

**THE DESIRABILITY OF THE DEROGATION CLAUSE IN INTER-
NATIONAL HUMAN RIGHTS LAW AND THE AFRICA CHARTER
ON HUMAN AND PEOPLES' RIGHTS**

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DECLARATION

I, **Sharleen Wangechi Mbirua**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 
Date: 29/05/2018

This dissertation has been submitted for examination with my approval as University Supervisor.


Signed:  30 May 2018
Humphrey Sipalla

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DEDICATION

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ABSTRACT

Human rights are protected under international human rights law. In exceptional cases, such as a concern of the community of nations, states are allowed to temporarily suspend from some of their treaty obligations. Such exceptional circumstances, provided for in derogation provisions, are established in treaties such as the International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights. The African Charter on Human and Peoples' Rights does not contain such exceptional provisions. This paper aims at analysing the lack of a derogation clause from the African Charter.

Through secondary modes of data collection, which mainly includes of books, journal articles and decided cases, this paper seeks to assess the scope of the doctrine of derogation from international and regional human rights instruments. By doing so, the practicality of the derogation clause will be examined. Further undertakings of this study will be to discuss the advantages and disadvantages of including a derogation clause in the African Charter, as well as highlighting the practice of derogation in some African states.

LIST OF CASES

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

1. *Amnesty International v Zambia*, ACmHPR Comm. 212/98, 12 Annual Report(1999).
2. *Civil Liberties Organisation and Media Rights Agenda v Nigeria*, ACmHPR Comm. 105/93, 128/94, 130/94, 152/96, 14 Activity Report(2000).
3. *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, ACmHPR Comm. 74/92, 9 Activity Report(1995).

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

1. *Tanganyika Law Society and the Legal and Human Rights Centre v the United Republic of Tanzania*, AfCHPR App. 009/11, 011/11, 2 (2013),

EUROPEAN COURT OF HUMAN RIGHTS

1. *A. and others v United Kingdom*, ECtHR Judgment of 19 February 2009.
2. *Ireland v United Kingdom*, ECtHR Judgement of 18 January 1978.
3. *Isayeva v. Russia*, Judgement of 24 February 2005.
4. *Lawless v Ireland*, ECtHR Judgment of 1 July 1961.

PERMANENT COURT OF INTERNATIONAL JUSTICE CASES

1. *S.S. 'Wimbledon' Case, (Britain et al. v. Germany)*, Judgement of 17 August 1923 PCIJ.

UN HUMAN RIGHTS COMMITTEE

1. *Consuelo Salgar de Montejo v. Colombia* CCPR Comm. No. 64/1979 (24 March 1982).
2. *Jorge Landinelli Silva v. Uruguay* CCPR Comm. No. 34/1978 (8 April 1981).

KENYA

1. *Martha Karua v Radio Africa Ltd t/a Kiss F.M. Station & 2 others* [2004] eKLR.

MALAWI

1. *Chihana v R*, [1992] MSCA.

2. *Jumbe and Another v Attorney General*, [2005] MWHC.

NIGERIA

1. *General Sanni Abacha and others v Chief Gani Fawehinmi*, [2000] 6 NWLR.
2. *Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu & Anor* [2001] 3 S.C.N.J.

International Statutes and Conventions

1. American Convention on Human Rights, 22 November 1969, Treaty Series No. 36.
2. African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.
3. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.
4. International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.
5. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
AfCHPR	African Court on Human and Peoples' Rights
ACHPR	African Charter on Human and Peoples' Rights
AHG	Assembly of Head of States and Government (of the OAU)
CCPR	United Nations Human Rights Committee
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECmHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
IACmHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLA	Institute for International and Comparative Law in Africa
ILC	International Law Commission
MSCA	Malawi Supreme Court of Appeal
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	United Nations Declaration of Human Rights
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background

Derogation clauses allowing states to temporarily suspend from some of their treaty obligations during times of public emergency,¹ are established in several human rights instruments. The clause is justified by the acknowledgment that sovereign states have the responsibility to protect their citizens and their domestic institutions.² Unlike all other human rights treaties which include the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),³ the International Covenant on Civil and Political Rights (ICCPR)⁴ and the American Convention on Human Rights (ACHR),⁵ the African Charter on Human and Peoples' Rights (ACHPR) contains no such clause. In the *Commission nationale des droits de l'Homme et des libertés v. Chad* the African Commission on Human and Peoples' Rights (ACmHPR) held that the Charter 'does not allow for state parties to derogate from their treaty obligation'.⁶ The African Commission reaffirmed the latter, by also holding that 'the limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances'.⁷

Hence the question then, is why the Organisation of African Unity (now the African Union), in drafting the African Charter, would intentionally omit the clause, keeping in

¹ Lehmann J, 'Limits to counter-terrorism: Comparing derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights' 8 *Essex Human Rights Review*, (2011), 104.

Alnouq M, 'Derogation, emergency and the rule of law: Scope and limitations' Unpublished LLM Thesis, Central European University, 2010, 7.

² Cowell F, 'Sovereignty and the question of derogation: An analysis of Article 15 of the ECHR and the absence of a derogation clause in the ACHPR' 1 *Birkbeck Law Review* (2013), 136.

³ Article 15, *ECHR*, 4 November 1950, ETS 5.

⁴ Article 4, *ICCPR*, 16 December 1966, 999 UNTS 171.

⁵ Article 27, *ACHR*, 22 November 1969, Treaty Series No. 36.

⁶ *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, ACmHPR Comm. 74/92, 9 Activity Report (1995), 21.

⁷ *Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, ACmHPR Comm. 105/93, 128/94, 130/94, 152/96, 14 Activity Report (2000), 41.

mind, its continued influence in the recognised international human rights sphere. For instance, it is common international practice that, the limitation clause is deemed insufficient when extraordinary circumstances arise. Therefore, it is evident that confrontation arises, as to whether a derogation clause is suitable in the Charter. Because the absence, for one, has been depicted as a positive development of human rights norms in Africa and should not be seen as a defect,⁸ while on the other hand, it has been criticised for allowing discretionary abuse by states through the African Charter's 'clawback clauses' with others even going as far as recommending state parties to ignore the Charter in times of public and state emergencies.⁹

1.2 Statement of Problem

Emergencies are certain to occur during the lifetime of any community.¹⁰ Situations of war and emergency have unfortunately been frequent in the recent history of the African continent.¹¹ The African Charter should presumably effect a derogation clause so as to protect states faced with emergencies while ensuring clear rules for the protection of the rights of individuals. The African Charter however, does not provide for a derogation clause, thus seemingly defeating its own obligation to promote and protect the rights of individuals and peoples'.¹²

1.3 Hypothesis

Due to the almost unanimous use of a derogation clause in international human rights law, and its acceptance in African states through their constitutions, the derogation clause is most appropriate in the context of the African Charter.

⁸ Ali A, 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' 17 *Law, Democracy & Development Journal of Faculty of Law* (2013), 79.

⁹ Heyns C, 'The African regional human rights system: In need of reform?' 1 *African Human Rights Law Journal* (2001), 162.

¹⁰ Oren G, 'Once more unto the breach: The systemic failure of applying the European Convention on Human Rights to entrenched emergencies' 23 *Yale Journal of International Law* (1998), 438.

¹¹ D'Sa RM, 'The African Charter on Human and Peoples' Rights: Problems and prospects for regional action' 10 *Australian Yearbook of International Law* (1983), 109 as cited in Brems E, *Human Rights: Universality and diversity*, Kluwer Law International, The Hague, 2001, 125.

¹² Preamble para. 10, ACHPR, 27 June 1981, 1520 UNTS 217.

1.4 Research Objectives

The dissertation has the following objectives:

- i. To analyse the history of the derogation clause and its international impact.
- ii. To evaluate the various constitutional provisions that already provide for some form of derogation in various African states.
- iii. To investigate the suitability of the derogation clause in the African Charter.

1.5 Research Questions

The main question of the research is, 'Is the principle of a derogation clause appropriate in the African Charter so as for the Charter to formally recognise and apply it? In order to arrive at the answer, the research also considers these subsidiary questions:

- i. What are the conceptual underpinnings of the derogation clause?
- ii. How has the derogation clause been indirectly implemented in African states, despite of its absence in the African Charter?
- iii. Is the absence of the clause detrimental to the African Charter or a 'blessing in disguise'?
- iv. How can a derogation clause be applied in the context of the African Charter?

1.6 Justification of the Study

Conventions pertaining to human rights have been critiqued by some countries to be instruments that interfere with matters, which fall within domestic jurisdiction of States' and being an infringement on national sovereignty.¹³ With that said, the relative state instability prevalent in Africa over the past two decades, with countries like Sierra Leone, Guinea, Liberia, Gambia and Ethiopia declaring state of emergencies in 2010, 2014, 2014, 2016 and 2018 respectively, it would be reasonable for the Charter to address itself from the exceptions to and derogation from the rights of individuals and the circumstances in which their suspension may be permissible.¹⁴ The study is thus significant in that it investigates the relevance of the clause itself, in consideration of the promotion of human rights and the necessary part it would or should play in the African Charter.

¹³ D'Sa RM, 'The African Charter on Human and Peoples' Rights', 107.

¹⁴ D'Sa RM, 'The African Charter on Human and Peoples' Rights', 107.

1.7 Literature Review

Since the establishment of the African Charter, significant contributions concerning the lack of a derogation doctrine have been conducted. Firstly, Laurent Sermet highlights the reality that numerous African constitutions,¹⁵ contain derogation clauses within their municipal laws, that become operational in cases of exceptional circumstances and crisis war. He argues that a common African constitutional standard is not reflected in the African Charter,¹⁶ resulting in the African Charter being at odds with domestic constitutional law.¹⁷ It is also of less clarity that the African Charter imposes obligations on states to make laws in line with the intents and purposes of the Charter.¹⁸

Further criticism asserts that the absence of the derogation clause, weakens the entire system of the African Charter, as states facing an emergency are unlikely to seek the guidance of the ACHPR if they know that the recognition and accommodation of their need to enter into a state of exception, cannot be appreciated.¹⁹ This is because the response of a state to a public emergency is said to be an acid test of its commitment to the effective implementation of human rights;²⁰ therefore, the better way to defend fundamental rights and the integrity of the law is through constitutional systems that allow for an additional

¹⁵ Section 45(2), *Constitution of Nigeria* (1999). Article 93(4), *Constitution of Ethiopia* (1995). Article 52, *Constitution of Angola* (1992). Article 46, *Constitution of Cape Verde* (1992). Article 31, *Constitution of Guinea-Bissau* (1984). Article 72, *Constitution of Mozambique* (2004). Article 27(5)(a), *Constitution of Eritrea* (1997). Article 24(3), *Constitution of Namibia* (1990). Article 137, *Constitution of Rwanda* (2003). Section 38, *Constitution of Swaziland* (2005). Article 44, *Constitution of Uganda* (1995). *Constitution of Kenya* (2010).

¹⁶ Sermet L, 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion' 1 *African Human Rights Law Journal* (2007), 144.

¹⁷ Sermet L, 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights', 144.

¹⁸ *Tanganyika Law Society and The Legal and Human Rights Centre v. The United Republic of Tanzania*, AfCHPR App. 009/11, 011/11, 2 (2013), para. 101.

¹⁹ Cowell F, 'Sovereignty and the question of derogation', 139.

²⁰ McGoldrick D, 'The interface between public emergency powers and international law' 2 *International Journal of Constitutional Law* (2004), 388.

legal emergency act.²¹ Repudiation of the aforementioned justification is heralded in the *Chad Mass Violations case*, where the Commission held that the Charter 'does not allow for state parties to derogate from their treaty obligations.... and even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.'²²

Charles Dlamini maintains that the presence of clawback clauses in the Charter does not offer individuals the same degree of protection provided by derogation clauses contained in international covenants and conventions. He believes that derogation clauses are advantageous to the promotion of human rights for they limit state conduct in two ways; through restricting the circumstances where derogation may take place and such clauses also define rights that cannot be derogated from and must be respected.²³

Additionally, Christof Heyns is of the view that since the African Charter is silent on the issue of derogation, international norms should prevail. He advocates for the amendment of the African Charter to include such a clause.²⁴ His view is supported by the fact that most African states are parties to both the Charter and the ICCPR which require different obligations from states since the latter contains a derogation provision. Sermet poses the following quandary; are the actions of a state enduring conflict, justified under Article 4 of the United Nations Human Rights Committee (CCPR) or with regard to the African Charter? He believes that the Article 30(4) of the Vienna Convention on the Law of Treaties which attempts to regulate the order of priority among various treaties concerning the same matter, does not resolve the question of this conflict of standards.²⁵

The need to discuss the importance for a derogation clause in the African context is hence demanded. This discussion does not ignore the criticisms that have been set out concern-

²¹ Hickman RT, 'Between human rights and the rule of law: Indefinite detention and the derogation model of constitutionalism' 68 *The Modern Law Review* (2005), 655-668.

²² *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, ACmHPR, 21.

²³ Dlamini CRM, 'The protection of human rights in Africa' Published LLM Thesis, University of Zululand, KwaZulu-Natal, January 1989, 165.

²⁴ Heyns C, 'The African regional human rights system: In need of reform?', 162.

²⁵ Sermet L, 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion', 144.

ing the doctrine. For instance, states have been said to co-opt and distort the derogation regime under international human rights law. The 1997 UNHCR Special Rapporteur study highlights the extensive application of derogations; specifically ninety-five states, or around half of the countries in the world, had been under a state of emergency, actual or declared, during the period of 1985-1997.²⁶ The CCPR expressed concerns over state parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by Article 4.²⁷ Additionally, although derogation is an impactful contribution to the making of human rights treaties, it does not help their enforcement. A derogation clause thus has a 'potentially negative consequences' as it 'condones a deviation from pre-existing treaty commitments.'²⁸ It would therefore conclude that it is one of the techniques that states use to limit their international obligations.²⁹ The query thus emerges of the desirability of the derogation clause in the African Charter, in light of the criticisms of its presence and absence in human rights instruments.

1.8 Theoretical Framework

1.8.1 Introduction

This research is informed by the collective and cultural relativism *Weltanschauungen*, to the extent to which these theories are pertinent to the experience of a derogation doctrine.

²⁶ UCHR: *Final report of the Special Rapporteur on the administration of justice and the human rights of detainees*, 12 March 1986, at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G95/126/75/PDF/G9512675.pdf?OpenElement> as cited in Sheeran PS, 'Re-conceptualizing states of emergency under international human rights law: Theory, legal doctrine, and politics' 34(3) *Michigan Journal of International Law* (2013), 492.

²⁷ *CCPR General Comment No. 29, Article 4: Derogations during a state of emergency*, 31 August 2001, 1.

²⁸ Hafner-Burton E, Helfer L, Fariss C, 'Emergency and escape: Explaining derogations from human rights treaties' 65 *International Organisation* (2011), 678, as cited in Ali A, 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights', 82.

²⁹ Ouguerouz F, *The African Charter on Human and Peoples' Rights. A comprehensive agenda for human dignity and sustainable democracy in Africa*, Brill Publishers, Leiden, 2003, 423, as cited in Ali A, 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights', 82.

1.8.2 African collective theory

'Sticks in a bundle are unbreakable'

*Bondei proverb.*³⁰

African philosophy is unique in its focus on preserving the community.³¹ Whereas Western conceptions are concerned with the autonomous individual, African conceptions do not know such a thing. Instead, individuals still perceive themselves in their group identity in traditional Africa;³² therefore concluding the apprehension of the community in that without a community, there are neither laws, nor rights.³³ Ibhawoh affirms the latter when he stated that:

'An African concept of human rights is actually a concept of human dignity that defines the inner moral nature and worth of the human person and his or her proper relations with society. In pre-colonial Africa, rights were assigned on the basis of communal membership.'³⁴

The aforementioned justification promotes the idea that "a person is a person because of or through others" translated from the South African Zulu aphorism, 'Umuntu Ngumuntu Ngabantu', present in the ubuntu philosophy.³⁵ The object of law would need to go beyond the mere resolution of conflict but for the maintenance of the equilibrium of the society... as a corporate whole.³⁶ Since human rights in Africa can be considered to emphasis on collective rights as opposed to individual,³⁷ attention must thus be given to indige-

³⁰ Akoto-Abutiati D, *Proverbs and the African tree of life: Grafting Biblical proverbs on to Ghanaian eve folk proverbs*, Brill Publishers, Leiden, 2014, 78.

³¹ Ibhawoh B, *Imperialism and human rights: Colonial discourses of rights and liberties in African history*, The State University of New York Press, New York, 2007.

³² Shivji I, *The concept of human rights in Africa*, Codesria Book Series, London, 1989, 12.

³³ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, Trafford Publishing, Victoria, 2007.

³⁴ Ibhawoh B, *Imperialism and human rights*, 15.

³⁵ Khomba J, 'Redesigning the balanced scorecard model: An African perspective' Published PhD Thesis, University of Pretoria, 2011, 127.

³⁶ Ademowo AJ, 'Law in traditional Yoruba philosophy: A critical appraisal' 2 *Caribbean Journal of Philosophy* (2013), 10. Okafor F, 'Legal positivism and the African legal tradition' 24 *International Philosophical Quarterly* (1984), 161.

³⁷ Shivji I, *The concept of human rights in Africa*, 24.

nous values. Consequentially, the notion of individualistic human rights that is reflected in the Universal Declaration of Human Rights (UDHR), indicates a form of the domination of the Western world.³⁸ The latter is by virtue of the UDHR being articulated as the first time in human history, a regime of basic and inalienable rights to which all human beings are entitled by virtue of their humanity,³⁹ and yet the declaration was drafted by the imperial powers who were actively denying Africans of their right to self determination during the colonial era.

The aforementioned posits that there are two distinct final goods to be promoted, namely those of individual freedom and communal relationship.⁴⁰ However, realities of pre colonial and post colonial Africa differ greatly from those of the post colonial Africa. This is witnessed with the African Charter's inclusion of both individual rights⁴¹ and communal rights.⁴² Undoubtedly, Africa presents a paradoxical picture in the study of human rights with different periods contributing significantly to the divergence in the conceptual understanding of human rights.⁴³ It is through this that the complication of promotion and protection of human rights resides.

1.8.3 Cultural relativism theory

This theory argues that human rights should not be construed as absolute because there is infinite cultural variability in every society;⁴⁴ that even as a matter of customary or conventional international law or a body of substantive human rights norms existing, their meanings vary substantially from culture to culture.

³⁸ Mbondenyi M, *International human rights and their enforcement in Africa*, LawAfrica Publishing, Nairobi, 2011, 66.

³⁹ Ibhawoh B, *Imperialism and human rights*, 17.

⁴⁰ Metz T, 'African values and human rights as two sides of the same coin: A reply to Oyowe' 14 *African Human Rights Law Journal* (2014), 307.

⁴¹ Article 2, *ACHPR*. Article 14, *ACHPR*. Article 17, *ACHPR*. Article 18, *ACHPR*.

⁴² Article 29, *ACHPR*.

⁴³ Mbondenyi M, *International human rights and their enforcement in Africa*, 67.

⁴⁴ Mbondenyi M, *International human rights and their enforcement in Africa*, 64.

This theory seeks to criticise the manner in which social systems outside Western countries, were analysed from Western perspective and why they were regarded as inferior.⁴⁵ According to Chinua Achebe, the West in post-colonial Africa, desired to 'set up Africa as a foil to Europe'.⁴⁶ On the other hand, Jacktson Ojwang contended that the influence of Western jurisprudence in Africa is overwhelming and given the different social context, unwarranted. He suggested that jurisprudence needs to be replaced if Africa is to achieve its goals.⁴⁷ Legal philosopher Chinedu Okafor advises local human rights groups to seek legitimisation by teasing out and harnessing popular aspects of local cultures.⁴⁸

1.8.4 Overview of the theoretical framework

The aforementioned theories serve as insight to the appositeness of a derogation clause within the African Charter. For instance, since the communal rights are held at a higher regard than individual rights, legal standards (such as derogation clauses) that favour the betterment of protecting peoples' rights should be defended. On the other hand, one may argue that since derogation is an internationally accepted norm,⁴⁹ it does not necessarily equate to the cultural values distinctive in contextual Africa. A unique approach must therefore be fostered in addressing the African Charter, to the extent of a derogation doctrine; keeping in mind its application across different international covenants and conventions.

⁴⁵ Ntephe P, 'Does Africa need another kind of law?: Alterity and the rule of law in Subsaharan Africa' Unpublished PhD Thesis, University of London, 2012, 66.

⁴⁶ Achebe C, 'An image of Africa: Racism in Conrad's heart of darkness' 18 *The Massachusetts Review* (1977), 782-794 as cited in Ntephe P, 'Does Africa need another kind of law?: Alterity and the rule of law in Subsaharan Africa' Unpublished PhD Thesis, University of London, 2012, 70.

⁴⁷ Ojwang JB, *Laying a basis for rights: Towards a jurisprudence of development*, Nairobi University Press, Nairobi, 1992, 351-400 as cited in Ntephe P, 'Does Africa need another kind of law?: Alterity and the rule of law in Subsaharan Africa' Unpublished PhD Thesis, University of London, 2012, 72.

⁴⁸ Okafor O, 'Modest harvests: On the significant (but limited) impact of human rights NGOs on legislative and executive behaviour in Nigeria' 48 *Journal of African Law* (2004), 47 as cited in Ntephe P, 'Does Africa need another kind of law?: Alterity and the rule of law in Subsaharan Africa' Unpublished PhD Thesis, University of London, 2012, 74-75.

⁴⁹ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 32.

1.9 Assumptions

- The doctrine of derogation clause is already an African constitutional practice.
- The historical development of the derogation clause has played a part in inclusion and absence of the derogation clause across international human rights conventions.

1.10 Methodology

This research utilises mostly secondary modes of data collection mechanisms. Accordingly, desk research will be extensively used. This include books, journal articles, and decided cases that provide the requisite information. These sources will be accessible through the University's online databases and library. Internet searches will also assist in the research. These include online journal articles, dissertations, international instruments amongst others.

1.11 Limitations to the Study

This study is limited to:

- i. Time constraints- This study requires its submission within a prescribed period.
- ii. There are few cases documented by the African Commission concerning the derogation clause. This study, will be forced to explore international and regional cases that highlight the same.

1.12 Chapter Breakdown

a) Chapter One- Introduction

This chapter serves as an introduction to the dissertation as is set out above. This entails giving a background and reasons for the research, as well as defining the parameters of the study and the methodology to be used.

b) Chapter Two- The Development of The Derogation Clause Across International Conventions

This chapter conceptualises the derogation clause across three international human rights conventions. It will also seek to briefly mention the drafting process of the African Charter and how this process may have led to the absence of the clause.

c) Chapter Three- African Constitutions And The Derogation Clause

This chapter looks to derogation practices in six African states and their inclusion of the derogation clauses in the respective constitutions.

d) Chapter Four- Implications of Establishing A Derogation Clause In The African Charter

This chapter explores the plausible reasons for the omission of the derogation clause in the Charter, and the justification and need for the use of this derogation doctrine. It also focuses on the conflicting thoughts on the inclusion of the clause.

e) Chapter Five- Conclusion and Recommendation

This chapter concludes the study and gives recommendations on how the derogation clause may be applied in the African Charter.

CHAPTER TWO

DEVELOPMENT OF THE DEROGATION CLAUSE ACROSS INTERNATIONAL CONVENTIONS

2.0 Introduction

Chapter one served to introduce this research, in regards to the objectives of this dissertation, the theory underpinning derogation clauses, as well as a snippet as to what the Academy garners in respect to this doctrine. This chapter proffers the conceptual underpinnings of the derogation clause across international and regional conventions.

2.1 Background of derogation

The inclusion of derogation clauses in international human rights instruments represents a concession to the belief that when governments perceive threats to the nation, they will inevitably take action.⁵⁰ Historically, the earliest development of emergency regimes, hails from the Roman Republic. The Roman Republic is appreciated for giving a good set of rules for states of emergency.⁵¹ It is said to have influenced the way in which the derogation clauses in post-World War II constitutions and in human rights treaties like the ECHR and the ICCPR, have been structured and interpreted.⁵²

2.1.1 Suspension of treaty obligations in general public international law

Further development concerning the justification of States to suspend from their treaty obligations is witnessed in Article 62 of the Vienna Convention on the Law of Treaties (VCLT) and Article 25 of the International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts. The former highlights the reality that a party under the VCLT, who invokes the suspension of its treaty operations, shall

⁵⁰ Ryspaeva A, 'Justification of derogations of human rights in emergency situations' Published LLM Thesis, Central European University, 2015, 57.

⁵¹ Loof JP, 'Crisis situations, counter terrorism and derogation from the European Convention on Human Rights. A threat analysis' in Buyse A.C (ed), *Margins of conflict. The ECHR and transitions to and from armed conflict*, Antwerp-Cambridge-Portland: Intersentia, Cambridge, 2010, 36.

⁵² Loof JP, *Human rights and national security: compatible entities? Derogation and restriction of human rights during states of emergency and other situations that threaten national security*, Nijmegen: Wolf Legal Publishers, Leiden, 2005, 34-35.

indicate the measures proposed to be taken with respect to the treaty and the reasons therefor.⁵³ The latter declares that necessity may be invoked on States' as a ground for precluding the wrongfulness of an act, not in conformity with a States' international obligation, if it is the only way a State can safeguard an essential interest against a grave and imminent peril.⁵⁴

Interestingly, the ICJ Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons also provides for some form of justification for the suspension of treaty obligations, during times of war or national emergencies. Although this Advisory Opinion acknowledges the right to life as a non-derogable right by virtue of the ICCPR's provisions, the test of what is an arbitrary deprivation of life is to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities.⁵⁵

2.2 Derogation under International Conventions

The derogation clauses across the various regional and international conventions are similar in that they establish two central standards for a valid derogation clause; that a public emergency must exist which 'threatens the life of the nation' and measures taken, concerning this public emergency, should strictly be required by the exigencies of the situation. Although this may be the case, they differ in the manner concerning application, implementation and their non-derogable rights.

⁵³ Article 62 (1), *VCLT*.

⁵⁴ Draft articles on state responsibility for internationally wrongful acts, ILC 53rd Report, 2001, UN Doc A/56/10.

⁵⁵ *Legality of the Threat or Use of Nuclear Weapons* 226 (1996), Advisory Opinion, ICJ Reports 1996, 25. See also para 79 that stipulates of the intransgressible principles of international customary law that all states must adhere to whether or not they have ratified the conventions that contain them, this is in context of derogation being a custom. See also para 97 that states that the Court cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence.

2.2.1 Early ECHR drafts included derogation clauses

The derogation clause, in the initial phases of drafting the ECHR, was absent.⁵⁶ The Council of Europe's Consultative Assembly instead, relied on the comparative studies of the United Nations drafts. The latter rendered the existence of a general limitation clause satisfactory in limiting a state party's actions during emergency periods.⁵⁷ During the conference, debates ensued between opposing fronts. On one hand, were the delegates that advocated for the inclusion of a specific derogation clause; with the United Kingdom spearheading the latter by producing a detailed proposal suggesting for both a derogation article and exceptions clauses.⁵⁸ On the other hand, were those that advocated for a more general approach when defining rights and limitations (Italian and French experts protested a derogation article due to its inconsistency with enumerations).⁵⁹ However, the delegates in finalising the final draft, drew inspiration from the ICCPR drafts as well as the proposal from the British government. The Senior Officials of the Council of Europe, presented the Convention for signature on November 4, 1950, with the derogation clause included.

2.2.2 Derogation under the ECHR

The derogation clause, according to Article 15, states that derogation is permitted in times of war or other public emergency, 'threatening the life of the nation'. Over the years, since its entry into force, the European Court of Human Rights (ECtHR) has interpreted the derogation clause to express the following:

⁵⁶ Hartman J, 'Derogation from human rights treaties in public emergencies, A critique of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' 22 *Harvard International Law Journal* (1981), 5.

A striking feature of the Travaux Préparatoires is the brief and limited reference to public emergencies and the principle of derogation orders as is stated in Cowell F, 'Sovereignty and the question of derogation', 144.

⁵⁷ Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights Council of Europe 1975, 138.

⁵⁸ Hartman J, 'Derogation from human rights treaties in public emergencies', 5.

⁵⁹ Hartman J, 'Derogation from human rights treaties in public emergencies', 5.

- i) The ECHR is subject to a strict, impartial and non-politicised international supervision by its European Commission on Human Rights (that was abolished in 1998) and the ECtHR.⁶⁰
- ii) That Article 15 only has effect if the State concerned issues a formal declaration of derogation.⁶¹ However, the member states have been shown to have considerable delays in submitting to this requirement of notification ie. United Kingdom.⁶²
- iii) Discretion *vis-à-vis* derogation was left to States by the vague language of the ECHR.⁶³ In *A and Others v United Kingdom*,⁶⁴ the ECtHR concluded that each Contracting State is responsible for determining whether that life is threatened by 'public emergency' and if so, how far is it necessary to overcome this emergency. The member states thus have a better understanding of national issues as opposed to an international judge who is not in direct and continuous contact with the pressing needs of the country at that moment.⁶⁵
- iv) Although the Court casts a wide net of margin of appreciation over a state, the ECtHR upholds that such discretion is not unlimited and is subject to the scrutiny of European supervision. The state centric analysis has however been criticised,⁶⁶ as is stated above for entrusting member states with such discretionary powers. In the *Lawless v Ireland* case, the ECtHR sought to limit the latter by stating that the term, 'threatening the life of a nation' in this case, was determined to mean 'exceptional situations of crisis' which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.⁶⁷

⁶⁰ Schreuer C, 'Derogation of human rights in situations of public emergency: The experience of the European Convention on Human Rights' 9 *Yale Journal of International Law* (1982), 116.

⁶¹ *Isayeva v. Russia*, ECtHR Judgement of 24 February 2005, para.191.

⁶² Schreuer C, 'Derogation of human rights in situations of public emergency', 119.

⁶³ Mokhtar A, 'Human rights obligations v. derogations: Article 15 of the European Convention on Human Rights' 8(1) *International Journal of Human Rights* (2004), 65.

⁶⁴ *A and others v United Kingdom*, ECtHR Judgment of 19 February 2009, para. 173.

⁶⁵ *Ireland v United Kingdom*, ECtHR Judgement of 18 January 1978, para. 207.

⁶⁶ Janis M, Kay R, Bradley A, *European human rights law*, Oxford University Press, London, 2008, 71.

⁶⁷ *Lawless v Ireland*, ECtHR Judgment of 1 July 1961, para. 26 and 90.

2.2.3 Initial opposition to derogation provisions in the ICCPR

The preparatory works of the derogation clause in the ICCPR appeared in the earliest days of drafting the Covenant. Although opposition to the derogation clause is said to have been rather mute, its specific terms inspired extensive debate.⁶⁸ The British government emphasised when arguing in favour of the ICCPR's derogation clause in 1947, that 'under general international law in time of war, States were not strictly bound by conventional obligations unless the conventions contained provisions to the contrary'.⁶⁹ The US delegation opposed the clause arguing, that a single general limitation clause was preferable,⁷⁰ while Yugoslavia protested that the 'moral effect' of a covenant, which stressed restrictions, would be 'disastrous'.⁷¹ After further debates and overall disagreements between present States, the Drafting Committee⁷² of 1947, learning its lesson from the vicious war, concluded that the main focus of the provision was to minimise the risk of abuse and ensuring States are bound by their legal human rights obligations, even in armed conflicts and similar crisis situations.⁷³ (Interestingly, the derogation provision was discussed prior to the adoption of the UDHR which does not contain a derogation provision) The Covenant was adopted on 19 December 1966.

The normative derogation provision, under Article 4 of the ICCPR, states that when a 'public emergency threatening the life of the nation' is proclaimed, a State party may derogate from their obligations, only to the 'extent strictly required by the exigencies of the situation'.⁷⁴ Although the latter has endured critique for its inconclusive nature,⁷⁵ the rel-

⁶⁸ Hartman J, 'Derogation from human rights treaties in public emergencies', 8.

⁶⁹ Simpson B, *Human rights and the end of empire: Britain and the genesis of the European Convention*, Oxford University Press, London, 2001, 477.

⁷⁰ Hartman J, 'Derogation from human rights treaties in public emergencies', 8.

⁷¹ Hartman J, 'Derogation from human rights treaties in public emergencies', 5.

⁷² The Drafting Committee was appointed in 1947 by the Commission on Human Rights to prepare a draft declaration and covenant on human rights.

⁷³ Loof JP, 'Crisis situations, counter terrorism and derogation from the European Convention on Human Rights', 38.

⁷⁴ Article 4 (1), *ICCPR*.

⁷⁵ Becker M, 'An Escape from the perceived rationalist-constructivist binary: A look into derogable international human rights agreements' Unpublished International and Comparative Studies Thesis, University of Michigan, Michigan, 2015, 66.

evant authorities (including the CCPR) have established the following regime in interpreting the clause:

For one, even when states are faced with armed conflict or a terrorist attack, it does not equate to imposition of restrictions on human rights, being justified.⁷⁶ The Siracusa Principles although not binding, advance the latter by specifying that exceptional circumstances are those of imminent and actual danger, as opposed to internal conflicts and unrest that do not constitute a grave and imminent threat to justify derogation under the article.⁷⁷ In the *Consuelo Salgar de Montejo v. Colombia* case, the CCPR stated that the mere declaration of the existence of a state of emergency is insufficient, and states are bound 'to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4 (1) exists in the country concerned'.⁷⁸

Additionally, the validity of the derogation clause also depends on the official proclamation of a State party.⁷⁹ This condition is designed to force derogating parties to act openly from the outset of the emergency and to delegitimise after the fact justifications for violations of human rights.⁸⁰ Notification of the derogation⁸¹ requires that a State party availing itself of the right of derogation, shall immediately inform the other States parties to the Covenant through the United Nations Secretary General, of the provisions from which it has derogated and the reason for these measures.⁸²

⁷⁶ CCPR General Comment No. 29, 2.

⁷⁷ UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4.

⁷⁸ *Consuelo Salgar de Montejo v. Colombia* CCPR Comm. No. 64/1979 (24 March 1982) para. 10.3.

The committee has previously upheld this position in the *Jorge Landinelli Silva v. Uruguay* case where it was held that 'the State Party is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes Article 4(1)' the committee's function is therefore 'to see to it that States Parties live up to their commitments under the Covenant. *Jorge Landinelli Silva v. Uruguay* CCPR Comm. No. 34/1978 (8 April 1981) para. 8.3.

⁷⁹ Article 4 (1), ICCPR.

⁸⁰ Siehr A, 'Derogation measures under Article 4 ICCPR, with special consideration of the war against international terrorism' 47 *German Yearbook of International Law* (2004), 553.

⁸¹ Article 4 (3), ICCPR.

⁸² Siehr A, 'Derogation measures under Article 4 ICCPR, with special consideration of the war against international terrorism', 553.

Some State parties have never fully respected treaty obligations. For instance, Trinidad and Tobago declared a vague and abstract notification in 1995.⁸³ The country also craftily, in its reservation against Article 4 (specifically paragraph 2), aimed at eliminating any accusation of Trinidad and Tobago violating non-derogable rights.⁸⁴ Additionally, the United States, following the aftermath of 9/11, never notified a state of public emergency pursuant to Article 4,⁸⁵ yet over 600 persons suspected of being terrorist were detained at Guantanamo Bay with a few having been charged.⁸⁶

2.2.3 Derogation under the ACHR

The drafting negotiation of the ACHR, held around 1969, was less difficult than other human rights instruments as a result of the ICCPR serving as a model for the working draft.⁸⁷ During the drafting negotiation conference, El Salvador's delegation proposed the derogation clause to include the terms "or other public calamity" ('u otra calamidad pública'). El Salvador's bided that the term, involved a situation was not necessarily a

The Siracusa Principles also provide for five specific elements that every notification should contain in order to provide sufficient information.

⁸³ The unclear provision reads that 'action has been taken or is immediately threatened by persons or bodies of persons of such a nature and on so extensive scale as to be likely to endanger the public safety or to deprive the community of supplies or services essential to life' as cited in Siehr A, 'Derogation measures under Article 4 ICCPR, with special consideration of the war against international terrorism', 551.

⁸⁴ The HRC, recognising the counter-productivism of reservations to article 4 of the ICCPR, held in the General Comment 24 that the commission has the power to determine whether a specific reservation is compatible with the object and the purpose of the treaty.

Siehr A, 'Derogation measures under Article 4 ICCPR, with special consideration of the war against international terrorism', 558.

⁸⁵ Siehr A, 'Derogation measures under Article 4 ICCPR, with special consideration of the war against international terrorism', 571.

⁸⁶ Siehr A, 'Derogation measures under Article 4 ICCPR, with special consideration of the war against international terrorism', 573.

⁸⁷ Faulkner E, 'The right to habeas corpus: Only in the other Americas' 9 *American University International Law Review* (1994), 665.

threat to internal or external security, but which could nevertheless arise.⁸⁸ Distinctively Mexico's delegation proposed to delete among other things, the principle of non-derogable rights from the Convention; other member states refuted both this suggestions.⁸⁹

Although the derogation provision has been critiqued for being loosely drafted as compared to other human rights instruments,⁹⁰ the Convention revels in having eleven non-derogable clauses, four more non-derogable rights than the ICCPR and seven more than the ECHR. The Inter American Commission on Human Right (IACmHR) has exceptionally recognised that while economic and social deprivations may *explain* human rights violations, they cannot *justify* denials of civil and political rights⁹¹ during state emergencies. The IACmHR has also stated that the right to due process or 'essential judicial guarantees' must be preserved during states of emergency.⁹² The derogation clause is also drafted differently from the other aforesaid international human rights agreements, in that Article 27 states that derogation is permitted during, time of war, public danger, or other emergency that threatens the independence or security of a State Party. Such derogation should not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.⁹³

2.2.4 Derogation under the African Charter on Human and Peoples' Rights

Before the negotiations for drafting the Charter began, African states in the 1970's enjoyed the principle of non-interference, in continental human rights adherence and obliga-

⁸⁸ United Nations, 'Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers' *The administration of justice during states of emergency*, in Professional Training Series (9) 2003, 820.

⁸⁹ Tessema B, 'A critical analysis of non-derogable rights in a state of emergency under the African system: The case of Ethiopia and Mozambique' Unpublished LLM Thesis, Eduardo Mondlane University, 31 October 2005, 12.

⁹⁰ Nmehielle V, *The African human rights system: Its laws, practises and institutions* Kluwer Law International, The Hague, 2001, 59.

⁹¹ Hartman J, 'Working paper for the Committee of Experts on the Article 4 derogation provision' 7 *Human Rights Quarterly*, (1985), 95.

⁹² O'Donnell D, 'Commentary by the Rapporteur on derogation' 7 *Human Rights Quarterly*, (1985), 32.

⁹³ Article 27 (1), *ACHR*.

tions.⁹⁴ Indeed there was a juridical void in African regional rights promotion and protection and the human rights abuses of the 1970s in Amin's Uganda, Nguema's Equatorial Guinea and Bokassa's Central African Republic,⁹⁵ brought on pressure for change.

The drafting of the African Charter was to ensue, with the obligation of responding to African needs, in the sense of incorporating African traditional values and civilisation; which in turn should inspire and characterise the reflection and conception of African human rights.⁹⁶ Therefore in July 1979, African leaders, in a historic decision, declared themselves conscious of the fact that a political regime, which protects fundamental human rights, is indispensable.⁹⁷ Events such as the 'Law of Lagos', the Dakar Declaration, negotiations by African experts and lawyers in Dakar, Monrovia and Banjul and Nairobi, led to the adoption of the African Charter in Nairobi, in 1981.⁹⁸

Accordingly, moderate discussions prevailed concerning the inclusion of a derogation provision in the African Charter. During the meeting of experts in Dakar, Senegal, the highly respected President of Senegal, Leopold Sedar Senghor advised experts by stressing that, 'room should be made for African tradition in the (African) Charter'.⁹⁹ It was hence agreed that it would be merely futile to present the Organisation of African Unity (OAU) with a carbon copy of other international instruments, which because of their universality, did not focus specifically on African concerns and traditional values. In light of the continuous advice of President Senghor, the experts were extremely mindful of avoiding derogations from principles of human rights that had been universally accepted.¹⁰⁰

⁹⁴ Viljoen F, *International human rights law in Africa*, Oxford University Press, Oxford, 2007, 158.

⁹⁵ Viljoen F, *International human rights law in Africa*, 158.

⁹⁶ Nmehielle V, *The African human rights system*, 83.

⁹⁷ Ouguergouz F, *The African Charter on Human and Peoples' Rights*, 39.

Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 32.

⁹⁸ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 25-63.

⁹⁹ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 29.

¹⁰⁰ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 31.

2.3 Derogation, limitation and clawback clauses

Discrepancies in the application of the derogation provisions were prevalent in the drafting negotiations of both the ICCPR and the ECHR. Opponents of the derogation clause during the drafting of the ICCPR argued that the eventualities of the derogation clause were sufficiently covered by the relevant limitation clause and that limitation clauses can be invoked in times of emergency.¹⁰¹ Despite the fact that the derogation and limitation clauses both aim at interfering with substantive human right obligations, they should not be confused as they serve different purposes.

The idea of limitations is based on the recognition that most human rights are not absolute but rather reflect a balance between individual and community interests.¹⁰² Such an imposition on rights has resulted in limitations being referred to as ‘ordinary’ limitations, in so far as they can be imposed permanently during times of peace.¹⁰³ A limitation, when applied, ‘must be necessary in a democratic society’.¹⁰⁴

Unlike limitations, derogations must be as restrictive as possible¹⁰⁵ for their operation suspends a right completely, resulting in a total paralysis of a norm.¹⁰⁶ These extraordinary limitations¹⁰⁷ are relevant in tackling exceptional circumstances such as serious

¹⁰¹ Tessema B, ‘A critical analysis of non-derogable rights in a state of emergency under the African system: The case of Ethiopia and Mozambique’ Unpublished LLM Thesis, Eduardo Mondlane University, 31 October 2005, 13.

¹⁰² UN Commission on Human Rights, The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights A contribution to the freedom of the individual under law, 10 March 1981, E/CN.4/RES/19(XXXVII).

¹⁰³ United Nations, ‘Human rights in the administration of justice’ 814.

¹⁰⁴ Article 8(1), *ECHR*. See also Article 24 of the Constitution of Kenya which gives a detailed expounding on limitations

¹⁰⁵ Faulkner E, ‘The right to habeas corpus: Only in the other Americas’, 687.

¹⁰⁶ Ouguergouz F, *The African Charter on Human and Peoples’ Rights*, 436.

¹⁰⁷ Svensson-McCarthy AL, *The international law of human rights and states of exception: With special reference to the Travaux Préparatoires and case-law of the international monitoring bodies*, Martinus Nijhoff Publishers, The Hague, 1998, 49.

crisis situations¹⁰⁸ in order to meet the exigencies of the situations. They are thus temporary in nature.¹⁰⁹

On the other hand, special limitations exist, well known as clawback clauses. Although present in other human rights instruments,¹¹⁰ they distinctively feature in the African Charter. Clawback clauses in the African Charter include ‘subject to law and order’,¹¹¹ ‘provided that he abides with the law’,¹¹² ‘in accordance with the provisions of the law’,¹¹³ ‘in accordance with the provisions of the appropriate law’,¹¹⁴ ‘except for reasons and conditions previously laid down by law.’¹¹⁵

2.4 Conclusion

From this discussion, one can appreciate the divergent avenues that different international human rights instruments sought to come to the conclusion of a derogation clause within their respective treaties. The negotiating history of both the ECHR and ICCPR show that in the late 1940s, derogation clauses were viewed by states with suspicion. Further, the chapter briefly argued for the justification of the doctrine and how the various treaties have included the derogation provision. This chapter illustrated the history of the African Charter and a possible rationale as to the omission of the derogation clause within its provisions. The latter shall be crucial in the proceeding chapters for it aids in accentuating the discrepancy between the African Charter and African constitutional practice that provide for derogation clauses.

¹⁰⁸ Loof JP, ‘Crisis Situations, counter terrorism and derogation from the European Convention on Human Rights’, 43.

¹⁰⁹ Loof JP, ‘Crisis Situations, counter terrorism and derogation from the European Convention on Human Rights’, 42.

¹¹⁰ Article 12(3), *ICCPR*.

¹¹¹ Article 8, *ACHPR*.

¹¹² Article 12, *ACHPR*.

¹¹³ Article 13, *ACHPR*.

¹¹⁴ Article 14, *ACHPR*.

¹¹⁵ Article 6, *ACHPR*.

CHAPTER THREE

AFRICAN CONSTITUTIONS AND THE DEROGATION CLAUSE

3.0 Introduction

The Permanent Court of International Justice affirmed that ‘the court declines to see in the conclusion of any treaty, by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty’.¹¹⁶ The previous chapter showcased the derogation provisions across various international human rights conventions and how the different relevant treaties have chosen to interpret and put in practice the derogation clause.

As stated in Chapter one, some African constitutions¹¹⁷ contain derogation clauses that become operational in the cases of exceptional circumstances, crisis war. It can thus be elucidated that a common African constitutional standard is not reflected in the African Charter.¹¹⁸ Presumptively, the African Charter has no restraining influence on States when they are ignoring the Charter by including the clause.¹¹⁹ Below are some African states that contain the derogation clauses in their respective constitutions.

3.1 Ethiopia

Chapter 3 of Ethiopia’s 1995 Constitution contains the bill of rights that provides for civil, political, economic and cultural rights. The emergency clause is stipulated in Chapter 11 of the Constitution and is therefore not part of the Bill of Rights provisions. The latter has been criticised as a dangerous move, for the derogation clause is not subject to the interpretations clause, applicable to the Bill of Rights; hence no constitutional imperative

¹¹⁶ *S.S. ‘Wimbledon’ Case, (Britain et al. v. Germany)*, Judgement of 17 August 1923, PCIJ, para. 25.

¹¹⁷ Section 45(2), *Constitution of Nigeria* (1999). Article 93(4), *Constitution of Ethiopia* (1995). Article 52, *Constitution of Angola* (1992). Article 46, *Constitution of Cape Verde* (1992). Article 31, *Constitution of Guinea-Bissau* (1984). Article 72, *Constitution of Mozambique* (2004). Article 27(5)(a), *Constitution of Eritrea* (1997). Article 24(3), *Constitution of Namibia* (1990). Article 137, *Constitution of Rwanda* (2003). Section 38, *Constitution of Swaziland* (2005). Article 44, *Constitution of Uganda* (1995).

¹¹⁸ Sermet L, ‘The absence of a derogation clause from the African Charter on Human and Peoples’ Rights’, 144.

¹¹⁹ Heyns C, ‘The African regional human rights system: In need of reform?’, 162.

for their interpretation in light of international human rights instruments.¹²⁰ The clause gives power to the Federal government to declare 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.¹²¹

Accordingly, when a state of emergency is declared in Ethiopia, the Council of Ministers shall have all the necessary powers to protect the country's peace and sovereignty, and to maintain public security, law and order.¹²² A state of emergency, if approved by the House of Representatives may remain in effect for a maximum of six months. It should be noted that Ethiopia declared a state of emergency on October 2016 that lasted 10 months.¹²³ The African Commission, during its 59th Ordinary Session, condemned the deterioration of human rights in the country, urging the Federal Democratic Republic of Ethiopia to lift the ban on movement, assembly, media access, and internet services that became prevalent with the declaration of state emergency.¹²⁴

The African Commission also showed concern over the arbitrary arrests and detention of citizens,¹²⁵ a concern shared by Ethiopian Mr Feyisa Lilesa, who after winning a silver medal, in the 2016 Olympic marathon, held his arms above his head in an "X," as a sign of protest against his government. Ethiopia has acceded to the ICCPR¹²⁶ that provides for a derogation clause. And yet, as of 2017, the Ethiopian government had not sent notification of the declaration of the state of emergency and the derogations as required by the

¹²⁰ Techane M, 'The impact of the African Charter and the Maputo Protocol in Ethiopia' in Ayeni V (ed), *The impact of the African Charter and the Maputo Protocol in selected African states*, Pretoria University Law Press, Pretoria, 2016, 62.

¹²¹ Article 95, *Constitution of Ethiopia* (1995).

¹²² Article 95 (4), *Constitution of Ethiopia* (1995).

¹²³ Human Rights Watch, *State of emergency ends in Ethiopia: Government should use reform, not force, to avoid more protests*, 7 August 2013 <<https://www.hrw.org/news/2017/08/07/state-emergency-ends-ethiopia>

¹²⁴ ACHPR/Res. 356(LIX) 2016 Resolution on the Human Rights Situation in the Federal Democratic Republic of Ethiopia.

¹²⁵ ACHPR/Res. 356(LIX) 2016 Resolution on the Human Rights Situation in the Federal Democratic Republic of Ethiopia.

¹²⁶ Ethiopia acceded to the ICCPR on 11 June 1993.

Covenant. Ethiopia ended its state emergency, 10 months after its declaration, four months supplementary than is required, in their municipal laws.¹²⁷ Significantly, on February 2018, Ethiopia declared another state of emergency that is intended to last six months.¹²⁸

3.2. Kenya

The 2010 Kenyan Constitution provides in its Bill of Rights Article 58, that legislation enacted as a consequence of a state emergency, may limit a right or fundamental freedom in the Bill of Rights. However, this derogation provision is subject to the extent that the limitation is strictly required by the emergency, as well as the laws enacted, are consistent with the Republic's obligations under international law applicable to a state of emergency.¹²⁹ A state emergency can be declared in the scenarios where the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency.¹³⁰ Kenya's 2010 Constitution is appreciated appraisal for being progressive in Kenya's constitutional history, in that the previous constitution had countless clawback clauses, that defeated the very essence of guaranteeing human rights.¹³¹

Kenya being party to the ACHPR, has an obligation to adhere to its provisions that does not provide for derogation. A discrepancy ensues for Kenya is also state party to the IC-CPR, having acceded to it on 1 May 1972. Such conflict of state obligation has been criticised by Kenyan scholars,¹³² in that it is putting Kenya at odds with the African Charter, posing challenges especially during review of the state by the relevant treaty bodies as well as in the course of litigating the Bill of Rights. In the Kenyan case of *Martha Karua*

¹²⁷ Article 72, *Constitution of Ethiopia* (1995).

¹²⁸ Agence France-Presse, 'Ethiopia state of emergency to last six months' Daily Nation, 17 February 2018 - <<https://www.nation.co.ke/news/africa/Ethiopia-state-of-emergency-to-last-six-months-/1066-4309234-saa0isz/index.html>> on 1 March 2018.

¹²⁹ Article 58(3), *Constitution of Kenya* (2010).

¹³⁰ Article 58, *Constitution of Kenya* (2010).

¹³¹ Ambani JO, MK Mbondenyi, 'A new era in human rights protection in Kenya? An analysis of the salient features of the 2010 Constitution's Bill of Rights' in Mbondenyi MK, Asaala EO, Kabau T, Waris A, *Human rights and democratic governance in Kenya: A post-2007 appraisal*, Pretoria University Law Press, 2015, 18.

¹³² JO Ambani & MK Mbondenyi 'A new era in human rights protection in Kenya?', 29-30.

v Radio Africa, the High Court at Nairobi acknowledged this contradiction and held that the, ‘African Charter does not allow any derogations, and therefore there is need to harmonise this in any future Constitutional dispensation’.¹³³

3.3. Malawi

Article 45 of the 1994 Malawian Constitution provides that no derogation from the rights, envisaged in its Chapter 4, shall be permissible save for a declaration of a state emergency. Other than the Constitution giving stricter provisions as to when a derogation clause is applicable, (mimicking that of the ICCPR provisions) it is interesting to note that it does not permit derogation during a state emergency when such derogation is not inconsistent with the obligations of Malawi under international law.¹³⁴ Although the African Charter is recognised as a major international human rights document in Malawi,¹³⁵ the application of international law by the national courts, would strive to ensure an interpretation that does not contradict the Constitution or any domestic statutes, but where this is not possible, domestic law will always prevail.¹³⁶

Unsurprisingly, international human rights standards have thus had little practical impact in Malawi.¹³⁷ In the 1992 *Chihana v R* case the Malawi Supreme Court of Appeal (MSCA) recognised the Universal Declaration of Human Rights (UDHR) as forming part of Malawian law but rejected the applicability of the African Charter in Malawi. The MSCA asserted that unless the country takes legislative measures to adopt the African Charter, it is not part of the municipal law of Malawi.¹³⁸ The stagnation of international human rights ‘applicability’ was remedied with the fact that all international agreements

¹³³ *Martha Karua v Radio Africa Ltd t/a Kiss F.M. Station & 2 others* [2004] eKLR 10.

¹³⁴ Article 45(3) (b), *Constitution of Malawi* (1994).

¹³⁵ *Jumbe and Another v Attorney General*, [2005] MWHC 15 as cited in Chisala-Tempelhoff S, Bakare SS ‘The impact of the African Charter and the Maputo Protocol in Malawi’ in Ayeni V (ed), *The impact of the African Charter and the Maputo Protocol in selected African states*, Pretoria University Law Press, Pretoria, 2016, 155.

¹³⁶ Institute for International and Comparative Law in Africa (ICLA), *Malawi*, undated, 38.

¹³⁷ Chirwa D, ‘Democratisation in Malawi 1994–2002: Completing the vicious circle?’ 19 *South African Journal on Human Rights* (2003), 328 as cited in the Institute for International and Comparative Law in Africa (ICLA), *Malawi*, undated, 27.

¹³⁸ *Chihana v R* Criminal, [1993] MSCA.

entered into prior to the 1994 Malawian Constitution or after the Constitution are binding on Malawi only if they are not in conflict with any domestic legislation.¹³⁹ This would mean that the ICCPR, that Malawi acceded to on 22 December 1993, which provides for a derogation provision; thus establishing a discord amongst Malawi's obligations under international human rights instruments.

3.4. Gambia

Gambia holds an intriguing history with regards to the African Charter. Not only is Gambia the headquarters of the African Commission (and its Secretariat) as of 12 June 1989 to present day Africa, but it is worth noting that most of the drafting of the African Charter took place in the capital city of Gambia, Banjul; hence the firm referral of the Charter as the Banjul Charter, after its birthplace.

Granted that Gambia ratified the African Charter on 8 June 1983, the Gambian Constitution contrarily includes of a derogation clause; it authorises the taking of measures that are reasonably justifiable for dealing with periods of emergency that exists in the country.¹⁴⁰ These measures are limited in their efforts to protect human rights as compared to other constitutions and international human rights instruments. These rights include the right to life, freedom from inhumane treatment or torture. Instead, the Gambian constitution uniquely alludes to the non-derogable nature of the right to liberty, privacy and the secure protection of the law.¹⁴¹ Ineffective human rights laws at the national level, depicts the lack of seriousness among states especially Gambia to uphold the values and rights entrenched in the African Charter. The latter is evidently so, with the termination of appointment of Justice Hassan Jallow by the President in 2003. This move is reported to have occurred after Justice Jallow, presided over high-profile constitutional cases in the Supreme Court in which several provisions of controversial Acts of the National Assem-

¹³⁹ Institute for International and Comparative Law in Africa (ICLA), *Malawi*, undated, 38.

¹⁴⁰ Article 35(1), *Constitution of Gambia* (1997).

Rights pertaining to privacy, speech, conscience, assembly, association, movement, fair play and personal liberty, can be presumed to acquire the status of non-derogable rights under this provision.

¹⁴¹ Article 35(2), *Constitution of Gambia* (1997).

bly were invalidated for contravening the Constitution and the African Charter.¹⁴² This goes to demonstrate that the state authorities cannot evaluate a situation in the country as objectively as possible¹⁴³ especially if their powers extend to the derogation of human rights provisions during states of emergencies.

3.5 Cameroon

The Republic of Cameroon ratified the African Charter on 20 June 1989, whereas the Republic acceded to the ICCPR on 27 Jun 1984. Distinctively, Cameroon's derogation clause provides that the president may, where circumstances so warrant, declare by decree a state of emergency, which shall confer upon him, such special powers as may be provided for by law.¹⁴⁴ A serious threat to the nation's territorial integrity or to its existence, its independence or institutions, would lead the president to take any measures as he may deem necessary.¹⁴⁵ With the 1996 Constitution of Cameroon endorsing such blanket provisions, it is peculiar that Cameroon has remained silent when exceptional circumstances, that could have justified the enforcement of an emergency regime, have transpired. Whether it be the repeated volcanic eruptions (1959, 1982, 1989, 1999 and 2000) of Mount Cameroon, the deadly gas emission of Lake Nyos nor even the current substantial terrorist attacks by the Islamic movement Boko Haram in the northern region of Cameroon, state of emergencies have not been declared.¹⁴⁶

However, a de facto emergency was declared when protests erupted in 2008, that questioned the Presidency of President Biya, Cameroon's President since 1982. The army was deployed to restore 'peace and order', peace and order that caused the deaths of 139 people.¹⁴⁷ It may thus be assumed that the exercise of the derogation clause is being exerted

¹⁴² Institute for International and Comparative Law in Africa, *The 1997 Constitution of The Gambia*, undated, 22.

¹⁴³ Ryspaeva A, 'Justification of derogations of human rights in emergency situations' Published LLM Thesis, Central European University, 2015, 12.

¹⁴⁴ Article 9(1), *Constitution of Cameroon* (1996).

¹⁴⁵ Article 9(2), *Constitution of Cameroon* (1996).

¹⁴⁶ Kamga G, 'Emergency regimes in Cameroon: Derogation or failure? of the law,' *25 African Journal of International and Comparative Law* (2017), 521.

¹⁴⁷ Kamga G, 'Emergency regimes in Cameroon: Derogation or failure? of the law,' 527.

for tyrannical purposes; affirming the fear that derogations are inappropriate for the promotion of human rights.¹⁴⁸

3.7 Nigeria

The 1999 Federal Republic of Nigeria's Constitution provides a veritable foundation upon which any law invalidating fundamental rights may be justified.¹⁴⁹ The derogation clause thus stipulates that, nothing, be it the right to private and family life, freedom of thought, conscience and religion, freedom of expression and the press, right to peaceful assembly and association and right to freedom of movement, shall be invalidated by a reasonably justifiable law in a democratic society.¹⁵⁰ However, this is subject to limitation of periods of emergency; specifically to the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons.¹⁵¹

The aforementioned constitutional provision was upheld in the Supreme Court decision of *Medical and Dental Practitioners Disciplinary Tribunal v. Emewulu & Anor*¹⁵² that reiterated that all freedoms are limited by state policy and interest. The corrosive effect of the derogation clause on the integrity of human rights in Nigeria is hence questioned, granted the backdrop that Nigeria is party to the African Charter.

The Charter should thus be respected and possess a greater vigour and strength than any other domestic statute, as was asserted by Nigerian Justice Mohammed.¹⁵³ The African Commission affirming the latter, in the *Media Rights Agenda* case, where it held that 'the African Charter does not contain a derogation clause. Therefore limitations on the rights

¹⁴⁸ Higgins R, 'Derogation under human rights treaties,' 48 *British Year Book of International Law* (1977), 282.

¹⁴⁹ Dada JA, 'Impediments to human rights protection in Nigeria' 18 *Annual Survey of International & Comparative Law*, (2012), 78.

¹⁵⁰ Article 45(1), *Constitution of Federal Republic of Nigeria* (1999).

¹⁵¹ Article 45(1) (a), *Constitution of Federal Republic of Nigeria* (1999). Article 45(1) (b), *Constitution of Federal Republic of Nigeria* (1999).

¹⁵² *Medical and Dental Practitioners Disciplinary Tribunal v Emewulu*, [2001] 3 S.C.N.J. 73 as quoted in Dada JA, 'Impediments to human rights protection in Nigeria', 77.

¹⁵³ *General Sanni Abacha and others v Chief Gani Fawehinmi*, [2000] 6 NWLR 251.

and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances'.¹⁵⁴ The Commission opined that 'to allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law'.¹⁵⁵ Albeit the Commission's assertion, the Supreme Court of Nigeria, in the *Abacha v Fawehinmi case* unanimously decided that the Constitution is superior to the African Charter, but the African Charter is superior to municipal legislation.¹⁵⁶ Confusion as to the place of derogation in Nigeria, in light of its Charter and constitutional obligation is thus showcased.

3.8 Conclusion

In light of the various constitutions presented above, various derogation clauses have been drafted differently to cater for each sovereign country. This creates a predicament where the clauses are not only too wide but ill-defined and nebulous, concurring Heyns argument that the African Charter has 'no restraining influence on states' when they are ignoring the Charter by including the clause.¹⁵⁷ The African Commission maintains its position on the derogation clause when they asserted that the restriction of human rights is not a solution to national difficulties; that the legitimate exercise of human rights does not pose dangers to a democratic State governed by the rule of law.¹⁵⁸ This constitutes a formidable weakness which can gravely undermine human rights promotion.¹⁵⁹ It would thus be appropriate to assume that, in order for fundamental human rights and the integrity of the law can be protected, is for the African Charter to establish a derogation clause.

This Chapter showcased the reality that most state parties to the African Charter are also parties to the ICCPR, which contains explicit provisions concerning derogation. The dif-

¹⁵⁴ *Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, ACmHPR, para. 67.

¹⁵⁵ *Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, ACmHPR, para. 66.

¹⁵⁶ *General Sanni Abacha and others v Chief Gani Fawehinmi*, (2000) 6 NWLR as cited in Institute for International and Comparative Law in Africa (ICLA) *Nigeria*, undated, 13.

¹⁵⁷ Heyns C, 'The African regional human rights system: In need of reform?', 162.

¹⁵⁸ *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan* ACmHPR Comm. 48/90, 50/91, 52/91, 89/93, 13th Annual Activity Report (1999), 79.

¹⁵⁹ Dada JA, 'Impediments to human rights protection in Nigeria', 70.

ferent legal requirements that are provided for by the treaties creates a lacuna as to which treaty a contracting party to both, is expected to adhere to. Should the African Charter's provisions be undermined to prioritise the ICCPR, when African States are faced with states of emergencies?

CHAPTER FOUR

IMPLICATIONS OF ESTABLISHING A DEROGATION CLAUSE IN THE AFRICAN CHARTER

4.0 Introduction

With Chapter three's expository analysis of some African constitutions with derogation provisions, one may ask then why the Charter does not reflect this constitutional practice. This Chapter not only analyses the possible reasons for the lack of the inclusion of the clause, but the arguments that are for and against its incorporation in the African Charter.

4.1 Plausible reasons for the omission of the derogation clause

4.1.1 The Charter was drafted in a hurry

Some aspects of the African Charter were drafted during the meeting of African experts and jurists in Dakar, Senegal, from 28 November to 8 December 1979. As a result of the Cold War atmosphere, different political or ideological issues managed to extend to African states. Countries such as the Gambia, Senegal and Botswana retained liberal, pluralist political systems whereas African Socialism was present with other states.¹⁶⁰ This conflict of schools of thought and ideologies is said to have haunted the drafting of the Charter and at times even threatened the integrity and survival of the process.¹⁶¹ Lengthy debates hence slowed drafting, precipitating the finalisation of only eleven articles.¹⁶²

Because of the aforementioned, political pressure was exerted by the OAU's Council of Ministers, following the conclusion of the Dakar Conference. They requested that the Ministerial Conference reconvene in Banjul, Gambia, 'as soon as possible' to finish the Charter,¹⁶³ and urged to 'exert efforts to complete its work'.¹⁶⁴ Conclusively, the drafting of the African Charter took nearly two years to complete. During the Banjul Conference of 7th to 19th January 1981, 68 articles were adopted, well before the set date of comple-

¹⁶⁰ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 27.

¹⁶¹ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 27.

¹⁶² Viljoen F, *International human rights law in Africa*, 160.

¹⁶³ Gittleman R, 'The African Charter on Human and Peoples' Rights: A legal analysis' 22 *Virginia Journal of International Law* (1982), 667.

¹⁶⁴ Viljoen F, *International human rights law in Africa*, 161.

tion,¹⁶⁵ whilst the Assembly of Head of States and Government (AHG) approved this draft with no debate,¹⁶⁶ review, amendments or even a formal vote.¹⁶⁷ Contradictorily, as stipulated in Chapter Two, the ICCPR took a drafting process of nearly twenty years to complete. As the case may be, further deliberations concerning the protection of human rights should have occurred, and this may have led to more room for the derogation provision to be discussed.

4.1.2 Drafting a Charter that serves African needs

Okoth Ogendo, contends that one of the reasons an African human rights mechanism was created, is because a system needed to be founded on historical traditions and values of African civilisations rather than reproducing and trying to administer the norms and principles derived from the historical experiences of Europe and Americas.¹⁶⁸

In 1969, the United Nations Division of Human Rights, in cooperation with the Government of the United Arab Republic, organised a seminar in Cairo, to study the possibility of the establishment of regional commissions on human rights with special reference to Africa. During the seminar, Africans expressed their views that the UDHR was a document adopted when most of the members of the United Nations were States with 'white populations, largely European and of Christian traditions'.¹⁶⁹ The general stance was that the principles expressed therein did not necessarily reflect African values or problems embodied in peculiarly African solutions.¹⁷⁰

It is therefore no surprise that the experts meeting in Dakar in 1979, would reject the substantive provisions of the United Nations-sponsored Monrovia Proposal (of 1979 held in Liberia) so as to attempt to create a uniquely African document more responsive to Afri-

¹⁶⁵ Murray R, Evans M, *The African Charter on Human and Peoples' Rights: The system in practice 1986–2006*, Cambridge University Press, Cambridge, 2008, 7.

¹⁶⁶ Viljoen F, *International human rights law in Africa*, 161.

¹⁶⁷ Jallow H, *The law of the African (Banjul) Charter on Human and Peoples' Rights*, 34.

¹⁶⁸ Nmehielle V, *The African human rights system*, 83.

¹⁶⁹ Gittleman R, 'The African Charter on Human and Peoples' Rights', 671.

¹⁷⁰ Gittleman R, 'The African Charter on Human and Peoples' Rights', 671.

can needs.¹⁷¹ In the opinion of the experts assembled at Dakar, problems unique to Africa justified a departure from such regional models such as the ECHR and the ACHR.¹⁷² It was made clear on 8th December 1979, that whatever the final draft may be, it would be crucial not to present the OAU with a carbon copy of other international instruments, which because of their universality, did not specifically focus on African concerns and traditional values.¹⁷³ The experts were however mindful in avoiding derogations, from principles of human rights which had at the time been universally accepted.¹⁷⁴

4.1.3 African States were not willing to sign the Charter

The experts are said to have been realistic about the extent to which the sovereignty of states could be curtailed despite the mandate granted by the AHG of the OAU.¹⁷⁵ Having the derogation clause could have thus driven states away, from approving the African Charter.¹⁷⁶

4.2 Arguments for the inclusion of a derogation clause

4.2.1 The advantages of derogation provisions

Advocates for the inclusion of a derogation clause in the African Charter compel us to consider the reason that derogation clauses exist. The derogation regime seeks to strike a delicate balance between the protection of fundamental rights and freedoms of individuals (when his fundamental rights would be most at risk) along with protecting the legitimate interests of a nation in a situation of crisis by placing reasonable restraint of emergency powers of a state.¹⁷⁷ As Melkamu states, such a provision, although an additional source of power to the government, is a significant limitation to governmental power for it cur-

¹⁷¹ Gittleman R, 'The African Charter on Human and Peoples' Rights', 671.

¹⁷² Gittleman R, 'The African Charter on Human and Peoples' Rights', 668.

¹⁷³ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 31.

¹⁷⁴ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 32.

¹⁷⁵ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 33.

¹⁷⁶ Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, 32.

¹⁷⁷ Loof JP, 'Crisis situations, counter terrorism and derogation from the European Convention on Human Rights', 37.

tails the power of government in situations where protection of individual rights are most needed.¹⁷⁸

Derogation clauses reduce uncertainty by authorising temporary deviations from treaty rules if exigent circumstances arise.¹⁷⁹ The reality that the African Charter does not contain a derogation clause is said to be regrettable since for the past two decades, the African continent has faced frequent situations of war and emergency;¹⁸⁰ videlicet, Gambia, Cameroon, Ethiopia as is stipulated in Chapter 3. Derogation clauses further promote the protection of human rights through their inclusion of non-derogable rights. The gravest of emergencies cannot justify the breach of non-derogable rights, for they are considered to be too fundamental and too precious to be dispensed with.¹⁸¹ As shown in Chapter 3, the various African states provided for non-derogable rights in their respective constitutions. The latter provisions, as seen, were either vague or limited. The inclusion of a derogation clause in the African Charter would serve to bring uniformity to the protection of non-derogable rights as is recognised in the ICCPR, ACHR and the ECHR.

4.2.2 The disadvantages of derogation provisions

The absence of the derogation clause garners critique; one being that its omission weakens the entire system of the African Charter, as states facing an emergency are unlikely to seek the guidance of the African Commission on Human and Peoples' Rights if they know that the Commission cannot recognise and accommodate their need to enter into a state of exception.¹⁸²

¹⁷⁸ Melkamu TA, 'Absence of a derogation clause under the African Charter and the position of the African Commission' 4 Bahir Dar University Journal of Law (2014), 265.

¹⁷⁹ Hafner-Burton E, Helfer L, Fariss C, 'Emergency and escape: Explaining derogations from human rights treaties', 55.

¹⁸⁰ RM, D'Sa, 'The African Charter on Human and Peoples' Rights', 109.

¹⁸¹ Michaelsen C, 'Derogating from international human rights obligations in the 'war against terrorism'? A British-Australian perspective' *Terrorism and Political Violence Journal* (2005), 8.

¹⁸² Cowell F, 'Sovereignty and the question of derogation' 139.

Additionally, instead of the Charter taking primacy, the various national laws of member states actually assume primary place, consequentially creating legal spaces that are notionally outside of the Commission's scope of review.¹⁸³ The Algerian Charter for Peace and National Reconciliation prohibits public debate regarding the atrocities committed during the past decade of internal conflict. The prerogative that the absence of the derogation clause gives to state parties, is dangerous. It allows for some level of discretionary power, which can be seen with the 1992 Gambian state report to the African Commission; indicated in its Chapter 3 of the 1970 Gambian Constitution were the rights in the Charter. After the coup, the new government suspended chapter 3 which contained the fundamental Bill of right's provisions.¹⁸⁴

As Melkamu states, the maintenance of an absence of a derogation clause should not be based on the theoretical assumption that its omission reduces the power of states to restrict human and peoples' rights and ensures the better protection of such rights.¹⁸⁵ As suggested in Chapter 3, African constitutions contain emergency clauses within their provisions, pertaining to public emergencies. Not only does the Charter not reflect an African constitutional standard, but it also presents a dilemma to parties states who are signatories to the ICCPR, that in fact contains a derogation clause. The general inconsistencies presents confusion on the nature of obligations of states for there is no rule of international law that could govern the hierarchy between human right treaties.¹⁸⁶ Critics of the Charter go as far as recommending parties to ignore the Charter in times of public and state emergencies.¹⁸⁷

It is of no consolation that the derogation regime can also be considered as rules of international customary law, significantly so, for even non-signatory parties to treaties are also

¹⁸³ Cowell F, 'Sovereignty and the question of derogation' 154-155.

¹⁸⁴ Ouguergouz F, 'The African Charter on Human and Peoples' Rights. A comprehensive agenda for human dignity and sustainable democracy in Africa, 426.

¹⁸⁵ Melkamu TA, 'Absence of a derogation clause under the African Charter and the position of the African Commission', 262.

¹⁸⁶ Melkamu TA, 'Absence of a derogation clause under the African Charter and the position of the African Commission', 267.

¹⁸⁷ Heyns C, 'The African regional human rights system: In need of reform?', 162.

bound by these standards,¹⁸⁸ treaties such as the VCLT. The United Nations Sub-Commission on Human Rights, echoed the importance of adopting derogation clauses.¹⁸⁹ They encourage all states whose legislation contains no explicit clause that guarantees the legality of the implementation of a state of emergency, to adopt clauses in accordance with international norms and principles.¹⁹⁰ Keeping in mind the aforementioned international and national incorporation of derogation clauses, the treaty seems dangerously inadequate.

4.3 Arguments against the inclusion of a derogation clause

From Heyns to Sermet, whose criticisms are highlighted in Chapter One, various scholars have criticised the absence of the derogation clause. They, however tend to ignore the several factors that may justify its absence.

Abdi Jibril Ali, specifies such justifications to include the increase of non-derogable rights in the international community. He argues that since the adoption of the UDHR, the promotion and protection of human rights are on an upward trajectory as evidenced by the adoption of several global and regional human rights instruments and the establishment of organs that monitor their implementation.¹⁹¹ From the coming into force of the ECHR of 1953 (that provides for four non-derogable rights) to the ICCPR of 1976 with six non-derogable rights; increasingly to the ACHR of 1978, that contains five more non-derogable rights than the ICCPR as was illustrated in Chapter Two of this thesis. It could thus be argued that the absence of the derogation is a commendable reflection of the trend of expanding non-derogable rights. Moreover, other human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESR) and even the UDHR do not provide for derogation provisions.

¹⁸⁸ Sermet L, 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion', 154.

¹⁸⁹ United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities, Res1995/33. Question on human rights and states of exception, 35th session, 24 August 1995 as cited in Mbondenyi M *International human rights and their enforcement in Africa*, 141.

¹⁹⁰ Sermet L, 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion', 154.

¹⁹¹ Ali A, 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights 85.

Additionally, as discussed in Chapter 2, during the drafting of the derogation clause for the ECHR, the British government was insistent on the inclusion of derogation articles and exemption clauses; whereas some States protested against the insertion of the clause.¹⁹² Ali argues that the derogation clause was initially incorporated as an instrument of colonial control.¹⁹³ It would assume that both derogation clauses (ICCPR and ECHR) as was encouraged by Britain, were responding to the 'increase in resistance to British rule from subjugated populations' in Africa and Asia.¹⁹⁴ For instance, Britain exercised extensive use of colonial states emergency powers and provisions to repress independence movements, against the Mau Mau of Kenya and declared an eight year state of emergency in the period prior to independence.¹⁹⁵

Derogations are essentially designed to deal with public emergencies. A concept, that is prone to manipulation, especially by African States. Several states have failed to notify the ICCPR of their intention to derogate whilst declaring states of emergencies.¹⁹⁶ By way of illustration, states of emergencies have been declared in Nigeria 1998, Sierra Leone 1998 and 2008, Egypt's three decade long state of emergency (with a three month extension as of January 12 2018)¹⁹⁷ Ethiopia 1998, 2016 and 2018.

The exercise of the derogation system is extremely flawed. The current system under the ICCPR and the ECHR creates a 'legal grey hole'; a legal space wherein, some legal constraints on executive action exist, but that are so insubstantial that they still permit the

¹⁹² Hartman J, 'Derogation from human rights treaties in public emergencies', 5.

¹⁹³ Ali A, 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights', 90.

¹⁹⁴ Reynolds J 'The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law' Comparative Research in Law & Political Economy. Research Paper Number 19 of 2010, 38 - <http://digitalcommons.osgoode.yorku.ca/clpe/86> on 22 January 2018.

¹⁹⁵ Cowell F, 'Sovereignty and the question of derogation', 149.

¹⁹⁶ Melkamu TA, 'Absence of a derogation clause under the African Charter and the position of the African Commission', 262.

¹⁹⁷ Jones G, 'Egypt to extend state of emergency for 3 months: MENA' 2 January 2018 <https://www.reuters.com/article/us-egypt-security/egypt-to-extend-state-of-emergency-for-3-months-mena-idUSKBN1ER1B0> on 20 January 2018.

government to do as it pleases.¹⁹⁸ For instance, the ECHR allows for very lengthy derogation periods.¹⁹⁹ For instance, Turkey has given the most far-reaching notices of derogation. They span the years 1961, 1963-1964, 1970-1975,²⁰⁰ and as recent as August of 2016 where UN experts urged Turkey to adhere to its human rights obligations even in time of declared emergency which Turkey declared in July of 2016.²⁰¹ The reasons given for assuming derogation have been critiqued for not being compelling enough whilst the extent of the derogation is unspecified.²⁰² Additionally, the United Kingdom's declared a state of emergency after the 9/11 attacks on US soil.²⁰³ The rationale that the life of a nation was at stake, in the United Kingdom's scenario can be viewed as hyperbolic, hence allowing states to some form of discretion as what constitutes issues threatening the nation.

4.4 Conclusion

This section has examined the appropriateness of the derogation clause in the African context. The doctrine is justified through its system of protecting human rights whilst curtailing governmental power. Although its advantages are apparent, one cannot ignore the arguments opining for its omission within the African context. Through this Chapter, it is apparent that the desirability of derogations provisions is necessary in the context of the African Charter.

¹⁹⁸Dyzenhaus D, 'Schmitt v Dicey: Are state of emergency inside or outside the legal order,' 27(5) *Cardozo Law Review* (2006), 2018.

¹⁹⁹Loof JP 'Crisis situations, counter terrorism and derogation from the European Convention on Human Rights', 37.

²⁰⁰Schreuer C, 'Derogation of human rights in situations of public emergency', 118.

²⁰¹Office of the United Nations High Commissioner for Human Rights (OHCHR), 'UN experts urge Turkey to adhere to its human rights obligations even in time of declared emergency' 19 August 2016 <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394>> on 18 January 2018.

²⁰²Cowell F, 'Sovereignty and the question of derogation', 149.

²⁰³*A. and others v United Kingdom*, ECtHR Judgment of 19 February 2009.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

Despite the overall international acclaim that heralded the adoption of the African Charter in 1981, and its subsequent entry into force in 1986, calls for reform of the African human rights mechanism began within five years of its existence.²⁰⁴ The problem identified by this dissertation was that derogation provisions help in the promotion and protection in human rights, an international customary norm that is not in practice under the African Charter; and yet as the previous chapter stipulated, the practice of derogation clauses does have its limitations and disadvantages. Nevertheless, the existence of what amount to parallel legal universes within African countries is certainly not easy to square with the notion of equality before the law. Yet such squaring should be done, in the overriding interest of ensuring that the Banjul Charter norms are able to function meaningfully in the current African social framework.²⁰⁵

5.2 Conclusion to this study

This thesis began with the assumption that a derogation clause is pertinent to the protection and promotion of human rights in Africa. However, in reviewing the disadvantages stipulated in the previous chapter, incorporating the derogation provision into the Charter will require a more precise and complicated strategy, to avoid its undoing.

5.2.1 Recap of chapter one

Chapter one set out to introduce the research. It briefly discusses the arguments for and against the derogation clause as well as identifying a theoretical justification for a derogation provision that caters to the division. The study also set out to investigate the suitability of the derogation clause in the African Charter.

5.2.2 Recap of chapter two

²⁰⁴ Nmehielle V, *The African human rights system*, 243.

²⁰⁵ Melkamu TA, 'Absence of a derogation clause under the African Charter and the position of the African Commission', 262.

Chapter two aimed at highlighting the divergent avenues that different international human rights instruments sought to come to the conclusion of a derogation clause within their respective treaties. It displayed the reality that contracting parties to the ICCPR and ECHR did not always approve of the inclusion of the derogation clause; a fact that this research, presupposed (a presumption that was based on the universality and acceptance of the derogation clause within the various international human rights instruments).

From the analysis of the chapter, it was compelling to see the historical nature of the acceptance and disapproval of this derogation doctrine. Although member states of the ICCPR and the ECHR were suspicious of a derogation doctrine during early stages of their respective drafting process, it is not lost that they both ended up including derogation provisions in their treaties; hence the desirability of derogation.

5.2.3 Recap of chapter three

This Chapter proved the disadvantages of the lack of a derogation regime in the African Charter, due to its incorporation in its Member states' constitutions. This Chapter somewhat discredits the African cultural theory that states of the distinctive rights that are only contextual in Africa. It does so by highlighting that an international custom, in form of a derogation provision, are rampant in some African states through their constitutions

5.2.4 Recap of chapter four

The Chapter examined the suitability of the derogation clause in the African Charter. It concluded that the derogation regime has indeed its flaws. Although this may be the case, the overriding interest of the Charter to protect and promote human rights should prevail through the inclusion of a derogation provision.

5.3 Recommendations

5.3.1 Commission extending its powers of interpretation

The African Commission has wide powers to interpret the Banjul Charter in a progressive manner. So as to ensure the better protection of human and people's rights, the Commission may interpret the African Charter in a manner that is consistent with not only international standards, but more specifically to the catering of African needs and values.

5.3.2 Additional protocols of the African Charter that include derogation provisions

As was discussed in the African Commission's 19th session, there is general dissatisfaction expressed with the Charter.²⁰⁶ Additional protocols may establish guidelines that State parties may use to derogate in an effective and uniform manner. Provisions detailing a states powers, limitations, duration, notification, restrictions should be encouraged.

Scholar Schreur advocates for the following to be considered whilst formulating a derogation clause²⁰⁷

1. Reasonable accommodation between the necessities of community interests and justified particular individual interests.
2. Derogations must be accompanied by official proclamations and notifications giving all relevant details.
3. Derogations must be subject to effective outside supervision in order to prevent abuse.
4. Derogations must be used only in situations of absolute necessity in which other means cannot reasonably be expected to safeguard public order.
5. Derogations must be applied subject to strict proportionality. This means: (1) that the derogation should only apply to those rights which have to be limited to cope with the emergency; and (b) that the limitation should only apply to the extent absolutely required.
6. Derogations should be withdrawn as soon as circumstances permit.

5.4 Further research

More research as to the viability of a derogation clause is needed. Each regional and international convention has established a derogation provision that caters to its member states. Since the omission of the derogation clause can be traced to the need to preserve African values and traditions, a derogation clause, which is clearly desirable in the African Charter context, should reflect the latter.

²⁰⁶ Melkamu TA, 'Absence of a derogation clause under the African Charter and the position of the African Commission', 262.

²⁰⁷ Schreuer C, 'Derogation of human rights in situations of public emergency: The experience of the European Convention on Human Rights' 9 *Yale Journal of International Law* (1982), 116.

Bibliography

A. Books

Akoto-Abutiate D, *Proverbs and the African tree of life: Grafting Biblical proverbs on to Ghanaian eve folk proverbs*, Brill Publishers, 2014.

Brems E, *Human Rights: universality and diversity*, Kluwer Law International, The Hague, 2001

Ibhawoh B, *Imperialism and human rights: Colonial discourses of rights and liberties in African history*, The State University of New York Press, New York, 2007.

Janis M, Kay R, Bradley A, *European human rights law*, Oxford University Press, London, 2008.

Jallow H, *The law of the African (Banjul) Charter on Human and People's Rights*, Trafford Publishing, Victoria, 2007.

Loof JP, *Human rights and national security: compatible entities? Derogation and restriction of human rights during states of emergency and other situations that threaten national security*, Nijmegen: Wolf Legal Publishers, Leiden 2005.

Mbondenyi M, *International human rights and their enforcement in Africa*, LawAfrica Publishing, Nairobi, 2011.

Murray R, Evans M, *The African Charter on Human and Peoples' Rights: The system in practice 1986–2006*, Cambridge University Press, Cambridge, 2008.

Nmehielle V, *The African human rights system: Its laws, practises and institutions*, Kluwer Law International, The Hague, 2001.

Ojwang JB, *Laying a basis for rights: Towards a jurisprudence of development*, Nairobi University Press, Nairobi, 1992

Shivji I, *The concept of human rights in Africa*, Codesria Book Series, London, 1989.

Simpson B, *Human rights and the end of empire: Britain and the genesis of the European Convention*, Oxford University Press, London, 2001.

Svensson-McCarthy AL, *The international law of human rights and states of exception: With special reference to the Travaux Preparatoires and case-law of the international monitoring bodies*, Martinus Nijhoff Publishers, The Hague, 1998.

Viljoen F, *International human rights law in Africa*, Oxford University Press, Oxford, 2007.

B. Chapters in Books

Ambani JO, MK Mbondenyi 'A new era in human rights protection in Kenya? An analysis of the salient features of the 2010 Constitution's Bill of Rights' in Mbondenyi MK, Asaala EO, Kabau T, Waris A, *Human rights and democratic governance in Kenya: A post-2007 appraisal*, Pretoria University Law Press, 2015.

Bakare SS 'The impact of the African Charter and the Maputo Protocol in Malawi' in Ayeni V (ed), *The impact of the African Charter and the Maputo Protocol in selected African states*, Pretoria University Law Press, Pretoria, 2016.

Chisala-Tempelhoff S, Bakare SS 'The impact of the African Charter and the Maputo Protocol in Malawi' in Ayeni V (ed), *The impact of the African Charter and the Maputo Protocol in selected African states*, Pretoria University Law Press, Pretoria, 2016.

Loof J.P, 'Crisis situations, counter terrorism and derogation from the European Convention on Human Rights. A Threat Analysis' in Buyse A.C. (ed) *Margins of Conflict. The ECHR and transitions to and from armed conflict*. Antwerp-Cambridge-Portland, Intersentia, 2010.

Techane M, 'The impact of the African Charter and the Maputo Protocol in Ethiopia' in Ayeni V (ed), *The impact of the African Charter and the Maputo Protocol in selected African states*, Pretoria University Law Press, Pretoria, 2016.

C. Journal Articles

Ali A, 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' 17 *Law, Democracy & Development Journal of Faculty of Law* (2013).

Ademowo AJ, 'Law in traditional yoruba philosophy: A critical appraisal' 2 (1) *Caribbean Journal of Philosophy* (2013).

Achebe C, 'An image of Africa: Racism in Conrad's heart of darkness' 18 *The Massachusetts Review* (1977).

Chirwa D, 'Democratisation in Malawi 1994–2002: Completing the vicious circle?' 19 *South African Journal on Human Right* (2003).

Cowell F, 'Sovereignty and the question of derogation: An analysis of Article 15 of the ECHR and the absence of a derogation clause in the ACHPR' 1 *Birkbeck Law Review* (2013).

D'Sa RM, 'The African Charter on Human and Peoples' Rights: Problems and prospects for regional action' 10 *Australian Yearbook of International Law* (1983).

Dada JA, 'Impediments to human rights protection in Nigeria' 18 *Annual Survey of International & Comparative Law* (2012).

Dyzenhaus D, 'Schmitt v Dicey: Are state of emergency inside or outside the legal order,' 27(5) *Cardozo Law Review* (2006).

Gittleman R, 'The African Charter on Human and Peoples' Rights: A legal analysis' 22 *Virginia Journal of International Law* (1982).

Hafner-Burton E, Helfer L, Fariss C, 'Emergency and Escape: Explaining derogations from human rights treaties' 65 *International Organisation* (2011).

Hartman J, 'Derogation from human rights treaties in public emergencies, A critique of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations', 22 *Harvard International Law Journal* (1981).

- Hartman J, 'Working Paper for the Committee of Experts on the Article 4 derogation provision' 7 *Human Rights Quarterly* (1985).
- Heyns C, 'The African regional human rights system: In need of reform?' 1 *African Human Rights Law Journal* (2001).
- Hickman RT, 'Between human rights and the rule of law: Indefinite detention and the derogation model of constitutionalism' 68(4) *The Modern Law Review* (2005).
- Higgins R, 'Derogation under human rights treaties,' 48 *British Year Book of International Law* (1977).
- Kanga G, 'Emergency regimes in Cameroon: Derogation or failure? of the law,' 25 (4) *African Journal of International and Comparative Law* (2017).
- Lehmann J, 'Limits to counter-terrorism: Comparing derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights' 8 *Essex Human Rights Review* (2011).
- McGoldrick D, 'The interface between public emergency powers and international law' 2(2) *International Journal of Constitutional Law* (2004).
- Melkamu TA, 'Absence of a derogation clause under the African Charter and the position of the African Commission' 4 *Bahir Dar University Journal of Law* (2014).
- Metz T, 'African values and human rights as two sides of the same coin: A reply to Oyowe' 14, *African Human Rights Law Journal* (2014).
- Michaelsen C, 'Derogating from international human rights obligations in the 'war against terrorism'? A British-Australian perspective' *Terrorism and Political Violence Journal* (2005).
- O'Donnell D, 'Commentary by the Rapporteur on derogation' 7 *Human Rights Quarterly* (1985).

Okafor O, 'Modest harvests: On the significant (but limited) impact of human rights NGOs on legislative and executive behaviour in Nigeria' 48 *Journal of African Law* (2004).

Oren G, 'Once more unto the breach: The systemic failure of applying the European Convention on Human Rights to entrenched emergencies' 23 (2) *Yale Journal of International Law* (1998).

Reynolds J 'The long shadow of colonialism: The origins of the doctrine of emergency in international human rights law' 19 *Comparative Research in Law & Political Economy* (2010).

Schreuer C, 'Derogation of human rights in situations of public emergency: The experience of the European Convention on Human Rights' 9 *Yale Journal of International Law* (1982).

Sermet L, 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion' 1 *African Human Rights Law Journal* (2007).

Sheeran PS, 'Reconceptualizing states of emergency under international human rights law: Theory, legal doctrine, and politics' 34(3) *Michigan Journal of International Law* (2013).

Siehr A, 'Derogation Measures under Article 4ICCPR, with Special Consideration of the War against International Terrorism' 47, *German Yearbook of International Law* (2004).

D. Dissertations and Theses

Alnouq M, 'Derogation, emergency and the rule of law: Scope and limitations' Unpublished LLM Thesis, Central European University, 2010.

Becker M, 'An escape from the perceived rationalist-constructivist binary: A look into derogable international human rights agreements' International and Comparative Studies Thesis, University of Michigan, Michigan, 2015.

Diamini C, 'The protection of human rights in Africa' Published LLM Thesis, University of Zululand, KwaZulu-Natal, 1989.

Khomba J, 'Redesigning the balanced scorecard model: An African perspective' Published PhD

Thesis, University of Pretoria, 2011.

Ntephe P, 'Does Africa need another kind of law?: Alterity and the rule of law in Subsaharan Africa' Unpublished PhD Thesis, University of London, 2012.

Ryspaeva A, 'Justification of Derogations of Human Rights in Emergency Situations' Published LLM Thesis, Central European University, 2015.

Tessema B, 'A critical analysis of non-derogable rights in a state of emergency under the African system: The case of Ethiopia and Mozambique' Unpublished LLM Thesis, Eduardo Mondlane University, 31 October 2005.

E. Online Resources

Agence France-Presse, 'Ethiopia state of emergency to last six months' Daily Nation, 17 February 2018 - <<https://www.nation.co.ke/news/africa/Ethiopia-state-of-emergency-to-last-six-months-/1066-4309234-saa0isz/index.html>>

Horne F, 'State of Emergency Ends in Ethiopia: Government Should Use Reform, Not Force, to Avoid More Protests' Human Rights Watch, 7 August 2013 - <<https://www.hrw.org/news/2017/08/07/state-emergency-ends-ethiopia>>

Jones G, 'Egypt to extend state of emergency for 3 months: MENA' 2 January 2018 <https://www.reuters.com/article/us-egypt-security/egypt-to-extend-state-of-emergency-for-3-months-mena-idUSKBN1ER1B0>

F. Institutional Reports

Institute for International and Comparative Law in Africa, *The 1997 Constitution of The Gambia*, undated.

Institute for International and Comparative Law in Africa (ICLA), *Malawi*, undated.

Office of the United Nations High Commissioner for Human Rights (OHCHR), 'UN experts urge Turkey to adhere to its human rights obligations even in time of declared

emergency'

19

August

2016

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394>

United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities, Res1995/33. Question on human rights and states of exception, 35th session.