

# 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."<sup>1</sup> 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.<sup>2</sup> These criteria are known as the requirements of necessity, proportionality, and nondiscrimination. Among the major regional human rights treaties, both the Pact of San José<sup>3</sup> and the European Convention on Human Rights<sup>4</sup> include similar, though not identical, provisions for derogation in time of emergency.<sup>5</sup>

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.<sup>6</sup> 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

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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.<sup>7</sup> Derogation provisions have thus earned a reputation as susceptible to abuse. More fundamentally, the need for derogation clauses is dubious, not because emergencies may not require limitations on human rights, but because the normal mechanism for reconciling human rights with the public interest, if properly interpreted, is sufficiently adaptable to apply to any situation.<sup>8</sup>

These observations might be thought to explain why the African Charter of Human and Peoples' Rights (the "Banjul Charter") departs from older treaties by including no derogation provision for emergencies. For its part, the African Commission on Human and Peoples' Rights (the "Commission") has written that it considers this omission intentional and justified. According to the Commission, the normal exercise of human rights does not present any danger to a democratic state that would justify extraordinary limitations on those rights.<sup>9</sup> Similarly, in *Commission Nationale des Droits de l'Homme et Libertés v. Chad*, the Commission noted: "even with a civil war in Chad [derogation] cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter."<sup>10</sup> Thus, the Commission position appears to flatly reject the legality of derogation by African states during emergencies or even civil wars.<sup>11</sup>

Professor Laurent Sermet agrees, arguing that the absence of a derogation clause in the Banjul Charter creates a "flagrant contradiction" between it and the ICCPR, and that "the legal standard most favourable for the protection of human rights" should prevail.<sup>12</sup> There is a difference, however, between divergent texts and contradiction between those texts. The texts of the ICCPR and Banjul Charter would contradict one another if compliance with both were impossible. Yet compliance with both is not impossible; a state party to both instruments violates neither by refraining

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7. On this point, see the sources cited in HRC, GC No. 29, *supra* note 2, n.1.

8. On these principles, see generally Mohamed Elewa Badar, *Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments*, 7 INT'L J. OF HUM. RTS. 63 (2003).

9. Amnesty Int'l v. Sudan, Communication 48/90-50/91-52/91-89/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], paras. 79-80 (Nov. 15, 1999), <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/11>.

10. Comm'n Nat'le des Droits de l'Homme et des Libertés v. Chad, Communication 74/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], para. 21 (Oct. 11, 1995), [https://www.achpr.org/public/Document/file/English/achpr18\\_74\\_92\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr18_74_92_eng.pdf).

11. *See id.*; Sudan Hum. Rts. Org. v. Sudan, Communication 279/03-296/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], para. 167 (May 27, 2009), <https://www.achpr.org/sessions/descions?id=190>.

12. Laurent Sermet, *The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion*, 7 AFR. HUM. RTS. L.J. 142, 144-45 (2007).

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.<sup>13</sup> 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.<sup>14</sup>

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."<sup>15</sup> Under the customary principle of treaty interpretation known as *effet utile*,<sup>16</sup> a less literal interpretation of Article 27 may be justified. Article 27 could be read as implicitly authorizing states to limit human rights whenever necessary—and solely to the extent necessary—to protect the listed societal and individual interests.

This interpretation has been adopted in the general jurisprudence of both the Commission and the African Court on Human and Peoples' Rights (the "Arusha Court"). Consistent with the jurisprudence of other

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13. Revised Treaty of the Economic Community of West African States art. 15, July 24, 1993, 2373 U.N.T.S. 233 [hereinafter ECOWAS]; Protocol on Democracy and Good Governance art. 1(h), 39, Dec. 21, 2001, ECOWAS Doc. A/SP1/12/01.

14. *Gbagbo v. Côte d'Ivoire*, ECW/CCJ/JUD/03/13, Court of Justice of the Economic Community of States of West Africa [ECOWAS Ct. Just.], paras. 70-71 (Feb. 22, 2013), <https://ihrda.uwazi.io/en/document/b3bqf8k4suja961ptccui8uxr?page=1>.

15. African Charter on Human and Peoples' Rights art. 27(2), June 27, 1981, 1520 U.N.T.S. 217 [hereinafter Banjul Charter].

16. *See, e.g., Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, para. 50 (Oct. 12, 2005), 16 ICSID Rep. 210 (2012).

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.”<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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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17. *Umuhoza v. Rwanda*, No. 003/2014, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], paras. 133-34 (Nov. 24, 2017), <https://africanlii.org/afu/judgment/african-court/2017/21>; *Konaté v. Burkina Faso*, No. 003/2014, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], paras. 145-66 (Dec. 5, 2014); *Media Rts. Agenda & Const. Rts. Project v. Nigeria*, Communication 105/93-128/94-130/94-152/96, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], paras. 68-69 (Oct. 31, 1998), <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/08/Media-Rights-Agenda-v.-Nigeria.pdf>; African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)* para. 10, (Dec. 12, 2015), <https://www.achpr.org/legalinstruments/detail?id=10>.

18. See *Media Rts. Agenda v. Nigeria*, 105/93-128/94-130/94-152/96, paras. 41-42; *Amnesty Int’l v. Sudan*, Communication 48/90-50/91-52/91-89/93, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], para. 80 (Nov. 15, 1999), <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/11>.

19. *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last visited Oct. 23, 2022).

20. Audrey Lebret, *COVID-19 Pandemic and Derogation to Human Rights*, J.L. & BIOSCIENCES, May 4, 2020, at 1.

## II. AFRICAN CONSTITUTIONAL PRACTICE

### A. *Background: African Constitutions and Human Rights*

African state practice in derogations during states of emergency has two separate but related elements. The first is municipal law, specifically, constitutional provisions and legislation that authorize derogation of human rights in time of emergency. The second element is state practice in declaring emergencies that derogate from human rights in specific cases. The two elements are related by the fact that, in theory, municipal law should implement the international obligations of states. However, it is possible for municipal law to authorize derogations that are never put into practice. Conversely, it is possible for governments to derogate from human rights contrary to municipal law. In Africa, both kinds of disjunction have been common since the ICCPR entered into force.

The relevant constitutional provisions will be discussed here in Part II, and state practice will be addressed in Part III. Because the African continent contains at least fifty-four sovereign states,<sup>21</sup> a comprehensive survey of both would require a book-length treatment. Some compression is required. This part will summarize the trends in constitutional provisions in Africa among the forty most influential African states, with a list of the relevant constitutional articles in the Appendix for those who wish to review their wording.

Before discussing the relevant constitutional provisions, some background will be helpful. In terms of treaty adherence, of the forty African states analyzed here, all but Morocco are parties to the Banjul Charter,<sup>22</sup> and all but Comoros are parties to the ICCPR.<sup>23</sup> Every state includes a list of human rights in its national constitution. Some lists are more complete than others. For example, the constitution of Mauritania only mentions a few rights in vague terms,<sup>24</sup> while the constitution of South Africa contains an extensive and detailed list of guaranteed human rights.<sup>25</sup>

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21. The African Union counts fifty-five member states, but this number includes the Sahrawi Arab Democratic Republic. *See Member States*, AFR. UNION, [https://au.int/en/member\\_states/countryprofiles2](https://au.int/en/member_states/countryprofiles2) (last visited Dec. 28, 2021). The Sahrawi Republic is not currently recognized as a state by the United Nations or Arab League.

22. *See Parties to the African Charter on Human and Peoples' Rights*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f&clang=_en).

23. *See Parties to the ICCPR*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=_en) (last visited Nov. 3, 2022).

24. Constitution of the Islamic Republic of Mauritania, July 20, 1991, art. 3, 13-15, 19-22.

25. S. AFR. CONST., 1996, §§ 7-35.

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 rights. Treaty obligations bind states regardless of whether and how the state chooses to implement those obligations through domestic law.<sup>26</sup> Moreover, to the extent a human right has entered the *corpus* of customary international law, the state is bound to observe the right regardless of whether it is party to a treaty guaranteeing that right.

*B. Survey of African State Constitutions Authorizing Emergency Derogation*

Thirty-nine of the forty African constitutions surveyed here expressly authorize declarations of a state of emergency, state of siege, state of war, or martial law (henceforth referred to collectively as “state of emergency”). The sole exception is Libya, which proposed a new draft constitution in 2017 that would authorize the president to declare states of emergency without parliamentary approval.<sup>27</sup>

In most cases, declarations of states of emergency may last only for limited periods of time—usually for a period between fourteen and twenty-one days—without legislative approval.<sup>28</sup> The period varies quite a lot, however, sometimes longer and occasionally shorter. Only a handful of constitutions, such as Tunisia’s,<sup>29</sup> authorize the president to declare a national emergency and invoke very broad powers without legislative consent.

By their plain terms, four of the forty constitutions either do not authorize, or actually prohibit, any derogation of human rights even during states of emergency. Except for Malawi, each of these four countries has in fact derogated from human rights during declared states of emergency, as will be discussed in Part III. This furnishes an illustration of the point made earlier, that state practice does not uniformly comply with municipal law.

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26. See Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

27. See Zaid Al-Ali, *Libya’s Final Draft Constitution: A Contextual Analysis*, 3, 10 (2020).

28. In some cases, such as Equatorial Guinea, the president may declare a state of emergency lasting for several months without legislative approval. See, e.g., *The Fundamental Law of the Republic of Equatorial Guinea*, [CONSTITUTION] Nov. 17, 1991, art. 43. In others, the declaration can only last a very short time without parliamentary approval, as in Mozambique (five days when the Assembly is in session) or Nigeria (two days when the National Assembly is in session). See *Constitution of the Republic of Mozambique*, Dec. 21, 2004, art. 285; *Constitution of Nigeria* (1999), § 305(6)(b).

29. *Constitution of the Tunisian Republic*, Jan. 26, 2014, art. 80.

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 human rights may be derogated will tend to result in *de facto* derogations, because initiative rests with the government. In the absence of a clear prohibition on derogations, the government may rely on the concept of “state of emergency” as a sufficient justification for interpreting vague language in the constitution to authorize whatever measures seem necessary for national security or public order.

Second, some of the unclear constitutions do list a few nonderogable rights (examples include the constitutions of Botswana, the Democratic Republic of Congo, Nigeria, and Zimbabwe), which implies by the principle of *expressio unius est exclusio alterius* that other rights are derogable during a state of emergency.<sup>30</sup> However, it is far from satisfactory for a constitution to authorize the derogation of human rights by implication, particularly when, as in all such cases surveyed, the list of nonderogable rights is too meager to comply with Article 4 of the ICCPR.

A table summarizing how the forty constitutions deal with derogations from human rights in states of emergency will be helpful:

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30. See Constitution of Botswana Sep. 30, 1966 (as amended in 2016), § 16(1); Constitution of the Democratic Republic of Congo Dec. 2005, § 61; Constitution of Nigeria (1999), § 45; Constitution of Zimbabwe Amendment No. 20, § 86(3).



	<b>Constitutions</b>
<b>Authorizes derogation (19)</b>	Algeria, Angola, Cape Verde, Chad, Equatorial Guinea, Eritrea, Ethiopia, Ghana, Kenya, Liberia, Malawi, Mozambique, Namibia, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, Zambia
<b>No authorization (4)</b>	Central African Republic, Egypt, Republic of Guinea, Morocco
<b>Unclear (17)</b>	Botswana, Burkina Faso, Cameroon, Comoros, Congo (Democratic Republic), Congo (Republic), Côte d'Ivoire, Gabon, Libya, Madagascar, Mauritania, Morocco, Niger, Nigeria, Senegal, Tunisia, Zimbabwe

Of the nineteen states whose constitutions provide for derogation of human rights, not one includes a full list of nonderogable rights as provided by ICCPR Article 4, at least as the UN Human Rights Committee has interpreted that provision. However, three of these constitutions—those of Malawi, Namibia and South Africa—prohibit any derogations that would violate international law in general or ICCPR Article 4 specifically,<sup>31</sup> and therefore may comply with international law by reference.

For example, sections 16 and 17 of the constitution of Botswana include derogation provisions for states of war and emergency.<sup>32</sup> The constitution is not clear on what derogation measures the government may take during either situation. However, section 16 of the constitution specifies that the right against arbitrary deprivation of liberty (section 5) and the right to protection from discrimination on grounds of race, tribe, place of origin, political opinion, color or creed (section 15) are unenforceable during the state of war or emergency if a derogation measure is authorized by a law “reasonably justifiable for the purpose of dealing with the situation that exists.”<sup>33</sup>

Again, applying *expressio unius est exclusio alterius*, it appears that these are the only two human rights listed in Chapter II for which derogation is permissible. Although this provision is technically consistent with most of ICCPR Article 4, it does fail to make race-based or sex-based

31. See Constitution of Malawi, May 16, 1994, § 45; Constitution of Namibia, Feb. 09, 1990, art. 96; S. AFR. CONST., 1996, § 37.

32. See Constitution of Botswana Sep. 30, 1966 (as amended in 2016), §§ 16, 17.

33. *Id.* § 16.

discrimination nonderogable and is inconsistent with the Human Rights Committee's expansion of the list of nonderogable rights in General Comment No. 29 on article 4.<sup>34</sup>

Very few African constitutions that list nonderogable rights include the full list incorporated in ICCPR Article 4, and none include all those considered by the Human Rights Committee to be nonderogable.<sup>35</sup> For example, the constitutions of Eritrea, Ethiopia, and Kenya fail to identify the human right to life as nonderogable.<sup>36</sup> This creates a considerable danger of extrajudicial killings by government forces during declared states of emergency. Also contrary to Article 4, the constitutions of Kenya and Mozambique fail to specify that the human right against discrimination is nonderogable.<sup>37</sup>

In very few African countries are the human rights considered nonderogable under international law explicitly made derogable by the constitution. One exception is Zambia. Article 25 of Zambia's constitution specifies nine articles that may be derogated during a declared public emergency or war "to the extent that it is shown that the law in question authorises . . . measures for the purpose of dealing with any situation existing or arising during that period." No person acting under the authority of that law may be held liable for violating the constitution.<sup>38</sup> These derogable articles include the human right to freedom of conscience and religion (Article 19) and to the protection of children from trafficking (Article 24(3)). Neither derogation is compatible with ICCPR Article 4.<sup>39</sup>

In summary, on a plain textual reading, although all forty constitutions guarantee at least some human rights, only seven of them require the state fully to make any derogation conform to its obligations under international human rights law. Moreover, if one rejects the argument that the Banjul

34. HRC, GC No. 29, *supra* note 2, para. 13.

35. *Id.*

36. See Constitution of Eritrea May 23, 1997, art. 27; Constitution of Ethiopia Aug. 21, 1995, art. 93; Constitution art. 25 (2010) (Kenya).

37. See Constitution art. 25 (2010) (Kenya); Constitution of Mozambique Dec. 21, 2004, art. 286.

38. Const. of Zambia (1991) § 25.

39. Article 4 prohibits derogation of ICCPR article 18 (freedom of thought, conscience, and religion). HRC, GC No. 29, *supra* note 2, para. 7. As for child trafficking, the Human Rights Committee has observed that, for some rights not listed in article 4, "there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4," such as the prohibition on abductions and forcible transfers of populations. *See id.* para. 13(b)(d). Both prohibitions are implicated by child trafficking. Moreover, the Committee has pointed out that the Convention on the Rights of the Child (CRC), which prohibits child trafficking in article 35 and child exploitation in article 36, is applicable in states of emergency under CRC article 38. *See* Convention on the Rights of the Child art. 35-36, 38, Nov. 20, 1989, 1577 U.N.T.S. 3. The CRC contains no derogation clause. HRC, GC No. 29, *supra* note 2, n.5.

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 with ICCPR Article 4.<sup>40</sup> However, as noted, text is not practice, and although the implementation of international law in the municipal legal order is desirable, the ultimate test for compliance with international law is not the law's inclusion in the state's constitution or legislation, but the state's actual compliance with or violation of international law. That subject will be addressed in Part III.

### C. *Constitutional Delegation and Human Rights Derogations*

As noted, many African constitutions that do not clearly specify whether derogations are permissible leave the elaboration of government powers to legislation. Those that do not specify that legislation will define the scope of emergency powers necessarily leave the question of derogation to the government or the courts, as applicable under each state's respective municipal law. None of the constitutions that delegate emergency powers to legislation provide that such legislation may derogate from human rights protected by the constitution or international law. The constitutions of Gabon, Madagascar, and Senegal, for example, are unclear as to whether they permit derogation of human rights during states of emergency.<sup>41</sup> They stipulate that the government's powers during an emergency will be defined by legislation with no additional limitations.

This arrangement is fundamentally problematical. The constitution is the government's source of political and legal authority. Indeed, constitutions commonly declare themselves the supreme law of the land.<sup>42</sup> When a supreme authority such as a constitution guarantees enumerated human rights, lesser legislation cannot logically derogate from those rights without superseding the constitution itself. In other words, only the constitution itself can authorize the derogation of constitutional rights, because there is no higher authority. Unless the constitution were explicitly to delegate to the legislature an authority to derogate from constitutional rights by legislation during states of emergency—and no African

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40. See HRC, GC No. 29, *supra* note 2, para. 3.

41. See Constitution of Gabon, Feb. 21, 1961, as reviewed in 2011, art. 25; Constitution of Madagascar, Nov. 17, 2010, art. 61; Constitution of Senegal, Jan. 22, 2001, as amended through 2016, art. 69.

42. *E.g.*, Constitution art. 2 (2010) (Kenya); S. Afr. Const., 1996, art. 2; Const. of Zambia (1991) § 1.

constitution does so—it follows that such legislation cannot logically suspend human rights guaranteed by that same constitution. A legislature has no power to supersede the constitution except by constitutional amendment through procedures specified, again, in the constitution itself.

If the legislature has no general authority to permit derogations from human rights (or any other constitutional provision), it seems that laws governing the declaration of a state of emergency can only authorize the suspension or alteration of other legislation. To the extent that human rights are guaranteed by legislation instead of the constitution itself, this presents no doctrinal problem. But, as noted, all forty African states surveyed here expressly protect at least some human rights in their constitutions.

One possible solution to this conundrum would be to infer an authorization to derogate from human rights by relying on the constitution's grant of authority to the legislature to legislate in states of emergency. There is no logical objection to such an inference, but it would set a dangerous precedent. If the legislature can implicitly derogate from constitutionally guaranteed human rights without a clear grant of authority, there is no reason why it should not implicitly derogate from any other provision of the constitution, including the provisions for holding elections or, by a process of involution, the very provision limiting its authorization to declare states of emergency in the first place. The better interpretation, then, is that a grant of legislative authority to provide for states of emergency does not authorize derogations of human rights. That interpretation is not universally accepted by African states, however.

### III. PRACTICE OF AFRICAN STATES DURING DECLARED EMERGENCIES

As noted, constitutions and laws are not the only way that a state may comply with its obligations under international law. State practice is paramount. A constitution drafted to comply assiduously with international law means nothing if the state's government does not comply with its own constitutional obligations. This part will show that, in African human rights practice, the unfortunate trend is to interpret constitutional derogation provisions and legislation in a way that puts the state in violation of its obligations under international human rights law.

The basis for this Part is a comprehensive survey of state practice in all forty African states from 1976 (when the ICCPR entered into force) to the present day. Rather than presenting the study's findings in detail, this part will summarize the survey of African practice using case studies from six states to illustrate its general conclusions. It will begin, however, with a discussion of recent African practice in responding to the COVID-19

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<sup>43</sup> and eight more declared public health emergencies,<sup>44</sup> albeit to the same general effect.<sup>45</sup> Interestingly, robust democracies in Africa were more likely to declare emergencies than weak democracies, and much more likely to do so than authoritarian governments.<sup>46</sup> Regardless, by 2021, like most countries around the world, nearly all African states had declared emergencies or disasters.<sup>47</sup> Very few of these states notified the United Nations of intended derogations to human rights as required by Article 4(3) of the ICCPR.<sup>48</sup>

As might be expected given the highly communicable nature of COVID-19, the most immediate human rights limitations were on the freedom of movement and assembly. At least twenty-two African countries fully prohibited public gatherings and another fifteen prohibited selected forms of gatherings by, for example, limiting the number of persons in a gathering.<sup>49</sup> Thirty-seven countries imposed curfews, and forty imposed lockdowns in both 2020 and 2021.<sup>50</sup>

According to the World Health Organization, between its introduction in early 2019 and the end of 2021, COVID-19 had infected at least 276 million persons and killed 5.37 million of them.<sup>51</sup> There is no question that, during a pandemic involving an exceptionally communicable and deadly disease with multiple variants, states are justified in suspending rights to

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43. Angola, Botswana, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Eswatini (Swaziland), Ethiopia, Gabon, Gambia, Guinea, Guinea Bissau, Lesotho, Liberia, Malawi, Mozambique, Namibia, Senegal, Sierra Leone, South Africa, and Zimbabwe. *African Government Responses to COVID-19*, INT'L CTR. FOR NOT-FOR PROFIT L., <https://www.icnl.org/post/analysis/african-government-response-to-covid-19> (last visited Oct. 23, 2022).

44. Burkina Faso, Republic of Congo, Kenya, Liberia, Madagascar, Niger, Sudan, and Togo. Botswana and Gambia declared both public health emergencies and states of emergency. *Id.*

45. *Id.*

46. *Taking Stock of Reg'l Democratic Trends in Africa and Middle East Before and During the COVID-19 Pandemic*, INT'L IDEA (Jan. 2021) at 10, Figure A3.2, <https://www.idea.int/regional-democratic-trends-africa-and-middle-east-during-covid19>.

47. See INT'L CTR. FOR NONPROFIT L., *supra* note 43.

48. See ICCPR, *supra* note 1, art. 21.

49. See INT'L CTR. FOR NONPROFIT L., *supra* note 43.

50. *Id.*

51. See WORLD HEALTH ORG., *supra* note 19.

freedom of assembly<sup>52</sup> and freedom of movement<sup>53</sup> to a reasonable degree in order to restrict public gatherings that risk spreading the virus. Some states also suspended in-person court procedures and prison visits to the plaudits of the African Commission on Human and Peoples' Rights ("African Commission").<sup>54</sup>

In addition, freedom of expression has been restricted in some African states. From the earliest days of COVID-19, multiple persons and organizations worked diligently to spread misinformation about the disease and vaccines. People and organizations spread misinformation out of ignorance, with an intent to attract attention or money, or to further political or economic agendas.<sup>55</sup> Such efforts have proliferated the virus and contributed to its death toll. Many African governments have imposed regulatory or criminal prohibitions on the spreading of false information relating to the pandemic.<sup>56</sup> Criminal prosecutions in Cameroon, Eswatini, Egypt, Kenya, Somalia, and Zimbabwe have been criticized by some as disproportionate,<sup>57</sup> but criminal prohibitions to counter potentially lethal propaganda fit comfortably within the derogation provisions of the ICCPR if narrowly tailored to messages that pose a significant danger of harm to the public.

Not all African states have restricted their human rights derogations to such laudable policies, however. The High Commissioner for Human Rights has warned against using emergency derogations during the

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52. See ICCPR, *supra* note 1, art. 21; Banjul Charter, *supra* note 15, art. 11.

53. See ICCPR, *supra* note 1, art. 12; Banjul Charter, *supra* note 15, art. 12.

54. See African Comm'n on Hum. and Peoples' Rts. [Afr. Comm'n H.P.R.], *449 Resolution on Human and Peoples' Rights as Central Pillar of Successful Response to COVID-19 and Recovery From its Socio-political Impacts*, at pmb., ACHPR/Res. 449 (LXVI) (Aug. 7, 2020), <https://www.achpr.org/sessions/resolutions?id=480>.

55. See, e.g., Neia Prata Menezes et al., *What is Driving COVID-19 Vaccine Hesitancy in Sub-Saharan Africa?*, WORLD BANK BLOGS (Aug. 11, 2021), <https://blogs.worldbank.org/african/what-driving-covid-19-vaccine-hesitancy-sub-saharan-africa>; Tim Nguyen & Sergio Cecchini, *Countering COVID-19 Misinformation in Africa*, THINK GLOB. HEALTH (July 23, 2021), <https://www.thinkglobalhealth.org/article/countering-covid-19-misinformation-africa>. See generally Aengus Bridgman et al., *Infodemic Pathways: Evaluating the Role that Traditional and Social Media Play in Cross-National Information Transfer*, FRONTIERS IN POLI. SCI. (Mar. 29, 2021); Sheera Frenkel, *The Most Influential Spreader of Coronavirus Misinformation Online*, N.Y. TIMES (July 24, 2021), <https://www.nytimes.com/2021/07/24/technology/joseph-mercola-coronavirus-misinformation-online.html>; Jeff Tollefson, *The Race to Curb the Spread of COVID Vaccine Disinformation*, NATURE (Apr. 16, 2021), <https://www.nature.com/articles/d41586-021-00997-x>.

56. See INT'L CTR. FOR NONPROFIT L., *supra* note 43 (last visited Oct. 23, 2022) (Botswana, Ethiopia, The Gambia, Kenya, Lesotho, Mali, Mauritius, Namibia, Nigeria, South Africa, Tanzania, and Zimbabwe).

57. See, e.g., INT'L IDEA, *supra* note 46, at 11.

COVID-19 pandemic in a disproportionate or illegitimate manner.<sup>58</sup> 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.<sup>59</sup> More generally, several countries, including Egypt, Kenya, Morocco, Nigeria, South Africa, and Uganda, have responded to COVID-19 with legislation or other measures that raise troubling human rights concerns.<sup>60</sup> The African Commission expressed alarm as early as summer 2020 at

high incidents of violations of human rights resulting from the highly securitized approach that have been used in many States Parties during the COVID-19 pandemic and subsequent State of Emergencies, that has led to non-compliance by the police with basic human rights standards in the execution of their duties, including excessive use of disproportionate force, extrajudicial killings and summary executions, assault and bodily injury, including sexual violence, arbitrary and illegal arrest or deprivation of liberty, torture, inhumane and degrading treatment, extortion and highly intrusive communication and online surveillance and cyber policing, affecting disproportionately the poor, women, journalists, human rights activists and members of opposition political parties.<sup>61</sup>

There have also been credible allegations that some states have repressed, arbitrarily arrested, or attacked human rights advocates who have criticized the government's response to the pandemic.<sup>62</sup> For example, soon after imposing a dusk-to-dawn curfew to slow the spread of COVID-19, Kenyan security forces began enforcing the curfew with indiscriminate violence, beating and tear-gassing those who appeared to be disobeying the

58. See Office of the High Comm'r for Hum. Rts., *COVID-19 Guidance*, OHCHR, <https://www.ohchr.org/en/covid-19/covid-19-guidance> (last visited Nov. 5, 2022).

59. See, e.g., *Tanzania bans Kwanza Online TV for 11 months citing 'misleading' Instagram post on COVID-19*, COMM. TO PROTECT JOURNALISTS (July 9, 2020), <https://cpj.org/2020/07/tanzania-bans-kwanza-online-tv-for-11-months-citing-misleading-instagram-post-on-covid-19>; Abdi Latif Dahir, *Tanzania's President Says Country is Virus Free. Others Warn of Disaster.*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/world/africa/tanzanias-coronavirus-president.html>.

60. See *UN Raises Alarm About Police Brutality in COVID-19 Lockdowns*, ALJAZEERA, (Apr. 28, 2020), <https://www.aljazeera.com/news/2020/04/raises-alarm-police-brutality-covid-19-lockdowns-200428070216771.html>; Isaac Mugabi, *COVID-19: Security forces in Africa brutalizing civilians under lockdown*, DEUTSCHE WELLE, (Apr. 20, 2020), <https://p.dw.com/p/3bBi7>.

61. See African Comm'n on Hum. and Peoples' Rts, *supra* note 54.

62. See *id.* p.mbl.

order.<sup>63</sup> On March 30, 2020, a thirteen-year-old boy was shot on his balcony in Nairobi by police who were supposedly enforcing the curfew.<sup>64</sup> Many were arrested and refused release except upon payment of a fine or bribe.<sup>65</sup> 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.<sup>66</sup>

Similarly, although Morocco's constitution does not formally permit the derogation of human rights, Morocco passed a law in March 2020 declaring a state of health emergency and broadly imposing criminal fines and one to three months of imprisonment on anyone violating "orders and decisions taken by public authorities" or "obstructing" those decisions with "writings, publications, photos, or discs."<sup>67</sup> The Moroccan government has used this law to shut down newspapers for months<sup>68</sup> and to prosecute both human rights activists and journalists who have criticized the government's handling of the pandemic.<sup>69</sup> Such uses of derogation lack any basis in the Moroccan constitution, and therefore violate the human rights of those prosecuted, because they are not prescribed by valid legislation under Morocco's own municipal laws. They further violate Morocco's obligations under the ICCPR, which allows derogations only to the extent strictly required to address a state of emergency that "threatens the life of

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63. See Max Bearak & Rael Ombuor, *Kenya's coronavirus curfew begins with wave of police crackdowns*, WASH. POST (Mar. 28, 2020), [https://www.washingtonpost.com/world/africa/kenyas-coronavirus-curfew-begins-with-wave-of-police-crackdowns/2020/03/28/358327aa-7064-11ea-a156-0048b62cdb51\\_story.html](https://www.washingtonpost.com/world/africa/kenyas-coronavirus-curfew-begins-with-wave-of-police-crackdowns/2020/03/28/358327aa-7064-11ea-a156-0048b62cdb51_story.html); Otsieno Namwaya, *Kenya Police Abuses Could Undermine Coronavirus Fight*, HUM. RTS. WATCH (Mar. 31, 2020), <https://www.hrw.org/news/2020/03/31/kenya-police-abuses-could-undermine-coronavirus-fight>.

64. See Georja Calvin-Smith, *Probe Ordered into Fatal Shooting of Kenyan Teenager During Virus Curfew*, FRANCE24 (Mar. 31, 2020), <https://www.france24.com/en/africa/20200331-coronavirus-kenya-shooting>.

65. Abdi Latif Dahir, *Kenya's Held for Weeks in Quarantine Were Told to Pay to Get Out*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/world/africa/kenya-coronavirus-quarantine.html>.

66. See Georja Calvin-Smith, *Kenya's President Apologises for Police "Excesses" Amid Coronavirus Curfew*, FRANCE24 (Apr. 2, 2020), <https://www.france24.com/en/africa/20200402-eye-africa-kenya-s-president-apologises-for-police-excesses-amid-coronavirus-curfew>.

67. Decret-loi no. 2-220-292 du 23 mars 2020 édictant des dispositions particulières à l'état d'urgence sanitaire et les mesures de sa déclaration art. 4, 6870 Bull. Off. 506 (Morocco) (author's translation).

68. See Elhafad Nouini, *Impact of Covid-19 on Freedom of Expression in Morocco and Tunisia*, ROWAQ ARABI, 2020, 33, 41.

69. See *Morocco and Western Sahara: End Prosecution of Activists Under New Health Emergency Law*, AMNESTY INT'L (June 9, 2020), <https://www.amnesty.org/en/latest/news/2020/06/morocco-and-western-sahara-end-prosecution-of-activists-under-new-health-emergency-law/>.



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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

At the same time, the Commission issued a general statement on human rights derogations during the pandemic.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> Because the costs

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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 slow the spread of the pandemic, but at a cost to the human rights to vote and participate in government, and the right of all peoples to self-determination.<sup>76</sup> Several African states, including Burundi, Cameroon, Côte d'Ivoire, Ghana, Egypt, Mali, and Tanzania, held elections in 2020.<sup>77</sup> Yet, several states, such as South Africa and Uganda, postponed elections for a fixed period. Chad, Ethiopia, Gabon, and Nigeria postponed elections indefinitely.<sup>78</sup> The African Commission issued a statement in mid-2020 recognizing the risks of in-person elections, expressing concern about the possibility of unnecessary or excessive postponements, and proposing guidance to minimize disruptions in the democratic process without compromising public safety.<sup>79</sup> The Commission did not, however, identify any specific states as having struck a balance with too little regard for human rights.

The following year, the African Court on Human and Peoples' Rights ("Arusha Court") rendered an advisory opinion to the Pan African Lawyers Union (PALU) on the right to participate in government in the context of elections held during the COVID-19 pandemic.<sup>80</sup> The three substantive questions presented asked: (1) what are the "applicable obligations" of African Union (AU) member states for ensuring the right to participate in elections during a public health emergency such as the COVID-19 pandemic; (2) what laws apply to the states that choose to conduct elections as opposed to those that postpone elections; and (3) what laws apply to states that are unable to conduct elections during the pandemic?<sup>81</sup> The three questions put to the court are really one broad question: What are AU member state obligations under international treaties and customary law

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76. See ICCPR, *supra* note 1, art. 1, 25; Banjul Charter, *supra* note 15, art. 13. See generally African Charter on Democracy, Elections and Governance, Jan. 30, 2007, <https://au.int/en/treaties/african-charter-democracy-elections-and-governance> [hereinafter ACDEG].

77. INT'L IDEA, *supra* note 46, at 9.

78. *Id.* at 8-9.

79. See African Comm'n on Hum. and Peoples' Rts. [Afr. Comm'n H.P.R.], *Statement of the African Commission on Human and Peoples' Rights on Elections in Africa during the COVID-19 Pandemic* (July 22, 2020), <https://www.achpr.org/pressrelease/detail?id=522>.

80. Advisory Opinion on Request No. 001/2020 by the Pan African Lawyers Union (PALU) on the Right to Participate in the Government of One's Country in the Context of an Election Held During a Public Health Emergency or a Pandemic, Such as the COVID-19 Crisis, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (July 16, 2021) [hereinafter Advisory Opinion on Request No. 001/2020], <https://www.african-court.org/cpmt/details-advisory/0012020>.

81. *Id.* para. 8.

with regard to preparing for, holding, and postponing elections during the pandemic? Although that question would appear too broad to be justiciable, the African Court decided to attempt an answer without discussing the situation of any specific state.<sup>82</sup>

The court began by affirming that states have the option of conducting elections during the pandemic, but that they equally possess the authority under the Banjul Charter, as supplemented by the African Charter on Democracy, Elections and Governance (ACDEG), to exercise their judgment to postpone elections.<sup>83</sup> Article 13(1) of the Banjul Charter recognizes the right of every citizen to participate directly in government or to vote for representatives “in accordance with the provisions of the law.”<sup>84</sup> The court later elaborated that the frequency of elections was a matter “not directly regulated by the Charter and the ACDEG.”<sup>85</sup> Although technically accurate, these statements potentially sanction legislation that undermines the relevant human right by indefinite postponements provided by law.

Fortunately, the court clarified later in its opinion that such legislation must comply with the conditions applicable to all limitations on human rights. Specifically, it observed that, although the Banjul Charter does not include an explicit provision for the derogation of human rights “even in emergency situations,” African Union member states may limit human rights under Article 27(2) of the Charter to ensure the rights of others, collective security, morality and the common interest through measures that are provided by law, proportionate to the aims discussed (here, specifically “to protect the health and life of persons” in the electoral context), and that do not “undermine the essential content of rights.”<sup>86</sup> These conditions apply to the postponement of elections to the same extent as restrictions on normal electoral procedures.<sup>87</sup>

The court did not offer more specific guidance, concluding that, “as a judicial body, it is not its role to develop policy guidelines for States on how to conduct elections in a situation of emergency.”<sup>88</sup> However, the court did emphasize the need to obtain the consent of “the majority of political actors” before postponing elections in the near term, in accordance with the

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82. *Id.* para. 45.

83. *Id.* paras. 51-52 (first citing Banjul Charter, *supra* note 15 art. 13(1); then quoting African Charter on Democracy, Elections and Governance art. 2, 3, June 27, 2019, <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>).

84. Banjul Charter, *supra* note 15, art. 13(1).

85. *Id.* para. 96.

86. *Id.* paras. 73, 76-77.

87. *See id.* paras. 98-103.

88. *Id.* para. 71.

ECOWAS Protocol on Democracy and Elections (*sic*: Good Governance).<sup>89</sup> Neither the ECOWAS Protocol nor the court's opinion define the universe of political actors to which this principle applies, and the court's opinion did not discuss the circumstances under which postponements would be compatible with the human right to participate in government.

As for compatibility, the court noted that pandemic-related measures should not entirely suppress the critical elements of the right of citizens to participate in elections, including campaigning, free and fair access to media, the monitoring of the electoral process, secret ballots, transparency in vote counting, and the possibility of contesting the results.<sup>90</sup> Absolute prohibitions on voting, the freedom of movement, or the use of online media would therefore violate the state's human rights obligations because legitimate state aims could be accomplished with less extreme measures, such as social distancing, the use of masks, and sanitation procedures.<sup>91</sup>

The court thus provided sound general guidance on how elections may be limited or postponed in response to the pandemic without commenting on specific restrictions adopted by any African Union member state. The court's guidance was consistent with both the ICCPR and African regional instruments, and balanced, albeit vaguely, public health concerns with preservation of the human right to participate in government. But the most interesting aspect of the case was the court's implied recognition that the absence of a derogation provision in the Banjul Charter had no appreciable effect on the ability of African Union member states to limit the human right to participate in government in response to a state of emergency.

#### B. *African State Practice, 1976-2019*

Many African states have suspended internationally protected human rights during states of emergency in the decades between the ICCPR's taking effect (1976) and the COVID-19 pandemic in 2020. Without undertaking a comprehensive discussion of state practice in the forty countries surveyed here, this part will summarize the findings of the state practice survey during the relevant period. The summary will focus on three aspects of that practice: (1) the circumstances under which states of emergency have been declared; (2) state compliance with procedural obligations under the ICCPR and the state constitutions discussed in Part

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89. *Id.* para. 55. The ECOWAS Protocol on Democracy and Good Governance, Dec. 2001, Doc. A/SP1/12/1, forbids in article 2 any "substantial modification . . . to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of political actors."

90. Advisory Opinion on Request No. 001/2020, *supra* note 80, paras. 80-81.

91. *Id.* paras. 82-83.

III.A above; and (3) the range of human rights derogated during the emergency and the extent to which these derogations were adequately justified by the circumstances.

Before the COVID-19 pandemic, African countries declared states of emergency during the relevant period in response to a limited range of events. In nearly all cases, the basis for the declarations were the following:

- political protests;
- large scale public riots;
- civil wars and rebellions, including inter-ethnic violence; and
- attempted *coup d'état*.

In only rare cases before 2019 were emergencies declared in response to other conditions, such as disease epidemics or natural disasters.<sup>92</sup> Some of the categories most often invoked overlap in specific instances. Political protests can turn into riots, and a failed *coup d'état* attempt can spark inter-ethnic violence. But what most declared emergencies have in common is a need to respond to organized violence.

The noteworthy exception is the first—political protest—which may be either peaceful or violent. A peaceful protest, regardless of size, cannot fulfill the ICCPR's conditions for invoking a state of emergency with accompanying derogation of human rights, because peaceful protests by their nature do not “threaten the life of the nation.”<sup>93</sup> Nonetheless, as will be discussed, there are instances in which African governments have responded to peaceful protests by declaring a state of emergency and derogating from human rights in violation of international law.

Five case study summaries will illustrate the circumstances under which states of emergency were used by African governments after 1976. Although these studies as a group are approximately representative of African practice, a few are outliers from the general trend. That trend, and its relationship to the case studies, will be discussed in Part IV.

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92. One example is Eswatini, which temporarily declared a national emergency in 2004 in response to a serious increase in HIV infections and a series of severe storms that disrupted food supplies. See *National Disaster Declared*, NEW HUMANITARIAN (Feb. 19, 2004), <https://www.thenewhumanitarian.org/news/2004/02/19/national-disaster-declared>; Subheading Entitled “Eswatini,” *CrisisWatch*, INT’L CRISIS GRP. (Feb. 2004), <https://www.crisisgroup.org/crisiswatch/february-2004#eswatini>; see also Michael Wines & Sharon Lafraniere, *Hut by Hut, AIDS Steals Life in a Southern Africa Town*, N.Y. TIMES (Nov. 28, 2004), <https://www.nytimes.com/2004/11/28/world/africa/hut-by-hut-aids-steals-life-in-a-southern-africa-town.html?searchResultPositios=2> (describing the severity of the AIDs epidemic in the region).

93. ICCPR, *supra* note 1, art. 4.

## Algeria, 1988-2011

Between 1988 and 2011, the Algerian government declared a state of emergency or state of siege several times. The 1988 declaration responded to public riots that originated in perceptions of government corruption, political repression, and economic stagnation.<sup>94</sup> The riots included attacks on government buildings, the burning of automobiles, and the looting of shops.<sup>95</sup> At the time, Algeria had not yet ratified the ICCPR, and therefore no notification to the UN Secretary-General was made.<sup>96</sup> However, Algeria had ratified the Banjul Charter the year before, in March 1987.<sup>97</sup> Algeria's constitution did not prohibit the suspension of human rights, and therefore both internal and international procedures were followed.

The riots in Algeria may have justified the declaration of a state of emergency, but the human rights derogations chosen by the government were excessive, unnecessary, and often in violation of international law including *ius cogens*. The government implemented martial law, silencing the press (which was already heavily censored at the time), imposed a curfew, and arbitrarily detained journalists. The government also deployed the army to quell the riots with excessive force, causing significant civilian casualties, estimated at 500 to 600 deaths and at least 1000 wounded.<sup>98</sup> The Algerian government arrested several thousand persons and reportedly engaged in the widespread torture of detainees, including beating, clubbing, knifing, electric shock, forcing detainees to crawl nude across glass, sexual violence, sodomization, burning with cigarettes, and forced swallowing of

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94. See Yasmina Allouche, *Why Algeria's 'Black October' in 1988 Defined its Role in the Arab Spring*, MIDDLE EAST MONITOR (Oct. 6, 2016, 4:30 PM), <https://www.middleeastmonitor.com/20161006-why-algerias-black-october-in-1988-defined-its-role-in-the-arab-spring/>; Paul Delaney, *Toll is Put at 200 in Algerian Riots*, N.Y. TIMES, Oct. 10, 1988, at A1 <https://www.nytimes.com/1988/10/10/world/toll-is-put-at-200-in-algerian-riots.html>; Hana Hassain, *Remembering Algeria's Black October*, MIDDLE EAST MONITOR (Oct. 5, 2018, 8:45 AM), <https://www.middleeastmonitor.com/20181005-remembering-algerias-black-october/>; Christina Okello, *Algeria Marks Black October Riots Amid Ongoing Protests*, RADIO FRANCE INTERNATIONALE (May 10, 2019, 8:44 AM), <https://www.rfi.fr/en/africa/20191004-algeria-mark-black-october-riots-amid-ongoing-protests>.

95. See Delaney, *supra* note 94.

96. Parties to the ICCPR, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=_en) (last visited Oct. 23, 2022).

97. Parties to the Banjul Charter, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f&clang=_en) (last visited Oct. 23, 2022).

98. See Delaney, *supra* note 94; Hassain, *supra*, note 94; U.S. DEP'T OF STATE BUREAU OF HUM. RTS., DEMOCRACY, AND LAB., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988 1277 (1989) [hereinafter U.S. Dep't of State 1988 Algeria Report].

noxious liquids.<sup>99</sup> No member of the military or police was ever prosecuted for these acts, despite the government having acknowledged their occurrence in 1993.<sup>100</sup> Most rioting appears to have ended within a week, and the state of emergency was lifted almost immediately.<sup>101</sup>

On June 4, 1991, the Algerian government declared a state of siege in response to attacks on government buildings by Muslim fundamentalists who sought to overthrow the government and to install an Islamic state.<sup>102</sup> By this time, Algeria was bound by the ICCPR. Algeria followed both internal and international procedures, notifying the United Nations of the declaration and suspending no human rights except for some judicial procedures and a six-month delay in the elections originally scheduled for that month.<sup>103</sup> The 1991 declaration was thus consistent with both the ICCPR and Banjul Charter.

However, to forestall further fundamentalist attacks on the government, the Army staged a *coup d'état* January 1992, canceled elections and appointed a new president, who immediately declared yet another state of emergency immediately.<sup>104</sup> The 1992 declaration was to last twelve months and would apply to the entire territory of Algeria.<sup>105</sup> Algeria promptly notified the UN Secretary-General of the declaration. However, in June 1992, Islamic extremists assassinated the president, causing the Army to arrest and detain thousands of members of the Islamic Salvation Front (FIS)

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99. U.S. Dep't of State 1988 Algeria Report, *supra* note 98, at 1278; HUMAN RIGHTS WATCH, WORLD REPORT 1993: ALGERIA, 288-94 (1993) [hereinafter 1993 Human Rights Watch World Report].

100. See U.S. Dep't of State 1988 Algeria Report, *supra* note 98, at 1278.

101. Paul Delaney, *Algeria to Lift State of Emergency as Unrest Ebbs in Riot-Torn Cities*, N.Y. TIMES, Oct. 12, 1988, at A12 <https://www.nytimes.com/1988/10/12/world/algeria-to-lift-state-of-emergency-as-unrest-ebbs-in-riot-torn-cities.html>; Hassain, *supra* note 94; Immigration and Refugee Board of Canada [IRB], *Algeria: Riots of October 1988*, Pub. No. DZA2017 (Sept. 1, 1989), <https://www.refworld.org/docid/3ae6aba95c.html> [hereinafter *Algeria: Riots of October 1988*].

102. 1993 Human Rights Watch World Report, *supra* note 99, at 289.

103. See Canadian Security Intelligence Service, *Commentary No. 65: Insurgency, Legitimacy and Intervention in Algeria*, FED'N OF AM. SCIENTISTS INTEL. RES. PROGRAM (Jan. 1996), <https://fas.org/irp/world/para/docs/com65e.htm> [hereinafter CSIS Comment No. 65]; see also 1993 Human Rights Watch Report, *supra* note 99; HUM. RTS. WATCH, HUMAN RIGHTS IN ALGERIA SINCE THE HALT OF THE ELECTORAL PROCESS (1992), <https://www.hrw.org/report/1992/02/27/human-rights-algeria-halt-electoral-process>; Associated Press, *Army Sends Tanks to Algerian Capital After Day of Rioting*, N.Y. TIMES, June 26, 1991, <https://www.nytimes.com/1991/06/26/world/army-sends-tanks-to-algerian-capital-after-day-of-rioting.html>.

104. CSIS Comment No. 65, *supra* note 103.

105. See Presidential Decree No. 92-44 of Feb. 9, 1992 [hereinafter Presidential Decree No. 92-44], <https://www.refworld.org/docid/3fbc20364.html>.

in prison camps.<sup>106</sup> 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.”<sup>107</sup> 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.<sup>108</sup> Extrajudicial killing became common during the emergency, with lethal armed attacks against even peaceful pro-Islamic demonstrators.<sup>109</sup> Reports indicate that tens of thousands of civilians were killed in the war.<sup>110</sup> The president suspended the right of appeal in criminal trials involving accusations of terrorism, including capital cases.<sup>111</sup>

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.”<sup>112</sup> Firsthand observers reported a significant number of detainees tortured or abused in custody.<sup>113</sup> 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.<sup>114</sup>

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,<sup>115</sup> 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.<sup>116</sup> He kept himself in power through fraudulent elections for the next twenty-seven years. Burkina Faso acceded to the ICCPR in 1999.<sup>117</sup> In 2014, Compaoré tried to amend the constitution to extend his term of office beyond twenty-seven years, which caused a popular revolt.<sup>118</sup>

The uprising began with violent street parades and riots by tens of thousands of democratic protesters from January 2014.<sup>119</sup> In the face of continued protests, including the firebombing of parliament, Compaoré dissolved parliament and declared a nationwide state of emergency on October 30, 2014, in hopes of retaining power.<sup>120</sup> Burkina Faso's government failed to notify the UN Secretary-General of this declaration. It is unclear what effect the declaration *per se* had on human rights, because Compaoré's government had not respected human rights significantly even before the declaration.

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115. See World Peace Foundation, *Algeria: Civil War*, MASS ATROCITY ENDINGS (Aug. 7, 2015), <https://sites.tufts.edu/atrocityendings/2015/08/07/72/>.

116. Declan Walsh, *Ex-Leader of Burkina Faso Convicted in Killing of Thomas Sankara, His Predecessor*, N.Y. TIMES (Apr. 6, 2022), <https://www.nytimes.com/2022/04/06/world/africa/burkina-faso-blaise-compaore-thomas-sankara.html>.

117. Parties to the ICCPR, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=_en) (last visited Oct. 23, 2022).

118. David Smith, *Burkina Faso: Violent Clashes Over Plans to Extend President's Rule*, THE GUARDIAN (Oct. 31, 2014), <https://www.theguardian.com/world/2014/oct/30/protesters-storm-burkina-faso-parliament-constitution-vote-president-blaise-compaore>.

119. Naila Salihu, *Burkina Faso*, ACCORD (Oct. 23, 2015), <https://www.accord.org.za/conflict-trends/burkina-faso/>.

120. FREEDOM HOUSE, FREEDOM IN THE WORLD IN 2015 113-116 (Arch Puddington et al. eds., 2015); *As it Happened: Burkina Faso Unrest*, BRIT. BROAD. NEWS (Oct. 30, 2014), <https://www.bbc.com/news/live/world-africa-29831591>; Emma Farge & Bate Felix, *Beyond Burkina Faso, Africa's 'Black Spring' Hopes May Be Premature*, REUTERS (Nov. 6, 2014), <https://www.reuters.com/article/us-burkina-politics-africa-analysis/beyond-burkina-faso-africas-black-spring-hopes-may-be-premature-idUSKBN0IQ1ZE20141106>.

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.<sup>121</sup> 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 legislature<sup>122</sup> ratified this declaration and it continues to the present day.<sup>123</sup> The United Nations was notified of the emergency belatedly, on April 17, 2019.<sup>124</sup>

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.<sup>125</sup> 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.<sup>126</sup> 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

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121. Salihi, *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-idUSKCN1OU00V>; *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.aib.media/2018/12/31/eprouve-par-le-terrorisme-le-burkina-faso-instaure-letat-durgence-dans-six-de-ses-regions/?fbclid=IwAR1TdOUO6MiCUmn0ifz7joJoBIZaajQLL0s-fhfoHhcYeErMejRJC\\_KN2-Y](https://www.aib.media/2018/12/31/eprouve-par-le-terrorisme-le-burkina-faso-instaure-letat-durgence-dans-six-de-ses-regions/?fbclid=IwAR1TdOUO6MiCUmn0ifz7joJoBIZaajQLL0s-fhfoHhcYeErMejRJC_KN2-Y); *Tackling Burkina Faso's Insurgencies and Unrest*, INT'L CRISIS GRP. (Jan. 28, 2019), <https://www.crisisgroup.org/africa/sahel/burkina-faso/tackling-burkina-fasos-insurgencies-and-unrest>.

123. *Burkina Faso Travel Advisory*, U.S. STATE DEP'T (Apr. 18, 2022), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/burkina-faso-travel-advisory.html>.

124. Depository Notification, Sec'y Gen., Burkina Faso: Notification Under Article 4(3), U.N. Depository Notification C.N.148.2019.TREATIES-IV-4 (Apr. 29, 2019).

125. *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-idUSKCN1OU00V>; *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>.

126. Daily Press Briefing, Office of the Spokesperson for the Secretary-General, UN Press (Dec. 11, 2019).

militants.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup>

#### 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.<sup>130</sup> Cameroon acceded to the ICCPR effective September 27, 1984, which in theory should have deterred its abuses of emergency declarations.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> Fighting resulted in both military and civilian casualties estimated at around 200 to 1,000 deaths, and 1,205 detentions.<sup>134</sup> 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.<sup>135</sup>

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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> (last visited Oct. 23, 2022).

132. Fombad, *supra* note 130, at 71.

133. Clifford D. May, *Cameroon Reported to Execute Plotters After Trials in Secret*, N.Y. TIMES, May 10, 1984, at A1; U.S. DEP'T OF STATE: CAMEROON, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984 49 (1984) [hereinafter Dep't of State 1984 Cameroon Report]; Gerard Emmanuel Kamdem Kamga, *The Origin and Development of Emergency Regimes in Cameroon*, 21 FUNDAMINA 289, 307 (2015).

134. Dep't of State 1984 Cameroon Report, *supra* note 133, at 49.

135. 1988 U.N.Y.B. 110, U.N. Sales No. E.92.XIV.2; Dep't of State 1984 Cameroon Report, *supra* note 133, at 49, 51.

The initial declaration may have been justified by the violence and crime following the coup attempt. Courts were reportedly unbiased and free from government interference at the beginning,<sup>136</sup> but the state of emergency was renewed repeatedly until 1991, and the objectivity of courts reportedly deteriorated as the state of emergency lengthened. Between 1984 and 1991, the government formed a new party (the Cameroon People's Democratic Movement, or CPDM) to consolidate power, and human rights violations increased in frequency and severity. There were reports of torture of detained persons during police interrogations and in prison. Moreover, between forty-five and 120 defendants were executed after trial and at least three were convicted of capital offenses *in absentia*.<sup>137</sup> In one case, the U.N. Human Rights Committee specifically found a journalist to have been subjected to cruel, inhuman, and degrading treatment while in prison.<sup>138</sup>

In 1990, Cameroon adopted a new and very broad state of emergency law that encompassed any "series of disturbances undermining public order or the security of the state."<sup>139</sup> Although the legislation provided for only limited extensions of time, this limitation was routinely disregarded.<sup>140</sup> By 1991, the Cameroon government had established strict press censorship, restricted the right of assembly, and limited women's human rights and labor rights.<sup>141</sup> Cameroon security forces were attacking peaceful pro-democracy protests, and regularly committing torture and extrajudicial killings with impunity. These acts of violence were especially directed at opposition political candidates before the 1992 election.<sup>142</sup> In 1991 alone, there were over 100 documented instances of extrajudicial killing by Cameroon security forces, and arbitrary detentions are believed to have exceeded 10,000.<sup>143</sup>

The first presidential election in Cameroon to offer more than one candidate was held on October 11, 1992, with incumbent Paul Biya reportedly winning by a plurality vote of 40%. Because Biya had failed to

136. Dep't of State 1984 Cameroon Report, *supra* note 133, at 52.

137. *Id.* at 50-52.

138. Mukong v. Cameroon, Views Hum. Rts. Comm., Communication No. 458/1991, U.N. Doc. CCPR/51/D/458/1991 (July 21, 1994).

139. Fombad, *supra* note 130, at 69, 73.

140. *Id.* at 71.

141. HUM. RTS. WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1992 41, 43, 46 (1992) [hereinafter 1992 Human Rights Watch World Report].

142. U.S. DEP'T OF STATE: CAMEROON, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991 42-45 (1992) [hereinafter Dep't of State 1991 Cameroon Report]; 1992 Human Rights Watch World Report, *supra* note 141, at 42-44.

143. Dep't of State 1991 Cameroon Report, *supra* note 142, at 43, 45.

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.<sup>144</sup> The government failed to notify the United Nations of this declaration.<sup>145</sup> 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.<sup>146</sup> 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,<sup>147</sup> 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.<sup>148</sup> As of this publication, the CPDM has remained in power for thirty-seven consecutive years, and Biya remains president after forty years in office, largely due to the damage inflicted on democracy during states of emergency.

#### Chad, 2006-2019

Chad acceded to the ICCPR on June 9, 1995. Between 2006 and 2019, Chad experienced a massive influx of internally displaced persons and refugees from Sudan who were fleeing ethnic cleansing by the Janjaweed militias, as well as direct attacks by the Janjaweed and other armed militias on towns within Chad.<sup>149</sup> Within Chad as well as southern Sudan, these militias engaged in mass rapes, murders, and abductions, and recruited children into their ranks.<sup>150</sup> In the meantime, the national government of

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144. ARTICLE 19, CAMEROON—A TRANSITION IN CRISIS 10 (1997).

145. Gerard Emmanuel Kamdem Kamga, *Emergency Regimes in Cameroon: Derogations or Failures of Law?*, 25 AFR. J. INT'L & COMP. L. 519, 531 (2017).

146. See *supra* note 144, at 23; Kamga, *supra* note 145, at 531; 3 U.S. DEP'T OF STATE, *Department Statements: Human Rights Situation in Cameroon*, in 3 U.S. DEP'T OF STATE DISPATCH 845 (1992); Laura-Stella Eposi Enonchong, *Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship*, 5 AFR. J. LEGAL STUD. 313, 327 (2012).

147. Fombad, *supra* note 130, at 68.

148. U.S. STATE DEP'T, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CAMEROON 32-36 (2021).

149. U.N. Human Rights Couns., Nat'l Rep. Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Couns. Resol. 5/1 - Chad, U.N. Doc. A/HRC/WG.6/5/TCD/1 (2009) [hereinafter UNHRC – Chad Report 2009].

150. *Id.*

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

In response, the Déby government declared three separate national emergencies between 2006 and 2008. The first, in November 2006, lasted for twelve days, but was extended for an additional six months (to May 2007). It was used to censor the press and to suppress political opposition in order to ensure Déby's reelection.<sup>152</sup> No notice was filed with the United Nations, in violation of ICCPR Article 4(3).

In October 2007, rebellions and political opposition led Déby to declare another state of emergency, limited to two eastern regions and the northern region.<sup>153</sup> It is unclear how long the declaration lasted. The third declaration was made in February 2008, in response to rebel attacks on the capital, N'Djamena, and applied to the entire country. It allowed for government control of the news media, authorized home searches without a warrant, banned most meetings, and established a nightly curfew.<sup>154</sup> Government forces demolished almost 2000 homes to make room for construction projects unrelated to the conflict, rendering an estimated 10,000 citizens homeless.<sup>155</sup> It is unclear how long the 2008 restrictions stayed in force.

Fighting between rival ethnic groups and aggression by Islamic militants caused Chad to declare new states of emergency in 2015 and again in 2019. The first applied only to the Lake Chad region bordering Nigeria and responded to a double attack launched by Boko Haram that claimed five lives in Ngouboua village.<sup>156</sup> The emergency legislation gave authorities the option to ban gatherings, the movement of people, and

151. LAUREN PLOCH, CRS REPORT FOR CONG.: INSTABILITY IN CHAD 2 (Jan. 30, 2008).

152. *Id.*; *Chad Profile – Timeline*, BRIT. BROAD. CO. (May 8, 2018), <https://www.bbc.com/news/world-africa-13164690>.

153. *State of Emergency Imposed Even as Peace Talks Conclude*, THE NEW HUMANITARIAN (Oct. 16, 2007), <https://www.thenewhumanitarian.org/news/2007/10/16/state-emergency-imposed-even-peace-talks-conclude>.

154. Stephanie Hancock, *Chad Imposes State of Emergency to Combat Rebels*, REUTERS (Feb. 14, 2008, 2:37 PM), <https://www.reuters.com/article/us-chad-rebels-deby/chad-imposes-state-of-emergency-to-combat-rebels-idUSL1471790020080214>; *Aid Work Continues Despite State of Emergency*, THE NEW HUMANITARIAN (Feb. 18, 2008), <https://www.thenewhumanitarian.org/news/2008/02/18/aid-work-continues-despite-state-emergency>; *Chad President Declares State of Emergency*, FRANCE24 (Feb. 15, 2008), <https://www.france24.com/en/20080215-chad-president-declares-state-emergency-chad>; *Chad Declares State of Emergency*, ALJAZEERA, (Feb. 14, 2008), <https://www.aljazeera.com/news/2008/2/14/chad-declares-state-of-emergency-2>.

155. *See* KY LUU, CHAD - COMPLEX EMERGENCY 1 (2008).

156. *Boko Haram: State of Emergency Declared Around Lake Chad*, BRIT. BROAD. CO. (Nov. 9, 2015), <https://www.bbc.com/news/world-africa-34771128>.

vehicles in the area.<sup>157</sup> 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.<sup>158</sup> 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 Telestchad, the only television station in Chad).<sup>159</sup> The National Assembly extended the state of emergency for four months,<sup>160</sup> although there does not appear to have been any need for an extension. The 2015 parliamentary elections were delayed until 2020 as well.<sup>161</sup>

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.<sup>162</sup> It was extended for four months as well.<sup>163</sup> The ostensible goal of the declaration was the mass disarmament of civilians through home searches and confiscations of weapons,<sup>164</sup> but the government response appears to have included several limitations and violations of human rights. According to Amnesty International:

Several cases of excessive use of force by defense and security forces were reported. Defense and security forces opened fire on a group of women, wounding 10 of them, during a protest on 23 February in Abéché. They were students protesting against the decision to remove the head of a school complex in disobedience of an earlier court ruling. On 12 September, police in N'Djamena shot a man in the leg, on the pretext that he had walked in a restricted area.

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157. *Id.*

158. See UN Human Rights Office 'Deeply Regrets' Resumption of Executions in Chad, UNITED NATIONS NEWS (Sept. 1, 2015), <https://news.un.org/en/story/2015/09/507782-un-human-rights-office-deeply-regrets-resumption-executions-chad>; see also Amnesty Int'l, *Chad: Crackdown on Fundamental Freedoms*, at 5, AI Index AFR 20/8653/2018 (June 1, 2018).

159. Front Line Defenders, *UPR Submission- Chad 2018*, (Apr. 1, 2018).

160. Matthew M. Bigg, *Chad Extends State of Emergency Over Boko Haram Attacks*, REUTERS (Nov. 19, 2015), <https://news.trust.org/item/20151119023508-ds6gi/>.

161. Amnesty Int'l, *Human Rights in Africa, Review of 2019: Chad*, at 29, AI Index AFR 01/1352/2020 (Apr. 8, 2020).

162. *Chad Extends State of Emergency in 3 Provinces by 4 Months*, REUTERS (Sept. 10, 2019, 4:32 PM), [https://www.voanews.com/a/africa\\_chad-extends-state-emergency-3-provinces-4-months/6175541.html](https://www.voanews.com/a/africa_chad-extends-state-emergency-3-provinces-4-months/6175541.html).

163. *Id.*

164. See *State of Emergency Lifted in North and Eastern Chad*, THE NATIONAL (Jan. 25, 2020), <https://www.thenationalnews.com/world/state-of-emergency-lifted-in-north-and-eastern-chad-1.969430>.

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.<sup>165</sup>

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.<sup>166</sup> In an attempt to solve the intercommunal violence through government violence, villagers were subjected to intimidation, in some cases through torture, assault, and other cruel, inhuman, or degrading treatment.<sup>167</sup>

During none of these national emergencies did the government of Chad submit an Article 4(3) notification to the United Nations. More importantly, the fact that the emergencies were confined to specific regions suggests that they were not of a nature to threaten the life of the nation, and therefore did not qualify as emergencies justifying the derogation of human rights under the ICCPR Article 4. Instead, most derogations were extreme responses to sometimes serious but limited disorder that could have been controlled merely by the normal exercise of policing or army deployments. The fact that these measures targeted peaceful protesters in particular indicates an illegitimate purpose, because, as noted, peaceful protest itself can under no circumstances threaten the life of a nation.

#### Egypt, 1967-present

The Egyptian constitution is one of the few to include no authorization for the government to derogate from human rights. Regardless, Egypt has proven the most relentless abuser of state of emergency declarations and accompanying derogations of human rights, not only in Africa, but worldwide. In fact, Egypt has the most enduring state of emergency declaration in the history of the concept. Egypt declared a state of emergency in 1967 during the Arab-Israeli War and has maintained it

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165. Amnesty Int'l, *Human Rights in Africa, Review of 2019: Chad*, at 29, AI Index AFR 01/1352/2020 (Apr. 8, 2020).

166. *Id.*; See also Int'l Crisis Group, *Avoiding the Resurgence of Intercommunal Violence in Eastern Chad*, Report No. 284 (Dec. 30, 2019), <https://www.crisisgroup.org/africa/central-africa/chad/284-eviter-la-reprise-des-violences-communautaires-lest-du-tchad>.

167. See CHADIAN LEAGUE OF HUM. RTS., 2018 RAPPORT SUR LA SITUATION DES DROITS DE L'HOMME AU TCHAD (2018), [http://www.laltdh.org/pdf/rapport\\_dh\\_2018.pdf](http://www.laltdh.org/pdf/rapport_dh_2018.pdf); see also U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHAD (2020).



effectively without interruption since then.<sup>168</sup> Although it was allowed to lapse briefly between 1979 and 1980, it has remained in force since the assassination of President Anwar Sadat in 1981.<sup>169</sup> With only trivial interruptions, Egypt has been in a continuous state of emergency for fifty-five years and counting.

During those decades, the Egyptian government's record of respecting human rights has been extremely disappointing. The Egyptian government is highly authoritarian. Political opponents, human rights advocates, and journalists are routinely censored, arrested on false charges, and imprisoned for criticizing the government.<sup>170</sup> Police have violently dispersed peaceful protests, in one case killing hundreds of people.<sup>171</sup> The unchecked power of the president has resulted in forced disappearances, arbitrary executions, torture of prisoners (and many deaths in custody), and violations of the right to privacy.<sup>172</sup>

Like states of emergency in other countries, the law regulating states of emergency in Egypt (No. 162 of 1958, as amended) allows the suspension of the rights to freedom of assembly, freedom of speech and the press, the right to privacy of communications, and the right to a prompt and fair trial.<sup>173</sup> But Egyptian practice also derogates from a wide variety of other human rights. Stores may be closed and business firms may be seized without a warrant.<sup>174</sup> Detained persons may be forced to perform hard labor without trial for up to six months, and they may be subjected to burdensome fines.<sup>175</sup> From the 1980s to the 2000s, the Egyptian government kept thousands of accused persons in jails at a time, without charge or trial, in

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168. See United Nations Human Rights Council, ICJ Submission to the Universal Periodic Review of Egypt, (2009), <https://www.icj.org/wp-content/uploads/2009/09/Egypt-ICJ-submission-UPR-non-judicial-submission-2009.pdf>;

169. *Id.*

170. See U.S DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT (2021).

171. See Kareen Fahim & Mayy el Sheikh, *Memory of a Mass Killing Becomes Another Casualty of Egyptian Protests*, N. Y. TIMES, Nov. 13, 2013, at A12.

172. See Marwa Al-A'asar, *EOHR Calls for Investigating 900 Torture Cases*, DAILY NEWS EGYPT (June 22, 2011), <http://www.dailynewsegypt.com/2011/06/22/eohr-calls-for-investigating-900-torture-cases/>; Cairo Inst. for Hum. Rts. Stud., *Egypt: Human Rights Council: Countries Should Take Bold Action*, (Feb. 9, 2021), <https://cihrs.org/egypt-human-rights-council-countries-should-take-bold-action/?lang=en>; *States Break Silence to Condemn Egypt's Abuses at UN Rights Body*, AMNESTY INT'L (Mar. 12, 2021), <https://www.amnesty.org/en/latest/news/2021/03/states-break-silence-to-condemn-egypts-abuses-at-un-rights-body/>.

173. Law No. 162 of 1958 (Law on the State of Emergency), *al-Jarīdah al-Rasmīyah*, 27 September 1958, art. 3 (Egypt).

174. *Id.*

175. *Id.* art. 5.

some cases for more than a decade.<sup>176</sup> The president is authorized to perform warrantless searches and to charge civilians in military tribunals for nonmilitary crimes.<sup>177</sup> These tribunals are composed of members who are appointed by the president, and who do not have lifetime tenure.<sup>178</sup> The accused do not enjoy a right to appeal in these tribunals.

Human rights authorities have periodically commented on this use of the ongoing state of emergency to derogate from human rights. For example, in November 2002, the Human Rights Committee declared itself “disturbed by the fact that the state of emergency proclaimed by Egypt in 1981 is still in effect, meaning that the State party has been in a semi-permanent state of emergency ever since.”<sup>179</sup> It recommended lifting the emergency but lacked the authority to do more.<sup>180</sup> Similarly, many Human Rights Council member states have expressed concern about the ongoing state of emergency and urged Egypt to lift its state of emergency during Universal Periodic Reviews, but (as is typical of the UPR process) they have not openly condemned Egypt’s abuses.<sup>181</sup>

Just before election to the UN Human Rights Council in May 2007, Egypt pledged to lift the state of emergency upon “adoption of new anti-terrorism legislation.”<sup>182</sup> Yet, on May 26, 2008, the majority in Parliament again extended the state of emergency.<sup>183</sup> It was continually extended every three years between 1981 and 2012, and was partially lifted in January 2012.<sup>184</sup> President Mohamed Morsi introduced a new emergency

176. See Suzanne Trimel, *As State of Emergency is Lifted, Egypt Must Make ‘Clean Break’ from Abusive Past and Return to Rule of Law*, AMNESTY INT’L (June 1, 2012), <https://www.amnestyusa.org/press-releases/as-state-of-emergency-is-lifted-egypt-must-make-clean-break-from-abusive-past-and-return-to-rule-of-law/>.

177. See Law No. 162 of 1958 (Law on the State of Emergency), *al-Jarīdah al-Rasmīyah*, 27 September 1958, art. 3, 4, 6 (Egypt).

178. See *id.* art. 8, 12.

179. Hum. Rts. Comm., Concluding Observations of the Hum. Rts. Comm. on Its Seventy-Sixth Session, U.N. Doc CCPR/CO/76/EGY, para. 6 (Nov. 28, 2002).

180. *Id.* para. 7.

181. *E.g.*, Hum. Rts. Council, Rep. of the Working Grp. on the Universal Periodic Rev. on Its Fourteenth Session, UN Doc. A/HRC/14/17, paras. 50 (Spain), 59 (Can.), 63 (Mex.), 75 (Swed.), 89 (Jap.) (Mar. 26, 2010).

182. *Id.* para. 14.

183. *Egypt Extends ‘State of Emergency,’* AL JAZEERA (May 27, 2008), <https://www.aljazeera.com/news/2008/5/27/egypt-extends-state-of-emergency#:~:text=Egypt%20extends%20%E2%80%98state%20of%20emergency%E2%80%99%20Decision%20is%20being,%27Muslim%20Brotherhood%27%20%5BAFP%5D%2027%20May%202008%20%E2%80%98Rights%20violations%E2>

184. See *Egypt to Lift 25-Year-Old Emergency Laws*, DAILY NEWS EGYPT (Mar. 24, 2006), <https://dailynewsegypt.com/2006/03/24/egypt-to-lift-25-year-old-emergency-laws/>; Dashiell Bennett, *Morsi’s Emergency Law Makes Matters Worse in Egypt*, THE ATL. (Jan. 28, 2013),

law in January 2013, however, to suppress unrest.<sup>185</sup> After a military coup deposed Morsi, acting president Adly Mansour reimposed the state of emergency in August 2013 in response to destructive acts of sabotage and killing by supporters of deposed president Morsi, as well as killings by the security forces opposing these supporters.<sup>186</sup>

Between late 2013 and 2017, Egypt had its longest period without a nationwide state of emergency since 1967.<sup>187</sup> There was only one exceptional declaration during this period, in October 2014, in the northern Sinai after a terrorist attack killed thirty-three Egyptian police and military personnel. In April 2017, following bomb attacks on Coptic churches by Muslim terrorists that killed forty-five people in northern Egypt, the state of emergency was declared yet again, and has been continually renewed in three-month increments since that time.<sup>188</sup> Most recently, the emergency declaration has been used to violently suppress dissent and consolidate the power of the new president, Abdel Fattah al-Sisi.<sup>189</sup>

#### IV. CONCLUSIONS

Very few African states with relatively satisfactory human rights practices used declarations of emergency before the COVID-19 pandemic for any purpose. Ghana, Namibia, and post-Apartheid South Africa, for example, all have respectable human rights records,<sup>190</sup> and none issued a declaration of emergency to derogate from human rights before 2019. In stark contrast, those African states that have most declared states of emergency, such as Chad, Democratic Republic of Congo, Egypt, and

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<https://www.theatlantic.com/international/archive/2013/01/emergency-law-only-makes-matters-worse-egypt/319000/>.

185. Bennett, *supra* note 184.

186. Rana Muhammad Taha, *State of Emergency and Curfew Imposed*, DAILY NEWS EGYPT (Aug. 14, 2013), <https://dailynewsegypt.com/2013/08/14/state-of-emergency-and-curfew-imposed/>.

187. *Egypt Declares State of Emergency in Sinai After Checkpoint Bombing*, THE GUARDIAN (Oct. 24, 2014, 10:56 PM), <https://www.theguardian.com/world/2014/oct/25/egypt-declares-state-of-emergency-in-sinai-after-checkpoint-bombing>.

188. *Egypt Extends State of Emergency for Seventh Time Since Terror Attacks*, DAILY SABAH (Jan. 13, 2019, 12:00 AM), <https://www.dailysabah.com/mideast/2019/01/13/egypt-extends-state-of-emergency-for-seventh-time-since-terror-attacks>.

189. See HUM. RTS. WATCH, WORLD REPORT 2021: EVENTS OF 2020 207 (2021), <https://www.hrw.org/world-report/2021/country-chapters/egypt#>.

190. Freedom House rates these countries as “free” in the global scores (80 for Ghana, 79 for South Africa, 77 for Namibia). *Countries and Territories*, FREEDOM HOUSE (2021), <https://freedomhouse.org/countries/freedom-world/scores?sort=desc&order=Total%20Score%20and%20Status>.

Ethiopia, rank among the lowest on the Human Freedom Index.<sup>191</sup> 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.<sup>192</sup> 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.”<sup>193</sup> 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),<sup>194</sup> Tunisia (2015 to present)<sup>195</sup> and Zambia (1964 to 1991 and again in

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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 INT’L (Mar. 15, 2019), <https://www.amnesty.org/en/latest/news/2019/03/tunisia-repressive-state->

2017).<sup>196</sup> 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 been derogated no more than strictly necessary to address the emergency. Much more often, the declarations are unnecessary, disproportionate, or both.

As a procedural matter, compliance with the ICCPR Article 4 notification requirement in African practice has been disappointing as well. Even African states with good human rights records have rarely notified the United Nations of their declarations of emergency. However, when they do send notice to the United Nations, they almost never specify which human rights they intend to derogate and attempt to justify those derogations with reference to the relevant circumstances, as required by Article 4(3).

Obviously, those African states that have notified the UN Secretary-General of their intention to derogate specific human rights have not made a practice of explicitly declaring an intention to derogate from rights listed as nonderogable under Article 4. In practice, African states have frequently violated nonderogable rights during states of emergency, including the rights to life and personal security; the right to freedom from torture and other cruel, inhuman and degrading treatment; the right to protection from retroactive criminal laws; the rights to freedom of thought, conscience, and religion; and the right to freedom from discrimination.

As for derogable rights, even when a declaration of emergency was justified by the facts, African states have frequently violated Article 4(1) by suspending these rights in a manner not necessary to address the emergency. The case studies summarized in Part III.B exemplify this trend,

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of-emergency-bill-a-threat-to-human-rights/; Human Rights Committee, Human Rights Committee Asks Tunisia about State of Emergency and Torture, Urges Human Rights Protection in Counter-Terrorism, (Mar. 4, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25657&LangID=E>.

196. See Chiponde Mushingeh, *The Evolution of One-Party Rule in Zambia, 1964-1972*, 22 TRANSAFRICAN J. OF HIST. 100, 110 (1993); *State of Emergency Declared in Zambia*, INDEP. ONLINE (July 6, 2017), <https://www.iol.co.za/news/africa/state-of-emergency-declared-in-zambia-10159360>; Ernest Chanda, *How to Gut a Democracy in Two Years*, FOREIGN POL’Y (Aug. 3, 2017), <https://foreignpolicy.com/2017/08/03/how-to-gut-a-democracy-in-two-years-zambia-state-of-emergency-lungu/>; *Zambia Suspends Pro-Opposition TV News Channel*, EYEWITNESS NEWS (Mar. 9, 2019, 8:55 PM), <https://ewn.co.za/2019/03/04/zambia-suspends-pro-opposition-tv-news-channel>.

as do many declarations of emergency not mentioned there. For example, the government of Gabon declared a state of siege on May 25, 1990 after political rioters attacked government buildings and private business firms,<sup>197</sup> but it continued the declaration in effect for months after the riots dissipated, probably to facilitate undermining the integrity of the first multiparty election in September 1990.<sup>198</sup> Similarly, although the government of The Gambia justifiably declared a state of emergency in 1981 in response to an attempted *coup d'état* while the president was out of the country, it left the state of emergency, along with its derogations of the rights to freedom of movement, freedom from arbitrary detention, and a fair trial, in place for almost four years after the attempt was foiled.<sup>199</sup> Similar examples include the Republic of Congo in 1993,<sup>200</sup> Ivory Coast in 2000,<sup>201</sup> and Ethiopia from 2015 until 2018.<sup>202</sup>

In summarizing the lessons of African law and practice, it is important not to allow the general trend to prejudice the judgment of individual cases. Some have argued that derogations present a rational policy option in unpredictable situations,<sup>203</sup> and African states have sometimes used derogations moderately, in a manner entirely consistent with ICCPR Article 4. But any close analysis of the actual trends in Africa paints a discouraging portrait of Article 4. Precious few African constitutions are

197. *See Troops Sent into Gabon's Port Gentil to Calm Unrest*, ASSOCIATED PRESS NEWS (May 28, 1990), <https://apnews.com/article/ffd3ef6d6c1f036ad5cb55f1a378eb86>; *Protesters in Gabon Battle for an Oil Depot*, N.Y. TIMES, May 30, 1990, at A15; John Hatchard, *States of Siege/Emergency in Africa*, 37 J. AFR. L. 104, 106 (1993).

198. *Irate Voters in Gabon Attack Poll Aides and Ballot Boxes*, N.Y. TIMES, Sept. 17, 1990, at A8.

199. *See* ARNOLD HUGHES & DAVID PERFECT, *Electoral Politics, 1981-94*, in A POLITICAL HISTORY OF THE GAMBIA, 1816-1994, 221, 221 (2006); Hatchard, *supra* note 197, at 106; Tijan M. Sallah, *Economics and Politics in the Gambia*, 28 J. MODERN AFR. STUD. 621 (1990).

200. *Emergency Declared in Congo*, N.Y. TIMES, July 17, 1993, at A5; U.S. DEP'T OF STATE, *U.S. Department of State Country Report on Human Rights Practices 1993 - Congo*, REF WORLD (Jan. 30, 1994), <https://www.refworld.org/docid/3ae6aa4bc.html>.

201. *See* U.S. DEP'T OF STATE, *Cote D'Ivoire*, in 25 ANNUAL HUMAN RIGHTS REPORTS SUBMITTED TO CONGRESS 166 (2000), <https://heinonline.org/HOL/P?h=hein.intyb/huhelsnk0025&i=200&a=YXN1LmVkdQ>; *see also* HUM. RTS. WATCH, *CÔTE D'IVOIRE: THE NEW RACISM 7* (2001); *see also* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., 2001 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: COTE D'IVOIRE (Mar. 4, 2002), [https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/07/hrp01cote\\_divoire.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/07/hrp01cote_divoire.pdf); *see also* HUM. RTS. WATCH, *CÔTE D'IVOIRE: THE NEW RACISM 7* (2001).

202. *See, e.g., Ethiopia Rights Body: 'More than 600 Protest Deaths'*, BRIT. BROAD. CO. (Apr. 18, 2017), <https://www.bbc.com/news/world-africa-39619979>; Amnesty Int'l, *Human Rights in Africa, Review of 2019: Ethiopia*, AI Index AFR 01/1352/2020 (Apr. 8, 2020).

203. Laurence R. Helfer, Emilie M. Hafner-Burton & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673-707 (2011).

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 aim<sup>204</sup>—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.

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

## APPENDIX - CONSTITUTIONAL PROVISIONS ON STATES OF EMERGENCY

## ALGERIA, Constitution of Nov. 1, 2020

- Article 112 (state of emergency or state of siege)
- Article 113 (state of emergency or siege is defined by legislation)
- Article 114 (“state of exception”)
- Article 117 (suspends constitution during state of war and makes president dictator)

## ANGOLA, Constitution of Jan. 21, 2010

- Article 58 (limitation or suspension of human rights during state of emergency)

## BOTSWANA, Constitution of Sept. 30, 1966 (rev. Feb. 5, 2016)

- Article 16 (authorizes derogation of human rights)
- Article 17 (state of emergency)

## BOTSWANA, Constitution of Sept. 30, 1966 (rev. Feb. 5, 2016)

- Article 16 (human rights derogation)
- Article 17 (state of emergency declaration)

## BURKINA FASO, Constitution of June 11, 1991 (rev. Nov. 5, 2015)

- Article 58 (state of emergency or state of siege)
- Article 59 (state of emergency declaration by President)
- Article 101 (state of siege and state of urgency are defined by legislation)
- Article 106 (Parliament’s “plain right” in state of siege)

## CAMEROON, Constitution of June 2, 1972 (rev. April 14, 2008)

- Article 9 (state of emergency or state of siege declaration by President)
- Article 45 (ratified treaties override national laws)

## CAPE VERDE, Constitution of Sept. 14, 1981 (rev. May 3, 2010)

- Article 25 (suspension of human rights during state of emergency or martial law)
- Article 297 (non-derogable rights and statuses during state of emergency or martial law)



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 emergency of state of siege are defined by legislation)
- Art. 157 (state of emergency declaration by President; and state of emergency of state of siege are defined by legislation)

CÔTE D'IVOIRE, Constitution of Sept. 30, 1966 (rev. Feb. 5, 2016)

- Article 101 (state of emergency and state of siege are defined by legislation)

EGYPT, Constitution of Feb. 10, 1953 (rev. April 16, 2019)

- Article 92 (prohibition on suspension or limitation of human rights)
- Article 17 (state of emergency declaration by President)

EQUATORIAL GUINEA, Constitution of Nov. 17, 1991 (rev. Feb. 5, 2016)

- Article 43 (suspension of human rights during state of emergency)

ERITREA, Constitution of May 23, 1997

- Article 26 (suspension or limitation of human rights during state of emergency)

- 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)

NIGER, Constitution of Nov. 25, 2010 (rev. June 8, 2017)

- Article 67 (state of emergency declaration)
- Article 68 (state of emergency is defined by legislation)

NIGERIA, Constitution of May 29, 1999 (rev. March 3, 2011)

- Article 45 (limitations on suspending or restricting human rights and freedoms during state of emergency)
- Article 305 (state of emergency declaration or request thereof by President or Governor)

SENEGAL, Constitution of Jan. 7, 2001 (rev. March 20, 2016)

- Article 69 (state of emergency or state of siege; and state of emergency and state of siege are defined by legislation)
- Article 70 (during time of war, invasion, or attack, human rights must be governed by organic law)

SIERRA LEONE, Constitution of Jan. 10, 1991 (rev. Sep. 30, 2013)

- Article 29 (state of emergency and its declaration)

SOUTH AFRICA, Constitution of Dec. 4, 1996 (rev. Nov. 20, 2012)

- Article 37 (state of emergency; and non-derogable human rights during state of emergency)

SUDAN, Constitution of Aug. 4, 2019

- Article 48 (prohibition on derogation from rights and freedoms guaranteed in Bill)
- Article 210 (state of emergency declaration)
- Article 211 (non-derogable human rights and freedoms during state of emergency)
- Article 212 (state of emergency duration)

TANZANIA, Constitution of April 26, 1977 (rev. Sep. 30, 2005)

- Article 30 (limitations on human rights and freedoms)
- Article 31 (National Assembly limitations in enacting legislation during state of emergency)
- Article 32 (state of emergency declaration by President)

UGANDA, Constitution of Oct. 8, 1995 (rev. Dec. 20, 2017)

- Article 44 (non-derogable human rights and freedoms)
- Article 46 (laws and their effects during state of emergency)

- Article 110 (state of emergency declaration by President)

TUNISIA, Constitution of Jan. 26, 2014

- Article 49 (limitations on human rights and freedoms)
- Article 80 (state of emergency)

ZAMBIA, Constitution of Aug. 31, 1991 (rev. Jan. 5, 2016)

- Article 25 (limitations on human rights derogation)
- Article 30 (state of emergency declaration by President)
- Article 31 (state of emergency)

ZIMBABWE, Constitution of May 22, 2013 (rev. July 25, 2017)

- Article 86 (limitations on human rights)
- Article 87 (limitations or suspensions of human rights during state of emergency)
- Article 113 (state of emergency declaration)