



A Comparative Analysis of the Regional Human Rights Systems on the Derogation of Treaty Obligation in Times of Coronavirus Crises

Abebe BK*

University of Gondar School of Law, Ethiopia

***Corresponding author:** Brook Kebede Abebe, University of Gondar School of Law, Ethiopia,
Email: kebedebrook89@yahoo.com

Conceptual Paper

Volume 6 Issue 4

Received Date: October 19, 2021

Published Date: November 01, 2021

DOI: 10.23880/ijfsc-16000244

Abstract

Derogation of treaty obligation is one of the critical moments, which opens the door to possible abuses of human rights in times of crises like coronavirus. Under this paper, the writer by using the comparative methodology as an instrument of critique evaluates and scrutinizes the roles and reponses of major regional human rights systems to protect and promote human rights in times of coronavirus crises. Besides, the paper addresses the normative frameworks to the question of how the regional human rights systems allow the suspension of treaty obligations in times of crises like the pandemic coronavirus. Accordingly, the paper marks an attempt at a regime level of comparative analysis. However, among the regional systems, the African Charter on Human and Peoples' rights doesn't have a derogation clause. Therefore, the paper tries to draw inspiration from other regional human rights systems and construct a derogation clause under the African Charter. Accordingly, special emphasis is given to the African human rights system. In terms of scope, the paper is limited to the legislative framework and the institutional responses of the three regional human rights systems. To put it differently, the paper-based on qualitative comparative approach-evaluates the derogations of human rights treaty obligations in times of coronavirus crises under the regional human rights systems and highlights how the institutional organs have sprung into action.

Keywords: Coronavirus Crises; Derogations; State of Emergency; Regional Human Rights System; Human Rights

Introduction

International and regional human rights instruments often contain provisions that let states to temporarily suspend their obligations in a time of crisis like Coronavirus. They can invoke special powers that would normally be considered infringements of the basic human rights of individuals. Based on international human rights standards (International Covenant on Civil and Political Rights and other soft laws), exceptionally, sates may alter their treaty obligation and declare a state of emergency [1]. However, any alteration or derogation of human rights in times of crisis expected to follow the legal norms and procedures set by these instruments [1]. Recently, in response to the

pandemic coronavirus, many states have declared a state of emergency as a solution for mitigating the crises. However, under the guise of containing and mitigating the impact of the coronavirus, states are threatening the human rights norms and grounding principles of rule of law [2]. In this regard, as has been seen in different countries, there is clear potential for abuse of the situation and a detrimental impact on the human rights of individuals [2]. For instance, police and security officials are using disproportionate and unnecessary powers including unlawful mass arrest and detention, and citizens face increased surveillance. This is happening almost in all parts of the globe. As a result, human rights activists, scholars, and other lawyers are increasingly expressing fears for human rights values and the rule of law [2].

Currently, there are around five regional human rights mechanisms that can be varying significantly from a very advanced human rights protection system to an emerging one [3]. This paper doesn't cover all the five regional human rights mechanisms rather it focuses on the three of them namely, the European, the Inter American, and the African human rights arrangements. Therefore, it makes a comparative analysis based on three grounds. Firstly, it analyzes the normative recognition and content of derogation of treaty obligation in the three regional arrangements. Secondly, the paper evaluates the practices of the state regarding suspension/derogation of human rights obligations in times of coronavirus crises. The last analysis is on the responses of the three regional systems for the right balance between public health and human rights in times of coronavirus crises.

As noted above, the paper focuses on the issue of derogation of human rights obligations in times of crisis by comparing the regional human rights systems. It does so intending to identify and explain the convergences and divergences of human rights norms in the age of pandemic in different regions. The paper offers a distinct contribution to comparative regional human rights laws. Firstly, it goes beyond the binary form that is prevalent in comparative human rights law scholarship. Accordingly, it broadens the inquiry into a triangular analysis. Besides, the paper discusses the existing scholarship on regional human rights instruments in times of crises that have been largely descriptive in character. Besides, it focuses on the identification of formal textual similarities and differences concerning the possibility of derogation or suspension of treaty obligation in different regions.

This paper is consisting of four parts. The first part is dealing with the comparative analysis of the normative framework on *Jus ad Tumultum* under the three regional human rights systems. The second part is dealing with the practice of derogation/suspension of human rights during the Coronavirus crisis. The third part is covering the issues responses made by the regional human rights institutions in mitigating human rights abuses and violations in times of coronavirus crises. The last part includes conclusions.

The Normative Framework for Derogating Human Rights in Times of Crises under the Regional Human Rights Systems (*Jus Ad Tumultum*)

By anticipating the possibility of unprecedented circumstances like the coronavirus crises, the international and regional human rights instruments are contained derogation clauses [1]. In the coronavirus crises, the principal

purpose of derogation is 'to strike a balance between the sovereign right of a government to maintain public health and the protection of the rights of the individual from abuse by the state' [4]. The derogation clauses are found under International Covenant on Civil and Political Rights (hereinafter called ICCPR) Article 4, the European Convention on Human Rights (hereinafter called ECHR) Article 15, and the American Convention on Human Rights (hereinafter called ACHR) Article 27. Based on these human rights documents, state parties may take measures derogating from their obligations in times of public emergencies. However, these provisions are principally designed to leave an exceptional room for possible suspension of human rights to protect the rights of individuals in cases of serious emergency crises like coronavirus. Accordingly, state parties to these international instruments may not simply declare a state of emergency in times of crises like COVID-19. They are expected to follow strict conditions including both procedural and substantive protective measures against possible abuses [1].

As noted above, in the Inter-American Human Rights System, Article 27 of the ACHR regulates the "suspension of human rights". Unlike to the ECHR, the ACHR is saying *suspension*, not derogation, from human rights and fundamental freedoms [5]. It clearly defines the circumstances under which a state party might suspend human rights. In a time of war, public danger, or other emergencies that threatens the independence or security of a State Party. So a state may take measures to the extent and for the period strictly required by the exigencies of the situation. However, such measures shall not contradict with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin [6].

Similar to ICCPR and ACHR, Article 15 the ECHR allows states to take temporary measures 'in time of war or other public emergency threatening the life of the nation'. However, the measures should only 'to the extent strictly required by the exigencies of the situation.' This article also contains non-derogable lists of human rights [7]. It should be clear therefore that Article 15 ECHR does not create a Schmittian state of exception. An Article 15 emergency instead constitutes a different regime of legality, rather than a zone of lawlessness.

In ECHR, the two terminologies which are necessitated for the declaration of a state of emergency are 'war' and 'other public emergency threatening the life of the nation'. However, under ACHR particularly in Article 27, "public danger" and "emergency that threatens the independence or security of a State Party" are the terminologies that may be used to suspend human rights [6]. Compared to the ECHR, the existence of these broad terminologies allows state parties more discretion and raises the likelihood of a potentially

abusive invocation. In contrast to the ECHR counterpart, the ACHR provision is more specific in the temporal application and includes explicit anti-discrimination prohibitions. Most importantly, Article 27 of ACHR, paragraph 2 containing extensive lists of non-derogable human rights which state parties cannot suspend under any circumstances including in times of coronavirus [5]. However, unlike the ECHR, the ACHR failed to include judicial guarantees from suspension. In this regard, the Inter AMERICAN Court of Human Rights (hereinafter called IACtHR) in its advisory opinion stated on the need for “the active involvement of an independent and impartial judicial body to pass on the lawfulness of measures adopted in a state of emergency” [5].

In contrast to the ECHR and the ACHR, the ACHPR neither speaks of *suspension*, nor derogation. This is because the African Charter on Human and Peoples’ Rights (hereinafter called ACHPR) does not contain a derogation/suspension clause. However, the fact on the ground shows that many African state constitutions contain a derogation clause and they have declared a state of emergencies to contain and mitigate the impact of COVID-19 [8]. This had brought a lot of controversies among writers [9]. For example, Murraray argues that those clawback clauses of the African Charter can serve as derogation clauses when extraordinary exigencies (like coronavirus) occur [10]. But Ouguergouz strongly resists the idea of Murraray and argues that the purposes of limitation and derogation clauses are quite different and we cannot derogate human rights through claw back clauses [11]. He further argues that if an unprecedented situation (like coronavirus) occurs, the state shall better use the grounds of termination of treaties specified under the Vienna Convention Law of Treaties (VCLT) [10]. Some scholars are arguing that all rights recognized under the Charter are non-derogable [12]. Therefore, state parties to the ACHPR cannot declare a state of emergency under the guise of to prevent, control, and reduce the effects of COVID-19 transmission. In support of the last argument, it has been established by the African Commission on Human and Peoples’ Rights (hereinafter called the African Commission) in different occasions stated that a member State of the ACHPR cannot derogate human rights in case of any kinds of emergency (including coronavirus crises). For instance, in a Communication brought against Eritrea (Article 19 v Eritrea), the African Commission clearly shows that states at any time cannot invoke any situations to derogate its obligation under the African Charter [5]. Therefore, even though several African states provide justifications for the temporary suspension of human rights by citing the situation of the pandemic, based on the Commission’s position that reflected in Article 19 v Eritrea case, the State of Emergency declared by African state is contrary to the obligation provided under Article 1 of the African Charter.

In the case against the Gambia, the Commission clearly stated that derogation clauses included in the Constitution of Gambia are tantamount to the violation of the obligation of states which provided in the first two provisions of the African charter [13]. From this position of the Commission, it is possible to argue that even the mere stipulation of the derogation clause under the state constitution and the promulgation of SoE to prevent, control and reduce the effects of COVID-19 transmission are clear violations of the African Charter [14-20]. Frans Viljoen also argued that the African Commission made all human and people rights incorporated in the African Charter as regional *jus cogens* [12].

Therefore, based on the above analyses, any SoE which is declared to prevent, control and reduce the effects of COVID-19 transmission in Africa is incompatible with the obligation of state-provided under Article 1 of the African Charter [21].

The paper argues that the pandemic brings into an unambiguous solution for an age-old controversy concerning the absence of derogations clause and the utility of claw-back clauses under the ACHPR. Therefore, even though the African Commission consistently followed the above approach, COVID19 is a real situation that mandatorily requires the suspension of rights recognized under the Charter [8].

Moreover, the paper argues for the possibility of derogation under the African Charter and it identifies the following interrelated reasons. Firstly, though the Charter is silent, derogation is neither discussed nor rejected in the course of drafting and adoption of the African Charter. Therefore, the absence of a derogation clause from the charter is neither inclusionary nor exclusionary [22]. Consequently, based on the Charter, there is no explicit rejection for the African States to derogate the provisions of the Africa Charter in times of coronavirus crises. Secondly, even if Kéba Mbaye in the drafting process of the Charter stated that the charter will reflect African values [23], the Charter failed to reflect a common African national constitutional standard [9]. Since the African States Constitution unlike the African Charter contains derogation clauses. Thus the position of the Commission doesn’t reflect the real African values and practices of the African states. Accordingly, the absence of a derogation clause is contrasting with the fact that most Africans state constitutions and the practice of African states.

Thirdly, African states are not the only party to the African Charter but also ICCPR. Though the African Charter is silent, ICCPR provides a standard for derogation. Therefore, these documents provide different legal commitments for states and it creates a paradox [9]. In this regard, Africa doesn’t have a law that will govern such kinds of conflicts. Thus we

are supposed to consult VCLT. Under Article 30(4) of VCLT there is a provision [24], which determines the applicable law among international treaties regarding the same subject matter. In the case at hand, if we follow *the lex posterior derogate priori principle* of interpretation at all times, it will be pointless. This is because these two treaties are human rights treaties thus such principles may jeopardize favorable protection. Hence, it is better to refer to other parts of VCLT which contain favorable protection of human rights law. Concerning this issue, Ouguerouz argued that if there is a real threat to the life of the state, a fundamental change of circumstances would be best applicable for African states to derogate the Charter's obligations [25]. Hart also argued that the doctrine of necessity would best fit to describe the derogation concept [26]. There are still arguments for the possibility of derogation on the ground of *force majeure* [27].

Lastly, as to the analysis made by Frenesh Belay, the African Commission guideline and the dialogue on state reporting there is a question to a state whether there is a provision in its constitution for derogation of rights and about the circumstances [28]. Even though it is arguable, we can say that the Commissioners accept the possibility of derogation under the ACHPR in times of emergencies [28]. Therefore, this piece of writing strongly argues against the position of the Commission and for the possibility of derogation under the African human rights system at least for the purpose to prevent, control and reduce the effects of COVID-19 transmission. Accordingly, through articles 60 and 61 of the African Charter, the paper recommends the African Commission to take inspiration from international and other regional human rights systems.

The Practice of Temporary Suspension of Human Rights during the Coronavirus Crisis in Different Regions

In different parts of the globe, many states have suspended human rights in response to mitigate and contain the spread and impacts of COVID-19. For instance, under the Inter American Human Rights System, Argentina, Bolivia, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Honduras, Panama, Peru, and El Salvador have declared a state of emergencies. Stimulatingly, while Ecuador, Panama, Chile, and Peru based their suspension on a general state of emergency [29]. In Europe, six members of the European Convention on Human Rights states including Armenia, Estonia, Georgia, Latvia, Moldova, and Romania have declared a state of emergency based on Article 15 of ECHR in response to the pandemic [30]. In contrast to the Council of Europe, more than 10 American states have communicated and several states have submitted multiple notifications regarding the suspension of human rights to the Organization of American States. Even though the African

Charter failed to cover the issue of suspension of human rights in times of crises like coronavirus, several African states are declaring a state of emergency including Botswana, Ethiopia, Liberia, Sierra Leone, Senegal, and so on.

Almost all derogation clauses under the international and regional human rights instruments allow a state to declare a state of emergency "in times of war or other public emergencies like coronavirus which are threatening the life of the nation".

The current practice of the declaration of a state of emergency made by some European states indicated that states are following the procedure set by the ECHR. For instance, Spain [31] and Italy [32] have not used the ECHR system but have declared states of emergency under their national constitution. In this regard, the Italian Constitution, for instance, only allows an emergency to be declared by the government, subject to review by its legislature. On the other hand, the pandemic also introduces a terminology that is using for the measures taken by the states including emergency power to impose "lockdowns". For instance, in the UK there is some confusion about whether a country should declare a state of emergency under the ECHR or whether it can simply go it alone [33]. This is because the UK has introduced a political jargon called "emergency powers" but has not declared a state of emergency [33]. In this regard, emergency powers are not advisable and highly criticized. This is because they were tools in ending the Roman Republic and in the rise of Adolf Hitler, so we should always be wary of them. Declaring a state of emergency has the useful effect of defining the boundaries of exceptional powers so that checks are in place [33].

Covid-19 Responses by the Regional Human Rights Systems

In the age of the pandemic, the strength of the three regional human rights systems becomes most visible. Similar to the ECtHR, the African Commission [34] and the IACtHR have been suspending all public hearings and the ordinary sessions, as well as the calculation of all the time limits that were pending before them.

On March 24, 2020 the African Commission in its press release indicated the possible danger poses to the health, safety, and lives of the people of the continent. While this statement might sound rather general, the Commission also recalls relevant provisions of the African Charter particularly Article 4 on the right to life, Article 9 on the right to access information and Article 16 on the right to health [35]. Besides, the Commission also raised several concerns on human rights protection in times of Covid19 [36-39]. The European Commission is also coordinating

a common European response to the coronavirus outbreak [40]. Besides, the European Court of Human Rights has announced a series of exceptional measures in response to the coronavirus outbreak [41]. It will also consider urgent requests for interim measures when there is an imminent risk of irreversible harm [41].

Similarly, on April 14, 2020 the IACtHR issued a statement regarding the challenges posed by Covid-19, in which it urges member states to respect human rights standards and further international obligations [42]. It emphasized in particular that all restrictions must be “temporarily limited, legal, and adjusted to well-defined aims based on scientific criteria, reasonable, necessary and proportionate and following other requirements developed in Inter-American human rights law [42]. Besides, it reaffirms standards which can provide useful for the examination of cases arising out of the crisis. On March 28, the IACHR created the Rapid and Integrated Response Coordination Unit for COVID-19 Pandemic Crisis Management (SACROI COVID-19) [42] to strengthen institutional capacities and develop a strategy to monitor and follow up on how the crisis affects the human rights of vulnerable people and groups [43]. The Inter-American Commission on Human Rights (IACHR) further sets out standards for measures adopted by states that involve restrictions of rights or guarantees. Moreover, on April 10, the IACHR adopted Resolution No. 01/20 on the Pandemic and Human Rights in the Americas [44].

Conclusion

Recently, as the coronavirus crisis has been increased, many countries of the globe had *unilaterally* declared a state of emergency to contain and mitigate the impact of the pandemic. In this regard, the paper by making a comparative analysis marked an attempt at a regime level comparative analysis of the role and responses of the regional human rights systems on the protection of human rights in the crises of coronavirus. As discussed above, the European and the Inter American human rights systems consisting of legal frameworks that may be used in times of coronavirus crises. But the documents have a difference in terms of clarity of terminologies. In contrast to the ECHR and the ACHR, the ACHPR neither speaks of *suspension* nor *derogation*. This is because the African Charter on Human and Peoples’ Rights (hereinafter called ACHPR) does not contain a derogation clause. However, this paper identified the possibilities for African states to suspend human rights at least to balance the public health issue and human rights.

References

1. <http://hei.unige.ch/~clapham/hrdoc/docs/siracusa.html>

2. Devon Haynie (2020) Global Leaders Are Using Coronavirus to Trample on Human Rights, Group Warns. USNews
3. Benedek W, Jacqué JP, Kedzia Z, Gómez F, Kicker R, et al. (2010) The Role Of Regional Human Rights Mechanisms. European Parliament.
4. (2020) Covid-19 and Human Rights: we are all in this together. United Nations.
5. Buergenthal T, Nieto Navia R, Piza E RE, Nikken P, Fix-Zamudio H (1987) Inter-American court of human rights. Inter-American commission on human rights.
6. (2020) IACHR Implements Rapid and Integrated Response Coordination Unit for COVID-19 Pandemic Crisis Management. Organization of American states.
7. ECHR. Article: 15(2).
8. C Heyns (2002) Civil and political rights in the African Charter. In: Evans M, Murray R (Eds.), The African Charter on Human and Peoples’ Rights the system in practice, African Commission on Human and Peoples’ Rights.
9. Laurent Sermet (2007) ‘The absence of a derogation clause from the African Charter on Human and Peoples’ Rights: A critical discussion. African Human Rights Law Journal 7(1): 142-161.
10. Murray R (2000) The African Commission on Human and Peoples’ Rights and International Law. Vienna Convention on the Law of Treaties.
11. Ouguerouz F (2003) The African Charter on Human and Peoples’ Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa. M Nijhoff, pp: 434.
12. Viljoen F (2007) International Human Rights Law in Africa. Oxford Scholarship Online, pp: 252.
13. Jawara v The Gambia (2000) AHRLR 107 (ACHPR 2000).
14. (2000) Nationale des Droits de l’Homme et des Libertés Vs Chad; Malawi African Association and Others Vs Mauritania. International Network for Economic, Social & Cultural Rights.
15. (2009) Sudan Human Rights Organization and Another Vs Sudan. Global Health & Human Rights.
16. Liesbeth Zegveld and Mussie Ephrem Vs Eritrea.
17. Droits de l’Homme et des Libertés Vs Chad.
18. (1998) Media Rights Agenda and Others v. Nigeria, African Commission on Human and Peoples’ Rights, Comm. Nos. 105/93, 128/94, 130/94 and 152/96.

19. (1999) Amnesty International and Others Vs Sudan. Global Health & Human Rights Database.
20. (1998) Constitutional Rights Project and Civil Liberties Organisation v. Nigeria. Global Freedom of Expression.
21. Article 1 of the charter stated that state party to the Charter must take all necessary measures including legislation, which is compatible with the charter.
22. (2016) An Informal communication made with Takele Seboka Bulto (Ph.D. and Assoc. Professor), On December 2016, Addis Ababa University, School of Law
23. Nathaniel Rubner (2008) An historical investigation of the origins of the African Charter on Human and Peoples' Rights. Cambridge University.
24. Application of successive treaties relating to the same subject matter. Vienna Convention on the Law of Treaties.
25. Fundamental change of circumstances. Vienna Convention on the Law of Treaties.
26. Hartman JF (1981) Derogation from Human Rights Treaties in Public Emergencies-A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations. Harv Int'l LJ.
27. (1995) The eight annual reports of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (Report of the Special Rapporteur).
28. Tessema FB (2005) A Critical Analysis Of Non-Derogable Rights In The State Of Emergency Under The African System: The Case Of Ethiopia And Mozambique. University of Pretoria.
29. Among others Argentina, Bolivia, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Honduras, Panama, Peru, and El Salvador. Interestingly, while Ecuador, Panama, Chile, and Peru based their suspension on a general state of emergency, Guatemala, Bolivia, Honduras, and Argentina declared a public health emergency. Colombia even announced a state of economic, social, and ecological emergency. Those more specific framings of emergency avoid the connection to war metaphors and link to the standards of the WHO.
30. https://www.coe.int/en/web/conventions/fulllist//conventions/treaty/005/declarations?p_auth=oC00wpDO
31. Mark Armstrong (2020) COVID-19: Spain extends state of emergency until 11 April. Euronews.
32. (2020) Italy declares state of emergency over coronavirus. France24.
33. (2021) Coronavirus Act 2020: Government Bill. Originated in the House of Commons, Session 2019-21. UK Parliament.
34. (2020) Press Statement of the African Commission on Human & Peoples' Rights on the postponement of the 66th Ordinary Session in light of the global Coronavirus (COVID-19) pandemic. African Commission on Human and Peoples' Rights.
35. (2020) Press Statement on human rights based effective response to the novel COVID-19 virus in Africa. African Commission on Human and Peoples' Rights.
36. (2020) Press Statement of the African Commission on Human and Peoples' Rights on the human rights of mine workers and mining affected communities during the COVID-19 pandemic in South Africa. African Commission on Human and Peoples' Rights.
37. (2020) Press release on the holding of general elections in Burundi in the context of the prevalence of the Coronavirus Pandemic. African Commission on Human and Peoples' Rights.
38. (2020) Africa: We must act now to avoid a catastrophe, say rights chiefs. African Commission on Human and Peoples' Rights.
39. (2020) Press release on the violence resulting from the publication of the final results of the parliamentary elections in Mali. African Commission on Human and Peoples' Rights.
40. Overview of the Commission's response. European Commission.
41. (2020) Coronavirus: Exceptional measures at the European Court of Human Rights. ECHR.
42. (2020) Covid-19 and human rights: problems and challenges must be addressed with a human rights perspective and respecting international obligations. Corte IDH.
43. Stefanelli JN (2020) OAS Publishes Guide on Safeguarding Rights of Vulnerable Groups in Context of COVID-19 Response. The American Society of International Law.
44. (2020) Pandemia y Derechos Humanos en las Américas. Comisión Interamericana de Derechos Humanos.

