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Abbreviations and Acronyms

AC	African Commission
ACHPR	African Charter on Human and Peoples' Rights
ATP	Anti-Terrorism Proclamation
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLR	African Human Rights Law Reports
AU	African Union
CRC	Child Rights Convention
DPFA	The Declaration of Principles on Freedom of Expression in Africa
ECHR	European Convention on Human Rights
EPRDF	Ethiopian People's Revolutionary Democratic Front
ESAT	Ethiopian Satellite Television
FOE	Freedom of Expression
HOPR	Houses of Peoples' Representatives
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice

OHCHR	Office of the Higher Commissioner for Human Rights
OMN	Oromia Media Network
TPLF	Tigray People’s Liberation Front
TGE	Transitional Government of Ethiopia
UDHR	UDHR Universal Declaration of Human Rights
UK	United Kingdom
US	United States
VCLT	Vienna Convention on the Law of Treaties

Chapter 1: Introduction and Research Design

1.1 Introduction

Ethiopia is the second populous state and the oldest independent country in the African continent.¹ Although the country continuously maintained one of the fastest economic developments in the last decade², thousands of anti-government protestors showed their grievance by conducting continues demonstrations in the last couple of years and the country becomes politically unstable in an unprecedented manner.

As the result of the mass protests and political unrest, the Ethiopian government declared a state of emergencies twice, in the last two years, and authorizes the military to enforce security nationwide.³ During these state of emergencies, ‘the government officially restricted access to the internet and some media outlets and banned protests.’⁴ Besides this, different human rights organization reported around 11,607 individuals were detained in prisons, some of them as the result of their posts on social media, and more than 500 people were killed by the government forces while demonstrating.⁵

Ethiopia is party to different international and regional human rights treaties including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Right (ACHPR). According to Article 9(4) of the

¹ see *Ethiopia Country Profile*, BBC News, 3 April 2018, Available from <https://www.bbc.com/news/world-africa-13349398>, (14 May 2018).

² The World Bank, *The world Bank in Ethiopia: Overview*, (website), <http://www.worldbank.org/en/country/ethiopia/overview> , (accessed 07 July 2018)

³ State of Emergency Proclamation for the Maintenance of Public Peace and Security Council of Ministers Proclamation No.1/2016, 8 October 2016.

⁴ A. Allo, 'Protests, Terrorism, and Development: on Ethiopia's State of Emergency', *Yale Human Rights and Development Journal*, Vol. 19, no. 1, 2017, P.135, Available from <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1143&context=yhrdlj>, (accessed 12 July 2018)

⁵ see *Ethiopia State of Emergency Arrests top 11000*, AL JAZEERA (13 November 2016) <https://www.aljazeera.com/news/2016/11/ethiopia-state-emergency-arrests-top-11000-161112191919319.html>, (accessed 24 February 2018).

Constitution of Federal Democratic Republic of Ethiopia (FDRE Constitution), these international human rights documents are considered as an integral part of the law of the land.⁶ The Constitution made it clear that all the three branches of the government at all level have the responsibility and duty to respect and enforce these rights.⁷ Moreover, the Constitution states that the fundamental rights and freedoms guaranteed by the Constitution shall be interpreted in conformity to the Universal Declaration of Human Rights (UDHR), International Covenants on Human Rights and International instruments adopted by Ethiopia.⁸ These all international human rights documents set directly and indirectly different principles and standards regarding the administration of a state of emergency situation.

Even if states are permitted to derogate from some of their human rights obligations, the derogation has to be always for legitimate aims and needs to be done according to international human rights principles and standards which I will cover in the next chapter. Accordingly, the thesis firstly discusses the concept of a state of emergency under international and regional laws and the Constitution of Ethiopia. Secondly, it will examine the concept and scope of the right to freedom of opinion and expression. Lastly, it will examine the administration of a state of emergency in Ethiopia, from international human rights standards perspective, and its impact on the enjoyment of the right to freedom of opinion and expression.

1.2 The Significance of the Thesis

So far, there is a lack of academic literature in Ethiopia regarding a state of emergency and its effect on the enjoyment of human rights in general and the right to freedom of opinion and expression in particular. First and for most, the author believes that this study will serve as a base for further researches in the area. It will also have significance in creating awareness regarding the right to freedom of opinion and

⁶ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Proclamation No. 1/1995, Addis Ababa, Article 9(4).

⁷ FDRE Constitution, Article 13(1)

⁸ *ibid.*, Article 13(2)

expression and what a state of emergency is in a nutshell. Besides this, the study is explanatory in nature and it will have the following benefits in particular:

- It discusses the concept of the right to freedom of opinion and expression with the aim to raise the awareness of readers and to contribute to the promotion of the right to freedom of opinion and expression.
- It evaluates the emergency situation in Ethiopia and its adequacy for declaring a state of emergency.
- It empowers journalists, judges, prosecutors and police officers and enhances their daily activities when dealing with the right to freedom of opinion and expression cases in both a normal and/or emergency situations.

1.3 Research Questions

This thesis will focus on examining the protection of the right to freedom of opinion and expression during the state of emergencies in Ethiopia with the main research question: *“is the derogation from the right to freedom of expression in conformity with international human rights standards?”*

For the purpose of laying fertile ground to analysing the main research question, the author addresses sub-questions: *what is the purpose of a state of emergency* and *what is the normative scope of the right to freedom of opinion and expression*, with the aim to clarify the concepts.

1.4 Research Methodology

An interdisciplinary human rights-based approach is used to examine the protection of the right to freedom of opinion and expression during the state of emergencies in Ethiopia.

Chapter 2 and 3 of the thesis are consists of literature reviews that address the concept, historical development, and scope of a state of emergency and the right to freedom of opinion and expression. These two chapters of the thesis are written based on different methods of qualitative research techniques including legal analysis, and text analysis.

Chapter 4 of the thesis analyses the political situation of Ethiopia that led to the declaration of a state of emergencies. Additionally, it also deals with the protection of the right to freedom of expression during the emergency situation. The chapter is written based on a qualitative method through the consultation of different reports, academic articles, national and international laws.

1.5 Limitation of the Thesis

The Primary limitation of this thesis is, it deals with a number of important human rights concepts however some of them will be addressed in a restricted manner as the result of the limited scope of the thesis. The other limitation of the thesis is related to a methodological problem: the research is made only based on secondary data. The other limitation is related to lack of jurisprudence regarding a state of emergency and the right to freedom of expression in Ethiopia. Additionally, inaccessibility of government data and reports regarding the administration of the state of emergency is another major limitation of the thesis. Nevertheless, an effort has been made to tackle the research questions based on the available literature and jurisprudence.

1.6 The scope of the Thesis

The thesis covers the concept of a state of emergency and the right to freedom of opinion and expression in the nutshell as a base to analyse the situation in Ethiopia. In particular, the thesis examines the causes of the recent two emergencies situations in Ethiopia and their effects on the enjoyment of the right to freedom of opinion and expression in the country. Although the research touches other relevant human rights topics, it will not discuss them in detail because of the limited scope of the thesis.

1.7 Overview of Chapters

The thesis is organised into four chapters. The first chapter is an introductory chapter that covers the background and the relevance of the research. The second chapter of the thesis is dedicated to expounding the historical evolution and conceptual development

of state of emergency. In this chapter, the author will examine relevant academic literature and human rights documents with the aim to unfold the purpose of a state of emergency. In the third chapter, the right to freedom of opinion and expression both under international law and the FDRE Constitution will be studied. This chapter of the thesis also covers the prerequisite for limiting the right to freedom of opinion and expression with the aim to facilitate for the discussion in the last chapter of the thesis. The last chapter of the thesis will analyse the effect of the state of emergency on the enjoyment of the right to freedom of opinion and expression in Ethiopia. In general, this thesis is expected to evaluate the administration of a state of emergency in Ethiopia and its conformity with international human rights standards with special emphasis on the right to freedom of opinion and expression.

Chapter 2: The Concept of a State of Emergency

During certain exceptional situations, states are allowed to suspend or derogate from some of their human rights commitments. This chapter briefly studies the historical background and the conceptual development of this exceptional situation-state of emergency. Moreover, the chapter will examine the Constitutional provision for declaration of a state of emergency under the Federal Democratic Republic of Ethiopia Constitution.

2.1 Introduction

Except for very few rights,⁹ human rights are not absolute rights; they can be derogated or limited as far as the derogation or limitation is in line with the international principles and standards ratified by the nation-state concerned. However, both limitation and derogation principles have to be applied for legitimate aims. Out of these legitimate grounds, the state of emergency is the one.

Like a natural person, the life of states at some point can face a serious threat to its existence. These threats can be because of different natural factors like drought, earthquake, tornado or as a result of manmade factors like war, terrorism or other forms of serious societal disorders.¹⁰ In such kind of situations, the government may fail or face difficulty to control the situation under the normal power structure and may consider it necessary to apply extra power and limit the enjoyment of some of the rights of citizens with the intention to restore peace and order in the country.¹¹ That is why Nowak compared the principle of the state of emergency with that of an individual's right to

⁹ M., Nowak, 'Introduction to human rights theory', in M. Nowak, K.M. Januszewski, and T. Hofstätter, *All Human Rights For All*, Vienna, manual on human rights, 2012.

¹⁰ M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl am Rhein, Germany; Arlington, VA: N.P. Engel Publishers, 2005, p.84.

¹¹ United Nations, Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, *Professional Training Series No.9 Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, New York and Geneva, 2003, P. 813, available from: <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>, (accessed 14 July 2017), (hereinafter: *Professional Training Series No.9*).

self-defence under criminal law.¹² In both cases, the need to use the exceptional act arises out of the necessity to survive.

Different countries use different terminologies to refer to the special legal order introduced in crisis situations including “state of exception”, “state of emergency”, “state of alarm”, “state of siege”, “martial law” and so forth.¹³ The common challenge in this regard is that gravest and systematic human rights violations happen in the time of a state of emergency when states use extraordinary power to solve the threats to public order.¹⁴

There are two broad views regarding the legality of a state of emergency.¹⁵ The first school of thought is called the Sovereignty approach. According to this school of thought, there should be no legal accountability upon the state during the state of emergency and it considers emergency as extrajudicial. The main advocate for this approach is Carl Schmitt and according to him, sovereignty includes both the capacity to decide what an exception is and to make the decisions appropriate to that exception.¹⁶ Above all, for Schmitt ‘any analysis of a state of emergency must begin not from the norm but from the exception’¹⁷ and ‘a formal legal order exists only when a normal situation exists’.¹⁸ Giorgio Agamben, in his book titled state of exception, shares Schmitt’s view that ‘state

¹² Nowak, 2005, p.84.

¹³ *ibid.*

¹⁴ E. Criddle, and E. Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' *human rights quarterly*, Vol. 34, 2012, P.40, Available from <http://ssrn.com/abstract=1591970>.

¹⁵ Scott P. Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' *Michigan Journal of International Law*, vol. 34, issue.3, 2013, p. 500, available from: : <http://repository.law.umich.edu/mjil>, (accessed 13 July 2018).

¹⁶ B. Gulli, 'The Sovereign Exception: Notes on Schmitt’s Word that Sovereign is he Who Decides on the Exception' *Glossator*, vol. 1, 2009, p.23, Available from glossator.org (accessed 11 April 2017).

¹⁷ C. SCHMITT, *Political Theology – Four Chapters on the Concept of Sovereignty* 5 (George Schwab trans., 2005) (1985), cited in A. Allo, 'Protests, Terrorism, and Development: On Ethiopia’s State of Emergency' *Yale Human Rights and Development L.J.*, vol. XIX, 2018, p. 141.

¹⁸ *ibid.*

of exception is ‘*a fictio iuris par excellence*, which claims to maintain the law in its very suspension as force-of-law” without endorsing his thesis.’¹⁹

Although the sovereignty approach to a state of emergency was somehow supported by few scholars in the post-September 11 legal debates, the majority of scholars of our time reject Schmitt Sovereignty thesis.²⁰ The second school of thought, the Rule of Law approach, is dominant in international human rights law. As its name implies, the Rule of Law approach strongly opposes the Sovereignty approach. The heart of this approach is that even in the case of a state of emergency, rule of law should prevail. In this case, either the Constitution or any other form of legislation should govern the activity of the government even in the case of a state of emergency.

2.2 Historical Background

The practice of using exceptional power (in its general form) by governments or different rulers’ is such an old practice in the history of human being and rulers have been using it in various forms in order to deal with their internal and external threat.²¹ According to Anna McCarthy, the tradition of giving exceptional power to certain entities during emergency regime existed even during the ancient Greek cities by electing *Aesymnetes*, or *Aesymneteia* during a crisis situation.²² Although there is no sufficient literature about the roles of *Aesymnetes*, the finding of Anna McCarthy shows that *Aesymnetes* were used as a last resort to control dangerous situations at the moment.²³ [...the task of *Aesymnetes*] was to restore or maintain the civil peace and he

¹⁹ S. Sheeran, p. 501

²⁰ *ibid.*

²¹ A. McCarthy, *The International Law of Human Rights and State of Exception: With Special Reference to the Travaux Preparatoires and Case-Law of The International Monitoring Organs*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1998, p. 9.

²² *ibid.*, P.9

²³ *ibid.*, P.11

would not usually abdicate his power until peace and order had been properly restored'.²⁴

Similar to the ancient Greek, ancient Roman Empires had also the practice of assigning a person entitled 'dictator', empowered with exceptional power, in order to deal with the situation of emergency both as the result of internal or external causes.²⁵ However, the practice of appointing the dictator was a kind of the last remedy. They didn't grant extraordinary power in order to deal with an ordinary crisis situation. The dictator could only be appointed in serious situations and namely during important wars and civil upheaval.²⁶ The relevant point the readers must not forget in this regard is that the ancient Rome was a Republic and the assignment of the dictator was according to the rule of law. Although the dictator is an absolute ruler, his term was also limited by the law and under any circumstance, he 'could not in any way alter the Rome Constitution'.²⁷ In connection to this, it is relevant to consider that the term dictator was not used in the negative sense as we used it today. However, throughout the time the meaning, nature, and mandate of the dictator changed and finally led to the downfall of the dictatorship.²⁸

²⁴ REINACH, De l'état de siege, p. 12., cited in A. McCarthy, p.10, :For an example of an aesymnétés, see the description by Aristotle as to the election of Pittacus by the people of Mytelene "for purpose of repelling the exiles who tried to come back led by Antimenides and the poet Alcacus" ARISTOTLE, The Politics, p. 136.

²⁵ Jaime Oraa, Human Rights In States Of Emergency In International Law 7 (1992); Nigel S. Rodley, Book Review, 42 Int'l & Comp. L.Q. 732, 732-33 (1993) (Reviewing Oraa, Supra), cited in S. Sheeran, p. 496.

²⁶ CICERO, traite des lois, texte etabli et traduit par Georges de Plinval, Paris, Societe deedition "Les Belles Lettres", 1959 (Collection des Universites de France), Livre troisieme, partie 9, P. 85; MOMMSEN, "Le droit public romain", P.179; ROSSITER, Constitutional Dictatorship, P. 21 and WILLEMS, P., Droit public romain ou Les institutions politiques de Rome depuis l'origine de la ville jusqu'à Justinien, Paris, Ernest Thorin, editeur, 1884, 5e ed., P: 266, cited in A. McCarthy, P.13

²⁷ C.L. ROSSITER, *Constitutional Dictatorship Crisis Government in the Modern Democracies*, Princeton University Press, 1948, p. 5(hereinafter referred to as ROSSITER, Constitutional Dictatorship). cited in A. McCarthy, P.14

²⁸ A. McCarthy, P.16, in order to learn more about "Dictator" please read the Article by William Smith (D.C.L., LL.D.) accessible at:
http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Dictator.html

In addition to ancient Greek and Rome, in medieval Europe, we find concepts called martial law and state of siege in the British law and French legal system consecutively; both principles are somehow similar to the concept of a state of emergency.²⁹ Although the principle of martial law and state of siege seems similar, there is a big difference between the two. The major difference between the two is that the state of siege principle is anticipation for crisis situation whereas the martial law system was always a reaction to the crisis situation.³⁰

In the English legal system, Martial law is declared in situations when a place or territory is threatened or taken by armed enemies. During this time the regular common law gets suspended and everything will be governed by the martial law.³¹ Historically Martial Law was first introduced to deal with members of the military. 'After the fourteenth century onward it began to be used against civilians.'³² The very interesting point in the development of martial law system is throughout the time it changed its nature:

Until about the 1550s, it [martial law] was only used as an extraordinary measure during wars and open rebellions. [...later...] martial law was then transformed from an emergency power activated in time of war to being used as peacekeeping measures in normal times against people who were not involved in any violent opposition to the regime.³³

Later on time, the excessive use of the martial law didn't make both citizens and members of the parliament happy. As the result of this, 'the extensive use of the martial

²⁹ M. Radin, 'Martial Law and the State of Siege', *California Law Review*, vol. 30, issue no.6, 1942, p. 636, Available at : <http://scholarship.law.berkeley.edu/californialawreview/vol30/iss6/2> (accessed 13 April 2017)

³⁰ A. McCarthy, P.20 cited in ROSSITER, *Constitutional Dictatorship*

³¹ *ibid.*

³² *ibid.*

³³ J. v. CAPUA, 'The early history of martial law in England from the Fourteenth Century to the Petition of Right', *Cambridge Law Journal*, Vol. 36, No. 1, 1977, PP. 153-164, Available from JSTORE, (accessed 11 July 2018) (hereinafter referred to as CAPUA, "The Early History of Martial Law").

law was outlawed by parliament by the Petition of Rights in 1628.³⁴ However, even after that, it was unequivocally been practiced in the British colonial empire.³⁵

In French history, the concept of the state of siege was evolving throughout time.³⁶ When we look the era before the French revolution; the state of siege was referred to the situation in which the military took control of the area under attack.³⁷ However its implication was not based on written law, rather it was dealt customarily and in each time it stayed in effect as long as the threat continued.³⁸ The first legislation about the state of siege was enacted by the Constituent Assembly's Decree of July 8, 1791³⁹- which was meant to govern during actual war condition.⁴⁰ This law did not stay long.

In 1797, the concept expanded in a statute that authorized the declaration of a state of siege in case of foreign invasion or rebellion. The statute was interpreted broadly, however, as "rebellion" was considered to include any type of domestic disturbance. For example, Napoleon I and Napoleon II invoked the doctrine to combat political opposition.⁴¹

³⁴ J. v. CAPUA, PP. 171-172 and SHARPE Robert J., *The Law of Habeas Corpus*, Oxford, Clarendon Press, 1976, p. 12, cited in A. McCarthy, P.20

³⁵ A. McCarthy, P.22 cited Jaenicke, Günther, "Das Staatsnotrecht in Grossbritannien", in *Das Staatsnotrecht in Belgien, Frankreich, Grossbritannien, Italien, den Niederlanden, der Schweiz und den Vereinigten Staaten von Amerika*, by Hans Ballreich, Karl Doebling, Günther Jaenicke, Helmut Strebel and Günther Weiss, Köln/Berlin, Carl Heymanns Verlag KG, p. 59 at pp. 92-93. Martial law was thus i.a. used on the following accession: Ireland (1798, 1916 and 1920/1921), Canada (1837/1938), South Africa (1835/1836, 1846/1847, 1850-1853, 1899-1902 and 1906-1908), Ceylon (1848), Jamaica (1865) and many times in India, *ibid.*, loc. cit. See also HOLLAND, Denys C., "Emergency Legislation in the Commonwealth", *Current Legal Problems*, Vol. 13, 1960, pp. 148-170.

³⁶ W. Feldman, 'Theories of Emergency Power: A comparative Analysis of American Martial Law and the French State of Siege' *Cornell International Law Journal*, vol. 38, issue no.3, 2005, p. 1023, available from:

http://scholarship.law.cornell.edu/cilj/vol38/iss3/17?utm_source=scholarship.law.cornell.edu%2Fcilj%2Fvol38%2Fiss3%2F17&utm_medium=PDF&utm_campaign=PDFCoverPages, (accessed 12 July 2018).

³⁷ Lieutenant Colonel J. B. Kelly & Captain George A. Pelletier, Jr., *Theories of Emergency Government*, 11 S.D. L. REv. 42, 43 (1966). cited in W. Feldman, P. 1024.

³⁸ *ibid*

³⁹ A. McCarthy, P.36,

⁴⁰ M. Radin, p.638

⁴¹ J. Kelly & G. Pelletier, *Theories of Emergency Government*, cited in Feldman, P.1024

The concept of the state of siege was further developed in the 1848 Constitution of the Second French Republic which introduced an Article that in detail addressed the occasions in which state of siege can be declared and regulates the forms and effects of the measure.⁴² However, this development went wrong when the 9 August 1849 Constitution established the political state of siege that could be declared by the parliament.⁴³ According to literature, Napoleon III abused this law so often against his oppositions in the Constituent Assembly.⁴⁴ Later on, the 1852 Constitution transferred the power to declare a state of siege from the parliament to the head of the state but with the approval from the Senate.⁴⁵ The 1875 French Constitution reorganized the structure of French government which in effect led to the law of April 4, 1878, that reshaped the state of siege principle in conformity with the new government structure which somehow ‘limited the condition in which state of siege can be declared.’⁴⁶

This provision greatly narrowed the broad authorization under the law of the 1849 to declare of state of siege in the event of an “imminent danger to internal or external security,” a standard open to very broad interpretation.⁴⁷

⁴² S. Sheeran, P. 496 Cited **Giorgio Agamben, The State Of Exception (Kevin Attell Trans., Univ. Of Chi. Press 2005) (2003); David Dyzeni-Aus, The Constitution Of Law: Legality in A Time Of Emergency (2006); Oren Gross & Fionnuala Nr Aolain, Law In Times Of Crisis: Emergency Powers In Theory And Practice (2006);** David Cole, *The Priority Of Morality: The Emergency Constitution's Blind Spot*, 113 **Yale L.J.** 1753 (2004); **John Ferejohn & Pasquale Pasquino, The Law Of The Exception: A Typology Of Emergency Powers**, 2 **Int'l J. Const. L.** 210 (2004); **Oren Gross, Chaos And Rules: Should Responses To Violent Crises Always Be Constitutional?**, 112 **Yale L.J.** 1011, 1021-24 (2003); **Tom R. Hickman, Between Human Rights And The Rule Of Law: Indefinite Detention And The Derogation Model Of Constitutionalism**, 68 **Mod. L. Rev.** 655 (2005); **Kim Lane Scheppele, Law In A Time Of Emergency: States Of Exception And The Temptations Of 9/11**, 6 **U. Pa. J. Const. L.** 1001 (2004); William E. Scheuerman, *Emergency Powers And The Rule Of Law After 9/11*, 14 **J. Pol. Phil.** 61 (2006).

⁴³ C. Rossiter, *Constitutional Dictatorship: Crisis Government in the modern Democracies*, Princeton, Princeton University Press, 1948, p. 81.

⁴⁴ *ibid.*

⁴⁵ M. Radin, P.638.

⁴⁶ A. McCarthy, Page 39, see also W. Feldman, p. 1025.

⁴⁷ W. Feldman, p.1026.

In addition to France and ancient Rome, the concept of the state of emergency was used during the American Civil war by suspending constitutionally guaranteed rights including the right to *habeas corpus*.⁴⁸

The development of the principle of state of siege was continued in the twentieth century in which different governments exercised the extraordinary power to deal with different emergency situations.⁴⁹ The good example for this is the Weimar Constitution of Germany which gave extraordinary power to the president to deal with the emergency situation.⁵⁰ The development of the concept continued after the Second World War, The best example of this was the declaration of a state of emergency by the US for the reasons like fighting communism in another country.⁵¹

As we saw in the limited historical sketch, since the ancient Greek cities, different states used different means to solve their emergency situation. The common thing among these states is that they reduced the rights of their citizens and grant extraordinary power to the government/leader in order to solve the emergency situation. However, there was inconsistency and differences in the way they declared and governed the emergency situations. Moreover the practice of declaring a state of emergency was solely a domestic matter, not an international law issue, which is different at this time.

2.3 Human Rights Instruments and the State of Emergency

After the tragedies and atrocities of the Second World War, promotion and protection of human rights became one of the objectives of international and regional organizations and international and regional human rights documents were adopted. These international human rights documents not only apply in normalcy but also in a state of exception. It is recognized that whenever states face a natural or man-made crisis, governments get challenged to function properly. That is why McGoldrich said '[t]he

⁴⁸ S. Sheeran, P.497.

⁴⁹ J. Balkin, and S. Levinson, 'Constitutional Dictatorship: Its Danger and Its Design', *Yale law faculty scholarship series*, Paper 221, 2010, available from: http://digitalcommons.law.yale.edu/fss_papers/221, (accessed 12 July 2018)

⁵⁰ S. Sheeran, P.497

⁵¹ *ibid*.

response of a state to a public emergency is an acid test of its commitment to the effective implementation of human rights.’⁵²

The drafters of international and regional human rights instruments namely, International Covenant on Civil and Political Rights (ICCPR), and The American Conventions on Human Rights (ACHR) and European Conventions on Human Rights (ECHR), were aware of the impact of emergency in human rights protection.⁵³ On the one hand, the drafters were conscious of the fact that some emergency situations requires the extraordinary power of the government in order to solve them, and on the other hand, they recognised that each state has the responsibility to protect its citizens. The concept of the state of emergency which grants extraordinary power to states was born out of this tension.⁵⁴ Hence, it is at this stage that the issue of declaring a state of emergency becomes an international law matter that requires the utmost balance between protecting the interest of states and their responsibility to protect, respect, and fulfill human rights. As a result, most international and regional human rights instruments came up with derogation clauses that temporarily exempt states from some of their human rights obligations during an emergency situation.

The concept of derogation of rights could be traced back to 1947 when the United Kingdom presented a draft International bill of human rights to the drafting committee.⁵⁵ Article 4 of this draft proposed that states should take strictly limited measures that derogate from their human rights obligation at the time of war or another national emergency.⁵⁶ In addition to this, Article 4, second paragraph, included a responsibility to inform the secretary general of the United Nations about the measures which the state has enacted, the duration of the derogation and the reasons for the

⁵² D. McGoldrick, 'The Interface Between Public Emergency Powers and International Law', *International Journal of Constitutional Law*, vol. 2, no. 2, 1 April 2004, P. 388, available at: <https://doi.org/10.1093/icon/2.2.380> (accessed 07 July 2018).

⁵³ E. Hafner-Burton, L.Helfer and C. Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties', *International Organization*, vol. 65, 2011, pp. 676, Available from Jstor (accessed 13 May 2017).

⁵⁴ *ibid*

⁵⁵ UN doc. E/CN.4/AC.1/4, cited in M. Nowak 2005, p. 88.

⁵⁶ *ibid*.

derogation.⁵⁷ This draft proposal did not incorporate any list of non-derogable rights which made it open for derogation of any of the rights during a state of war or national emergency. This was criticized mainly by the United States of America.⁵⁸

After different stages of negotiations, drafters of the ICCPR included a provision which allows state parties to resort to derogation on certain strict conditions.⁵⁹ These conditions, by their nature, are both substantive and procedural conditions with the primary aim of preventing the possible arbitrary use of the provision by the state.⁶⁰ In addition to the ICCPR, both Article 27(1) of the ACHR and Article 15(1) of the ECHR also dealt with similar issues.⁶¹

In the case of Africa, although African states frequently declare a state of emergency, the African Charter on Human and Peoples' Right (ACHPR), unlike ACHR and ECHR, doesn't contain a provision which deals with a derogation.⁶² This, in other words, means that the Charter does not allow states parties to derogate from any of their human rights obligation under whatever circumstances. In relation to this, the African Commission on Human and Peoples' Right in *Constitutional rights project vs. Nigeria* case clearly stated that 'the limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances.'⁶³ The sole legitimate justification

⁵⁷ *ibid.*

⁵⁸ Nowak, 2005, p. 88.

⁵⁹ *ibid.*

⁶⁰ B. Tessema, 'A Critical Analysis of Non-Derogable Rights in a State of Emergency under the African System: The Case of Ethiopia and Mozambique', Master Thesis, Universidad Eduardo Mondlane, 2005, page 11, available from http://repository.up.ac.za/bitstream/handle/2263/1138/belay_ft_1.pdf?sequence=1, (accessed 24 May 2017).

⁶¹ Professional Training Series No.9, page 815

⁶² L. Sermet, 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion', *African Human Rights Law Journal*, vol. 7, 2007, p. 142, available from: <http://www.ahrlj.up.ac.za/sermet-l>, (accessed 13 July 2018).

⁶³ African Commission on Human and Peoples' Right, *Constitutional Rights Project vs. Nigeria*, Communication no. 140/94, 141/94, 145/95, 15 November 1999, available from, www.worldcourts.com/achpr/eng/decisions/1999.11.15_Constitutional_Rights_Project_v_Nigeria_140-94_141-94_145-95.htm, (accessed 20 March 2018).

for limitations to the rights and freedoms of the charter are stated under article 27(2) of the Charter.⁶⁴ These limitations are general limitation clauses in their nature and have a different purpose than derogation, which is explained in the next sub-chapter. Although in practice most Constitutions in Africa contain derogation clauses, the absence of such clause in the Charter has to be considered as a positive step for the protection of human rights in Africa.⁶⁵

On the contrary, Frederick Cowell argues that the absence of derogation clause *per se* is an implication of the weak protection for human rights in the African Charter on Human and Peoples' Rights (ACHPR).⁶⁶ Furthermore, he argues that the concept of emergency power is mainly based on the principle of sovereignty of states and that is why international human rights instruments try to balance the interest of the state and human rights of the subjects.⁶⁷ Accordingly, to Frederick Cowell, '[t]he inclusion of a derogation clause in the [ECHR] and the exclusion of a derogation clause in the [ACHPR] is a reflection of differing conceptions of sovereignty within both instruments.'⁶⁸ Despite the fact that the commission made it clear that 'emergency powers can never be a justification for limiting rights under the Charter, Cowell argues, the absence of a derogation clause still highlights the relative weakness of the institutions under the ACHPR.'⁶⁹ I share his argument. The inclusion of derogation clauses in human rights documents doesn't imply weakness in terms of protecting human rights rather the opposite is true. It is an inevitable fact that states, at some point, may face an emergency situation that threatens their existence. A failure to control the

⁶⁴ African Charter on Human and Peoples' Rights (ACHPR) under Article 27 declares that: 1, every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community. 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.

⁶⁵ L. Sermet, P.161.

⁶⁶ F. Cowell, 'Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR', *Birkbeck Law Review*, vol. 1, no. 1, p. 135. Available at <http://www.bbkrlr.org/1-1-6.html> (accessed 16 May 2017).

⁶⁷ Cowell, P. 136.

⁶⁸ *ibid.*

⁶⁹ *ibid.*, P. 158

emergency situation is not only a threat to the existence of the state but also endangers the enjoyment of human rights in the state. In the case of the African Charter on Human and Peoples' Right, 'the Charter has been criticised for its extensive deployment of clawback clauses - phrases which could effectively remove (or at a minimum severely curtail) the rights ostensibly guaranteed.'⁷⁰ Although in principle the presence of clawback clauses is not a problem, however 'this is a particular problem in Africa as many states still have laws and regulations that directly violate human rights.'⁷¹ Hence, incorporating a derogation clause in the African Charter would serve as guidance for states on how to deal with the inevitable, emergency situation by permitting them to temporarily exempt from some of their human rights obligation. Moreover, it would provide absolute protection for certain human rights.

2.3.1 Derogation vs. Limitation

Even if this thesis mainly focuses on the principle of derogation, the writer finds it relevant to discuss the difference between derogation from human rights obligation and limitation to the exercise of human rights. In this regards, Anna McCarthy refers to derogation as an extraordinary limitation, while considering limitation as ordinary limitation.⁷² The main reason behind the principle of limitation is to balance between the rights of an individual person with that of the interest of the general public.⁷³ In relation to this, Article 29(2) of the UDHR states that the main reason for the limitation is:

[...] for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.⁷⁴

⁷⁰ *Human Rights Agreements in Africa, Europe and the Americas, and Regional Courts*, BBC-World Service, (2008). Available at http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/treaties_regional.shtml , (accessed 25 July 2015).

⁷¹ *ibid.*

⁷² A. McCarthy, page 49.

⁷³ B. Tessema, p. 13.

⁷⁴ UDHR, Article 29(2).

The reading of the above provision tells us that the human rights and freedoms of an individual can be limited in order to avoid conflict of interest with that of other individuals or the public at large.

On the contrary, as we saw above the only rationale behind the principle of derogation is to give time for the state to control the emergency situation and restore the country to normal condition, which is also another form of balancing interest. Thus it can be argued that both derogation and limitation principles are means of balancing between the individual and public interest.⁷⁵ However, it is important to keep in mind that derogation from human rights commitment must be the last resolute even in the state of emergency. The state should first to try to maintain peace and security only by using ordinary limitation or restrictions to human rights.⁷⁶ About this, Human Rights Committee general comment no. 29⁷⁷, declare that derogation from the covenant *must have an exceptional and temporary nature* and the motive to use Article 4 of the ICCPR should be ‘the restoration of a state of normalcy where full respect for the covenant again be secured in the state.’⁷⁸ In summary, unlike from limitation principle, derogation from human rights applies only in the time of emergency and it should always be used as a last resort to control the emergency situation.

2.4 Conditions for Derogation Measures

Although the concept of derogation is a kind of permission to States to avoid their human rights obligations at the time of emergency situations which threatens the life of the nation, the centre of the concept is the recognition of a state as the primary protector of society that in certain extraordinary situations it demands to suspend certain human rights within defined limits.⁷⁹ In other words, the concept of derogation shows how the

⁷⁵ Nowak, 2012, p. 274.

⁷⁶ A. McCarthy, p. 49.

⁷⁷ United Nations, Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11. (hereinafter: ICCPR General Comment No.29).

⁷⁸ *ibid.*

⁷⁹ R.Burchill, *P.* 96

international human rights regimes allow for state interest to prevail over human interests by granting the state to “violate” rights.⁸⁰ However, derogation provisions do not just allow states to avoid their human rights obligation in an arbitrary way; rather it shows a legitimate path to do so without violating rule of law principle.⁸¹

Regarding the preconditions to derogate from human rights obligation; Article 4(1) of the ICCPR states:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁸²

The reading of the above Article indicates that two requirements must be met in order to implement the derogation provision. These requirements are (a) presence of public emergency situation which threatens the life of the nation, and (b) official proclamation/declaration of a state of emergency.⁸³

In relation to the first requirement, it is not clear from the above Article as to what constitutes a public emergency and how to determine a public emergency that threatens the life of the nation. Even though there are no objective criteria to determine what constitutes a public emergency, the literature suggests that it must be understood in a very restrictive manner based on a case by case.⁸⁴ Regarding how to determine a public

⁸⁰ *ibid.*, p. 95.

⁸¹ *ibid.*

⁸² ICCPR, Art 4(1).

⁸³ *ibid.*

⁸⁴ R.Burchill, 'When does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism', *Yearbook of New Zealand Jurisprudence*, Vol 9, P. 100, Electronic copy available at: <http://ssrn.com/abstract=1343444>, (accessed 24 May 2017).

emergency, it is mostly the political organ of the state which decides on what constitutes a public emergency threatening the life of the nation.⁸⁵

Though the General Comment no. 29⁸⁶ is silent about the definition of public Emergency, it clearly states that ‘not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation...’⁸⁷ The Paris Minimum Standards of Human Rights Norms in a State of Emergency⁸⁸ (non binding in its nature) which set a minimum standards governing the declaration and administration of state of emergency that threaten the life of a nation defined the term “public emergency” as:

an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.⁸⁹

Similarly, the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR defined “a threat to the life of the nation” as the one that:

- a) affects the whole of the population and either the whole or part of the territory of the state; and
- b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the covenant.⁹⁰

⁸⁵ R.Burchill, P. 101

⁸⁶ Human Rights Comm., General Comment No. 29: States of Emergency (Article 4) ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

⁸⁷ General Comment No. 29, Para. 3

⁸⁸ R.B. Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency', *American Journal of International Law*, vol. 79, no. 4, 1985, pp. 1072-1081. Available from <https://doi.org/10.2307/2201848> (accessed 07 July 2018).

⁸⁹ The Paris Minimum Standards of Human Rights Norms in a State of Emergency

⁹⁰ Siracusa Principles, Paragraph 39, Siracusa Principles are prepared by a group of 31 experts in international law, convened by the International Commission of Jurists, the International Association of

Furthermore, it clearly states that ‘internal conflicts and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4 of the ICCPR.’⁹¹ Additionally, ‘Economic difficulties *per se* cannot justify derogation measures’.⁹²

When we come to the second requirement, the mere existence of a public emergency is not enough to derogate from human rights obligations. The state party is required to officially proclaim the existence of the public emergency before derogating from its human rights obligation.⁹³ To do so, the state should, in advance, enact a national law regarding the procedures for the proclamation of a state of emergency⁹⁴ and the human rights committee has the mandate to monitor the compliance of this law with that of Article 4 of the ICCPR.⁹⁵ The requirement of official proclamation of a state of emergency is crucial ‘for the maintenance of the principles of legality and rule of law.’⁹⁶

In connection with the prerequisite for derogation, the derogation clause of the ECHR, Article 15 paragraph 1 states that:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the

Penal law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights and the International Institute of Higher Studies in Criminal Sciences, met in Siracusa, Sicily, for a week in spring 1984 to consider the limitation and derogation provisions of the International Covenant on Civil and Political Rights. The participants were agreed upon the need for a close examination of the conditions and grounds for permissible limitations and derogations enunciated in the Covenant in order to achieve an effective implementation of the rule of law. See the introductory note of Siracusa Principles

⁹¹ Siracusa Principles, Paragraph 40.

⁹² *ibid.*, Para. 41

⁹³ ICCPR, Article 4(1)

⁹⁴ Siracusa Principles, Paragraph 43.

⁹⁵ General Comment no. 29, Para 2

⁹⁶ *ibid.*

exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.⁹⁷

Unlike Article 4 of the ICCPR, the ECHR explicitly mentioned war as one ground for initiating a state of emergency. However, the phrase other public emergency is still open to subjective interpretation. In relation to this, the European Court of Human Rights (ECtHR) recognised that States have a significant margin of appreciation in deciding what constitutes a threat to the life of the nation. This margin of appreciation, however, is not absolute in that it must be done under- supervision by the court and the Commission.⁹⁸ According to the European Commission decision in the Greek case, Public Emergency must have the following characteristics:

- It must be actual or imminent;
- Its effects must involve the whole nation;
- The continuance of the organised life of the community must be threatened;
- The crisis or danger must be exceptional, in that that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health, and order are plainly inadequate.⁹⁹

Even if the European Commission decisions are only binding upon member states of the European Commission, the way they interpret public emergency that threatens the life of the nation is more or less similar (some difference exists) with that of the Siracusa Principles.

When we come back to the ICCPR, in addition to the above two prerequisites for derogation; the existence of a public emergency threatening the life of the nation and official proclamation of the emergency, Article 4 also enclosed conditions and limits for

⁹⁷ Council of Europe, European Convention on Human Rights (ECHR), 4 November 1950, Article 15, Paragraph one.

⁹⁸ Ireland v UK, Series A No. 25 (1970) Para. 207

⁹⁹ Council of Europe, European Commission of Human Rights, The Greek Case, paragraph. 112-113.

derogation measures. These are notification, strictly required by the exigencies of the situation, and protection of non-derogable rights.

2.4.1 Notification

As discussed above, the mere existence of an emergency situation which threatens the life of the nation is not enough to derogate from human rights obligations. Official proclamation/declaration of a state of emergency is a mandatory step for derogation from the human rights obligations.¹⁰⁰ Moreover, the party derogating from the obligation under the ICCPR is required to immediately notify other State parties of the Covenant through the intermediary of the Secretary-General of the United Nations.¹⁰¹ The notification needs to indicate ‘provisions from which it has derogated and the reasons by which it was actuated’¹⁰², and have to provide ‘sufficient information to permit the states parties to exercise their rights and discharge their obligations under the Covenant’.¹⁰³ A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation’.¹⁰⁴ Failure to immediately notify in due form of its derogation is in breach of its obligations to other states parties’.¹⁰⁵

2.4.2 Strictly Required by the Exigencies of the Situation

In addition to the notification requirement, Article 4(1) of the ICCPR states any derogation measures need to be limited to ‘the extent strictly required by the exigencies of the situation.’¹⁰⁶ According to this requirement ‘the severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and

¹⁰⁰ Siracusa Principles, Paragraph 42

¹⁰¹ ICCPR Article 4(3) and Siracusa Principles, Paragraph 44

¹⁰² *ibid.*

¹⁰³ Siracusa Principles, Paragraph 45

¹⁰⁴ ICCPR Article 4(3) and Siracusa Principles, Paragraph 49

¹⁰⁵ Siracusa Principles, Paragraph 47

¹⁰⁶ General Comment no. 29, Para. 4

extent.¹⁰⁷ In this regard, ‘A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitations clauses of the Covenant would be adequate to deal with the threat to the life of the nation.’¹⁰⁸ Even if it is the national authorities that determine necessity to derogate from the human rights obligations, however, the judgment of the national authorities cannot be accepted as conclusive¹⁰⁹ and international law requires the existence of effective remedies ‘to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation’.¹¹⁰ To summarise, these requirements state that the derogation measures need to pass the necessity and proportionality test to the demand of the situation.

2.4.3 Non-Derogable Rights

The other important feature of derogation provision is that it listed out non-derogable rights. In whatever situation, States are not entitled to derogate from their obligation from the right to life¹¹¹; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent¹¹²; freedom from slavery or involuntary servitude¹¹³; the right not to be imprisoned for contractual debt¹¹⁴; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation¹¹⁵; the right to recognition as a person before the law¹¹⁶; and freedom of thought, conscience and religion.¹¹⁷ However, the fact that

¹⁰⁷ Siracusa Principles, Para. 51

¹⁰⁸ *ibid.*, Para. 53

¹⁰⁹ *ibid.*, Para. 57.

¹¹⁰ *ibid.*, Para. 56.

¹¹¹ ICCPR Article 4(2)

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

these rights are non-derogable doesn't mean that no limitation or restriction would ever be justified because the restriction is different from derogability.¹¹⁸

The other important point regarding these non-derogable rights is that the lists under Article 4 paragraph 2 are not exhaustive. The UN Human Rights Committee in its General Comment Number 29 states that:

“States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.”¹¹⁹

The right to non-discrimination (Article 2(1)) is also another example of non-derogable right under whatever situation. Last, but not least, the right to hold an opinion which is guaranteed under Article 19(1) of the ICCPR is an absolute right which cannot be limited or derogated.¹²⁰

Although all human rights are universal, indivisible and interdependent,¹²¹ the main reason for selecting some provisions of the ICCPR as the nonderogable right is because some rights *bear the nature of peremptory norm of international law*.¹²² Additionally, it can never become necessary to derogate from some rights even for the purpose of protecting the life of the nation.”¹²³

To sum up, under Article 4 of the ICCPR, existence of a public emergency threatening the life of the nation and official proclamation of the emergency are a precondition for

¹¹⁸ General Comment 29., Para. 7.

¹¹⁹ *ibid.*, Para. 11.

¹²⁰ ICCPR, art 19(1)

¹²¹ United Nations, Human Rights Office of the High Commissioner, Vienna Declaration and Programme of Action, Part I, Para.5., 25 June 1993, available at: <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>, (accessed 28 April 2017).

¹²² General Comment 29, para. 11.

¹²³ *ibid.*

derogation measure by state parties. Moreover, notification, strictly required by the exigencies of the situation and protection of non-derogable rights are conditions laid under the provision. On the contrary, the African Charter on Human and Peoples' Right incorporated ordinary limitation clause only and a state of emergency situation cannot be a legitimate justification for extraordinary limitation (derogation) from the Charter. Ultimately, the absence of derogation clause and the deployment of extensive clawback clauses weaken the protection of human rights in the charter.

2.5 State of Emergency under the FDRE Constitution

In the case of Ethiopia, the FDRE Constitution under Article 93(1)(a) addressed the situation of State of Emergency as follows:

The Council of Ministers of the Federal Government shall have the power to decree a state of emergency, should an external invasion, a breakdown of law and order which endangers the Constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occur.¹²⁴

This provision clearly states that declaration of a State of Emergency is only justified at the time of the external invasion, a breakdown of law and order which endanger the Constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or epidemic. From this provision, it is clear that the grounds for declaring State of Emergency under the FDRE Constitution are exhaustively listed. In addition to this, 'the Constitution requires the actual occurrence of the circumstance for a state of emergency to be established.'¹²⁵ In another word, immanency of one of the situations is not enough to declare a state of emergency.

¹²⁴ FDRE Constitution, Article 93 (1(a))

¹²⁵ Y.T. Walilegne, 'State of Emergency and Human Rights Under the 1995 Ethiopian Constitution', *Journal of Ethiopian Law*, Vol. 21, p. 105, available at: http://journals.co.za/content/jel/21/1/AJA00220914_30, (accessed 13 July 2018).

The other important point worthy of mentioning here is that it is the Council of Ministers of the Federal Government that has the power to declare a State of Emergency in Ethiopia.¹²⁶ In fact, regional state executive branches can also declare a state-wide state of emergency in their respective region, however, only at the time of natural disaster or an epidemic occurs.¹²⁷

Although it is the Council of Minister that has the power to declare State of Emergency, the decree has to be submitted to the House of People's Representative (HOPR) for endorsement. If the State of Emergency is declared when the HOPR is in session, the decree must be submitted to the House within forty-eight hours.¹²⁸ However, if the state of emergency is declared while the HOPR is in recess, the declaration shall be submitted to the HOPR within fifteen days of its adaptation.¹²⁹ In both cases, the decree made by the executive branch of the government (Council of Ministers) requires approval by a two-thirds majority vote from the members of the HOPR (legislative branch) otherwise it shall be repealed forthwith.¹³⁰ Regarding the duration of the declaration of a state of emergency; the Ethiopian Constitution clearly states that a State of Emergency declared by the Council of Ministers and approved by the HOPR can remain in effect up to six months.¹³¹ Thus, the declaration of emergency is limited to a maximum of 6 months, however, if it is required, by two-thirds majority vote, the HOPR can allow the renewal of the State of Emergency Proclamation every four months successively.¹³² These standards are one of the means in which the Constitution prevents abuse of power by the Council of Ministers.

¹²⁶ FDRE Constitution, Article 93 (1(a))

¹²⁷ *ibid.*, Article 93 (1(b))

¹²⁸ *ibid.*, Article 93 (2(a))

¹²⁹ *ibid.*, Article 93 (2(b))

¹³⁰ *ibid.*, Article 93 (2(a&b))

¹³¹ *ibid.*, Article 93 (3)

¹³² *ibid.*

During declaration of a state of emergency, the Constitution requires the HOPR to establish a State of Emergency Inquiry Board.¹³³ The board is equipped with the power to inspect and follow up any inhumane deeds and to ensure the prosecution of perpetrators of the deeds if any.¹³⁴ In cases of inhumane acts, the board has the power to recommend corrective measures to the Prime Minister or the Council of Ministers.¹³⁵

Moreover, the board is responsible to announce within a period of one month the names of all individuals arrested on account of the State of Emergency including the reasons for their arrest.¹³⁶ Last, but not the least, it is the responsibility of the board to put forward its views to the HOPR on a request to extend the duration of the State of Emergency.¹³⁷

For the period of the State of Emergency, it is the Council of Ministers that possesses all the necessary power to protect the country's peace and sovereignty, and to maintain public security, law, and order.¹³⁸ This power includes the power to suspend political and democratic rights guaranteed under the Constitution to the extent necessary to avert the condition that required the declaration of a State of Emergency.¹³⁹ However, even at the time of a State of Emergency, the Constitution gives absolute protection for certain rights. Article 93(4)(c) of the Constitution states that:

In the exercise of its emergency powers the Council of Ministers can not, however, suspend or limit the rights provided for in Articles 1, 18, 25, and sub-Articles 1 and 2 of Article 39 of this Constitution.

From the lists of rights and freedoms that get absolute protection (non-derogable status) under the FDRE Constitution; the first one is the right to be protected against cruel,

¹³³ FDRE Constitution Article 93 (5)

¹³⁴ *ibid.*, Article 93 (6(b&d))

¹³⁵ *ibid.*, Article 93 (6(c))

¹³⁶ *ibid.*, Article 93 (6(a))

¹³⁷ *ibid.*, Article 93 (6(e))

¹³⁸ *ibid.*, Article 93 (4(a))

¹³⁹ *ibid.*, Article 93 (4(b))

inhuman or degrading treatment or punishment and the right to be protected from slavery, servitude and human trafficking (Article 18).¹⁴⁰ Secondly, the right to equality is also protected in an absolute manner under Article 25 of the FDRE Constitution.¹⁴¹ Last but not the list, the right of Nations, Nationalities, and People of Ethiopia to self-determination up to secession and the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history is protected in untouchable manner (Article 39 (1&2)).¹⁴² Moreover, although it is not a right, nomenclature of the State is non-derogable (Article 1).¹⁴³

In comparison with the list of non-derogable rights found under Article 4(2) of the ICCPR, the list of the rights under Article 93(4(c)) of the FDRE Constitution is very limited. A point worth mentioning here is that the FDRE Constitution properly prohibits torture, inhumane or degrading treatment of persons during the State of Emergency, but fails to protect the right to life.¹⁴⁴ The Constitution also fails to give special protection to the right to recognition everywhere as a person before the law, freedom against imprisonment for contractual debt and the right to freedom of thought, conscience, and religion. However, since Ethiopia ratified the ICCPR, it is automatically qualified as an integral part of the law of the land.¹⁴⁵

In general Article 93 of the Ethiopian Constitution contains basic principles of the state of emergency that are in compliance with the ICCPR.¹⁴⁶ Unlike Article 4 of the ICCPR, the Constitution exhaustively listed public emergency situations that are considered as a threat to the life of the nation. Moreover, the Constitution gave power to the HOPR to assess the necessity of declaring a state of emergency to control the threat that the

¹⁴⁰ Joint reading of FDRE Constitution Article 93 (4(c)) and Article 18(1&2)

¹⁴¹ Joint reading of FDRE Constitution Article 93 (4(c)) and Article 25

¹⁴² Joint reading of FDRE Constitution Article 93 (4(c)) and Article 39(1&2)

¹⁴³ Joint reading of FDRE Constitution Article 93 (4(c)) and Article 1

¹⁴⁴ Y.T. Walilegne, p. 107.

¹⁴⁵ According to Article 9(4) of the FDRE Constitution All international agreements ratified by Ethiopia are an integral part of the law of the land

¹⁴⁶ Awol Allo, P.146

country faced. The power given to the HOPR is in compliance with the principle found under Article 4 of the ICCPR: “strictly required by the exigencies of the situation”. Likewise, the Constitution clearly listed non-derogable rights, even at the time of the state of emergencies. Nevertheless, the Constitution is silent about the duty to immediately notify other state parties of the ICCPR, which is one of the basic standards under Article 4 of the ICCPR. According to Siracusa Principles, ‘a state party which fails to make an immediate notification in due form of its derogation is in breach of its obligations to other states parties.’¹⁴⁷ Besides this, one can say, the FDRE Constitution properly addressed the issue of the state of emergency. However, the truth on the ground is totally different (see chapter 5).

2.6 The Judiciary and the State of Emergency

Although Article 4 of the ICCPR is silent about the role of the judicial branch of the state during a state of emergency situation, the Paris minimum Standards and the Siracusa Principles identified the role courts should play during a state of emergency.

According to the Paris Minimum Standards, the judiciary has the jurisdiction to decide on the Constitutionality of the emergency legislation.¹⁴⁸ Secondly, it has the power to check whether or not any particular exercise of emergency power is in conformity with the emergency legislation.¹⁴⁹ Thirdly, the judiciary has also the mandate, to safeguard the non-derogable rights and check the proportionality of derogatory measures in relation to the derogated rights.¹⁵⁰ Last but not least, ‘where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect.’¹⁵¹ Thus, according to the Paris Minimum Standards courts shall have the power to declare null and void any emergency measures which doesn’t pass the above criteria’s. Similarly, the Siracusa Principles states that: ‘ordinary courts shall

¹⁴⁷ Siracusa Principles, Para. 47.

¹⁴⁸ Paris Minimum Standards, Section (B), Article 5.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.¹⁵²

In Ethiopian context, although the judicial power is vested in the courts at the federal and regional level¹⁵³, courts are not mandated to interpret the Constitution. The power to interpret the Constitution is given to the House of Federation (HOF)¹⁵⁴ which is composed of representatives of Nations, Nationalities, and Peoples of Ethiopia.¹⁵⁵ In another word, it is the executive and legislative branches of the government that has the power to decide on the existence of an emergency situation and the Ethiopian courts have no say in this regard because Article 93 of the FDRE Constitution does not mention the role of the judicial branch of the state during a state of emergency situation. However, all the three organs of the government at all levels have the duty to respect and enforce the “Fundamental Rights and Freedoms” provisions of the Constitution.¹⁵⁶

2.7 Conclusion

Under the existence of a public emergency that threatens the life of the nation, state parties to the ICCPR can derogate from their human rights obligation after officially proclaiming the existence of the emergency situation in their nation. However, any of the derogation measures are required to be limited to the extent strictly required by the exigencies of the situation. Furthermore, the state party derogating from its human rights obligation is required to notify other state parties of the ICCPR and have the responsibility to protect, respect and fulfill non-derogable rights even at the time of public emergency situation. Although the FDRE Constitution under Article 93 incorporated most of these principles, it is silent about the obligation to notify other state parties of the ICCPR and failed to provide absolute protection for some right.

¹⁵² Siracusa Principles, Para. 60.

¹⁵³ FDRE Constitution, Article 79(1)

¹⁵⁴ FDRE Constitution, Article 62(1)

¹⁵⁵ *ibid.*, Article 61(1)

¹⁵⁶ *ibid.*, Article 13(1)

Chapter 3: Freedom of Opinion and Expression

Freedom of opinion and expression is one of the basic human rights and they are considered as the cornerstones of democracy.¹⁵⁷ This chapter discusses the conceptual foundation and limitations of the right to freedom of opinion and expression under international human rights law. Additionally, the chapter will analyse the protection of the right to freedom of opinion and expression under the FDRE Constitution with the aim to lay the foundation for the final chapter of the thesis that analyses the protection of the right to freedom of opinion and expression during the state of emergency in Ethiopia.

3.1 Freedom of Opinion and Expression as Human Right

The right to freedom of opinion and expression is fundamental right which declares that everyone has the right to hold their own opinions, and the right to seek, receive and share information and ideas.¹⁵⁸ They have also been universally recognised as a pillar of democratic society and ‘key to the protection of all human rights, and fundamental to human dignity’.¹⁵⁹

¹⁵⁷ United Nations Educational, Scientific and Cultural Organisation (UNESCO), ‘Freedom of expression: A fundamental human right underpinning all civil liberties’, https://en.unesco.org/70years/freedom_of_expression

¹⁵⁸ K. Bresner, ‘Understanding the Right to Freedom of Expression: An International law Primer for Journalists’ Toronto, International Human Rights Program (IHRP) at the University of Toronto, Faculty of Law and Journalists for Human Rights (JHR), 2015, p.2, available at: <http://www.jhr.ca/en/wp-content/uploads/2017/06/Understanding-Freedom-of-Expression-Primer-ENG-web.pdf>, (accessed at 13 July 2018). See also, T. Mendel and E. Salomon, ‘*Freedom of Expression and Broadcasting Regulation*’, CI Debates Series, no. 8, 2011, p. 9, available at: <http://unesdoc.unesco.org/images/0019/001916/191623e.pdf>, (accessed 12 June 2018). The African commission on Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/ Nigeria case stated that Freedom of expression is a basic human rights which comprises the right to receive information and express one’s opinion.

¹⁵⁹ T. Mendel, ‘Restricting Freedom of Expression: Standards and Principles’ Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression, Center for Law and Democracy, P.1, available from: <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>, (accessed 22 February 2018).

Freedom of opinion and freedom of expressions are very much interrelated; the earlier freedom is a private matter belonging to the realm of mind¹⁶⁰ while the later, freedom of expression, is used as a means of exchange and development of opinions. Freedom of opinion is broader than the right to hold opinion without interference¹⁶¹; it also covers the right to change an opinion anytime without any precondition.¹⁶² This freedom protects all possible kinds of opinions including opinions of political, scientific, historic, moral or religious nature, and any forms of brainwashing or coercion to change one's opinion is absolutely prohibited.

Freedom of expression is not only important in its own, rather it is an enabler of the enjoyment of other rights.¹⁶³ That is why the recognition of freedom of expression is vital for the healthy functioning of the entire human rights apparatus.¹⁶⁴ As Professor Richard Moon points out "Freedom of expression does not simply protect individual liberty from state interference rather, it protects the individual's freedom to communicate with others"¹⁶⁵ and granted the liberty to express an opinion, regardless of their truth and falsity.¹⁶⁶

3.2 Why is Freedom of Opinion and Expression Important?

Professor Richard Moon argues the right to freedom of expression can serve one or a combination of three objectives: recognition of truth, advancement of democracy and

¹⁶⁰ Nowak., p. 441.

¹⁶¹ ICCPR, Art 19(1)

¹⁶² General Comment no.34 p.9

¹⁶³ F. La Rue, 'Report of the Special Rapporteur', See also See also, T. Mendel and E. Salomon, 'Freedom of Expression and Broadcasting Regulation', CI Debates Series, no. 8, 2011, p. 9.

¹⁶⁴ M. O'Flaherty, 'Freedom of Expression: Article19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34', *Human Rights Law Review*, vol. 12, no.4, 2012, Oxford University Press, p.627, available from: <https://doi.org/10.1093/hrlr/ngs030>, (accessed 14 July 2018).(Here in after General Comment No 34).

¹⁶⁵ R.Moon, 'The Social Character of Freedom of Expression', *Amsterdam Law Forum*, Vol.2, no. 1, 2009, Available from <http://amsterdamlawforum.org/article/view/106/190>, (accessed 14 July 2018).

¹⁶⁶ S. Hugelier, '*Freedom of expression and transparency: two side of one coin*', p. 1, available from <https://www.law.kuleuven.be/apps/jura/public/art/47n1/hugelier.pdf>, (accessed 14 July 2018).

realisation of individual autonomy.¹⁶⁷ As a matter of fact, truth presupposes the exchange of ideas and information among members of the community and it is only achieved through collective deliberation.¹⁶⁸ Even more, freedom of expression is vital for the proper functioning of a democratic form of government and it enables citizens to discharge their responsibility through public discussion and participation.¹⁶⁹ Last, but not the least, ‘freedom of expression is central to self-realisation and autonomy because individual identity, though, and feelings emerge in the social realm.’¹⁷⁰

By its nature, Freedom of expression is related to human nature. Humans are a rational creature and social animal. Our life is all based on our interaction with each other. Freedom of expression is crucial for the development and fulfillment of every person¹⁷¹ by sharing ideas and information’s which are important for the daily life.¹⁷² In order to make a wise decision on any matter, anyone needs to have information. Without free expression, individuals cannot make informed decisions.¹⁷³ Thus, freedom of expression serves as a medium for the exchange of ideas and will use to achieve the pursuit of knowledge and development.¹⁷⁴ In addition to this, freedom of expression also

¹⁶⁷ R. Moon, P.43.

¹⁶⁸ *ibid.*, P.44

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ Index on Censorship, *Why is free speech important?*, [website] 2018, Available from : <https://www.indexoncensorship.org/2016/04/free-speech-important/>, (accessed 07 July 2018) , see aslo, The African commission on Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/ Nigeria case stated that Freedom of expression is vital to an individual’s personal development and political consciousness.

¹⁷² *ibid.*

¹⁷³ Index on Censorship, *About Free Expression*, [website], 2018, <https://www.indexoncensorship.org/about-free-of-expression/>, (accessed 07 July 2018).

¹⁷⁴ *ibid.*

strengthens public confidence in the concerned government¹⁷⁵ by building the capacity of the public to engage in decision making.

Where information and ideas are not permitted to flow freely, other human rights, as well as democracy itself, are under threat. Participatory mechanisms depend on the free flow of information and ideas, since citizen engagement can only be effective if people are informed and have the means to express themselves. Other social values - including good governance, public accountability, individual fulfillment and combating corruption- also depend on respect for freedom of expression.¹⁷⁶

As mentioned earlier, freedom of expression and the right to hold opinion is one of the fundamental human rights and the cornerstone of healthy democracy.¹⁷⁷ It is also one of important requirement for the protection of other human rights like freedom of religion, the right to peaceful assembly and association. In relation to this, the Special Rapporteur calls freedom of expression as an “enabler” of other rights irrespective of the generation of the rights.¹⁷⁸

Nevertheless, freedom of expression it is not an absolute right. It can be limited and derogated according to the steps laid down in the international human rights documents.¹⁷⁹

¹⁷⁵ *ibid*, The African commission on Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/ Nigeria case stated that Freedom of expression is vital for an individual to participate in the conduct of public affair of his country

¹⁷⁶ T. Mendel and E. Salomon, 'Freedom of Expression and Broadcasting Regulation', CI Debates Series, no. 8, 2011, <http://unesdoc.unesco.org/images/0019/001916/191623e.pdf>, (accessed 12 June 2018).

¹⁷⁷ Global Trends in NGO Law, 'The Right to Freedom of Expression: Restriction on A Foundational Right', A Quarterly Review of NGO Legal Trends around the World, April 2015, P.1, available from: <http://www.icnl.org/research/trends/trends6-1.pdf?pdf=trends6-1>, (accessed 14 June 2018).

¹⁷⁸ F. La Rue, 'Report of the Special Rapporteur.

¹⁷⁹ *Ibid*, p.1

3.3 Freedom of Opinion and Expression under International Human Rights Law

Freedom of expression is guaranteed under different international human rights instruments. Although it is nonbinding by its nature, the right to freedom of expression was for the first time recognised under Article 19 of the Universal Declaration on Human Rights¹⁸⁰, which has a customary international law effect till now. Later on, Article 19 of the International Convention on Civil and Political Rights recognised the right to freedom of expression in a legally binding manner.¹⁸¹

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹⁸²

From the above provision, we can point out key features of the right to freedom of expression.¹⁸³ The first feature is that the ICCPR protects opinions in an absolute manner. In connection with this, it is relevant to question what the demarcation is between opinion and expression in the sense of the ICCPR. On this matter, Nowak states that the right to hold opinion protects only the internal conviction of a person and

¹⁸⁰ UDHR, Article 19.

¹⁸¹ ICCPR, Article 19.

¹⁸² ICCPR, Article 19.

¹⁸³ T., Mendel, 'Restricting Freedom of Expression: Standards and Principles' *Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression*, Center for Law and Democracy, P.3, available from; <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>, (accessed 22 February 2018).

he mentioned brainwashing as an example of the violation of this right.¹⁸⁴ In this sense, opinions stay in oneself, whereas expression is another level¹⁸⁵ which conveys the opinion to another person. The other important feature of freedom of expression is that the right applies to everyone without any discrimination.¹⁸⁶ Freedom of expression covers any kind of communicable ideas, messages, and information despite the means of communication.¹⁸⁷ This right covers a very broad range including political, social and economic sphere, even sometimes in the most offensive manner. Notwithstanding that, such rights may be limited according to the law of the land.¹⁸⁸ The protection for means of communication is wider than to most common ways of communication: oral, written or printed form of communication. Article 19 paragraph 2 protects:

all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.¹⁸⁹

The other important protection of this provision is that the right includes not only the right of the speaker but also the right to seek and receive information and ideas that make it two-sided protection.¹⁹⁰ Moreover, freedom of expression was traditionally

¹⁸⁴ M., Nowak, Grandner, M., Gabriel, I., et al, all human rights for all Vienna manual on human rights: Freedom of Expression, Assembly and Association, Vienna. Graz, Deutsche Nationalbibliothek, 2012. P.381.

¹⁸⁵ T., Mendel, P.3.

¹⁸⁶ To have a clear understanding of the prohibition of discrimination, please See Article 19 of ICCPR and read the key aspects of the Article from <https://www.Article19.org/pages/en/key-aspects.html>

¹⁸⁷ ICCPR, Article 19 Para. 2.

¹⁸⁸ General Comment No. 34, Par. 11.

¹⁸⁹ *ibid.*, Par. 12

¹⁹⁰ The duality of the right to freedom of expression is well explained by the Inter American Court of Human Rights in: *Compulsory Membership in an Association Prescribed by law for the Practice of Journalism*, note 10, Paras. 30.

understood as a negative protection which prevents the State from interfering with the freedom of expression of individuals. However, the right to freedom of expression is broader than that including a positive obligation which requires the States to do certain things to make the enjoyment of freedom of expression possible.

In addition to the UDHR and ICCPR, the United Nations Convention on the Rights of the Child under Article 12 and 13 recognised the right to freedom of expression of children.¹⁹¹ Article 13(1) stated that:

“The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”¹⁹²

Moreover, the United Nations Convention on the Rights of Persons with Disabilities under Article 21 recognises the right to freedom of expression of persons with disability in a specific manner. In general, the right to freedom of expression is one of the basic rights that got recognition under different types of international human rights documents.

3.4 The Right to Freedom of Expression and Regional Instruments

In addition to the above international human rights documents, freedom of expression is guaranteed, at Article 10 of the European Convention on Human Rights (ECHR)¹⁹³, at

¹⁹¹ United Nations, General Assembly, *International Convention on the Rights of the Child* (CRC), 20 November 1989, Article 12 and 13.

¹⁹² CRC, Article 13(1).

¹⁹³ ECHR, Article 10.

Article 13 of the American Convention on Human Rights¹⁹⁴ and at Article 9 of the African Charter on Human and People's Rights (ACHPR)¹⁹⁵.

Article 9 of the ACHPR states that:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.¹⁹⁶

As the result of the claw-back clause “within the law” in Article 9(2), Article 9 was regarded as the weakest of all the freedom of expression provisions within the international human rights treaties. However, the African Commission in its mandate to promote and protect human rights in the charter solved the problem by interpreting the claw-back clause in line with international law.

According to Article 9.2 of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.¹⁹⁷

In addition to the interpretation made above, the African Commission adopted a declaration of principles on freedom of expression in Africa in the year 2002 with the intention to enhance Article 9 of the charter. The other interesting point regarding

¹⁹⁴ OAS, *American Convention on Human Rights*, 22 November 1969, Article 13.

¹⁹⁵ Organisation of African Unity (OAU), *African Charter on Human and People's Rights*, 27 June 1981, (Banjul Charter), Article 9.

¹⁹⁶ Banjul Charter., Article 9.

¹⁹⁷ African Commission on Human and Peoples' Right, 140/94- 141/94-145/95 : Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria, Decision 60/91, Kigali, Rwanda, 1999.

freedom of expression under the African Charter is that it did not contain derogation clause. Thus, all rights and freedoms, including the right to freedom of expression, in the African charter cannot be limited on the ground of emergency and special circumstances.¹⁹⁸

3.5 Limitation on Freedom of Opinion and Expression

Like most other human rights, the right to freedom of expression is not absolute right; it can be limited under certain situations. In this regard, the international law clearly indicates the three tests which any restrictions on freedom of expression should meet.¹⁹⁹ In relation to this Article 19(3) of ICCPR states:

The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

According to the above provision, the restriction on freedom of expression must fulfill a strict three-part test²⁰⁰: which are discussed below.

¹⁹⁸ The African Commission on Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/ Nigeria case.

¹⁹⁹ Nowak., p. 458

²⁰⁰ T. Mendel and E. Salomon, 'Freedom of Expression and Broadcasting Regulation', CI Debates Series, no. 8, 2011, p. 12.sited UN Human Rights Committee decision: Mukong v. Cameroon, 21 July 1994, Communication No.458/1991, para.9. 7. and the European Court of Human Rights decision : Sunday times v. United Kingdom, 26 April 1979, Application No. 6538/74, para. 45.

A. The restriction must be provided by the law

The first test is that the restriction must be provided by the law.²⁰¹ In this regard, the Human Rights Committee under General Comment no. 34 elaborates that the law has to be adopted by the legislative body or the court of the concerned state.²⁰² Additionally, the law has to be enacted in a clear and unambiguous manner to enable individuals to regulate his or her conduct accordingly.²⁰³ States cannot enact laws imposing restriction or limitation in an arbitrary manner. Any kinds of limitation or restriction on freedom of expression have to be compatible with the aim and objective of international human rights law principles in general.²⁰⁴

In connection to this, as discussed above, Article 9(2) of the African Charter states that: “every individual shall have the right to express and disseminate his opinions within the law.” The African Commission had interpreted the clawback clause “within the law” has to be interpreted in a compatible manner with the aim and objective of international human rights law.²⁰⁵

B. Interference must be necessary/proportional

The term interference must be necessary implies that the reason behind the limitation has to be necessary to achieve the purposes listed in Article 19(3).²⁰⁶ In general, the principle of necessity indicates that the act has to be the last and only option to achieve the desired result.

²⁰¹ *ibid.*

²⁰² General Comment no 34. Para 24

²⁰³ *ibid.*, Para 25

²⁰⁴ *ibid.*

²⁰⁵ The African Commission on Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/ Nigeria case.

²⁰⁶ Nowak p. 460

The concept of necessity also includes the element of proportionality. The restrictive measures on freedom of expression need to be proportional in severity and intensity²⁰⁷ to achieve their legitimate purpose.²⁰⁸ Hence, the restriction on freedom of expression must not be overbroad and needs to be proportionate to the interest to be protected.²⁰⁹

C. The limitation must pursue a legitimate aim

The third test is that the limitation must pursue a legitimate aim. The restriction of freedom of expression should serve as one of the legitimate aims listed in Article 19(3): the reputation of others, morality, and national security.

i. Respect for the rights and reputations of others

In relation to protecting the rights and reputation of others, the law tries to balance between the rights to freedom of expression of a person with that the rights of others.²¹⁰ Otherwise, the unregulated exercise of the right to freedom of expression by an individual can unjustifiably harm the right of another individual. For example, like the right to freedom of expression and information, there is also a right 'to be protected from unlawful attacks on honor and reputation.'²¹¹ Thus, a proportional restriction on freedom of expression based on this ground can help to respect the rights of others including the right to privacy.²¹² However, this limitation of freedom of expression must not be exploited to protect government officials from public opinion and criticism.²¹³

²⁰⁷ *ibid.*

²⁰⁸ General Comment no 34. Para 33.

²⁰⁹ *ibid.*

²¹⁰ Nowak, p. 462.

²¹¹ ICCPR , Article 17(1).

²¹² Nowak, p.462.

²¹³ African Commission on Human and Peoples' Right , Declaration of principles on freedom of expression in Africa, Principle XII(1(b)), 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia, available from: <http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html>, (accessed 14 June 2018).

- ii. protection for national security or of public order, or public health or morals

Although protection of national security is a legitimate ground for limiting freedom of expression and information, this ground is commonly abused by governments. However, this limitation is ‘permissible only in serious cases of political or military threat to the entire nation’²¹⁴ and governments should act genuinely to protect the interest of the nation. The Declaration of Principles on Freedom of Expression in Africa (hereinafter referred to as DPFA) is very clear about this point. Under principle XIII(2), it states:

Freedom of expression should not be restricted on public order national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.²¹⁵

In addition to the DPFA, the Johannesburg Principle on National Security, Freedom of Expression and Access to Information (hereinafter referred to as Johannesburg Principles) is an international customary law with a lot of relevance to the issue at hand. Under principle 6, it indicates that governments need to demonstrate the following three elements in order to punish expression as a threat to national security:

- a) the expression is intended to incite imminent violence;
- b) it is likely to incite such violence; and
- c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.²¹⁶

²¹⁴ Nowak, p. 464.

²¹⁵ Declaration of Principles on Freedom of Expression in Africa, Principle XIII(2).

²¹⁶ United Nations, Commission on Human Rights, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, principle 6, U.N. Doc. E/CN.4/1996/39 (1996).

In general, national security laws need to be framed and implemented narrowly and have to comply with international law principles.

Although the issue of public health is considered as the most common limitation clause in the ICCPR, it is of a minor practical relevance in the case of freedom of expression and information.²¹⁷ In relation to this, Nowak argues that states can use this limitation ground in order to prohibit ‘misleading publications on health-threatening substances or practices.’²¹⁸

Morality is also a legitimate ground to limit freedom of expression. However, what is moral and immoral should not emanate from a single tradition; rather it has to incorporate many social, philosophical and religious views.²¹⁹ Thus, this ground of limitation needs to be ‘understood in line with the universality of human rights and the principles of non-discrimination.’²²⁰ In order to implement the legitimate grounds for limiting freedom of expression states are required to proof ‘the nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.’²²¹

In sum, the right to freedom of expression is not an absolute right. It can be derogated or limited. However, any kind of restriction to this right needs to pass the three-part test; the restriction must be provided by the law, the restriction must be necessary and proportional, and the sole purpose of the limitation has to be to pursue a legitimate aim.

²¹⁷ Nowak, P 466.

²¹⁸ *ibid.*

²¹⁹ General Comment no 34, p 32.

²²⁰ *ibid.*

²²¹ General Comment no 34, p 32.

3.6 Freedom of Expression and the Media

In the modern world, the media is serving as a conduit for the exchange of ideas and information for the public and it is an important means for individuals to enjoy their right to freedom of expression and information. Indeed, the mass media makes the exercise of freedom of expression a reality²²² and that is why freedom of the press is considered as one of the pillars of the democratic system. Without a free and uncensored press or other media, it will be difficult, if not impossible, to combat corruption, and ensure transparency and accountability.

In terms of protection, even though there is no special protection for the media and press under international law, ‘the media enjoys the same protection under the right to freedom of expression as everyone else’.²²³ However, this doesn’t mean that the media gets no privilege at all. By taking into account the role of the media in informing the public, unlike a private person, the media enjoyed the **privilege not to disclose their sources**.²²⁴ The reason behind this protection is that without this protection, whistleblowers will not come forward ultimately affecting the right to access to information of the public.²²⁵

Accordingly, protection of the journalists and media practitioners is very important to exercise freedom of expression and information. In order to attain press freedom and freedom of expression, it is important to ensure that a journalist is free from pressure,

²²² T. Mendel and E. Salomon, Compulsory Membership in an Association Prescribed by law for the Practice of Journalism, Advisory Opinion OC-5/85, Inter-American Court of Human Rights Series A No 5 (13 November 1985) , note 10, para. 34.

²²³ *ibid.*, p. 12.

²²⁴ *ibid.*

²²⁵ *ibid.*

intimidation, and coercion.²²⁶ This is vital not only to protect the right of journalists as an individual person but also for the sake of the right of the general public.

3.6.1 Freedom of Expression and Internet

Freedom of expression has been developing over time and the good example of this is the right ‘to seek, receive and impart information and ideas of all kinds through the Internet.’²²⁷ Although the internet was not invented at the time of writing the draft of the UDHR and ICCPR; the special rapporteur asserted that the right to freedom of expression under both documents should be interpreted by accommodating new technological developments including internet.²²⁸ The wording of Article 19(2) of the ICCPR by itself shows that the provision protects the ‘freedom to seek, receive and impart information and ideas of all kinds through’ **any media** and **regardless of frontiers**.²²⁹ The phrasing of the drafting committee of the ICCPR made it possible to apply the principles of freedom of expression ‘regardless of the technological changes that might take place in the future.’²³⁰ In this regard, the Human Rights Committee in its General Comment no.34 clearly stated that freedom of expression protected under Article 19 (2) of the ICCPR includes any forms of ‘audio-visual as well as electronic and internet-based modes of expression.’²³¹

²²⁶ African Commission on Human and Peoples’ Right, Resolution on the Safety of Journalists and Media Practitioners in Africa, Resolution no 185, 12 May 2011, available at: <http://www.achpr.org/sessions/49th/resolutions/185/>, (accessed 17 February 2018).

²²⁷ F. La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', 16 May 2011, A/HRC/17/27, P. 1 (hereinafter called F. La Rue, ‘Report of the Special Rapporteur’).

²²⁸ F. La Rue, ‘Report of the Special Rapporteur’.

²²⁹ ICCPR, Article 19(2).

²³⁰ A. Punddephatt, 'Freedom of Expression and the Internet', *United Nations Educational Scientific and Cultural Organization*, 2016, p. 7, available from: <http://unesdoc.unesco.org/images/0024/002466/246670e.pdf>, (accessed 11 July 2018).

²³¹ General Comment No 34. para. 12.

This decision considered the fact that internet access becomes the most convenient means for individuals to participate in public discourse and discussion on different issues including human rights matters.²³² In today's community internet become part of our life and it is undoubtedly helping us to enjoy our rights including the right to freedom of expression, the right to education and etc. That is why the Human Rights Committee calls states to 'take all necessary steps to foster the independence of the new media (eg, internet) to ensure access of individuals thereto.'²³³

3.6.2 Limitation on Freedom of Expression on the Internet

Freedom of expression on the internet is not an absolute right; it can be limited by law. However, 'any limitations on any websites, blogs or any other internet-based, electronic or other such information dissemination system are only permissible to the extent that they are compatible with paragraph 3'²³⁴ of Article 19 of the ICCPR. Moreover, it is condemned prohibiting the publication of materials merely on the base that it may be critical of the government or a political system.²³⁵

Hence, any limitation on freedom of expression on the internet should fulfill the strict three-part tests; the restriction must be provided by the law, the restriction must be necessary and proportional, and the sole purpose of the limitation has to be to pursue a legitimate aim (see supra section 3.5). Any kind of restriction on connectivity and limitation on online contents that fails to comply with the above test is a pure violation of the right to freedom of expression.

²³² A. Yang & R. Wang, 'The Value of Freedom of Expression and Information on Countries' Human Rights Performance: A Cross-National Longitudinal Study', Vol. 19, no. 3, 2016, p. 357, available from: <https://doi.org/10.1080/15205436.2015.1128547>, (accessed 14 June 2018).

²³³ General Comment No 34. para. 15.

²³⁴ *ibid.*, para. 43

²³⁵ *ibid.*

3.7 Freedom of Expression under the Ethiopian Legal System

Although Ethiopia is a country with very old civilization, the tradition of Constitutionalism is not an old practice in the Ethiopian history. Ethiopia got its first written Constitution in 1931 during the regime of Emperor Haileselassie I.²³⁶ However this doesn't mean that prior to 1931 the country was ruled without any law with supreme in its nature because; there were different unwritten traditional documents that are similar in nature to the modern Constitutions.²³⁷ Nevertheless, during that time 'citizens were mere subjects of the Emperors having privileges and benefits emanating from the Omni-benevolent Emperors merely on their goodwill.'²³⁸

With that said, it was in the 1931 Constitution that human rights and freedoms were recognised for the first time. Nonetheless, unlike the modern concept of human rights, the sources of these rights were not human dignity. According to the 1931 Constitution, human rights emanate from the goodwill of the emperor.²³⁹ In spite of, the inclusion of specific rights and duties of the people in the 1955 Revised Constitution²⁴⁰, 'there was a clear indifference as to the actual enforcement of these rights and liberties.'²⁴¹

In relation to the freedom of expression, the 1931 Constitution did not incorporate any provision which recognise freedom of expression. However, the 1955 revised Constitution came up with Article 41 which says: 'Freedom of speech and of the press

²³⁶ G. Ayferam, 'Constitution, Constitutionalism and foundation of democracy in Ethiopia', *International Journal of Research*, Vol. no. 2, 2015, p. 586.

²³⁷ In order to study about these unwritten Constitutions and there futures, see G. Ayferam,

²³⁸ T. Regassa, 'Making Legal Sense Of Human Rights: The Judicial Role In Protecting Human Rights In Ethiopia', *Mizan Law Review*, Vol. 3, no. 2, 2009, P. 297, available from <http://opendocs.ids.ac.uk/opendocs/handle/123456789/8716>, (accessed 13 July 2018).

²³⁹ In relation to this, Tsegaye Regassa states that the 1931 Constitution is an imperial grant. Even more, the Constitution is silent about state obligation towards the right of citizens. See, T. Regassa, P. 296-297, and The 1931 Constitution of Ethiopia

²⁴⁰ Chapter three of the Constitution deals with rights and duties of the people which includes, the right to equality, prohibition of discrimination, freedom of speech and expression, right to life, liberty or property, etc.

²⁴¹ G. Ayferam, P.593.

is guaranteed throughout the Empire in accordance with the law.’²⁴² Although freedom of speech was guaranteed in the Constitution, like the rest human rights provision, Article 41 was attached by the claw-back clause.²⁴³ Even more, in both the 1931 and 1955 revised Constitution, the sovereignty of state lay on the Emperor and it was the Emperor who had the right to declare State of Emergency.²⁴⁴

After throwing down the imperial regime by military coup d'état in 1974, the country was without any Constitution for 13 years.²⁴⁵ Later on, in 1987 Ethiopia got its third Constitution- The Constitution of the people's democratic republic of Ethiopia.²⁴⁶ This Constitution was Similar to the 1955 Constitution. The third Ethiopian Constitution also addressed the freedom of expression.²⁴⁷ However, the right to freedom of expression was found under part two- chapter seven of the Constitution which is basically titled as fundamental freedoms, rights, and duties of Citizens. This can be argued that only the rights of citizens were respected under the Constitution. In addition to this, Article 47 of the Constitution seems recognised freedom of expression as absolute right because it did not include any limitation on the right; however ‘these Constitutional guarantees of

²⁴² Article 41 of the 1955 Revised Constitution of Ethiopia

²⁴³ In the absence of separation of power and independent of the judiciary, this kind of claw-back clauses leads to abuse of power.

²⁴⁴ Article 29 of the 1931 Ethiopian Constitutions states that “The provisions of the present chapter(The chapter which deals about the rights recognised by the Emperor) shall in no way limit the measures which the Emperor, by virtue of his supreme power, may take in the event of war or public misfortunes menacing the interests of the nation. Article 29 of the 1955 revised Constitution also declares that ... (the Emperor) has... the right declare a state of siege, martial law, or a national emergency, and to take such measures as are necessary to meet a threat to the defence or integrity of the Empire and to assure its defence and integrity.

²⁴⁵ A. Abebe, 'Human rights under the Ethiopian Constitution: A descriptive overview', *Mizan Law Review*, Vol. 5, no.1, 2011, P. 42, Available from:

<https://www.ajol.info/index.php/mlr/article/view/68768/56833>, (accessed 12 July 2018).

²⁴⁶ Ayferam, P. 594

²⁴⁷ Article 47 (the first paragraph) states: “Ethiopians are guaranteed freedom of speech, press, assembly, peaceful demonstration and association.” the second paragraph also states that, “the state shall provide the necessary material and moral support for the exercise of these freedoms.”

freedom of expression were not effective in fostering political dissent and freedom of the press.²⁴⁸

After the downfall of the socialist military rule in 1991, Ethiopia got its current Constitution- The Federal Democratic Republic of Ethiopia Constitution in 1995 which gave outstanding emphasis for human rights and freedoms.²⁴⁹ The FDRE Constitution under its preamble states that ‘full respect of individual and people’s fundamental freedoms and rights’²⁵⁰ is base ‘to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing [citizens] economic and social development’.²⁵¹ This commitment is more manifested under chapter three of the Constitution which is dedicated to fundamental rights and freedoms including the “right of thought, opinion, and expression”.

It is under this chapter of the Constitution that the “right of thought, opinion and expression is guaranteed”.²⁵² Before discussing the detail about Article 29 of the FDRE Constitution, which deals with the right of thought, opinion, and expression, let us first review the nature of chapter three of the Constitution.

Chapter three of the FDRE Constitution contained 31 different fundamental freedoms and rights which are divided into two main parts namely “human rights” and “democratic rights”. The effect of dividing these fundamental rights and freedoms into these two parts will be clear when we read Article 10 of the FDRE Constitution which articulate ‘human rights and freedoms [emanate] from the nature of mankind are inviolable and inalienable.’²⁵³ On the other hand, the same provision in the second paragraph declares that ‘human and democratic rights of citizens and peoples shall be

²⁴⁸ G. Timothewos, 'Freedom of Expression in Ethiopia: The Jurisprudential Dearth', *Mizan Law Review*, Vol.4, No.2, 2010, p. 205, available from: LAWETHIOPIA, (accessed 13 July 2018).

²⁴⁹ A. Abebe, P. 43.

²⁵⁰ EFDRE Constitution Preamble .

²⁵¹ *ibid.*

²⁵² *ibid.*, Article 29.

²⁵³ *ibid.*, Article 10.

respected²⁵⁴ which seems written in lesser emphasis than that of the first paragraph. In relation to the effect of these differences, Timothewos is quoted as follow:

Two things can be inferred tentatively from Article 10. The first tentative inference is that human rights and freedoms are derived from the nature of man and as such are universal. This is to mean that human rights are the rights of all human beings simply and merely by virtue of their humanity, as opposed to democratic rights which are the rights of citizens and ‘peoples’ derived from their juridical and political status. So this would seem to mean that in terms of the bearers of the right, human rights and democratic rights are different, the former being more inclusive than the later.²⁵⁵ The second tentative inference is that human rights are to be accorded a relatively more robust protection as ‘inviolable and inalienable’ rights as compared with democratic rights which are just to be ‘respected’.²⁵⁶

So far, there is no jurisprudence regarding the relevance of dividing chapter three of the FDRE Constitution into two categories and the Minutes of the Constitutional Assembly is silent about the issue at hand.²⁵⁷ Thus the author believes that it is relevant to remind the principle of indivisibility of human rights and in my opinion, the Ethiopian courts have to deal Article 10 of the FDRE Constitution by taking in to account the principle of indivisibility of human rights.

However, the relevance of showing the weakness of chapter three of the FDRE Constitution is because it categorised “the right of thought, opinion, and expression”

²⁵⁴ *ibid.*

²⁵⁵ Timothewos, p.208.

²⁵⁶ Timothewos, p.208, cited in, A. Mohamed, ‘the human rights provisions of the FDRE Constitution in light of the theories human rights, AAU Printing press, p.85.

²⁵⁷ G. Hessebon, 'An Apologetics for Constitutionalism and Fundamental Rights: Freedom of Expression in Ethiopia', Master Thesis, Central European University, 2009, p.12, Available from www.etd.ceu.hu/2009/hessebon_gedion.pdf, (accessed 02 March 2018).

under part two of chapter three of the Constitution which is democratic rights.²⁵⁸ In another word, it seems the FDRE Constitution is written in a way which does not accept that freedom of expression emanates from human nature. Rather, it sounds like it is given by the will of the drafters of the Constitution. This way of thinking is totally against the widely accepted foundation of freedom of expression which is ‘the belief that [freedom of expression] is crucial for human autonomy and self-realisation.’²⁵⁹

Article 29(1) of the FDRE Constitution recognised that “everyone has the right to hold opinion without any interference” which is the direct copy of the ICCPR. Under sub-Article 2 of the Constitution states that:

Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.²⁶⁰

In addition to this, the FDRE Constitution guaranteed freedom of the press, other mass media, and artistic creativity.²⁶¹ In relation to this Article 29(3) of the Constitution protected the media from any form of censorship and guaranteed access to information of **public interest**.²⁶² Additionally, Article 29(4) gives the press, as an institution, legal protection to guarantee its independence and its capacity to entertain a diverse opinion.²⁶³ Moreover, Article 29(5) obliges all media financed by or controlled by the state to operate in a way that entertains diversity in the expression of opinion.²⁶⁴

²⁵⁸ Timothewos, P. 211.

²⁵⁹ *ibid.*

²⁶⁰ FDRE Constitution Article 29(2) .

²⁶¹ *ibid.*, Article 29(3).

²⁶² *ibid.*

²⁶³ *ibid.*, Article 29(4).

²⁶⁴ *ibid.*, Article 29(5).

3.7.1 Limitation of Freedom of Expression under the FDRE

Constitution

In the one hand, the FDRE Constitution states that freedom of expression can only be limited through laws and it laid a principle that prohibits limitation of freedom of expression and information ‘on account of the content or effect of the point of view expressed’.²⁶⁵ On the other hand, the Constitution states that freedom of expression can be legitimately limited ‘in order to protect the well-being of the youth and the honor and reputation of individuals’.²⁶⁶ In addition to this, it states that ‘any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law’.²⁶⁷

As discussed earlier (see *supra* section), Article 19(3) of the ICCPR incorporated three tests that any limitation on freedom of expression must meet. These tests are: “provided by the law”, “legitimate aim” and “necessary to attain the legitimate aim”. In relation to the first test, similar to Article 19 of the ICCPR, the FDRE Constitution set the standard that any limitations to freedom of expression and opinion have to be provided only through law. Secondly, Article 29 of the FDRE Constitution provided legitimate grounds to limit the right to freedom of expression and information. Unlike the ICCPR, the well-being of the youth is a legitimate ground for limiting freedom of expression. Although no jurisprudence is so far developed in the area, expressions which contain pornographic content can be limited based on this ground.²⁶⁸ The second legitimate ground for limiting freedom of expression is the protection of the honour and reputation of individuals. The objective of this limitation is to balance between the right to freedom of expression and ‘the right for human dignity, reputation, and honour’.²⁶⁹ This ground of limitation is similarly addressed under Article 19(3(a)) of the ICCPR. Last

²⁶⁵ *ibid.*, Article 29(6).

²⁶⁶ *ibid.*

²⁶⁷ *ibid.*

²⁶⁸ Timothewos, P. 215.

²⁶⁹ FDRE Constitution Article 24(1) .

but not least, propaganda for war and public expression with the intent to injure human dignity is a legitimate ground under the FDRE Constitution to limit the right to freedom of expression. Even if Article 29(6) of the FDRE Constitution exhaustively listed the legitimate grounds for limiting freedom of expression and information, it left out a couple of internationally recognised legitimate grounds that include national security and public health.²⁷⁰ Although Article 29 of the FDRE Constitution is silent about the necessity test for limiting the right to freedom of expression and information, it has to be interpreted in compliance with the ICCPR. In the case of the right to freedom of information, although the FDRE Constitution under Article 29 sub-Article 3(b) guarantees the right to “access to information of public interest”, the protection is not full protection according to international principles. In the absence of a clear definition of what public interest means, the provision creates a space for potential abuse and denial of access to information.²⁷¹

The right to freedom of expression and access to information cannot be separated because access to information is an integral part of the right to freedom of expression.²⁷² Thus, according to Article 19(3) of the ICCPR, any limitation on the right to access to information should meet the three-part test which we discussed in the above chapter. However, the wording of Article 29(3(b)) of the Ethiopian Constitution gave the space for government authorities to decide on what information is of public interest and what is not, which is purely against the principle for limiting the right to freedom of expression, particularly the principle of “being prescribed by law”.²⁷³ As shown above, the FDRE Constitution has recognised freedom of opinion in an absolute manner. Moreover, it protected freedom of the expression and guaranteed freedom of the press. However, like Article 19(3) of the ICCPR, the Constitution states that freedom of expression can be limited by law to achieve legitimate aims.

²⁷⁰ Timothewos, P. 219.

²⁷¹ Article 19, *The Legal Framework for Freedom of Expression in Ethiopia*, p.17, [website] <https://www.article19.org/data/files/pdfs/publications/ethiopia-legal-framework-for-foe.pdf>, (accessed 13 July 2018).

²⁷² *ibid.*

²⁷³ *ibid.*

3.8 Conclusion

The right to freedom of opinion and expression is one of the basic rights that are recognised under different international and regional human rights documents. It is considered as a cornerstone of democracy and an enabler of other human rights. Freedom of expression covers the freedom to seek, receive and impart information and ideas of all kinds regardless of the means and medium of communication. Moreover, it guarantees freedom of the press and protects freedom of expression on the internet. Unlike the right to freedom of opinion, the right to freedom of expression is not an absolute right; it can be restricted. Nevertheless, the limitation needs to be provided by the law in order to pursue a legitimate aim. Moreover, any of the restrictive measures must be necessary and proportionate to achieve the legitimate aims.

Although Article 29 of the FDRE Constitution recognised the right to freedom of opinion and expression and exhaustively listed legitimate grounds to limit freedom of expression, it left out a couple of legitimate grounds from the ICCPR. Moreover, the FDRE Constitution recognised access to information in a vague manner and it left loopholes for potential abuse by the government. The right to freedom of expression and access to information are two sides of the same coin. Hence any limitation to access to information should be made in conformity with the three-part test principles.

Chapter 4: The Right to Freedom of Opinion and Expression: The Truth in Ethiopia

Based on the foundation laid in the previous Chapter, this part of the thesis examines the status of the right to freedom of opinion and expression on the ground. The aim of this Chapter is to understand the impact of the two states of emergency in the enjoyment of the right to freedom of opinion and expression in Ethiopia.

4.1 Freedom of Expression in the Pre-2005 Ethiopia

As it is discussed in the third Chapter of the thesis, the right to freedom of expression was recognised in Ethiopia, for the first time, under the 1955 revised Constitution. Although newspaper has started to be printed in Ethiopia prior to the revised Constitution, the progress was low and unsatisfactory mainly as the result of the strict control by the royal family (1920s to 1974) and the military Derg regime (1974-1991).²⁷⁴ During these periods the media served only as the mouthpiece of governments, instead of serving the general public by providing neutral information.²⁷⁵

After the downfall of the military Derg regime, the Transitional Government of Ethiopia (TGE) declared its intent to fully respect individual human rights without limitations.²⁷⁶ Following this declaration of intent, a revolution of private newspapers and magazines started to appear in Addis Ababa.²⁷⁷ Furthermore, the endorsement of the 1992 Press Proclamation created a fertile ground for the enjoyment of the right to freedom of expression by both the media and citizens.²⁷⁸ The 1995 Constitution under Article 29

²⁷⁴ M.A. Moges., 'Ethiopian journalism from self-censoring to silence: a case of reporting on internal conflict', ESSACHESS - Journal for Communication Studies, vol. 10, no. 1, 2017, pp. 112, Available at essachess.com, (accessed 17 June 2018).

²⁷⁵ *ibid.*

²⁷⁶ S.Bonsa, 'The State of the Private Press in Ethiopia', in S. Bonsa, edited by Bahiru Zewde and Siegfried Pausewang, *Ethiopia: The Challenge of Democracy from below*, Nordiska Afrikainstitutet, Uppsala : Nordiska Afrikainstitutet ; Addis Ababa : Forum for Social Studies , 2002, P.186.

²⁷⁷ Bonsa, P.186.

²⁷⁸ Moges, P.112.

recognised the right to hold opinion, the right to freedom of expression, guaranteed access to information, guaranteed the independence of the Media and safeguarded it from any form of censorship.²⁷⁹

The coming into force of the 1992 Press law and the 1995 Constitution improved the protection of the right to freedom of opinion and expression in Ethiopia and paved the way for the private press and media to exercise their right to freedom of expression in an unprecedented manner.²⁸⁰ However, the landscapes for enjoying the right to freedom of expression for individuals, the press and media have become hostile following the highly contested 2005 general election in the country.²⁸¹

4.2 Freedom of Expression in the post-2005 Ethiopia

As is addressed in the second chapter of the paper, the protection of freedom of expression enables the enjoyment of other rights and it is crucial for the healthy functioning of the entire human rights system in the country. In this regard, Media is responsible to inform the society and enable them to make an informed decision on their economic, social, political and cultural life. In contrast, States have an obligation not only to abstain from controlling the media but also to create fertile legal and regulatory landscape for the establishment of free and diverse media. These obligations of the state apply both to the traditional media's like newspaper, radio or television and the digital Media including social media platforms.²⁸²

In the case of post-2005 Ethiopia, despite the recognition of media freedom under the Constitution, the truth in the ground is absolutely different. Since 2005, the media

²⁷⁹ FDRE Constitution, Article 29

²⁸⁰ *ibid.*, P.112.

²⁸¹ In May 2005 Ethiopia had the most contested Parliamentary election. Following opposition parties refusal to accept the election result, at least 46 unarmed civilians were killed by the Ethiopian military force while protesting on the streets. Moreover independent journalists, editors and publishers faced harassment, intimidation and arrest as the result of their critical writings about the election. (see Human Rights Watch, Ethiopia: Events of 2005)

²⁸² Article 19, *Media Freedom*, [website] 2018 , <https://www.article19.org/issue/media-freedom/>, (accessed 23 May 2018).

landscape in Ethiopia become tightly controlled by the government and it turned out to be so difficult for Ethiopians to find independent media outlet.²⁸³ The direct and/or indirect pressure, harassments and prosecution of journalists ‘especially those working in the free press, have discouraged many publications and forced them out of the market.’²⁸⁴ Besides this, ‘Journalists in the surviving newspapers exercise curious reporting to be safe from harassment and criticisms, and to protect their papers from being shut down.’²⁸⁵

Unfortunately, ‘many journalists are forced to choose between self-censorship, harassment, and arrest, or exile.’²⁸⁶ In addition to direct threat and abuses against journalists, the government used other tactics ‘to restrict independent media include harassing advertisers, printing presses, and distributors.’²⁸⁷ Moreover, the government jammed radio and television broadcasts, targeted sources and family members of Diaspora journalists.²⁸⁸

In addition to the media professionals, individuals from all walks of life: the academia, opposition political parties, and civil society organisation etc are prosecuted by politically motivated charges because of their critical views against the ruling party and government.²⁸⁹ The worst of all is that the government used its legislative power in order to enact laws that have negative effects on the enjoyment of the right to freedom of expression. Out of these laws, the Anti-Terrorism Proclamation and the computer crime proclamation are the main ones.

²⁸³ Human Rights Watch, *Ethiopia: Events of 2017*, [website], 2018, <https://www.hrw.org/world-report/2018/country-chapters/Ethiopia>, (accessed 16 June 2018).

²⁸⁴ Moges, P.113.

²⁸⁵ Human Rights Watch, ‘Ethiopia: Events of 2017’

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

²⁸⁸ *ibid.*

²⁸⁹ Hessebon, p.17,

4.2.1 Anti-Terrorism Proclamation

In August 2009, the government enacted the infamous Anti-Terrorism Proclamation (ATP).²⁹⁰ Although it is the obligation of the state to protect citizens from any acts of terrorism through counterterrorism legal framework, there are vague terms and loopholes in the law that created space for the government to arbitrarily use the ATP to silence dissident opinions.²⁹¹

Even though putting restrictions on the right to freedom of expression for subverting terrorism and protecting national security is a legitimate ground of limitation, the extent of such limitation in the Ethiopian context is so broad.²⁹² According to this proclamation any publication that sounds like a direct or indirect encouragement of terrorism, which is vaguely defined, causes up to 20 years of imprisonment.²⁹³ In other words, the wording of the ATP has the effect of narrowing the landscape for free public discussion and affected the right to access to information of citizens.²⁹⁴

The other problem of the ATP is its extremely broader and vague definition for acts of terrorism.²⁹⁵ Article 3 of the ATP contains an excessively broad definition of acts of terrorism²⁹⁶ that gives space for the government to use and abuse the law ‘to repress internationally protected freedoms and to crack down on political dissent, including

²⁹⁰ Anti-Terrorism Proclamation, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia’, Proclamation No. 652/2009.

²⁹¹ M.Tsegaye, 'Implication of the Anti-Terrorism law of Ethiopia on Freedom of expression and the Media', LLM Thesis, Addis Ababa University, 2016, P.4, Available from http://www.academia.edu/33207647/Implications_of_the_Anti-Terrorism_Law_of_Ethiopia_on_Freedom_of_Expression_and_the_Media, (Accessed 16 June 2018).

²⁹² Tsegaye, P.24

²⁹³ 'Ethiopia Country Report | Freedom On The Net 2017' (*Freedomhouse.org*, 2018) , available from: <https://freedomhouse.org/report/freedom-net/2017/ethiopia>, (accessed 24 July 2018).

²⁹⁴ Tsegaye, P.4.

²⁹⁵ The Oakland Institute, ‘*Ethiopia’s Anti-Terrorism Law: A tool to stifle dissent*’, ‘*Ethiopia’s Anti-Terrorism Law: A tool to stifle dissent*’, 2015, P.9., available from: https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Ethiopia_Legal_Brief_final_web.pdf, (accessed 1 July 2018).

²⁹⁶ Anti-Terrorism Proclamation, Article 3.

peaceful political demonstrations and public criticisms of government policy.’²⁹⁷ According to the ATP, ‘minor acts of violence committed in the context of political activism (e.g. a political protestor who damages a police car or breaks the window of a government building)’²⁹⁸ and ‘a non-violent march that blocked traffic’²⁹⁹ could be considered as terrorist acts. What is even worse is that:

...(S)omeone who advised or even just offered water and food to a political protester might be charged with terrorism under this provision. Similarly, someone who held a sign used in a nonviolent political protest that blocked traffic could arguably be found guilty of possession of property used to commit a terrorist act.³⁰⁰

In addition to the wide definition of acts of terror set under Article 3 of the ATP, Article 6 of the ATP is also the other controversial provision. It says:

Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years.³⁰¹

This provision used a very vague and broad terminology: “encouragement”. It opened a wide door of subjectivity ‘as any publication could be regarded as ‘encouragement of terrorism’ depending on the perception of ‘some or all members of the public to whom

²⁹⁷ The Oakland Institute, ‘Ethiopia’s Anti-Terrorism Law: A tool to stifle dissent’, P.9.

²⁹⁸ *ibid.*, P.9.

²⁹⁹ *ibid.*

³⁰⁰ *ibid.*

³⁰¹ Anti-Terrorism Proclamation, Article 6.

it is published.³⁰² Last but not the least; the ATP did not take into consideration the content, the manner and the context of the publication.³⁰³ As a result of this loophole, Molaligne argues that a purely academic work can be labeled as a direct or indirect encouragement to terrorism as per Article 6 of the ATP.³⁰⁴

The Oakland Institute in its report titled Ethiopia's Anti-terrorism law: a tool to stifle dissent described the ATP as:

“...a tool of repression, designed and used by the Ethiopian government to stifle its critics and political opposition, and criminalize the robust discussion of matters of enormous public interest and importance.”³⁰⁵

Even though the Human Rights Committee in its 102nd session raised its concern regarding the unclear definition of certain offenses and the scope of the provisions in the ATP that left space to abuse the media³⁰⁶, the government of Ethiopia did not make any effort to amend the ATP; instead, it used the law against the media. Since the adaptation of the ATP in 2009, the government of Ethiopia used and abused the law to arrest several journalists with charges of terrorism.³⁰⁷ Out of these several journalists, Eskinder Nega, Reeyot Alemu, and Zelalem Workagenehu are among them.

³⁰² H. A. Tura, 'The Impact of Ethiopia's Anti-Terrorism Law on Freedom of Expression', *Conference: 5th International Conference of Ph.D. Students and Young Researchers*, available at SSRN Electronic Journal, Vilnius University, 2017, P. 396, <https://ssrn.com/abstract=2660268>.

³⁰³ Tsegaye, P.36.

³⁰⁴ *ibid.*

³⁰⁵ The Oakland Institute, '*Ethiopia's Anti-Terrorism Law: A tool to stifle dissent*', P.5.

³⁰⁶ United Nations, Human Rights Committee, *Concluding observation of the Human Rights Committee*, 'consideration of reports submitted by Ethiopia under article 40 of the Covenant', Human Rights Committee 102nd session, Geneva, 2011, pp.15.

³⁰⁷ L.Church, *Striking the Balance: Combating Terrorism and Preserving the Freedom Of Expression In Ethiopia*, Harvard International Law Journal [website], 2016, <http://www.harvardilj.org/2016/01/striking-the-balance-combating-terrorism-and-preserving-the-freedom-of-expression-in-ethiopia/>, (accessed 12 May 2018).

Eskinder Nega

In 1993, Eskinder launched a newspaper called *Ethiopia* which was shut down by the Ethiopian authorities. Later on, together with his wife, he established ‘a publishing house that printed newspapers critical of the government’³⁰⁸ However, ‘Eskinder has had his journalist license revoked and has been detained at least seven times by the authorities, including for his reporting following the violence surrounding the 2005 elections.’³⁰⁹

In September 2011, he was accused of conspiring with a terrorist group with the aim to forcefully overthrow the government.³¹⁰ Interestingly, he was arrested after publishing an ‘Article criticizing the government’s use of the anti-terrorism law to arrest journalists.’³¹¹ In June 2014, the court found him guilty and he was sentenced to 18-years imprisonment *under the very law he had criticized*.³¹²

Reeyot Alemu,

A High school English teacher and journalist Reeyot Alemu was arrested in June 2011 for the critical articles she published in *Feteh* newspaper.³¹³ At first, she was accused of different terrorist activities and sentenced to 14 years in prison.³¹⁴ Later on, the appeal court found her guilty of a single criminal activity: the crime of promoting terrorism, and reduced the sentence to five years.³¹⁵

³⁰⁸ The Oakland Institute, ‘*Ethiopia’s Anti-Terrorism Law: A tool to stifle dissent*’, P.7.

³⁰⁹ *ibid.*, P.7.

³¹⁰ Church, 26 January 2016.

³¹¹ The Oakland Institute, ‘*Ethiopia’s Anti-Terrorism Law: A tool to stifle dissent*’, P.7.

³¹² *ibid.*

³¹³ *ibid.*

³¹⁴ *ibid.*

³¹⁵ *ibid.*

Zelalem Workagenehu

In July 2014, blogger Zelalem Workagenehu was arrested and charged with conspiring to overthrow the government for the mere fact that he organised a course on digital security.³¹⁶ After almost two years, in May 2016, the court found him guilty of terrorism and sentenced to over five years in prison.³¹⁷

In addition to these journalists, In April 2014, the critical “Zone 9”³¹⁸ bloggers were arrested and charged with terrorism under the harsh ATP.³¹⁹ Even if the cause for their arrest and prosecution was their critical articles appeared on their blog,³²⁰ ‘they were accused of intent to overthrow the government, an offense under the criminal code, by encrypting their communications to disseminate seditious writings.’³²¹ They had been ‘denied bail brought to court dozens of times for sham trials and the government released some of the defendants in late 2015 prior to the President Obama’s visit to Ethiopia.’³²² However, the prosecutor took the case to the Supreme Court and they were repeatedly summoned to appear throughout 2016.³²³

4.2.2 Computer Crime Proclamation

In June 2016, the government enacted the computer crime proclamation which dealt with different criminal activities including ‘illegal access to the computer system

³¹⁶ Ethiopia Country Report, *Freedom On The Net 2017*.

³¹⁷ *ibid*.

³¹⁸ Zone 9 is a group of Ethiopian bloggers, founded in 2012 with the slogan, “we Blog Because We Care.” The name refers to the eight zones of the notorious Kality prison where political prisoners are held, and to the rest of Ethiopia, a place the bloggers feel is increasingly an extension of the prison, with ever-greater restrictions on freedom.

³¹⁹ Ethiopia Country Report, *Freedom on the Net 2017*.

³²⁰ Tura, P. 401.

³²¹ Ethiopia Country Report, *Freedom on the Net 2017*.

³²² The Oakland Institute, *Ethiopia’s Anti-Terrorism Law: A tool to stifle dissent*, P.6.

³²³ Ethiopia Country Report, *Freedom on the Net 2017*.

(hacking), to disseminating spam and combating child pornography.³²⁴ However, the proclamation also contains provisions which are detrimental to freedom of expression and other human rights. The first infamous provision in this regard is found under Article 13(1) that says:

(Whosoever intentionally) intimidates or threatens another person or his families with serious danger or injury by disseminating any writing, video, audio or any other image through a computer system shall be punishable, with simple imprisonment not exceeding three years or in a serious cases with rigorous imprisonment not exceeding five years.³²⁵

According to this provision posting of any material can be criminalized if the post is perceived as intimidating because the law fails to define what intimidating means in this regard.³²⁶ As the result of the ambiguous wording of the provision, posting evidence of corruption or any other serious crime can be argued as intimidating to the individuals accused of the crime.³²⁷ This will have serious effects if it involves government officials. Moreover, the proclamation criminalised defamation and gave far-reaching investigation power for law enforcement agencies including the capacity to intercept digital communication.

4.3 Internet and Freedom of Expression in Ethiopia

The new era of internet has paved a new means for the realisation of freedom of expression. The internet has expanded the ability of individuals to enjoy their right to

³²⁴ Article 19, 'Ethiopia: Computer Crime Proclamation', Legal analysis, July 2016, Available from [https://www.article19.org/data/files/medialibrary/38450/Ethiopia-Computer-Crime-Proclamation-Legal-Analysis-July-\(1\).pdf](https://www.article19.org/data/files/medialibrary/38450/Ethiopia-Computer-Crime-Proclamation-Legal-Analysis-July-(1).pdf), (accessed 17 June 2018)

³²⁵ FDRE, Computer Crime Proclamation, Proclamation No. 958/2016, Article 13(1)

³²⁶ Article 19, 'Ethiopia: Computer Crime Proclamation', Legal analysis (2016), P. 17.

³²⁷ *ibid.*

freedom of opinion and expression which in effects enhances the enjoyment of other human rights and the overall development of humankind.³²⁸

Like the case of any other human rights, Ethiopia has an obligation and duty to respect, to protect and to fulfill the right to freedom of opinion and expression.³²⁹ This obligation and duty include to protect, to respect and to fulfill the right to freedom of opinion and expression through the internet. However, Ethiopians are not properly benefiting from the opportunity the internet has brought as a result of inaccessibility and restricted connectivity.

According to the ICT Development Index (IDI) 2017 rank, Ethiopia is 170th out of 175 countries, with 15.37% of internet access penetration and 50.51% mobile phone coverage³³⁰ mainly because of poor telecommunication infrastructure which is almost entirely absent from rural areas, where about 85 percent of the population resides.³³¹ In terms of price, internet services remain inaccessible for most Ethiopians and Ethiopia is among the most expensive countries for internet access.³³² On average, Ethiopians spent around 85 USD per month for internet, whereas, neighboring Kenya and Uganda costs less than 30USD per month for the relatively better quality of internet service.³³³

In addition to the inaccessibility of the internet service for the majority of citizens, the government is highly anxious about the internet. In the last couple of years, the

³²⁸ F La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Report to the Human Rights Council, 17th session, UN Doc A/HRC/17/27 (2011), p 19.

³²⁹ United Nations Human Rights Office of the High Commissioner, 'International Human Rights Law' Available From <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 01 July 2018)

³³⁰ International Telecommunications Union, *ICT Development Index: 2017*, [website] 2018, <https://www.itu.int/net4/ITU-D/idi/2017/index.html#idi2017economytabÐ>, accessed 12 April 2018).

³³¹ Ethiopia Country Report, Freedom On The Net 2017

³³² Alliance for Affordable Internet, *Affordability Report: Ethiopia 2017*, [website] 2018 , http://a4ai.org/affordability-report/data/?_year=2017&indicator=INDEX&country=ETH , (accessed 12 April 2018).

³³³ Ethiopia Country Report, Freedom On The Net 2017

government restricted connectivity and blocked different websites including social media's on different occasions.

4.3.1 Restriction on Connectivity

Following the widespread anti-government protests in the country, the government reacted with excessive and lethal forces and restricted access to the internet. In October 2016 all mobile internet and social media had been shut down³³⁴ for a period of more than three months.³³⁵ In addition to politically motivated shutdowns, 'the authorities also blocked access to Facebook, Twitter, Instagram, Viber, IMO, and Google+ to prevent cheating during University examination in July 2016.'³³⁶ Moreover, immediately after the conviction of two prominent human rights activists (Yonatan Tesfaye and Getachew Shiferaw) for online expression in May 2017, the government shut down the internet service from 30 May to 8 June 2017.³³⁷

Researches indicated that in addition restricting the right to freedom of expression, the ICT shutdowns are affecting the economy of the country.³³⁸ According to a study made by the Center for Technology Innovation at the Brookings Institute, Ethiopia lost 9 million USD between mid-2015 and mid-2016 as a result of internet shutdowns.³³⁹ Another research made by Collaboration on International ICT Policy in East and Southern Africa (CIPESA), the internet shutdowns between 2015 and 2017 costs

³³⁴ E. Chala, *Ethiopian Authorities Shut Down Mobile Internet and Major Social Media Sites*, Global Voice [website], 2016, <https://globalvoices.org/2016/10/11/ethiopian-authorities-shut-down-mobile-internet-and-major-social-media-sites/>, (accessed 16 June 2018).

³³⁵ Ethiopia Country Report, Freedom On The Net 2017

³³⁶ Article 19, *Ethiopia: Third Internet shutdown follows imprisonment of two human rights activists*, [website] 2017, <https://www.article19.org/resources/ethiopia-third-internet-shutdown-follows-imprisonment-of-two-human-rights-activists/>, (accessed 24 February 2018).

³³⁷ Ethiopia Country Report, Freedom on the Net 2017, see also, Article 19, *Ethiopia: Third Internet shutdown follows imprisonment of two human rights activists*.

³³⁸ Ethiopia Country Report, Freedom On The Net 2017

³³⁹ J. Jeffrey, 'Ethiopia: Internet shutdowns take their toll on economy,' African Business, 29 December 2016, <http://africanbusinessmagazine.com/region/east-africa/ethiopia-internet-shutdowns-take-toll-economy/#>, (accessed 1 June 2018).

Ethiopia nearly 3.5 million USD per day.³⁴⁰ Despite the disparity on the exact amount of the economic loss, these two research made it clear that the ICT shutdowns in the country affected not only the right to freedom of expression, but also the economy of the country.

The Telecom service in Ethiopia is monopolised by the state-owned EthioTelecom and the monopoly not only caused inaccessibility of the service in the rural part of the country but also enables the government to abuse its power to restrict information flows and access to the internet and mobile phone services.³⁴¹

4.3.2 Limits on Content:

The Ethiopian government is infamous for ‘a nationwide, politically motivated internet blocking and filtering apparatus that is reinforced during sensitive political events.’³⁴² In December 2016, the test made by the Open Observatory of Network Interference (OONI) revealed the fact that a wide range of websites, including social media platforms, was blocked in Ethiopia.³⁴³ Till now, there is no ‘known procedural law that governs the manner in which illegal, offensive and harmful content could be blocked, filtered or taken down.’³⁴⁴ From a human rights perspective, ‘states must refrain from interfering with or curtailing the enjoyment of human rights’³⁴⁵ and restricting connectivity, internet filtering, and blocking are a clear violation of the right to freedom of expression by the government. Unfortunately, this violation on the right to freedom of expression spoils the overall human rights situation of the country.

³⁴⁰ Ethiopia Country Report, Freedom On The Net 2017

³⁴¹ *ibid.*

³⁴² *ibid.*

³⁴³ *ibid.*

³⁴⁴ K. M. Yilma, 'Some Remarks on Ethiopia's New Cybercrime Legislation', *Mizan Law Review*, Vol. 10, No. 2, P. 457. Available from <http://dx.doi.org/10.4314/mlr.v10i2.7>, (accessed 09 July 2018).

³⁴⁵ United Nations Human Rights Office of the High Commissioner, *International Human Rights Law*, [website] Available From <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 01 July 2018).

4.4 Conclusion

In spite of the Constitutional recognition of the right to freedom of expression in Ethiopia, violations to the right become rampant following the most contested general election in 2005. Since 2005, the landscape becomes hostile for private and independent Media's and journalists are forced to choose between self-censorship, harassment, and arrest, or exile.³⁴⁶ Moreover, advertisers and distributors are harassed and radio and television broadcasters were jammed by the government.³⁴⁷

The government enacted and used the Anti-Terrorism, and Computer Crime Proclamation as a means to silence dissident opinions from journalists, academicians, human rights activists, and political opposition groups. Several journalists and human rights activists were arrested and charged with terrorism merely for exercising their freedom of expression.

Furthermore, using its monopoly in the Telecom sector, the government arbitrarily restricted connectivity and blocked a wide range of websites including social Media's on a different occasion. These arbitrary restrictions on connectivity not only violated the right to freedom of expression of individuals but also affected the overall economy of the country. In general, according to freedom in the world 2018 report, Ethiopia is one of the least free countries in the world.³⁴⁸

³⁴⁶ Ethiopia: Events of 2007, Human Rights Watch

³⁴⁷ *ibid.*

³⁴⁸ Freedom House, *Freedom in the world 2018: Ethiopia Profile*, [website] 2017, <https://freedomhouse.org/report/freedom-world/2018/ethiopia>, (accessed 11 July 2018).

Chapter 5: The State of Emergency in Ethiopia

During the time of emergency that threatens the very existence of the nation, international law allows states to derogate from their human rights obligations.³⁴⁹ This chapter explores and reflects on the causes of the political unrest in Ethiopia and the effect of the declaration of a state of emergency on the enjoyment of the right to freedom of opinion and expression.

5.1 Anti-Government Protests

The genesis of the current political unrest and human rights crisis in Ethiopia dates back to April 2014 when Oromo students in Ambo, Alamaya, and Jima universities started the protest against the Addis Ababa Integrated Regional Master Plan (hereinafter the master plan).³⁵⁰ Although the students peacefully protested the master plan by pointing out the potential eviction it would cause on the Oromo farmers, the security force crackdown the protest.³⁵¹ Even though the security forces illegally arrested, tortured and killed several people during the protest, in 2015 the protest was joined by farmers and others in the Oromo community and it forced the government to cancelation the Master Plan in January 2016³⁵², nevertheless the struggle shifted into ending economic marginalization.³⁵³

³⁴⁹ ICCPR, Article 4.

³⁵⁰ Y.T. Ayele, 'The Discursive Construction of Identity: The Case of Oromo in Ethiopia', Master Thesis, Norwegian University of Life Science, 2016, P. 8.

³⁵¹ Ayele, P. 8.

³⁵² Amnesty International, *Ethiopia: Draconian State of Emergency Measures*, p.2, [website] 2017, <https://www.amnesty.org/en/documents/afr25/5669/2017/en/>, (accessed 2 April 2018).

³⁵³ 'Why has Ethiopia imposed a State of Emergency?', BBC News, 21 February 2018, <http://www.bbc.com/news/world-africa-43113770>, (accessed 11 July 2018) see also

Home Office, *Country Policy and Guidance Note Ethiopia: Oromo's including the Oromo Protests*, London, United Kingdom Govt. 2017.

In the beginning the protests were leaderless and unorganised, later on, an underground organisation called “Qeerro” started organising them.³⁵⁴ Most of the protests had similar nature and protesters requested the government; to immediately withdraw the federal security forces including the military and intelligence, the release of political prisoners, independent investigation, and prosecution against the responsible government officials,³⁵⁵ ‘administrative autonomy of the region, and political and economic justice.’³⁵⁶ In relation to this, Amnesty International described the protests in Oromia and Amhara region as follow:

The mass protests taking place across Oromia in October 2015 and Amhara Regional State in July 2016 started as opposition against specific government policies. However, the protests evolved into the primary forum for expression of other popular demands including equitable distribution of political power, self-rule, economic justice, democratic reform and respect for human rights, including the release of prisoners, many of whom are prisoners of conscience, detained solely because of their peacefully expressed political opinions.³⁵⁷

The protest in Oromia extended to the Amhara, the second biggest ethnic group in Ethiopia, regional state in August 2016 ‘against arbitrary detention and demanding the self-determination of the ethnic Amhara community in neighbouring Tigray Region’ Besides this, the dominance of the ruling party members and the small Tigray Ethnic group in the economic and political sphere of the country is considered as another ground for the protests in the region.

In addition to protests in the Oromia and the Amhara regional state, ‘(t)he Konso community in Southern Nations’ Nationalities and Peoples Region (SNNPR) also protested demanding respect for their right to self-determination.’³⁵⁸ The Konso people

³⁵⁴ Ayele, P. 11.

³⁵⁵ *ibid.*, P. 11.

³⁵⁶ Amnesty International, ‘Ethiopia: Draconian State of Emergency Measures’, p.2

³⁵⁷ Amnesty International, *Commentary on the Ethiopian state of emergency*, p.3, [website] 2018, <https://www.amnesty.org/en/documents/afr25/7982/2018/en/>, (accessed 3 April 2018).

³⁵⁸ *ibid.*

protested the forceful annexation to the “Segen Area People Zone”³⁵⁹ and appealed the decision to the regional council of SNNPR.³⁶⁰ On 27 June 2016, their appeal to self-determination had been rejected by the Regional Council of the SNNPR, which escalated the protest.³⁶¹ Following the new protest breaking out, the government tried to control the protest by deploying military force in the area.³⁶² From 5-19 September 2016, dozens of protesters were killed by the government security forces and hundreds of peaceful protestors were arrested arbitrarily.³⁶³ Moreover, ‘1500 houses were burned down by a raging fire that was ignited by security officials’³⁶⁴ which caused the eviction of thousands from their village.³⁶⁵

The anti-government protests and tension in both Oromia and Amhara region escalated as the result of stampede during Irrecha, the annual Thanksgiving festivity of the Oromo community, which caused the *death of at least 55 people* on 2 October 2016.³⁶⁶ So far, the investigation has not been conducted regarding the cause of the stampede however the government accuses ‘anti-peace’ protestors as the cause for the stampede, ‘while Oromo activists claim that government security forces triggered it when they fired tear gas canisters and shot live ammunition into the crowd.’³⁶⁷ Consequently, the Oromo activists declared ‘week of rage’ throughout Oromia which at some part of the region went ‘violent as protesters attacked foreign and local businesses, farms and vehicles,

³⁵⁹ Segen Area People Zone is one of the Zones(districts) in the Southern Nations’ Nationalities and Peoples Region (SNNPR)

³⁶⁰ Association For Human Rights In Ethiopia, ‘AHRE urges Ethiopia to End the Atrocities and Human Rights Abuses against the Konso People’, 2016, [online], <https://ahrethio.org/2016/09/20/ahre-urges-ethiopia-to-end-the-atrocities-and-human-rights-abuses-against-the-konso-people/> (accessed 09 July 2018).

³⁶¹ *ibid.*

³⁶² *ibid.*

³⁶³ *ibid.*

³⁶⁴ *ibid.*

³⁶⁵ *ibid.*

³⁶⁶ Amnesty International, ‘Ethiopia: Draconian State of Emergency Measures’, p.2.

³⁶⁷ *ibid.*

especially those near Addis Ababa.³⁶⁸ Moreover, the governments reported members of the security forces been attacked and killed by protesters in some parts of Oromia Region.³⁶⁹ Following yearlong chains of antigovernment protests in the Oromia and Amhara region of the country, the government declared a country-wide six-month state of emergency on October 9, 2016, which later the Ethiopian parliament extended it by four more months.³⁷⁰

In August 2017 the government lifted the state of emergency which stayed for 10 months period. However, within two weeks the protests restarted in most part of Oromia region and it spread to Amhara regional state.³⁷¹ On 20 January 2018, ‘(a)t least seven people were killed in Woldiya town, Amhara Regional State when security forces opened fire on worshippers attending the annual Epiphany holiday.³⁷² These incidents escalate the protests and residents in Woldiya and nearby towns attacked government properties and targeted supporters of the ruling party.³⁷³

As the result of the increasing mass protest, the ruling party (EPRDF) addressed the public to undertake deep reform to bring national reconciliation among Ethiopian nations and nationalities and people.³⁷⁴ Moreover, as part of the reform, the government released most of the political prisoners, journalists, and human rights activists. Since January 2018, more than 3000 prisoners have been released, including Dr. Merera

³⁶⁸ *ibid.*

³⁶⁹ State of Emergency Proclamation for the Maintenance of Public Peace and Security Council of Ministers Proclamation No.1/2016 [State of Emergency Proclamation No. 1/2016] (Oct. 8, 2016) (Eth.), see also ‘Ethiopia Extends State of Emergency by Four Months, AL JAZEERA, 30 March 2017, <https://perma.cc/B4ZZ-4Q62>, (accessed 14 May 2018)

³⁷⁰ Human Rights watch, ‘*The legal Analysis of Ethiopia’s State of Emergency*’, 30 October 2016, p.1, available at <https://www.hrw.org/news/2016/10/30/legal-analysis-ethiopias-state-emergency>, (accessed 24 April 2018).

³⁷¹ Amnesty International, *Commentary on the Ethiopian State of Emergency*, p.2.

³⁷² *ibid.*

³⁷³ *ibid.*

³⁷⁴ *ibid.*

Gudina (Chairman of the Oromo Federalist Congress), Eskinder Nega (a prominent journalist) and Bekele Gerba (Vice-Chairman of the Oromo Federalist Congress).³⁷⁵

In February 2018, Prime Minister Hailemariam Dessalegn announced his decision to resign from his position which followed by the declaration of a state of emergency by the Council of Ministers which later approved by the parliament.³⁷⁶ The government rationalised the declaration of the state of emergency as a necessary step ‘to ensure peace and political stability, to respond to the resignation of the prime minister, and to facilitate a peaceful transition of power.’³⁷⁷ However, different groups condemned the decision by arguing that the solution to the political tension and protests in Ethiopia is greater respect for human rights, not less.³⁷⁸

5.2 Legal Analysis of Ethiopia’s State of Emergency from International Human Rights Standards Perspective

During this chain of protests, on one hand, security forces killed dozens of protesters and arrested tens of thousands. On the other hand, protestors targeted and attacked government builds and businesses perceived to have a connection with the government.³⁷⁹ The government justified the declaration of a state of emergency as a necessary measure for protecting infrastructures from being attacked by “anti-peace groups in close collaboration with foreign elements”.³⁸⁰

However, the question needs to be addressed here is: Do the anti-government protests qualify as a legitimate ground for declaring a state of emergency? As discussed in the second chapter, one of the requirements set under Article 4 of the ICCPR is that

³⁷⁵ Why has Ethiopia imposed a State of Emergency?, BBC News.

³⁷⁶ Amnesty International, *Commentary on the Ethiopian State of Emergency*, p.4

³⁷⁷ Why has Ethiopia imposed a State of Emergency? , BBC News.

³⁷⁸ Amnesty International, *Ethiopia: MPs’ decision to approve state of emergency disappointing and irresponsible*, [website], 2018, <https://www.amnesty.org/en/latest/news/2018/03/ethiopia-mps-decision-to-approve-state-of-emergency-disappointing-and-irresponsible/>, (accessed 9 July 2018).

³⁷⁹ Human Rights watch, *The legal Analysis of Ethiopia’s State of Emergency*, p.1

³⁸⁰ *ibid.*

existence of an emergency situation that threatens the very life of the nation.³⁸¹ Even if it is the political organ of the government that has the power to declare a public emergency, international human rights law stated that ‘not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation.’³⁸² Moreover, according to Siracusa Principles only internal conflicts and unrest that impose grave and imminent threat to the existence of the nation justify as a ground to derogate from human rights obligation.³⁸³

The initial cause of the protests in Ethiopia was related to the Addis Ababa Master Plan. Later on, it evolved into a means for expressing years of frustration and became a venue for demanding political and economic justice³⁸⁴, democratic reform, respect for human rights and etcetera.³⁸⁵ Although some of the demonstrations end up with violence, the overall situation did not by any standard qualify as a threat to the life of the nation and it didn’t require extraordinary state measure.

In this regard, human rights groups and allies of the Ethiopian government opposed the government’s *decision* to declare a state of emergency. The US Embassy in Ethiopia stated: ‘the challenges facing Ethiopia...are best addressed through inclusive discourse and political processes, rather than through the imposition of restrictions’³⁸⁶ Moreover, the Embassy calls the government to ‘identify other means to protect lives and property while preserving, and indeed expanding, the space for meaningful dialogue and political participation that can pave the way to a lasting democracy.’³⁸⁷ The other problematic issue is that the state of emergency directive contains extensive and loosely written

³⁸¹ ICCPR, Article 4

³⁸² General Comment no 29, Para. 3

³⁸³ Siracusa Principles, Para. 39.

³⁸⁴ Amnesty International, *Ethiopia: Draconian State of Emergency Measures*, p.2

³⁸⁵ Amnesty International, *Commentary on the Ethiopian State of Emergency*, p.3

³⁸⁶ US Embassy Ethiopia, ‘U.S. Embassy Statement on the Ethiopian Government’s Declared State of Emergency’, 17 February 2018, available at: <https://et.usembassy.gov/u-s-embassy-statement-ethiopian-governments-declared-state-emergency/> (Accessed 9 July 2018).

³⁸⁷ *ibid.*

restrictions on different actions that undermine basic human rights including freedom of expression.³⁸⁸ Additionally, the directive gave excessive power to the command post.³⁸⁹

Article 4(1) of the ICCPR clearly states that the existence of the public emergency should be officially proclaimed before states taking derogative measure. And any of the derogation measures needs to be consistent with other international obligations and the scopes of the derogation measures required to be to the extent strictly required by the exigencies of the situation.³⁹⁰ More importantly, Article 4 of the ICCPR explicitly listed untouchable rights in whatever situation and laid an obligation on states to notify other state parties of the ICCPR.³⁹¹

5.2.1 Notification

Article 4 of the ICCPR require state parties to immediately notify other states parties of the ICCPR regarding the provisions from which they derogate and the reason thereof, through the intermediary of the Secretary-General of the United Nation.³⁹² The notification by states parties is required to contain detailed information regarding the derogated rights and its explanation.³⁹³ Such notification has a dual purpose: in one hand it enables other state parties to monitor the implementation of the state emergency rule from the perspective of other provisions of the covenant.³⁹⁴ On the other hand, it is crucial for the Human Rights Committee to discharge its duty, ‘in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation.’³⁹⁵

³⁸⁸ Human Rights watch, *The legal Analysis of Ethiopia's State of Emergency*, p.1

³⁸⁹ The Command post is an organ established by the State of Emergency directive with the power to administer the State of Emergency

³⁹⁰ ICCPR, Article 4(1).

³⁹¹ ICCPR, Article 4(2).

³⁹² ICCPR, Article 4(3).

³⁹³ General Comment, No 29, para. 17.

³⁹⁴ *ibid.*

³⁹⁵ *ibid.*

Till the day of writing this thesis, the Ethiopian government had not sent any notifications regarding the declarations of a state of emergencies in the country. Thus, the Ethiopian government clearly fails to comply with its human rights obligation in this regard.

5.2.2 Legality

According to the principle of legality, laws have to be available and accessible to the public.³⁹⁶ In connection with a state of emergency, ‘legal rules limiting the exercise of human rights shall be clear and accessible to everyone.’³⁹⁷ However, the government of Ethiopia did not make publicly available both the exact content of the state of emergency declaration and its implementation directive.³⁹⁸ Moreover, the declaration and its implementation directive are not written in clear and precise language.³⁹⁹

Last but not least, Amnesty international objects the declaration and its implementation directive for violating the principle of non-retroactive application of criminal laws by authorising the security forces to arrest people for actions they committed prior to the declaration of the state of emergency.⁴⁰⁰ According to Article 15 of the ICCPR, no one shall be guilty of a criminal offense for any omission or commission made prior to the enactment of the law.⁴⁰¹ Nonetheless, this principle is violated by the state of the emergency declaration which allows rehabilitation measure for individuals who involved in protests and strikes prior to the state of emergency.⁴⁰²

³⁹⁶ Amnesty International, *Ethiopia: Draconian State of Emergency Measures*, p.5.

³⁹⁷ United Nations, Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, UN Doc E/CN.4/1984/4, (1984).

³⁹⁸ Amnesty International, *Ethiopia: Draconian State of Emergency Measures*, p.5.

³⁹⁹ *ibid.*

⁴⁰⁰ Amnesty International, *Ethiopia: Draconian State of Emergency Measures*, p.5.

⁴⁰¹ ICCPR, Article 15(1).

⁴⁰² Amnesty International, *Ethiopia: Draconian State of Emergency Measures*, p.5.

5.2.3 Non-derogable rights

Even in a time of public emergency which threatens the life of the nation, states cannot derogate from human rights which listed under Article 4(2) of the ICCPR. These rights are absolute rights since they are protected from any kind of restriction or suspension in whatever circumstance.

Article 4(2) of ICCPR explicitly listed: Article 6 (right to life); Article 7 (freedom from torture); Article 8(1 and 2) (freedom from slavery and servitude); Article 11 (freedom from imprisonment due to failure to fulfil contractual liability); Article 15 (freedom from non-retroactive application of criminal law); Article 16 (right to recognition before the law); and Article 18 (freedom of thought, conscience and religion).⁴⁰³ In addition to the above rights, **the right to hold opinion** without interference is an absolute right.

Different individuals released from detention under the state of emergency reported the prevalence of torture and ill-treatment in the detention centers. In relation to this, ‘Amnesty International has also confirmed that the police tortured and ill-treated detainees at Awash Arba and Awash Sebat military training centers.’⁴⁰⁴

Some other prisoners were subjected to indoctrination.⁴⁰⁵ Befekadu Hailu, a journalist and one of the released prisoners, in his interview with the Voice of America (VOA) Amharic service had reported that government authorities had forced the prisoners to take rehabilitation training with political content and to wear t-shirts with the message “never again”.⁴⁰⁶

“A day before we left the center, we were told that we will be wearing a white T-shirt on which the words ‘*ayidegemim/Irra hin deebi ’amu*’ (never again) were printed in both Amharic and Afaan Oromo. None of us hesitated to wear it; it is

⁴⁰³ ICCPR, Article 4(2).

⁴⁰⁴ Amnesty International, *Ethiopia: Draconian State of Emergency Measures*, p.5.

⁴⁰⁵ B., Hailu, 'What was the indoctrination like?', Borkena, 23 December 2016, <https://www.borkena.com/2016/12/23/indoctrination-like-listen-befekadu-hailu/>, (accessed 11 July 2018).

⁴⁰⁶ *ibid.*

fresh and clean and our souls were desperately looking beyond the center and into getting back to our homes; we were exhausted and we were looking forward to resume our lives that we have left behind.”⁴⁰⁷

Regarding the content of the training, he described the training modules as biased and ‘prepared to present the political narrative of the ruling coalition, EPRDF, as the best alternative we could ever get.’⁴⁰⁸ However, understandably most of the prisoners were scared to criticize the modules and to refuse to wear the t-shirt.

5.2.4 Necessity and proportionality

As addressed in the previous chapter, any derogation measures have to be limited to the extent strictly required to save the life of the nation from the emergency situation that threatens the very existence of the nation. The UN Human rights committee made it clear that ‘this requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.’⁴⁰⁹ This obligation is based on the principle of necessity and proportionality hence any derogation measures in a state of emergency situation must be ‘necessary for the achievement of their intended purpose, must be proportionate to that purpose and must not jeopardize the rights restricted.’⁴¹⁰

When we came to the situation in Ethiopia, the recent unrest and mass protests that lead to the declaration of a state of emergencies were mainly limited to the Oromia and Amhara region of the country. Although the rest parts of the country were relatively peaceful, the state of emergency was declared all over the country which is totally disproportional to the exigency of the situation on the ground. The state of emergency,

⁴⁰⁷ B., Hailu, 'Memoirs of My Detention at Awash 7: Tales of Indoctrination, of Laughter and the Unknown,' ADDIS STANDARD, 30 December 2016, <http://addisstandard.com/memoirs-detention-awash-7-ales-indoctrination-laughter-unknown/>, (accessed 13 July 2018).

⁴⁰⁸ *ibid.*

⁴⁰⁹ General Comment No.29, paragraph 4.

⁴¹⁰ Amnesty International, *Commentary on the Ethiopian State of Emergency*, p.8.

if it was necessary at all, must be restricted only in the Oromia and Amhara region of the country.

In addition to the disproportional geographic coverage of the state of emergency, the material scope of derogation was absolutely disproportionate to the exigency of the situation. For instance, Federal and Regional officials are prohibited from giving any statement regarding the security issue of the country without permission from the command post. And it is not clear how this can lead to violence. Moreover, it was ‘also prohibited to disseminate and receive publications from abroad without the permission of the Command post, using mobile, social media, radio and television.’⁴¹¹

To conclude, the state of emergency is an exceptional situation that needs to be implemented in good faith and in strict compliance with international human rights norms and standards. Based on these norms and standards, the protests in Ethiopia were no threat to the existence of the nation and the declarations of the state of emergency and its administration were not in compliance with international human rights principles which Ethiopia is obliged to respect.

5.3 Restrictions on Freedom of Expression

As it is discussed in the fourth chapter of this thesis, the landscape in Ethiopia (prior to the state of emergency) is tight for the enjoyment of the right to freedom of expression. Later on, the Ethiopian government used the state of emergency rule in order to crack down the antigovernment peaceful protests and the online platforms citizens used to organize themselves.⁴¹² As the result of that, among different things, ‘the state of emergency restricted certain online activities and the internet was shut down for several days’⁴¹³ throughout the country. As well, displaying antigovernment symbols and gestures, accessing or posting contents related to the protest on social media were

⁴¹¹ *ibid.*

⁴¹² Ethiopia Country Report, *Freedom On The Net 2017*.

⁴¹³ *ibid.*

criminalised.⁴¹⁴ Moreover, any kind of efforts to communicate with “terrorist” groups which include exiled dissidents was criminalized under the state of emergency proclamation.⁴¹⁵

Unfortunately, different journalists and political activists were arrested for expressing their opinions on online platforms. In May 2017 the Ethiopian High court found **Yonatan Tesfaye**, activist, and spokesperson for the blue party, guilty for encouraging terrorism based on his post on Facebook⁴¹⁶ ‘in which he said the government had used excessive force against protesters.’⁴¹⁷ And the court sentenced him to six and half year in prison.⁴¹⁸ Later on, the Ethiopian Supreme Court has reduced the prison sentence to three years and on March 5, 2018, Yonatan Tesfaye is released.⁴¹⁹ In addition to Yonatan, ‘**Getachew Shiferaw**, Journalist, was sentenced to one and a half years in prison on subversion charges for Facebook comments published in support of an exiled journalist.’⁴²⁰

The other point worth mentioning here is that: under the state of emergency proclamation and the directive, it is prohibited to share information on the internet, radio, TV and social media “that will create misunderstanding between people or unrest”.⁴²¹ However, the phrase “that will create misunderstanding between people or unrest” is vague and it opens a window for the use and abuse of the law.

⁴¹⁴ ibid.

⁴¹⁵ ibid.

⁴¹⁶ ibid.

⁴¹⁷ A. Maasho, 'RPT-Ethiopian opposition politician convicted of encouraging terrorism', Reuters News, 17 May 2017, <https://www.reuters.com/article/ethiopia-arrests/rpt-ethiopian-opposition-politician-convicted-of-encouraging-terrorism-idUSL8N1IJ1GZ>, (accessed 11 July 2018).

⁴¹⁸ Why has Ethiopia imposed a State of Emergency? , BBC News.

⁴¹⁹ ibid.

⁴²⁰ Ethiopia Country Report, *Freedom on the Net* 2017.

⁴²¹ State of Emergency Directive, Addis Ababa, 15 October, 2016, available from : <http://www.ictpolicy.org/blog/wp-content/uploads/2016/10/Ethiopia-State-of-Emergency-Directive-October-15-2016.pdf>, (accessed 9 June 2018).

In addition to this, it was prohibited to watch or share any television or radio programmes such as ESAT and OMN that are labeled as terrorist linked Media by the Ethiopian government.⁴²² The directive also prohibits any kind of communication and sharing of information with the government or non-governmental organizations on matters that affect security, sovereignty, and the Constitution.⁴²³ Moreover, it prohibited any political parties from giving a press release that disrupts security, sovereignty, and the Constitutional order.⁴²⁴

In summary, Ethiopia is a country with a very immature democracy and the country has a turbid history of respect for freedom of opinion and expression.⁴²⁵ The states of emergency only worsen the situation. The prohibitions laid by the state of emergency were disproportional, ambiguously phrased and they are unnecessary for saving the life of the nation. It is true that Ethiopia faced incidents of unprecedented violence and political unrest in the last couple of years. Yet, the solution for the public grievance should have been democratic reform and inclusive discourse. Declaration of state of emergency in general and restriction of the right to freedom of opinion and expression, in particular, was not necessary at all. The declaration of the state of emergency in effect constricted the already turbid freedom of opinion and expression in the country⁴²⁶ and it seems the government wanted to keep a tight grip on citizens by depriving an alternative source of information.⁴²⁷

⁴²² State of Emergency Directive, Article 2.

⁴²³ *ibid.*

⁴²⁴ *ibid.*

⁴²⁵ B. Sams, Free Speech and Free Press around the World, *Ethiopia*, [website] 2014, <https://freespeechfreepress.wordpress.com/africa/ethiopia/>, (accessed 11 July 2018).

⁴²⁶ *ibid.*

⁴²⁷ Arid Lands Institute, 'Violation of Freedom of Expression in Ethiopia', Pambazuka News, 09 May 2013, Available from: <https://www.pambazuka.org/activism/violation-freedom-expression-ethiopia>, (accessed 11 July 2018).

Chapter 6: Conclusion

Following the 2015 mass protests and chains of anti-government demonstrations that broke out among the two biggest ethnic groups in Ethiopia; the Oromo and the Amhara, the political situation of the country become unstable in an unprecedented manner. Even though the protests were, in general, over the economic, social and political injustice in the country, the government took harsh measures and twice declared a state of emergency. Hence, this thesis is written with the primary aim to examine the impacts of these states of emergencies on the enjoyment of the right to freedom of opinion and expression and to critically analyse the compatibility of the derogation measures with that of international human rights principles. To achieve the aim, I divided the thesis into four chapters and addressed different particular research questions in each.

The first chapter is an introductory chapter that addressed the aims, significance, limitation, and methodology of the research. Chapter two covers the relevant literature and laws on the historical background, conceptual development and rationale of state of emergency and analysed the concept of derogation both under international law and the Ethiopian Constitution. Under the FDRE Constitution; although it is the Council of Ministers of the Federal Government of Ethiopia that has the power to declare a state of emergency, however, it requires endorsement by two-thirds majority votes from the HOPR which is one means the Constitution used to protect abuse of power and violation of human right in the name of state of emergencies. Moreover, the Constitution contains an extra layer of protection by exhaustively listing the grounds for declaring a state of emergency and by listing absolutely untouchable rights. Nevertheless, the lists of non-derogable rights are very limited in comparison to the lists found under the ICCPR. In particular, the Constitution failed to protect the right to life, the right to be recognised as a person before the law, freedom against imprisonment for contractual debt and the right to freedom of thought, conscience, and religion in an absolute manner. To fill this loophole the judiciary is required to incorporate the ICCPR and other international human rights principles that are ratified by Ethiopia, into their day-to-day work.

The third chapter is dedicated to studying the normative scope of the right to freedom of opinion and expression both under the ICCPR and the FDRE Constitution. Despite the fact that the right to freedom of opinion and expression is a cornerstone of healthy democracy, this right is not an absolute right. Both the ICCPR and the FDRE Constitution states that this right can be limited under certain conditions to achieve legitimate aims. In the case of Ethiopia; even if the FDRE Constitution exhaustively listed the legitimate grounds for limiting the right to freedom of opinion and expression, it left out a couple of internationally recognised grounds; national security and public health. Furthermore, the FDRE Constitution guarantees the right to access to information of public interest in a vague manner as the result of it, in the absence of a neutral organ with the power to interpret the Constitution, the government gets a space for interpreting the provision in its favour. The fourth chapter examines the status of the protection of the right in the ground.

The coming into force of the 1992 Press law and the 1995 FDRE Constitution improved the protection of the right to freedom of expression and opened a way for the private Press and Media to enjoy their rights. However, the situation dramatically changed after the controversial 2005 general election in the country. Regardless of the Constitutional protection, in practice, the government enacted the very restrictive laws; the ATP and Computer Crime Proclamation, which limited the landscape for exercising freedom of expression in the country. Additionally, the government frequently abused its monopoly in the Telecom sector for the purpose of restricting connectivity and limiting contents on the internet. As the result of all these, Ethiopia is one of the least free countries in the world. To improve this hostile environment, among different things, the government have to repeal the restrictive legislations that curb the right to freedom of expression and should abolish criminal defamation provisions.

The last chapter analysed the state of emergencies in Ethiopia and its effects on the enjoyment of the right to freedom of opinion and expression. Even if, in some parts, protestors targeted and attacked governmental and private properties, I did not find the situation as threatening to the life of the nation. The states of emergencies were not only unnecessary and disproportionate to control the situation, but also not made in good

faith and implemented against international principles. Additionally, the government of Ethiopia failed to notify other state parties of the ICCPR regarding both the declaration and lifting of the states of emergencies; that is a breach of its obligation to other state parties. Moreover, the states of emergency directives were not accessible to the people, and some of its provisions violated the principle of non-retroactive application of criminal laws. In general, the declaration and implementation of the state of emergency were not inconformities with international human rights principles.

Prior to the official declaration of the states of emergencies, the Ethiopian government was infamous for human rights violations in general and the violation of the right to freedom of opinion and expression in particular, which can be considered as a *de facto* state of emergency. The official declaration of the state of emergencies only played a legalisation role to the violations that already existed in the country.

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Abstract

The chain of mass protests in Ethiopia has affected the socio-economic and political situation of the country. Consequently, the government declared a state of emergency and banned a number of activities that have an impact on the enjoyment of the right to freedom of expression. Using the interdisciplinary human rights perspective, the thesis discusses the concept of the state of emergency and the right to freedom of expression based on international human rights standards and examines the administration of the state of emergency in Ethiopia and its impact on the enjoyment of the right to freedom of opinion and expression. Although international laws permit states to derogate from some of their human rights obligations, the states have to meet international human rights standards before taking any derogation measures.

Abstract (German)

Die anhaltenden Massenproteste in Äthiopien hatten Einfluss auf die sozio-ökonomische und politische Situation des Landes. Folglich rief die Regierung den nationalen Notstand aus und verhängte ein Verbot für eine Reihe von Aktivitäten, die das Recht auf freie Meinungsäußerung betreffen. Die vorliegende Arbeit diskutiert das Konzept des nationalen Notstands sowie das Recht auf freie Meinungsäußerung von einer interdisziplinären Menschenrechtsperspektive, die von den internationalen menschenrechtlichen Standards ausgeht. Außerdem wird die Administration des nationalen Notstands in Äthiopien untersucht, sowie deren Einfluss auf die Ausübung des Rechts auf Meinungs- und Redefreiheit. Zwar dürfen Staaten im Notstand nach internationalem Recht von einigen menschenrechtlichen Verpflichtungen abweichen, jedoch müssen sie die internationalen menschenrechtlichen Standards erfüllen, bevor sie solche Maßnahmen ergreifen.