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### *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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