

HUMAN RIGHTS DEROGATIONS IN NATIONAL EMERGENCIES: LESSONS FROM AFRICA

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It is a privilege to pay respects to the career of a man so admirable both as a person and as a scholar. Actually, Bob Lutz is more than a scholar: he is an institution. His expertise in international law is so broad that it seems a

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shame to honor him with a topic covering fewer than a half dozen fields of the subject. Few international lawyers can boast of anything approaching Bob's range, which includes everything from international trade law to human rights, international commercial arbitration to law of the sea, U.S. foreign relations law to comparative law. To honor him properly would require a multivolume treatise. My contribution to this celebratory issue is lamentably, if inevitably, narrow, but it does aspire to emulate Bob in being original and instructive.

I. INTRODUCTION

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) allows states to derogate from most human rights during a "public emergency which threatens the life of the nation."¹ This provision imposes certain procedural and substantive requirements on states, most prominently by requiring prior proclamation of the emergency and limiting the use of derogation to the extent "strictly required by the exigencies of the situation" and ensuring that derogation does not involve discrimination solely on prohibited grounds such as race or sex.² These criteria are known as the requirements of necessity, proportionality, and nondiscrimination. Among the major regional human rights treaties, both the Pact of San José³ and the European Convention on Human Rights⁴ include similar, though not identical, provisions for derogation in time of emergency.⁵

Consistent with the phrasing of the derogation provision, the Human Rights Committee views ICCPR Article 4 as an *ultima ratio*, to be used only in the most dire and exceptional situations and for as limited a time as possible.⁶ Yet, states have historically invoked derogations under ICCPR Article 4 and its regional cognates regularly, and frequently those invocations were based on circumstances that appeared concerning to the

1. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR].

2. *Id.* For the Human Rights Committee's interpretation of the provisions of Article 4, see Hum. Rts. Comm., ICCPR General Comment No. 29, at para. 5, UN Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter HRC, GC No. 29].

3. American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123.

4. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221.

5. Three African states are parties to the 1994 Arab Charter on Human Rights: Libya, Syria, and Tunisia. Article 4 of the Charter permits derogations in time of emergency. *See Arab Charter on Human Rights 2004*, in 24 BOS. UNIV. INT'L L.J. 147, 151-52 (2006) (Mohammed Amin Al-Midani & Mathilde Cabanettes trans., 2006).

6. *See* HRC, GC No. 29, *supra* note 2, paras. 2-3.

Committee.⁷

from derogating from human rights during a state of emergency. Moreover, it is entirely possible to declare an emergency and derogate from human rights consistent with general principles of human rights limitation.

As for inconsistency, Sermet's proposed principle of "most favorable for human rights" is one possible approach to resolving it. His ideas find confirmation not only in the African Commission, but in the Economic Community of West African States (ECOWAS) Community Court of Justice. Although that court has jurisdiction *ratione personae* over ECOWAS member states only, its jurisdiction *ratione materiae* encompasses alleged human rights violations.¹³ Like the African Commission, it has taken the position that derogations from human rights are impermissible by state parties to the Banjul Charter even during national emergencies.¹⁴

And yet, other jurisprudence and a great preponderance of African state practice support another approach. Specifically, the African system permits some limitations on human rights and thus opens the door to some limited forms of derogation during states of emergency, to the extent consistent with the ICCPR. Specifically, although the Banjul Charter does not contain a general clause expressly authorizing state parties to limit human rights proportionately in pursuit of legitimate aims, such as the protection of human health and welfare or the human rights of others, it does provide for individual duties in Article 27(2): "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."¹⁵ Under the customary principle of treaty interpretation known as *effet utile*,¹⁶ a less literal interpretation of Article 27 may be justified. Article 27 could be read

international human rights authorities, the Commission and Arusha Court have repeatedly upheld state restrictions on human rights when such restrictions “are prescribed by law, serve a legitimate purpose and are necessary and proportional as may be expected in a democratic society.”¹⁷ Indeed, in several cases, the Commission has specifically characterized ICCPR Article 27(2) as the basis by which state parties to the Banjul Charter may limit human rights.¹⁸ And, more importantly, state parties to the Banjul Charter prefer this interpretation. Derogations are quite common among these states and are often authorized by their constitutions, as will be discussed. Therefore, it is safe to conclude that African states may derogate from human rights, at a minimum when consistent with other bases for limitations on human rights, in a manner proportionate to the need for limitation.

If the disjunction between the ICCPR and Banjul Charter is idiosyncratic to the African human rights system, the study of African practice in derogating from human rights in times of emergency is not. At the moment, the world is suffering through a pandemic of extraordinary scope and severity, having caused more than 6.5 million deaths since 2020.¹⁹ Many states around the world—including many in Africa—have responded by implementing emergency measures that derogate from human rights, particularly the rights to freedom of assembly, freedom of movement, health care, family life, and privacy.²⁰ As international human rights law undergoes this unusual stress test, it is instructive to draw lessons from past practice on a continent where derogations have been common for many decades.

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None of them incorporate every human right guaranteed by the ICCPR, ICESCR, and Banjul Charter. The fact that no African state constitution surveyed here includes a comprehensive list of human rights has no bearing on whether the states are obligated by international law to protect all human

Nineteen of the forty constitutions provide unambiguously for the derogation of at least some human rights in case of a state of emergency. In most cases, the rights that may be derogated are specifically listed. These constitutional provisions will be discussed in more detail below.

The remaining seventeen constitutions are unclear in varying degrees about whether a state of emergency justifies derogation of human rights, or else provide that the conditions of the emergency are provided by legislation. This leaves uncertain whether such legislation may derogate from constitutionally protected human rights. The legal consequences of relying on emergency legislation without constitutional limitations will be addressed in Part II.C. For now, two important points should be made. First, during a national emergency, constitutions that are unclear about whether

Charter implicitly authorizes derogation during emergencies, then the number is reduced to the four states that do not on a plain reading authorize any derogation whatsoever.

The Human Rights Committee has several times expressed its concern with municipal laws that appear to allow derogations in a manner incompatible w2(w)4.6 (s).7 (pa2.6 (t),05 Tw 1.82C1c)-4.7 (c)-1.6 (i6b0.00e(o a).E2 (m)-4.6 (e[.9 (t

constitution does so—it follows that such legislation cannot logically

pandemic, which has resulted in the suspension of select human rights in nearly all African states.

A. *The COVID-19 Pandemic and States of Emergency, 2020-21*

By the summer of 2020, twenty-eight African states had declared a state of emergency in response to the COVID-19 pandemic. Of these, twenty declared states of emergency or national disaster

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COVID-19 pandemic in a disproportionate or illegitimate manner.⁵⁸ However, some states have taken advantage of the crisis to unnecessarily limit freedom of expression and the press. For example, in Tanzania, where the government initially adopted a policy of declaring the country COVID-free while infections were growing exponentially, a television station that reported facts on COVID-19 infections was banned for nearly a year.⁵⁹ More generally, several countries, including Egypt, Kenya, Morocco,

order.⁶³ On March 30, 2020, a thirteen-year-old boy was shot on his balcony in Nairobi by police who were supposedly enforcing the curfew.⁶⁴ Many were arrested and refused release except upon payment of a fine or bribe.⁶⁵ President Kenyatta has formally apologized for the behavior of the police, but the government failed to promptly investigate these incidents of excessive use of force and failed to discipline human rights violators.⁶⁶

Similarly, although Morocco's constitution does not formally permit the derogation of human rights, Morocco passed a law in March 2020

the nation.” Criticism of government measures cannot threaten the life of a nation.

Other countries, such as Egypt and Nigeria, have also censored the media, imprisoned critics of government health policy, and used excessive force against citizens who violate curfews or lockdowns.⁷⁰ The African Commission has been active in trying to steer African governmental responses to COVID-19 into paths compatible with international human rights law. In August 2020, the Commission issued a press release condemning excessive uses of force and cruel, inhuman, and degrading treatment in prisons “in some African States” in response to the COVID-19 pandemic, without, however, naming any specific offender.⁷¹ More generally, the African Commission has recognized the lack of formal resolutions providing guidance on derogations during states of emergency and expressed its interest in prioritizing the development of more specific norms.⁷²

At the same time, the Commission issued a general statement on human rights derogations during the pandemic.⁷³ Recommended measures include ensuring that the state of emergency is not used to enforce the law with unnecessary or disproportionate force; preventing law enforcement officers from engaging in torture and other cruel, inhuman or degrading treatment; adopting procedures to prevent arbitrary arrests and detention; preventing discrimination against vulnerable groups such as women, non-nationals, and refugees; and ensuring that human rights defenders are not persecuted.⁷⁴

The issue of elections during the pandemic has occasioned more international controversy than most derogated human rights because elections have been postponed in many African states.⁷⁵ Because the costs

70. See, e.g., *Nigeria: Authorities Must Uphold Human Rights in Fight to Curb COVID-19*, AMNESTY INT’L (Apr. 1, 2020), <https://www.amnesty.org/en/latest/news/2020/04/nigeria-covid-19/>; *Egypt: World Bank Funds Health but Neglects Jailed Doctors*, HUM. RTS. WATCH (Dec. 8, 2020), <https://www.hrw.org/news/2020/12/08/egypt-world-bank-funds-health-neglects-jailed-doctors>.

71. See African Comm’n on Hum. and Peoples’ Rts. [Afr. Comm’n H.P.R.], *Press Release of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa on Reports of Excessive use of Force by the Police during the COVID-19 Pandemic* (Apr. 17, 2020), <https://www.achpr.org/pressrelease/detail?id=491>.

72. See African Comm’n on Hum. and Peoples’ Rts. [Afr. Comm’n H.P.R.], *447 Resolution on Upholding Human Rights During Situations of Emergency and in Other Exceptional Circumstances*, ACHPR/Res. 447 (LXVI) (Aug. 7, 2020), <https://www.achpr.org/sessions/resolutions?id=478>.

73. See African Comm’n on Hum. and Peoples’ Rts., *supra* note 54.

74. See *id.* paras. 2, 5.

75. See INT’L IDEA, *supra* note 46, at 910.

of secure, remote voting by mail or computer are high relative to the per capita gross domestic product of nearly all African states, elections in Africa generally require in-person voting. Delays in elections may help

with regard to preparing for, holding, and postponing elections during the

III.A above; and (3) the range of human rights derogated during the

Algeria, 1988-2011

Between 1988 and 2011, the Algerian government declared a state of
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noxious liquids.⁹⁹ No member of the military or police was ever prosecuted for these acts, despite the government having acknowledged their occurrence in 1993.¹⁰⁰ Most rioting appears to have ended within a week,

in prison camps.¹⁰⁶ FIS terrorists responded with assassinations of intellectuals, journalists, and doctors, and attacks on government buildings and airports.

The 1992 emergency decree gave the Minister of Interior sweeping powers, including the authority to ban public gatherings, dissolve municipal governments, and detain for an unspecified period any adult “whose activity is shown to endanger the public order, public security, or the proper functioning of public services.”¹⁰⁷ A long military struggle ensued and anti-Islamic militias formed. In 1997 and 1998, these militias elevated the violence by arbitrarily slaughtering, kidnapping, raping, and mutilating dozens or hundreds of men, women and children in pro-Islamic villages.

The state of emergency declaration did little to restore peace, but it did suspend a wide range of human rights. Civilians charged with offenses against state security could be tried by military courts.¹⁰⁸ Extrajudicial killing became common during the emergency, with lethal armed attacks against even peaceful pro-Islamic demonstrators.¹⁰⁹ Reports indicate that tens of thousands of civilians were killed in the war.¹¹⁰ The president suspended the right of appeal in criminal trials involving accusations of terrorism, including capital cases.¹¹¹

Arrests were indiscriminate and due process frequently denied. Detainees “were not informed of the reasons for their detention, the length of the ordered detention, or the criteria for determining when they would be released.”¹¹² Firsthand observers reported a significant number of detainees tortured or abused in custody.¹¹³ Elections were suspended for many years, and the government censored press reports critical of the government. Threats and attacks on journalists, editors, and human rights activists also became common.¹¹⁴

106. 1993 Human Rights Watch Report, *supra* note 99, at 288.

107. Youssef M. Ibrahim, *In Algeria Now, No Appeal in Terrorist Cases*, N.Y. TIMES, Oct. 15, 1992, at A11, <https://www.nytimes.com/1992/10/15/world/in-algeria-now-no-appeal-in-terrorist-cases.html?searchResultPosition=1>; Presidential Decree No. 92-44, *supra* note 105, art. 2, 4, 5, 7, 9.

108. See 1993 Human Rights Watch World Report, *supra* note 99, at 289.

109. *Id.*

110. See Jon Henley, ‘I Saw Algerian Soldiers Massacre Civilians’, THE GUARDIAN (Feb. 13, 2001, 21:32 EST), <https://www.theguardian.com/world/2001/feb/14/jonhenley>.

111. Ibrahim, *supra* note 107.

112. *Id.*

113. *Id.*; Yasmine Ryan, *Uncovering Algeria’s Civil War*, AL-JAZEERA (Nov. 18, 2010), <https://www.aljazeera.com/indepth/2010/11/201011812224407570.html>; AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 1993, 49-52 (1993); Henley, *supra* note 110.

114. *Algeria Lifts 1992 Emergency Decree, State News Agency Says*, CABLE NEWS NETWORK (Feb. 22, 2011), <http://www.cnn.com/2011/WORLD/africa/02/22/algeria.emergency/index.html>.

The declaration was extended even after the civil war tapered off following ceasefire negotiations in 1997. The war formally ended in 2005,¹¹⁵ but the emergency declaration remained in effect until 2011, when protests forced the president to rescind it. During the entire period (1992 until 2011), no national elections were held in Algeria.

Burkina Faso, 2014-present

Until 2015, Burkina Faso was not a country in which human rights were generally respected. In 1987, former deputy Blaise Compaoré came into power following a *coup* he orchestrated with two other politicians, whom he soon had arrested and executed in order to achieve a dictatorship.¹¹⁶ He kept himself in power through fraudulent elections for the next twenty-seven years. Burkina Faso acceded to the ICCPR in

Within approximately two weeks, Compaoré was forced to flee the country, and a transitional government was set up, but negotiations between political and military leaders continued to delay elections until, in November 2015, elections temporarily put an end to the state of emergency.¹²¹ The new government under President Kaboré slowly began a process of improving human rights compliance, but an Islamist insurgency and hundreds of terrorist attacks on schools, police stations, and army barracks caused the government to declare another state of emergency on December 31, 2018, with respect to fourteen provinces. The legislature¹²² ratified this declaration and it continues to the present day.¹²³ The United Nations was notified of the emergency belatedly, on April 17, 2019.¹²⁴

The Islamist violence to which the declaration of emergency responds is extreme. It has caused multiple deaths, much property destruction, mass displacements of civilians, and high food insecurity.¹²⁵ Aside from the suspension of the right to privacy (searches without warrants), the declaration appears to have not imposed other systematic effects on human rights.¹²⁶ However, Burkinabe military and security forces appear to have committed some sporadic but serious human rights violations, including the summary execution of one-to-two-hundred civilians between April 2018 and January 2019, under the alleged belief that they were Islamist

121. Salihu, *supra* note 119.

122. Act No. 001-2019/AN (Jan. 11, 2019) (Burk. Faso); *Burkina Faso Declares State of Emergency in North Following Attacks*, REUTERS (Dec. 31, 2018, 5:52 AM), <https://www.reuters.com/article/us-burkina-security/burkina-faso-declares-state-of-emergency-in-north-following-attacks-idUSKCN1OU0OV>; *Burkina Faso Declares State of Emergency in 6 Provinces*, AFRICA TIMES (Dec. 31, 2018, 7:34 PM), <https://africatimes.com/2018/12/31/burkina-faso-declares-state-of-emergency-in-6-provinces/>; *Éprouvé par le terrorisme, le Burkina Faso instaure l'Etat d'urgence dans six de ses régions*, L'AGENCE D'INFORMATION DU BURKINA (Dec 13, 2018), <https://www.rfi.fr/actualites/burkina-faso/20181213-burkina-faso-urgence-terrorisme>

militants.¹²⁷ This does not appear to be part of a government policy or program, and Burkinabe authorities did acknowledge the charges and stated an intention to investigate them.¹²⁸ However, the Burkina Faso government does not appear to have made any progress in conducting significant investigations of government human rights violations in the ensuing years, despite pressure from the United Nations and United States.¹²⁹

Cameroon, 1984-1992

Following Cameroon's independence in 1961, its government recurrently declared states of emergency to abuse human rights, censor the press, and eliminate political opposition.¹³⁰ Cameroon acceded to the ICCPR effective September 27, 1984, which in theory should have deterred its abuses of emergency declarations.¹³¹ In fact, very little changed. Between 1984 and 1986, the government declared a state of emergency every five to six months, belatedly informing the United Nations in most cases but without clearly explaining the derogations intended.¹³² The first state of emergency was declared on April 18, 1984, in the Yaounde region after a failed *coup d'état* and before Cameroon was bound by the Convention.¹³³ Fighting resulted in both military and civilian casualties estimated at around 200 to 1,000 deaths, and 1,205 detentions.¹³⁴ The emergency was eventually expanded to the entire country to counter "banditry" and other crimes, and to suppress attempts to reestablish the long-banned Union des Populations Camerounaises.¹³⁵

127. John Campbell, *Security Service Human Rights Violations in Burkina Faso*, COUNCIL ON FOREIGN RELATIONS (Mar. 27, 2019), <https://www.cfr.org/blog/security-service-human-rights-violations-burkina-faso>.

128. *Id.*

129. *Burkina Faso Executions Prompt Broad Call for Inquiry*, HUM. RTS. WATCH (Sept. 16, 2020, 2:41 PM), <https://www.hrw.org/news/2020/09/16/burkina-faso-executions-prompt-broad-call-inquiry>.

130. Charles Manga Fombad, *Cameroon's Emergency Powers: A Recipe for (Un)constitutional Dictatorship?*, 48 J.AFR. L. 62, 64 (2004).

131. Parties to the ICCPR, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5>

obtain a majority and the Cameroon constitution had no procedures for a second election in such cases, the opposition disputed the result. Biya declared another state of emergency on October 27, 1992, limited to the North West Province, where opposition protests were being held.¹⁴⁴ The government failed to notify the United Nations of this declaration.¹⁴⁵ Biya accused the provincial government of orchestrating electoral fraud in the parliamentary election, and for three months, hundreds of opposition supporters and journalists were arbitrarily detained for long periods, while others were beaten or murdered by security forces.¹⁴⁶ The declaration expired before the end of 1992, when the government succeeded in suppressing opposition to the election and consolidation of power. In 1996, the Parliament amended the constitution to make the President's power all but absolute during states of emergency,¹⁴⁷ a situation only partially rectified by new amendments in 2008. The ultimate result was the decimation of Cameroon's nascent democracy and the deepening of corruption, which has continued to the present.¹⁴⁸

President Idriss Déby Itno began holding fraudulent elections, leading to multiple *coup d'état* attempts and a boycott of elections by the political opposition.¹⁵¹

In response, the Déby government declared three separate national emergencies between 2006 and 2008. The first, in November 2006, lasted

vehicles in the area.¹⁵⁷ The legislation also allowed for the search of homes. In addition, the formerly abolished death penalty was reinstated, and ten Boko Haram militants were tried, sentenced to death, and executed.¹⁵⁸ In March 2016, Chad's government issued a blanket ban on all protests and the use of national radio (leaving broadcast news in the hands of the state-owned Teleshad, the only television station in Chad).¹⁵⁹ The National Assembly extended the state of emergency for four months,¹⁶⁰ although there does not appear to have been any need for an extension. The 2015 parliamentary elections were delayed until 2020 as well.¹⁶¹

In August 2019, another state of emergency was declared. This declaration was limited to three regions bordering Niger and Sudan where inter-ethnic violence had been occurring since May.¹⁶² It was extended for four months as well.¹⁶³ The ostensible goal of the declaration was the mass disarmament of civilians through home searches and confiscations.

Also, in N'Djamena, Bonheur Mateyan Manaye was riding a motorcycle on 4 November when he was shot by the police escort of the Speaker of the National Assembly. He later died of his injuries.¹⁶⁵

Additionally, police and military forces conducted arbitrary arrests and detention, controlled freedom of movement, interfered in commerce, and limited freedom of assembly by banning peaceful protests and arresting or tear gassing protesters, opposition politicians, and their supporters.¹⁶⁶ In an attempt to solve the intercommunal violence through government violence, villagers were subjected to intimidation, in some cases through

law in January 2013, however, to suppress unrest.¹⁸⁵ After a military coup deposed Morsi, acting president Adly Mansour reimposed the state of emergency in August 2013 in response.

Ethiopia, rank among the lowest on the Human Freedom Index.¹⁹¹ And, when invoking states of emergency, the governments of these countries have unsurprisingly continued or aggravated their human rights violations.

Although a government with an established reputation for violating human rights obviously does not require a declaration of emergency to violate human rights, the declaration does usually assist an authoritarian government in persecuting the news media and human rights defenders, suspending constitutional processes (such as they are), deterring any impulse toward judicial independence, arresting any political opponents, and using armed force to intimidate any sectors of the public who might consider organizing protests. By establishing martial law and other restrictions on civil society, the declaration facilitates more extreme and systematic human rights violations than those that occur in ordinary times.

Some such governments have declared states of emergency multiple times in their turbulent histories. Tunisia and Zambia have each declared emergencies at least three times between 1976 and 2019.¹⁹² But the length of the states of emergency is as telling as the frequency. The Human Rights Committee has observed that measures derogating from the ICCPR under Article 4 “must be of an exceptional and temporary nature.”¹⁹³ Emergencies are nearly always temporary by nature because only in extraordinary cases are states unable to adjust to radically changed circumstances. Declared states of emergency in Africa are often another matter. Most states of emergency declared in Africa last less than a year, sometimes only a few weeks, but others have endured several years or decades. In such cases, the declaration was usually part of a program of government repression or unconstitutional bids to maintain power, as in Burkina Faso (2014 to present), Chad (2006-2019), The Gambia (2017),¹⁹⁴ Tunisia (2015 to present)¹⁹⁵ and Zambia (1964 to 1991 and again in

191. *Id.* (all rated as “not free”—15 for Chad, 19 for the DRC, 18 for Egypt, 23 for Ethiopia).

192. See *Tunisia Repressive State of Emergency Bill a Threat to Human Rights*, AMNESTY INT’L (Mar. 15, 2019), <https://www.amnesty.org/en/latest/press-release/2019/03/tunisia-repressive-state-of-emergency-bill-a-threat-to-human-rights/>; see also Anthony Mukwita, *Zambia-Politics: State of Emergency Lifted*, INTER PRESS SERV. (MAR. 20, 1998), <https://www.ipsnews.net/1998/03/zambia-politics-state-of-emergency-lifted/#more-65480>.

193. HRC, GC No. 29, *supra* note 2, para. 2.

194. *Gambia: State of Emergency No License for Repression*, AMNESTY INT’L (Jan. 18, 2017), <https://www.amnesty.org/en/latest/news/2017/01/gambia-state-of-emergency-no-license-for-repression/>; *The Gambia’s President Declares State of Emergency*, BRIT. BROAD. CO. (Jan. 17, 2017), <https://www.bbc.com/news/world-africa-38652939>; Jaime Yaya Barry & Dionne Searcey, *President’s Term Running Out, Gambia Shudders as He Refuses to Quit*, N.Y. TIMES, Jan 19, 2017, at A4.

195. See *Tunisia: Repressive State of Emergency Bill a Threat to Human Rights*, AMNESTY

2017).¹⁹⁶ Egypt in particular stands out as a chronic abuser of states of emergency, to the point that the term has lost all meaning.

Even African states with less severe human rights problems have frequently declared states of emergency under conditions that do not satisfy Article 4(1) of the ICCPR. Declarations have been used to quell both peaceful protests and riots which, under even a charitable interpretation of the facts, could not be construed as “threaten[ing] the life of the nation.” In some cases, the declarations have been entirely justified by the circumstances. Often in those cases, human rights have

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fully consistent with ICCPR Article 4, and among those that are superficially consistent, the state's actual practice may violate the derogation provision regardless.

As noted, derogations are used much more readily and for much longer periods by authoritarian governments with poor human rights records than by governments that generally respect human rights. When derogations are invoked, the notification procedure of Article 4 is rarely observed. The scope and purpose of derogations very rarely comply either with the conditions of necessity and proportionality required by Article 4, nor are nonderogable rights consistently respected. The notable exception is the response of African states to the COVID-19 pandemic. The African governments that have used states of emergency to respond to COVID-19 in a manner consistent with Article 4 greatly outnumber those that have opportunistically abused the pandemic to undermine human rights.

Nonetheless, it is far from clear that a formal procedure for derogating from human rights during states of emergency has advanced any important policy, other than requiring (without consistently achieving) some measure of transparency during states of emergency. The absence of an explicit authorization for derogations in the Banjul Charter has not resulted in a general belief among African states or the Arusha Court that suspending human rights in an emergency *ipso facto* violates the Charter, despite a position to the contrary sometimes taken by the African Commission and ECOWAS Community Court. This suggests that the ordinary principles justifying limitations of human rights suffice in emergency situations quite as well as they do in normal life. That is not surprising, given that the usual test for limitations—that any limitation be prescribed by law, necessary for a legitimate government aim, and proportional to that aim²⁰⁴—could reasonably be viewed as no more and no less exacting than Article 4's requirements for derogation. In light of the technical superfluity of a derogation provision, the lessons of Africa strongly suggest that the main function of ICCPR Article 4 in practice is to provide political cover for violations of civil and political rights on an exceptional scale, rather than to provide any leeway to respond to emergencies that international human rights law would normally deny to states.

204. See *supra* sources cited in note 17; Badar, *supra* note 8, at 63.

APPENDIX - CONSTITUTIONAL

CENTRAL AFRICAN REPUBLIC, Constitution of Nov. 26, 1964 (rev. Mar. 27, 2016)

Article 31 (President's declaration of state of emergency; and Parliament's ongoing role and "plain right" in its continuation)

Article 32 (state of emergency or state of siege declaration by President)

Article 66 (state of emergency or state of siege are defined by legislation)

CHAD, Constitution of Mar. 31, 1996 (rev. May 4, 2018)

Article 87 (state of emergency declaration and non-derogable rights during state of emergency)

COMOROS, Constitution of Dec. 23, 2001 (rev. July 30, 2018)

Article 19 (suspension of human rights during state of emergency)

Article 55 (state of emergency declaration by President)

DEMOCRATIC REPUBLIC OF CONGO, Constitution of June 30, 1960 (rev. Oct. 25, 2015)

Article 61 (non-derogable human rights during state of emergency)

Article 85 (state of emergency declaration by President; and state of

Article 27 (state of emergency declaration by the President; and National Assembly's powers during state of emergency)

Article 28 (prohibition on laws that infringe on fundamental rights and freedoms conferred by the Constitution)

ETHIOPIA, Constitution of Dec. 8, 1994

Article 55 (state of emergency declaration)

Article 77 (state of emergency declaration by Council of Ministers)

Article 93 (suspension or limitation of human rights during state of emergency)

GABON, Constitution of March 26, 1991 (rev. Jan. 12, 2011)

Article 16 (state of emergency)

Article 17 (state of emergency declaration by President)

GHANA, Constitution of April 28, 1992 (rev. Dec. 16, 1996)

Article 31 (state of emergency declaration by President)

REPUBLIC OF GUINEA, Constitution of Dec. 23, 1990 (rev. May 7, 2010)

Article 6 (non-derogable human rights)

Article 90 (state of emergency declaration by President)

KENYA, Constitution of Aug. 27, 2010

Article 24 (limitations on human rights by law)

Article 25 (non-derogable human rights)

Article 58 (state of emergency)

Article 132 (state of emergency declaration by President)

LIBERIA, Constitution of Jan. 6, 1986

Article 86 (state of emergency declaration by President)

Article 87 (limitations on powers conferred during state of emergency)

Article 88 (Legislature's approval of state of emergency)

MADAGASCAR, Constitution of Aug. 19, 1992 (rev. Dec. 11, 2010)

Article 61 (state of exception or state of emergency)

Article 17 (state of emergency declaration)

- MALAWI, Constitution of May 16, 1994 (rev. Feb. 14, 2017)
Article 45 (non-derogable rights during state of emergency declared by President)
- MALI, Constitution of Jan. 12, 1992
Article 49 (state of emergency declaration by President)
Article 50 (state of emergency powers)
Article 72 (state of emergency and state of siege are defined by legislation)
- MAURITANIA, Constitution of July 12, 1991
Article 39 (state of emergency declaration by President; and respective limitations on powers)
Article 71 (state of emergency and state of siege are defined by legislation)
- MOROCCO, Constitution of July 29, 2011
Article 59 (state of exception declaration by King; and fundamental freedoms and rights must still be guaranteed during state of exception)
Article 74 (state of siege)
- MOZAMBIQUE, Constitution of Dec. 21, 2004 (rev. Jan. 14, 2004)
Article 56 (limitations on human rights and freedoms)
Article 72 (state of emergency declaration)
Article 282 (state of emergency of state of siege)
Article 283 (state of emergency declaration in situations of a “less serious nature”)
Article 284 (duration of state of emergency or state of siege)
Article 285 (approval of state of emergency by Assembly of the Republic)
Article 286 (non-derogable rights during state of emergency or state of siege)
Article 287 (permitted limitations on human rights and freedoms during state of emergency or state of siege)
- NAMIBIA, Constitution of Feb. 9, 1990 (rev. Sep. 19, 2014)
Article 24 (non-derogable human rights during state of emergency)
Article 26 (state of emergency declaration by President; and limitations on human rights and freedoms during state of emergency)

