberties and Media Rights Agenda v. Nigeria*], paras. 1, 4-5.

⁹³ *Id.*, para. 41.

⁹⁴ *Amnesty International and Others v. Sudan*, Communications 48/90, 50/91, 52/91 and 89/93, (2000) AHRLR 297, (ACHPR1999), African Commission on Human and Peoples' Rights (ACmHPR), (13th Annual Activity Report), paras. 1-7.

⁹⁵ *Id.*, paras. 42 and 79.

⁹⁶ *Id.*, para. 42.

⁹⁷ *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communications 279/03 and 296/05 (2009) AHRLR 153 (ACHPR 2009), African

though the right against arbitrary deprivation of life and the prohibition against slavery are non-derogable rights even in times of war or armed conflict under human rights treaty regimes envisaging for the right of derogation, the reasoning of the Commission does not rest on this fact. The Commission merely reiterated the absence of such clause under the African Charter and referred back to its previous decisions in *Commission Nationale des Droits de l'Homme et des Libertés v. Chad* and *Constitutional Rights Project, Civil Liberties and Media Rights Agenda v. Nigeria*.

The African Commission continued to hold its persistent view declaring the prohibition of derogation under the ACHPR in *Article 19 v. Eritrea*.⁹⁸ This case, decided in 2007, involves a communication alleging the continued incommunicado detention of eighteen journalists since 2001.⁹⁹ The state party argued the acts alleged in the communication were taken in time of war when the very existence of the nation was at risk¹⁰⁰ which is the usual requirement for taking derogation measures in treaties that do allow them. However, the Commission rejected the submission and noted that the ACHPR does not permit member states to derogate from their obligation under the Charter in times of war or other emergency.¹⁰¹ It further viewed the existence of war, turmoil or other emergency situation in the member state cannot excuse breach of any right under the ACHPR.¹⁰²

Commission on Human and Peoples' Rights (ACmHPR), (28th Activity Report), paras. 165-167.

⁹⁸ *Article 19 v. Eritrea*, Communication 275/2003, (2007) AHRLR 73 (ACHPR 2007), African Commission on Human and Peoples' Rights (ACmHPR), (22nd Activity Report).

⁹⁹ *Id.*, para. 2.

¹⁰⁰ *Id.*, para 87.

¹⁰¹ *Id.*, paras. 87, 98-99.

¹⁰² *Ibid.*

The foregoing cases demonstrate that the African Commission is not willing to accept the breach of the Charter's obligation in times of public disturbances where the life of the nation in question is at stake.¹⁰³ The question is, however, what reasoning does the Commission have for its position? Unfortunately, the Commission, apart from pointing to the fact that there is no derogation clause under the ACHPR has not provided any reason as to why derogation is prohibited under the African Charter. The Commission does not go into the discussion of why the behaviours of the state parties in question are contrary to the terms of the Charter. Neither has it pointed out that the omission of a derogation clause from the ACHPR is a gap or defect in the Charter. These are important given the fact that the omission does not necessarily mean either prohibition or *carte blanche*. Therefore, it is difficult to defend the position of the Commission.

Firstly, the Commission is too unrealistic in its position. The Commission imposed obviously a high threshold of legal protection in expecting state parties to the ACHPR never to derogate from the Charter's obligations which cannot be realized in the event of natural catastrophes, military insurgency, terrorism, turmoil or the outbreak of war.¹⁰⁴ Indeed various African countries

¹⁰³ This has led some authors to argue that the African Commission in its non-derogability jurisprudence raised the Charter's rights up to the level of peremptory norms. Viljoen, F., [International Human Rights Law in Africa], p.334. However, this is not altogether clear. Even with the assumption that the position of the Commission is tenable, the fact that a given right is non-derogable does not necessarily mean that the right in question is peremptory norm. As indicated in the previous section while the list of non-derogable rights under human rights treaties allowing derogation is related to the question of whether a particular right is peremptory norm there are also rights which are not subject to suspension either because their suspension is irrelevant for combating the emergency situation, impossible or constitute states' other obligation under international law. Therefore the fact that the Commission view all of the rights enshrined under the African Charter are non-derogable does not necessarily lead to the conclusion that these rights have attained the status of peremptory norms.

¹⁰⁴ Viljoen, F., [International Human Rights Law in Africa], p.333-334.

already have in their national constitutions derogation provision and they are at the same time parties to the ICCPR which contains express provision on derogation.¹⁰⁵ Secondly, the view of the Commission would inevitably lead member states to resort to defences available under general international law such as necessity whenever they are confronted with real emergency situation which may be abused to the detriment of the protection of human and peoples' rights.¹⁰⁶ Scholars have long recognized that in the face of absence of derogation provision there is a potential danger that state parties may resort to "customary law exceptions of state of necessity" to suspend the Charter's guarantee and expressed hope that the African Commission would not let this happen by accommodating the various interests involved.¹⁰⁷ But, as the forgoing cases demonstrate, the Commission failed to do so.

Derogation provision carries specific safeguards of necessity, proportionality, inviolability and temporality in order to avoid abuse.¹⁰⁸ More importantly, the Commission should have considered the general tendency of African states to abuse human rights of individuals particularly during state of emergency. Derogation clauses are inserted in international and regional human rights treaties with a view to prevent abuse of emergency powers to the detriment of

¹⁰⁵ See for instance Constitution of the Republic of South Africa, 4 December 1996, Article 37; Constitution of the Federal Republic of Nigeria, 1999, Article 305; Constitution of the Federal Democratic Republic of Ethiopia, 21 August 1995, Article 93; Constitution of the Republic of Mozambique, 16 November 2004, Article 72 and Constitution of the Arab Republic of Egypt, 1971, (as Amended in 2007), Article 148.

¹⁰⁶ Mugwanya, G., [Human Rights in Africa], p.355.

¹⁰⁷ Meron, T., [*Human Rights and Humanitarian Norms as Customary Law*], p.219. See the preceding sub-section on why the customary law exceptions are not appropriate to be applicable to human rights during state of emergency.

¹⁰⁸ Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.150; See generally section 2 of this article.

human rights.¹⁰⁹ Such clauses make greater inspection by supranational body possible and help to limit state power.

2.2.2. State Reports

In examining state reports, the African Commission took a completely different approach on the issues of derogation. The Commission failed to reiterate its position as expressed in individual communications. The approach of the Commission in state reports rather tends to regulate the behaviour of state parties during a declared state of emergency. To begin with the reporting guidelines, in particular, on civil and political rights adopted by the African Commission in October 1991, it requires member states to provide information on whether their constitutions or bill of rights contain provisions on derogation and the situations in which such provisions operate.¹¹⁰

During the oral examination of state reports, the Commissioners never challenged the delegates of member states by pointing out that the omission of a derogation clause from the ACHPR means the Charter's guarantees are not subject to derogation. The initial report of Zimbabwe mentions the state of emergency was renewed covering also the time when the report was submitted, but with the improvement in 1986 allowing detainees to challenge their detention under emergency legislation before courts of law.¹¹¹ But the

¹⁰⁹ Nowak, M., [*CCPR Commentary*], p.84-85. Under human rights instruments which incorporate derogation clause any recourse to measures derogating from human rights must fully comply with all the requirements for valid derogation. In addition, such measures should not offend rights which are not derogable at all times regardless of the prevailing situation.

¹¹⁰ African Commission on Human and Peoples' Rights, Guidelines for States Periodic Reports, Second Annual Activity Report of the African Commission, Annex X, (1989).

¹¹¹ Summary of Zimbabwe's First Report to the African Commission on Human and Peoples' Rights, p.11, available at, <http://www.achpr.org/states/zimbabwe/reports/1st-1986-1991/>,

Commission only inquired whether there are detainees despite the court order for their release.¹¹² With regard to state report of Gambia, the Human Rights Desk Officer of Gambia presenting the report indicated that the Gambian Constitution incorporates a derogation clause and pointed out circumstances in which such clause can be put into operation.¹¹³ It is also indicated that the prohibition against discrimination on the ground of race is one of the derogable rights.¹¹⁴ However, neither the special rapporteur dealing with the report of Gambia nor other Commissioners challenged the derogation on ground of race at all. In a similar fashion, during the oral examination of state report of Togo, the Commissioners expressed concern on whether the Charter has been rendered totally inapplicable by the emergency situation in the member state.¹¹⁵

With respect to the decades old declared state of emergency in Egypt, in its initial report the state party has sought to justify the emergency law by reference to the rules in Article 4 of the ICCPR and the jurisprudence of the HRC pursuant to this provision.¹¹⁶ Nevertheless, the African Commission

(accessed on 21 April 2013); The African Commission on Human and Peoples' Rights, Examination of State Reports, Gambia-Zimbabwe-Senegal, 12th Session, (1992), available at, <http://www1.umn.edu/humanrts/achpr/sess12-complete.htm>, (accessed on 21 April 2013).

¹¹² [The African Commission on Human and Peoples' Rights, Examination of State Reports, Gambia-Zimbabwe-Senegal].

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ The African Commission on Human and Peoples' Rights, Examination of State Reports, Nigeria – Togo, 13th Session, (1993), available at,

[http:// www1.umn.edu/humanrts/achpr/sess13-complete.htm](http://www1.umn.edu/humanrts/achpr/sess13-complete.htm), (accessed on 21 April 2013).

¹¹⁶ Arab Republic of Egypt, Ministry of Justice, General Department for International and Cultural Cooperation, The First Report of Egypt Presented to the African Committee of Human Rights held at Nigeria during 28/2/1991 to 13/3/1991, available at, <http://www.achpr.org/states/egypt/reports/1st-1986-1992/>, (accessed on 21 April 2013). The African Commission on Human and Peoples' Rights, Examination of state Reports, Egypt-

failed to challenge this by arguing that derogation is not possible under the ACHPR. The question posed to members of the delegate during the examination of the report is merely confined to whether it was necessary to have the declared state of emergency in force ten years later.¹¹⁷ More recently, in its concluding observation adopted after examining the seventh and eighth state report of Egypt the Commission simply stated that the time is ripe for Egypt to restore the full enjoyment of the African Charter's rights and freedoms.¹¹⁸

Generally, the oral examination of the state reports and concluding observations of the African Commission reveals that the Commission seeks to monitor the conduct of member states in taking measures which relieve state parties from honouring some of their obligation under the ACHPR. The effort of the Commission to monitor the action of states during state of emergency is logically sound. Nevertheless, the inconsistency of its approach in dealing with individual communications and state reports is regrettable. In the interest of consistent application of the ACHPR, it is imperative that the Commission adopt the same standard in its consideration of individual communications and states reports. In addition, it is not clear against which standard the commission seeks to measure the behaviour of state parties in state reports. This is of particular significance given the fact that the African Charter simply omits a derogation clause without either prohibiting or allowing it. That seems the reason behind why the Commission remained superficial in its

Tanzania, 11th Session, (1992), available at, <http://www1.umn.edu/humanrts/achpr/sess11-complete.htm>, (accessed on 21 April 2013).

¹¹⁷ [The African Commission on Human and Peoples' Rights, Examination of state Reports, Egypt-Tanzania].

¹¹⁸ African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the Seventh and Eighth Periodic Report of the Arab Republic of Egypt, Thirty-Seventh Ordinary Session, Banjul, Gambia, (2005), paras. 11 and 26.

examination of state reports and even failed to challenge the Constitution of Gambia which allows measures of derogation which discriminate on the ground of race. In general terms, it is unfortunate that the Commission is unable to produce consistent jurisprudence on issues of derogation which may guide state parties in this respect.

2.3. Arguments for and against the Inclusion of Derogation Clause under the African Charter

In light of the omission of a derogation clause from the African Charter, arguments are forwarded both in favour and against the inclusion of such clause under the Charter. At this juncture, it is important to emphasize that the position which seeks to justify legal standards favourable for a better protection of human and peoples' rights should be defended. To begin with arguments against the inclusion of derogation clause under the Charter, it is argued that African States may abuse the right to derogation. Viljoen puts forward two reasons. African State parties to the ICCPR generally failed to honour their obligation to report to the Secretary General of the United Nations whenever they take derogation measures.¹¹⁹

But the question that this line of thinking fails to answer is in how far it is legally sound to deny African States their customary right and/or duty to ensure the continued existence of their nation whenever there is exceptional peril which poses danger to the very existence of the nation in question. It is

¹¹⁹ This author compares the African practice with that of states in Latin America and point to the failure by African States to honour their duty to notify when they declare state of emergency under Article 4 of the ICCPR. Viljoen, F., [International Human Rights Law in Africa], p.334. See also Ssenyonjo, M., Economic, Social and Cultural Rights in the African Charter, In Ssenyonjo, M., (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights*, Martinus Nijhoff Publishers, Leiden, Boston (2012), p.97; Cowell, F., [Sovereignty and the Question of Derogation], p.152.

not disputable that the duty of international notification is an additional safeguard against abuse of the right to derogation on the part of derogating state to the detriment of individual rights in that it allows international supervision. But this requirement is not a substantive condition; *a conditio sine qua non* to the exercise of the right to derogation. Arguably, as it stands now under international human rights instruments which envisage the right to derogation, failure to observe this requirement would not lead to the invalidity of the measures taken entailing temporary suspension of individual rights. In *Landinelli Silva v. Uruguay* the HRC is clear in its position on this issue when it observes “the substantive right to take derogatory measures may not depend on a formal notification being made in accordance with Article 4 paragraph 3 of the ICCPR.¹²⁰ Therefore, it is questionable whether the failure to honour the duty to notify the international community could justify the prohibition of derogation under the African Charter’s human rights system.

Secondly, it is also submitted that African States often resort to declare state of emergency when confronted with threats.¹²¹ Therefore according to this line of thinking African States should be denied the right to derogate from their obligation under the Charter.¹²² This is rather an argument of a political nature and merits little or no legal value.

Arguments in favour of maintaining the absence of a derogation clause under the ACHPR seems to rest on the theoretical assumption that the omission of derogation provision reduces the power of states to restrict human and peoples’ rights and ensures better protection of such rights. In reality that is not the case. On the one hand, the omission of a derogation clause is arguably more prone to abuse than when such clause exists. Despite the position the

¹²⁰ [*Landinelli Silva et al. v. Uruguay*], para. 8.3.

¹²¹ *Ibid.* Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.161.

¹²² Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.161.

African Commission took in individual communications, there is nothing under the ACHPR which stops state parties from proclaiming state of emergency and thereby derogating from their obligation under the Charter. As Murray correctly observes, such omission “may actually provide states with more room by failing to set any standard at all, allowing states to act as they please.”¹²³

On the other hand, the construction that derogation measures are prohibited under the ACHPR cannot be, in any way, taken to enhance the protection of human and peoples’ rights. If the member states of the African Charter know that the African Commission would not accept any defence of state of exception to derogate from their obligation under the Charter, they are not going to resort to the Commission for guidance should they face crisis situation which would trigger the operation of derogation provision under

¹²³ Murray, R., [*The African Commission on Human and Peoples’ Rights and International Law*], p.123. As far back as 1983 Umozurike notes “The question is not whether any such suspensions are permissible, but when and to what extent. Declarations of emergency for military, political, or even economic reasons are thus discretionary-tempered, unless stated otherwise, only by states’ duty “to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter.” Umozurike, U., [*The African Charter on Human and Peoples’ Rights*], p.910. See also Mutua, M., *The African Human Rights System: A Critical Evaluation*, p.8. But, like the African Commission there are authors who point out that states parties to the ACHPR should live up to their commitment even during state of emergency by emphasizing the omission of derogation clause from the Charter and without providing any reasoning why this is the case. See, Scheinin, M., and Vermeulen, M., *Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fights against Terrorism*, *European University Institute Working Papers*, (2010), p.21; Yerima, T., *Comparative Evaluation of the Challenges of African Regional Human Rights Courts*, *Journal of Politics and Law*, Vol. 4, No. 2, (2011), p.123.

human rights treaties expressly allowing derogation.¹²⁴ This would undoubtedly weaken the Charter's system of protection in times of crisis.

Other authors also share the view that the omission of a derogation clause puts human and peoples' rights in a dangerous situation.¹²⁵ This is also implicit in the position held by the UN Sub-Commission on Human Rights which invites all states whose legislation, notably constitutional laws or bill of rights, does not incorporate derogation provision to adopt such provision in light of international standards with a view to ensuring the legality of declaration of a state of emergency.¹²⁶

A derogation provision which conforms to internationally accepted standards enhances the protection of human and peoples' rights by regulating the behaviour of derogating state in its way to proclaim state of emergency and in the course of such emergency when declared.¹²⁷ Such provision is not additional source of power for government but an important limitation to

¹²⁴ Cowell, F., [Sovereignty and the Question of Derogation], p.139.

¹²⁵ Sermet sees such omission "renders exceptional circumstances common place leading to their improper perpetuation." Likewise Mugwanya argues the absence of derogation provision allows states invoke powers outside the constitutional order which can be easily abused given the fact that such powers are not subject to constitutional and judicial checks and balance. Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.154; Mugwanya, G., [Human Rights in Africa], p.355.

¹²⁶ United Nations High Commission for Human Rights, The Sub-Commission on Prevention of Discrimination and Protection of Minorities, Question of Human Rights and State of Emergency, Sub-Commission Resolution 1995/33, 35th Session, 24 August 1995, para. 4 available at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/91ee27f8de08901380256665004e8ede?Opendocument>, (accessed on 10 June 2013).

¹²⁷ Mugwanya, G., [Human Rights in Africa], pp.355-356.

governmental power in a sense of protection of individual rights by curtailing the power of the government in situations when they are most needed.¹²⁸

It should also be noted that the notion of derogation is based on the principle that the exercise of certain rights may be limited in special circumstances owing to the negative consequence that the exercise of such rights may bring to the protection of human rights of the whole society.¹²⁹ Similarly, the fact that rights cannot be exercised to the detriment of the rights of others is suggested to a certain extent under other provisions other than derogation provisions of Article 5(1) of the ICCPR and Article 17 of the ECHR. Therefore, a limited derogation measures for instance from the right to liberty would ensure the right to liberty for the whole society in the long run.¹³⁰ In this way derogation provision helps maintain human rights in times of crisis and promotes the protection of human and peoples' rights.

By pointing to Article 53 of the Vienna Convention on the Law of Treaties, it has been argued that a derogation provision is generally contrary to *jus cogens*.¹³¹ This is not convincing for maintaining the omission of a derogation clause under the ACHPR because it is possible to provide for the catalogue of non-derogable rights in order to avoid offence to *jus cogens*. It is evident under human rights instruments incorporating a derogation provision that the

¹²⁸ Id., p.356; Cowell, F., [Sovereignty and the Question of Derogation], p.153.

¹²⁹ Cowell, F., [Sovereignty and the Question of Derogation], p.139.

¹³⁰ Ibid.

¹³¹ Sermet, L., [The Absence of a Derogation Clause from the African Charter], pp.159-160. Article 53 of the VCLT reads "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

catalogue of non-derogable rights goes far beyond *jus cogens*.¹³² And this is even extended through the jurisprudence of human rights monitoring bodies.¹³³ In addition, the principle of consistency ensures that the power to derogate does not extend to states' other obligations under international law let alone those human rights norms which are of customary nature, especially when they have attained the status of *jus cogens*.¹³⁴

Another important reason for arguing in favour of the inclusion of a derogation clause under the human rights system the African Charter creates is due to the apparent incompatibility between the ICCPR to which almost all African states are parties and the ACHPR.¹³⁵ Under the ICCPR states are allowed to keep their domestic emergency provisions and derogate under Article 4. This has more than theoretical relevance because African states parties both to the ICCPR and ACHPR may, as Egypt has done, invoke the provisions of Article 4 of the ICCPR before the African Commission when confronted with serious crisis situation where the life of the nation in question is at stake. In such circumstances Article 30(4) of the VCLT which tries to regulate the relationship between different treaties dealing with the same subject matter does not seem to offer way out. As Sermet argues, the fact that these instruments deal with the protection of human person rules out the application of Article 30(4) of the VCLT.¹³⁶

¹³² See [International Covenant on Civil and Political Rights], Article 4(2); [European Convention for the Protection of Human Rights and Fundamental Freedoms], Article 27(2).

¹³³ See for instance, [UN Human Rights Committee (HRC), General Comment No. 29], paras. 7-16.

¹³⁴ See the preceding section.

¹³⁵ Currently 51 African States are parties to the ICCPR. See, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en, (accessed on 18 June 13).

¹³⁶ Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.144. The fact that all rules which do apply to ordinary treaties do not necessarily apply to human rights

There is no other rule of international law which governs the hierarchy between human rights treaties. In the absence of such rule, it is not possible to argue that as a universal human rights treaty the ICCPR does have precedence over other regional human rights instruments such as the African Charter or vice versa. Therefore, as noted in this very section preference should be given to an instrument which is more protective. In such a situation, Article 5(2) of the ICCPR is already interesting. This provision prohibits restriction of or derogation from any of the human rights which member states recognize outside the ICCPR on the ground that the latter recognizes such rights only to a lesser extent. Therefore, the question that must be addressed is whether the ACHPR is more protective during state of emergency than the ICCPR. Unfortunately this is not the case and as established above nothing stops member states of the Charter from derogating from their obligation to protect human and peoples' rights should there arises extra ordinary situation which risk the life of the nation.

This in effect means the Charter cannot serve to restrain any abuse on the part of a state derogating from its obligation and may be ignored in a situation where the Charter's protection is most needed. Thus, it cannot be said the Charter protects individual rights to a greater extent than the ICCPR does during a state of emergency. It is imperative that a comprehensive derogation clause at least in the form of jurisprudential declaration be included within the Charter's human rights protection system so as to hold member states

treaties is indicated under Article 60 of the VCLT. Paragraph 5 of this particular provision indicates that the rules pertaining to the termination or suspension of the operation of a treaty as a consequence of its breach do not apply to treaties on the protection human person. Arguably the same is true when it comes to the rule which regulates the application of successive human rights instruments when a need arise to determine which should be picked against the other.

answerable for their abusive conduct both before proclaiming a state of emergency and in the course of proclaimed state of emergency.

Moreover, free consent as a basis for treaty making is now universally recognized.¹³⁷ And it is implied in the concept of state sovereignty that states are bound by certain rule or prohibition only when they expressly consented to it. From this it naturally follows that whatever sovereign states have not expressly agreed to give up is not given up. In the absence of clear indication under the Charter, why the Commission should not take this in to account and determine which rights under the Charter are derogable and which are not?

Finally, it is worth to note that the absence of a derogation clause under the African Charter stands in sharp contrast with the African constitutional practice. Almost all constitutions of African states incorporate derogation provision and such provisions are often consulted to proclaim state of emergency and take measures involving the suspension of human and peoples' rights.¹³⁸ Must not this be considered as subsequent practice of African states in interpreting the omission of derogation provision under the ACHPR? Should the African Commission not consider this in dealing with both individual communications and state reports? Article 31 paragraph 3(b) of the VCLT indicates the possibility to interpret a treaty whose terms are not clear in light of state practice. This particular provision speaks of any subsequent practice of member states to a given treaty which establishes their agreement relating to the application of such treaty. Therefore, how can one accept the position of the African Commission with respect to individual communications rejecting any defence of state of emergency altogether?

¹³⁷ See generally, [Vienna Convention on the Law of Treaties].

¹³⁸ Only very recently Egypt and Nigeria imposed state of emergency on 28 January 2013 and 14 May 2013 respectively. The Constitutions of both countries incorporate derogation provision.

More importantly, the African Commission has a legal mandate to draw, among others things, upon international human rights law to which state parties to the ACHPR are members, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law and general principles of law recognized by African States in its task of interpreting the Charter.¹³⁹ Here, it is interesting to look at how the Commission approached the issues of missing rights under the Charter such as the right to housing in accordance with its mandate to draw upon other international human rights law. In *Social and Economic Rights Centre and Another v. Nigeria*, the Commission pointed to Articles 60 and 61 for the interpretation of the African Charter and continued to argue that the Charter guarantees the right to housing despite the fact that this right is not expressly recognized by the Charter.¹⁴⁰ However, the Commission never employed this approach in the context of derogation. If African State confronted with real emergency situation dangerous enough to risk the life of the nation takes measures derogating from its obligation under the Charter in compliance with notably the ICCPR, why does that not constitute a valid legal defence before the Commission? In the interest of the consistent application of the Charter the Commission should adopt the same approach with respect to derogation.

¹³⁹ [African Charter on Human and Peoples' Rights], Articles 60 and 61.

¹⁴⁰ *Social and Economic Rights Centre and Another v. Nigeria*, Communication No. 155/96 (2001) AHRLR 60, (ACHPR 2001), paras. 49 and 60.

3. *De Lege Ferenda*: Inclusion of Derogation Clause under the African Human Rights System

3.1. Jurisprudential Declaration

3.1.1. The African Commission: Drawing upon International Human Rights Law

The ACHPR vests the African Commission with promotional, protective and interpretive functions.¹⁴¹ The Commission's protective and interpretive mandates offer it a legal authority to introduce a derogation clause by way of jurisprudential declaration.¹⁴² Within its protective mandate the African Commission is generally enjoined to ensure the protection of human and peoples' rights under the conditions laid down by the ACHPR.¹⁴³ It examines state reports and considers inter-state and individual communications of alleged violation of human and peoples' rights.¹⁴⁴ In doing so, the Commission in one or another way necessarily engages itself in the task of interpreting the Charter. Under Article 45(3) the Commission has the power to interpret the ACHPR at the request of a state party, organ of the African Union (AU) or an African Organization recognized by the AU.

In interpreting and applying the African Charter, the Commission is instructed to draw upon international law on human and peoples' rights. These are norms of international human rights law which are binding at least on most of

¹⁴¹[African Charter on Human and Peoples' Rights], Article 45.

¹⁴² The idea of jurisprudential declaration is first suggested by Sermet. He pursued this argument by pointing to the General Comment No. 29 of the HRC on States of Emergency as evidence showing that the interpretation of Article 4 of the ICCPR "could not be fixed by its texts." Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.155.

¹⁴³ [African Charter on Human and Peoples' Rights], Article 45(2).

¹⁴⁴ *Id.*, Articles 62, 47 and 55.

the African State parties to the ACHPR either as a matter of customary or treaty law obligations. More specifically these include the Charter of the UN, the Universal Declaration of Human Rights (UDHR), instruments adopted within the framework of the UN which lay down rules expressly recognized by member states of the AU mainly the two UN human rights treaties; the ICCPR and the ICESCR, as well as African practices consistent with international norms on human and peoples' rights and customs generally accepted as law.¹⁴⁵ This calls for contextual interpretation of the Charter in light of the relevant rules of international human rights law applicable to member states of the African Charter.¹⁴⁶

So the African Commission has a very wide discretion under Article 60 and 61 of the ACHPR to look outside the Charter at the derogation provision of importantly the ICCPR and the jurisprudence of the Human Rights Committee to determine the circumstances in which member states of the ACHPR can declare state of emergency and take measures derogating from their obligation under the Charter to prevent abuse of governmental power.

With these provisions, the African Charter is said to offer sufficient flexibility without the need for amendment whenever a need arise for adjustment and to correct the flaws of the Charter.¹⁴⁷ While it is not disputable that the Charter creates a flexible system, pursuing this argument to the extent that the provisions of Articles 60 and 61 render the amendment of the Charter

¹⁴⁵ [African Charter on Human and Peoples' Rights], Article 60 and 61.

¹⁴⁶ This technique of interpretation is mentioned in the Vienna Convention on the Law of Treaties. Therefore a given treaty can be interpreted contextually having regard to "any relevant rules of international law applicable in relation between the parties. Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations, Treaty Series, Vol. 1155, p.33, Article 31(3)(c).

¹⁴⁷ Heyns, Ch., The African Regional Human Rights System: In Need of Reform? *African Human Rights Law Journal*, Vol. 2, (2001), p.157.

unnecessary is less convincing simply because the jurisprudence of the Commission does not offer the same normative value as amending the Charter itself. It is true that as the ACHPR's monitoring body the African Commission clarifies the content of the Charter through its jurisprudence on individual complaints, resolutions and concluding observations. These are subsidiary means of determining norms of human and peoples' rights and are not formal source of binding rules. In addition, treaty interpretation comes into play only whenever the meaning of the treaty in question, the African Charter in this case, is disputed. Adopting additional protocol to the Charter on state of emergency, however, means having the rule out there always to guide states on their way to proclaim state of emergency and take derogation measures. Further, the question of accessibility is worth considering. The jurisprudence of the Commission is not as accessible as the amending protocol. So taking Articles 60 and 61 of the ACHPR to argue that in the presence of these provisions amendment of the Charter is not important is not without serious flaws. However, it is still an important way out up until such time when the amendment of the Charter is secured and enters into force. Even when this is the case, it serves vital role with respect to member states of the Charter which do not ratify such amendment protocol.

Scholars emphasize the importance of looking beyond the Charter to interpret it as decisive to secure the protection of human and peoples' rights during state of emergency as the absence of derogation provision undermined the Charter's protection.¹⁴⁸ The African Commission should reverse its position with respect to its interpretation of the absence of derogation provision relating to individual communications. It is necessary that the Commission carefully describe situations which would trigger the operation of derogation

¹⁴⁸ Gittleman, R., *The African Charter on Human and Peoples' Rights: A Legal Analysis*, *Virginia Journal of International Law*, Vol. 22, No. 4, (1981-1982), p.709.

measures, provide for the catalogue of non-derogable rights under the ACHPR that states parties could not derogate from in any case and prescribe the conditions thereof with respect to other rights from which derogation is permissible. In this respect there is no doubt that the Commission hugely benefits from the jurisprudence of other human rights monitoring bodies such as the Human Rights Committee and the (now defunct) European Commission and the European Court of Human Rights which have considerable reputation.

Some authors doubt whether it is possible, in the absence of derogation provision in the ACHPR and in light of the African constitutional diversity, to give a list of rights non-derogable in all situations and everywhere in Africa.¹⁴⁹ However, fifty one of the African States are now parties to the ICCPR. The constitutions or bill of rights of these states and thus their terms on derogation are expected to conform to that of the ICCPR. Therefore, the African Commission should have no difficulty in determining circumstances in which state parties can take derogation measures and in identifying norms which they should always comply with despite the existence of validly declared state of emergency. The same conclusion also applies with respect to the African Court on Human and Peoples' Rights.

At this juncture, it is important to look into the normative content of such jurisprudential declaration. Here one must distinguish between the interpretations given by the Commission at the request of a state party, organ of the AU or an African organization from those given with respect to state reports, inter-state complaints or individual communications. The interpretations of the Commission under Article 45(3) of the ACHPR, those which are given at the request of the above mentioned entities, have no

¹⁴⁹ Sermet, L., [The Absence of a Derogation Clause from the African Charter], p.156.

binding force at all. Even though member states cannot simply set it aside, interpretations which are given under Article 45(3) should not go beyond recommendation.

However, it becomes different with respect to declaration of a derogation clause when this takes place within the competence of the Commission in dealing with state reports, inter-state complaints or individual communications. The interpretation of the Commission concerning the consideration of communications that determine substantive or procedural rule of law, and thus jurisprudential declaration of a derogation clause in this context, is in general opposable to the member states involved since the interpretations given in this case has to do with the monitoring of the implementation of the Charter.¹⁵⁰ In other words, the views of the Commission has more weight even though it is not strictly speaking formally binding in itself when it comes to consideration of communications since as already indicated above the Commission's views are not source of binding rules.

However, these views constitute authoritative interpretation of the African Charter. This is implied in member states consent to be bound by the ACHPR and to accept the authority of the Commission.¹⁵¹ Thus, member states of the Charter are required to comply with the Commission's position in good faith which is now a well-established principle of international law.¹⁵² Otherwise,

¹⁵⁰ Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.570.

¹⁵¹ Chinkin, C., Sources, in Moeckli, D., Shah, S. & Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, (2010), 119.

¹⁵² In its General Comment No. 33 on the obligation of member states of the Optional Protocol to the ICCPR the HRC has correctly stated that it is imperative that member states cooperate with its views in good faith and communicate to it the progress thereof by pointing to the Committee's role both under the Covenant and Optional Protocol and the principle of good faith in performing treaty obligation. UN Human Rights Committee (HRC), General

there is no point in vesting the Commission with the mandate to ensure the protection of human and peoples' rights. Therefore, the basis from which the legal authority of the interpretation of the Commission derives regarding communications is Article 45(2). Furthermore, the Commission's views with respect to individual communications manifest some characteristics of judicial determination since the Commission's decision making procedure is quasi-judicial even though in most cases the jurisprudence of human rights monitoring bodies in general and the African Commission in particular lack adequate reasoning comparable to judicial organ.¹⁵³ In short, the interpretations of the Commission involving the declaration of derogation clause which relate to state reports and individual and inter-state communications should be given more weight than its views under Article 45(3) of the Charter.

Once the African Commission, and this is also applicable to the African Court, is able to declare a derogation clause which is opposable to the behaviour of member states of the ACHPR in conformity with the minimum threshold of protection set out under Article 4 of the ICCPR and as further clarified by the jurisprudence of its HRC the next question is in how far this is applicable invariably to all since there are still fraction of African States not parties to the ICCPR and thus are not bound by the standard set out by it. In principle a given treaty does not create obligations or rights for a third state

Comment No. 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 5 November 2008, CCPR/C/GC/33, para. 13-16. Schmidt, M., United Nations, in Moeckli, D., Shah, S. & Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, United Kingdom, (2010), 413.

¹⁵³ For instance the HRC is of the opinion that its views "exhibit some important characteristics of a judicial decision since they are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions." [General Comment No. 33], paragraph 11.

unless it consented to be bound by it.¹⁵⁴ Thus, jurisprudential declaration of a derogation clause in accordance with Article 4 of the ICCPR may not bind member states of the ACHPR not parties to the ICCPR. However this rule is not without exception. The rules of Article 38 of the VCLT indicate that treaty provisions bind third states if they recognize customary rules of international law.¹⁵⁵ The question is then whether the rules of Article 4 of the ICCPR are reflections of customary international human rights law. Even though this is not the case by the time the Covenant is drafted, it is arguable that the rules of Article 4 have attained the status of customary international law over the years since it entered into force. States pay lip service to this provision in general and this is evident from the notification communicated to the Secretary General of the United Nations. In addition the list of non-derogable rights under paragraph 2 of Article 4 includes fundamental human rights which are peremptory norms of international law which bind all states invariably. Furthermore as Gittleman argues “it is in the interest of consistent judicial determination or application of the ACHPR that the Commission maintain the same standard of reviewability to states not parties to the ICCPR.”¹⁵⁶

3.1.2. The African Court on Human and Peoples’ Rights

The African Court on Human and Peoples’ Rights with a possible merger with the African Court of Justice in the future¹⁵⁷ is another ACHPR’s monitoring body, perhaps more important than the African Commission,

¹⁵⁴ [Vienna Convention on the Law of Treaties], Article 34.

¹⁵⁵ *Ibid*, Article 38.

¹⁵⁶ Gittleman, R., [The African Charter on Human and Peoples’ Rights], p.707.

¹⁵⁷ See, African Union, Assembly of Heads of State and Government, Decision on the Merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, 5th Ordinary Session, 4-5 July 2005, Assembly/AU/Dec.83 (V); Protocol on the Statute of the African Court of Justice and Human Rights, 1 May 2008.

potentially able to make jurisprudential declaration of derogation clause in to the African human rights system. This Court established by the Protocol to the ACHPR on the establishment of an African Court on Human and Peoples' Rights is meant to complement the protection mandate of the Commission.¹⁵⁸ It has both advisory and contentious jurisdiction which should enable it to introduce a derogation clause to the system.

In its advisory jurisdiction, the Court may deliver its opinion on any legal issue mainly relating to the Charter but also with respect to any other relevant human rights instrument when requested by a member state of the AU, the AU itself, any of its organs or any African Organization recognized by the AU except where the Commission is being seized of the issue.¹⁵⁹ So the Court can declare a derogation clause at the request of any of the foregoing organs. This opinion is not formally binding not because this is said to be the case somewhere in the Protocol but it follows from the very nature of advisory opinions. However, there is no doubt that the Court's opinions have more legal authority than that of the Commission given that the Court is a judicial body and thus more authoritative and persuasive. Therefore, the Court's advisory jurisdiction is important to develop a regional derogation clause for Africa.¹⁶⁰ As already mentioned, the Court should decline considering any matter which is being examined by the Commission. This is understood to refer to matters which are on the table of the Commission by the time they are brought before the Court as opposed to those upon which the Commission

¹⁵⁸ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, Ouagadougou, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Article 2.

¹⁵⁹ [Protocol to the African Charter on Human and Peoples' Rights], Article 4(1).

¹⁶⁰ Udombana, N., *Toward the African Court on Human and Peoples' Rights: Better Late than Never*, *Yale Human Rights and Development L. J.*, Vol. 3:45, (2000), p.93.

had pronounced itself.¹⁶¹ Accordingly, the Court can declare a derogation clause in its advisory jurisdiction even when this constitutes a matter previously dealt with by the Commission.

A question may be asked whether the Court can review the compatibility of domestic constitutional provisions on the state of emergency in light of international standards. While there is no express provision to this effect, the language of Article 4(1) of the Protocol does not seem to exclude this possibility. As Muigai observes, the advisory jurisdiction of the Court is broad enough so as to encompass the power of reviewing not only domestic legislations but also regional initiatives.¹⁶² Similarly Mugwanya argues Article 4(1) with the use of the word ‘may’ appears to cover the authority to review domestic legislations for their compatibility against international standards.¹⁶³

The Court’s contentious jurisdiction is another important tool available to it to jurisprudentially declare a derogation clause. The Court’s jurisdiction in this respect covers all cases and disputes relating to the interpretation and application of the ACHPR and also any other relevant human rights instrument.¹⁶⁴ This is where the Court’s finding is formally binding.

In terms of source of law, it is evident from the provisions of Article 3 of the Protocol that the Court is not limited to the African Charter. Unlike the

¹⁶¹ Naldi, G., The African Union and the Regional Human Rights System, in Evans, M., and Murray, R., (eds.) *The African Charter on Human and Peoples’ Rights: The System in Practice 1986-2006*, (2nd ed.), Cambridge University Press, United Kingdom, (2008), p.43.

¹⁶² Muigai, G., From the African Court on Human and Peoples’ Rights to the African Court of Justice and Human Rights, in Ssenyonjo, M., (ed.), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples’ Rights*, Martinus Nijhoff Publishers, Leiden, Boston (2012), p.275.

¹⁶³ Mugwanya, G., [*Human Rights in Africa*], p.327.

¹⁶⁴ [Protocol to the African Charter on Human and Peoples’ Rights], Article 3.

Commission which is merely mandated to draw upon international human rights law under Article 60 and 61 of the Charter, the jurisdiction of the Court extends to the interpretation and application of the Charter and any other relevant human rights instrument.¹⁶⁵ More importantly, Article 7 indicates that the Court should not limit itself to the ACHPR when it envisages that “the Court shall apply the provisions of the Charter and any other relevant human rights ratified by the states involved” in a particular issue before the Court.¹⁶⁶ This means the Court can decide in accordance with obligations flowing from international human rights instruments provided that such instruments are ratified by the states involved in the issue before it.¹⁶⁷ The liberality the Protocol offers in this respect can be seen from the point of the two other regional human rights systems of the European and Americas. The material jurisdiction, *ratione materiae*, of both the European and Inter-American Human Rights Courts are limited to matters relating to the interpretation and application of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols there to and American Convention on Human Rights respectively.¹⁶⁸

¹⁶⁵ Id., Article 3. The instruments referred to by the Protocol are mentioned both in the Preamble of the African Charter and Articles 60 and 61 but only as a source of inspiration by the African Commission.

¹⁶⁶ Id., Article 7.

¹⁶⁷ Viljoen, F., Communications under the African Charter: Procedure and Admissibility, in Evans, M., and Murray, R., (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006*, (2nd ed.), Cambridge University Press, United Kingdom, (2008), p.132; Udombana, N., [Toward the African Court on Human and Peoples' Rights], p.90; Ouguergouz, F., [*The African Charter on Human and Peoples' Rights*], p.714; Eno, R., The Jurisdiction of the African Court on Human and Peoples' Rights, *African Human Rights Law Journal*, Vol. 2, (2002), p.226.

¹⁶⁸ [European Convention for the Protection of Human Rights and Fundamental Freedoms], Articles 32, 33 and 34; [American Convention on Human Rights], Article 62(1).

Therefore, the African Court on Human and Peoples' Rights unlike its regional counterparts can directly apply the provisions of Article 4 of the ICCPR to which almost all African States are parties. This is also much more solid legal basis compared to Articles 60 and 61 of the Charter to put the Court in a better position to introduce a regional derogation clause by way of jurisprudence. This enhances the protection of human and peoples' rights during state of emergency as it makes possible to hold African States accountable before the Court pursuant to the terms of Article 4 of the ICCPR for violation of the Charter's protection for lack of safeguard it offers during such time.

3.2. Amendment to the African Charter: Adoption of Additional Protocol

The last option for introducing a regional derogation clause in to the African human rights system is by way of amendment to the African Charter. Treaty amendment is generally regulated by the Vienna Convention on the Law of Treaties (VCLT). The wording of Article 40 paragraph 1 of this Convention recognizes that multilateral treaties like the African Charter may, as they usually do, envisage for amendment mechanisms. When it comes to the ACHPR amendments to it is possible in accordance with the provisions of its Article 68. This can be set in motion once request is made by a member state of the Charter and is eligible for adoption upon the approval by simple majority of member states.¹⁶⁹ Although treaty amendment is always not an easy task since negotiation and agreement on the proposed amendment is part

¹⁶⁹ [African Charter on Human and Peoples' Rights], Article 68. Once member states are informed of the proposal for amendment and the African Commission pronounced itself on it the Assembly of Heads of States and Governments proceeds with its consideration.

of this process,¹⁷⁰ Article 68 of the Charter only requires simple majority for the approval of the proposal for amendment which is less stringent requirement in any case. In addition, since the norms and jurisprudences of other human rights treaty regimes, notably that of the ICCPR and ECHR are now well-developed it should be less difficult than it would be to agree on the content of such amendment protocol on derogation. The drafting of the amendment protocol in this respect can hugely benefit from these norms and jurisprudences.

Here the African Commission is given the chance to reflect on the proposed amendment. The language of Article 68 seems to suggest that the opinion of the Commission pertains to whether the proposed amendment is necessary. However, nothing in the provision prevents it from reflecting on the content of the proposed amendment. This offers the possibility to ensure that the proposed amendment conforms to international norms on state of emergency.

4. Conclusion

Derogation clauses are inserted in to human rights instruments with a view to limit the power of states to suspend human rights during state of emergency when the life of the nation is at stake. This is evident from the routine and stringent requirements built around the prerogative of states in human rights treaties which incorporate derogation clauses.

¹⁷⁰ Cognizant of the problem associated in particular with amendment of multilateral treaties, Antony Aust observes “(...) the process of agreeing on amendments and then bringing them into force can be nearly as difficult as negotiating and bringing into force the original treaty, and sometimes even more troublesome.” Aust, A., *Amendment of Treaties*, in Orakhelashvili, A. and Williams, S., (eds.) *Forty Years of the Vienna Convention on the Law of Treaties*, MPG Books Group, Great Britain, (2010), p.41. Thus as already indicated, the importance of judicial declaration of derogation clause lies in the fact that such declaration can potentially provide immediate way out until the amendment to the Charter is realized.

The African Charter on Human and Peoples' Rights omits a derogation clause. This has been a source of controversy among international human rights lawyers given the fact that the Charter neither prohibits nor allows derogation in times of emergency. The problem is magnified since almost all African States are parties to the International Covenant on Civil and Political Rights which incorporates express provision on derogation. In addition it is a common constitutional practice of African States to include such clause in their constitutions and invoke it whenever they face emergency situation. This puts the Charter at odd with such African constitutional practice.

The position of the African Commission is not entirely consistent. The Commission rejected all defence of derogation on the ground of state of emergency but only with respect to individual communications. Unfortunately the jurisprudences of the Commission lack any meaningful reasoning as to why derogation is not possible under the African Charter. The Commission simply point out the absence of a derogation clause under the Charter and reached a conclusion that this constitutes prohibition of derogation in a number of instances.

Apart from lacking strong legal justification this position of the Commission puts human and peoples' rights in a precarious situation in times when states face emergency situation. This is not only because it leads member states to resort to customary means of suspending the operation of treaties which lack the necessary power limiting requirements as derogation clauses do and thus potentially prone to abuse, but also turns the ACHPR to a suicidal charter unable to play a restraining function due to interpretational inflexibility. Thus, the article concludes omission of derogation clause from the ACHPR is simply a lacuna which is unfavourable to the protection of human and peoples' rights during state of emergency.

When it comes to examination of state reports, the African Commission failed to confirm its stance with respect to individual communications. The oral examinations of states reports and the resulting concluding observations of the Commission indicate that it seeks to regulate the behaviour of states during state of emergency. Even though this is important and should also be the case with respect to individual communications, the Commission should first make clear a legal standard against which it can measure the behaviour of states. The importance of introducing such standard lies in the fact that the present legal protection of the Charter is inadequate during state of emergency. Therefore, the Commission should look at the rules of other international human rights instruments on derogation in the interest of greater protection of human and peoples' rights during such time as it does with respect to the Charter's claw-back clauses.

Equally the African Court on Human and Peoples' Rights can play an essential role in introducing such standard of measure since the Protocol establishing the Court allows it to directly apply relevant international human rights law to a dispute before it on the condition that such instrument is ratified by parties to a dispute before it.