STATE OF EMERGENCY AND HUMAN RIGHTS UNDER THE 1995 ETHIOPIAN CONSTITUTION

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Introduction

The universal and transcendental nature attributed to human rights norms has been the object of great controversies amongst human rights lawyers, academicians and policymakers.[1] One of the controversies involves the question of the derogability of human rights norms in situations of emergency.

In their day-to-day life, societies face exigencies that necessitate the derogation or suspension of human rights. In fact, judging by what has happened across the globe over recent decades, it can be safely said that exigencies and tensions are almost inevitable in the experience of any country. According to a Report prepared by the International Commission of Jurists in 1983, "at any given time in recent history a considerable part of humanity has been living under a state of emergency."[2]

The 1997 Annual Report of the UN Special Rapporteur on States of Emergency noted that "[i]f the list of countries that have proclaimed, extended

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[1] There is a veritable mass of literature on states of emergency. For some of the most comprehensive scholarly works on the subject, *see* Fitzpatrick: Human Rights, supra note 1; ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATE OF EXCEPTION WITH SPECIAL REFERENCE TO THE *TRAVAUX PREPARATOIRES* AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS (1998) [hereinafter Svensson-McCarthy: Human Rights]; JAMIE ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 1(1992) [hereinafter Oraa: Human Rights]; INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS, 413(Geneva, 1983) [hereinafter ICJ: States of Emergency].

[2] ICJ: States of Emergency, *surpa* note 1, at 413.

or lifted a state of emergency during the last 10 years ... were transposed onto a world map it would be disturbing to note that it would cover almost three quarters of the Earth's surface, and that no region would be left out."[3] Similarly, in his Tenth Annual Report, the Special Rapporteur states that:

> [A]t the very time these normative achievements [the generation of human rights norms] came into effect, the world found itself in the grip of what amounted to an institutional epidemic of states of emergency, which, like a contagious disease infecting the democratic foundations of many societies, were spreading to countries in virtually all continents, particularly from the 1970s onwards.[4]

In 2001, the United Kingdom, following the 9/11 terrorist attacks on the United States, declared a state of emergency and suspended the application of Article 5 of the ECHR, which ensures the right to liberty and security of individuals.[5] Likewise, as recently as September 2005, the USA was forced to declare a state of emergency to address the aftermath of the devastating destruction caused by hurricanes Katrina and Rita in New Orleans and Texas, respectively. What is more, some countries like Israel live in a perpetual state of emergency.[6]

By definition, state of emergency challenges the very foundations and threatens the existence of a nation.[7] When exigencies occur, international human rights instruments and domestic legislation give States a limited "grace period" of exemption from their obligations to respect and ensure human rights. Thus, in such unfortunate circumstances the State is allowed to take

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[3] UN Doc. E/CN.4/Sub.2/1995/20, 5 at para. 11.

[4] UN Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities Forty-ninth session Agenda item 9(a), The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency, Tenth Annual Report, E/CN.4/Sub.2/1997/19 (June 23, 1997).

[5] Virginia Helen Henning, *Anti-Terrorism, Crime and Security Act 2001: Has The United Kingdom Made a Valid Derogation From The European Convention on Human Rights?* 17 AM. U. INT'L L. REV., 1263, 1264-1265(2002); UN Doc. E/CN.4/Sub.2/2003/39, para.8.

[6] Adam Mizock, The *Legality of the Fifty-Two Years State of Emergency in Israel*, 7 U.C. DAVIS J. INT'L L. & POL'Y, 223, 225 (2001)[hereinafter Mizock: State of Emergency in Israel]. *See also* UN Doc. E/CN.4/2003/NGO/233, 1 at para. 1; Gross et al argue that "[a] state of emergency has become the norm, the ordinary state of affairs, in Northern Ireland." Oren Gross et al, To Know Where We Are Going, We Need to Know Where We Are: Revisiting States of Emergency in HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY 79, 95(Angela Hegarty et al., eds., 1999) [hereinafter Gross et al: Revisiting State of Emergency].

[7] The Report by the International Commission of Jurists likened states of emergency to the notion of self-defense in penal law. *See* ICJ: States of Emergency, *supra* note 3, at 413.

limited measures to meet the demands of states of emergency as and when they occur.[8] Such measures may, *inter alia*, entail restrictions or suspension of some human rights and freedoms for a limited time.[9]

In a bid to arrest potential abuses, both international and regional human rights instruments as well as domestic legislation ostensibly provide for the situations that warrant declaration of a state of emergency, the impact of emergencies on rights and freedoms as well as procedural requirements to declare a state of emergency.[10] They also expressly outlaw any derogation from what are commonly known as non-derogable rights.

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[8] Different statespersons, political philosophers and scholars have emphasized the right of a State to use emergency powers in order to save itself from destruction. Thomas Jefferson thought that "[t]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and those who are enjoying them with us; thus absurdly sacrificing the end to the means." *See,* THE WRITINGS OF THOMAS JEFFERSON 279-280(P. L. Ford, ed., 1893). Machiavelli maintained that "a strict observance of established laws [at all times] will expose her [the Republic] to ruin." Discourses, XXXIV as quoted in Venkat Iyer, *States of Emergency-Moderating their Effects on Human Rights*, 22 DALHOUSIE L.J. 125, 128 &189(Fall 1999) [hereinafter Iyer: States of Emergency]; Clinton Rossiter referred *de jure* states of emergency as "constitutional dictatorship" suggesting that in certain instances even democratic governments have to make use of emergency powers in order to be able to return to their regular constitutional order. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP- CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, 5 (1948) as quoted in Svensson-McCarthy: Human Rights, *supra* note 3 at 2; Margaret Thatcher is quoted as saying: "To beat off your enemy in a war, you have to suspend some of your civil liberties for a time. Yes, some of those measures do restrict freedom. But those who choose to live by the bomb and the gun, and those who support them, can't in all circumstances be accorded exactly the same rights as everyone else. We do sometimes have to sacrifice a little of the freedom we cherish in order to defend ourselves from those whose aim is to destroy that freedom altogether." *as quoted* in Oren Gross, "*Once More unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 501 n.6 (1998) [hereinafter Gross: Once More unto the Breach]. However, "the well-known English constitutional scholar, Professor A.V. Dicey, was hostile to the idea of constitutional guaranties of fundamental rights because the same constitution that guaranteed those rights provided for their suspension in time of national emergency and allowed to determine the existence of such emergency-the very government against whom the right were most needed." Warbrick, The Protection of Human Rights, *supra* note 3, at 160.

[9] Svensson-McCarthy: Human Rights, *supra* note 3, at 1-2.

[10] National laws and international instruments contain what is known as derogation clause which regulates the impact of emergency on human right. Some consider the derogation clause "as the 'cornerstone' of the system of human rights protections, and as the most important provision of human rights treaties." *See* Oraa: Human Rights, *supra* note 3, at 1, n.1 citing the remarks made by Mr. Prado Vallejo, a member of the UN HR Committee, in CCPR/C/SR.35 (1982), at 8, para.32.

This article seeks to review the impact of states of emergency on human rights under the Ethiopian legal structure. It makes a modest attempt to assess the adequacy of the Federal Constitution in preserving human rights in a state of emergency, a situation that warrants their derogation.

The piece has two parts. Part I provides a brief discussion of the attempts made to define the term state of emergency and the situations that justify declarations of states of emergency. In addition, it highlights the governing principles that come into play once a state of emergency is declared.

Part Two presents a critical overview of the constitutional and institutional framework of state of emergency under the Ethiopian legal system. This part also attempts to elucidate the organs of government with whom the power to declare emergencies resides, the preconditions that need to be fulfilled for a valid declaration, and the protections against the abuse of emergency measures. The nature of non-derogable rights and the role of the Ethiopian courts in checking emergency powers are also discussed and analyzed.

Before proceeding any further, the writer wants to make one preliminary remark. There exists a multiplicity/duplicity of terms used to describe emergency situations.[11] Phrases such as "state of siege," "states of exception," "martial law," "suspension of guarantees," "state of emergency," "public emergency," "state of alarm," "state of defense," and others are used in different countries to describe a lack of normalcy in the political state of affairs of a country.[12] As a result, it has become a common practice for writers to make their preferences of terminology at the outset. For instance, Joan Fitzpatrick favors the term "state of emergency" as it "possesses the advantage

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[11] Svensson-McCarthy: Human Rights, *supra* note 3, at xxvi. For a very interesting discussion concerning the terminology that better describes the 'crisis situation' common to emergencies, *see* Fitzpatrick: Human Rights, *supra* note 1, at n.1 (1994); Svensson-McCarthy: Human Rights, *supra* note 3, at xxiv; Iyer: States of Emergency, *supra* note 10, at 130-132. *See also* SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY 12-15 (1989) [hereinafter Chowdhury: Rule of Law]. The Canadian Emergency Act recognizes four different types of emergencies: "public welfare emergency, public order emergency, international emergency and war emergency. *See* Peter Rosenthal, *The New Emergencies Act: Four Times the War Measures Act*, 20 MANITOBA L. J. 563, 565-573(1991).

[12] Gross: Once More unto the Breach, *supra* note 10 at 501 n.4; Chowdhury: Rule of Law, *supra* note 16, at 12.

of breadth of reference to a wide variety of factual circumstances..."[13] This is also the term preferred by the FDRE Constitution and will be used throughout this Paper, save in cases where the context demands otherwise.

I. STATE OF EMERGENCY: AN INTERNATIONAL PERSPECTIVE

1. Scope of Application

All the major international and regional human rights instruments, with the notable exception of the African Charter on Human and Peoples' Rights (hereinafter the ACHPR), recognize the right of States to suspend human right norms contained therein in cases of exigencies that threaten the life of the nation.[14] Similarly, these instruments lay down conditions and requirements for a valid derogation, as well as enumerate certain rights that may not be suspended or derogated even during the gravest of emergencies.

These instruments, however, differ both in their use of terminology of the situations that justify derogation and their listing of non-derogable rights. The ICCPR refers to "public emergency which threatens the life of the nation," the European Convention on Human Rights (hereinafter the ECHR) to "war or other public emergency threatening the life of the nation," while the Inter-American Convention on Human Rights (hereinafter the IACHR) to "war, public danger, or other emergency that threatens the independence or security of a State Party."[15] All the same, the derogation clauses in the above instruments are "essentially equivalent in criteria, theory, and purpose."[16]

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[13] Fitzpatrick: Human Rights, *supra* note 1, at 1; Oraa: Human Rights, *supra* note 3, at 2-3.

[14] Nicholas Haysom, *States of Emergency in a Post-apartheid South Africa* 21 COLUM. HUM. RTS. L. REV. 139, 142(1990) [hereinafter Haysom: States of Emergency].

[15] Article 4 of the ICCPR, International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171; Article 15 of the ECHR, European Convention for the Protection of Human Rights and Fundamental Freedoms, done Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221, and Article 27 of the IACHR, American Convention on Human Rights, done Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, OEA/Ser.L./V/II.23, doc.2, rev.6, OASOR OEA/Ser.K/XVI/I.1, doc.65, rev.1, corr.2 (Jan. 7, 1970), *reprinted in* 9 I.L.M. 673 (1970).

[16] Joan Hartman, *Derogation from Human Rights Treaties in Public Emergencies* 22(1) HARV. INT'L. L. J., 1, 3 (1981); Ronald St. J. Macdonald, *Derogations under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT'L L. 225, 231(1997) [hereinafter Macdonald: European Convention]. *But see*, Mizock: State of Emergency in Israel, *supra* note 10, at 231. He points out there main differences between the derogation clauses of the ICCPR and the ECHR, namely the ICCPR has three more non-derogable rights that are not included in the ECHR; it also requires official declaration of state of emergency and it obliges states not to discriminate in taking emergency measures.

States of emergency trace their origin back to the Roman Empire and found their way almost in all contemporary political systems and international human rights instruments.[17] They portray one of the instances of a "head-on collusion between state sovereignty and national security on the one hand, and the growing international involvement in protecting individual human rights against state encroachment on the other hand."[18] In order to deflect this tension, both international human rights and national constitutions or subsidiary laws lay down provisions, known as derogation clauses, which regulate exigencies.[19]

Accordingly, ICCPR recognizes the right of States Parties to derogate from their treaty obligations in certain circumstances. Article 4 states that:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
> 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

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[17] Iyer: States of Emergency, *supra* note 10, at 128; Oraa: Human Rights, *supra* note 3, at 7; Svensson-McCarthy: Human Rights, *supra* note 3, at 9. For a detailed discussion of the history of states of emergency *see* Svensson-McCarthy: Human Rights, *supra* note 3, at 9-45.

[18] Gross: Once More unto the Breach, *supra* note 10 at 441.

[19] *Ibid.* There are three main differences between the derogation clauses of the ICCPR and the ECHR, namely the ICCPR has three more non-derogable rights that are not included in the ECHR; it also requires official declaration of state of emergency and it obliges states not to discriminate in taking emergency measures. *See*, Mizock: State of Emergency in Israel, *supra* note 10, at 231. For the legislative history of Article 4 of the ICCPR and Article 15 of the ECHR *see*, Svensson-McCarthy: Human Rights, *supra* note 3; Manfred Novak, *supra* note 31.

Similarly, Article 15 of the ECHR states that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation."[20]
Article 27(1) of the IACHR states that:

> [i]In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

As opposed to the above three human rights instruments, the ACHPR does not have a derogation clause. It, however, is full of limitations or 'clawback' clauses that authorize States to suspended most of the rights in the Charter.[21] These clauses give wide latitude for States, under normal circumstances (even in the absence of emergencies), to restrict the rights and freedoms enshrined under the Charter in so far as such restrictions are done in accordance with domestic laws of the States.[22] Thus, it is perfectly legal for a

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[20] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), November 4, 1950), *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf (last visited on February 28, 2004).

[21] *See for instance*, Articles 6, 8, 9(2), 10(1) and (2) and 12(4) of the Charter. The enjoyment of some of the rights in the Charter is "subject to law and order," "within the law," if one "abides by the law," or "subject to the obligation of solidarity." Other rights may be restricted in order to protect "national security," "public interest," "public order" and "public health", which according to one writer are "nebulous and open-ended phrases, not qualified as 'necessary in democratic society' [as in the case of the ECHR and IACHR]." GEORGE W. MUGWANYA, HUMAN RIGHTS IN AFRICA: ENHANCING HUMAN RIGHTS THROUGH THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 389 (2003).

[22] Rosalyn Higgins, *Derogation under Human Rights Treaties*, 48 BYIL, 281,281(1978) [hereinafter Higgins: Derogation]. For further discussion of claw back clauses, *see generally*, Dinah Shelton, The Promise of Regional Protection of Human Rights in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 369-370 (Burns H. Weston et al. eds. & contributors, 1999); P. Takirambudde, *Six Years of the African Charter on Human and Peoples' Rights: An Assessment* 7(2) LESOTHO L. J. 35, 50-52 (1991); Oji Umozurike, *The Protection of Human Rights Under the Banjul (African) Charter on Human and Peoples' Rights* 1 AFR. J. INT'L L. 82 (1988) and R. Gittleman, The Banjul Charter on Human and Peoples' Rights: A

government to take away the rights recognized by the Charter by enacting a domestic law.

2. PROBLEM OF DEFINING STATES OF EMERGENCY

> It is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this no constitutional shackle can wisely be imposed on the power to which the care of it is committed.[23]

As the above quotation sums it up, defining state of emergency has proved to be a rather daunting task. In the words of the International Law Association, it "is neither desirable nor possible to stipulate what particular type or types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merit taking into account the overriding concern for the continuance of a democratic society."[24] The word emergency is an "elastic concept,"[25] capable of covering a very wide range of situations and occurrences including such diverse events as wars, famines, earthquakes, floods and epidemics.[26] The number, diversity and

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Legal Analysis, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 159 (C.E. Welch et al, eds., 1984).

[23] Gross: Once More unto the Brach *supra* note 10 at 439 n.8 (1998) quoting Alexander Hamilton, THE FEDERALIST No. 23, at 153 (Clinton Rossiter, ed., 1961).

[24] International Law Association Report 59(1984) as quoted in Oraa: Human Rights, *supra* note 3, at 31. Gross doubts whether it is possible to formulate a working definition of the terms that "would stand the test of actual exigencies. In times of crisis, legal niceties may be cast aside as luxuries enjoyable only in times of peace and tranquility." Gross: Once More unto the Brach *supra* note 10, at 439.

[25] H. P. LEE, EMERGENCY POWERS 4(1984) as quoted in Gross: Once More unto the Breach, *supra* note 10, at 501 n7.; Gross et al: Revisiting State of Emergency, *supra* note 10, at 80 n5; Mohamed M. El Zeidy, *The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation From Human Rights Obligation*, 4 SAN DIEGO INT'L L. J. 277, 280(2003) [hereinafter El Zeidy: The ECHR and States of Emergency].

[26] Gross et al: Revisiting State of Emergency, *supra* note 8, at 79; Macdonald argues that "[t]he types of situations that may occur in a state range from ordinary, through extraordinary, to the 'exceptional' circumstances of a public emergency, although the distinctions are unclear." Macdonald: European Convention, *supra* note 23 at 233. Likewise, Yoram Dinstein says that "the absence of a consensus as to when a public emergency occurs [means that] it is by no means plain when exactly a State is allowed by international law to derogate from its obligations to respect and ensure human rights." Yoram Dinstein, The Reform of the

complexity of emergency regimes that exist at any given point in time as well as the profusion and inexactitude of terminology employed in different legal systems make the term not amenable to a precise and a single definition that is acceptable on both sides of the Atlantic.[27]

Nonetheless, "state of emergency" has been defined in tediously many ways. First, Article 4 of the ICCPR refers to a public emergency as a calamity that "threatens the life of a nation," while the European Commission defined "public emergency" as "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the State in question."[28]

Similarly, the *Paris Minimum Standard of Human Rights* prepared by the International Law Association (ILA) defines states of emergency as "an exceptional situation of crisis or public danger, actual or eminent, which affects the whole population of the area to which the declaration applies and constitutes threat to the organized life of the community of which the state is composed."[29]

It is possible to make distinction between *de jure* and *de facto* states of emergency. *De jure* emergencies are emergencies put in place after all the legal and institutional requirements for their declaration and implementation under domestic law and international human rights instruments are fulfilled.[30] The second types of emergencies, *de facto*, are "undeclared, emergency regimes and ambiguous situations."[31] They are "situations of a purely political nature," (in government) which cannot be justified in terms of the constitution or

Protection of Human Rights During Armed Conflicts and Periods of Emergency and Crisis, in THE REFORM OF INTERNATIONAL INSTITUTIONS FOR THE PROTECTION OF HUMAN RIGHTS: FIRST INTERNATIONAL COLLOQUIUM ON HUMAN RIGHTS 337, 349(1993). *See also*, El Zeidy, The ECHR and States of Emergency, *supra* note 34, at 281.

[27] Iyer: States of Emergency, *supra* note 10, at 133.

[28] *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser.B) at 56(1960-1961). *See also Lawless* (Court), 3 Eur. Ct. H.R. (ser.A) 1960-1961).

[29] Art.1(b) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency. The full text of the Standard appears in Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L., 1072, 1072(1985) [hereinafter Lillich: The Paris Minimum Standards].

[30] States of Exception in Turkey: 1960-1980 in ICJ: States of Emergency, *supra* note 3, at, 312.

[31] Iyer: States of Emergency, *supra* note 10, at 133; States of Exception in Turkey: 1960-1980 in ICJ: States of Emergency, *supra* note 3, at 311-312.

previously established laws."[32] *De facto* emergencies usually arise when a government resorts to its emergency powers without complying with the legal or constitutional preconditions for the declaration of states of emergency, or when the measures are extended beyond the formal termination of a declared state of emergency.[33] In some instances, a state of emergency that was declared in full compliance with all the conditions for its declarations may outlive the period for which it was intended and easily becomes a perpetual state of emergency.[34]

Some writers equate emergency rule to a state of necessity "which recognizes the right of every sovereign state to take all reasonable steps needed to protect and preserve the integrity of the state...."[35] The overarching purpose of the right of States to resort to self-defense in case of exigencies is to "balance the most vital needs of the State with the strongest protection of human rights possible in the circumstances."[36] It should be noted that the adjustment "is not between the State and the individual," but rather it is "between the individual's rights and freedoms and the rights and freedoms of the community."[37]

There is a plethora of evidence that shows the direct correlation between state of emergency and gross human rights violations. In many instances, emergency powers tend to be abused by governments to dispel any political dissent and perpetuate their tyrannical rule. The world has witnessed grave violations of human rights in the last couple of decades under the guise of states of emergency, declared or otherwise.[38] According to Joan Fitzpatrick, "[g]overnments have frequently succumbed to the temptation to deflect criticism of their human rights violations by pleas of "emergency." Officials

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[32] Iyer: States of Emergency, *supra* note 10, at 171; ICJ: States of Emergency, *supra* note 3, at 413

[33] ICJ: States of Emergency, *supra* note 3, at 413; Iyer: States of Emergency, *supra* note 10, at 171.

[34] ICJ: States of Emergency, *supra* note 3, at 415. As one of the contributors said it, in Uruguay "people have become accustomed to the emergency régime to the point that it has become the normal machinery of government." *States of Exception in Uruguay*, ICJ: States of Emergency, *supra* note 3, at 358.

[35] Iyer: States of Emergency, *supra* note 10, at 128.

[36] Macdonald: European Convention, *supra* note 23 at 225.

[37] Higgins: Derogation, *supra* note 30, at 282.

[38] Oraa: Human Rights, *supra* note 3, at 1.

may even be tempted to manufacture crises in order to justify their denials of fundamental rights."[39]

3. PRINCIPLES GOVERNING STATES OF EMERGENCY

As discussed above, some of the major international human rights treaties recognize the right of States parties to derogate from some of their obligations under the treaties in exceptional situations. Such a right is meant to enable governments to save the State, not a specific government, from destruction as a result of exigencies.[40] The treaties, however, do not give a *carte blanche* to the States parties. Instead, they impose a number of conditionalities for the legitimate exercise of the right of States to restrict some of the rights contained therein. These preconditions and requirements are intended to strike a balance between the needs of the State and the rights and freedoms of individuals as most of their rights are protected even during exigencies.[41] These principles, which "form the core of the 'legal regime of the derogation clauses'... function to minimize the danger of usurpation or abuse of the derogation power by establishing a set of criteria by which any particular exercise of that power may be evaluated."[42]

The five substantive principles require that for valid states of emergency, the government which intends to resort to emergency powers must prove a) the existence of an exceptional threat to the security of the state or its people; b) the emergency measure that is going to be taken is proportional to the threat posed; c) that there will be no derogation from certain rights and freedoms, known as non-derogable rights; d) that the emergency measures are not going to be used in a discriminatory manner; and e) the compatibility of all

[39] Joan Fitzpatrick, Protection against Abuse of Concept of "Emergency" in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 203, 203(Louis Henkin et al, eds., 1994) [hereinafter Fitzpatrick: Protection against Abuses].

[40] UN & International Law Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (Professional Training Series No. 9, Chapter 16, 2003) available at http://www.unhchr.ch/pdf/CHAPTER_16.pdf at 821 [hereinafter UN &ILA: Human Rights]; Margaret DeMerieux, *The Regimes for States of Emergency in Commonwealth Caribbean Constitutions*, 3 J. TRANSNAT'L L. & POL'Y, 103, 103(1994)[hereinafter DeMerieux: Emergency in Commonwealth Caribbean].

[41] UN & ILA: Human Rights, *supra* note 71, at 821.

[42] Gross: Once More Unto the Breach, *supra* note 10, at 448; Oraa: Human Rights, *supra* note 3, at 3.

emergency measures with the State's other international obligations.[43] We may sketch each of these principles as follows.

3.1. Overview of the Principles Governing Derogation

3.1.1. Strict necessity and proportionality

Despite the fact that there is a difference in phraseology, international human rights instruments require that an exceptional threat that "threatens the life of the nation" must exist before a State could be allowed to suspend rights and freedoms.[44] The exigency must "imperil some fundamental elements of statehood or survival of the populations,"[45] be provisional or temporary in nature,[46] be imminent,[47] and be of such character that it threatens the nation as a whole.[48] Some of the exigencies include, but are not limited to, public health threats, economic calamities, natural disaster,[49] war, internal or external armed conflict, acts of subversion and insurrection, and "anything that puts the security of the State in peril."[50]

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[43] *See* Article 4 of the ICCPR, Article 15 of the ECHR, and Article 27 of the American Convention of Human Rights. Incidentally, the African Charter of Human Rights has no comparable derogation clause.

[44] Articles 4(2) of the ICCPR and Article 15 of the ECHR.

[45] Fitzpatrick: Human Rights, *supra* note 1, at 56; Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1367(1996) [hereinafter Aolain: Emergency Regime]. For detailed discussion see section 2.5.1.

[46] Chowdhury: Rule of Law, supra note 16 at 27-29; *But see*, John Quigley, *Israel's Forty-Five Year Emergency: Are There Limits to Derogation from Human Rights Obligations*? 15 MICH. J. INT'L L. 491, 491 (1994) [hereinafter Quigley: Are There Limits].

[47] Oraa: Human Rights, *supra* note 3, at 27; Aolain: Emergency Regime, *supra* note 79, at 1386; Macdonald: European Convention, supra note 23 at 241; Chowdhury: Rule of Law, *supra* note 16, at 27-29.

[48] Oraa: Human Rights, supra note 3, at 29; Chowdhury: Rule of Law, *supra* note 16, at 27-29

[49] Higgins: Derogation, *supra* note 30, at 287.

[50] Macdonald: European Convention, supra note 23 at 233; Quigley: Are There Limits, supra note 80 at, 492-493; L.C. Green, *Derogation of Human Rights In Emergency Situations*, 16 CAN. Y.B.I.L. 92, 105-106(1978). Joan Fitzpatrick, however, maintains that the "[s]atisfaction of technical criteria for the existence of a state of war is neither necessary nor sufficient for derogation from human rights treaties, though it bears obvious importance with respect to the applicability of international humanitarian law. Derogation would not be permissible in the case of a war that did not threaten the 'life of the nation' or 'the independence or security' of the derogating State." Fitzpatrick: Human Rights, supra note 1 at 57. Haysom argues that the failure to adequately provide for right to derogate would mean that the derogations will occur outside the law, without the law, without legal limitation or formal proclamation." Haysom: States of Emergency, *supra* note 19 at 143.

The derogating state has to demonstrate that the measures it could have taken under ordinary laws would not have been sufficient to meet the danger posed by the exigencies.[51] In *Ireland v. United Kingdom*, the European Court of Human Rights held that the U.K. was "reasonably entitled to consider" that the measures that were available under ordinary laws were not suitable or adequate to meet the danger posed by the IRA terrorist activities.[52] The Court also considered the question in the *Lawless case* and ruled that "the application of ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland."

The measures taken to avert the crisis should also be proportional to the threat posed by the crisis. Hence, suspension of rights and freedoms of citizens should be limited to the extent strictly required by the situation on the ground. The non-derogation clauses of the ECHR and the ICCPR state that restrictions placed on rights and freedoms in times of public emergency must be limited "to the extent strictly required by the exigencies of the situation."[53] Thus, "emergency power cannot be used to destroy the guaranteed rights altogether or to impose unwarranted limitations on their exercise."[54] In other words, the principle of proportionality proscribes "unnecessary suspension of specific rights, greater restrictions on those rights than necessary, or the unnecessary extension of the geographical area to which the state of emergency applies."[55]

Similarly, the emergency measures taken by a derogating State must be connected to the emergency, i.e., they must be *prime facie* suitable to reduce the crisis and must be commensurate with the severity of the threat posed.[56] Implicit in the element of severity is the requirement of restricting the measures to areas that are affected by the emergency and only to the extent necessary.[57]

According to the Human Rights Committee's General Comment on Article 4 of the ICCPR, the requirement of proportionality "relates to the duration, geographical coverage and material scope of the state of emergency

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[51] Macdonald: European Convention, *supra* note 23, at 243.
[52] *Ireland v. United Kingdom*, 25 Eur. Ct. H. R. (ser. A) at 84 (1987).
[53] Article 4(1) of the ICCPR and Article 15(1).
[54] Chowdhury: Rule of Law, *supra* note 16, at 102.
[55] Grossman: Examination of State of Emergency, *supra* note 45, at 35-52.
[56] Macdonald: European Convention, *supra* note 23, at 243-44.
[57] *Ibid.*, at 244.

and any measures of derogation resorted to because of the emergency."[58] The Human Rights Committee added that:

> the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviors of the State Party. When considering States Parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.[59]

The principle of proportionality, thus, requires States to provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.[60] If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.[61]

In the opinion of the Committee, the possibility of restricting certain Covenant rights, for instance, freedom of movement (article 12) or freedom of assembly (article 21), is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.[62]

As the European Human Rights Court ruled in the *Lawless* case, real and effective safeguards must also be provided in order to curtail any possible abuse of emergency powers.[63] According to the Court, the inclusion of a number of safeguard measures in the Emergency legislation (Act) and its subsequent amendment, limited the acts of the government to those that are

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[58] General Comment No. 29, at 2 Para. 2; Chowdhury: Rule of Law, *supra* note 16, at 103; Macdonald: European Convention, *supra* note 23, at 243.

[59] General Comment No. 29, at 2-3 Para. 4

[60] *Ibid.*

[61] General Comment No. 29, at 2-3 Para. 4.

[62] General Comment No. 29, at 3 Para. 5.

[63] *Lawless case*, 1 Eur. Ct. H.R. (Ser. A) (1961), at Para. 42.

strictly necessary to address the situation.[64] The Court also emphasized the importance of the supervision by the Irish Parliament, which possessed the power to revoke the declaration of emergency by receiving detailed information about the enforcement of the Act.[65] The safeguards provided by the Act were deemed to be of particular importance in determining that the measures taken by the government were "strictly required by the exigencies of the situation."[66]

3.1.2. Non-discrimination

The principle of non-discrimination requires that emergency measures adopted by the derogating State should not entail discrimination solely on the basis of race, colour, sex, language, religion or social origin or any other status. Article 4 of the ICCPR stipulates that in time of public emergency which threatens the life of the nation, the State parties to the Covenant may take measures derogating form their obligation under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures do not involve discrimination solely on the ground of race, religion, sex, ethnic group, political belief or other status. Article 15 of the ECHR does not contain a specific prohibition against discrimination in the application of emergency measures. Under Article 1 of Protocol 12 to the Convention, however, it is unlawful for a High Contracting Party to discriminate on the basis of the above-mentioned grounds.

It should be stressed that the prohibition of discrimination under Article 4 of the ICCPR is in addition to the stipulations under Articles 2(1) and 26. According to Prof. Grossman, "[t]he multiple reference[s] to this prohibition, not unusual in international instruments related to the protection of human rights, serve to codify what is already a fundamental principle of *jus cogens*: the total proscription of any form of discriminatory treatment based [the above grounds.]"[67] Besides, to the extent that a High Contracting Party to ECHR is also a State Party to the ICCPR, derogatory measures that discriminate based on those grounds would be a violation of the principle of consistency incorporated under Article 15 of the ECHR.[68]

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[64] *Ibid.*
[65] *Ibid.*
[66] *Lawless* case, 1 Eur. Ct. H.R. (Ser. A) (1961), at Para. 35
[67] Grossman, Examination of State of emergency, *supra* note 37, at 35-52.
[68] UN & ILA: Human Rights, *supra* note 81, at 879.

3.1.3. Compatibility with other Obligations

According to the principle of consistency or compatibility, states may derogate from human rights norms provided that such measures are not inconsistent with their other obligation undertaken under international law. This criterion is intended to create compatibility, concordance and complemetarity among the different obligations of the derogating State under international law and maintain better protection of human rights in crisis situations. Both under Article 15(1) of the ECHR and Article 4 of the ICCPR, a State may suspend rights only if the measures it has taken are "not inconsistent with its other obligations under international law."[69] Hence, the derogating State has to make sure that the emergency measures it takes are in conformity with its obligations under the particular human rights treaty to which it is a party and other international law norms. Thus, the obligation of consistency (compatibility) may have the effect of expanding the list of non-derogable rights discussed below.[70]

In *Brannigan v. United Kingdom*, the European Human Rights Court entertained the question whether the United Kingdom's public announcement of a state of emergency in Northern Ireland was enough to meet the requirements of an official proclamation of a state of emergency under Article 4 of the ICCPR. The Court noted that the statement of the Secretary of State for the Home Department to the House of Commons "was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation."[71]

The requirement that the right of states to suspend rights should be compatible with its other international law obligations reflects the overlap and divergence between international human rights law and other systems of international law in general and international humanitarian law norms, such as

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[69] In a similar vein, Article 53 of the ECHR states that a High Contracting Party could not use the Convention to justify limitations or derogation from any of the human rights obligations that it has accepted under its own domestic law or *any other agreement* to which it is a party.

[70] Macdonald: European Convention, *supra* note 23, at 246; P. VAM DIJK et al, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 555(2d. ed., 1990); DAVID J. HARRIS, et al, THE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 503(1995).

[71] *Brannigan v. United Kingdom*, Para 73.

the Geneva Conventions, in particular."[72] The four Geneva Conventions and their Additional Protocols are not subject to suspension even in case of emergency, "since the very purpose of their adoption was to provide rules to govern situations of armed conflict."[73] A noted scholar emphasizes the complementarity and non-exclusiveness nature of the protective norms of international law, especially international human rights law and international humanitarian law norms in states of emergency. He argues that:

> Ideally, there should be a continuum of norms that protect human rights in all situations, from international armed conflicts at one end of the spectrum to situations of non-armed internal conflicts at the other. In every situation, either there should be a convergence of humanitarian or human rights norms, or at least one of these two systems of protection of human rights should clearly apply.[74]

3.2. Non-Derogable Rights

3.2.1. Substantive Rights

Even if a State declares emergency in full compliance with the aforementioned conditions, there are certain "core" human rights norms from which no derogation is allowed. Stated in simple terms, the principle of non-derogability prohibits States from suspending the rights that are specifically mentioned as non-derogable even under the gravest states of emergency. According to this principle, even in a situation of a state of emergency, there are certain fundamental rights and freedoms which can never be suspended or derogated from.

The list of these rights differs from treaty to treaty and, as we shall see, there is a general trend of expanding this list although the proposals have not yet attained universal acceptance. The non-derogable rights that are listed

[72] Herman Montealegre, *The Compatibility of a State Party's Derogation Under Human Rights Conventions with Its Obligations Under Protocol II and Common Articles 3*, 33 AM. U. L. REV. 41, 44 (1983) [hereinafter Montealegre: Compatibility of a State Part's Derogation].

[73] Montealegre: Compatibility of a State Part's Derogation, *supra* note at 108, at 44.

[74] Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 Am. J. Int'l L. 589, 589(1983) (Note and Comment). *See also*, Draper, *The Relationship between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y. B. HUM. RTS. 191 (1971).

under Article 4(2) of the ICCPR are: Article 6(the right to life), Article 7(freedom from torture or to cruel, inhumane or degrading treatment or punishment), Article8 (prohibition against slavery or to be held in servitude), Article 11(imprisonment for the inability to discharge contractual obligation), Article 15 (prohibition against *ex-post facto* criminal law), Article 16(the right to be recognized as a person before the law) and Article 18 (freedom of thought, conscience and religion). In contrast, under Article 15 of the ECHR, Article 2 (the right to life), Article 3 (prohibition against torture, inhumane or degrading treatment or punishment), Article 4(1) (prohibition against slavery or servitude), and Article 7 (non-retroactivity of criminal laws) are the only non-derogable rights. Article 3 of Protocol 6 and Article 2 of Protocol 13 to the ECHR also prohibit derogation under Article 15 of the Convention.

As can readily be observed, the above two human rights treaties recognize, in common, four rights as non-derogable, namely, the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the rule of no *ex post facto* criminal laws. According to Jamie Oraa these four rights have attained the status of *jus cogens* norms of international law.[75]

According to Joan Fitzpatrick, the criteria for making certain rights non-derogable in the case of the ICCPR are: first, some of those rights are absolutely fundamental and indispensable for the protection of human beings and, second, derogation from some of those rights during states of emergency would never be justified because they have no direct bearing on the emergency.[76] By the same token, the Human Rights Committee maintains that "[t]he proclamation of certain provisions of the Covenant as being a non-derogable nature ... is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18)."[77] But these criteria seem not to have been consistently applied because there are some rights which seem to have no less fundamental importance but have nonetheless not been included in the list

[75] Oraa: Human Rights, *supra* note 3, at 96.

[76] Fitzpatrick: Protection against Abuses, *supra* note 62, at 209; Oraa: Human Rights, *supra* note 3, at 94; General Comment 29, at 4-5, Para. 11.

[77] General Comment 29, at 4, Para. 11.

of non-derogable rights. As a result, there has been, as of late, calls to broaden the list of these rights.

The Paris Minimum Standards which were adopted by the ILA in 1984 contain "a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation, including sixteen articles setting out the non-derogable freedoms to which individuals remain entitled even during states of emergency."[78] Likewise, the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, that came out in 1985, make a similar recommendation of making the right to fair trail non-derogable.[79] Again the *Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency*, approved by the ILA in 1990, endorse the recommendations of the above two standards and ask for making the right to fair trail non-derogable.[80]

The UN Human Rights Committee too seeks to enlarge the list of non-derogable rights by adding the rights to fair trial and personal liberty as non-derogable provisions. It strongly suggests that the writ of *habeas corpus* should be a non-derogable right.[81] In General Comment No. 29, it states that:

> It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including often judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state

[78] Chowdhury: Rule of Law, *supra* note 16, at 1. For the list of the proposed non-derogable rights to a fair trail, *see* Lillich, The Paris Minimum Standards, *supra* note 40, at 1079.

[79] The Siracusa Principles on the Limitation and Derogations Provision in the International Covenant on Civil and Political Rights, 7 HUM. RTS. Q. 3, 12-13(1985).

[80] Richard B. Lillich, *Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency* 85 AM. J. INT'L L, 716,716 (1991) [hereinafter Lillich: *Queensland Guidelines*].

[81] Annual Report of the Human Rights Committee, UN. G.A.O.R., 49th Sess., Supp. No. 40, at 120, UN Doc. A/49/40, at 2(1994).

of emergency must conform to the provisions of the Covenant, including all the requirements of article 14 and 15.[82]

In the same vein, the Inter-American Court of Human Rights, in its Advisory Opinion of January 30, 1987, asserts that the writ of *habeas corpus* and *amparo*, which are not specifically included in the list of non-derogable rights under Article 25, "may not be suspended because they are judicial guarantees essential for the protection of the rights and freedoms whose suspension Article 27 (2) prohibits".[83]

3.2.2. Procedural Safeguards

Article 4(1) of the ICCPR makes it a requirement that a State which wishes to suspend rights and freedoms has to first "officially proclaim" the existence of the emergency threatening the life of the nation. In other words, the principle of proclamation proscribes a States' resort to emergency measures without a prior official proclamation of a state of emergency.[84]

The official proclamation of a state of emergency serves a number of important purposes. First, it prevents an arbitrary use of emergency powers in events that do warrant suspension of rights. By compelling States to make the existence of emergency public, the principle tries "to reduce the incidence of *de facto* states of emergency by requiring states to follow formal procedures set forth in their own municipal laws."[85] "Official proclamation by the political organs of a state, its legislature and executive, has the important effect of publicizing the existence of the crisis and of possible derogations from normal standards."[86] According to the UN Human Rights Committee, the official proclamation of state of emergency:

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[82] General Comment 29, at 6 Para. 15.

[83] IACtHR, Advisory Opinion OC-8/87 of January 30, 1987, which appears in THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS 492(1995).

[84] Gross: Once More unto the Brach, *supra* note 10, at 448-449.

[85] *Ibid.* at 449; N. Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning situations Known as States of Emergency, UN. Doc. E/CN.4/Sub 2/1982/15, July 27, 1982, at 12; Chowdhury: Rule of Law, *supra* note 16, at 28-29; Fitzpatrick: Human Rights, *supra* note 1, at 59; Oraa: Human Rights, *supra* note 3, at 34-35. Joan Hartman argues that the principle of proclamation avoids ex post facto explanations for the violations of rights. *See* Joan F. Hartman, Working Paper for the Committee of Experts on the Article 4 Derogation Provision, 7 HUM. RTS. Q. 89, 99(1985).

[86] Macdonald: European Convention, *supra* note 23, at 250. He argues that "[i]t is perhaps unrealistic to expect states in the midst of a crisis threatening their continued existence to comply with a requirement of prior notification." *Id.* He also laments the lack of a "review

> [I]s essential for the maintenance of the principles of legality and the rule of law at time when they are most needed. When proclaiming a state of emergency with consequences that would entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor that the laws in question enable and secure compliance with article 4. [87]

Secondly, the official declaration of emergency notifies the population as to "the exact material, territorial and temporal scope of the application of emergency measures and their impact on the exercise of human rights."[88] Thirdly, it also helps for domestic supervision by the legislative and judicial organs of the government.[89]

As an extension to the requirement of public declaration of emergencies, States are required to inform, in a timely manner, the other contracting parties to the treaties that they are temporarily unable to discharge some of their treaty obligations. In order to check whether derogations from human rights are necessary and proportional to the danger posed by the exigencies, derogations are "subject to international scrutiny and review."[90] In line with this, both the ICCPR and ECHR require States Parties to notify he Secretary General the declaration and termination of states of emergency.

Article 4 of the ICCPR stipulates that any State party to the Covenant availing itself of the right of derogation should immediately inform the other States parties, through the intermediary of the Secretary General of the UN, of the provisions from which it had derogated and the reasons by which it was actuated. The ICCPR also provides for a similar notification requirement when the derogation is terminated.

Article 15(3) of the ECHR requires that a derogating State "shall keep the Secretary General of the Council of Europe fully informed of the measures

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mechanism of a state's measures before they are instituted and before likely violations of the convention and human rights occur." *Id.*

[87] General Comment 29, at 2, Para. 2.

[88] Nowak: Commentary, *supra* note 27, at 80.

[89] *Ibid.*

[90] Higgins: Derogation, *supra* note 40, at 283.

which it has taken and the reasons thereof." High Contracting parties are obliged to notify the Secretary General when derogation ceases.[91]

The purpose of notification is to inform the other Contracting States to the instruments and the organ entrusted with the supervision of the instruments. A Commentary on the ICCPR states that derogations are "a matter of gravest concern and the States parties have the right to be notified of such situations"[92] so that they will be informed of "what the situation of the derogating state is in respect of the treaty, and accordingly to be able to exercise their own rights."[93]

The ICCPR and ECHR do not set specific time limits within which the State invoking the right to derogate has to notify the other Contracting Parties. In the *Lawless case*, Ireland's notification of the Secretary General about the measures it had taken derogating from the ECHR within twelve days was considered "sufficiently prompt."[94]

In the *Greek case*, although it fulfilled the "promptness" prong, the Respondent government failed to specify the reasons that necessitated derogation from Article 15 of ECHR and provide the text of the emergency decree up until after four months of the declaration of emergency.[95] The Court ruled that the Government failed to meet the requirements of Article 15(3) of the Convention.[96]

What is more, both instruments do not provide any guidelines as to what type of information should be included in the notification to the appropriate organs. Louis Henkin argues that [a] key weakness of Article IV (3),... is that it fails to require States to Report the specific derogation measure taken."[97] The absence of specific requirements of providing details about the specific measures taken has made it difficult to determine whether actions taken in derogation were "strictly" necessary," as required by Article 4.[98] In

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[91] Art. 15(3) of the ECHR.

[92] MARE J. BOSSUYT, GUIDE TO THE TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS 97(1987).

[93] Oraa: Human Rights, *supra* note 3, at 58. Article 41 of the ICCPR recognizes the rights of other states to lodge inter-state communication with the Human Rights Committee if the derogating state has already made a declaration accepting the jurisdiction of the latter.

[94] *Lawless case*, 1 Eur. Ct. H.R. (Ser. A) (1961) at 42.

[95] The *Greek Case*, (1969) 12 YBECHR, paras. 165 at 71, 74.

[96] *Ibid.*

[97] LOUISE HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 85(1981).

[98] *Ibid.*

the *Ireland v. United Kingdom* case, the European Human Rights Court stated that the United Kingdom's notices of derogation "fulfilled the requirements of article 15(3)," without specifying the necessary details that should be included in such a notice.[99]

A question that may be asked in connection with the requirements of notification is: what is the legal consequence of a state's non-compliance with it? Some argue that:

> [w]hile it might be salutary if the ... authorities regarded a deficiency in notification as rendering the declaration a nullity, the seriousness of what is at stake if the state demonstrates the existence of an emergency at the appropriate time may equally make it appear too draconian a sanction and one which is likely to be of little efficacy.[100]

Allan Rosas claims, "it would seem that a failure to notify in accordance with paragraph 3, while a breach of the relevant instruments, does not, as such, foreclose invoking the right to derogate."[101]

II. STATE OF EMERGENCY AND THE FDRE CONSTITUTION

This Part examines the Ethiopian constitutional law concerning human rights and states of emergency. It explains the procedures of declaring states of emergency, the constitutional safeguards against potential abuse of emergency powers, non-derogable rights and the role of the Ethiopian judiciary, if any, in limiting the emergency powers of the government. It also attempts to identify the shortcomings in the Ethiopian constitutional framework in light of the generally accepted international norms discussed in the earlier sections.

1. CONSTITUTIONAL BACKGROUND

In May 1991, the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of mainly ethnic-based rebel groups came to power by overthrowing the military junta that ruled the country for almost two decades. In the following month, EPRDF held a national conference that established a

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

[100] DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 506(1995).

[101] Allan Rosas, Emergency Regimes: A comparison in BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAY IN HONOUR OF ASBJORN EIDE 165, 177(Donna Gomien ed., 1993).

transitional government and endorsed a transitional period Charter.[102] The Charter, which had only twenty provisions, envisaged a nation of a multi-party democracy and incorporated certain basic constitutional principles including guarantee of equal rights, self-determination of all people, enduring peace and stability by bringing to an end all hostilities, redressing regional imbalances as well as establishing accountable government, rebuilding the country and restructuring of the state.[103]

In 1994, the Council of Representatives endorsed a draft constitution that the Constituent Assembly, elected by universal suffrage, adopted in December of 1994. The Constitution came into force in August 1995 and established an ethnic based state structure and dividing powers and their exercise between the Federal and state governments.[104] A document of 11 chapters and 106 articles, the 1995 FDRE Constitution is the fourth written constitution in the political history of Ethiopia.

The preamble to the Constitution lists past and existing social, economic and political ills it aspires to remedy. The first chapter deals with general provisions such as the nomenclature of the state, its territorial jurisdiction, national anthem and language policy of the country. Chapter Two sets out the fundamental principles of the Constitution, which include the supremacy of the Constitution and the inviolable and inalienable nature of human and democratic rights. Fundamental Rights and Freedoms are covered by Chapter Three of the Constitution. Chapter Four provides the structure of the government and sets out the separation of powers among the three organs of the government. Chapter Five defines the structure and division of powers at the federal level and authorizes state constitutions to define the structure and

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[102] H. S. Lewis, Ethnicity in Ethiopia: The View from Below (and from the South, East, and West) in THE RISING TIDE OF CULTURAL PLURALISM: THE NATIONS-STATE AT BAY? 158 (Crawford Young ed., 1993).

[103] The Transitional Government of Ethiopia, The Transitional Period Charter of Ethiopia No. 1 of 1991, Negarit Gazetta, Year 50, No1, Preamble.

[104] ETH. CONS. Arts. 1, 45, 46, 47, 50, 51 and 52. For some of the scholarly works on the FDRE Constitution, *see*, Fasil: Constitution for the Nation of Nations, supra note 14; Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights and Development*, 20 SUFFOLK TRANSNAT'L L. REV. 1-84 (1996) [hereinafter Minasse: The Ethiopian Constitution]; T.S. Twibell, *Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems*, 21 LOY. L. A. INT'L & COMP. L. J. 399-466(1999); Charles E. Ehrlich, *Ethnicity and Constitutional Reform: The Case of Ethiopia*, 6 ILSA J. INT'L & COMP. L. 51-71 (1999); Berket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91-142 (1997).

divide power at the state level. Chapter Six establishes the two houses of the federal parliament and stipulates the conditions of eligibility for membership in the houses, powers and rules of procedure as well as the procedures for the dissolution of the two houses. Chapter Seven details the nomination, appointment, powers and functions of the President of the Republic. Chapter Eight deals with the powers of the executive, the appointment and term of office of the chief executive organ and Council of Ministers. Chapter Nine establishes an independent judiciary at both federal and state levels and sets out the structure and power of courts. The national policy objectives and principles are outlined in Chapter Ten. Chapter Eleven addresses miscellaneous issues, including procedures for constitutional amendment.

The Constitution establishes a bicameral legislative organ composed of two houses, the House of Peoples' Representatives (HOPR) and the House of the Federation (HOF), at the Federal level.[105] Despite the stated bicameral structure of the parliament, it is only the HOPR that has the supreme legislative decision-making power in matters that are assigned to the Federal government.[106] The HOF has a very limited role in the law-making process.[107] The HOF is, however, entrusted with very important tasks including the interpretation of the Constitution, deciding on issues relating to the right of ethnic groups to self-determination including and up to secession, and deciding the instances in which the federal government has to intervene in the states.[108] In interpreting the Constitution, the HOF is assisted by the Council of Constitutional Inquiry (CCI), which is composed of legal experts.[109] The CCI is mandated to investigate constitutional disputes and submit its recommendations to the HOF for a final decision.[110]

The Council is composed of eleven members, six of whom should be legal experts with proven professional competence and high moral standing.[111] They are recommended by the HOPR for appointment by the President of the Republic.[112] The remaining three members are persons designated by the

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[105] ETH. CONST. art. 53.

[106] ETH. CONST. art. 55(1).

[107] The only instances in which the HOF participates in law making process are during constitutional amendment as per art. 104 of the Constitution and authorization of Federal intervention in States according to Article 62(9) of the Constitution.

[108] ETH. CONST. art. 62(9).

[109] ETH. CONST. arts. 82-84.

[110] ETH. CONST. art. 84(1).

[111] ETH. CONST. art. 82(2) (c).

[112] ETH. CONST. art. 82(2) (c).

HOF.[113] The CCI is presided over by the President of the Federal Supreme Court with the Vice President of the same court as its vice president.[114]

The Constitution embraces a rigid form of amendment so that human rights provisions will not be watered down by subsequent constitutional amendments. According to Article 105, amendment of human rights provisions requires majority vote of all state legislatures as well as two third majority vote of both the HOPR and the HOF, whereas amending other provisions requires two-third majority votes of the joint session of the HOPR and HOF along with majority votes in two-third of the state legislatures.[115]

Nearly one-third of the text of the Constitution is devoted to fundamental human rights and freedoms. These are categorized as "Human Rights" and "Democratic Rights" and, under Article 13 (2),"rights and freedoms" are to be "interpreted in conformity with the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international instruments ratified by the country."[116] In addition, Article 9(4) states that "[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land." Moreover, the Constitution also establishes twin human rights institutions, namely, the Human Rights Commission and the Office of the Ombudsman.[117]

There are differing opinions concerning the incorporation of such detailed provisions in the FDRE Constitution. For instance, according to Fasil Nahum, the Legal Advisor to the Ethiopian Premier, "the clear message of the Constitution is that it is serious with the respect for human rights."[118] Some others, however, very much doubt the significance of such detailed human rights provisions. Professor Minasse Haile, for instance, asserts that "the fate of human rights in Ethiopia is a dim one."[119] He adds that "government's

[113] ETH. CONST. art. 82(2) (d).
[114] ETH. CONST. art. 82(2) (a) and (b)
[115] ETH. CONST. art. 105 (2).
[116] Some of the rights included in the Human Rights Section are the right to life, the security of person and liberty, rights of persons arrested, accused, detained or convicted; the right to equality, the right to privacy and freedom of religion, belief and opinion. Whereas rights such as right of thought, opinion and expression, freedom of assembly and demonstration, freedom of association, freedom of movement, right to nationality, rights of women, family rights, rights of children, right to vote, right to justice, rights of labour, right to development, rights to environment, right to property and right to self-determination as well as economic, social and cultural rights are included under "democratic rights".
[117] ETH. CONST. art. 55.
[118] Fasil: Constitution For A Nation of Nations, *supra* note 14, at 58
[119] Minasse: The New Ethiopian Constitution, *supra* note 153, at 66.

verbal commitment to human rights and democracy is merely designed to tranquilize donor governments into disregarding its continuing violations of human rights."[120] Another writer considers the human rights provisions of the Constitution as "... too specific on a particular right, yet too vague and general to serve as a proper measuring guide for implementation."[121]

2. Declaration of State of Emergency

There are two major models for declaring a state of emergency: the parliamentary and the presidential or executive models. As the name indicates, in the parliamentary model, the prerogative to declare a state of emergency is vested in Parliament, whereas in the executive model, the power to declare a state of emergency is vested in the chief executive, the president or the prime minister.[122]

Within the parliamentary system, there are certain variations. In some instances, parliament may be required to follow more stringent procedures than is the case with ordinary legislation, or it may have to consult the executive branch before it decides on state of emergency cases.[123] When parliament is not in session, an alternative option for tackling the problem of emergency situations is normally provided.[124] Whosoever is nominated as a temporary guardian of the emergency powers, has to refer the whole issue to the titular holder of those powers as soon as possible.[125]

Similarly, in the case of the executive model, the decree introducing a state of emergency may be required to be countersigned by another official within the executive and the president may also be required to bring the matter to the attention of parliament as soon as possible.[126] Article 93 of the FDRE Constitution lays down the circumstances for a valid declaration of states of emergency under the Ethiopian legal system. Sub-article 1 reads:

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[120] *Ibid.*

[121] Twibell: Ethiopian Constitutional Law, *supra* note 166, at 442.

[122] Venelin Ganev, *Emergency Powers and the New East European Constitutions*, 45 AM. J. COMP. L. 585, 588(1997) [hereinafter Ganev: Emergency Powers]

[123] *Ibid.*, at 588. For instance, the Constitution of Slovenia empowers the National Assembly to declare a state of emergency, but the motion for the declaration has to come from the executive branch. *Ibid.*

[124] Ganev: Emergency Powers, *supra* note 175, at 591.

[125] *Ibid.*

[126] *Ibid.*, at 590. For instance, the Romanian Constitution requires the decree of emergency to be signed by the president and the prime minister. The president is also required to convene parliament within 24 hours after the declaration of emergency. *Id.*

1. (a) The Council of Ministers of the Federal Government shall have the power to decree a state of emergency, should an external invasion, a break down of law and order which endangers the Constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occur.
(b) State executives can decree a State-Wide state of emergency should a natural disaster or an epidemic occur. Particulars shall be determined in State Constitutions to be promulgated in conformity with this Constitution.

First, the situations that justify the declaration of a state of emergency are an external invasion, a break down of law and order which endangers the constitutional order and which cannot be controlled by regular law enforcement agencies and personnel, a natural disaster, or an epidemic. In these situations, the Council of Ministers can lawfully exercise its power to declare a state of emergency. To put it differently, a war of aggression, internal disturbance, such as rebellion and subversive movements or natural calamities like flood, wildfire and transmissible diseases are the only grounds on which a state of emergency could be declared under the Constitution.

The Constitution requires the actual occurrence of the circumstance for a state of emergency to be put in place. Near occurrence or quite immanency are insufficient. The requirement that the breakdown of law and order must be such that it endangers the Constitutional order and cannot be controlled by the regular law enforcement agencies and personnel indicates that a declaration of emergency should be of an exceptional nature. The crisis has to be so serious that the country's institutional framework has broken down and violence must have become widespread, wreaking havoc on citizens.

Second, the power to declare states of emergency is given to the Council of Ministers, which is the executive organ of the country.[127] During emergency, the Council is also given all the powers to protect the country's peace and sovereignty as well as maintain public security, law and order.[128] Similarly, Article 93(1) (b) authorizes state executives to declare state of

[127] ETH. CONST. art. 77(10) cum Article 93(1) (a). Article 77(10) states that [the Council] has the power to declare a state of emergency; in doing so, it shall, within the time limit prescribed by the Constitution, submit the proclamation declaring a state of emergency for approval by the House of Peoples' Representatives." Here it should be noted that Article 93(1)(b) of the Constitution authorizes state executives to declare "a state-wide state of emergency should a natural disaster or an epidemic occur."

[128] ETH. CONST. art. 93(4) (a).

emergency within their respective regions when they are confronted with natural disasters or epidemic, provided that such declaration is in conformity with the constitution of the particular state.

Where a state of emergency is declared while the HOPR is in session, the declaration should be submitted to the House within forty-eight hours for endorsement. [129] If, however, the House is in recess, the declaration should be submitted within fifteen days of its adoption by the Council of Ministers.[130] If the declaration gets the assent of the HOPR, the state of emergency will remain in effect for up to six months. Similarly, if the members of the HOPR, by a two-thirds majority vote so decide, an emergency proclamation may be renewed for a four-month period successively.[131]Third, the Council has "the power to suspend *political and democratic rights* contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency."[132] Fourth, the Constitution, under Article 25 incorporates the principle of non-discrimination and its derogation clause stipulates clearly that the principle is not subject to any type of limitation or suspension.

3. Non-Derogable Rights under the FDRE Constitution

In line with the general state practice in times of emergency discussed in earlier sections, the FDRE Constitution too allows limitations on and derogation from the fundamental rights and freedoms listed under Chapter Three while at the same time recognizing certain absolute rights. Article 93 (4) of the Constitution states:

> (b) The Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.
>
> (c) In the exercise of its emergency powers the Council of Ministers can not, however, suspend or limit the rights provided for in Articles 1, 18, 25, and sub-Articles 1 and 2 of Article 39 of this Constitution.

The Constitution thus puts certain rights and freedoms beyond the reach of the emergency powers of the government even when there is an actual

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[129] ETH. CONST. art. 93(2) (a).
[130] ETH. CONST. art. 93(2) (b).
[131] ETH. CONST. art. 93(3).
[132] ETH. CONS. art. 93(4) (b) [emphasis added]. Note that the Constitution speaks about derogation of political and democratic rights, and not derogation of human rights. For more discussion on this issue see chapter 4 and accompanying footnotes.

and imminent danger against the life of the nation. The list of fundamental rights and freedoms that are non-derogable under the FDRE Constitution include: the right to protection against cruel, inhuman and degrading treatment or punishment [Art.18(1)]; the right to be protected against slavery, servitude and the trafficking of human beings [Art. 18(2)]; the right to equality (Art.25) and the right of Nations, Nationalities and Peoples of Ethiopia to self-determination up to secession [Art.39(1)] and their right to speak, to write and to develop their own language as well as to express, to develop and promote their culture and to preserve their history [Art.39(2) and (3)]. Although it is not a right, nomenclature of the State is also made non-derogable under the Constitution (Art.1).

A juxtaposed reading of Article 93(4) (c) of the Constitution and Article 4(2) of the ICCPR clearly demonstrate that the list of non-derogable rights and freedoms in the former leaves out some of the rights that are enumerated in the latter. The non-derogable rights listed under Article 4(2) are right to life;[133] freedom against torture, cruel, inhuman or degrading treatment or punishment;[134]freedom against slavery, slave trade and servitude;[135] freedom against imprisonment for contractual obligation;[136] freedom against *ex post facto* criminal laws;[137] right to recognition everywhere as a person before a law;[138] and right to freedom of thought, conscience and religion.[139] The Constitution fails to exempt the right to life,[140] freedom against imprisonment for contractual debt, right to recognition everywhere as a person before the law and the prohibition against *ex posto facto* penal law as well as right to freedom of thought, conscience and religion from suspension during emergencies.

4. Constitutional Safeguards against Abuse of Emergency Powers

The importance of precise and effective national legislation and effective domestic control mechanisms to prevent breaches of human rights during situations of public emergency cannot be overemphasized. Domestic control

[133] ICCPR, art. 6
[134] ICCPR, art. 7.
[135] ICCPR, art. 8 (1) and (2).
[136] ICCPR, art. 11
[137] ICCPR, art. 15.
[138] ICCPR, art. 16
[139] ICCPR, art. 18
[140] As absurd as it is, the Constitution prohibits torture, inhumane or degrading treatment of persons, and not their killing. So, it is perfectly legitimate for the government to kill someone during emergency, but it cannot treat him or her inhumanly.

over emergency power takes two main forms: legislative control and judicial review.[141]

4.1. Legislative Control

In most cases, national constitutions provide in some detail the circumstances under which a state of emergency may be declared, the nature of permissible derogations, the monitoring role of the legislative and judicial organs, and the way in which the emergency regime could be extended and ultimately come to an end.[142] Specific controls may include: a requirement that any resort to emergency powers must be approved, either before introduction or soon after that, by a specified majority of the legislators; a duty on the executive to seek periodic renewals for emergency mandate; time limits on the overall duration of the emergency; and a right on the part of the legislature to terminate the emergency at its discretion.[143]

In the Ethiopian Constitution, attempt has been made to give HOPR some control over the executive act of proclaiming or declaring an emergency. The first limitation is that if the state of emergency is declared while the HOPR is in session, the emergency decree should be submitted to the House within forty-eight hours of its declaration.[144] If the emergency is decreed when the HOPR is in recess, then, it needs to be submitted to the House within 15 days of its declaration. In both cases, if the decree fails to get the approval of two-third majority vote of the members of the HOPR, it has to be repealed forthwith.[145] The second limitation relates to the scope of the emergency regulations, i.e., the executive can only derogate from what the Constitution designates as "political and democratic rights." The third safeguard is temporal, i.e., the declaration of emergency is limited to six months. Although the Constitution does not put an upper limit to the number of renewals, it requires the HOPR to reconsider the emergency publicly on a bi-annual basis.

More importantly, the Constitution entrusts the duty to administer a state of emergence to the Emergency Inquiry Board constituted by the HOPR.[146] The Board undertakes a series of tasks including inspection and follow up to ensure

[141] Iyer: States of Emergency, *supra* note 10, at 185.
[142] ICJ: State of Emergency, *supra* note 3, at 432.
[143] Iyer: States of Emergency, *supra* note 10, at 185-186.
[144] ETH. CONST. art. 93(2)(a).
[145] ETH. CONST. art. 93(2) (a).
[146] ETH. CONST. art. 93(5).

that measures taken during the state of emergency are not inhumane.[147] When the Board finds any case of inhumane treatment, it is mandated to suggest certain corrective actions to the Council of Ministers or to the Prime Minister and to ensure that the perpetrators of those acts are prosecuted.[148] It is also empowered to publicize the names of all persons detained by reason of the declared state of emergency within one month and to convey its views to the House of Peoples Representatives on matters of extension of the duration of the state of emergency.[149]

4.2. JUDICIAL REVIEW

In a system in which the judiciary is empowered to review acts of parliament and the executive action, a declaration of emergency that fails to meet legal requirements could be declared null and void by a court of law.[150] Further, national courts normally have the power to review measures taken during the emergency situation, including the power to issue writ of habeas corpus.[151]

Of greater interest is the question whether the courts have power to question the wisdom of the executive's determination that an emergency exists. Some authors argue that "a court [should] question the correctness of the belief that an emergency situation in fact existed or even the *bona fides* of the government in making a proclamation or declaration of emergency."[152] Others, however, claims that "the executive and legislature, the political branches of government, are entitled to discretion in determining the existence and gravity of a threat to the nation, i.e., the need for a state of emergency, and the necessity for recourse to specific measures."[153]

The different principles adopted as guidelines for derogation as well as the human rights instruments and the work of human rights bodies, make it clear that ordinary courts should be empowered not only to rule on the constitutionality of the state of emergency but also the way in which the

[147] ETH. CONST. art. 93(6).
[148] ETH. CONST. art. 93(6)(c) and (d).
[149] ETH. CONST. art. 93(6)(e).
[150] DeMerieux: Emergency in Commonwealth Caribbean, *supra* note 71, at 117.
[151] *Id.* at 186; Gross: Once More unto the Breach, *supra* note 12, 491.
[152] DeMerieux: Emergency in Commonwealth Caribbean, *supra* note 71 at 117; Iyer: States of Emergency, *supra* note 10, at 186.
[153] ICJ: States of Emergency, *supra* note 3, at 435. It is alleged that the U.S. Courts avoid this issue "by invoking the political question doctrine or declaring that the discretion of the executive, the legislature, or the military commander is absolute and not subject to judicial review." Alexander: The Illusionary Protection, *supra* note 365, at 15-16.

executive exercise it emergency powers.[154] Courts should be able to declare that emergency measures that go beyond the demands of the situation and the powers conferred on the executive as null and void. Constitutional and judicial guarantees, including due process of law and habeas corpus, should be accessible to individuals to challenge government acts.

The *Paris Minimum Standards* suggest that during emergency the judiciary should have four specific powers for the protection of the individual. First, the judiciary should have the power to decide "whether or not an emergency legislation is in conformity with the constitution of the state."[155] Second, the courts should have the jurisdiction to rule on "whether or not any particular exercise of emergency power is in conformity with the emergency legislation."[156] Third, the judiciary should be able "to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality."[157] Finally, "where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect[158] [and, if necessary, grant relief on such basis.]"[159] If derogation measures or any act of application of such measures does not satisfy the above tests, courts should have full power to declare such measures

[154] In its General Comment 29, the Human Rights Committee notes that "a state party may not depart from the requirement of effective judicial review of detention. The *Siracusa Principles* also states that during public emergency, "where persons are detained without charge the need of their continued detention shall be considered periodically by an independent review tribunal." According to the Tenth Annual Report by Mr. Leondro Despouy, the remedy of habeas corpus should be included "among the non-derogable guarantees because it is an essential legal guarantee for the protection of certain non-derogable rights." The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency- Eighth annual report and list of States which, since January 1, 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leondro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council Resolution 1985/37. UN Doc. E/CN.4/Sub.2/1997/19, 7-32, at para. 107; ICJ: States of Emergency, *supra* note 129, at 434-6.

[155] Section (B) Art. 5 of the Paris Minimum Standards which appear in Lillich: The Paris Minimum Standards, *supra* note 40, at 1075.

[156] Lillich: The Paris Minimum Standards, *supra* note 40, at 1075; Chowdhury: Rule of Law, *supra* note 16 at 141.

[157] Lillich: The Paris Minimum Standards, *supra* note 40, at Section (B) Art. 5; Chowdhury: Rule of Law, *supra* note 21 at 141.

[158] Lillich: The Paris Minimum Standards, *supra* note 40, at Section (B) Art. 5; Chowdhury: Rule of Law, *supra* note 21 at 141.

[159] Chowdhury: Rule of Law, *supra* note 16 at 142.

as null and void.[160] Similarly, the *Siracusa Principles* and other major human rights instruments emphasize that every derogation should be subject to the possibility of a challenge to and a remedy against its abusive application or imposition. They also stress that the ordinary courts shall maintain their jurisdiction to adjudicate any complaint that a non-derogable right has been violated.[161]

The institutional process of testing the constitutionality of legislative enactments and executive action is conducted through different mechanisms in different countries.[162] Some have entrusted their ordinary courts with that, while other have opted for special constitutional courts to undertake the task of constitutional interpretation. In others, such as Switzerland, referendums whereby the entire population engages in constitutional interpretation and reviews the laws enacted by the legislature are not unusual. The overreaching purpose behind all such exercise is to void subsidiary laws and administrative decisions that run against the constitution and thereby ensure the supremacy of the latter.

The FDRE Constitution, in a rather unique way, empowers the second house of Parliament, the HOF, to interpret the Constitution.[163] The House is composed of representatives of nations, nationalities and peoples of Ethiopia, each represented by at least one member and an additional representative for each one million of its population.[164] The Council of Constitutional Inquiry (CCI) has the mandate to investigate constitutional disputes and to submit recommendations to the HOF if it finds that there is a need for constitutional interpretation. The HOF then must decide on the dispute within 30 days of receipt.[165] The CCI has a role of a "clearing house," since its mandate is

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[160] Lillich: The Paris Minimum Standards, *supra* note 40, at Section (B) Art. 5; Chowdhury: Rule of Law, *supra* note 16, at 142; Stephen Ellmann, *A Constitution for all Seasons: Providing against Emergencies in a Post-Apartheid Constitution*, 21 COLUM. HUM. RTS. L. REV., 163, 187 (1989).

[161] Haysom, States of Emergency, *supra* note 19, at 155-6.

[162] For very good discussions on the issue of constitutional interpretation, *see* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1977); WALTER MURPHY ET AL, AMERICAN CONSTITUTIONAL INTERPRETATION (2d. ed., 1995); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (1986); Dennis Davis et al, Democracy and Constitutionalism: The Role of Constitutional Interpretation in RIGHTS AND CONSTITUTIONALISM 1(Dawid van Wyk et al., eds., 1996); MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971).

[163] ETH. CONST. art. 61(1) and 83(1).

[164] ETH. CONST. art. 61(2)

[165] ETH. CONST. art. 84(2).

limited to making recommendations to the HOF concerning the need for constitutional interpretation.[166]

A question that forces itself into the forefront is: what is the rationale behind entrusting the HOF with the power to interpret the Constitution? Commenting on this particular question, the Ex-Speaker of the HOPR, who was also the Secretary of the Constitutional Drafting Commission, Ato Dawit Yohannes is quoted as saying:

> How can a constitution that has been ratified by the People's Assembly be allowed to be changed by professionals who have not been elected by the people? To allow the courts to do the interpretation is to invite subversion of the democratization process. Since, the constitution is eventually a political contract of peoples, nations and nationalities, it would be inappropriate to subject it to the interpretation of judges. It is the direct representatives of the contracting parties that should do the work of interpreting the constitution.[167]

The above quotation makes it clear that the drafters of the Ethiopian Constitution considered the Constitution a political pact entered into by the peoples of Ethiopia and constitutional interpretation as a political function.

Be that as it may, the next questions worth considering at this juncture are: Where does this leave Ethiopian courts as far as interpretation of the constitution is concerned? On the one hand, given the fact that the power of the courts to review the constitutionality of law is not provided for *expressis verbis* in the Constitution, one may reasonably argue that ordinary courts have no jurisdiction to entertain cases involving the constitutionality of laws.

However, one may also reasonably argue that a close reading of the section of the Constitution dealing with judicial power reveals that the power to interpret the constitution is shared between ordinary courts and the House of Federation. Article 78 of the Constitution endows courts, both at the Federal and State levels, with judicial power. It goes with out saying that the exercise of judicial power naturally implies interpretation and application of the constitution as well as other laws in their day-to day activity of dispute settlement. In fact, court cases, especially criminal cases, often involve

[166] ETH. CONST. art. 83(2).
[167] As quoted in Assefa Fiseha, Adjudication of Constitutional Issues in Ethiopia: Challenges and Prospects (unpublished, LL.M. Thesis, University of Amsterdam, June 2001), at 44.

allegations of violation of constitutionally guaranteed rights, thereby making it almost impossible for the court to rule on such cases without making some sort of reference to the Constitution.

In a similar vein, Article 13 (1) of the Constitution reads as "[a]ll Federal and State legislative, executive and judicial organs of at all levels shall have the responsibility and the duty to respect and enforce the provisions of this Chapter [Chapter 3]." It is clear from the provision that all the three branches of the government share the duty and responsibility to respect and enforce human rights provisions of the Constitution equally. Courts can neither respect nor enforce human rights norms unless they are in one way or another involved in interpreting the scope and limits of the norms.

Be that as it may, it can be maintained that judicial review of legislative and executive measures assumes even more importance in Westminster styles of government where the party in power controls both the legislative and executive branches. It provides the "check and balance" necessary for the better protection of human rights and freedoms of individual citizens.

CONCLUSION

A few things need only be said by way of conclusion as this paper is a study of principles rather than a case study of their application. All the major international instruments allow states to restrict or derogate from certain rights and freedoms when states of emergency materialize. The overarching purpose of allowing a state to derogate from human rights norms in extraordinary circumstances is to "balance the most vital needs of the state with the strongest protection of human rights possible in the circumstances [not because such norms become any less important]."[168] This balancing act "is not between the State and the individual," but rather "between the individual's rights and freedoms and the rights and freedoms of the community at large."[169] It is thus imperative for nations to strictly observe not only the norms governing the preconditions for a valid declaration of a state of emergency but also those safeguarding against abuses of emergency powers.

[168] Macdonald: European Convention, *supra* note 23 at 225.
[169] Higgins: Derogation, *supra* note 30, at 282.