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**The need to curb national threat and State of emergency in Ethiopia: compatibility to international human rights obligation.**

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*Till this time Ethiopia witnessed five emergency declarations including the current proclamation which is proclaimed to avert the danger and protect the sovereignty of the state which is the main concern of this paper. Starting from its endorsement many peoples criticize the proclamation as it restricts many fundamental human rights and freedoms as well as includes vague and ambiguous words. As well as many academicians claim that the exclusion of the judiciary is also against the constitution as well human rights treaties to which Ethiopia is a state party. The main concern of this paper is analyzing the derogation of human rights during a public emergency that threatens the life of the nation. And the paper particularly examines the compatibility of the declaration of the state of emergency proclaimed by the Ethiopian government to avert the threat against the sovereignty and integrity of the state with the internationally established human rights norms governing emergency declaration. To explore the problems identified, the researcher has employed a qualitative research design. Accordingly, for this research work mainly doctrinal qualitative research methods have been used. The researcher finally argues that even though the Ethiopian government has a sufficient cause for declaring a state of emergency decree, the declaration does not meet some of the substantive and procedural conditions which are provided under ICCPR and other human rights instruments. Specifically, it is possible to conclude that the protection accorded to the non-derogable rights in the SOE proclamation, as well as the practice, prevailed in the ground is not consistent with article 4 of ICCPR as well as with the emerging human right understanding and interpretation which is implicated in the general comment of the human right committee. The austere clause under the proclamation is also against the human rights obligation of the state to guarantee effective due process right of individuals during emergencies as well as to provide independent and impartial tribunal which is considered an absolute right that may suffer no exception. The SOE proclamation also includes sweeping and vaguely worded restrictions on a broad range of actions that undermine basic rights, including freedom of expression, association, and peaceful assembly, and go far beyond what is permissible under international law.*

*Keywords: Austere clause; State of emergency declaration; Ethiopian constitution; Siracusa principles*

## 1. Introduction

It is an undeniable fact of life that States may encumber with some extraordinary situation that will not be controlled by a regular peace enforcement mechanism. And in such situations they may consider it necessary, to restore peace and order, to limit the enjoyment of individual rights and freedoms.<sup>1</sup> Though human rights norms permit states to resort to such measures, derogating states are expected to observe strict substantive and procedural conditions laid down under human rights instruments.<sup>2</sup> Like any nation in the world to overcome the problems that happened in different times, up to this time Ethiopia witnessed five emergency declarations including the current proclamation which is proclaimed to avert the danger and protect the sovereignty of the state which is the main concern of this paper. Be this as it may, enormous allegations were with regarding the state of emergency declarations declared in Ethiopia starting from 2016. Different researchers and human rights activists blame the government especially concerning the 2016 declaration, as it is inconsistent with the strict conditions provided under the different binding and non-binding human rights instruments. The other states of emergency declarations declared successively were not also free from accusation by human rights activists, researchers, academicians including human rights NGOs.<sup>3</sup> In fact, the only focus of this paper is on the new state of emergency declaration which is proclaimed on November 02/2021 regarding its compatibility with the human rights obligation that the state owes under the international arena.

Accordingly, the writer in this paper intensively assesses the compatibility of the current Ethiopian state of emergency with the internationally established human rights norms governing emergency declaration. Particularly, the paper tried to answer questions like; from the outset is there exceptional and imminent danger encumbered Ethiopia that necessitates emergency declaration? If the answer to the preceding question is affirmative, does the measures taken by the government were strictly required by the exigencies of the situation? Is that permissible under international law to sweep the power of the judiciary in its totality? Do the measures incorporated under the proclamation are consistent with other international obligations Ethiopia owes?

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<sup>1</sup> Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, office of the high commissioner for human rights(OHCHR) in cooperation with the international bar association, professional training series no. 9, United Nations,New York and Geneva, 2003 p. 813[ hereinafter OHCHR, training manual]

<sup>2</sup> Joan F. Hartman, Derogation from Human Rights Treaties in Public Emergencies: A critique of implementation by the European Commission and Court of Human Rights committee of the united nation, Harvard International law journal, Vol.22, No.1, 1981.

<sup>3</sup> Amnesty International Public Statement, ai index: afr 25/5669/2017 Ethiopia: draconian state of emergency measures.

Owing to the nature of the study and to effectively answer the questions raised above the researcher has employed a qualitative research approach. Hence, for this research work, doctrinal qualitative research methodology has been employed. As an atypical methodology to legal study, the doctrinal method involves elucidation and analysis of international conventions, Regional treaties, and national laws that concern a state of emergency. Accordingly, pieces of literature have been discussed intensively. This paper apart from providing the law aims to undertake a critical interpretation and analysis of the contents of these international, regional, and domestic laws regulating the state of emergency including but not limited to the International covenant on civil and political rights (ICCPR), Siracusa principles governing limitation and derogation of rights, FDRE constitution, and General comments of treaty bodies.

Structurally, the paper at first glance tried to provide a general introduction. And the second section is devoted to analyzing the national and international human rights law regime concerning the declaration of a state of emergencies. The third section is devoted to analyzing the current state of emergency declared by the Ethiopian government in light of the conditions established under international human rights norms and in last the paper ended by providing a concluding remark.

## 2. The meaning and rationale for declaration of a state of emergency: An overview

States may apply various terms to the special legal order introduced in crises such as “state of exception”, “state of emergency”, “state of alarm”, “state of siege”, or “martial law”.<sup>4</sup> It is an undeniable fact of life that many States will at some stage be confronted with serious crises, such as wars or other kinds of serious societal upheavals, and that in such situations they may consider it necessary, to restore peace and order, to limit the enjoyment of individual rights and freedoms and possibly even to suspend their enjoyment altogether.<sup>5</sup> In different from normal legal order state of emergency is a special legal regime regulating activities of public administration during the abnormal time.<sup>6</sup> And we can find a provision that permits state parties to resort to derogatory measures on certain strict conditions in different international and regional human rights instruments during such abnormal situations.<sup>7</sup> Internationally we can find such kind of derogation under the Covenant on civil and political rights (ICCPR) which provides a state of emergency as

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<sup>4</sup> OHCHR, training manual, p.813

<sup>5</sup> Ibid.

<sup>6</sup> Bekele Zelalem, *The Quest for Election and State of Emergency in Ethiopia: An Appraisal on Related Constitutional Issues in Focus*, *Beijing Law Review*, vol. 11, no. 4, 2020.

<sup>7</sup> For instance take a look at art. 4 of ICCPR, Art 27 of the American Convention on Human Rights, Art. 15 of the European Convention on Human Rights.

follows. “In a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”<sup>8</sup>

In the same vein, the American Convention on Human Rights and the European convention on human rights under Articles 27(1) and 15(1) respectively provide states of emergency with the slightest deviation from ICCPR.<sup>9</sup> Comparatively, indifferent from those international and regional human rights instruments the African Charter on Human and Peoples’ Rights contains no derogation provision. “In the view of the African Commission on Human and Peoples’ Rights, this means that the Charter does not allow for states parties to derogate from their treaty obligations during emergencies”. In other words, even a civil war cannot be used as an excuse by the state (for) violating or permitting violations of rights in the African Charter”<sup>10</sup>

As implicated in the human rights jurisprudence the right to derogate is a flexible instrument designed to help Governments to overcome exceptional crises. And the purpose of this flexibility is not intended to be used by authoritarian regimes seeking to eliminate human rights and that it cannot be used to save a specific Government.<sup>11</sup> The human rights committee in its general comment provides the purpose of declaration of a state of emergency as “the restoration of a state of normalcy where full respect for the Covenant can again be secured”.<sup>12</sup>

#### A. Conditions to derogate from human rights obligation under international human rights law

The freedom of action of States in the field of human rights is limited by:<sup>13</sup>

- A. The principle of exceptional threat;
- B. the principle of official proclamation;

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<sup>8</sup> International Covenant on Civil and Political Rights, Adopted by the General Assembly of the United Nations on 19 December 1966, entered in to force in 1976.art 4[ Here in after ICCPR]

<sup>9</sup> The only differences between the emergency concept contained in article 15(1) of the European Convention and that in article 4(1) of the International Covenant are that the former also refers to “war” and that the verb is in the gerund(“threatening”) rather than the simple present tense (“which threatens”).

<sup>10</sup> OHCHR, training manual, P. 816

<sup>11</sup> Id., p. 821

<sup>12</sup>Human Rights Committee, General Comment 29, Article 4 (seventy-second session, 2001), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1, (2001), Para 1 [Here in after General comment no.29]

<sup>13</sup> OHCHR, training manual, p.819

- C. the principle of non-derogability of certain rights;
- D. the principle of strict necessity;
- E. the principle of compatibility with other international legal obligations;
- F. the principle of non-discrimination; and
- G. the principle of international notification.

i. The principle of exceptional threat and official proclamation

The human right Committee states that a State party must comply with “two fundamental conditions” before invoking article 4(1) of the Covenant, namely (1) “the situation must amount to a public emergency which threatens the life of the nation” and (2) “the State party must have officially proclaimed a state of emergency”. Concerning the first condition i.e condition of exceptional threat, it is evident that “not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation” within the meaning of Article 4(1).<sup>14</sup> Moreover unequivocally the committee makes clear that whether the emergency is invoked in an armed conflict or some other kind of crisis, the situation must be so serious as to constitute a threat to the life of the nation.<sup>15</sup> The committee further provides that any derogatory measures must be limited to the extent strictly required by the exigencies of the situation.<sup>16</sup> Therefore this condition requires that “States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.”<sup>17</sup> According to the Committee, the second requirement i.e. Official proclamation is essential for the maintenance of the principles of legality and the rule of law at times when they are most needed. As well States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers.<sup>18</sup> Moreover, The Siracusa principle states that Apart from official proclamation Procedures under national law for the proclamation of a state of emergency shall be prescribed in advance of the emergency.<sup>19</sup> Generally from the jurisprudence of the human rights committee, one can understand that to be consistent with article 4(1) of the ICCPR, at the first glance domestic law must authorize derogations from human rights obligations only in genuine emergencies that are so serious as to actually constitute a threat to the life of the nation. In the second place limitations should only sustain for only the time necessitated by the situation, last but not least States parties continue

<sup>14</sup>General comment no.29, para.3

<sup>15</sup> OHCHR, training manual, p. 821

<sup>16</sup> General Comment no. 29, para.4

<sup>17</sup>OHCHR, Training Manual, P. 822

<sup>18</sup> General Comment No.29, para.2

<sup>19</sup> Siracusa Principles on the Limitations and Derogation provisions in the International Covenant on Civil and Political Rights, American Association for the International commission of jurists(AACJ), 1985, p.10, Para 42&43

to be bound by the principle of legality and the rule of law throughout any public emergency which threatens the life of the nation.<sup>20</sup>

### **ii. Non-derogability of certain rights during emergency declaration**

Under international human rights law, some categories of human rights are absolutely protected from derogation by the state parties even at the time of a state of emergency declaration. The ICCPR, ACHR<sup>21</sup>, ECHR<sup>22</sup> enumerate different non-derogable rights in their respective provisions. For instance, ICCPR under article 4(2) states that no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.” These rights include The right to life, the right to freedom from torture, cruel, inhuman, and degrading treatment or punishment, and medical or scientific experimentation without one’s free consent, the right to freedom from slavery, the slave trade and servitude, the right not to be imprisoned on the ground of inability to fulfill a contractual obligation, the right not to be subjected to retroactive legislation (ex post facto laws), the right to recognition as a person before the law, the right to freedom of thought, conscience and religion, and the right not to be subjected to the death penalty. In addition to those rights listed under ICCPR Human Rights Committee in its General Comment identified additional non-derogable provisions, including Article 2(1) (non-discrimination); Article 3 (the right to an effective remedy); Article 14 (right to a fair trial); and the right to take proceedings before a court to challenge the lawfulness of detention (Article 9(4) on habeas corpus). These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.<sup>23</sup>

### ***Non-derogable rights and the right to effective procedural and judicial protection during emergency declaration***

Practice shows us the mere protection of rights in human right instrument is not a sufficient guarantee for the full-fledged protection of those non-derogable rights listed under different human rights instruments. Therefore these rights must, in addition, be accompanied by the availability at all times of effective domestic remedies to alleged victims of violations of these rights.<sup>24</sup> In human rights jurisprudence, the principle of legality and rule of law must be guaranteed at all times, including in public emergencies. On the other hand, The Siracusa

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<sup>20</sup> OHCHR, Training Manual, p.825

<sup>21</sup> Inter American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, Art.27(2).

<sup>22</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950 and entered in to force in 1953. Art. 15(2)[hereinafter ECHR]

<sup>23</sup> Siracusa Principles, p.12, Para. 58

<sup>24</sup> OCHCR, Training Training Manual, p.847



principle asserts that the ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.<sup>25</sup> The human rights committee reiterated the necessity of securing non-derogable rights through procedural guarantees under its comment no.29.<sup>26</sup> As per the wording of the committee, it is only a court of law may can try and convict a person for a criminal offense. To protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."<sup>27</sup> The Inter American court in one of its decision asserts that "*writs of habeas corpus and 'Amparo'* are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society".<sup>28</sup>

The Siracusa principle further provides that "Although protections against arbitrary arrest and detention and the right to a fair and public hearing in the determination of a criminal charge may be subject to legitimate limitations if strictly required by the exigencies of an emergency, the denial of certain rights fundamental to human dignity can never be strictly necessary for any conceivable emergency."<sup>29</sup> And the principle emphasizes the importance of respecting these fundamental rights to ensure the enjoyment of non-derogable rights and to provide an effective remedy against their violation.<sup>30</sup>

### iii. The principle of strict necessity

ICCPR requires that those derogations imposed by the state shall be limited to the extent strictly required by the exigencies of the situation. Even though human rights instruments failed to provide a clear definition for the term "exigencies of the situation" the human rights committee in its general comments as well as regional courts tried to provide a precise meaning to this condition. The human rights committee interprets "strictly required by the exigencies of the situation" as it relates to the duration, geographical coverage, and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. As reiterated by the committee the principles of necessity and proportionality require that any measures imposed must be necessary for the achievement of the intended purpose, must be proportionate

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<sup>25</sup> Siracusa, 60

<sup>26</sup> General Comment No.29, Para.15

<sup>27</sup> Id., Para.16

<sup>28</sup> OHCHR, Training Manual, p.849

<sup>29</sup> Siracusa Principles, p.15, Para.70

<sup>30</sup> Ibid.

to that purpose, and must not jeopardize the rights restricted. On the other hand, the Inter American court on human rights in its advisory opinion provides that “the lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) will depend upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures

### *The right to liberty vs. special powers of arrest and detention during emergency declaration*

As a matter of fact use of special powers of arrest and detention is one of the most common means of addressing problematic situations.<sup>31</sup> And states can also lawfully resort to Special powers of arrest and detention in public emergencies threatening the life of the nation. However, as the right to liberty is not incorporated under the list of non-derogable rights, measures used by states sometimes be far-reaching, involving the elimination of judicial review of the lawfulness of the action taken, as well as long-term detention or internment.<sup>32</sup> Though states may exercise their special power of arrest and detention during emergencies the person has also some right to counterbalance the action of the state and thereby to check the consistency of the state action. This means that special powers of arrest and detention are lawful only to the extent that they are strictly proportionate to the threat actually posed by the emergency.<sup>33</sup> The HR committee in its comment asserts that “persons deprived of their liberty in a public emergency which threatens the life of the nation have a right to an effective remedy to challenge the lawfulness of the arrest and detention. In other words, judicial remedies, such as the writ of habeas corpus, must be effectively available at all times.”<sup>34</sup> Therefore the guarantees contained in articles 9 (3) and (4) must be effectively enforced at all times, even in public emergencies threatening the life of the nation.<sup>35</sup>

### *The place of the right to a fair trial during emergency declaration*

In fact, we can't find the right to a fair trial in the non-derogable right listed under ICCPR or other regional human rights instruments. This fact by itself doesn't mean that the state has the discretion to deprive this right of individuals in all of its forms. In this instance, it is important to take a look at the general comment of the human rights committee. The committee articulated

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Id.,p. 867

<sup>34</sup> General comment No. 29, Para. 1&16

<sup>35</sup> These procedural rights includes the right of anyone arrested or detained on a criminal charge [to] be brought promptly before a judge or other officer authorized by law to exercise judicial power and the right of anyone who is deprived of his liberty by arrest or detention to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” (art. 9(4)).



that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency; that “only a court of law may try and convict a person for a criminal offense”; and that “the presumption of innocence must be respected.”<sup>36</sup>

The case jurisprudence of the committee is also in tandem with its general comment. As one understands from the case of *M. González del Río v. Peru*, the Committee held, that “the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception”.<sup>37</sup> Despite the existence of these guarantees, it is important to bear in mind that, it is not feasible to expect that all provisions of article 14 can remain fully in force in any kind of emergency.<sup>38</sup> In general, a person has the right to be tried by a competent, independent, and the impartial court that respects the right to a fair trial/due process guarantees of the detained/accused person.

#### iv. The principle of Consistency with Other International Legal Obligations

As provided in different human rights instruments derogatory measures must not be “inconsistent with” a State party’s “other obligations under international law”.<sup>39</sup> The human rights committee states that “no measure derogating from the provisions of the Covenant may be inconsistent with the State party’s other obligations under international law, particularly the rules of international humanitarian law.”<sup>40</sup> Article 4 of the Covenant cannot be read as a justification for derogation from the Covenant if such derogation would entail a breach of the State’s other obligations, whether based on treaty or general international law”.<sup>41</sup> The same is true under Siracusa principles.<sup>42</sup> The jurisprudence of treaty bodies as well as regional human right courts reveal that in case of derogatory measures “States must ensure that these measures are not inconsistent with their other obligations under international law such as higher absolute human rights standards, humanitarian law standards or any other relevant principles binding on the derogating States by international treaty or customary law or general principles of law.”<sup>43</sup>

#### v. The Condition of International Notification and non-discrimination under international human rights law

Notification is also the other crucial condition laid down in human rights instruments in case of derogation of rights by state parties. Specifically, States Parties to the ICCPR must notify other

<sup>36</sup> General Comment No.29, Para.16

<sup>37</sup> OHCHR Training Manual, p. 873

<sup>38</sup> Ibid.

<sup>39</sup> Article 4(1) of ICCPR, Art.15(1) of ECHR, Art. 27(1) of ACHR

<sup>40</sup> General Comment No. 29, Para.9

<sup>41</sup> Ibid.

<sup>42</sup> Siracusa Principles, P.15, Para.66

<sup>43</sup> OHCHR, Training Manual, p.879

States Parties of the provisions they are derogating from, through the UN Secretary-General. The notification must state the provisions of the ICCPR from which they have derogated and the reasons for so doing.<sup>44</sup> The committee in this regard states that “notification is essential not only for the discharge of the Committee’s functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant”. Notification is important to prevent abuse of the right to derogate by the state in general and for monitoring derogatory measures by the human rights committee in particular. The Siracusa principle states that “the notification shall contain sufficient information to permit the states parties to exercise their rights and discharge their obligations under the Covenant.”<sup>45</sup>

The other important condition in declaring a state of emergency is the observance of the principle of non-discrimination. Though there is no clear stipulation concerning the condition of non-discrimination in article 4 of ICCPR, the jurisprudence of the human rights committee reveals the importance of this very condition.<sup>46</sup> Therefore in a public emergency, all derogating States must at all times guarantee the principle of equality and the prohibition of discrimination which is a fundamental principle of international human rights law and general international law.<sup>47</sup> That means the state should avoid discrimination solely on the ground of race, colour, sex, language, religion or social origin”.<sup>48</sup> In human rights law, “the prohibition of discrimination is inherently flexible and allows derogating States to take measures that are strictly necessary to overcome an emergency situation provided that the measures pursue a legitimate aim and are reasonable/proportionate in the light of that aim”.<sup>49</sup>

### 3. Ethiopian State of emergency Enacted to Avert the Threat Against National Existence and Sovereignty: Its compatibility with internationally established human rights norms.

3.1. Is there exceptional and imminent danger encumbered Ethiopia that necessitates emergency declaration

As discussed above “derogation measures” are permitted under international law only a state faced with a situation of exceptional and actual or imminent danger which threatens the life of

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<sup>44</sup> ICCPR, art. 4(3)

<sup>45</sup> See Siracusa principle under p.11.

<sup>46</sup> See the General comment of human right committee.

<sup>47</sup> OHCHR Training Manual, p.881

<sup>48</sup> Id., p.881

<sup>49</sup> Ibid.

the nation.<sup>50</sup> The same is provided in the FDRE constitution which states that the government declares a state of emergency under the constitution, “should an external invasion, a breakdown 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.”<sup>51</sup> By using its power vested to it under the FDRE constitution the Ethiopian government declared a nationwide state of emergency declaration on November 02/2021. The main driving force to declare the said state of emergency as provided in the proclamation is the threat posed by internal and external forces against national existence and sovereignty. Among other reasons, the preamble of the proclamation states the following reasons for the declaration. A) the terrorist TPLF and its affiliates pose a grave and imminent danger against the existence and sovereignty of the country; and B) Considering the gravity of the killings, looting, and other cruel attacks that are being perpetrated by the terrorist TPLF and its affiliates against civilians in several parts of the country; C) threat posed by individuals who live among the civilian population and work as operatives of the TPLF and its terrorist affiliates to the security of the state and the nation;<sup>52</sup> The proclamation further affirms the impossibility of averting the danger by using regular law enforcement mechanisms.<sup>53</sup> It is the writer's opinion that the legal, as well as the factual scenario in Ethiopia, fulfills the first condition provided under ICCPR i.e existence of an exceptional scenario that threatens the life of the nation. In fact, as stated by the human rights committee even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. And if we take a look at the scenario in Ethiopia the conflict is not a mere non-international armed conflict that is restricted among the warring parties( the terrorist group(TPLF) and the government) rather the war b/ n the parties take the life and property of dozen of civilians. As well as the dimension of the conflict is also grave in its nature which involves almost all populations of the state in one or in another way. To affirm this statement it is enough to take a look at the report of the human rights commission as well as international human rights organizations. Therefore it is possible to conclude that the scenario in Ethiopia is exceptional and it is also difficult to avert the danger in regular mechanism if not impossible.

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<sup>50</sup> See Art. 4 OF ICCPR and Siracusa principle.

<sup>51</sup> Constitution of the federal democratic republic of Ethiopia,1995, Federal Negarit gazette, Proc No.1, 1<sup>st</sup> year, No.1, Art.93, [Here in after FDRE constitution]

<sup>52</sup> State of emergency proclamation enacted to avert the threat against national existence and sovereignty, Proc No 1264,2021.[Hreinafter SOE proclamation no.5/2021].

<sup>53</sup> See the preamble of the SOE proclamation.

Concerning the condition of the official proclamation, the Constitution clearly provided the procedure for legislating emergency declaration. And the gov.t also fulfilled this criterion by enacting the declaration and submitting it for approval to the HPR and it become a law after the lower house approved it by unanimous vote.

3.2. What is the extent of protection accorded to non-derogable rights under the proclamation?

i. [The place of non-derogable of rights under the proclamation](#)

The new emergency declaration explicitly imposes a duty on the State of Emergency operation command to respect non-derogable rights enshrined under Article 93(4) of the FDRE Constitution on its directives, decisions, and measures.<sup>54</sup> Even though the constitution, as well as the proclamation, requires respect for those rights listed under article 93(4)(C) of the constitution it was a long-lasting debate that the protection provided there is not consistent with article 4 of ICCPR as well as the general comment of the human right committee. The right to life for instance is not included in the non-derogable list under the FDRE constitution which is made part of non-derogable rights under ICCPR. Despite its absence in the non-derogable list of rights in the constitution, many scholars argue that the right to life is also a non-derogable right since Ethiopia is a party to ICCPR and the constitution itself require the interpretation of human right provisions in light of treaties to which Ethiopia is a party according to article 13(2). In addition to the inconsistency with ICCPR, It is difficult to be sure concerning the position held by the new emergency declaration concerning additional non-derogable rights identified by the human right Committee in its general Comment including the right to non-discrimination, the right to an effective remedy; right to a fair trial; and the right to habeas corpus. However from the provisions of the proclamation, it is possible to understand that in one or another way additional rights identified by the committee do not get sufficient protection, and even the proclamation paralyzes some of the rights indirectly by removing courts from the whole game.

ii. [The austere clause under the proclamation and its implication under international human rights law](#)

As provided elsewhere in this paper the mere protection of rights in human rights instrument is not a sufficient guarantee for the full-fledged protection of those non-derogable rights rather these rights must, in addition, be accompanied by the availability at all times of effective domestic remedies to alleged victims of violations of these rights. The Human right committee in its comments states that “It is inherent in the protection of rights explicitly recognized as non-

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<sup>54</sup> SOE proclamation, No.1264/2021, Art. 5(2)

derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including often judicial guarantees.<sup>55</sup> And to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."<sup>56</sup> Coming to the emergency proclamation, It explicitly sweeps the authority of judicial organs until the expiry of the proclamation.<sup>57</sup>Therefore a court doesn't have any room to entertain cases related to the emergency proclamation. Hence alleged victims of human rights do not have the opportunity for instance to challenge the lawfulness of detention, or get other possible procedural safeguards from the court. The provision of the proclamation that takes the power of the judiciary, on the one hand, is against the general comment of the human rights committee and Siracusa principles, that require the availability of effective domestic remedy and it also undermines the protection of non-derogable rights by letting them without judicial guarantee which is the inherent nature of rights. All in all the total exclusion of courts from entertaining cases related to the emergency declaration is against the spirit of non-derogable rights listed under the ICCPR as interpreted by the human rights committee under its general comment no.29.

3.3. Does the measures taken by the government were strictly required by the exigencies of the situation?

Derogations from human rights obligations must not go beyond what is strictly required by the exigencies of the situation. That means the relevant measures must be tailored to the "exigencies of the situation" in terms of their territorial application, their material content, and their duration. In the words of the human rights committee not only the declaration of emergency, but each specific measure taken under the derogation must be also demonstrably required by the exigencies of the situation.

#### A. *Territorial application of the proclamation*

Concerning the geographical scope of the new proclamation, it is disproportionate to the exigency of the situation. As provided in the proclamation its application is extended in all parts of Ethiopia.<sup>58</sup>The proclamation further empower the State of Emergency Operation Command to determine, through directives, parts of the country where the application of this proclamation

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<sup>55</sup> General comment No.29.

<sup>56</sup> OHCHR Training Manual 9, p.848

<sup>57</sup> SOE proclamation, No.1264/2021, Art.8(1)

<sup>58</sup> Id.,Art.3(1)

would be lifted and publicize the same to the public.<sup>59</sup> However, as reported by the government itself the actual conflict(war) is limited to three regions of the state( namely Tigray, Amhara, and Afar). And it is tenable to argue that the situation does not necessitate the same form of measure in the other part of the country as applicable in the above-mentioned regional states. Apart from this, Even though, the operation command has been endowed with the power of restricting the application of the proclamation into some areas till recent times, major limitations found in the proclamation are still intact with the same magnitude in all areas of the country. Therefore the territorial application of the proclamation in the whole part of the country without distinction from the areas that have the highest level of risk coupled with the inability of the operation command to lift the directive as the situation necessitates makes the proclamation disproportionate to the exigencies of the situation.

### *B. The material scope of the proclamation*

Among others the proclamation prohibit;

1. Any form of expression which contributes to the success of terrorist groups' objectives, encourages the activities of the terrorist group or terrorizes the civilian population is prohibited.
2. Providing any form of monetary, information, material, or moral support, either directly or indirectly, to terrorist groups is prohibited.
3. Holding demonstrations or public gatherings

Among others the operation command has also the following powers;

1. Cause the closure or termination of any means of communication and public transportation
2. Arrest any person without a court warrant upon reasonable suspicion
3. Search without warrant
4. Order the suspension or permanent cancellation of licenses of civil society organizations
5. Order the suspension or permanent cancellation of licenses of mass media or journalists
  - i. **The right to liberty and due process right of individuals during emergency declaration**

Under the SOE proclamation, the operation command has the power to arrest any person without a court warrant upon reasonable suspicion that he cooperates with terrorist groups and can detain such person for the period that this proclamation is in force. While states can lawfully resort to

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<sup>59</sup> Id.,Art.3(2)



Special powers of arrest and detention in public emergencies, long-term detention or internment and widespread arrest are not permitted under international human rights law. By the same token, special powers of arrest and detention are lawful only to the extent that they are strictly proportionate to the threat actually posed by the emergency. Apart from avoiding arbitrary and widespread detention, the government has to take measures that would counterbalance the effect of special power of detention for instance, by guaranteeing judicial remedies, such as the writ of habeas corpus, that would effectively be available at all times. Coming to the SOE proclamation, as discussed above it permits arrest and detention without a warrant on the one hand and it excludes courts from oversight the proclamation on the other. At first glance, the proclamation gives far-reaching powers to the government which heightens the risk of arbitrary arrest as articulated by the human rights watch. After the endorsement of the proclamation, the authorities detain many peoples, mostly ethnic tigres in almost all parts of the state. And the observation by the writer also testifies that authorities abuse the “reasonable suspicion” criteria by arresting people due to the mere fact that someone made a report to the authorities without any tangible evidence. In the second place, the detainees were held in police stations even for a day more than 30 without any oversight by the court concerning the lawfulness of the custody (habeas corpus) or the condition of their custody, and to the worst, Some of the detainees were released even without any investigation after 30 days of arrest. These measures are unlawful government actions that are against the human rights obligation of the state to guarantee effective due process right of individuals during emergencies.

ii. **Restriction on Freedom of Expression in light of the condition of necessity**

As discussed elsewhere in this paper under ICCPR as well as the FRDRE constitution, certain rights may be derogated under a state of emergency but must be tailored to the “exigencies of the situation. However, The SOE proclamation includes sweeping and vaguely worded restrictions on a broad range of actions that undermine basic rights, including freedom of expression, association, and peaceful assembly, and go far beyond what is permissible under international law. For instance, the proclamation bans any form of expression which, contributes to the success of terrorist group's objectives, or terrorizes civilian population”. However, there is no clarification regarding the type of expressions that likely result in the advantage of the terrorist group or terrorize a civilian population. This in turn left the discretion to the authorities to determine those forms of expression and create misunderstanding between people. This makes the declaration highly discretionary and prone to abusive and partisan implementation.

On the other hand, the proclamation empowers the operation command to suspend or cancel the licenses of mass media or journalists who have been suspected of providing direct or indirect, moral or material support to terrorist organizations. This provision is also again vague since it fails to provide the exact meaning of support and it is difficult to determine which types of conduct constitute direct and indirect support. This type of restriction again gives unwarranted discretion to the authorities to limit access to information and arbitrarily block mass media and intimidate and harass journalists.

### 3.4. Does the measures incorporated under the proclamation are consistent with other international obligations Ethiopia owes?

The other condition by which states are required to observe in declaring a state of emergency measures is the consistency of each derogatory measure with the international obligation of the state. It is known that Ethiopia is the signatory to many of the core international human rights instruments as well as the four Geneva conventions. As discussed above some of the provisions of the new state of emergency proclamation are inconsistent with some human right instrument. For instance, the provision of the proclamation that sweeps the power of the judiciary is against ICCPR, ACHPR as well as CEDAW. Specifically, the proclamation is against the right of the person to get effective remedy and it violates the due process/ fair trial guarantees provided in these human rights instruments specifically the right to non-discrimination, the right to an effective remedy; right to a fair trial; and the right to habeas corpus.

As discussed above a state party who avails itself in the state of an emergency declaration should notify other state parties through the secretary-general of the organization concerned by describing the measures in sufficient detail and stating the reasons why they have been taken. Apart from proclaiming the declaration, the Ethiopian government failed to notify other state parties to the treaty regarding the specific provisions of the covenant by which it has made derogation as well as the justification in doing so.

## 4. Concluding Remark

To avert the so-called “threat to the sovereignty and integrity of the state and the people” the Ethiopian government declared the 5<sup>th</sup> state of emergency. As discussed in the body of the paper the factual scenario in Ethiopia is a sufficient condition to proclaim an emergency declaration. The government has also officially proclaimed the contents of the declaration after its endorsement by the lower house. Concerning the protection for non-derogable rights, it is possible to conclude, the protection accorded to the non-derogable rights in the SOE

proclamation is not consistent with article 4 of ICCPR as well as with the emerging human right understanding and interpretation which is implicated in the general comment of the human right committee. The absence of the right to an effective remedy; right to a fair trial; and the right to habeas corpus is a piece of sufficient evidence to the aforementioned allegation. The total exclusion of courts from entertaining cases related to the emergency declaration also left non-derogable rights in a blanket by denying effective remedy for their violation which is also against the spirit of non-derogable rights listed under the ICCPR as interpreted by the human rights committee. Under international law not only the general derogation, rather each specific derogatory measure from human rights obligations must not go beyond what is strictly required by the exigencies of the situation. Nevertheless, the territorial, material and temporal application of the proclamation is not in tandem with the exigencies of the situation. Meaning the application of the proclamation in the whole part of the country is disproportionate to the exigency of the situation. Concerning its material scope as well the proclamation limits many rights, for instance, it permits arrest and detention without a warrant on the one hand and it excludes courts from oversight the proclamation on the other. These measures are unlawful government actions that are against the human rights obligation of the state to guarantee effective due process right of individuals during emergencies. The right to be tried by an independent and impartial tribunal which is considered an absolute right that may suffer no exception is not also gets sufficient concern from the SOE proclamation. The SOE proclamation also includes sweeping and vaguely worded restrictions on a broad range of actions that undermine basic rights, including freedom of expression, association, and peaceful assembly, and go far beyond what is permissible under international law. The government is also failed to notify state parties with sufficient precision and justification concerning the proclamation of emergency declaration. And in last the writer concludes that even though the Ethiopian government has a sufficient cause for declaring a state of emergency, the declaration does not meet some of the substantive and procedural conditions which are provided under ICCPR and the proclamation is not in tandem with the human rights obligation that Ethiopia owes under the international arena.

Having into account all those incompatibilities under the proclamation the writer recommends the government in the first place to lift the emergency declaration by taking into account the specific situation of each area. And in the second place, it is important to rectify the gaps that existed in the current proclamation by revising the proclamation in a way that conforms to human right standard in emergency times. And specifically, the proclamation should be revised in a way that restores the power of the judiciary and ambiguous provisions in the proclamation

should be replaced by a clear word that would narrow the arbitrary discretion of the authorities. Moreover, the government is expected to put in place an institutional mechanism that deals properly with human rights violations during the life span of the proclamation.

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